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## Insuring the "Uninsurable": Business Interruption Insurance Coverage & COVID-19

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## **INSURING THE “UNINSURABLE”: BUSINESS INTERRUPTION INSURANCE COVERAGE & COVID-19**

**Natalie E. deLatour\***

### ABSTRACT

*The COVID-19 pandemic has impacted virtually every facet of life in the United States, including the insurance industry. In particular, the number of business interruption insurance coverage lawsuits has continued to climb since March 2020, as insurers are denying coverage for pandemic-related losses and policyholders are seeking indemnification. Courts across the country are faced with answering difficult, novel questions about the interpretation and scope of business interruption insurance policies. Collectively, the conclusions the courts reach are critically important because they will determine the fate of policyholders and the insurance industry, respectively. This Note explores business interruption insurance coverage during COVID-19 by examining past and current judicial opinions, as well as legislative and industry proposals for the future. This Note proposes a framework for courts across the country, state governments, and the federal government to use as guidance for solving problems related to COVID-19 business interruption insurance coverage.*

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## INTRODUCTION

The COVID-19 pandemic has severely affected businesses across the country, as some insurance industry professionals are estimating business income losses to be around \$350 billion per month with the potential for as many as 30 million claims.<sup>1</sup> In fact, as of August 2021, almost 2,000 COVID-19-related business interruption insurance coverage lawsuits had been filed across the country since March 2020.<sup>2</sup> Without some kind of compensation, it is unclear whether many businesses will survive the pandemic.<sup>3</sup> Thus, policyholders are seeking indemnification for their losses, asserting that the current national landscape calls for unprecedented, novel interpretations of policy language.<sup>4</sup> However, the insurance industry

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1. Scott M. Seaman & Judith A. Selby, *An Overview of COVID-19 Related Legislative, Regulatory, & Litigation Activity & The Potential Impact on Insurer Solvency*, in 31 MEALEY'S LITIGATION REPORT: INSURANCE INSOLVENCY 1, 1 (Shawn Rice ed., 2020) ("The pandemic and the resulting emergency declarations and stay at home orders have transformed the American way of life, at least temporarily, and are exacting a major toll on the economy."); *APCIA Releases New Business Interruption Analysis*, AM. PROP. CAS. INS. ASS'N (Apr. 6, 2020) [hereinafter *APCIA April Analysis*], <https://www.apci.org/pciwebsite/cms/content/viewpage?sitePageId=60052> [https://perma.cc/36T3-GGCC]; Andrew G. Simpson, *P/C Insurers Put a Price Tag on Uncovered Coronavirus Business Interruption Losses*, INS. J. (Mar. 30, 2020), <https://www.insurancejournal.com/news/national2020/03/30/562738.htm> [https://perma.cc/3P7K-67S4] ("David A. Sampson, president and CEO of the American Property Casualty Insurance Association, said the \$220–383 billion per month loss estimate assumes there could be as many as 30 million claims from small business that suffered coronavirus-related losses.").

2. See generally *COVID Coverage Litigation Tracker*, COVID COVERAGE LITIG. TRACKER, <https://cclt.law.upenn.edu/> [https://perma.cc/DQ82-2GF5].

3. See Jim Sams, *Number of Federal COVID-19 Business Interruption Lawsuits at 101 and Rising*, CLAIMS J. (May 21, 2020), <https://www.claimsjournal.com/news/national/2020/05/21/297180.htm> [https://perma.cc/5BNN-DGWR]. One law professional insists that many businesses are counting on some type of insurance compensation or indemnification to survive the pandemic and "cited an estimate by the National Restaurant Association that if no assistance is given, 40 percent of restaurants will not survive the pandemic." *Id.*; see also Christy Maple & Kristin Tucker, *Lack of Physical Loss Moves Court to Reject COVID BI Claims*, PROPERTYCASUALTY360 (Dec. 8, 2020, 1:00 AM), <https://www.propertycasualty360.com/2020/12/08/georgia-joins-other-jurisdictions-where-covid-19-business-income-claims-fail-414-192661/> [https://perma.cc/H9M6-883M] ("For the first time in modern American history, businesses shuttered their doors for months, most in direct response to state and local orders mandating their closure. Many will never reopen."). See generally Adrian Azer et al., *Insurance Recovery and the Corona Effect: Pushing Back Denials for Business Interruption Claims*, in NEW APPLEMAN ON INSURANCE: CURRENT CRITICAL ISSUES IN INSURANCE LAW (2020).

4. See Azer et al., *supra* note 3 ("Many insureds have looked to their business interruption insurance policies as a means to mitigate some or all of the devastating economic losses caused by these shutdowns."); see also Mary Williams Walsh, *Businesses Thought They Were Covered for the Pandemic. Insurers Say No.*, N.Y. TIMES (Aug. 5, 2020),

has officially rejected coverage for most COVID-19-related business interruption claims, arguing that there is no coverage for COVID-19-induced losses because businesses cannot demonstrate "direct physical loss or damage" and because most policies include enforceable exclusions.<sup>5</sup> Simultaneously, state legislatures, the U.S. House of Representatives, and insurance industry groups have proposed legislation and future pandemic plans in an attempt to indemnify businesses for their losses and better prepare for future widespread catastrophes.<sup>6</sup>

Over a year since the onset of litigation, it is clear that the central coverage issues are: (1) whether the business suffered "direct physical loss or damage"; (2) whether there is coverage for losses sustained from a government shutdown order under a civil authority provision; and (3) what the effect of a virus exclusion is on a policy.<sup>7</sup> This Note analyzes the issues currently being introduced in COVID-19-related business interruption insurance lawsuits, looking to policy interpretation, arguments currently being offered by both insurers and policyholders, and the potential function of proposed legislation and future pandemic plans. Part I explains the general

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<https://www.nytimes.com/2020/08/05/business/business-interruption-insurance-pandemic.html>  
[<https://perma.cc/3DNJ-3PPT>].

5. Walter J. Andrews & Cary D. Steklof, *Groundbreaking Opinion: COVID Sufficient to Trigger Business Interruption Coverage*, HUNTON ANDREWS KURTH (Sept. 24, 2020), <https://www.huntonak.com/images/content/6/9/v3/69907/DBR-Andrews-Steklof-COVID-Trigger-Bus-Interruption-Coverage-0924.pdf> [<https://perma.cc/EBD8-WY7Z>] ("Bent on discouraging claims and avoiding lawsuits, insurance companies have outright denied business interruption claims regardless of the circumstances and despite the clear language of their policies providing coverage for such losses."); *APCIA April Analysis*, *supra* note 1 ("Many commercial insurance policies, including those that have business interruption coverage, do not provide coverage for communicable diseases or viruses such as COVID-19. Pandemic outbreaks are uninsured because they are uninsurable." (statement of David A. Sampson)); Simpson, *supra* note 1; Azer et al., *supra* note 3.

6. Gregory G. Schultz & Donald P. Boyle Jr., *Business Interruption Insurance Claims Arising Out of Coronavirus/COVID-19*, 26 GA. BAR J., Aug. 2020, at 19, 19, <http://digitaleditions.walsworthprintgroup.com/publication/?m=15035&i=671829&p=6> [<https://perma.cc/YN3F-NZD5>]. "As of [August 2020], at least eight U.S. states have introduced bills that would require insurance companies to pay business interruption claims (irrespective of policy language), primarily to small businesses." *Id.* See generally Evan Weinberger, *Chubb Pandemic Coverage Plan Exposes Industry Split*, BLOOMBERG L. (July 14, 2020, 5:31 AM), <https://news.bloomberglaw.com/insurance/chubb-pandemic-coverage-plan-exposes-industry-split> [<https://perma.cc/P5J7-SNHR>].

7. See generally James R. Robie et al., *Coronavirus "COVID-19" Business Interruption Issues*, in *INSURING REAL PROPERTY* § 3.06 (Stephen A. Cozen ed., 2020).

function of business interruption insurance and provides an overview of how courts usually rule on common issues in business interruption insurance lawsuits. Part II analyzes how courts are ruling on prominent COVID-19-related issues, highlighting the most compelling arguments and considerations for both insurers and policyholders respectively. Additionally, Part II discusses newly proposed legislation and future pandemic insurance plans, and addresses advantages and disadvantages of each. Finally, Part III proposes a workable framework for courts across various jurisdictions to consider in deciding business interruption insurance lawsuits during a public health emergency and suggests a proper use of legislation and future pandemic programs for state governments and the federal government.

## I. BACKGROUND

The purpose of business interruption insurance is to put a business in the same position as it would have been had no interruption occurred.<sup>8</sup> Business interruption insurance policies often include a “business income” provision under which “the insurer will pay for the actual loss of business income sustained because of the necessary suspension of ‘operations.’”<sup>9</sup> Many business owners have some form of business interruption coverage that they have paid substantial premiums on over the years.<sup>10</sup> Now, these policyholders are looking to their policies to determine whether different provisions (i.e., business income or civil authority) included in business interruption insurance policies will afford coverage for their COVID-19-related

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8. Nat'l Union Fire Ins. Co. of Pittsburgh v. Anderson-Prichard Oil Corp., 141 F.2d 443, 445 (10th Cir. 1944) (“The purpose, scope and legal effect of the insurance contract is to protect the prospective earnings of the insured business only to the extent that they would have been earned if no interruption had occurred, not to exceed the per diem limits of the policy.”).

9. See generally Douglas Scott MacGregor, *Insuring Business Losses Sustained in the Coronavirus Pandemic: A Plague on Whose House?*, in NEW APPLEMAN ON INSURANCE: CURRENT CRITICAL ISSUES IN INSURANCE LAW (2021). Policies include other provisions, including the civil authority provision, which is also relevant for this Note. *Id.*

10. Christopher C. French, *COVID-19 Business Interruption Insurance Losses: The Cases for and Against Coverage*, 27 CONN. INS. L.J. 1, 4 (2020).

losses.<sup>11</sup> However, because courts across the country are currently reaching largely differing conclusions, the answer is still uncertain.<sup>12</sup> Further, the COVID-19 pandemic poses an unprecedented threat to the insurance industry and policyholders because catastrophic events are generally confined to certain geographic areas.<sup>13</sup> Because of the global scope of this catastrophe, the impact on businesses, the economy, and the insurance industry could be detrimental.<sup>14</sup>

### A. *Policy Interpretation*

First and foremost, when deciding business interruption insurance coverage cases, a court's holding rests upon the interpretation of the policy language in question.<sup>15</sup> Thus, the specific terms of policies must be closely examined to determine whether coverage is afforded.<sup>16</sup> Coverage will ultimately depend upon "specific facts of the claim, the policy language and the application of the state laws that govern the interpretation of that policy language."<sup>17</sup> In making these decisions, courts adhere to "special rules" of contract

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11. Maple & Tucker, *supra* note 3.

12. Nick R. Herrick, *COVID-19 and Business Interruption Insurance – One Year Later, Ambiguity Remains*, MOYE WHITE: NEWS & INSIGHT BLOG (Mar. 10, 2021), <https://www.moyewhite.com/news-insights/blog/march-2021/covid-19-and-business-interruption-insurance-%E2%80%93one> [<https://perma.cc/F7XF-XERL>] ("Unfortunately, as we approach the 1-year anniversary, that lack of clarity persists as insurance carriers and courts across the country apply policy considerations in strikingly differing manners, resulting in wildly varying outcomes for insureds.")

13. See Joseph D. Jean et al., *COVID-19: Understanding Business Interruption Insurance and Wide-Impact Catastrophes*, PILLSBURY (Apr. 6, 2020), <https://www.pillsburylaw.com/en/news-and-insights/covid-19-business-interruption-insurance.html> [<https://perma.cc/Z55C-ASHA>]; Simpson, *supra* note 1 ("Pandemic-caused losses are excluded from standard business interruption policies because they impact all businesses, all at the same time." (quoting Sean Kevelighan, CEO of the Insurance Information Institute)).

14. Jean et al., *supra* note 13 ("Wide-impact catastrophes like this pandemic will cause tremendous and long-lasting economic damages."); Anne Gron & Georgi Tsvetkov, *History Can Inform Pandemic Biz Interruption Cases*, LAW360.COM (May 21, 2020, 5:51 PM), <https://www.law360.com/articles/1275331/history-can-inform-pandemic-biz-interruption-insurance-cases> [<https://perma.cc/H8ZF-LS96>] ("The SARS experience showed that pandemic-related business interruption losses are difficult for the insurance industry to cover because they are highly correlated [risks] . . . [which] are more difficult to insure because actual losses will tend to be very high or quite low making them difficult to accurately predict.")

15. See Robie et al., *supra* note 7, at § 3.06(4).

16. See Douglas Berry, *COVID-19—When Civil Authorities Take Over, Are You Covered?*, IRMI (Mar. 2020), <https://www.irmi.com/articles/expert-commentary/when-civil-authorities-take-over-are-you-covered> [<https://perma.cc/LX5G-FVYE>] ("[P]olicy wording is critical . . .").

17. See Robie et al., *supra* note 7, § 3.06(4).



interpretation that “have been created due to the imbalance of power and knowledge that favors insurers during the creation and sale of insurance policies.”<sup>18</sup> As with all insurance contracts, any part of the contract that is ambiguous will be construed in favor of the insured.<sup>19</sup> Additionally, courts consider the contract as a whole and ensure that the interpretation reflects the intentions of all parties.<sup>20</sup> Importantly, the policy language in question will be the most important factor in determining whether there is coverage under a business interruption insurance policy.<sup>21</sup>

### B. Central Issues in Litigation

Business interruption insurance lawsuits focus on a few issues, including: (1) whether there is “direct physical loss or damage” to a covered property, (2) whether a loss due to an intervening civil authority is covered by a civil authority provision, and (3) whether the policy includes an enforceable exclusion.<sup>22</sup> Coverage may be afforded where there is “direct physical loss or damage” to the

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18. French, *supra* note 10, at 12. Courts employ both the doctrine of *contra proferentum* and the “reasonable expectations doctrine” when interpreting insurance policies. *Id.* at 12–13; *see also* Scott P. DeVries et al., *Setting the Correct Prism for Construing Policy Language in COVID-19 Business Interruption Cases Can Be Outcome Determinative*, NAT’L L. REV. (Sept. 29, 2020), <https://www.natlawreview.com/article/setting-correct-prism-construing-policy-language-covid-19-business-interruption> [<https://perma.cc/GN5H-6534>]. Some commonly used interpretation principles include:

- (1) The plain meaning of policy terms apply, subject to the refinements below;
- (2) Coverage grants and related terms are interpreted broadly, in favor of coverage;
- (3) Exclusions and limitations of coverage are interpreted narrowly, against the insurer;
- (4) Ambiguous terms are construed against the insurer, who drafted them;
- (5) Ambiguity exists if the language has two or more reasonable interpretations;
- (6) The insurer must prove its interpretation is the only reasonable one;
- (7) Insurance policies are construed as a whole, and every term is given effect. No term should be ignored as mere surplusage; and
- (8) Insurance policies are construed to avoid rendering contractual obligations illusory.

DeVries et al., *supra* (cleaned up).

19. DeVries et al., *supra* note 18.

20. *See* AFLAC Inc. v. Chubb & Sons, Inc., 581 S.E.2d 317, 319 (Ga. Ct. App. 2003); Nat’l Union Fire Ins. Co. of Pittsburgh v. Anderson-Prichard Oil Corp., 141 F.2d 443, 446 (10th Cir. 1944) (“The rights and liabilities of the parties are of course measured by the contract of insurance, the terms of which must be judicially interpreted to give practical effect to the manifest intentions of the contracting parties.”).

21. *See* Robie et al., *supra* note 7, § 3.06(4).

22. *See generally* Robie et al., *supra* note 7. Although there are other issues present in business interruption insurance litigation, this Note focuses only on those mentioned *supra*.

property and no exclusion is applicable.<sup>23</sup> Conversely, coverage will likely not be afforded where there is no “direct physical loss or damage,” no connection between “direct physical loss or damage” and a loss causing event, or where an exclusion bars coverage.<sup>24</sup>

### 1. “Direct Physical Loss or Damage”

Virtually all business interruption insurance policies provide coverage for some variation of “direct physical loss or damage.”<sup>25</sup> In fact, the threshold question in many business interruption insurance cases is whether policyholders can demonstrate that they have suffered a “direct physical loss or damage.”<sup>26</sup> Whether there is “direct physical loss or damage” depends upon what constitutes property damage under the policy.<sup>27</sup> A typical business income provision in a business interruption insurance policy will include language such as: “We will pay for the actual loss of Business Income you sustain due to the necessary ‘suspension’ of your ‘operations’ during the ‘period of restoration.’ The ‘suspension’ must be caused by direct physical loss of or damage to [the covered] property . . . .”<sup>28</sup>

Many courts have determined that a “direct physical loss or damage” must include some tangible or physically manifested damage to the property.<sup>29</sup> This narrow interpretation usually requires some physical element of damage for coverage to be triggered.<sup>30</sup>

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23. *Id.*

24. *Id.*

25. *See id.* § 3.06(5)(a).

26. Alison Frankel, *As COVID-19 Insurance Cases Loom, 11th Circuit Restricts Definition of Property Damage*, REUTERS, <https://www.reuters.com/article/legal-us-otc-insurance/as-covid-19-insurance-cases-loom-11th-circuit-restricts-definition-of-property-damage-idUSKCN25F2L3> [https://perma.cc/5HZ8-HDX9] (Aug. 20, 2020, 10:18 AM).

27. *See generally* Robie et al., *supra* note 7.

28. *Id.* § 3.06(6) (alteration in original).

29. *See, e.g.*, *Mama Jo’s Inc. v. Sparta Ins. Co.*, 823 F. App’x 868, 879 (11th Cir. 2020); *Universal Image Prods., Inc. v. Chubb Corp.*, 703 F. Supp. 2d 705, 709–10 (E.D. Mich. 2010) (finding no physical loss where mold was found in a ventilation system because there was no structural or tangible damage to the property), *aff’d sub nom.* *Universal Image Prods., Inc. v. Fed. Ins. Co.*, 475 F. App’x 569 (6th Cir. 2012).

30. *See* Charles S. LiMandri et al., *Pandemic of Coverage Litigation for Business Income Losses Due to Coronavirus Plagues Insurance Industry*, 32 CAL. INS. L. & REGUL. REP. 81, 92 (2020) (“Courts have interpreted the words ‘direct physical loss’ and similar provisions in insurance contracts to mean

Courts adopting this strict interpretation of “direct physical loss or damage” place emphasis on the presence of some type of visible or tangible damage or where the property remains “physically unchanged.”<sup>31</sup>

Conversely, other courts have found that there can still be “direct physical loss or damage” where the property is no longer inhabitable or fit for use for its intended purpose.<sup>32</sup> Policyholders often argue that any “inability to use its property for its intended operations . . . constitutes a ‘physical loss’ to the property just as it would if it had sustained physical injury or damage.”<sup>33</sup> In these instances, courts reason that where a property becomes unusable, loses its essential “functionality,” or is “unfit for occupancy and use,” the property has sustained “direct physical loss or damage.”<sup>34</sup>

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damage to tangible, material objects.” (quoting *Patel v. Am. Econ. Ins. Co.*, No. 12-CV-4719, 2014 WL 1862211, at \*5 (N.D. Cal. May 8, 2014))).

31. *Universal Image Prods.*, 475 F. App’x at 574 (finding that a lack of tangible damage to the insured property, with only intangible losses such as strong odors, mold, and bacterial contamination in a ventilation system, was not enough to establish “direct physical loss”); *Phoenix Ins. Co. v. Infogroup, Inc.*, 147 F. Supp. 3d 815, 824 (S.D. Iowa 2015) (“[P]hysical loss or damage generally requires some sort of physical invasion, however minor.”); *AFLAC Inc. v. Chubb & Sons, Inc.*, 581 S.E.2d 317, 319–20 (Ga. Ct. App. 2003) (finding that a deficiency in a computer system was not a covered “direct physical loss” because there was no change in the system). “[C]overage is predicated upon a change in the insured property resulting from an external event rendering the insured property, initially in a satisfactory condition, unsatisfactory.” *Chubb & Sons*, 581 S.E.2d at 319; *see also* *Great N. Ins. Co. v. Benjamin Franklin Fed. Sav. & Loan Ass’n*, No. 90-35654, 1992 U.S. App. LEXIS 1593, at \*2–3 (9th Cir. Jan. 31, 1992) (finding that asbestos contamination was a purely economic loss, rather than physical, because the building remained “physically unchanged”); *Source Food Tech., Inc. v. U.S. Fid. & Guar. Co.*, 465 F.3d 834, 838 (8th Cir. 2006) (“Although Source Food’s beef product in the truck could not be transported to the United States due to the closing of the border to Canadian beef products, the beef product on the truck was not . . . physically contaminated or damaged in any manner.”).

32. *See* *Motorists Mut. Ins. Co. v. Hardinger*, 131 F. App’x 823, 824, 826–27 (3d Cir. 2005) (finding a “direct physical loss” where a residence became “uninhabitable” as a result of a well contaminated with *E. coli* bacteria); *Gregory Packaging, Inc. v. Travelers Prop. Cas. Co. of Am.*, No. 12-CV-4418, 2014 WL 6675934, at \*6 (D.N.J. Nov. 25, 2014) (finding that a juice packaging facility sustained “direct physical loss of or damage to” the covered property as a result of an ammonia release from the company’s refrigeration system); *Sentinel Mgmt. Co. v. N.H. Ins. Co.*, 563 N.W.2d 296, 300–01 (Minn. Ct. App. 1997) (finding “direct physical loss” where the covered property was contaminated with asbestos).

33. *Azer et al.*, *supra* note 3.

34. *See* *Essex Ins. Co. v. BloomSouth Flooring Corp.*, 562 F.3d 399, 406 (1st Cir. 2009) (concluding that where a policy does not exclude odor as a potential injury to property, an unwanted odor is “a loss of use of the building [that is] reasonably susceptible to an interpretation that physical injury to property has been claimed”); *Wakefern Food Corp. v. Liberty Mut. Fire Ins. Co.*, 968 A.2d 724, 734 (N.J. Super. Ct. App. Div. 2009) (concluding that where the language “direct physical damage” is ambiguous in the policy, an electrical grid is physically damaged where it is no longer capable of performing its “essential

Additionally, other courts have distinguished “physical loss” and “physical damage,” essentially negating the necessity that a property be physically damaged to sustain a loss.<sup>35</sup> Further expanding the meaning of “direct physical loss or damage,” many judicial opinions support a finding of “direct physical loss” where a substance or contaminant renders a property uninhabitable.<sup>36</sup> Some potentially hazardous substances or materials that have been included in this group include ammonia, gasoline, asbestos, and drywall.<sup>37</sup> However, once a policyholder is able to establish a “direct physical loss” to the covered property, the policyholder must also show causation between

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function of providing electricity” as a result of a series of incidents); *Port Auth. of N.Y. & N.J. v. Affiliated FM Ins. Co.*, 311 F.3d 226, 236 (3d Cir. 2002) (“[O]nly if an actual release of asbestos . . . has resulted in contamination of the property such that its function is nearly eliminated or destroyed, or the structure is made useless or uninhabitable . . .”); *Gen. Mills, Inc. v. Gold Medal Ins. Co.*, 622 N.W.2d 147, 152 (Minn. Ct. App. 2001) (“[T]he function of the food products . . . is not only to be sold, but to be sold with an assurance that they meet certain regulatory standards. When General Mills is unable to lawfully distribute its products because of FDA regulations, that function is seriously impaired.”); *Gregory Packaging*, 2014 WL 6675934, at \*6 (finding that an ammonia discharge constituted “direct physical loss or damage” to the facility because it “physically rendered the facility unusable for a period of time”); *Trinity Indus., Inc. v. Ins. Co. of N. Am.*, 916 F.2d 267, 270–71 (5th Cir. 1990) (finding a “direct physical loss” where “an initial satisfactory state . . . was changed by some external event into an unsatisfactory state”).

35. See *Total Intermodal Servs. v. Travelers Prop. Cas. Co. of Am.*, No. CV 17-04908, 2018 U.S. Dist. LEXIS 216917, at \*6, \*9, \*11 (C.D. Cal. July 11, 2018) (finding a “direct physical loss” where cargo was merely lost or permanently dispossessed, with no requirement of actual damage or alteration of the property). “[T]o interpret ‘physical loss of’ as requiring ‘damage to’ would render meaningless the ‘or damage to’ portion of the same clause, thereby violating a black-letter canon of contract interpretation—that every word be given a meaning.” *Id.* at \*9; see also *Manpower Inc. v. Ins. Co. of Pa.*, No. 08C0085, 2009 WL 3738099, at \*5 (E.D. Wis. Nov. 3, 2009) (“[T]he policy covered physical losses in addition to physical damage, and if a physical loss could not occur without physical damage, then the policy would contain surplus language. . . . ‘[D]irect physical loss’ must mean something other than ‘direct physical damage.’”).

36. See *TRAVCO Ins. v. Ward*, 715 F. Supp. 2d 699, 709 (E.D. Va. 2010) (finding a “direct physical loss” where a home was “rendered uninhabitable by the toxic gasses released by the Chinese Drywall”); *Motorists Mut.*, 131 F. App’x at 824, 826–27 (finding “direct physical loss” where a home was no longer inhabitable as a result of *E. coli* contamination).

37. See *TRAVCO*, 715 F. Supp. 2d at 709 (analyzing buildup of drywall); *W. Fire Ins. Co. v. First Presbyterian Church*, 437 P.2d 52, 54 (Colo. 1968) (en banc) (analyzing “infiltration and contamination” of gasoline); *Sentinel Mgmt.*, 563 N.W.2d at 300, 301 (analyzing asbestos contamination); *Gregory Packaging*, 2014 WL 6675934, at \*7 (finding that an ammonia discharge caused “direct physical loss or damage” because the property was left in an “unsatisfactory state needing repair”); *Essex Ins.*, 562 F.3d at 406 (finding that an odor can constitute physical injury to the property, where that unwanted odor results in “loss of use” of the property); *Matzner v. Seaco Ins. Co.*, No. 96-0498, 1998 WL 566658, at \*4 (Mass. Super. Ct. Aug. 12, 1998) (finding that carbon monoxide contamination constitutes “direct physical loss”).

the event and the loss or damage sustained.<sup>38</sup>

## 2. *Civil Authority Provisions*

Another issue often litigated in business interruption insurance coverage disputes is the application of civil authority provisions, which protect an insured “against income losses suffered when access to the insured’s property is cut off.”<sup>39</sup> A common civil authority policy provision provides:

We will pay for the actual loss of Business Income you sustain . . . caused by action of civil authority that prohibits access to the described premises due to direct physical loss of or damage to property . . . caused by or resulting from any Covered Cause of Loss.<sup>40</sup>

Many courts require that coverage for interruption due to an order by a civil authority be accompanied by “direct physical loss or damage” to nearby property or the insured property for coverage to be triggered.<sup>41</sup> However, a small number of courts do not require

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38. See Chad A. Pasternack & John David Dickenson, *Correlation or Causation for Coronavirus-Related Business Income Losses*, PROP. INS. L. OBSERVER (Mar. 24, 2020), <https://www.propertyinsurancelawobserver.com/2020/03/24/correlation-or-causation-for-coronavirus-related-business-income-losses/> [<https://perma.cc/A7ZB-34JS>] (“[T]he lost income must result from the property damage caused by the virus, not merely the general economic slowdown the virus has caused.”).

39. LiMandri et al., *supra* note 30, at 85.

40. *Dickie Brennan & Co. v. Lexington Ins. Co.*, 636 F.3d 683, 685 (5th Cir. 2011). Courts will usually consider a few factors in determining whether there was loss due to intervention by a civil authority including whether:

- (1) [T]he damage was because of action of civil authority;
- (2) the action of the civil authority prohibited access to the described premises of the insured;
- (3) the action of civil authority prohibiting access to the described premises is caused by direct physical loss of or damage to property other than at the described premises; and
- (4) the loss or damage to property other than the described premises was caused by or resulted from a covered cause of loss as set forth in the policy.

Robie et al., *supra* note 7, § 3.06(7).

41. See Robie et al., *supra* note 7, § 3.06(7); Alycen A. Moss & Paul Ferland, *Coronavirus: Is There Coverage Under Property Insurance Policies?*, PROP. INS. L. OBSERVER (Mar. 18, 2020), <https://www.propertyinsurancelawobserver.com/2020/03/18/coronavirus-is-there-coverage-under-property-insurance-policies/> [<https://perma.cc/QYL8-LQUM>] (“Importantly, in order for this coverage to be triggered, the insured still needs to prove there has been physical loss or damage.”). Most courts require some type of causal connection between the order and the damage or loss to a property. *Dickie*

simultaneous "direct physical loss or damage" to find coverage for interruption by an order of a civil authority under a civil authority provision.<sup>42</sup> As always, coverage under a civil authority provision ultimately depends upon the language in a particular policy.<sup>43</sup>

### 3. *Policy Exclusions*

Business interruption insurance policies often include a number of different exclusions that bar coverage under a policy.<sup>44</sup> Most notable for purposes of this Note is the virus exclusion, which was created and implemented into many policies after the Severe Acute Respiratory Syndrome (SARS) epidemic of 2003.<sup>45</sup> A typical virus exclusion may exclude coverage for "[t]he actual or suspected presence or threat of any virus, organism or like substance that is capable of inducing disease, illness, physical distress or death, whether infectious or otherwise, including but not limited to any epidemic, pandemic, influenza, plague, SARS, or Avian Flu."<sup>46</sup> Where there is an applicable virus exclusion in a policy, it is not likely that a policyholder will be able to recover; however, there are

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*Brennan*, 636 F.3d at 686 (finding no coverage under the policy because the plaintiffs "failed to demonstrate a nexus between any prior property damage and the evacuation order").

42. *See, e.g.*, *Sloan v. Phoenix of Hartford Ins. Co.*, 207 N.W.2d 434, 436–37 (Mich. Ct. App. 1973).

43. *See Robie et al.*, *supra* note 7, § 3.06(7).

44. *See LiMandri et al.*, *supra* note 30, at 98; *Simpson*, *supra* note 1 ("[T]he exclusions for pandemic-caused losses have been incorporated into standard business interruption policies for years.").

45. *See Moss & Ferland*, *supra* note 41; *Gron & Tsvetkov*, *supra* note 14 ("After the SARS epidemic, ISO developed policy language excluding losses caused by virus or bacteria from business interruption coverage, and many insurance policies adopted that or similar language."); *COVID-19 Business Interruption Insurance Lawsuits: The Ultimate Guide*, EXPERT INST., <https://www.expertinstitute.com/litigation-guides/covid-19-business-interruption-insurance/> [<https://perma.cc/92RT-SBJF>] ("The advent of SARS in the early 2000s catalyzed wide-spread modifications to insurance policy language regarding coverage for business interruptions related to illnesses. As such, virus, bacteria, microorganism, and/or pandemic exclusions are almost universal in property insurance contracts issued after 2006."); John Buchanan & Suzan Charlton, *Virus and Pollution Exclusions in Coronavirus-Related Business Interruption Claims*, A.B.A. (Aug. 27, 2020), <https://www.americanbar.org/groups/litigation/committees/insurance-coverage/articles/2020/virus-pollution-exclusions-coronavirus/> [<https://perma.cc/Z388-476X>] ("In the wake of the SARS pandemic of 2003, the insurance industry, through trade associations such as the ISO and the AAIS, first sought regulatory approval in 2006 to add the virus exclusion . . . to 'all risk' commercial property policies because the pollution exclusion did not expressly encompass viruses.").

46. *Meyer Nat. Foods, LLC v. Liberty Mut. Fire Ins. Co.*, 218 F. Supp. 3d 1034, 1038 (D. Neb. 2016).

some exceptions to this rule.<sup>47</sup>

### C. Legislative Proposals and Insurance Industry Plans

#### 1. Potential Legislative Solutions

In response to the widespread loss across the country, both the U.S. House of Representatives and individual state legislatures have proposed potential legislation.<sup>48</sup> Many of the state proposals require insurers to retroactively pay business interruption insurance claims, whereas many of the federal government proposals only offer risk protection for future pandemics.<sup>49</sup> Insurers have established a firm opposition to the mandatory retroactive proposals, warning that the implementation of these proposals could lead to insurance industry insolvency with long-term negative effects on the entire insurance industry.<sup>50</sup> Further, insurance industry professionals have argued that mandating insurers to pay claims regarding risks never assumed under policies is unconstitutional, but that argument is not discussed in this Note.<sup>51</sup>

The U.S. House of Representatives has offered a few proposals, including the Pandemic Risk Insurance Act (PRIA).<sup>52</sup> PRIA is a forward-looking proposal intended to protect business owners and ensure the availability of business interruption insurance coverage for

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47. See, e.g., *id.* at 1039 (stating that where a beef shipment was contaminated with E. coli and the company asserted that the contamination was covered under the policy, the court held there was no coverage because there was an exclusion in the policy that plainly precluded coverage under the policy). “Indeed, it is the ‘contamination exclusion’ . . . which governs the outcome of this dispute. And under the plain and ordinary meaning of the contamination exclusion, it clearly applies to these facts.” *Id.*

48. See Robie et al., *supra* note 7, § 3.06(2); Seaman & Selby, *supra* note 1, at 2–3.

49. See generally H.B. 2372, 2020 Gen. Assemb., Reg. Sess. (Pa. 2020); H.B. 858, 2020 Gen. Assemb., Reg. Sess. (La. 2020); Assemb. B. A10226B, 2020 Gen. Assemb., Reg. Sess. (N.Y. 2020).

50. See *APCIA April Analysis*, *supra* note 1; Simpson, *supra* note 1 (“If elected officials require payment for perils that were excluded, never underwritten for, and for which no premium was ever collected, catastrophic results will occur and we may deal with a second crisis: insurance insolvencies and impairments. There will also be irreparable harm done to contract law, and the impact of this will be felt by every business in America . . . .” (quoting Charles M. Chamness, president and CEO of National Association of Mutual Insurance Companies)).

51. Claire Wilkinson, *N.Y. Introduces Bill on Pandemic-Related Business Interruption Claims*, BUS. INS. (Mar. 30, 2020), <https://www.businessinsurance.com/article/00010101/NEWS06/912333772/NY-introduces-bill-on-pandemic-related-business-interruption-claims> [https://perma.cc/9TDL-ETAV].

52. See Pandemic Risk Insurance Act of 2020, 116 H.R. 6983, 116th Cong. (2020).

losses resulting from a future pandemic.<sup>53</sup> The goal of the proposal is to apportion the burden of indemnification between the federal government and insurers.<sup>54</sup> PRIA stems from the precedent of the Terrorism Risk Insurance Act (TRIA), which was successfully implemented to provide coverage for terrorism risks after the terrorist attacks of September 11, 2001 (9/11).<sup>55</sup>

Many states, including Pennsylvania, New York, and Louisiana, have proposed their own legislation that would require insurance companies to retroactively pay claims for COVID-19-related losses.<sup>56</sup> The proposed Pennsylvania bill would require insurers to pay claims in specified instances of "direct physical loss or damage."<sup>57</sup> Similarly, the proposed Louisiana legislation would require insurers to indemnify policyholders with business interruption insurance policies for "any loss of business or business interruption for the duration of the declared public health emergency."<sup>58</sup> Also, the proposed New York bill provides similar coverage for business interruption sustained from COVID-19 but also "purports to render any virus exclusion in those policies void."<sup>59</sup> It is vitally important that legislators consider the full ramifications of enacting such extraordinary legislation.<sup>60</sup>

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53. *Id.* §§ 2(1), 4(e)(1)(B).

54. *Id.* §§ 4(e)(1)(A), 4(e)(1)(B)(i). The federal government would pay 95% of the full amount, up to a \$750 million cap. *Id.*

55. Gron & Tsvetkov, *supra* note 14.

56. See H.B. 858, 2020 Gen. Assemb., Reg. Sess. §§ 1(A), (B) (La. 2020) ("Notwithstanding any other provisions of law to the contrary, every policy of insurance insuring against loss or damage to property, which includes the loss of use and occupancy and business interruption in force in this state on the effective date of this Act, shall be construed to include among the covered perils under such a policy, coverage for business interruption due to global virus transmission or pandemic . . . Insurers shall indemnify insured policyholders who have policies that provide the coverage required pursuant to this Section, subject to the limits of the insured's policy, for any loss of business or business interruption for the duration of the declared public health emergency."); H.B. 2372, 2020 Gen. Assemb., Reg. Sess. §§ 3(a), (b) (Pa. 2020); Assemb. B. A10226B, 2020 Gen. Assemb., Reg. Sess. (N.Y. 2020).

57. See Seaman & Selby, *supra* note 1, at 6. Under the Pennsylvania proposed bill, insurers would be legally required to provide coverage for direct physical loss, including (1) the presence of a person infected with the COVID-19 virus, (2) someone in the city who has been infected with the COVID-19 virus, and (3) the presence of the COVID-19 virus otherwise detected in the city. *Id.*

58. MacGregor, *supra* note 9, § VI(B)(1); La. H.B. 858, § A.

59. MacGregor, *supra* note 9, § VI(B)(4); see also N.Y. Assemb. B. 10226, § 2(e).

60. Seaman & Selby, *supra* note 1, at 6 ("[I]t is important that insurers engage with legislators to ensure they understand the adverse consequences associated with these bills, the troubling precedent



## 2. *Potential Future Plans*

To offer a solution to the tremendous losses suffered by businesses across the country, insurance industry groups have proposed plans, including Chubb's plan and the Business Continuity Protection Program.<sup>61</sup> Like PRIA, Chubb's plan is a voluntary, forward-looking program but differs from PRIA in that it would set up different coverage tiers for smaller and larger businesses.<sup>62</sup> Additionally, the proposed Business Continuity Protection Program, which has been backed by the insurance industry, is a federally funded program that would provide policyholders with "80% of payroll, benefits and expenses for three months."<sup>63</sup>

## II. ANALYSIS

Because business interruption insurance coverage largely depends on policy interpretation under an individual state's law and the individual factual circumstances of a case, courts across the country have come to varying conclusions as to the central issues underlying business interruption insurance claims for COVID-19-related losses.<sup>64</sup> These key issues concern (1) whether there has been "direct

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they present, the likely unintended consequences should these bills become law, and require coverage for which a premium was not paid.").

61. *See generally* Weinberger, *supra* note 6.

62. *See id.* The plan would require insurers to "contribute \$15 billion of the proposed \$250 billion in coverage for smaller businesses in the first year, with the contribution rising to \$30 billion over the course of 20 years . . . . A second layer of coverage totaling \$500 billion would be provided entirely by the federal government . . . ." *Id.* For the larger businesses, "insurers would cover \$15 billion of \$400 billion in coverage for the first year . . . rising to \$30 billion by the tenth year." *Id.* Small businesses would only pay premiums related to the insurer's share of the coverage, while larger businesses would pay premiums based on both the insurer's and government's share of coverage. *Id.* ("While participation would be voluntary, a participating insurer would be required to make business interruption coverage for public health emergencies, similar to provisions under the government's terrorism risk insurance program.").

63. *Id.* This plan is slightly different than many of the other offered plans. Essentially, this proposal would require policyholders to purchase business interruption insurance coverage through "state-regulated insurance companies and brokers." *Id.* The American Property Casualty Insurance Association urges that "the plan addresses the root cause of many COVID-19 coverage disputes between policyholders and insurers by specifically covering viral events in business interruption policies." *Id.*

64. Arden B. Levy & Robert H. Cox, *Property Loss or Damage That Triggers Business Interruption Coverage for COVID-19-Related Losses*, A.B.A. (Aug. 28, 2020), <https://www.americanbar.org/groups/litigation/committees/insurance-coverage/articles/2020/business->

physical loss or damage” to the covered property; (2) whether a loss due to an intervening civil authority is covered under a civil authority provision; and (3) the application of a virus exclusion.<sup>65</sup> Inconsistencies in court rulings across jurisdictions have led to confusion and a large influx of lawsuits for COVID-19-related business losses.<sup>66</sup>

#### A. Interpretation of “Direct Physical Loss or Damage”

The central and most prominent issue in past and present business interruption insurance cases is whether a policyholder sustained “direct physical loss or damage.”<sup>67</sup> Traditionally, some courts have narrowly interpreted the phrase “direct physical loss or damage,” only affording insurance coverage under limited circumstances.<sup>68</sup> Other courts have adopted a broad interpretation of “direct physical loss,” affording coverage to policyholders in a wider breadth of factual circumstances.<sup>69</sup> Many questions surrounding this particular issue in COVID-19-related cases remain “largely unanswered,” leading to a high volume of lawsuits across the country.<sup>70</sup>

##### 1. Argument for Insurers: Narrow Interpretation

Insurers are arguing that COVID-19-related losses are not a result of “direct physical loss or damage” to the premises, and thus, no coverage can be afforded under most business interruption insurance policies.<sup>71</sup> Throughout history, many courts have held that without some physical manifestation of loss or demonstrable harm, there is

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interruption-coverage-covid-19/ [https://perma.cc/DG87-NXND] (“[A] growing number of policyholders have filed suit challenging insurance denials . . .”).

65. See generally Robie et al., *supra* note 7.

66. See Herrick, *supra* note 12.

67. *Id.*

68. See Robie et al., *supra* note 7, § 3.06(5)(b) (citing *Total Intermodal Servs. v. Travelers Prop. Cas. Co. of Am.*, No. CV 17-04908, 2018 U.S. Dist. LEXIS 216917 (C.D. Cal. July 11, 2018)).

69. *Id.* § 3.06(5)(c); see also, e.g., *Total Intermodal Servs.*, 2018 U.S. Dist. LEXIS 216917, at \*9 (employing a broader meaning of “direct physical loss or damage” by treating “loss” and “damage” as distinct concepts).

70. Schultz & Boyle Jr., *supra* note 6.

71. See Levy & Cox, *supra* note 64; see also French, *supra* note 10, at 16.

no “direct physical loss or damage” that could trigger coverage under a business interruption policy.<sup>72</sup> Courts adopting this strict interpretation of “direct physical loss” place emphasis on the presence of some type of visible or tangible damage or where the property remains physically “unchanged.”<sup>73</sup>

In recent COVID-19-related litigation, many courts have applied this narrow interpretation of “direct physical loss or damage.”<sup>74</sup> In doing so, most courts are denying coverage absent “physical damage or any tangible injury.”<sup>75</sup> For example, the U.S. District Court for the Western District of Texas held that the COVID-19 virus was not “direct physical loss or damage” within the meaning of the policy because the presence of the COVID-19 virus is not a “distinct, demonstrable, physical alteration” that renders the property uninhabitable.<sup>76</sup> In another decision, the Georgia Court of Appeals found that restaurants’ dining rooms closing as a result of the governor’s executive order was not “direct physical loss or damage” because the dining rooms “underwent no physical change as a result

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72. See *Newman Myers Kreines Gross Harris, P.C. v. Great N. Ins. Co.*, 17 F. Supp. 3d 323, 331, 332–33 (S.D.N.Y. 2014) (finding no physical element of damage and thus no “direct physical loss” where power was shut off by the provider to preserve the system during Hurricane Sandy).

73. See cases cited *supra* note 31.

74. See, e.g., *Promotional Headwear Int’l v. Cincinnati Ins. Co.*, 504 F. Supp. 3d 1191, 1200 (D. Kan. 2020) (“[T]he overwhelming majority of cases to consider business income claims stemming from COVID-19 with similar policy language hold that ‘direct physical loss or damage’ to property requires some showing of actual or tangible harm to or intrusion on the property itself.”); *Diesel Barbershop, LLC v. State Farm Lloyds*, 479 F. Supp. 3d 353, 360 (W.D. Tex. 2020); *Rose’s 1, LLC v. Erie Ins. Exch.*, No. 2020 CA 002424 B, 2020 D.C. Super. LEXIS 10, at \*6, \*13 (D.C. Super. Ct. Aug. 6, 2020); *W. Coast Hotel Mgmt., LLC v. Berkshire Hathaway Guard Ins. Cos.*, 498 F. Supp. 3d 1233, 1238 (C.D. Cal. 2020).

75. Jason Grant, *Court Rejects Restaurant’s Case for Loss Coverage over Stay-at-Home Orders*, PROPERTYCASUALTY360 (Feb. 18, 2021, 7:00 AM), <https://www.propertycasualty360.com/2021/02/18/federal-court-shuts-down-restaurants-suit-for-covid-19-loss-414-197253/> [<https://perma.cc/E2H7-QFJ5>] (noting that “the vast majority of courts analyzing these claims have sided with the insurers”); see also, e.g., *Legal Sea Foods, LLC v. Strathmore Ins. Co.*, No. 20-10850, 2021 WL 858378, at \*3 (D. Mass. Mar. 5, 2021) (“The COVID-19 virus does not impact the structural integrity of property in the manner contemplated by the Policy and thus cannot constitute ‘direct physical loss of or damage to’ property. A virus is incapable of damaging physical structures because ‘the virus harms human beings, not property.’” (citing *Wellness Eatery La Jolla LLC v. Hanover Ins. Grp.*, No. 20-CV-1277, 2021 WL 389215, at \*16 (S.D. Cal. Feb. 3, 2021))).

76. *Diesel Barbershop*, 479 F. Supp. 3d at 360. Although the court noted that COVID-19 is similar to the cases with contaminants, such as ammonia, E. coli, or carbon monoxide, they found that “cases requiring tangible injury to property [were] more persuasive.” *Id.*

of the order.”<sup>77</sup>

In opposition to policyholders’ arguments, some courts are finding that only a “mere threat of exposure” to COVID-19 is not “direct physical loss or damage.”<sup>78</sup> Further and perhaps most relevant to COVID-19-related losses, courts following this narrow interpretation of “direct physical loss” do not find coverage where the damage can be simply cleaned away.<sup>79</sup> The U.S. Court of Appeals for the Eleventh Circuit outlined this reasoning, holding that where a property can be restored to a functional, usable condition by simply being cleaned, there is no “direct physical loss or damage.”<sup>80</sup> A few courts have followed suit, rejecting coverage where the COVID-19 virus was present on the property and could be cleaned.<sup>81</sup>

Lastly, some courts are finding that the closing of businesses due to a government-ordered shutdown is not a “direct physical loss” under a business income provision in a business interruption policy.<sup>82</sup>

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77. *Henry’s La. Grill, Inc. v. Allied Ins. Co. of Am.*, 495 F. Supp. 3d 1289, 1293, 1295–96 (N.D. Ga. 2020) (finding that “the Governor’s Executive Order did not create a ‘direct physical loss of’ the Plaintiff’s dining rooms” when the restaurant closed and the dining room was no longer available to patrons); *Maple & Tucker*, *supra* note 3 (“[The] analysis of the meaning of the phrase ‘direct physical loss of or damage to’ was guided by long-standing Georgia law finding that ‘the words ‘loss of’ and ‘damage to’ make clear that the coverage is predicated on a change to the insured property resulting from an external event.’”).

78. *Water Sports Kauai, Inc. v. Fireman’s Fund Ins. Co.*, 499 F. Supp. 3d 670, 675 (N.D. Cal. 2020) (finding that where a business did not plead “the actual presence of the coronavirus in their establishments,” there was no direct physical loss or damage as a result of contamination because the business only pleaded an “imminent threat”).

79. *See Mama Jo’s Inc. v. Sparta Ins. Co.*, 823 F. App’x 868, 879 (11th Cir. 2020) (finding no “direct physical loss” because “an item or structure that merely needs to be cleaned has not suffered a ‘loss’ which is both ‘direct’ and ‘physical’”); *see also Universal Image Prods., Inc. v. Fed. Ins. Co.*, 475 F. App’x 569, 573 (6th Cir. 2012) (“[C]leaning and moving expenses . . . are not tangible, physical losses, but economic losses.”).

80. *See generally Mama Jo’s*, 823 F. App’x 868.

81. *See B St. Grill & Bar LLC v. Cincinnati Ins. Co.*, No. CV-20-01326, 2021 WL 857361, at \*5 (D. Ariz. Mar. 8, 2021) (“The mere fact that Plaintiffs needed to clean surfaces that could host the virus does not constitute actual physical damage entitling them to coverage under the policy. Plaintiffs could easily remedy the problem by diligently cleaning, and clearly no repairs were necessary.”); *see also Uncork & Create LLC v. Cincinnati Ins. Co.*, 498 F. Supp. 3d 878, 883–84 (S.D. W. Va. 2020) (“Because routine cleaning, perhaps performed with greater frequency and care, eliminates the virus on surfaces, there would be nothing for an insurer to cover . . . .”); *Legal Sea Foods, LLC v. Strathmore Ins. Co.*, No. 20-10850, 2021 WL 858378, at \*3 (D. Mass. Mar. 5, 2021) (noting that “the presence of the virus at insured locations would not constitute the direct physical loss or damage required to trigger coverage under the Policy because the virus can be eliminated . . . and can be removed from surfaces with routine cleaning and disinfectant”).

82. *See SA Palm Beach LLC v. Certain Underwriters at Lloyd’s, London*, 506 F. Supp. 3d 1248,

Although the majority of courts deciding COVID-19-related business interruption insurance lawsuits have come to similar conclusions, more new and pending cases are being decided in favor of policyholders.<sup>83</sup> Overall, it is vitally important for policy holders to properly “tie the elements of the coverage to the facts of the damage and loss.”<sup>84</sup>

## 2. *Argument for Policyholders: Broad Interpretation*

Despite the firm and well-supported position taken by insurers, policyholders are arguing that COVID-19-related losses are the result of “direct physical loss or damage” to the premises, even if the loss is not tangible.<sup>85</sup> Before COVID-19, many courts have concluded that an insured need not establish actual physical damage to the covered

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1250, 1255 (S.D. Fla. 2020) (finding no direct physical loss or damage where a plaintiff alleged that it suffered a direct physical loss as a result of the COVID-19 pandemic and local government orders when it was “unable to use its property for its intended purpose” because the plaintiffs failed to allege “any physical damage”), *appeal filed*, No. 20-14812 (11th Cir.); *see also* Soundview Cinemas Inc. v. Great Am. Ins. Grp., No. 605985-20, 2021 WL 561854, at \*9 (N.Y. Sup. Ct. Feb. 8, 2021) (finding no coverage where a movie theater closed pursuant to a state executive order because “loss of use of the Premises due to COVID-19 related government orders does not constitute ‘direct physical loss of or damage to the property’ that would trigger Business Income coverage under the Policy”); Goodwill Indus. of Cent. Okla., Inc. v. Phila. Indem. Ins. Co., 499 F. Supp. 3d 1098, 1104 (W.D. Okla. 2020) (finding no coverage where the plaintiff failed to allege physical damage to the property because, at a minimum, “a plaintiff must allege that a substance entered its premises or attached to its surfaces to plead a “direct physical loss”), *appeal filed*, No. 21-6045 (10th Cir. 2021).

83. *See* Steve Hallo, *Ohio Becomes the Heart of COVID BI Claim Litigation*, PROPERTYCASUALTY360 (Feb. 10, 2021, 12:00 AM), <https://www.propertycasualty360.com/2021/02/10/ohio-becomes-the-heart-of-covid-bi-claim-litigation/> [<https://perma.cc/93CT-LWQC>] (“[T]he industry responded to the influx of lawsuits by moving quickly on cases that were poorly pled or were filed by attorneys without substantial experience in the insurance coverage realm, resulting in early decisions being found for insurers. Now that trend is beginning to reverse itself as courts have had the opportunity to evaluate better complaints and strategies by policyholders.”); *see also, e.g.*, *Elegant Massage, LLC v. State Farm Mut. Auto. Ins. Co.*, 506 F. Supp. 3d 360, 375–76 (E.D. Va. 2020) (finding that the plaintiffs adequately plead “facts and circumstances, some of which, if proved, would fall within the risk covered by the policy” even where plaintiffs did not plead any “structural damage”).

84. Michael S. Levine et al., *The Most Significant Business Interruption Cases of 2020*, PROPERTYCASUALTY360 (Feb. 5, 2021, 5:00 AM), <https://www.propertycasualty360.com/2021/02/05/top-insurance-cases-of-2020-part-1-business-interruption-414-196450/?ref=insurancedailynews> [<https://perma.cc/H8RM-5EDX>]. For example, most courts are rejecting coverage where policyholders fail to properly allege that the COVID-19 virus’s presence on the business premises was a direct physical loss that made the premises “unsafe” or “unusable.” *Id.*

85. Levy & Cox, *supra* note 64; French, *supra* note 10, at 20–21.

property to meet the threshold requirement of a “direct physical loss or damage.”<sup>86</sup> Some courts only require that a property become unusable, lose essential “functionality,” or become “unfit for occupancy.”<sup>87</sup> These decisions rest on the premise that “‘physical loss’ [is] not limited to ‘tangible changes to the insured property’ but also ‘changes . . . that exist in the absence of structural damage,’ as long as they are ‘distinct and demonstrable.’”<sup>88</sup>

Perhaps most relevant to policyholders’ arguments, many past judicial opinions support a finding of “direct physical loss” where a substance or contaminant (e.g., ammonia, gasoline, asbestos, or drywall) renders a property uninhabitable.<sup>89</sup> In some cases, even the “mere presence” of a hazardous substance in the vicinity of the property that renders a property “inoperable” is enough to constitute “direct physical loss.”<sup>90</sup> The ultimate underlying rationale of this narrow interpretation is that it considers the full bundle of rights that come along with property, embodying the entire property interest.<sup>91</sup>

Many policyholders are relying on this precedential case law to

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86. See *Murray v. State Farm Fire & Cas. Co.*, 509 S.E.2d 1, 17 (W. Va. 1998) (“Losses covered by the policy, including those rendering the insured property unusable or uninhabitable, may exist in the absence of structural damage to the insured property.”); see also *Gen. Mills, Inc. v. Gold Medal Ins. Co.*, 622 N.W.2d 147, 152 (Minn. Ct. App. 2001) (“We have previously held that direct physical loss can exist without actual destruction of property or structural damage to property; it is sufficient to show that insured property is injured in some way.” (citing *Sentinel Mgmt. Co. v. N.H. Ins. Co.*, 563 N.W.2d 296, 300 (Minn. Ct. App. 1997))).

87. See cases cited *supra* note 34.

88. RICHARD P. LEWIS & NICHOLAS M. INSUA, *BUSINESS INCOME INSURANCE DISPUTES* § 2.04(C)(1)(c) (2d ed. Supp. 2020); see also *Mellin v. N. Sec. Ins. Co.*, 115 A.3d 799, 805 (N.H. 2015) (“Evidence that a change rendered the insured property temporarily or permanently unusable or uninhabitable may support a finding that the loss was a physical loss to the insured property.”).

89. See cases cited *supra* note 37.

90. *Armstrong World Indus., Inc. v. Aetna Cas. & Sur. Co.*, 52 Cal. Rptr. 2d 690, 734–35 (Ct. App. 1996) (finding that the presence of asbestos in the vicinity of an insured property is a “direct physical loss” due to the potential future release of asbestos). It is important to note that, in the context of COVID-19 specifically, many courts require a much higher standard for contamination, in that there must be “sufficient evidence of the presence of the contaminant at the property plus an imminent threat from it.” *Water Sports Kauai, Inc. v. Fireman’s Fund Ins. Co.*, 499 F. Supp. 3d 670, 674 (N.D. Cal. 2020).

91. John S. Vishneski III et al., *Novel Coronavirus Property Damage Coverage Part II: Case Law Before the Pandemic*, LAW.COM: INS. COVERAGE L. CTR. (Oct. 12, 2020, 5:48 PM), <https://www.law.com/insurance-coverage-law-center/2020/10/12/part-ii-case-law-before-the-pandemic/> [<https://perma.cc/H5FR-U4FW>] (“Ignoring this bundle of rights, including the use of property, and rather than addressing the meaning of ‘physical loss of or damage to’ in policies, insurers have tended to focus courts on construction of the word ‘physical’—which itself is not controversial.”).

show that the presence of the COVID-19 virus on their businesses' premises amounts to "direct physical loss or damage" as a result of contamination of the property.<sup>92</sup> The U.S. District Court for the Northern District of California supported this argument by stating in a footnote that if the plaintiff would have properly alleged the presence of COVID-19 on the business premises, the court would likely have found the presence of the virus to be an "intervening physical force" that amounted to "direct physical loss or damage."<sup>93</sup>

Further, in a few recent cases, courts have concluded that "an allegation of COVID-19 entering the premises through an employee or customer is sufficient to demonstrate direct physical loss or damage."<sup>94</sup> For example, the U.S. District Court for the Western District of Missouri awarded coverage for policyholders as a result of the COVID-19 virus on the premises of businesses because the policyholders adequately demonstrated a "direct physical loss" where the presence of COVID-19 on the property made the property "unsafe and unusable."<sup>95</sup>

Lastly, many policyholders are arguing that government shutdown orders amount to a "direct physical loss."<sup>96</sup> Although most courts are deciding against this rationale, a few courts have agreed that a business being forced to close because of a COVID-19-related government shutdown order amounts to a "direct physical loss" of the property.<sup>97</sup> Thus, despite insurers' blanket denial of coverage for

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92. See generally *Studio 417, Inc. v. Cincinnati Ins. Co.*, 478 F. Supp. 3d 794 (W.D. Mo. 2020) (finding a "direct physical loss" as a result of the presence of the COVID-19 virus on the business premises of restaurants and salons because the virus made the premises "unsafe and unusable" for its intended use); *Mudpie, Inc. v. Travelers Cas. Ins. Co. of Am.*, 487 F. Supp. 3d 834 (N.D. Cal. 2020), *appeal filed*, No. 20-16858 (9th Cir.).

93. See *Mudpie*, 487 F. Supp. 3d at 841 n.7.

94. *Promotional Headwear Int'l v. Cincinnati Ins. Co.*, 504 F. Supp. 3d 1191, 1202–03 (D. Kan. 2020); *Studio 417*, 478 F. Supp. 3d at 802–03.

95. See *Studio 417*, 478 F. Supp. 3d at 800.

96. *Id.* at 803–04.

97. See *Henderson Rd. Rest. Sys. v. Zurich Am. Ins. Co.*, No. 20-CV-1239, 2021 WL 168422, at \*13 (N.D. Ohio Jan. 19, 2021); see also *In re Soc'y Ins. Co. COVID-19 Bus. Interruption Prot. Ins. Litig.*, No. 20-C-2005, 2021 WL 679109, at \*9 (N.D. Ill. Feb. 22, 2021) (finding the plaintiffs suffered a direct physical loss of their property where the "pandemic-caused shutdown orders" imposed a "physical limit" on the business). This court reasoned:

[T]he restaurants are limited from using much of their physical space. It is not as if the shutdown orders imposed a *financial* limit on the restaurants by . . . capping the

business interruption insurance claims and courts' tendency to rule in favor of insurers, these more recent decisions reveal that policyholders may have a path to coverage.<sup>98</sup> However, to survive early stages of litigation, "it is key for policyholders to tie the elements of the coverage to the facts of the damage and loss" in a particular case.<sup>99</sup>

### B. Interpretation of the "Civil Authority" Provision

Another prominent issue in COVID-19-related business interruption insurance cases is whether a policyholder can recover—outside of a business income provision—under a civil authority policy provision.<sup>100</sup> Traditionally, most courts require the initial occurrence of a "direct physical loss or damage" that causes a civil authority to intervene to trigger coverage under a policy.<sup>101</sup> However, other courts do not necessarily require this prerequisite, making civil authority coverage more available to policyholders.<sup>102</sup>

#### 1. Argument for Insurers: "Direct Physical Loss or Damage" Is Initially Required and Mandated Closures Are Not "Direct Physical Loss or Damage"

Insurers contend that for a civil authority policy provision to afford coverage, the order by a civil authority must be issued as a "direct

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dollar-amount of daily sales that each restaurant could make. No, instead the Plaintiffs cannot use (or cannot fully use) the physical space.

*In re Soc'y Ins. Co. COVID-19 Bus. Interruption Prot. Ins. Litig.*, 2021 WL 679109, at \*9.

98. Andrews & Steklof, *supra* note 5. Commentators on recent business interruption insurance legislation have called the decision in *Studio 417* "a resounding victory for policyholders" in spite of the insurance industry's position that "COVID-19 does not constitute 'physical loss or damage.'" *Id.*

99. Levine et al., *supra* note 84.

100. See generally Berry, *supra* note 16.

101. See *Dickie Brennan & Co. v. Lexington Ins. Co.*, 636 F.3d 683, 686–87 (5th Cir. 2011); see also *Two Caesars Corp. v. Jefferson Ins. Co.*, 280 A.2d 305, 308 (D.C. Ct. App. 1971) ("[T]he loss is compensable only when the Order of Civil Authority, which prohibits access, is predicated upon damage to or destruction of the business property.").

102. See, e.g., *Sloan v. Phoenix of Hartford Ins. Co.*, 207 N.W.2d 434, 436–37 (Mich. Ct. App. 1973) ("[I]rrespective of any physical damage to the insured property, coverage was provided and benefits were payable when, as a result of one of the perils insured against, access to the insured premises was prohibited by order of civil authority . . .").



result” of some initial “direct physical loss or damage.”<sup>103</sup> Courts interpret this to mean that there is a “causal link” between the property damage and intervention by a civil authority.<sup>104</sup> Thus, where an order by a civil authority is implemented to protect against future threat of injury or damage, there is often no coverage.<sup>105</sup> In one of the main cases outlining this issue, the U.S. Court of Appeals for the Fifth Circuit held there was no coverage under a policy where a business claimed loss as a result of a hurricane evacuation order because the business owners “failed to demonstrate a nexus between any prior property damage and the evacuation order.”<sup>106</sup> Importantly, coverage under a civil authority provision is often denied for failure to plead (1) prohibited access to the business premises, (2) damaged properties surrounding the business premises, and (3) loss of access resulting from COVID-19.<sup>107</sup>

Many courts have followed this rationale in recent cases involving COVID-19-related losses.<sup>108</sup> As an example of this, the Superior Court of the District of Columbia found no coverage where the plaintiffs failed to show “direct physical loss or damage” to their restaurant as a result of a government order mandating the closure of all non-essential businesses.<sup>109</sup> Additionally, the U.S. District Court

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103. See *Paradies Shops, Inc. v. Hartford Fire Ins. Co.*, No. 3-CV-3154, 2004 WL 5704715, at \*7 (N.D. Ga. Dec. 15, 2004) (“[T]he Civil Authority provision of the Policy reimburses lost business income only ‘when access to insured premises is specifically prohibited by order of a civil authority as the direct result of a Covered Cause of Loss to property away from your premises’ . . . .”); *United Air Lines, Inc. v. Ins. Co. of Pa.*, 439 F.3d 128, 135 n.8 (2d Cir. 2006) (concluding that “business interruption was caused by fears of future attacks, not by the actual physical damage”).

104. See *Dickie Brennan*, 636 F.3d at 686 (“[T]he ‘due to’ language in [the] policy requires a close causal link by its plain terms.”).

105. See *United Air Lines*, 439 F.3d at 135 (“Access may have been prevented to some property, but not because of the physical damage that occurred. For example, access may have been prohibited because of concerns over a possible further attack. . . . [I]t cannot be considered due to physical damage of the type insured.” (quoting Alan R. Miller, *Business Interruption Insurance: Current Issues*, 702 PLI LITIG. & ADMIN. PRAC. COURSE HANDBOOK SERIES 233, 267 (2004))).

106. *Dickie Brennan*, 636 F.3d at 686; *Source Food Tech., Inc. v. U.S. Fid. & Guar. Co.*, 465 F.3d 834, 836–838 (8th Cir. 2006) (holding that no “direct physical loss” resulted from an embargo on beef products by order of a civil authority).

107. See *Henry’s La. Grill, Inc. v. Allied Ins. Co. of Am.*, 495 F. Supp. 3d 1289, 1297 (N.D. Ga. 2020).

108. See *Rose’s 1, LLC v. Erie Ins. Exch.*, No. 2020 CA 002424 B, 2020 D.C. Super. LEXIS 10, at \*5–6 (D.C. Super. Ct. Aug. 6, 2020); see also *Studio 417, Inc. v. Cincinnati Ins. Co.*, 478 F. Supp. 3d 794, 803 (W.D. Mo. 2020).

109. *Rose’s 1*, 2020 D.C. Super. LEXIS 10, at \*13; Syed S. Ahmad & Michael L. Huggins, *Direct*

for the Western District of Missouri has followed the rationale that there must be a "direct physical loss" to trigger civil authority coverage and found for the policyholders.<sup>110</sup> In that case, the plaintiffs adequately demonstrated that the presence of the COVID-19 virus on the premises amounted to the prerequisite "direct physical loss or damage" that triggered civil authority coverage because the plaintiff's access to their property was prohibited.<sup>111</sup> This ruling demonstrates that policyholders may still be able to recover under a civil authority provision for COVID-19-related losses, but they must establish that prerequisite "direct physical loss or damage."

2. *Argument for Policyholders: Mandated Closures Are "Direct Physical Loss or Damage"*

Traditionally, only a few courts have found that coverage can still be afforded under a civil authority provision, even where there is no initial "direct physical loss or damage."<sup>112</sup> Most notably, the Michigan Court of Appeals found coverage for loss of access to insureds' businesses due to the civil unrest and disturbances in Detroit occurring in the summer of 1967 and a curfew that curtailed hours of operation, notwithstanding the fact that many businesses did not necessarily suffer actual physical damage.<sup>113</sup> This argument may not be as strong for policyholders because most lawsuits thus far have required initial "direct physical loss or damage" to recover under a civil authority provision.<sup>114</sup> While many courts do require some loss as a prerequisite, coverage can still potentially be afforded

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*Evidence of Loss or Damage May Be Unnecessary to Obtain Coverage for Losses Due to COVID-19*, in 34 MEALEY'S LITIGATION REPORT: INSURANCE 1, 1 (2020). Although the court did not find a "direct physical loss" in this case, the court noted that the policyholders had not offered any evidence that COVID-19 was present on the insured property, and that if they had, doing so would have increased the chances of finding a "direct physical loss." Ahmad & Huggins, *supra*, at 1–2.

110. *Studio 417*, 478 F. Supp. 3d at 803.

111. *Id.*

112. See LiMandri et al., *supra* note 30, at 86 n.17 ("[T]here are 'Civil Authority' provisions that do not require a nexus between existing property damage and the order of civil authority. . . [but] require[] only that the order of civil authority result from 'loss, damage or an event' not otherwise excluded."); see also Sloan v. Phoenix of Hartford Ins. Co., 207 N.W.2d 434, 437 (Mich. Ct. App. 1973).

113. *Sloan*, 207 N.W.2d at 437.

114. See, e.g., *Studio 417*, 478 F. Supp. 3d at 803.

without prerequisite loss because coverage largely depends on the policy language in question.<sup>115</sup>

Some policyholders are taking the same position as insurers, which requires a showing that the COVID-19 virus was present on the premises and caused “direct physical loss or damage” to the property.<sup>116</sup> A few COVID-19-related cases have extended this rationale and have been decided in favor of policyholders under a civil authority provision where the government order caused a “direct physical loss” of the property.<sup>117</sup> Importantly, the North Carolina Superior Court ruled that a government order that expressly forbade the plaintiffs from accessing and using their property amounted to a “direct physical loss” as a result of a government order.<sup>118</sup> Additionally, a test case was decided in the United Kingdom that provides guidance on the potential direction of COVID-19 litigation with regard to civil authority provisions.<sup>119</sup> In particular, the case provided specific guidance as to when a government shutdown order would trigger coverage under a civil authority provision.<sup>120</sup> Though it may not be binding in the United States, this case provides valuable and persuasive information for policyholders in the search for coverage and prepares insurers for new arguments that may be

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115. See Berry, *supra* note 16 (“In the absence of wording requiring it, a physical damage requirement normally will not be imposed by the courts.”).

116. See *Studio 417*, 478 F. Supp. 3d at 803; see also French, *supra* note 10, at 24 (“[P]olicyholders suffered ‘physical loss of or damage to property’ even if COVID-19 was not proven to be present in their businesses. The risk of people getting sick and dying from being in the policyholders’ business premises was so high that the business premises were rendered uninhabitable and unusable. That is enough to trigger coverage.”).

117. See, e.g., *N. State Deli v. Cincinnati Ins. Co.*, No. 20-CVS-2569, 2020 N.C. Super. LEXIS 38, \*6 (N.C. Super. Ct. Oct. 7, 2020) (finding that a “direct physical loss” does not have to include damage to the property and that loss of use of the property as a result of a government shutdown order was enough to amount to a “direct physical loss” of the property).

118. *Id.* at \*7.

119. See generally Paul Lewis et al., *Judgement Handed Down in FCA’s COVID-19 Business Interruption Insurance Test Case*, LEXOLOGY (Sept. 15, 2020), <https://www.lexology.com/library/detail.aspx?g=72a52c65-7e33-492b-82ee-adf7db26bcfa> [https://perma.cc/FUR8-TNH5].

120. *Id.* Notably, the court found that where a restaurant only offered dine-in services prior to the shutdown order, which required solely take out, there may be coverage under the provision. *Id.* However, the court noted that if a restaurant practiced both take out and dine-in prior to the shutdown order, then there likely would not be a “prevention of access” triggering coverage. *Id.*

offered by policyholders.<sup>121</sup> Overall, the way in which policyholders plead their cases will be especially important when trying to recover under a civil authority provision.

### C. *Application of the Virus Exclusion*

The last and perhaps most potentially conclusive issue of coverage in COVID-19-related business interruption cases is the enforceability of a virus exclusion on a policyholder's access to coverage.<sup>122</sup> Traditionally, most courts' rulings have favored insurers, determining that whenever a virus exclusion is present, there can be no coverage for viruses or other communicable diseases under the policy.<sup>123</sup> Yet, other courts have traditionally found, in limited circumstances, that even with an exclusion contained in the policy, the exclusion may still be unenforceable.<sup>124</sup> As expected, "issues surrounding whether insurance policy virus exclusions apply to losses caused by COVID-19 are novel and complex."<sup>125</sup>

#### 1. *Argument for Insurers: Virus Exclusion Bars Coverage*

The insurance industry collectively asserts that it intended for viruses to be excluded under business interruption insurance policies with the insertion of a virus exclusion into most business interruption

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121. Judy Greenwald, *Lost Income Claim Disputes Evolve Further*, BUS. INS. (Mar. 4, 2021), <https://www.businessinsurance.com/article/20210304/NEWS06/912340054/COVID-19-one-year-later-coronavirus-pandemic-risk-management-workers-compensatio> [<https://perma.cc/K6BG-QCA9>].

122. Richard P. Lewis et al., *The Debut of the Virus Exclusion*, LAW.COM: INS. COVERAGE L. CTR. (Oct. 8, 2020, 3:30 PM), <https://www.law.com/insurance-coverage-law-center/2020/10/08/the-debut-of-the-virus-exclusion-did-insurers-provide-adequate-notice-upon-initially-including-this-exclusion-in-your-policy/> [<https://perma.cc/8K8A-2Y3E>].

123. See, e.g., *Meyer Nat. Foods, LLC v. Liberty Mut. Fire Ins. Co.*, 218 F. Supp. 3d 1034, 1034 (D. Neb. 2016).

124. See *Davis v. United Servs. Auto. Ass'n*, 223 Cal. App. 3d 1322, 1332 (1990) (finding that an exclusion was unenforceable because the insurer failed to provide "clear notice of the exclusions for losses"). "The law . . . requires notice of the *specific* reduction in coverage; a general admonition to read the policy for changes is insufficient." *Id.*; see also *Perry v. Econ. Fire & Cas. Co.*, 724 N.E.2d 151, 153–54 (Ill. Ct. App. 1999) (finding that the insurer provided inadequate notice where "the notice itself" did not inform the insured of a reduction in coverage).

125. *Urogynecology Specialist of Fla. LLC v. Sentinel Ins. Co.*, 489 F. Supp. 3d 1297, 1301 (M.D. Fla. 2020).

insurance policies after the SARS epidemic of 2003.<sup>126</sup> Since then, most courts have found that where a virus exclusion exists in the policy, coverage is barred.<sup>127</sup>

In recent cases for COVID-19-related losses, quite a few courts have similarly found that where a virus exclusion is present in the policy, coverage is barred.<sup>128</sup> When determining enforceability of exclusions, most courts require that the exclusion be unambiguous and conspicuous to be valid and enforceable.<sup>129</sup> Following this rationale, the U.S. District Court for the Eastern District of Pennsylvania found no coverage where the exclusion was clear and unambiguous.<sup>130</sup> Similarly, the U.S. District Court for the Northern District of California found that policyholder's coverage was barred by a virus exclusion where the virus exclusion was unambiguous and there was no question as to the scope and validity of the exclusion.<sup>131</sup>

## 2. *Argument for Policyholders: Virus Exclusion Is Not Enforceable*

Predictably, policyholders urge a finding of insurance coverage both where a policy does and does not include a virus exclusion.<sup>132</sup> Perhaps obviously, where there is no virus exclusion present in a policy, coverage is not necessarily barred.<sup>133</sup> Further, an important

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126. Lewis et al., *supra* note 122.

127. See, e.g., *Meyer Nat. Foods*, 218 F. Supp. 3d at 1034 (determining that there was no coverage for a beef shipment contaminated with E. coli because there was an exclusion that plainly precluded virus coverage under the policy).

128. See, e.g., *Diesel Barbershop, LLC v. State Farm Lloyds*, 479 F. Supp. 3d 353, 362 (W.D. Tex. 2020).

129. See *Wilson v. Hartford Cas. Co.*, 492 F. Supp. 3d 417, 427 (E.D. Pa. 2020) (finding that exclusions are “effective against an insured if they are clearly worded and conspicuously displayed, irrespective of whether the insured read the limitations or understood their import”); see also *Boxed Foods Co. v. Cal. Cap. Ins. Co.*, 497 F. Supp. 3d 516, 523 (N.D. Cal. 2020) (finding that a virus exclusion was unambiguous and thus barred coverage where the plaintiff failed to prove that there was more than one reasonable interpretation of the exclusion).

130. *Wilson*, 492 F. Supp. 3d at 427.

131. *Boxed Foods Co.*, 497 F. Supp. 3d at 523–24.

132. See Lee Siegel & Ryan Maxwell, *Major Trends in COVID-19 Business Interruption Lawsuits*, LAW360.COM (May 14, 2020, 5:19 PM), <https://www.law360.com/articles/1273308/major-trends-in-covid-19-business-interruption-lawsuits> [<https://perma.cc/BU7C-XVB2>] (noting that policyholders may argue that a virus exclusion is not enforceable where a virus was not the actual cause of loss).

133. See generally *Optical Servs. USA/JCI v. Franklin Mut. Ins. Co.*, No. BER-L-3681-20, 2020 N.J. Super. Unpub. LEXIS 1782 (N.J. Super. Ct. Aug. 13, 2020); Jason Rubinstein & Mark Packman,

question that policyholders should consider is whether the broad language and ambiguity of a common virus exclusion renders the exclusion unenforceable under the particular factual circumstances of their respective policy.<sup>134</sup> Also, virus exclusions may be unenforceable as a result of insurers' failing to accurately represent the scope of coverage, failing to provide sufficient notice of the exclusions to their policyholders when they first incorporated them within their policies, or when the loss does not result from the virus itself.<sup>135</sup> In one case, the U.S. District Court for the Eastern District of Virginia found that because the plaintiff did not allege that the presence of the COVID-19 virus on the property was the cause of loss, the virus exclusion was not applicable.<sup>136</sup> Thus, if policyholders could demonstrate that they did not receive notice of a substantive change in coverage or that the virus was not the actual cause of loss, the exclusion may not be enforceable.<sup>137</sup>

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*Insurer-Friendly COVID-19 Case Law Is No Silver Bullet*, LAW360.COM (Oct. 14, 2020, 4:57 PM), <https://www.law360.com/articles/1319456/insurer-friendly-covid-19-case-law-is-no-silver-bullet> [<https://perma.cc/RW5W-5XJM>] (“[M]any business interruption policies do not include virus exclusions.”).

134. See generally LiMandri et al., *supra* note 30, at 98–101.

135. See *id.* at 100 (“Virus exclusions may potentially be unenforceable because the approval for insurers to use this exclusion was obtained through the use of false and misleading information in 2006. . . . [C]ourts should ‘prevent insurers from enforcing those exclusions in order to avoid paying for COVID-19 claims.’” (quoting Richard P. Lewis et al., *Here We Go Again: Virus Exclusion for COVID-19 and Insurers*, PROPERTYCASUALTY360 (Apr. 7, 2020, 12:00 AM), <https://www.propertycasualty360.com/2020/04/07/here-we-go-again-virus-exclusion-for-covid-19-and-insurers/> [<https://perma.cc/ERW9-X3B4>])); Lewis et al., *supra* note 122. Insurers have tried to characterize new exclusions as “mere clarifications of pre-existing limitations on coverage, rather than material reductions in the scope of coverage.” Lewis et al., *supra* note 122; see also LiMandri et al., *supra* note 30, at 98 (“[A] virus exclusion may not be sufficiently conspicuous, plain, or clear to be effective, or may have been added at a later date and in a way that did not provide adequate notice to the policyholder of its addition.”); Jordan Rand, *Disclosure Affects Enforceability of Insurers’ Virus Exclusions*, LAW360.COM (May 6, 2020, 5:43 PM), <https://www.law360.com/articles/1270364/disclosure-affects-enforceability-of-insurers-virus-exclusions> [<https://perma.cc/URJ9-ARR5>] (“If a virus exclusion was added at the time of an annual renewal, a lack of disclosure of that fact may be a basis to invalidate even the clearest of virus exclusions.”).

136. *Elegant Massage, LLC v. State Farm Mut. Auto. Ins. Co.*, 506 F. Supp. 3d 360, 375–76 (E.D. Va. 2020) (“Here, Plaintiff is neither alleging that there is a presence of a virus at the covered property nor that a virus is the direct cause of the property’s physical loss. . . . Rather, Plaintiff alleg[ed] that the Orders were the ‘sole cause of the Plaintiff’s . . . loss of business income . . . .’”).

137. Lewis et al., *supra* note 122 (“[B]oth state regulations and the common law in many states require insurance companies to provide notice of material changes in coverage . . . .”). “[Policyholders] whose virus exclusion did not come with such an advisory notice should question whether their insurance company adequately and affirmatively called their attention to how the virus exclusion created

Lastly, policyholders have asserted—and some courts have agreed—that virus exclusions do not include pandemics.<sup>138</sup> For example, the North Carolina Superior Court found that where a virus exclusion was present in the policy, coverage was not barred for “virus-related causes of loss.”<sup>139</sup> In another case, the U.S. District Court for the Middle District of Florida rejected the idea of a blanket denial of coverage for exclusions that were not intended to address harms suffered during the COVID-19 pandemic.<sup>140</sup> Although the insurers provided precedent for the applicability of the virus exclusion, the Court denied the insurers argument, ruling that COVID-19 presents very unique circumstances that precedent cases do not cover.<sup>141</sup>

#### D. Potential Use of Legislation and Future Plans

Legislation has been introduced in the U.S. House of Representatives, as well as by many state legislatures across the country, in an attempt to provide solutions for the paramount losses sustained by policyholders.<sup>142</sup> The legislation varies in function, with some offering federal funding and others requiring retroactive payment for COVID-19 losses.<sup>143</sup> Additionally, insurance companies have offered different proposals for plans to indemnify policyholders

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a material change in coverage from their prior policy . . . [or] whether a virus exclusion added without such notice is enforceable.” *Id.*

138. See McKinley Dev. Leasing Co. v. Westfield Ins. Co., No. 2020 CV 00815, 2021 Ohio Misc. LEXIS 17, at \*16 (Ohio Ct. Comm. Pleas Feb. 9, 2021) (finding a virus exclusion to be unenforceable because a “virus is not the same as a pandemic”); see also N. State Deli v. Cincinnati Ins. Co., No. 20-CVS-2569, 2020 N.C. Super. LEXIS 38, \*7 (N.C. Super. Ct. Oct. 7, 2020).

139. *N. State Deli*, 2020 N.C. Super. LEXIS 38, at \*9.

140. *Urogynecology Specialist of Fla. LLC v. Sentinel Ins. Co.*, 489 F. Supp. 3d 1297, 1301 (M.D. Fla. 2020).

141. *Id.* at 1302–03 (“None of the [precedented] cases dealt with the unique circumstances of the effect COVID-19 has had on our society—a distinction this Court considers significant.”).

142. MacGregor, *supra* note 9, §§ VI(A), VI(C); Pat Hatler et al., *A Survey of Recent Biz Interruption Insurance Legislation*, LAW360.COM (June 9, 2020, 5:47 PM), <https://www.law360.com/articles/1278954/a-survey-of-recent-biz-interruption-insurance-legislation> [<https://perma.cc/WL7M-82RY>].

143. See Hatler et al., *supra* note 142 (“Some proposals would result in shared risk-taking between policyholders, the commercial insurance industry, and the federal government. Others would have the federal government take on the full risk of these events.”).

for their uninsured losses and prepare for similar future catastrophes while protecting insurance industry solvency.<sup>144</sup>

### 1. *Mandatory Retroactive Legislation*

Insurers are actively arguing against retroactive legislation that would require mandatory payment of uninsured claims, emphasizing the critical nature of protecting insurance industry solvency.<sup>145</sup> Many insurance industry organizations, including the American Property Casualty Insurance Association (APCIA), International Association of Insurance Supervisors (IAIS), AM Best Rating Services, and National Association of Insurance Commissioners (NAIC), have issued advisory statements on the potential negative impact of legislative proposals for retroactive business interruption insurance.<sup>146</sup> There is an overwhelming consensus among insurance industry professionals that forcing insurers to pay unforeseen COVID-19 business losses would be detrimental to the insurance industry.<sup>147</sup>

Following these warnings, the insurance industry has come to a consensus that “pandemics are uninsurable.”<sup>148</sup> The insurance industry claims that it cannot realistically insure pandemics simply because the sheer volume of loss collectively sustained by

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144. See generally Weinberger, *supra* note 6.

145. MacGregor, *supra* note 9, § VI(D) (“[T]he bills ‘would have far-reaching, significant negative impacts to all consumers and businesses relying on the insurance market to protect them now and in the future.’”).

146. See generally NAIC, IAIS, and Am Best: *Mandating Retroactive Business Interruption Insurance Could Harm Consumers*, AM. PROP. CAS. INS. ASS’N (May 11, 2020) [hereinafter *NAIC, IAIS, and Am Best*], <https://www.apci.org/media/news-releases/release/60726/> [https://perma.cc/R2SM-JZW5].

147. *Id.* (“These proposals could impact the financial ability of insurers to meet their everyday promises to families, individuals, and businesses.” (quoting David Sampson, President and CEO of APCIA)). Other insurance industry groups stress the long-term negative effects that mandatory coverage could have on widely issued insurance policies, noting concerns such as pricing, availability of insurance, and confidence in providing coverage. *Id.*

148. See Walsh, *supra* note 4. In taking this position, insurance executives have recognized the function of insurance as follows:

At its most basic, insurance involves the efficient pooling of risks, so that everybody in a pool pays premiums but only a few have claims. That way, the many who have no losses can subsidize the few who do. That principle can’t work in a sweeping pandemic shutdown, where virtually everybody has a loss.

*Id.*



policyholders is too great.<sup>149</sup> The pandemic's effect on the insurance industry could be overwhelming because the 30 million business-loss claims that could have been filed from small businesses in 2020 is ten times the largest amount of claims ever handled by the insurance industry in a single year.<sup>150</sup> With an estimated \$400 billion a month in losses and with a total surplus of only \$800 billion across the entire insurance industry, insurers warn that mandated payments would cripple the industry—leading to increased rates, decreased availability of insurance, and higher premiums.<sup>151</sup> Ultimately, insurers will continue to argue that this type of retroactive, mandatory legislation is unconstitutional and potentially fatal to the insurance industry and, thus, cannot be implemented.<sup>152</sup>

Despite legitimate concerns raised by insurers, some policyholders are pushing for insurers to pay COVID-19-related claims, even where a policy does not necessarily afford coverage.<sup>153</sup> Some members of the U.S. House of Representatives have supported the policyholders' position by openly addressing insurers and asking that they cover these claims.<sup>154</sup> Policyholders urge that they have paid substantial premiums over a number of years to protect against losses, such as those sustained as a result of COVID-19.<sup>155</sup> It is clear that a lack of

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149. NAIC, IAIS, and Am Best, *supra* note 146 (“[Insurance] is not typically well suited for a global pandemic where virtually every policyholder suffers significant losses at the same time for an extended period.”). In fact, industry groups have gone so far as to say that “[o]nly the government has the capacity to provide relief to businesses’ in a pandemic.” Walsh, *supra* note 4 (quoting Sean Kevelighan of the Insurance Information Institute).

150. Simpson, *supra* note 1. For perspective, the insurance industry only processed around three million claims from the hurricane season of 2005, which included Hurricanes Katrina, Rita, Wilma, and many others. *Id.*

151. APCA April Analysis, *supra* note 1; NAIC, IAIS, and Am Best, *supra* note 146.

152. Wilkinson, *supra* note 51 (“Retroactively requiring contractual changes for which no premium was collected is ‘a dangerous, unprecedented, and unconstitutional proposal . . . .’” (quoting Erin Collins, Vice President, State Affairs at the National Association of Mutual Insurers)).

153. See generally *Insurers Reject House Members’ Request to Cover Uninsured COVID Business Losses*, INS. J. (Mar. 20, 2020) [hereinafter *Insurers Reject House Members’ Request*], <https://www.insurancejournal.com/news/national/2020/03/20/561810.htm> [<https://perma.cc/R4VN-4HU6>].

154. *Id.* In a letter, eighteen House members addressed leaders in the insurance industry, stating: “During times of crisis, we must all work together . . . . We urge you to work with your member companies and brokers to recognize financial loss due to COVID-19 as part of policyholders’ business interruption coverage.” *Id.*

155. See Levy & Cox, *supra* note 64; Walsh, *supra* note 4 (“I think business interruption claims should be paid when business is interrupted.”); see also Tom Hamburger, *Simon Wiesenthal Center Sues*

indemnification could be dire for policyholders and their businesses because industry experts estimate many businesses will not survive this period without some type of compensation.<sup>156</sup> Expectedly, policyholders are advocating for implementing retroactive state government proposals, which would essentially serve to rewrite or ignore policy language and require insurance companies to cover COVID-19-related losses.<sup>157</sup> While policyholders are vigorously advocating for coverage of their losses, it is uncertain whether any retroactive legislation will actually be passed.<sup>158</sup>

## 2. Federal Government Proposed Legislation

While not completely on board, insurers may be less opposed to legislation such as the U.S. House of Representatives' PRIA, which apportions responsibility of indemnification between the federal government and the insurance industry with most of the compensation costs apportioned to the federal government.<sup>159</sup> Another feature of this legislation is that participation in the program is voluntary; thus, it does not mandate that insurers do anything.<sup>160</sup> It has been argued that a federal safety net allowing for apportionment of risk will be important for both insurers and policyholders because it will help keep premiums from increasing and set a blueprint for

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*Insurance Giant in Latest Fallout over Coronavirus Claims*, WASH. POST (Apr. 29, 2020, 2:45 PM), [https://www.washingtonpost.com/politics/simon-wiesenthal-center-sues-insurance-giant-in-latest-fallout-over-coronavirus-claims/2020/04/29/2928cab8-89c4-11ea-ac8a-fe9b8088e101\\_story.html](https://www.washingtonpost.com/politics/simon-wiesenthal-center-sues-insurance-giant-in-latest-fallout-over-coronavirus-claims/2020/04/29/2928cab8-89c4-11ea-ac8a-fe9b8088e101_story.html) [<https://perma.cc/346J-KANK>]. One policyholder went so far as to characterize the denial of coverage for COVID-19 losses "immoral and unjust." Hamburger, *supra*. Many other policyholders have expressed their concerns, stating that they were "shocked" when they found out the business-interruption insurance policies that they had paid premiums for over the decades were not going to cover their COVID-19 losses. *Id.* Others considered the issue to be "a matter of basic fairness." *Id.*

156. Sams, *supra* note 3 ("[C]it[ing] an estimate by the National Restaurant Association that if no assistance is given, 40 percent of restaurants will not survive the pandemic.").

157. *See generally* Hatler et al., *supra* note 142.

158. Levy & Cox, *supra* note 64; Seaman & Selby, *supra* note 1.

159. *Insurers Reject House Members' Request to Cover Uninsured COVID Business Losses*, *supra* note 153. Insurance industry group leaders responded to a letter from the U.S. House of Representatives, noting: "The U.S. is in the midst of a national crisis that will require federal assistance that provides funding directly to those American individuals and businesses most in need. Our organizations stand ready to work with Congress on solutions that provide the necessary relief as soon as possible . . ." *Id.*

160. *See* Seaman & Selby, *supra* note 1, at 3.

similar future public health emergencies.<sup>161</sup> The PRIA could provide a long-term solution, unlike the mandatory legislation proposed by many states that would only provide short-term coverage to policyholders.<sup>162</sup> This plan is largely based on the mostly successful TRIA, which was enacted after the terrorist attacks of 9/11.<sup>163</sup> Though insurers are obviously opposed to paying claims not covered in the policy, a federally supported remedial program could provide a good balance that would benefit both policyholders and insurers.<sup>164</sup> There are many critics of this legislative proposal, and other professionals in the insurance industry argue that this plan would not solve the problem it aims to fix.<sup>165</sup> Critics cite the voluntary nature of the program, the prematurity in drafting the bill, and its potential effectiveness overall.<sup>166</sup>

### 3. Insurance Industry Proposals

Apart from proposed legislative solutions, insurance industry groups have proposed their own plans for a national solution,

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161. Caroline Meneau & Hope Tone, *Federal Pandemic Insurance Can Help Prepare for Next Crisis*, LAW360.COM (June 5, 2020, 6:23 PM), <https://www.law360.com/articles/1280192/federal-pandemic-insurance-can-help-prepare-for-next-crisis> [<https://perma.cc/K89B-XHBS>].

162. *Id.* (“PRIA would provide a backstop to insurers and encourage them to provide coverage for substantial and unexpected risks.”). Further, this legislation would serve to “stabilize premiums and provide coverage . . . in an event of potential future largescale losses.” *Id.*

163. Gron & Tsvetkov, *supra* note 14 (“The program was aimed at increasing the private insurance industry’s willingness and ability to cover terrorism risk. TRIA required insurers to offer coverage for terrorism risk to commercial buyers. The program then limited insurers’ exposure from terrorism events by capping losses an insurer would pay based on a formula.”); Meneau & Tone, *supra* note 161 (“The TRIA was drafted to provide protection to both the insurers and policyholders in the case of another large-scale terrorist attack.”).

164. Meneau & Tone, *supra* note 161 (“[A] federal pandemic insurance program . . . may bring stability to the industry and give policyholders greater confidence that their losses will be covered in the event of a future pandemic.”).

165. See generally U.S. House Committee on Financial Services, *Insuring Against a Pandemic: Challenges and Solutions for Policyholders and Insurers*, YOUTUBE (Nov. 19, 2020), [https://www.youtube.com/watch?v=BkEYalB8USw&feature=emb\\_title](https://www.youtube.com/watch?v=BkEYalB8USw&feature=emb_title); Robert W. Klein & Harold Weston, *Feasibility Questions About Government-Sponsored Insurance for Business Interruption Losses from Pandemics*, 39 J. INS. REGUL. 1, 8–9 (2020).

166. U.S. House Committee on Financial Services, *supra* note 165, at 2:12:45–2:13:12; Klein & Weston, *supra* note 165, at 9 (“[I]nsurers concerned about their financial risk may be less likely to participate in the program because their retained losses could drive them into insolvency. On the other hand, insurers that are less concerned about their financial risk may be more willing to participate as they would be able to collect and retain premiums until a pandemic occurs, which could take many years.”).

including Chubb's plan and the APCIA's Business Continuity Protection Program.<sup>167</sup> Chubb's plan is a voluntary program to cover losses for future pandemic risks and embodies many features of the PRIA, such as the federal government bearing much of the costs; however, it differs in that smaller and larger businesses would pay different premium amounts.<sup>168</sup> This plan might be more policyholder-friendly than the PRIA because premiums will only be paid on the insurer's portion of the assumed risk.<sup>169</sup>

The Business Continuity Protection Program is a federally funded program that works to "bolster the country's economic resilience by providing timely and efficient financial protection and payroll support to the private sector."<sup>170</sup> It would provide policyholders with "80% of payroll, employee benefits and operating expenses for three months."<sup>171</sup> The APCIA and other industry groups back this plan because they believe that it will get to the heart of the disagreement between policyholders and insurers by "specifically covering viral events in business interruption policies."<sup>172</sup> With the many proposals being offered to address this dilemma, it is likely that some kind of "workable framework" will come to fruition through compromise among industry professionals and legislators.<sup>173</sup>

### III. PROPOSAL

With continuous inconsistency among the courts over the past year, the trends surrounding COVID-19-related business interruption lawsuits are constantly changing.<sup>174</sup> This Part proposes a framework

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167. *See generally* Weinberger, *supra* note 6.

168. *Id.*

169. *Id.*; U.S. House Committee on Financial Services, *supra* note 165, at 31:58–32:05.

170. Hatler et al., *supra* note 142.

171. Weinberger, *supra* note 6; Hatler et al., *supra* note 142.

172. Weinberger, *supra* note 6; Hatler et al., *supra* note 142 ("The BCPP is a solution . . . to provide protection against widespread economic shutdowns due to a future viral outbreak.").

173. Weinberger, *supra* note 6 ("A workable framework for future pandemics may well be achievable . . .").

174. *See* Hallo, *supra* note 83 ("Through the first three quarters of 2020, business interruption claims stemming from COVID were largely going in favor of insurers . . . Now that trend is beginning to reverse itself as courts have had the opportunity to evaluate better complaints and strategies by policyholders."). One insurance professional explains that "rulings in the first year typically went to

for courts to follow in COVID-19-related lawsuits and suggests a potential function for proposed legislation and a future pandemic insurance program. First, to alleviate some of the controversy inherent in business interruption insurance lawsuits in the wake of public health emergencies, and COVID-19 specifically, courts must arrive at some type of consensus as to the meaning and application of determinative policy language, provisions, and exclusions, including “direct physical loss or damage,” civil authority provisions, and virus exclusions. Absent any consensus, the “who is right” (the insurer or the policyholder) discussion that is currently being debated in the courts will continue indefinitely.<sup>175</sup>

Second, continuing federal government stimulus payments and implementing a federal legislative solution for future pandemics are necessary to indemnify loss for COVID-19 and future pandemics. Mandatory retroactive legislation offered by state legislatures does not adequately resolve the competing interests of insurers and policyholders and is not a feasible solution. Although mandating insurance companies to pay out claims may seem like a preferred solution for policyholders, this choice would have a profound negative impact on the insurance industry.<sup>176</sup> A federally subsidized program similar to the PRIA may be the only option to address future business interruption losses sustained as a result of catastrophic events like COVID-19. Nevertheless, as evidenced by the large number of legislative proposals across federal and state governments and throughout the insurance industry, it is clear that insurers and legislators are aware of this great conundrum and realize there must be a mutually sensible solution (or at least some type of framework) to solve this inherent conflict between the parties’ respective

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insurers because of the flexibility companies had in choosing which [business interruption] claims to litigate around the country and the position of being able to achieve motions to dismiss early in the proceedings.” *Id.*

175. DeVries et al., *supra* note 18.

176. Larry Schiffer et al., *Fighting State Virus-Related Insurance Coverage Mandates*, LAW360.COM (Apr. 21, 2020, 6:05 PM), <https://www.law360.com/articles/1263747/fighting-state-virus-related-insurance-coverage-mandates> [<https://perma.cc/KH7G-8XUF>] (“The unintended consequences from the COVID-19 business interruption legislation, should that legislation become law, could very well cause a major disruption in the insurance industry.”).

interests.<sup>177</sup> Looking to the future, a pandemic risk insurance program should be enacted to mitigate harms of comparable future catastrophes.<sup>178</sup>

#### A. *Emphasis on Policy Interpretation*

Most importantly, an affirmative finding of coverage under business interruption policies depends on the language of the policy in question, an individual state's laws, and the specific factual circumstances of a case.<sup>179</sup> Fortunately, there are generally accepted rules of contract construction that can and do guide policy interpretation in a way that better reconciles insurer and policyholder arguments.<sup>180</sup>

First, it is most important to realize that feasibility of the suggested proposal articulated in this Note will be determined by the text of the insurance policy in question.<sup>181</sup> Given that the specific policy language is critical in deciding these types of cases and because the actual language in each policy likely differs, courts should continue looking to the plain language of the policy text but maintain flexibility and consider that a policy's plain language could be interpreted in more than one way.<sup>182</sup> Further, general principles of policy interpretation mandate—under the doctrine of *contra*

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177. Weinberger, *supra* note 6 (“The mere existence of competing plans from different corners of the insurance industry and Congress represent progress and a potential compromise . . .”).

178. See generally Meneau & Tone, *supra* note 161.

179. See Robie et al., *supra* note 7, § 3.06(4).

180. See generally John S. Vishneski III et al., *Novel Coronavirus Property Damage Coverage Part I: Property Rights, Physical Loss, Physical Damage, and the Novel Coronavirus*, LAW.COM: INS. COVERAGE L. CTR. (Oct. 12, 2020, 5:38 PM), <https://www.law.com/insurance-coverage-law-center/2020/10/12/part-i-property-rights-physical-loss-physical-damage-and-the-novel-coronavirus/> [<https://perma.cc/NQ7Z-YKZT>].

181. See Robie et al., *supra* note 7, § 3.06(4).

182. DeVries et al., *supra* note 18. Beyond just the “plain meaning” of the policy language, it is possible that there could be more than one reasonable interpretation of a particular policy. *Id.* Courts should look at whether an interpretation of a term or phrase is “a reasonable construction” of the policy language, not whether it is the “only reasonable construction” of the policy language. *Id.* To determine whether a policy interpretation is reasonable, courts often look to decisions of other courts or consult the “plain meaning” of the language. *Id.* (“[P]olicyholders also may assert that another court’s finding in favor of the interpretation advanced by the policyholder establishes the interpretation is ‘a’ reasonable one. This approach enables the policyholder to rely on any cases which support its construction and avoid the scorecard of wins and losses.”).

*proferentem*—that where terms in the policy allow for more than one reasonable interpretation, the policy may be deemed ambiguous and, if so, must be construed in favor of the insured.<sup>183</sup> By not limiting policy language to only one plausible, reasonable interpretation, courts could level the playing field for insurers and policyholders.

### B. Suggested Interpretation of “Direct Physical Loss Or Damage”

Courts across the country are continuing to reach different conclusions as to the meaning of “direct physical loss or damage” with insurers and policyholders on completely opposite sides of the argument.<sup>184</sup> To facilitate more consensus across the board, courts should distinguish between “direct physical damage” and “direct physical loss” when possible.<sup>185</sup> Also, courts should not restrict the meaning of “direct physical loss or damage” to only those losses that are tangible.<sup>186</sup>

#### 1. “Direct Physical Damage” Is Not “Direct Physical Loss”

When determining coverage, courts should consider whether a policyholder has sustained either “direct physical loss” or “direct physical damage,” recognizing the distinction between the two principles. In most policies, there is coverage where a party sustains “direct physical loss or damage,” but many courts overlook the importance of the “or,” which suggests damage and loss are potentially distinct principles.<sup>187</sup> Past and even very recent judicial opinions have demonstrated that “direct physical loss” and “direct

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183. See *id.* (“Under generally accepted principles of policy interpretation, ambiguity in . . . policy language should be construed in favor of coverage.”); see also Vishneski III et al., *supra* note 180.

184. See Gary Thompson, *Coronavirus Is a Direct Physical Loss Triggering Event*, LAW360.COM (Apr. 9, 2020, 2:25 PM), <https://www.law360.com/articles/1261513/coronavirus-is-a-direct-physical-loss-triggering-event> [https://perma.cc/QF7A-ZKKP].

185. See discussion *infra* Section III.B.1; see also Vishneski III et al., *supra* note 180 (“[T]he terms ‘loss of’ and ‘damage to’ must have different meanings.”).

186. See discussion *infra* Section III.B.2.

187. See Vishneski III et al., *supra* note 180; see also, e.g., *N. State Deli v. Cincinnati Ins. Co.*, No. 20-CVS-02569, 2020 N.C. Super. LEXIS 38, at \*8–9 (N.C. Super. Ct. Oct. 7, 2020) (“The use of the conjunction ‘or’ means—at the very least—that a reasonable insured could understand the terms ‘physical loss’ and ‘physical damage’ to have distinct and separate meanings.”).

physical damage” are distinct concepts, which should be considered in deciding cases related to COVID-19 losses.<sup>188</sup> With damage and loss potentially taking on different meanings, a court should find that the “direct physical loss” requirement is satisfied where the property has simply become uninhabitable or unusable for its purpose.<sup>189</sup>

2. *The Presence of the COVID-19 Virus Can Give Rise to a “Direct Physical Loss”*

Current court opinions support the conclusion that the presence of the COVID-19 virus on a property can give rise to “direct physical loss or damage” where the presence of the COVID-19 virus rendered a property uninhabitable, unusable, or no longer fit for its intended purpose, despite the absence of some tangible damage to the property.<sup>190</sup> Additionally, consistent with cases finding “direct physical loss or damage” as a result of a contaminant rendering a place of business uninhabitable or unusable, a contaminant that remains in the air or on surfaces for a prolonged amount of time (like COVID-19) should give rise to a finding of a “direct physical loss.”<sup>191</sup> Following the reasoning of the U.S. District Court for the Western District of Missouri, where the court found a “direct physical loss” when the COVID-19 virus was physically present on the business premises, courts should find (when properly pleaded by policyholders) that the presence of the COVID-19 virus on the premises is sufficient to satisfy the requirement of “direct physical loss or damage.”<sup>192</sup> It can be reasonably inferred that the presence of

188. See *Total Intermodal Servs. v. Travelers Prop. Cas. Co. of Am.*, No. CV 17-04908, 2018 U.S. Dist. LEXIS 216917, at \*9 (C.D. Cal. July 11, 2018); see also *N. State Deli*, 2020 N.C. Super. LEXIS 38, at \*8–9.

189. Vishneski III et al., *supra* note 180. “Damage” can take on a meaning different from “direct physical loss.” *Id.* “Direct physical damage” implies some type of alteration to the property; conversely, “loss” is ‘the act of losing possession’ and ‘deprivation.’” *Id.*

190. See cases cited *supra* note 92.

191. See cases cited *supra* note 37; see also *Study Suggests New Coronavirus May Remain on Surfaces for Days*, NAT’L INSTS. OF HEALTH (Mar. 24, 2020) [hereinafter *Coronavirus Study*], <https://www.nih.gov/news-events/nih-research-matters/study-suggests-new-coronavirus-may-remain-surfaces-days> [https://perma.cc/E9RC-CZHZ].

192. See *Studio 417, Inc. v. Cincinnati Ins. Co.*, 478 F. Supp. 3d 794, 800, 803 (W.D. Mo. 2020). The plaintiffs in *Studio 417* pleaded that “COVID-19 allegedly attached to and deprived Plaintiffs of their property, making it ‘unsafe and unusable, resulting in direct physical loss to the premises and property.’”



the COVID-19 virus on a business's premises is a "direct physical loss" because it is a contaminant that attaches to most surfaces and remains viable on those surfaces for an extended period of time without cleaning.<sup>193</sup> In fact, even courts that deny that the presence of the COVID-19 virus amounts to "direct physical loss or damage" still find that the COVID-19 virus is "like ammonia, E. coli, and/or carbon monoxide . . . and . . . some courts have found direct physical loss despite the lack of physical damage."<sup>194</sup> In taking this position, policyholders should submit circumstantial evidence, including witness testimony, that employees or patrons of their business had tested positive for COVID-19.<sup>195</sup>

Although insurers always argue that there must be some type of physical or tangible damage, this may not be the only reasonable interpretation of business interruption insurance policies, and courts should be urged to disregard this argument as incomplete and an incorrect application of the general principles of contract interpretation.<sup>196</sup>

Additionally, with little support from recently decided cases, it is uncertain at this time whether courts will continue to find that a government shutdown order amounts to a "direct physical loss" of the business premises. In the bulk of business interruption lawsuits filed for COVID-19-related losses, policyholders are arguing that a government-ordered shutdown caused their business losses for which they seek indemnity, but some courts are not buying this argument.<sup>197</sup>

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Based on these allegations, the Amended Complaint plausibly allege[d] a 'direct physical loss' based on 'the plain and ordinary meaning of the phrase.'" *Id.* at 800 (quoting *Vogt v. State Farm Life Ins. Co.*, 963 F.3d 753, 763 (8th Cir. 2020)). If pleaded properly, policyholders should prevail in arguing that the presence of the COVID-19 virus along with the "omnipresence of the pandemic, and/or the governmental orders" give rise to a "direct physical loss," which renders the property uninhabitable or unusable. DeVries et al., *supra* note 18.

193. See *Coronavirus Study*, *supra* note 191.

194. *Diesel Barbershop, LLC v. State Farm Lloyds*, 479 F. Supp. 3d 353, 360 (W.D. Tex. 2020).

195. Ahmad & Huggins, *supra* note 109, at 2 (noting that circumstantial evidence is essentially "any proof that would support a reasonable inference that COVID-19 is present at the premises").

196. In fact, it could even be argued that the COVID-19 virus creates a tangible, physical loss to property because the virus itself is tangible when it attaches to the property and renders it unusable or uninhabitable. DeVries et al., *supra* note 18 ("The virus itself is physical . . ."); Thompson, *supra* note 184 ("[T]he COVID-19 virus is a 'physical' thing, not an abstract fear."). A policyholder's argument must only be reasonable. DeVries et al., *supra* note 18.

197. See *Henderson Rd. Rest. Sys. v. Zurich Am. Ins. Co.*, No. 20 CV 1239, 2021 WL 168422, at \*13

Although this argument is plausible, policyholders are much less likely to recover under this rationale based on current case law.

*C. Where Government Shutdown Is Enforced by Civil Authority, Coverage May Be Afforded*

Consistent with the majority of courts across the country, courts should only afford coverage under a civil authority provision where the order of an intervening civil authority—or government shutdown order—is accompanied by “direct physical loss or damage” to the subject property or some other adjacent property.<sup>198</sup> It is important for policyholders to understand that most existing cases illustrate that where there is no direct connection—or nexus—between the presence of the COVID-19 virus (if found to be “direct physical loss or damage”) and the premises, there can be no coverage. As of now, only a few courts have found coverage without some kind of accompanying “direct physical loss or damage,” and it is uncertain, at least at this point in time, whether this will be a widespread conclusion reached by courts across the country.<sup>199</sup> Importantly, courts applying a broader interpretation of “direct physical loss or damage” may be able to conclude that a government shutdown order caused a “direct physical loss” to a business, which might be covered under a business interruption policy. However, as always, individual courts’ decisions largely depend on the specific text of the policy in question, and thus, policyholders must examine the language of their individual policies carefully to determine the best strategy for pleading under a civil authority provision.

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(N.D. Ohio Jan. 19, 2021); *see also In re Soc’y Ins. Co. COVID-19 Bus. Interruption Prot. Bus. Litig.*, No. 20-C-2005, 2021 WL 679109, at \*9 (N.D. Ill. Feb. 22, 2021). However, most courts have found that simply closing one’s business out of precaution or in response to a government mandate without some “direct physical loss or damage” to the property, such as an employee or patron of the business who tested positive, is not sufficient to support a finding of coverage. *See cases cited supra* note 82.

198. *See, e.g., Dickie Brennan & Co. v. Lexington Ins. Co.*, 636 F.3d 683, 686–87 (5th Cir. 2011). Though most courts require the causally connected loss when enforcing civil authority provisions, if the meaning of “direct physical loss” is expanded to include the presence of the COVID-19 virus on a business’s property, more courts may find civil authority coverage in a broader range of cases.

199. *See, e.g., Rose’s 1, LLC v. Erie Ins. Exch.*, No. 2020 CA 002424 B, 2020 D.C. Super. LEXIS 10, at \*5–6 (D.C. Super. Ct. Aug. 6, 2020).

#### D. Applicability of Virus Exclusions

The reality for policyholders is that a number of policies have undergone revisions in recent years to include a virus exclusion, making it likely that coverage under those policies will be barred. Insurers have the upper hand here, and most are capitalizing on this point in litigation, pushing for exclusion wherever a virus exclusion is present in a policy.<sup>200</sup> When considering the enforceability of virus exclusions, courts should carefully determine whether an exclusion is ambiguous, whether the policyholder received adequate notice of the exclusion, and whether factors other than the virus caused the loss.<sup>201</sup> If a court finds any of these to be true, the exclusion should be unenforceable.

Recent rulings suggest that the blanket denial proffered by insurers should not discourage policyholders to think no path exists to indemnification, and thus, insurers should prepare for these arguments by policyholders.<sup>202</sup> Policyholders may have a path to coverage and ultimately change insurers' current position in lawsuits, even where a policy includes a potentially controlling exclusion.<sup>203</sup> These rulings continue to prove the importance of proper pleadings

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200. Walter J. Andrews & Cary D. Steklof, *Fla. Court Refuses to Apply So-Called 'Virus-Exclusion' in COVID Insurance Lawsuit*, LAW.COM: DAILY BUS. REV. (Nov. 11, 2020, 11:55 AM), <https://www.law.com/dailybusinessreview/2020/11/11/fla-court-refuses-to-apply-so-called-virus-exclusion-in-covid-insurance-lawsuit/> [<https://perma.cc/X68Y-FD46>]. Not surprisingly, insurers have pushed for courts to deny coverage when a policy exclusion simply has the word "virus" in it. *Id.*

201. *See id.* Under controlling law in many jurisdictions, an exclusion will only apply where it is an unambiguous bar to coverage for the risk addressed. *Id.*; Buchanan & Charlton, *supra* note 45. Such as Minor League Baseball "alleging 'direct physical loss or damage' due to widespread shutdowns [rather than the virus] that have prevented them from fielding players and playing games" and in some civil authority coverage claims. Buchanan & Charlton, *supra* note 45.

202. Andrews & Steklof, *supra* note 200 ("Policyholders that continue to weigh the merits of filing suit should not be misled by the rhetoric surrounding alleged 'virus exclusions,' and litigants must be prepared to expose insurers that are repeatedly misapplying policy language to avoid their obligation to pay."). Insurers and policyholders should not automatically believe that coverage is barred simply because of seemingly exclusionary language in the policy. *Id.*

203. Tyrone R. Childress et al., *Policyholders Notch Victory in Fight for COVID-19-Related Business Interruption Insurance Coverage*, JONES DAY (Oct. 2020), <https://www.jonesday.com/en/insights/2020/10/policyholders-notch-victory-in-fight-for-covid19related-business-interruption-insurance-coverage> [<https://perma.cc/JKA6-RFJ4>] ("COVID-19 insurance coverage litigation is still in its early stages and . . . recent policyholder victories demonstrate that there continue to be available avenues for the recovery of COVID-19-related business interruption losses under the terms of many commercial property insurance policies.").

and careful consideration of the facts of a policyholders' case.

### *E. Potential Legislation and Possible Future Trends*

As more cases are filed, legislators and insurers are pursuing potential solutions "that may offer relief from pandemic-related losses in the future."<sup>204</sup> However, because of the risks associated with much of the proposed legislation and the uncertainty surrounding potential enactment, it is not clear at this time how legislation will function in a broader solution.<sup>205</sup> If legislators want to get involved, they need to seriously consider the potentially negative ramifications of different types of legislation while balancing the interests of the insurance industry and the policyholders.

#### *1. Insurers Cannot Retroactively Pay Claims*

Legislation that mandates insurance companies to pay for business interruption losses that insurers did not originally contemplate is not a workable solution. The solvency of the insurance industry is an absolute necessity for both insurers and policyholders on an ongoing basis, which could be severely affected by the long-term negative effects of blanket mandatory coverage of COVID-19-related losses.<sup>206</sup> The insurance industry functions by making projections, collecting premiums, and using those premiums to pay for losses sustained by policyholders.<sup>207</sup> The premiums feed into a surplus, which functions as "the cushion that helps insurers meet their obligations to policyholders" and "helps insurers meet their obligations when large natural catastrophes occur."<sup>208</sup> However, because of the unprecedented loss resulting from the COVID-19

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204. Meneau & Tone, *supra* note 161; Hatler et al., *supra* note 142.

205. Hatler et al., *supra* note 142.

206. See *APCIA April Analysis*, *supra* note 1 ("Any action to fundamentally alter business interruption provisions specifically, or property insurance generally, to retroactively mandate insurance coverage for viruses by voiding those exclusions, would immediately subject insurers to claim payment liability that threatens solvency and the ability to make good on the actual promises made in existing insurance policies.").

207. See generally Gron & Tsvetkov, *supra* note 14.

208. *Id.*

pandemic, the insurance industry is not in a position to pay claims on its own because of the sheer volume of losses, which industry experts estimate would take the insurance industry 150 years to accumulate through collection of business interruption insurance premiums.<sup>209</sup> Notwithstanding the assistance and support that mandated payment of business interruption insurance claims would provide to business owners nationwide, any enacted retroactive, mandatory legislation would not be certain to pass a constitutional challenge under the U.S. Constitution or individual state constitutions.<sup>210</sup> Thus, this type of mandatory, retroactive legislation could not play a productive role in a future plan.

## 2. *Compensation for Current Losses*

Many of the proposals offered by the federal government, state governments, and insurance industry groups are only forward-looking and will not retroactively pay for losses sustained as a result of the COVID-19 pandemic.<sup>211</sup> Because of this, a few insurance professionals have questioned whether an insurance program is even the best solution for this dilemma.<sup>212</sup> As a result, the real question for policyholders seems to be: how will businesses survive the current pandemic? For the time being, the only avenue for indemnification for policyholders may be through litigation or other funding sources (e.g., federal stimulus legislation). However, with a broader interpretation of what constitutes “direct physical loss or damage,” policyholders may be able to secure coverage through

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209. *Id.*; L.S. Howard, *It Would Take P/C Insurers 150 Years to Pay COVID-19 Business Interruption Losses*, *INS. J.* (Oct. 30, 2020), <https://www.insurancejournal.com/news/international/2020/10/30/588883.htm> [<https://perma.cc/AXR6-BPPG>] (“The world’s property/casualty insurers would have to collect business interruption insurance premiums for 150 years in order to absorb the estimated US\$4.5 trillion global output loss inflicted by COVID-19 and its handling in 2020.”). The tremendous volume of losses is not something that can be paid back all at one, and policyholders and industry experts must realize that “pandemic-induced business losses defy basic, widely-accepted criteria for insurability. Unlike risks like natural catastrophes, they occur on a global scale and are not diversifiable . . . .” *Id.*

210. Wilkinson, *supra* note 51.

211. See generally Hatler et al., *supra* note 142.

212. U.S. House Committee on Financial Services, *supra* note 165, at 33:56–34:07 (“I question whether insurance is the best structure for this problem. Insurance is a system of risk transfer— it is not a system of economic assistance.”).

litigation alone.<sup>213</sup> Nevertheless, if litigation really is the only option, some policyholders may be precluded from relief by the extensive cost of litigation. Although it is not possible for the insurance industry to retroactively pay claims for uninsured losses, the federal government does have the capacity to provide financial support to businesses during these unprecedented times.<sup>214</sup> For example, under the Coronavirus Aid Relief and Economic Security Act, the federal government distributed Paycheck Protection Program (PPP) loans to small businesses to keep them open and allow them to pay their employees after sustaining substantial losses from COVID-19.<sup>215</sup> Because the pandemic is not something that can be retroactively insured, the federal government must continue to provide support to businesses currently through federal stimulus legislation and PPP loans until a long-term solution is implemented.

### 3. *Pandemic Insurance for the Future*

It is essential to enact a workable plan providing assistance and insurance to businesses for future widespread public health emergencies in the future. While pandemic insurance may not be a reality for present losses, the federal government and the insurance industry should advisedly collaborate to implement a federally subsidized pandemic insurance program (similar to the PRIA) that would provide relief to policyholders for future pandemics.<sup>216</sup> A partially public and partially private program would be a viable solution because it alleviates some of the insurance companies' burden of indemnification by shifting that burden to the federal government, which is more capable of funding indemnity to

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213. See *supra* Section III.B.

214. See *Business Interruption/Businessowner's Policies (BOP)*, NAT'L ASS'N OF INS. COMM'RS: CTR. FOR INS. POL'Y & RSCH., [https://content.naic.org/cipr\\_topics/topic\\_business\\_interruptionbusiness\\_owners\\_policies\\_bop.htm](https://content.naic.org/cipr_topics/topic_business_interruptionbusiness_owners_policies_bop.htm) [<https://perma.cc/3LK9-D99A>] (Dec. 9, 2020).

215. Seaman & Selby, *supra* note 1 ("[T]he CARES Act is the largest economic bill ever enacted.").

216. See Meneau & Tone, *supra* note 161 ("Ultimately, a federal pandemic insurance program, similar to existing federal programs that provide coverage in the event of widespread disasters like floods and terrorism, may bring stability to the industry and give policyholders greater confidence that their losses will be covered in the event of a future pandemic."); Pandemic Risk Insurance Act of 2020, 116 H.R. 6983, 116th Cong. (2020).

policyholders on a large scale.<sup>217</sup> Many insurance industry professionals are pushing for a public-private plan, as this type of plan would protect insurance industry solvency.<sup>218</sup> There are a few consistent criticisms of the currently proposed PRIA legislation as to the uncertainty of many of the key provisions, including the actual amount of required premiums, the turnaround time for providing relief, and the voluntary nature of the program.<sup>219</sup> However, with the changing national political climate, legislators and insurers agree that the current proposal should continue to be perfected through careful consideration of both insurers' and policyholders' positions.<sup>220</sup> Ideally, a pandemic insurance program should be a hybrid of the PRIA and Chubb's plan, which would shift the burden slightly more to the insurance companies and keep policyholders' premiums reasonable, while potentially incentivizing participation or making participation less voluntary. Although this program would not provide relief to current victims of COVID-19 business income losses, this proposal would more efficiently distribute risk, provide coverage for those impacted by a future public health emergency, and allow the government and insurance industry to be prepared for the next pandemic.<sup>221</sup>

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217. See generally Meneau & Tone, *supra* note 161; *National Association of Professional Insurance Agents Asks House Committee to Develop Public-Private Partnership*, INSURANCENEWSNET.COM (Nov. 20, 2020) [*hereinafter Insurance Agents Ask House*], <https://insurancenewsnet.com/oarticle/national-association-of-professional-insurance-agents-asks-house-committee-to-develop-public-private-partnership> [<https://perma.cc/WPK5-AWJM>] (“A public-private partnership that utilizes the existing insurance framework could, over time, cultivate the development of a private pandemic market that operates independently of the federal government . . .”).

218. *Insurance Agents Ask House*, *supra* note 217 (“Without a federal government backstop, it is not clear that insurers would—or could—provide coverage for losses resulting from pandemics . . . [b]ut with a federal backstop, losses that arise out of future pandemics could be insurable.”).

219. U.S. House Committee on Financial Services, *supra* note 165, at 2:19:43–2:25:18. See generally Klein & Weston, *supra* note 165. With regard to the voluntary participation mechanism in the proposed legislation, the authors argue that because participation is voluntary, “it raises a question as to how many insurers would elect to participate.” *Id.* at 9.

220. *Insurance Agents Ask House*, *supra* note 217 (“We are also working to strengthen [the PRIA] by incorporating thoughtful provisions from other proposals, particularly those that would ensure the affordability and thus the participation of small businesses.”).

221. *Id.*; Hatler et al., *supra* note 142 (“These proposals are intended to create a new market for pandemic risk insurance, in which risk would be shared by policyholders, insurers and the federal government.”).

## CONCLUSION

The COVID-19 pandemic has impacted all areas of life, including insurance law. Business interruption insurance claims are continuing to rise across the country as more businesses seek indemnification for their losses resulting from the COVID-19 pandemic.<sup>222</sup> The main issues facing the courts in determining coverage are (1) whether the business suffered "direct physical loss or damage," (2) whether the loss caused by an intervening order of a civil authority is covered under a civil authority provision, and (3) the effect of a virus exclusion on a submitted claim. With the constantly increasing volume of cases decided to date in business interruption insurance lawsuits for COVID-19-related losses and the somewhat inconsistent conclusions reached by courts among the states, at this time it is uncertain what the ongoing trends will be as to the central issues of claims.<sup>223</sup> Although insurers may have prevailed in a majority of initial lawsuits, pending and recently decided cases have diminished the insurers' narrative and revealed that policyholders may also have viable arguments in litigation.<sup>224</sup> As more cases are decided, especially at the appellate level, more clarity will arise as to the central issues in these lawsuits.<sup>225</sup> Until then, the trends in litigation

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222. Rachel E. Keen & Jonathan Reid Reich, *COVID-19 Shutdowns, Related Litigation Put Pressure on Business Interruption Insurers*, NAT'L L. REV. (Oct. 26, 2020), <https://www.natlawreview.com/article/covid-19-shutdowns-related-litigation-put-pressure-business-interruption-insurers> [https://perma.cc/6B8H-UHCL].

223. Herrick, *supra* note 12.

224. Andrews & Steklof, *supra* note 200; Sherilyn Pastor et al., *Courts Find Coverage for COVID-19 Business Interruption Losses*, PROPERTYCASUALTY360 (Nov. 13, 2020, 5:30 AM), <https://www.propertycasualty360.com/2020/11/13/courts-find-coverage-for-covid-19-business-interruption-losses/?sreturn=20201110130508> [https://perma.cc/D5Y4-N3MM] ("[Recently-decided] cases provide a strong rebuttal to the narrative the insurance industry has tried to perpetuate to dissuade policyholders from seeking to validate their rights to coverage for their pandemic-related losses."); Childress et al., *supra* note 203 ("Insurers have had some early successes in certain jurisdictions defeating policyholder claims, particularly where there were pleading deficiencies or the policy contained an express virus exclusion.").

225. *The BI Interview with Amber Finch, Reed Smith*, BUS. INS., at 5:40–6:28 (Dec. 8, 2020) [*hereinafter BI Interview*], <https://www.businessinsurance.com/article/20201208/VIDEO/912338346/Video-The-BI-Interview-with-Amber-Finch,-Reed-Smith-business-interruption-COVID> [https://perma.cc/HAK7-ZW4T]; Greenwald, *supra* note 121 ("Appellate court rulings 'will help the parties on both sides to better understand the legalities of the policy language' and 'help streamline the process and minimize the litigation because it will allow the parties to resolve the claims . . .'" (quoting



and in proposed legislation will continue to change.<sup>226</sup> The bottom line in all COVID-19-related business interruption lawsuits is that the outcome will depend on the language of the policy in question, and thus, any type of consensus or agreed upon procedures in the present would help to solve disagreement and confusion among courts, legislators, insurance companies, and policyholders, allowing these groups to productively collaborate and find a solution to implement now and in future catastrophes.<sup>227</sup>

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attorney Michael S. Levine, Partner at Hunton Andrews Kurth LLP)).

226. *BI Interview*, *supra* note 225, at 6:35–6:45. Regarding future trends in COVID-19 business interruption insurance claims, one attorney stated: “The fact of the matter is that a new body of law is going to be created.” *Id.*; Levy & Cox, *supra* note 64 (“While numerous businesses are filing suit, many may be waiting to see how these other suits, and the litigated issues, proceed.”).

227. *See* Levy & Cox, *supra* note 64.