



Hartford Fire Insurance Company v. Moda LLC, et al.

Docket No.: X06-UWY-CV20-6056095-S

The Honorable Barbara N. Bellis
State of Connecticut
Superior Court
300 Grand Street
Waterbury, CT 06702

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Hartford's Policy Contains Numerous Ambiguous Virus Provisions



THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

NEW YORK - EXCLUSION OF LOSS DUE TO VIRUS OR BACTERIA

This endorsement modifies insurance provided under the following:

PROPERTY CHOICE COVERAGE PART

A. The exclusion set forth in Paragraph **B.** applies to all coverage under all forms and endorsements that comprise this Coverage Part, including but not limited to forms or endorsements that cover property damage to buildings or personal property and forms or endorsements that cover business income, extra expense or action of civil authority.

B. We will not pay for loss or damage caused by or resulting from any virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness or disease.

However, this exclusion does not apply to loss or damage caused by or resulting from "fungus", wet rot or dry rot. Such loss or damage is addressed in a separate exclusion in this Coverage Part.

C. The terms of the exclusion in Paragraph **B.**, or the inapplicability of this exclusion to a particular loss, do not serve to create coverage for any loss that would otherwise be excluded under this Coverage Part.

Dennehy Declaration (HFIC_000087)

Hartford's Policy Contains Numerous Ambiguous Virus Provisions



g. "Fungus", Wet Rot, Dry Rot, Bacteria or Virus

Presence, growth, proliferation, spread or any activity of "fungus," wet rot, dry rot, bacteria or virus.

But if direct physical loss or direct physical damage to Covered Property by a "Specified Cause of Loss" results, we will pay for the resulting loss or damage caused by that "Specified Cause of Loss".

Hartford's Policy Contains Numerous Ambiguous Virus Provisions



THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

NEW YORK CHANGES - FUNGUS, WET ROT AND DRY ROT

This endorsement modifies insurance provided under the following:

PROPERTY CHOICE COVERAGE PART

- A.** In the Property Choice – Covered Causes of Loss and Exclusion Form and Mortgageholders Errors And Omissions Coverage Form, the exclusion titled "Fungus", Wet Rot, Dry Rot, Bacteria and Virus and the Additional Coverage – Limited Coverage For "Fungus", Wet Rot, Dry Rot And Bacteria Found in the Property Choice – Specialized Property Insurance Coverages forms is deleted. Under these forms, the following exclusion is added:
- We will not pay for loss or damage caused by or resulting from "fungus", wet rot or dry rot. However, this exclusion does not apply when "fungus", wet rot or dry rot results from a Covered Cause of Loss.
- C.** Paragraph A. 12. of Ordinance Or Law – Increased Period Of Restoration found in the Property Choice Business Income or Extra Expense – Additional Coverages forms is replaced by the following:
- If a Covered Cause of Loss occurs to property at the "Scheduled Premises" described in the Property Choice Schedule of Premises and Coverage is extended to include the amount of actual and necessary loss you sustain during the increased period of suspension of operations caused by or resulting from a requirement to comply with any ordinance or law that:
1. Regulates the construction or repair of any property;

Dennehy Declaration (HFIC_000086)

Hartford's Policy Contains Numerous Ambiguous Virus Provisions



11. "Specified Causes of Loss" means fire; lightning; explosion; windstorm or hail; smoke; aircraft or vehicles; riot or civil commotion; vandalism; "Sinkhole Collapse"; "Volcanic Action"; falling objects; weight of snow, ice or sleet; water damage, "Sprinkler Leakage"; "Theft"; or "Building Glass" breakage.

Dennehy Declaration (HFIC_000095)

Hartford's Policy Contains Numerous Ambiguous Virus Provisions



15. "FUNGUS", WET ROT, DRY ROT, BACTERIA AND VIRUS - LIMITED COVERAGE

- a. The coverage described below only applies when the "fungus", wet or dry rot, bacteria or virus is the result of one or more of the following causes that occurs during the policy period and only if all reasonable means were used to save and preserve the property from further damage at the time of and after that occurrence.
 - (1) A "specified cause of loss" other than fire or lightning;
 - (2) Equipment Breakdown Accident occurs to Equipment Breakdown Property, if Equipment Breakdown applies to the affected premises; or
 - (3) Flood, if the Causes of Loss Flood endorsement applies to the affected premises.
- b. We will pay for loss or damage by "fungus", wet rot, dry rot, bacteria and virus. As used in this Limited Coverage, the term loss or damage means:
 - (1) Direct physical loss or direct physical damage to Covered Property caused by "fungus", wet rot, dry rot, bacteria or virus, including the cost of removal of the "fungus", wet rot, dry rot, bacteria or virus;

Dennehy Declaration (HFIC_000074)

Hartford's Policy Contains Numerous Ambiguous Virus Provisions



6. "Fungus", Wet Rot, Dry Rot, Bacteria and Virus - Limited Coverage

- a. The coverage described below only applies when the "fungus", wet rot, dry rot, bacteria or virus is the result of one or more of the following causes that occurs during the policy period and only if all reasonable means were used to save and preserve the property from further damage at the time of and after that occurrence:
- (1) A "specified cause of loss" other than fire or lightning;
 - (2) Equipment breakdown accident occurs to Equipment Breakdown Property, if Equipment Breakdown applies to the effected premises; or
 - (3) Flood, if the Causes of Loss - Flood endorsement applies to the effected premises.

Dennehy Declaration (HFIC_000102)

Hartford is a Member of ISO's Commercial Property Panel



The Hartford is a member of the Commercial Property Panel for ISO and appeared at a teleconference in December of 2004, as well as a commercial property panel meeting on September 28, 2005.

November 10, 2004

To the Members of the Commercial Property Panel

Representative

T. Bunnell *Tad*
W. Gregor *Bill*
P. Kreger *Peggy*
F. Malefatto *Frank*
D. McCrudden *Dan*
D. Murray *Denise*
L. Neuman *Laurance*
D. Savage *Dave*
S. Vogler *Sara*

Organization

The Cincinnati Insurance Company
Hastings Mutual Insurance Company
Safeco Insurance Company
OneBeacon Insurance
St. Paul Travelers
GNY Insurance Cos
CNA
The Hartford
Harleysville Mutual Insurance Company

Exh. B to Montenegro Aff. In Support of Fisher's
Motion to Compel (ISO_00004931)

October 25, 2005

To the Members of the Commercial Property Panel

Representative

T. Bunnell
R. Edgar
D. McCrudden
M. McFadden
D. Murray
L. Neuman
M. Palmer-Feo
D. Savage
K. Schwabe

Organization

The Cincinnati Insurance Company
Chubb
St. Paul Travelers Insurance Company
Great American Insurance Company
GNY Insurance Companies
CNA
Selective Insurance Company
The Hartford
ACE USA

Exh. C to Montenegro Aff. In Support of Fisher's
Motion to Compel (ISO_00005190)

Hartford's Involvement Drafting ISO Forms: Civil Authority



Hartford was involved in drafting ISO forms relating to, among other things, civil authority coverage:

Meeting of September 28, 2005

Commercial Property Panel
Minutes CPP-2005-009

CPP-2005-009 Time Element - Civil Authority

PANEL DISCUSSION

There was no discussion concerning the text of the Civil Authority basic coverage grant.

There was discussion on the terms of the optional enhancement endorsement. One panel member believes that it would be more appropriate to address the coverage period extension and increase in radius under separate endorsements rather than within one endorsement. That panel member also commented that differentiation of the radius by peril could lead to litigation over the cause of a civil authority's action. Another panel member feels that the options should also include a reduction in the radius, given concentrated exposures in metropolitan areas. There was also a suggestion to create an option for civil authority coverage in the event of evacuation prior to actual damage.

STAFF NOTE

ISO staff will take panel members' comments into consideration in finalizing this material. We do not anticipate seeking further input from the panel.

Exh. C to Montenegro Aff. In Support of Fisher's
Motion to Compel (ISO_00005206)

Hartford's Involvement Drafting ISO Forms: Virus Exclusion



Agenda CPP-2005-008, Meeting of September 28, 2005
Attachment

Draft of Contamination Exclusion
(difference between the original draft and new draft is shown in bold)

We will not pay for loss or damage caused by or resulting from any of the following:

Contamination by any pathogenic or poisonous biological agent, including but not limited to viruses and bacteria, whether naturally-occurring, **or induced by conditions intrinsic or extrinsic to property**, or engineered. But if such contamination results in fire, we will pay for the loss or damage caused by that fire.

With respect to any loss or damage to which this exclusion applies, this exclusion supersedes the exclusion relating to "pollutants".

This exclusion does not apply to "fungus" or wet or dry rot[, or to bacteria when involved in an occurrence of loss or damage by "fungus" or wet or dry rot]. A separate exclusion applies to [such occurrences] loss or damage from such conditions.***

***STAFF COMMENT: We are considering revision to the Exclusion and Additional Coverage relating to "fungus, wet rot, dry rot or bacteria", to remove reference to bacteria in light of the breadth and terminology of the contamination exclusion. Concomitantly, the last paragraph of the contamination exclusion would be revised to eliminate the bracketed [] text and add the text that follows the second set of brackets.

Fire of B...
What if not pathogen?
no poisonous but
transmission?
Does it include fire? 2d?
Added to 2d MM?

Pathogenic means
transmission capable of
causing disease!
Pathogen means
causing

see 2d MM

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Hartford's Involvement Drafting ISO Forms: Virus Exclusion (*Cont.*)

Draft of Errors Exclusion

Original Draft

We will not pay for loss or damage to a product caused by or resulting from error in any stage of the production or processing of that product. This exclusion encompasses any effect that compromises the form, substance or quality of the product. But if such error results in fire, we will pay for the loss or damage caused by that fire.

Revised Draft

We will not pay for loss or damage to a product caused by or resulting from error by any person or entity (including those having possession under an arrangement where work or a portion of the work is outsourced) in any stage of the development, production or use of the product, including planning, testing, processing, packaging, installation, maintenance or repair. This exclusion encompasses any effect that compromises the form, substance or quality of the product. But if such error results in fire or explosion, we will pay for the loss or damage caused by that fire or explosion.

*Add to
existing 3.2.1 text*

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Hartford's Involvement Drafting ISO Forms: Virus Exclusion *(Cont.)*

Meeting of September 28, 2005

Commercial Property Panel
Minutes CPP-2005-008

CPP-2005-008 Biological Contamination And Errors In Production

PANEL DISCUSSION

The contamination exclusion is intended to encompass contamination of any Covered Property, including premises and products. A panel member commented that this point needs to be made explicit in the text of the exclusion.

STAFF NOTE

ISO staff will take this into consideration in finalizing the text of the exclusion. We do not anticipate seeking further input from the panel.

Exh. A to Montenegro Aff. In Support of Fisher's
Motion to Compel (ISO_00004719 – 00004720)



ISO Members' Admission: Insureds' Reasonable Expectation of Coverage

The ISO members have acknowledged that “an insured would have a reasonable expectation of coverage if ordered to cease business by a government authority order”:

Civil Authority

I think an insured would have a reasonable expectation of coverage if ordered to cease business by a government authority.

Is it our intention to limit coverage both before and after a direct loss? The current and proposed wording only deal with orders during or after a direct loss, not with a precautionary evacuation.

Narrowing the affected area to one mile from the insured location could tend to discourage an insured to take steps to protect his or her property (e.g., boarding up windows) if a hazard, for example a hurricane, is not predicted to be that close. Is the draft provision saying there would be no coverage if actual damage is more than a mile away? It seems to be in the insurer and the insured's interests to cover additional expenses to evacuate and maintain business under those circumstances.

Besides, many businesses can't reopen if the public and its employees aren't allowed back in.

Perhaps a 10 mile limit would be a good compromise. Otherwise, I think we should assume there's a good reason for the order and honor it.

Exh. A to Montenegro Aff. In Support of Fisher's
Motion to Compel (ISO_00004722)

ISO's Notes Re Contamination: No Need for Change in Form or Substance of Product



ISO's internal handwritten notes expressly state, "contam[ination] implies the intrusion of or contact with an external force as the cause of the contam[ination]; there need not be a change in the product's form or substance"

contam implies the intrusion
of a contact with an external
force as the cause of the contam;
there need not be a change in
the product's form or substance
(damage is sufficient) ~~as to~~

Exh. D to Montenegro Aff. In Support of Fisher's
Motion to Compel (ISO_00005433)

ISO's Consideration of Impact of Potential Pandemic on Coverage in 2006



During this same time (2006), ISO was “mulling over” the impact that “avian influenza/other potential pandemics” may have on coverage:

Issues We're Mulling Over

- Avian Influenza/Other Potential Pandemics
- Nanotechnology
- Genetically Modified Organisms (GMOs)
- Climate Changes
- Others
 - Bed Bugs
 - Fear of Disease
 - Sub-microscopic Property Damage Liability
 - Excess CCIP & OCIP coverage
 - Blanket Property Coverage
 - Daylight Savings Time

Exh. N to Montenegro Aff. In Support of Fisher's
Motion to Compel (ISO_00004975)



ISO Circular



FORMS - FILED

JULY 6, 2006

FROM: LARRY PODOSHEN, SENIOR ANALYST

COMMERCIAL PROPERTY

LI-CF-2006-175

NEW ENDORSEMENTS FILED TO ADDRESS EXCLUSION OF LOSS DUE TO VIRUS OR BACTERIA

This circular announces the submission of forms filings to address exclusion of loss due to disease-causing agents such as viruses and bacteria.

BACKGROUND

Commercial Property policies currently contain a pollution exclusion that encompasses contamination (in fact, uses the term *contaminant* in addition to other terminology). Although the pollution exclusion addresses contamination broadly, viral and bacterial contamination are specific types that appear to warrant particular attention at this point in time.

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ISO Circular (Cont.)

ISO ACTION

We have submitted forms filing CF-2006-OVBEP in all ISO jurisdictions and recommended the filing to the independent bureaus in other jurisdictions. This filing introduces new endorsement [CP 01 40 07 06](#) - Exclusion Of Loss Due To Virus Or Bacteria, which states that there is **no coverage for loss or damage caused by or resulting from any virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness or disease.**

Note: In Alaska, District of Columbia, Louisiana*, New York and Puerto Rico, we have submitted a different version of this filing, containing new endorsement [CP 01 75 07 06](#) in place of CP 01 40. The difference relates to lack of implementation of the mold exclusion that was implemented in other jurisdictions under a previous multistate filing.

Both versions of CF-2006-OVBEP are attached to this circular.

* In Louisiana, the filing was submitted as a recommendation to the Property Insurance Association of Louisiana (PIAL), the independent bureau with jurisdiction for submission of property filings.

PROPOSED EFFECTIVE DATE

Filing CF-2006-OVBEP was submitted with a proposed effective date of January 1, 2007, in accordance with the applicable effective date rule of application in each state, with the exception of various states for which the insurer establishes its own effective date.

Upon approval, we will announce the actual effective date and state-specific rule of effective date application for each state.

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ISO Circular (Cont.)

COMMERCIAL FIRE AND ALLIED LINES
FORMS FILING CF-2006-OVBEF

Amendatory Endorsement - Exclusion Of Loss Due To Virus Or Bacteria

About This Filing

This filing addresses exclusion of loss due to disease-causing agents such as viruses and bacteria.

New Form

We are introducing:

- ◆ Endorsement **CP 01 40 07 06** - Exclusion Of Loss Due To Virus Or Bacteria

Related Filing(s)

Rules Filing CF-2006- OVBBER

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ISO Circular (Cont.)

Introduction

The current pollution exclusion in property policies encompasses contamination (in fact, uses the term *contaminant* in addition to other terminology). Although the pollution exclusion addresses contamination broadly, viral and bacterial contamination are specific types that appear to warrant particular attention at this point in time.

An example of bacterial contamination of a product is the growth of listeria bacteria in milk. In this example, bacteria develop and multiply due in part to inherent qualities in the property itself. Some other examples of viral and bacterial contaminants are rotavirus, SARS, influenza (such as avian flu), legionella and anthrax. The universe of disease-causing organisms is always in evolution.

Disease-causing agents may render a product impure (change its quality or substance), or enable the spread of disease by their presence on interior building surfaces or the surfaces of personal property. When disease-causing viral or bacterial contamination occurs, potential claims involve the cost of replacement of property (for example, the milk), cost of decontamination (for example, interior building surfaces), and business interruption (time element) losses.

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ISO Circular (Cont.)

Current Concerns

Although building and personal property could arguably become contaminated (often temporarily) by such viruses and bacteria, the nature of the property itself would have a bearing on whether there is actual property damage. An allegation of property damage may be a point of disagreement in a particular case. In addition, pollution exclusions are at times narrowly applied by certain courts. In recent years, ISO has filed exclusions to address specific exposures relating to contaminating or harmful substances. Examples are the mold exclusion in property and liability policies and the liability exclusion addressing silica dust. Such exclusions enable elaboration of the specific exposure and thereby can reduce the likelihood of claim disputes and litigation.

While property policies have not been a source of recovery for losses involving contamination by disease-causing agents, the specter of pandemic or hitherto unorthodox transmission of infectious material raises the concern that insurers employing such policies may face claims in which there are efforts to expand coverage and to create sources of recovery for such losses, contrary to policy intent.

In light of these concerns, we are presenting an exclusion relating to contamination by disease-causing viruses or bacteria or other disease-causing microorganisms.

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ISO Circular (Cont.)

Features Of New Amendatory Endorsement

The amendatory endorsement presented in this filing states that there is **no coverage for loss or damage caused by or resulting from any virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness or disease.** The exclusion (which is set forth in Paragraph B of the endorsement) applies to property damage, time element and all other coverages; introductory Paragraph A prominently makes that point. Paragraphs C and D serve to avoid overlap with other exclusions, and Paragraph E emphasizes that other policy exclusions may still apply.

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