

INFECTED JUDGMENT: PROBLEMATIC RUSH TO CONVENTIONAL WISDOM AND INSURANCE COVERAGE DENIAL IN A PANDEMIC

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Abstract

The COVID-19 pandemic created not only a public health crisis but also an insurance coverage imbroglio, prompting near-immediate business interruption claims by policyholders impacted by government restrictions ordered in response to the pandemic. Insurers and their representatives “presponded” to the looming coverage claims by quickly moving to denigrate arguments for coverage, engaging in a pre-emptive strike that has largely worked to date, inducing too many courts to rush to judgment by declaring—as a matter of law—that policy terms such as “direct physical loss or damage” do not even arguably encompass the business shutdowns resulting from COVID-19. Our closer examination of the term and of other key coverage questions suggests that policyholders have a much stronger case than suggested by the initial—and often superficial and conclusory—conventional wisdom flowing from the first wave of judicial decisions. Only a few courts have analyzed the COVID coverage debate with the type of reflective care, judicial humility, and respect for the trial process one would hope to see. The “early returns” in these coverage wars have been analytically disappointing, creating risk of an unfortunate path dependency or cascade of cases excessively narrowing the meaning of key terms such as “loss” and “damage,” and diminishing the quality of future coverage decisions.

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I. INTRODUCTION

A. COVID-19 AND COVERAGE CONTROVERSY

As the world now knows, a variant of the SARS coronavirus emerged in Asia in late 2019¹ creating a severe concentration of infections in Wuhan, China that spread rapidly throughout the world reaching the United States perhaps as early as December 2019.² By February 2020, the new virus named COVID-19³ was a

¹ “SARS” (Severe Acute Respiratory Syndrome) is the name given to a class of particularly dangerous virus that causes respiratory problems but often adversely affect other organs. Julia Ries, *Here’s How COVID-19 Compares to Past Outbreaks*, HEALTHLINE (Mar. 12, 2020), <https://www.healthline.com/health-news/how-deadly-is-the-coronavirus-compared-to-past-outbreaks>. SARS viruses are common in animals and only occasionally cross over to humans—with dangerous results. *Id.* The SARS-1 virus, which spread rapidly between 2002 and 2004, infected many and caused an estimated 774 deaths worldwide (though none in the United States). *Id.* See generally Center for Disease Control and Prevention, CDC.GOV, <https://www.cdc.gov> (providing range of information regarding the SARS virus and COVID-19 in particular).

² See CDC.GOV, *supra* note 1 (noting that as of January 1, 2021, COVID-19 surpassed twenty million cases and 341,199 deaths in the United States). *Accord*, Johns Hopkins Coronavirus Resource Center, <https://www.coronavirus.jhu.edu>.

³ COVID-19 is “a mild to severe respiratory illness that is caused by a coronavirus (*Severe acute respiratory syndrome coronavirus 2 of the genus Betacoronavirus*)” transmitted chiefly by contact with infectious material (such as respiratory droplets) or with objects or surfaces contaminated by the causative virus, and is characterized especially by fever cough, and shortness of breath and may progress to pneumonia and respiratory failure.” See *COVID-19*, MERRIAM-WEBSTER DICTIONARY (2020), <https://www.merriam-webster.com/dictionary/COVID-19>.

The term coronavirus derived from the crown-like spikes of the virus that appear when it is viewed by microscope. Kathy Katella, *Our New COVID-19 Vocabulary—What Does it All Mean?*, YALE MEDICINE (Apr. 7, 2020), <https://www.yalemedicine.org/stories/covid-19->

widely acknowledged serious problem⁴ that was deemed a “pandemic” by March 11, 2020.⁵ Beginning in March 2020, state and local governments began issuing

glossary/. It is a relative of the SARS-CoV (often referred to as “SARS” or Severe Acute Respiratory Syndrome) that caused substantial injury and death in a 2002-2003 worldwide outbreak. *Id.* Coronaviruses of various types can cause common colds as well as SARS and Middle East respiratory syndrome (MERS). *Id.* The variant emerging in 2019 “is believed to have started in animals and spread to humans. *Id.* Animal-to-person spread was suspected after the initial outbreak in December among people who had a link to a large seafood and live animal market in Wuahn, China.” *Id.*

COVID-19 is thus the name for the disease resulting from infection by the virus with the letters COVI standing for coronavirus, the D for disease, and the number 19 in the name resulting because this particular strain of the virus emerged in Wuhan in November 2019. Because the name is derived from initials, it is frequently abbreviated as “COVID-19” in capital letters.

⁴ See Christopher C. French, *COVID-19 Business Interruption Insurance Losses: The Cases for and Against Coverage*, 27 CONN. INS. L.J. 1 (2020) (acknowledging that COVID-19 infections were presenting serious problem). As is not common knowledge, governments exhibited a range of reactions to the COVID-19 problem. Some (*e.g.*, Canada, New Zealand, Hawaii), ordered substantial comprehensive “lockdowns” as a means of retarding the spread of the disease. See, *e.g.*, Lauren Vogel, *COVID-19: A Timeline of Canada’s First-wave Response*, CAN. MED. ASS’N J. NEWS (June 12, 2020), <https://cmajnews.com/2020/06/12/coronavirus-1095847>; Alexis Robert, *Lessons from New Zealand’s COVID-19 Outbreak Response*, THE LANCET (November 1, 2020), [https://www.thelancet.com/journals/lanpub/article/PIIS2468-2667\(20\)30237-1/fulltext](https://www.thelancet.com/journals/lanpub/article/PIIS2468-2667(20)30237-1/fulltext); Alejandro de la Garza, *Hawaii Is Riding Out the COVID-19 Storm. But Geographic Isolation Isn’t the Blessing it May Seem*, TIME (Nov. 25, 2020 10:07 AM), <https://time.com/5915084/hawaii-covid-coronavirus/>. Others, such as Sweden, adopted a system of modified restrictions that varied among states. Mariam Claeson & Stefan Hanson, *COVID-19 and the Swedish Enigma*, THE LANCET (January 23, 2021), [https://www.thelancet.com/journals/lancet/article/PIIS0140-6736\(20\)32750-1/fulltext](https://www.thelancet.com/journals/lancet/article/PIIS0140-6736(20)32750-1/fulltext).

⁵ The World Health Organization declared COVID-19 a pandemic on March 11, 2020. See *WHO Characterizes COVID-19 as a Pandemic*, WHO (Mar. 11, 2020), <https://www.who.int/emergencies/diseases/novel-coronavirus-2019/events-as-they-happen> (providing a timeline of COVID-19 developments and quoting WHO Director-General that the organization has “made the assessment that COVID-19 can be characterized as a pandemic” and is “the first pandemic caused by a coronavirus. And we have never before seen a pandemic that can be controlled, at the same time.”). See also Natasha Frost, *Coronavirus, QAnon, Trump: Your Monday Briefing*, N.Y. TIMES (Oct. 11, 2020), <https://www.nytimes.com/2020/10/11/briefing/coronavirus-qanon-trump-your-monday-briefing.html> (“More than six months since the start of the pandemic, European countries such as France, Spain and Britain are reporting daily infection numbers comparable to—and sometimes far beyond—those of their first peaks.”).

closure orders barring access to and operation of many facilities deemed insufficiently essential.⁶

The governmental orders varied, of course. Some demanded a stronger or more comprehensive shutdown than others. But many, if not most, precluded normal operation of “nonessential” business functions, perhaps most prominently indoor dining and entertainment, under pain of punishment for violation.⁷ Within days of government recognition (now widely seen as belated) that COVID was highly contagious and dangerous,⁸ insurance claims for business interruption were widely anticipated with additional anticipated coverage controversy involving other insurance products. The insurance coverage community was abuzz about the topic throughout Spring 2020, attention that continues only slightly abated today.⁹ Lawsuits followed relatively quickly, numbering more than 1,000 by Fall 2020.¹⁰

⁶ See French, *supra* note 4; Terry Spencer & Teresa Crawford, *US Moves Nearer to Shutdown Amid Coronavirus Fears*, AP (Mar. 16, 2020), apnews.com/article/1510caddee80ea2d73363fab76d55967 (“Officials across the country curtailed many elements of American life to fight the coronavirus outbreak. . . Governors and mayors closed restaurants, bars, and schools as the nation sank deeper into chaos.”).

⁷ See *infra* Part I(B) and Part II.

⁸ See *Death Rates from Coronavirus (COVID-19) in the United States as of December 22, 2020, by State*, STATISTA (Dec. 22, 2020), <https://www.statista.com/statistics/1109011/coronavirus-covid19-death-rates-by-state> (noting that, as of December 22, 2020, more than 319,000 American deaths were attributed to COVID-19 from a total of more than 20 million infections). Visible case studies of COVID-19 dangers were chronicled in often heart-wrenching news reports, see, e.g., *Those We’ve Lost*, N.Y. TIMES (Nov. 3, 2020), <https://www.nytimes.com/interactive/2020/obituaries/people-died-coronavirus-obituaries.html> (discussing as a regular feature in the Times since the onset of the pandemic), as well as being demonstrated rather dramatically and contemporaneously when President Donald Trump, three US Senators, White House employees, and Secret Service agents were afflicted during late September and early October 2020. The President was treated by a large team of physicians utilizing an array of antibiotics, steroids, and supplemental oxygen during the President’s 3-day hospitalization, with continuing treatment after discharge. See Katie Thomas & Denise Grady, *Trump Returns Home After Downplaying Disease, but Doctor Says He Isn’t ‘Out of the Woods,’* N.Y. TIMES (Oct. 7, 2020, 1:38 AM), <https://www.nytimes.com/live/2020/10/05/world/covid-trump>; Maggie Haberman & Annie Karni, *Trump’s Return Leaves White House in Disarray as Infections Jolt West Wing*, N.Y. TIMES (Oct. 6, 2020), <https://www.nytimes.com/2020/10/06/us/politics/white-house-coronavirus.html>.

⁹ See *infra* Part II.

¹⁰ See Tom Baker, *COVID Coverage Litigation Tracker*, cclt.law.upenn.edu/author/tombaker/ (last visited December 31, 2020).

In the early spring days of the pandemic, the insurance industry began a remarkable media campaign to make known its position on the issue of coverage for virus-related losses: there is no coverage. In insurance industry publications, in lawyers' news media, and even in the news media consumed by the general public, the message of "no coverage for pandemic losses" was repeated again and again. This lies in stark contrast to the treatment of coverage for COVID-related losses in other jurisdictions such as Western Europe. But in America, however, the insurance industry repeated the mantra.

Policyholders only had to open a newspaper to see how the industry was advancing their views that claims would be denied, imposing motions to dismiss, at least before presumably favorable tribunals. And insurers began to win. Those wins were reported and highlighted in the media. This anti-coverage public relations media blitz forms a curious backdrop to what actually occurred in courts across the United States deciding COVID-related claims. In short, as this article discusses below, courts often fell short in their analyses in these coverage cases, ignoring time-tested principles of insurance policy interpretation and even of basic civil litigation rules. The spectre of the anti-coverage media blitz may well have primed the judiciary for the results to come.

By January 2021, roughly seventy-five of these cases had some sort of substantive court decision, most commonly the grant or denial of a motion to dismiss for failure to state a claim, particularly the latter, pro-insurer result.¹¹ Insurers prevailed in sixty-seven of the seventy-five cases, with courts granting Rule 12(b)(6) (or its state equivalent) dismissal on the basis of a lack of sufficiently triggering damage, a virus exclusion that ousts coverage, or both.¹² The speed of these decisions and the success of insurers should be regarded—at least on the triggering damage question—as surprising and erroneous.¹³ Although insurers have a significant array of arguments against coverage, we find them considerably less powerful than suggested by insurers and accepted by many judges to date.¹⁴

¹¹ *Id.* In what might be termed the "first wave" of COVID-19 property insurance and business interruption cases, the majority have been brought by policyholders as plaintiffs rather than by insurers seeking a declaratory judgment of no coverage. For clarity, this article will generally use the term "policyholders" to include both named insureds and all other insureds under a policy unless insured status is important to determination of a coverage issue.

¹² See Baker, *supra* note 10.

¹³ See *infra* Part IV.

¹⁴ See *infra* Part III. This is not to say that insurers deserve none of these early victories. Where policies contain a sufficiently broad virus exclusion, the facts of many cases will likely make the exclusion applicable and support a finding of no coverage. As Professor Baker has noted:

In our view, each insurance coverage case needs to be decided based upon not only its particular factual context but also according to the specific policy at issue. Some policies contain a virus exclusion (which of course makes a stronger, perhaps even irrefutable, case for no coverage)¹⁵ while many others lack any such limitation on coverage—a factor strongly favoring policyholders.¹⁶ But the “early returns” point toward excessively impulsive and overbroad (in our view) embrace

Of the seven cases in which a merits-based motion to dismiss has been denied, four involve insurance policies without any virus exclusion, one involves the Hartford’s Endorsement for Limited Fungi, Bacteria, or Virus Coverage (which contains a virus exclusion that could be read to apply only to losses involving defective materials), and two have virus exclusions that apply to sickness or disease.

By contrast, of the eighteen cases in which a court has granted a merits-based motion to dismiss, only two don’t have virus exclusions.

This matters, among other reasons because the presence of a virus exclusion inhibits policyholders from pleading their cases in ways that would help them meet the requirement that their business income losses result from “physical loss of or damage to” the premises in question.

Bottom line [as of Oct. 7, 2020]: insurers are winning, overwhelmingly, when their policies have virus exclusions. But they are losing, at least at the motion to dismiss stage, when their policies do not have virus exclusions.

Baker, *supra* note 10. We are, as discussed in Part IV, nonetheless disturbed by many of these early insurer victory cases because of their superficial and weak reasoning taking an excessively narrow view of what constitutes “physical loss or damage,” which may have negative implications for future coverage disputes.

¹⁵ See *infra* Part V.

¹⁶ If nothing else, the presence of an exclusion implies, sometimes strongly in light of the language of the insuring agreement, that in the absence of an exclusion, a claim or loss is covered. As discussed in Part IV, the virus exclusion was developed to avoid potential coverage pursuant to standard issue policies. If the insuring agreement or other exclusions in those policies had sufficiently precluded coverage, there logically would have been no need for a specific virus exclusion. We appreciate that insurers may want a “belt and suspenders” approach to policy drafting and that exclusions in some cases may be added simply to solidify widely accepted understandings and to foreclose unrepresentative judicial construction of policies. But courts should also appreciate that just as often (or perhaps more frequently), exclusions are added to policies because the policies provide coverage in the absence of such exclusions.

of an insurer-sponsored conventional wisdom that COVID claims are simply not insured.¹⁷

In particular, we are unimpressed with insurer arguments that COVID and attendant government closure orders do not—as a matter of law—constitute “direct physical loss or damage” to covered property. To date, the majority of judges hearing COVID cases disagree. Although their views are positive law and ours are not, we remain disappointed in the quality of analysis applied in many of the COVID coverage cases, which has often been reductionist, simplistic, crabbed, and overconfident regarding textual analysis, as well as insufficiently sensitive to the value of trial proceedings for resolving these disputes.¹⁸

Judges granting dismissal motions without any opportunity for discovery, and denying any possibility of coverage at the metaphorical starting gate, have undermined the traditional American commitment to jury trials as well as widely accepted legal principles of insurance policy construction such as interpreting ambiguous terms against the drafter and considering policyholder reasonable expectations.¹⁹ Where the issue is solely whether sufficient “loss” or “damage” has taken place, standard property insurance policy language is simply not as conclusive as purported by these courts. Although other defenses such as a virus exclusion may carry the day for some insurers, insurers have to date gotten much more mileage out of very weak “no-loss/no-damage” arguments than should be the case if trial judges were consistently doing a thorough job.

¹⁷ Consistent with discussion in Part II of this article regarding the (in our view) successful public relations efforts of insurers to paint COVID-19 business interruption claims as (to use a favorite phrase of the former President Trump) losers, the legal and insurance trade press has tended to under-report policyholder victories while giving significant attention to insurer victories, emphasizing judicial statements labeling policyholder coverage arguments as meritless. Having followed the legal and trade press thoroughly the pandemic, we were surprised upon reading Professor Baker’s COVID Coverage Litigation Tracker to find that policyholders had “prevailed” on as many dismissal motions as they have (which is still a tiny fraction of the total number of motions). Baker, *supra* note 10. We put the term “prevailed” in scare quotes to emphasize that that surviving a motion to dismiss is not the equivalent of obtaining coverage—and certainly does not reflect payments that small business policyholders state they desperately need to survive. By contrast, when an insurer obtains a Rule 12 dismissal, it really has won something. In all eighteen cases where insurers have to date prevailed on dismissal motions, the court has dismissed the entire case with prejudice, leaving the policyholder with the unattractive options of appeal or accepting defeat.

¹⁸ See *infra* Part IV.

¹⁹ See *infra id.*

Potentially aiding and abetting this judicial failure has been substandard briefing and advocacy by policyholder counsel, many of whom are not insurance specialists but tort lawyers prosecuting coverage cases with perhaps relatively little experience or expertise about the nuances of insurance coverage law.²⁰ In many of the cases with outcomes we criticize, insurers have been served by better advocacy, an important factor in cases where judges also lack insurance expertise. In some other cases, a judge's background formerly representing insurers may also foreshadow pro-insurer rulings.²¹ But we also posit that the bench was probably affected by widespread insurer efforts to "poison the well" against COVID-19 coverage claims through an early onslaught of pro-insurer, anti-coverage commentary in the legal press, the insurance trade press, and in mass circulation media.²²

A more extensive and nuanced analysis of COVID coverage issues suggests to us that policyholders should be winning most of these dismissal motion cases—at least on the loss and damage issues—and proceeding further in the adjudication process. Notwithstanding some shining exceptions,²³ the first wave of decisions in these cases has been largely disappointing and reflects poorly on the legal and hyper-textual analysis of the bench. If this trend continues, the insurance industry will have

²⁰ Insurers have taken the rare step of filing memoranda opposing amicus participation in Covid coverage cases, presumably because they wish the court not to have the benefit of analysis by more seasoned coverage counsel. *See, e.g.*, Defendant's Opposition to United Policyholders, National Independent Venue Association, and Washington Hospitality Association's Motion for Leave to Appear as Amici Curiae, *Vita Coffee, LLC v. Fireman's Fund Ins. Co.*, No. 2:20-cv-01079-JCC-DWC (W.D. Wash. 2020) (noted insurer side law firm opposes, *inter alia*, submission of United Policyholders amicus brief authored by Covington & Burling partner David Goodwin, a prominent policyholder coverage attorney).

²¹ *See, e.g.*, *Franklin EWC, Inc. v. Hartford Fin. Servs. Grp.*, No. 20-cv-04434 JSC, 2020 U.S. Dist. LEXIS 174010 (S.D. Cal. Sept. 22, 2020) (granting of an insurer's dismissal motion by Magistrate Judge Jacqueline Scott Corley, formerly at DLA Piper, a firm known for representing insurers that has been involved in COVID coverage litigation, sufficiently aggressively that it has opposed judicial consideration of a proffered amicus brief by United Policyholders. *See also infra* Part II.

²² By legal press, we refer to media directed primarily at lawyers, such as *US Law Week*, *Law 360* and the like. By insurance trade press, we refer to periodicals such as *Insurance Journal*, *Business Insurance*, *National Underwriter*, *Best's Review* and electronic newsletters, bulletins, and blogs (*e.g.*, Randy Maniloff's *Coverage Opinions* or the Hunton & Williams newsletters). General circulation media is aimed primarily at laypersons and runs the gamut from individual blogs or websites to major newspapers of record.

²³ *See infra* Part IV(A) (discussing well-reasoned cases finding sufficient allegations of physical loss or damage for coverage claim to proceed).

obtained an undeserved victory that is inconsistent with the extent of coverage it promised to policyholders, particularly small businesses.

The remainder of this part of the article examines the risk management and insurability issues presented by pandemic claims and identifies the principal types of first-party property insurance that could be implicated. Part II recaps the remarkable public relations campaign of insurers designed to influence both judicial and lay perception of insurance coverage for COVID-related losses. Part III examines the crucial coverage issues of whether there has been direct physical loss or damage sufficient to create coverage, acknowledging that coverage may be taken away by certain virus exclusions or other aspects of the policy or situation. Part IV briefly raises the virus exclusion contained in many policies and some challenges with it.

We conclude with concerns regarding the success of a tightly packaged, insidiously executed, and albeit factually and legally incorrect adversarial position put forth in insurance media may well have affected the initial outcomes of COVID-related coverage litigation. While we of course hope that to be untrue, when one begins to stack together some of the bizarre and frankly un-judicial goings on in these early COVID coverage cases, one has to wonder whether and to what degree concerted insurer-directed media infected the judicial outcomes. If true, that lays a haunting precedent over future coverage litigation for insurance matters both about pandemic-related losses and beyond.

B. CONSIDERING COVID COVERAGE DISPUTES IN THE BROADER CONTEXT OF THE INSURABILITY OF PANDEMIC-RELATED LOSSES

A pandemic is a “clash event,”²⁴ like a war or nuclear accident. Losses flowing from this event are large, uniformly repeated amongst many policyholders, and simultaneously cut across multiple insurance product lines. Insurance is built as a risk-based product, designed to buffer chance happenings of loss-related events by pooling collective risk in a pool while knowing that not all policyholders in that risk pool will experience a loss at exactly the same time.

With a pandemic, “chance” may be frustrated in that the precise manner in which risks become losses may not be fully expected (or rather modelled) by insurers. This makes it difficult for the insurer to spread risk amongst the risk pool or even amongst various lines of insurance products. While some industries in a

²⁴ Michelle E. Boardman, *Known Unknowns: The Illusion of Terrorism Insurance*, 93 GEO. L.J. 783, 784 (2004) (dubbing “clash events” those large-scale losses like earthquakes and nuclear disasters that affect many policyholders at once and cut across multiple insurance lines).

pandemic can be severely affected (like the travel and hospitality industries in the current COVID-19 pandemic), and most at least significantly affected (such as retailers and services), there will be some industries that actually thrive in a pandemic (such as online retailers and delivery services). It may be fair to argue that it is the job of insurers to predict and price their insurance products accordingly, as part of building a solvent insurance framework. A failure to incorrectly build and price insurance in the wake of a clash event can leave only two outcomes: financial decimation for either the policyholder or the insurer. The stakes are high.

In a pandemic situation like that with COVID-19, a downturn in commercial activity is also often related to a resulting downturn in the financial markets. This challenges an insurer's ability to capitalize on investment returns for its retained insurance premium funds. The differential between premiums obtained and losses paid out—the spread—becomes tougher to profitably manage, because the financial markets unexpectedly reacted as a result of the very factor causing the losses insured.

But losses realized in a pandemic are not, by nature, impossible to insure. The difficulty is with estimating the correct pricing of the insurance products that tracks the realistic risks of payouts while still maintaining a profitable baseline for the insurer.

Anything that is fortuitous can be insured, in principle. The pandemic is an unexpected event. Whether insurers choose to insure pandemic-related losses as a matter of commercial choice is, of course, itself another matter.

Pandemic-relating losses are insurable in theory because the timing of the pandemic itself is a fortuitous event. We do not know when—or if—one will strike. But even in the wake of a full-blown pandemic, there are still fortuitous aspects making insurance a potentially profitable financial product to sell. Because, as noted above, not all industries will be affected at the same time and to the same degree, insurers may still be able to structure and price insurance profitably, even during a full-blown pandemic. This is because the degree and extent of loss experienced amongst individual policyholders is fortuitous. In fact, some policyholders may profit from the pandemic in their specific industries and may have no loss at all.

An insurer's ability to properly price an insurance product that appropriately accounts for pandemic-related losses based on the underwriting risk involves three factors:

- a) can the insurer properly rate the risk?
- b) is the premium for the risk affordable to policyholders?
- c) will the premium (along with investment income) exceed the loss?

As has probably occurred with COVID, insurance products were likely priced with the foresight of only a slight possibility of a pandemic. The insurer model may not have accounted for the various kinds of losses amongst policyholders (i.e. largely business interruption losses from governmental orders either closing businesses or telling customers to shelter at home to quell the spread of the virus).

Insurers cannot claim that the pandemic was completely unforeseen as an event. The world has seen its share of rising health epidemics in the recent decades, from Ebola to SARS to H1N1, swine flu, Zika, MERS, and HIV/AIDS. In fact, the insurance industry had a virus and bacteria exclusion approved by regulators for inclusion in property insurance policies in 2006, in direct response to the SARS virus (though this exclusion is not featured in all property policies).²⁵ The insurance industry also marketed specific insurance for pandemic-related losses, a product still available at the start of the COVID-19 pandemic in March 2020.²⁶

However, most insurers began the COVID-19 pandemic with blanket coverage denials for policyholders' COVID-related claims. And insurers did this not on the basis of the virus exclusion most logically relevant to the issue, but instead on the argument that the policyholder has suffered no physical loss or damage.

The insurance denials prompted some governments to propose legislation to mandate either government reinsurance for pandemic-related losses,²⁷ or insist that insurers cover such losses, even despite actual policy coverage wording.²⁸ In

²⁵ INSURANCE SERVICE OFFICE, ISO FORM CP 01 40 07 06 - EXCLUSION OF LOSS DUE TO VIRUS OR BACTERIA (July 6, 2006) [hereinafter ISO VIRUS EXCLUSION], <https://www.propertyinsurancecoveragelaw.com/files/2020/03/ISO-Circular-LI-CF-2006-175-Virus.pdf> (mentioning specifically SARS, avian flu, and influenza, as well as anthrax).

²⁶See, e.g., *PathogenRX, An Innovative Solution for Pandemic and Epidemic Risks*, MARSH, <https://www.marsh.com/us/campaigns/pathogenrx.html> (last visited Jan. 24, 2021) (which had almost no take-up prior to COVID-19); Stuart Collins, *Insurers Wary of Meeting Growing Demand for Specialist Pandemic Cover*, COM. RISK ONLINE (Apr. 9, 2020), <https://www.commercialriskonline.com/insurers-wary-meeting-growing-demand-specialist-pandemic-cover/>; see also Robert Hartwig, Greg Niehaus & Joseph Qiu, *Insurance for Economic Losses Caused by Pandemics*, 45 GENEVA RISK & INS. REV. 134, 138 (2020) (discussing the failed PathogenRX market).

²⁷ See, e.g., Pandemic Risk Insurance Act of 2020, H.R. 6983, 116th Cong. (2020).

²⁸ Various state governments in New Jersey, New York, Pennsylvania, Louisiana, Ohio, Massachusetts, and South Carolina all proposed bills mandating that insurers cover COVID-19 pandemic-related losses. See, e.g., The Gen. Assemb. of Pa., H.B. 2372, 2020 Sess. (Pa. 2020) ("Business Interruption Insurance Act"); State of N.Y. Assemb., A. 10226-B, 2020 Assemb. (N.Y. 2020) ("An Act in relation to requiring certain perils be covered under business interruption insurance during the coronavirus disease 2019 (COVID-19) pandemic"); State of N.Y. Senate, S. 8178, 2020 S. (N.Y. 2020) ("An Act in relation to

response, the National Association of Insurance Commissioners (NAIC) warned in correspondence to the U.S. House Committee on Small Business that such legislation requiring insurers to cover COVID-19 related losses would financially decimate the insurance industry.²⁹ The Insurance Commissioners argued that most insurance products were not designed or priced to provide coverage for pandemic-related losses. They also contended that “virtually every policyholder suffers significant losses at the same time.” But pandemic-related losses themselves are not uninsurable in principle. Insurers may just not have properly estimated how the particular losses of this pandemic have played out and may not have priced their products accordingly. Or, perhaps, the insurance products were not designed to cover pandemic-related losses at all.

C. INSURANCE IMPLICATED IN A PANDEMIC

A pandemic such as the COVID crisis can result in insurance claims across a variety of insurance product lines, including:

- a) property insurance, especially for contamination losses and business interruption losses, as well as losses arising from civil authority ‘stay at home’ orders or forced business closure orders;
- b) liability insurance, in the event an employee or customer takes legal action against the policyholder for injury suffered as a result of failure to take reasonable health precautions;
- c) workers compensation and employment insurance, for the sickness or quarantining or isolation of employees;
- d) directors and officers insurance, for any liability visited by corporate decisions as a result of the pandemic; and
- e) event cancellation insurance, triggered if a major event is cancelled (such as a sporting event or concert or film production).

requiring certain perils be covered under business interruption insurance during the coronavirus disease 2019 (COVID-19) pandemic”). These bills are currently winding their way through the legislative processes.

²⁹ Letter from Nat’l Ass’n of Ins. Comm’rs and the Cntr for Ins. Pol’y & Rsch to The Honorable Nydia M. Velázquez, Chairwoman, U.S. House Committee on Small Business (May 20, 2020), https://naic.org/documents/government_relations_200521.pdf.

1. Business Interruption Coverage

The most active area for insurance coverage issues at this stage of the COVID-19 pandemic has been litigation arising from business losses by commercial entities, as a result of policyholder claims for losses under business interruption and civil authority insurance provisions. This has triggered interpretive debates in the courts over the meaning of business interruption and civil authority coverage contained in commercial property policies. These types of insurance products are additional coverages to the standard all-risk commercial property insurance policy.³⁰

The standard commercial property policy provides coverage for losses arising from all risks to the policyholder's commercial property, save and except those risks that are specifically excluded in the policy. As a separate add-on, usually as an endorsement and for additional premiums, the policyholder can augment its property policy with various types of insurance coverage for other potential business-related losses.³¹

One such potential business-related loss is the interruption of a business' potential to generate income. This type of coverage is designed to protect the earning stream of the business in the event the business' capacity to earn income is interrupted as a result of a covered cause of loss. The coverage indemnifies the policyholder for income lost while the building restores its operations.³²

The coverage clause in the standard property policy typically covers "direct physical loss of or damage to" insured property.³³ The business interruption coverage clause typically dictates that the insurer will pay for the loss of business income "due to the necessary suspension or delay of operations caused by direct physical loss of or damage to property." To determine insurance coverage, the policyholder must prove it suffered some "direct physical loss of or damage to property." The archetypal scenario for triggering business interruption insurance is the fire at a commercial establishment. The fire damages the storefront and the

³⁰ See French, *supra* note 4, at 17–20; MARK S. DORFMAN & DAVID A. CATHER, INTRODUCTION TO RISK MANAGEMENT AND INSURANCE 346–47 (10th ed. 2013); EMMETT J. VAUGHAN & THERESE M. VAUGHAN, FUNDAMENTALS OF RISK AND INSURANCE 563–65 (11th ed. 2013).

³¹ See French, *supra* note 4, at 21–30; DORFMAN & CATHER, *supra* note 30, at 346–47; VAUGHAN & VAUGHAN, *supra* note 30, at 563–65.

³² See French, *supra* note 4, at 21–30; DORFMAN & CATHER, *supra* note 30, at 346–47; VAUGHAN & VAUGHAN, *supra* note 30, at 563–65.

³³ See JEFFREY W. STEMPEL & ERIK S. KNUTSEN, STEMPEL & KNUTSEN ON INSURANCE COVERAGE §15.01[D] (4th ed. 2015 & Supp. 2020).

business is unable to earn income until such time as the business can repair the fire-damaged storefront.

In a pandemic situation like COVID, however, the place of business is not physically destroyed but contaminated by virus, making use of the business property unsafe. Alternatively, access to the business' property may be curtailed due to governmental orders designed to curb the spread of the disease. For example, many restaurants have been ordered closed to dine-in customers and could only operate via take-out or delivery for a period of time. The question becomes whether the policyholder has suffered a "direct physical loss of or damage to" its commercial property by either contamination by virus or by a governmental order restricting property access or use.

Insurers will likely stress that commercial property policies are designed to cover physical damage to tangible property—like fire damage. One way of looking at the issue is that any loss of business income should be tied to the necessary interruption of a business' income stream as a result of something that harms the property in a way that would interfere with a policyholder using its property as a place to earn income. If the property itself is not damaged, the coverage should not be triggered.³⁴

Policyholders, however, likely believe that they purchased business interruption insurance as an add-on to their property coverage in order to insure a capital asset—the income-earning power of their business (hence the name "business interruption insurance"). If that income stream is interrupted due to an interference with their use of their property—whether by virus contamination or by orders of government—their reasonable expectation would be that the business interruption portion of their policy would cover such losses. The property policy is, after all, "all-risk" property insurance, and the business interruption coverage is tied to that "all-risk" concept. Policyholders who purchased business interruption insurance would expect coverage for an inability to use their property to earn business income.³⁵

2. Civil Authority Coverage

A common extension to the business interruption coverage in a commercial property policy is civil authority coverage. Under this coverage, a policyholder can insure its lost business income stream if access to its property is impaired or prohibited due to the order of some civil authority (i.e. a government). Some wordings of this coverage specifically require that the civil authority's order is due

³⁴ See French, *supra* note 4, at 51.

³⁵ See French, *supra* note 4, at 68–71.

to the direct physical loss of or damage to property adjacent to the policyholder's insured property as a result of a covered cause. A common coverage clause for civil authority insurance states: ". . . if an order of civil or military authority limits, restricts or prohibits partial or total access . . . provided such order is the direct result of physical damage of the type insured."³⁶ The classic example is the burned warehouse that sits next to the policyholder's place of business. To keep people in the adjacent properties safe, a civil authority could ban access to a policyholder's property simply because it is close to another property exhibiting unsafe characteristics (like the unstable structure after a fire).

Business interruption insurance claims due to COVID have arisen under the civil authority coverage provisions, resulting from losses due to state or municipal "shelter in place" orders or the closure of non-essential businesses or the modification of the use of businesses, such as eliminating indoor dining at restaurants. The risk of COVID with its airborne and highly contagious quality prompted many civil authorities to issue various orders in an attempt to contain the disease.

Courts examining civil authority coverage tend to look to causation arguments: was the order the result of directly physical loss of or damage to property? If so, is such a covered cause of loss? Policyholders have argued that they suffered loss of use or loss of functionality of their property due to the civil authority orders, and that constitutes a direct physical loss of property. However, insurers have argued that the language of most coverage grants demands that policyholders must also prove that alleged property damage to some property adjacent to the policyholder's place of business actually led to the civil authority making the order.

3. Contingent Business Interruption Coverage

Contingent business interruption coverage is similar to business interruption coverage except that the policyholder's income stream is affected by loss or damage to a related business' property, and not the property of the policyholder. This coverage is commonly implicated in a manufacturer setting, where a supplier suffers a loss and the manufacturer cannot obtain a needed component in a timely fashion and suffers a business interruption.³⁷

For example, if a tire manufacturer suffers a fire at the tire plant and is unable to ship its tires to auto makers because of fire damage to the plant, the auto makers will likely have a business interruption loss due to the inability to get tires

³⁶ See STEMPEL & KNUTSEN, *supra* note 33, at §28.04.

³⁷ See French, *supra* note 4, at 21–30; Dorfman & Cather, *supra* note 30, at 346–47; Vaughan & Vaughan, *supra* note 30, at 563–65.

in a timely manner from their supplier. The auto maker can then make a contingent business interruption claim in that, although it did not suffer the loss itself on its own property, its supplier did, and that loss to the supplier affected the policyholder's own business income stream. The key to coverage for contingent business interruption insurance is that, like business interruption insurance, the supplier must have suffered some "direct physical loss of or damage to" property as a result of a cause covered by the policyholder's all-risk insurance.

4. Ingress/Egress Coverage

Ingress/egress coverage is also sub-coverage that may be included in business interruption coverage. It provides coverage for losses arising if access to a policyholder's property is impeded through some reason other than by a civil authority order (i.e. blocked due to construction debris). To date, this coverage has not yet been implicated in any court decisions deciding COVID pandemic-related coverage issues. This makes sense as it was civil authority orders that largely affected property access for policyholders.

II. INSURER PUBLIC RELATIONS BLITZ: INSURERS PUSH THEIR ANTI-COVERAGE MESSAGE

As previously noted, COVID-19 became recognized as a major public health issue likely to adversely impact commerce in early March 2020. It was fairly clear at the outset, particularly when citizens began to stockpile supplies and stay indoors and when governments issued closure orders, that COVID would have a serious negative impact on many businesses, particularly entertainment, dining, and tourism.³⁸

³⁸ See French, *supra* note 4, at 1–3; *Why Are Markets Collapsing? How Bad Will COVID-19 Really Be?*, KNOWLEDGE@WHARTON (Mar. 16, 2020), <https://knowledge.wharton.upenn.edu/article/why-are-the-markets-collapsing-how-bad-will-covid-19-really-be/> ("markets are acting as if we are going to encounter the worst-case scenario") (italics removed). The actual downturn in these areas of commerce has perhaps been even worse than anticipated due to the difficulty in containing COVID, resulting in a quilted cycle of closures and declining customer patronage that has perhaps lasted even longer than predicted. See Zoe Wood, *How the Cineworld Closures Could Turn Leisure Parks into a Disaster Movie*, THE GUARDIAN (Oct. 10, 2020 03:00 EDT), <https://www.theguardian.com/business/2020/oct/10/how-the-cineworld-closures-could-turn-leisure-parks-into-a-disaster-movie> (describing massive movie theatre closures and layoffs and ripple effect on bars, restaurants, and shops that benefitted from entertainment traffic). Accord Julian Kozlowski, Laura Veldkamp, & Venky Venkateswaran,

In response to the COVID-19 pandemic, insurers quickly took control of the insurance coverage message in the media: there will be no coverage for COVID-19 related losses.³⁹ Typical of the industry line were statements by insurance executives that “[p]andemics are not insurable because they are too widespread, severe, and unpredictable to underwrite” and that “[c]ommercial-property insurance policies that include business-interruption coverage generally are not intended to cover disease- or pandemic-related losses.”⁴⁰

Another prominent insurer executive claimed to “see very minimal loss exposure from this” due to the addition of coverage-restricting language in policies

Scarring Body and Mind: The Long-Term Belief-Scarring Effects of COVID-19 (Nat'l Bureau of Econ. Rsch., Working Paper No. 27439, June 2020), https://www.nber.org/system/files/working_papers/w27439/w27439.pdf (finding that “long-run costs for the U.S. economy” from adverse psychological impact of pandemic will be “many times higher than the estimates of the short-run losses in output. This suggests that, even if a vaccine cures everyone in a year, the COVID-19 crisis will leave its mark on the US economic for many years to come.”).

³⁹ See, e.g., Caroline Glen, *Insurers Are Telling Businesses Their Policies Don't Cover Coronavirus Shutdown. John Morgan Attorneys Say They're Wrong*, ORLANDO SENTINEL (May 4, 2020), <https://www.orlandosentinel.com/coronavirus/jobs-economy/os-bz-coronavirus-insurance-denials-morgan-lawsuits-20200504-pbrpq6z7ofbevau67cpgq4nzqi-story.html>; Ellen Ioanes, *Does My Business-Interruption Insurance Cover Closing Because of COVID-19?*, BARRON'S (June 17, 2020 5:30 AM), <https://www.barrons.com/articles/does-my-business-interruption-insurance-cover-closing-because-of-covid-19-51592386201>; Leslie Scism, *Companies Hit by COVID-19 Want Insurance Payouts. Insurers Say No.*, WALL ST. J. (June 30, 2020 10:24 AM), <https://www.wsj.com/articles/companies-hit-by-covid-19-want-insurance-payouts-insurers-say-no-11593527047>. See also INS. INFO. INST., *Insurance Industry Provides Interactive 'Explainer' to Help Navigate Business Interruption Insurance*, III (Oct. 16, 2020), <https://www.iii.org/pres-release/insurance-industry-provides-interactive-explainer-to-help-navigate-business-interruption-insurance-101620>. The navigation tends to leave policyholders on the shoals of no coverage as the III Explainer consistently takes a narrow view of the scope of coverage and, in particular, contends that most all COVID-related coverage is not covered. *Accord Business Interruption Insurance: An Interactive Explainer Outlining the Case for a Federal Solution to Pandemic Relief*, FUTURE OF AM. INS. & REINSURANCE, https://fairinsure.org/business-interruption-insurance/?utm_source=Board+of+Directors&utm_campaign=5ca10385b4-EMAIL_CAMPAIGN_2018_08_15_11_45_COPY_01&utm_medium=email&utm_term=0_0934a86008-5ca10385b4-122588685.

⁴⁰ See Ioanes, *supra* note 39 (quoting David Sampson, president and CEO of the American Property Casualty Insurance Association (APCIA)).

because of “past pandemics and/or partial pandemics.”⁴¹ Swinging into attack mode, this industry leader also took the by-now almost obligatory insurer swipe at plaintiff counsel and made it clear that seeking coverage would not be for the faint of heart: “Lawyers and the trial bar will attempt to torture the language on standard industry forms and try to prove something exists that actually doesn't exist” “The industry will fight this tooth and nail. We will pay what we owe.”⁴²

Whether this evolved to be the message over a short period of time, or whether it was a concerted industry effort (likely the latter), we believe it made an impact on the subsequent insurance coverage court decisions about COVID-related claims. It provides an interesting example of insurers seizing the messaging opportunity to potentially affect legal decisions. Making use of extra-legal media messaging to impact the legal sphere is a useful tactic for prospective litigants and insurers seem to be good at it.

⁴¹ See Leslie Scism, *U.S. Businesses Gear Up for Legal Disputes with Insurers Over Coronavirus Claims*, WALL ST. J. (Mar. 6, 2020 10:00 AM), <https://www.wsj.com/articles/u-s-businesses-gear-up-for-legal-disputes-with-insurers-over-coronavirus-claims-11583465668> (quoting Chubb Ltd. CEO Evan Greenberg, however “Chubb declined to comment further” on the issue when asked by the Journal reporter). See also Maria Sassian, *Triple-I CEO Tells U.S. House—Global Pandemics are Uninsurable*, INS. INFO. INST. (May 21, 2020), <https://www.iii.org/insuranceindustryblog/triple-i-ceo-tells-u-s-house-global-pandemics-are-uninsurable/> (“An event like a global pandemic is uninsurable [said the executive.] Unlike a typical covered catastrophe, which is limited in terms of geography and time, pandemics have the potential to impact everywhere, all at once As such, this type of magnitude requires government resources to step in and provide support.”).

⁴² See Scism, *supra* note 39 (quoting Chubb Ltd. CEO Evan Greenberg).

Media targets included both the legal press,⁴³ the insurance trade press⁴⁴ as well as the business press,⁴⁵ and even the mainstream lay press read by the average public⁴⁶

⁴³ See, e.g., Larry P. Schiffer, *Does the Novel Coronavirus Cause Direct Physical Loss of or Damage to Property?*, NAT'L L. REV. (July 13, 2020), <https://www.natllawreview.com/article> (concluding that “[b]ased on the case law and the nature of the novel coronavirus, it appears unlikely that courts will conclude that viral contamination causes ‘direct physical loss.’”); *Insurers’ COVID-19 Notepad: What You Need to Know Now*, CROWELL MORING (June 9, 2020), <https://www.crowell.com/NewsEvents/AlertsNewsletters/all/Insurers-COVID-19-Notepad-What-You-Need-to-Know-Now-Week-of-June-8> (suggesting that coverage unlikely for COVID-related claims); Lauraann Wood, *Insurer Says Policy Isn’t Triggered in COVID-19 Coverage Suit*, LAW360 (July 14, 2020 3:56 PM), <https://www.law360.com/articles/1291736/insurer-says-policy-isn-t-triggered-in-covid-19-coverage-suit>.

Even if the virus had been present on the covered businesses’ properties, it wouldn’t constitute direct physical loss or damage because it doesn’t cause ‘a tangible change to the physical characteristics of property,’ [the insurer argued]. COVID-19 isn’t incorporated into their properties’ physical structure, doesn’t require a building’s physical alteration for removal ‘and does not render the building unfit for use,’ it said.

‘Rather, the coronavirus can be removed from surfaces with soap and water and rendered inert with various common household disinfectants, including bleach,’ [said the insurer.] ‘[The insureds’] alleged losses are at most economic losses, not a direct physical loss or damage.’

The businesses also aren’t entitled to coverage under the civil authority provision for additional coverage under their policies, which ‘has a very specific set of terms and conditions that must be met,’ [the insurer represented to the court.]

Wood, *supra*.

⁴⁴ See, e.g., Jeff Dunsavage, *COVID-19 Wrap-up: BI Coverage Continues to Make Headlines*, TRIPLE-I BLOG (May 21, 2020), <https://www.iii.org/insuranceindustryblog/covid-19-wrap-upbi-coverage-continues-to-make-headlines> (“The *Post* interviewed Triple-I CEO Sean Kevelighan and Triple-I non-resident scholar Michael Menapace, who explained why the suits are unreasonable and threaten the insurance industry’s solvency. ‘The insurance business works by spreading risk around so the industry isn’t hit all at once with claims,’ Kevelighan says. ‘A pandemic disrupts business far and wide, with no end date in sight.’”); *Focus on Facts, Not Media Misinformation: Berkley*, CARRIER MGMT (June 7, 2020), <https://www.carriermanagement.com/news/2020/06/07/207575.htm?print> (“Arguing that the media has been fed misinformation by

the plaintiffs bar, the chief executive officer of a property/casualty insurer said facts will win out on debates over business interruption coverage disputes related to COVID-19 shutdowns.”) (referring to W. Robert Berkley, Jr., president and CEO of WR Berkley); Stephan Kahl, *Munich Re to Stop Selling Pandemic Business Coverage*, INS. J. (Sept. 11, 2020), <https://www.insurancejournal.com/news/international/2020/09/11/582141.htm>; *Beazley Hikes Estimate for COVID-19 Related Claims Amid Resurgence in Virus*, SHARES MAG. (Sept. 22, 2020 07:30), <https://www.sharesmagazine.co.uk/news/market/7092096/Beazley-hikes-estimate-for-Covid-19-related-claims-amid-resurgence-in-virus> (estimating range of exposure from \$170 to \$350 million net of reinsurance).

⁴⁵ See, e.g., Leslie Scism, *U.S. Businesses Gear Up for Legal Disputes with Insurers Over Coronavirus Claims*, WALL ST. J. (Mar. 6, 2020 10:00 AM), <https://www.wsj.com/articles/u-s-businesses-gear-up-for-legal-disputes-with-insurers-over-coronavirus-claims-11583465668>; Ioanes, *supra* note 39; Katherine Chiglinsky, *Virus Fight Insurers Thought They’d Dodged Is Looming Anyway*, WASH. POST (Mar. 24, 2020 11:20 AM), https://www.washingtonpost.com/business/on-small-business/virus-fight-insurers-thought-theyd-dodged-is-looming-anyway/2020/03/24/aef84e06-6de1-11ea-a156-0048b62cdb51_story.html; Kate Rogers & Betsy Spring, *On Main Street, Business Owners Push for Greater Protection from Coronavirus-related Lawsuits*, CNBC (June 15, 2020 1:37 PM), <https://www.cnbc.com/2020/06/12/on-main-street-a-push-for-protection-from-coronavirus-related-lawsuits.html> (“‘It turns out that business interruption insurance is not what it sounds like,’ [Robert Cresanti, president and CEO of the International Franchise Association] said. ‘Most of the insurance companies are telling our people that business interruption insurance is actually business destruction insurance. So if your business is burned down or destroyed by a flood, you’re covered. But you’re not [covered] in a crisis like this where your business is truly interrupted.’”); Karen Epper Hoffman, *Business Interruption: Insurers Balk at Paying Claims*, CFO.COM (Sept. 10, 2020), <https://www.cfo.com/risk-management/2020/09/pandemic-losses-out-in-the-cold> (“Robert Gordon, senior vice president for policy, research, and international for the American Property Casualty Insurance Association (APCIA), says that because government emergency orders closed businesses to limit human transmission of COVID-19 and not because there had been direct property loss or damage, business interruption policies are not relevant.”).

⁴⁶ See, e.g., Ron Hurtibise, *Sorry, That’s Not Covered: Insurers Fight Businesses Over COVID-19 Shutdowns*, S. FLA. SUN SENTINEL (Sept. 12, 2020 8:55 AM), <https://www.sun-sentinel.com/business/fl-bz-owners-losing-covid-related-business-interruption-suits-20200912-46jlyxsftjenvlyrxg4tfbqyam-story.html> (“the industry has reinforced its message by boasting about nearly every court ruling that has gone its way. ‘Another court agrees: Business Interruption Insurance Does Not Cover Pandemic-Related Losses,’ said the subject line of an email release by the Insurance Information Institute, a trade group created by the industry to educate consumers about insurance-related issues.”); Judith Bachman, *Judges Are Deciding Whether Business Interruption Policies Cover Pandemic-Related Losses*,

as well as scholarly journals.⁴⁷ When insurers prevailed in litigation, victory was quickly trumpeted.⁴⁸

A similar public relations campaign by small business policyholders was harder to mount given the disparate number and dispersion of random policyholders with potential claims.⁴⁹ Although plaintiff law firms fulfilled some of this function in banging the drum for coverage, their efforts were (in our view) problematic in that many of these lawyers were not insurance coverage specialists from experienced policyholder-side coverage firms. In addition, early pro-coverage efforts were (in our view) too grandiose and not well-targeted.

For example, plaintiff firms sought mass consolidation of claims, including a request for consolidation by the federal Judicial Panel on Multi-District Litigation

ROCKLAND CNTY. BUS. J. (Oct. 8, 2020), <https://rbizjournal.com/2020/10/08/judges-are-deciding-whether-business-interruption-policies-cover-pandemic-related-losses>.

⁴⁷ See, e.g., Robert Hartwig, Greg Niehaus & Joseph Qiu, *Insurance for Economic Losses Caused by Pandemics*, 45 GENEVA RISK & INS. REV. 134, 134 (2020) (“Private insurance coverage for economic losses caused by pandemics is limited [due in large part] to the high levels of capital that would be required to credibly insure pandemic economic losses with cross-sectional pooling mechanisms.”).

⁴⁸ Leslie Scism, *Insurance Firms Gain Early Lead in Coronavirus Legal Fight With Businesses*, WALL ST. J. (Sept. 1, 2020 9:00 AM), <https://www.wsj.com/articles/insurers-gain-early-lead-in-covid-19-legal-fight-with-businesses-11598965200> (“Insurers say the policies are intended to help policyholders as they recover from events, such as fires, that lead to repairs and rebuilding, and were never intended to cover virus-related claims.”); Alison Frankel, *Latest COVID-19 Insurance Coverage Loss Shows Narrowing Path for Policyholders*, REUTERS (Sept. 15, 2020 6:54 PM), <https://www.reuters.com/article/legal-us-otc-insurance-idUSKBN2663HC>; Andrew G. Simpson, *Judges Nix Consolidating COVID Business Interruption Suits Against Big Insurers*, INS. J. (Oct. 4, 2020), <https://www.insurancejournal.com/news/national/2020/10/04/585092.htm>.

⁴⁹ This is not to say that the business community did not on occasion make itself heard on the issue. See, e.g., Stephen Gandel, *Companies Say Insurance Companies Are Stiffing Them Over Coronavirus Losses*, CBS NEWS (Sept. 21, 2020 11:16 AM), <https://www.cbsnews.com/news/covid-insurance-business-continuity-interruption-declined-coverage>; Kate Rogers & Betsy Spring, *On Main Street, Business Owners Push for Greater Protection from Coronavirus-related Lawsuits*, CNBC (June 12, 2020), <https://www.cnbc.com/2020/06/12/on-main-street-a-push-for-protection-from-coronavirus-related-lawsuits.html>. See also, Tim Carman, *Restaurants Are Suing Insurance Companies Over Unpaid Claims—And Both Sides Say Their Survival Is at Stake*, WASH. POST (May 19, 2020 1:37 PM), <https://www.washingtonpost.com/news/voraciously/wp/2020/05/19/restaurants-are-suing-insurance-companies-over-unpaid-claims-and-both-sides-say-their-survival-is-at-stake> (reporting both insurers and small businesses taking positions that adverse coverage decisions will be financially ruinous).

(MDL), which almost everyone (including the judges on the Panel) viewed as inapt unless confined to the same policy forms of a single insurer in light of the varying facts and policies of different cases.⁵⁰ More extremely, lawyers and legislators sympathetic to business sought to legislatively require coverage by insurers regardless of the policies at issue—a seemingly rather clear attempt to violate the Contract Clause of the U.S. Constitution that gave insurers a rather effortless public relations victory.⁵¹

As discussed below, we find the insurers’ industry-wide disparagement of coverage as legally misplaced as it may have been rhetorically brilliant. While we cannot help but admire the manner in which insurers moved quickly and uniformly to spin public opinion against coverage, we are dismayed that the tactic seems to have worked on judges. There are real arguments to be made about whether and how policyholders may have coverage for COVID-related losses. In fact, we think the insurance industry’s main contention about coverage—the “physical loss or damage” requirement—can be refuted in most cases. But this requires a more searching analysis of the question and less reflexive recoil than has been displayed in the bulk of court decisions to date.

In several states, legislation was introduced to require insurers to pay for lost policyholder revenue. There was also congressional inquiry pushing for such coverage without regard to the actual insurance policy terms at issue in a particular case. Predictably—and correctly in our view—insurers opposed any such legislative mandates or compulsion as violative of the Contract Clause of the U.S. Constitution.⁵² In doing so, they took the doctrinaire position—with which we

⁵⁰ See Andrew G. Simpson, *Judges Nix Consolidating COVID Business Interruption Suits Against Big Insurers*, INS. J. (Oct. 4, 2020), <https://www.insurancejournal.com/news/national/2020/10/04/585092.htm>. However, more limited consolidated treatment has been approved for particularized groupings of policies with the same operative language. See Jacob Rund, *Ski Pass Insurance Row Highlights Complex Route for Virus Suits*, BLOOMBERG L. (Oct. 20, 2020, 6:31 AM), <https://news.bloomberglaw.com/insurance/ski-pass-insurance-row-highlights-complex-route-for-virus-suits> (approving consolidation of 30 actions by policyholders against Society Insurance “for denying business interruption claims of restaurants and other hard-hit shops” as well as skiers’ lawsuits against Arch Insurance Co. and United Specialty Ins. Co. for denials of cancellation insurance purchased in connection with season-long ski passes). Regarding MDL proceedings generally, see DAVID F. HERR, MULTIDISTRICT LITIGATION MANUAL: PRACTICE BEFORE THE JUDICIAL PANEL ON MULTIDISTRICT LITIGATION (2020 ed.).

⁵¹ See *infra* text accompanying notes 51–53.

⁵² See Letter from Nat’l Ass’n of Ins. Comm’rs & Ctr. for Ins. Pol’y and Rsch. to Members of Cong. (May 20, 2020) (supporting insurer arguments against legislation forcing

disagree—that business interruption insurance was never intended (apparently under any circumstances) to provide coverage for any losses related to infectious disease like COVID.⁵³

coverage). *See also* H.B. 589, 133d Gen. Assemb., 2019-2020 Sess. (Ohio 2019) introduced by Representatives Crossman and Rogers. The bill would “require insurers offering business interruption insurance to cover losses attributable to viruses and pandemics and to declare an emergency” that presumably would support further orders providing for government-mandated closure of non-essential businesses. *See also* Elizabeth Blossfield, *Despite Insurance Industry Concerns, More States Introduce COVID-19 BI Bills*, INS. J. (Apr. 15, 2020), <https://www.insurancejournal.com/news/east/2020/04/15/564920.htm> (“‘It’s just not constitutional,’ Don Hayden, co-founder and partner of Mark Migdal & Hayden, added. ‘I mean, what you’re essentially doing is creating insurance where there is nothing. You’re essentially throwing out the underwriting and the risk evaluation that insurance companies have done before writing a policy and saying, ‘You have to cover this. Even though you had expressly said that you would not cover it in your exclusion and in your insurance agreement.’”’). *But see* Mark A. Packman, *Constitutionality Under the Contracts Clause of Proposed Legislation Enabling Policyholders to Obtain Insurance Coverage for Coronavirus Claims*, 55 TORT TRIAL & INS. PRAC. L.J. 509 (2020) (concluding that such legislation is constitutional due to emergency nature of pandemic and economic harm to particular businesses).

⁵³ Erin Ayers, *Insurers Decline Congress’ Request To Pay All COVID-19 Business Interruption Claims*, ADVISEN FRONT PAGE NEWS (Mar. 23, 2020), https://www.advisen.com/tools/fpnproc/fpns/articles_new_1/P/363166470.html?rid=363166470&list_id=1 (responding to congressional inquiry re insurer coverage of COVID business loss claims, insurer interest groups state that “[b]usiness interruption policies do not, and were not designed to, provide coverage against communicable diseases such as COVID-19”) (statement from leadership of American Property Casualty Insurance Association, National Association of Mutual Insurance Companies, Council of Insurance Agents and Brokers, and Independent Insurance Agents & Brokers of America) (also taking position that the members of these insurance industry organizations “include many small businesses and employers grappling with the same issues as many businesses.”). *See also id.* (acknowledging that COVID coverage claims will be brought concerning other types of insurance policies); Jeff Sistrunk, *4 Coronavirus Developments Insurance Lawyers Should Know*, LAW360 (Mar. 20, 2020, 5:31 PM), <https://www.law360.com/articles/1255415/4-coronavirus-developments-insurance-lawyers-should-know> (listing the four important topics with subheadings as follows: “Insurers Spurn Call to Expand Business Interruption Coverage”; “NJ Lawmakers Mull Business Interruption Coverage Bill”; “House Lawmakers Press Travel Insurers on Claim Denials”; and “Calif. Regulator Seeks ‘Grace Period’ on Policy Cancellations”).

Insurers also consistently maintained that they would go broke and the insurance industry would be destroyed if carriers were forced to provide COVID coverage.⁵⁴ Risk managers and brokers, who are normally viewed as representing policyholder interests, tended to align with insurers, presumably because they feared disruption of the industry more than denial of coverage to policyholder employers or clients, many of which were likely to fail in the absence of prompt payment of insurance coverage.⁵⁵ Regulators also sided with insurers,⁵⁶ in our view, without sufficient reflection and consciousness of their mission as public servants.⁵⁷ These entities also seemed to overlook the likely perception of policyholders who expected (perhaps with sufficient objective reasonableness to obtain coverage) that the premiums they had paid for years for something deemed “business interruption” coverage would provide at least some assistance in the face of the largest business interruption of this type in a century.⁵⁸

⁵⁴ See, e.g., Kate Smith, *Pandemic Partnerships*, BEST’S REV. (Aug. 2020), news.ambest.com/articlecontent.aspx?refnum=299433&altsrc=43 (“Even with pandemic excluded from most business interruption policies, COVID-19 is expected to cost the insurance industry more than \$200 billion.”). But see Kate Smith, *The COVID Catastrophe*, BEST’S REV. (June 2020), <http://news.ambest.com/ArticleContent.aspx?pc=1009&altsrc=158&refnum=297254> (stating that “The COVID-19 outbreak could dwarf other catastrophe losses insurers have seen. . . .” but also noting that “[e]ven with the economic downturn, the insurance industry, on the whole, is in a strong capital position”). Carman, *supra* note 49. Accord, 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/nationa/2020/03/30/562738.htm>.

“Pandemics are an extraordinary catastrophe that can impact nearly every economy in the world, so it is hard to predict and manage the risk,” Sean Kevelighan, CEO of the Insurance Information Institute, stated. “Pandemic-caused losses are excluded from standard business interruption policies because they impact all business, all at the same time.”

Moreover, he said, the exclusion for pandemic-caused losses have been incorporated into standard business interruption policies for years.

Simpson, *supra*. See also Elizabeth Pineau & Maya Nikolaeva, *Insurer AXA Must Pay Restaurant’s COVID-19 Losses*, French Court Rules, REUTERS (May 22, 2020, 2:08 PM) <https://uk.reuters.com/article/us-health-coronavirus-insurance-axa/french-court-orders-insurer-axa-to-pay-restaurants-covid-19-losses-idUKKBN22Y2LR>. (“AXA reacts to decision by stating that it would appeal.”); Elizabeth Blosfield, *Despite Insurance Industry*

Concerns, More States Introduce COVID-19 BI Bills, INS. J. (Apr. 15, 2020), <https://www.insurancejournal.com/news/east/2020/04/15/564920.htm>.

“I think in layman’s terms, [legislation forcing payment of covid claims] would implode the industry,” Doug Jones, managing director of JAG Insurance Group, told *Insurance Journal* in a March webinar on business interruption and the coronavirus. “At the end of the day, the ripple effect of what that would cause down the road, and I’m talking short-term, not long-term; I’m talking about months from now, not years from now. It would be difficult for anybody to buy any type of insurance.”

Additional concerns among the insurance industry about this type of legislation surround The Contracts Clause in the U.S. Constitution, which places limitations on states’ ability to interfere with private contracts.

“It’s just not constitutional,” Don Hayden, co-founder and partner of Mark Migdal & Hayden, added. “I mean, what you’re essentially doing is creating insurance where there is nothing. You’re essentially throwing out the underwriting and the risk evaluation that insurance companies have done before writing a policy and saying, ‘You have to cover this. Even though you had expressly said that you would not cover it in your exclusion and in your insurance agreement.’”

Blosfield, *supra*.

⁵⁵ The tone of reporting appears to suggest that this element of the risk management and insurance community tacitly accepted widespread lack of coverage and economic danger to the insurance industry. As reported in one publication geared toward risk managers and brokers only 14 percent of surveyed risk managers and corporate insurance buyers planning to add new pandemic coverage. Andy Toh, *2020 Property Insurance Survey*, BUS. INS. 31 (June 2020). But 27 percent state that their current policies provide coverage related to diseases and epidemics while 49 percent deny having such coverage. *Id.* 41 percent of policyholders are expecting to make a pandemic claim, with 28 percent not planning such claims. *Id.*

67% of risk professional expect direct business interruption losses due to COVID-19. 77% expect the losses to be over \$1 million, of which 36% estimate losses to be more than \$25 million. 91% support a federal backstop for pandemic risk insurance similar to the Terrorism Risk Insurance Act. 65% of risk professionals would be willing to pay up to 5% more in premium for pandemic risk insurance coverage.

Claire Wilkinson, *Pressure Builds for Pandemic Backstop*, BUS. INS. 4 (May 2020). A draft Pandemic Risk Insurance Act of 2020 then circulating “would establish a federal backstop

for business interruption losses resulting from a future pandemic and would be triggered when insurance industry losses exceed a \$250 million threshold and capped at \$500 billion . . .” *Id.* “The growing momentum among insurance buyers and others for a government backstop to cover pandemic risks comes as insurers continue to maintain that most commercial property policies do not provide coverage for business interruption losses arising from the COVID-19 pandemic.” *Id.*

The question of whether a potential Pandemic Risk Insurance Act should be retroactive to the to the COVID-19 pandemic is an issue RIMS is still exploring, she [Mary Roth, RIMS CEO] said

. . . .

RIMS doesn’t want to ‘get into the business of’ altering contractual agreements that were ‘legally and freely entered into,’ said Whitney Craig, RIMS government relations director.

‘We would be very wary of supporting legislation that has that. We don’t want to bankrupt an industry that we as risk managers rely on,’ Ms. Craig said.

Id.

⁵⁶ See Leslie Scism, *Companies Hit by Covid-19 Want Insurance Payouts—Insurers Say No*, WALL ST. J. (June 30, 2020, 10:24 AM), <https://www.wsj.com/articles/companies-hit-by-covid-19-want-insurance-payouts-insurers-say-no-11593527047>. (“Insurers have some conceptual backing for their stance that business-interruption coverage isn’t meant for pandemics. The National Association of Insurance Commissioners, a standards-setting group for state regulators, says pandemics violate a cardinal principle of insurance, which is that large numbers of policyholders pool their risk to fund a few losses at any one time. In a pandemic, almost all policyholders suffer losses, and simultaneously.”).

⁵⁷ We appreciate NAIC’s concern that large coverage obligations could imperil the insurance system generally. But we remain more than a little puzzled that a regulatory group charged with protecting the public seems uninterested in supporting policyholders, particularly small business policyholders, in cases where there is arguable coverage. Insurers are in the business of risk transfer and insurance is one of the largest, most profitable industries in the world. Although it may be regrettable if an insurance company (or several or dozens) should fail, we consider it at least equally regrettable if policyholders who paid for coverage fail after wrongfully being denied coverage due to fears of bankrupting the insurance industry. Past insurer claims that their financial sky was falling proved to be exaggerated, something regulators should know and appreciate. See Jeffrey W. Stempel, *Assessing the Coverage Carnage: Asbestos Liability and Insurance After Three Decades of Dispute*, 12 CONN INS. L. J. 349, 353 (2006) (citing asbestos mass torts, despite the massive costs, estimated to have been only a three percent drag on insurer earnings).

In addition, we note that there is more than a little disconnect between NAIC as an entity tending to back the insurer mantra that “everyone knows pandemics are not insured” while

As noted, insurers or their counsel campaigned in earnest to label COVID an uncovered loss in both the general media and what might be termed the insurance trade media.⁵⁹ Part of the insurer effort to disparage coverage claims was the continued assertion that nearly all property insurance with business interruption coverage also contained clear virus exclusions precluding coverage.⁶⁰ This claim may be overstated. In the COVID coverage decisions to date, more than twenty percent of the policies at issue lacked a virus exclusion.⁶¹ Thus, even if the insurer contention that “most” property policies have such an exclusion, there appear to be

some individual state commissioners have gone in the opposite direction and attempted to force coverage irrespective of the language, intent, and purpose of particular policies. Our preferred position is between these two extremes.

⁵⁸ Matthew Lerner, *Policy Wordings Tested by Interruption Losses*, BUS. INS. 27 (May 2020).

Business interruption claims have fast become one of the principal legal battlefronts between commercial policyholders and insurers since the outbreak of the coronavirus pandemic.

Dozens of businesses, including numerous restaurants, have filed state and federal lawsuits against their insurers seeking declaratory rulings that income lost due to the government-mandated lockdowns is covered by insurance.

Insurers argue that many of the policies include exclusions for virus related losses and most of those that don't still won't cover lost income because physical damage to an insured property must occur to trigger claims payments.

Id.

⁵⁹ See CARRIER MGMT, *supra* note 44. See, e.g., Larry P. Schiffer, *Does the Novel Coronavirus Cause Direct Physical Loss of or Damage to Property?*, X NAT'L L. REV. 114 (Apr. 13, 2020), <https://www.natlawreview.com/article/does-novel-coronavirus-cause-direct-physical-loss-or-damage-to-property> (concluding that “[b]ased on the case law and the nature of the novel coronavirus, it appears unlikely that courts will conclude that viral contamination causes ‘direct physical loss.’”).

⁶⁰ Erin Ayers, *Insurers Decline Congress' Request to Pay All COVID-19 Business Interruption Losses*, ADVISEN FRONT PAGE NEWS (Mar. 23, 2020), https://www.advisen.com/tools/fpnproc/fpns/articles_new_1/P/363166470.html?rid=363166470&list_id=1 (“The vast majority of commercial property insurance policies contain not only direct physical damage, but also contain exclusions for viral/bacterial contamination due to the unpredictability of the risk.”).

⁶¹ See Baker, *supra*, note 10 (visited Oct. 21, 2020).

a large number of cases where policyholders have a substantially better chance of success than suggested by the insurance industry shibboleth of no coverage.

As part of its aggressive “no coverage” strategy, insurers did more than rest on the virus exclusion (which we agree can be a strong defense to coverage where the policy actually contains such a limitation) even when policies at issue contained the exclusion. Rather, insurers dug in on a remarkable first line of defense: that COVID did not and could not cause *any* direct physical loss or damage to property, which is a prerequisite to most commercial property and business interruption coverage.

[T]he mere **threat** of COVID-19 at the property or the **preemptive closure** of businesses due to the threat of COVID-19 should not be considered “direct physical loss or damage” to property. Additionally, neither **government-ordered closure** of businesses nor a **government’s official statement** regarding COVID-19 damage at properties generally should be sufficient for a court to find “direct physical loss or damage” to a particular property. However, those insured that can prove the actual presence of the virus on the surfaces of or otherwise in covered property may be able to establish “direct physical loss or damage” to property.⁶²

⁶² Edward M. Koch & Elizabeth C. Dolce, “*Direct Physical Loss or Damage*”: *The Gatekeeper to Property Insurance Coverage and COVID-19*, WHITE & WILLIAMS (Mar. 24, 2020), <https://www.whiteandwilliams.com/resources-alerts-Direct-Physical-Loss-or-Damage-The-Gatekeeper-to-Property-Insurance-Coverage-and-COVID-19.html> (emphasis in original). *Accord*, Randy Maniloff, *First Coronavirus Coverage Suit Filed for Business Interruption*, COVERAGE OPS. (Mar. 17, 2020), <https://www.coverageopinions.info/Vol9Issue2/FirstCOVIDcase.html>.

In general, and putting aside any precise policy language that may apply, one critical requirement, for the potential availability of business interruption insurance, is that there has been physical damage to property. This is either to the insured’s own covered premises, or, for purposes of losses on account of the actions of civil authority, another’s premises.

Either way, it will be necessary [for policyholders] to prove that the presence of the coronavirus causes physical loss to the affected premises. Thus, we can expect to see arguments, like the one being made [in the first filed case], that there has been physical loss to a premises because the virus stays on the surface of objects or materials—‘fomites’—for some amount of time.

[A]ny legislative action to compel insurers to pay business interruption claims arising out of the coronavirus [would be] breathtaking. To achieve their result, lawmakers would not only obviate the “virus” exclusion, but, in addition, the fundamental ‘physical damage’ requirement of business interruption coverage.

Maniloff, *supra*. See Randy J. Maniloff & Margo Meta, *New DJ Takes Different Tack on Business Interruption Coverage for COVID-19*, WHITE & WILLIAMS (Mar. 27, 2020) <https://www.whiteandwilliams.com/resources-alerts-New-DJ-Takes-Different-Tack-on-Business-Interruption-Coverage-for-COVID-19.html> (describing French Laundry Partners, LP v. Hartford Fire Ins. Co. case seeking declaration of coverage and noting that loss of business use was caused primarily by government ordered suspension rather than tangible property destruction. Maniloff & Meta are skeptical of the claim and argue that “in general, to implicate ‘Civil Authority’ coverage, there must be physical damage to property other than the covered premises. But businesses have been closed principally to foster social distancing and not on account of the presence of the virus inside a premises.” Maniloff & Meta also note that French Laundry is represented by the same attorney as policyholder Oceana Grill, a New Orleans restaurant, that filed the nation’s first COVID coverage case).

Policyholders will sometimes be asserting that insurers, that issued immediate denials for [COVID]-19 claims, did so in bad faith on account of an alleged failure to investigate the claim under applicable law[.]

One business interruption coverage theory in particular is getting attention from policyholders [what the author dubs the “public space” theory that the ubiquitous COVID-19 virus has filled the air and attached to tangible property, making it physically damaged—which in turn means that the injury trigger of the typical policy is satisfied].

Another business interruption coverage issue has not received a lot of attention. The biggest push for coverage has been for businesses that have been shut down by order of a civil authority. However, even if owed, such coverage is likely quite limited. Civil authority-based business interruption coverage, per policy language, is usually available for only up to four weeks.

The restaurant industry is beating the loudest drum in the pursuit of business interruption coverage.

Randy Maniloff, *Covid-19 And Coverage: Four Weeks and Four Takeaways*, COVERAGE OPS. (Apr. 5, 2020), <https://www.coverageopinions.info/COVID19ISSUE/COVIDandCoverage.html>. These comments are but from one law firm, albeit a particularly large and prestigious insurer-side firm. Many other lawyers representing insurers wrote in the same vein in various publications and on law firm and other websites.

The New Jersey legislature has premised its actions on the need to take out the “virus” exclusion from business interruption policies. But that’s a tonsillectomy compared to what it is really doing—removing the heart of the policy.⁶³

Although there were of course stories highlighting the difficulties faced by businesses and other policyholders due to the COVID pandemic,⁶⁴ insurers succeeded in simultaneously pooch-pooching the merits of business interruption claims and painting a scenario of risk management ruin if they were required (either by legislatures or courts) to provide coverage they purportedly never agreed to provide.⁶⁵

⁶³ Randy Maniloff & Edward Koch, *COVID-19: The Real Operation of New Jersey’s Proposed Insurance Legislation*, COVERAGE OPS. (Mar. 19, 2020), <https://www.coverageopinions.info/Vol9Issue2/COVIDOperation.html>.

⁶⁴ See, e.g., Suzanne Barlyn, *U.S. University Insured Chinese Student Tuition Against Virus. Then COVID-19 Hit*, REUTERS: BUS. NEWS (Aug. 17, 2020, 6:25 AM), <https://in.reuters.com/article/us-health-coronavirus-university-insuran-idINKCN25D15P> (reporting that despite paying annual premium of \$424,000 for coverage, University of Illinois found harder market emerging in early 2020, with only limited coverage and premiums increasing to nearly \$2 million).

⁶⁵ See, e.g., Lucca De Paoli & Franz Wild, *Don’t Be Tricky With Virus Clams, Watchdog Warns U.K. Insurers*, BLOOMBERG (Mar. 19, 2020, 10:49 AM), <https://www.bloomberg.com/news/articles/2020-03-19/u-k-fca-requests-coronavirus-contingency-plans-from-insurers> (noting that the U.K. Financial Conduct Authority [FCA] has stated that “insurers must also [like policyholders] be adaptable” in lieu of the problems posed by COVID and must take care to communicate clearly and nondeceptively with policyholder claimants).

The industry has worked to reduce its exposure to pandemics since the 2003 outbreak of SARS in Asia. Over the years, they’ve tightened up their policies, inserting communicable-disease exclusions to prevent potential losses. That means consumers and companies will bear the brunt of the cost for disruptions related to the virus—which has infected more than 217,000 people worldwide and left at least 9,000 dead.

Id. Laura Foggan & Michael A. Sabino, *Feeling the Effect*, BEST’S REV. (May 2020), <http://news.ambest.com/articlecontent.aspx?pc=1009&AltSrc=108&refnum=296290> (predicting claims across various lines of insurance, particularly property insurance with business interruption coverage, and stating that “[i]t is essential that legislators—and the courts—recognize the limits of insurance in accordance with policy terms and exclusions.”); Cheri Trites-Versluis, *Renewal Language Scrutiny: COVID-19 Litigation is Generating a*

Policyholder counsel noted and criticized the perceived insurer public relations campaign.⁶⁶ And some in the industry had reservations about the industry's aggressive and rather blanket opposition to coverage.⁶⁷ Some observers also

Resurrection of Arguments Asserted at the Height of Asbestos and Silica Coverage Litigation, NAT'L UNDERWRITER 1, 42–43 (Sep. 2020), https://www.sapiens.com/wp-content/uploads/2020/09/NUP_0920-dl.pdf (citing *Above It All Roofing & Construction, Inc. v. Security Nat'l Insurance Co.* and *RLI Insurance v. Gonzalez*, which found asbestos to be a “pollutant” within policy’s pollution exclusion, and *Garamendi v. Golden Eagle Ins. Co.*, which found silica dust to be a pollutant, implying similar approach apt for COVID cases). Mr. Trites-Versluis is identified in the article as “the director of policy analysis for RiskGenius,” the same company whose CEO is extensively quoted in the media disparaging policyholder claims for business interruption coverage. *Id.*

⁶⁶ See, e.g., 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/nationa/2020/03/30/562738.htm> (quoting policyholder attorney John Houghtaling II) (“To avoid payments for a civil authority shut down the insurance industry is pushing out deceptive propaganda that the virus does not cause a dangerous condition to property.’ [] ‘This is a lie, it’s untrue factually and legally.’”).

⁶⁷ See, e.g., Kate Smith, *Pandemic Partnerships*, BEST’S REV. (Aug. 2020), <http://news.ambest.com/articlecontent.aspx?refnum=299433&altsrc=43>.

Stephen Catlin’s mobile buzzed nonstop. It was early April, and he had just written a thought leadership piece on the need for a swift and coherent insurance industry response to pandemic. Frustrated by the falling reputation of the industry and the “clumsy” comments and defensive posture of some insurers, the Convex CEO called on the insurance community to be proactive in finding a long-term solution to pandemic. His message struck a chord.

Id. Mr. Catlin is a 50-year veteran of the insurance industry and founder of an insurer and consulting group as well as a member of the International Insurance Society Insurance Hall of Fame, he elaborated on his views in an Op-Ed piece.

[First,] insurers and brokers should do a much better job when communicating with the public and with governments, especially regarding the true value that insurance provides. Secondly, it’s in the nature of our business to focus on the past, and therefore we often neglect giving adequate thought about the future. Finally, I regret that—when an event occurs that causes extreme human suffering—the insurance industry often views the event primarily in terms of dollars and cents.

wondered whether the more receptive negotiable attitude of some European insurers might be more productive.⁶⁸ But in the main, American insurers were on the

Over the years, we have identified a list of potential ‘Big Ones,’ events that could cause severe financial stress for insurers and reinsurers. These events range from a Category 5 hurricane that strikes at the heart of Miami to a powerful earthquake devastating Los Angeles or Tokyo. Over the past two decades, an extreme act of terrorism was added to the list.

However, until recently, relatively few insurers would have guessed that a pandemic could be the costliest event the industry could face. I believe that neither governments nor insurers had truly contemplated the economic consequences of a pandemic, in part because the financial impact of such an event is extremely difficult to model.

Unfortunately, the coronavirus has amplified some of the things that I believe the industry often does poorly.

It is not my place to comment on whether individual policies provide coverage for potential claims arising from COVID-19. However, I can say that I was dismayed at the defensive nature of some insurers’ statements as the crisis began to expand. There always has been widespread public distrust—if not disdain—for the insurance industry, and the comments uttered by some insurers did not help our relationships with governments and our customers.

As I often have said, it’s not what you say, but how you say it.

Now that it appears that COVID-19 may be the costliest event in the industry’s history, we must begin to think ahead. Will society face pandemics of a similar magnitude in years to come? While I hope we will not, I suspect that we will. If so, what should be the role of the insurance industry? Should we simply adopt policy wording that make it crystal clear that insurance coverage will be of little benefit to policyholders for future losses arising from a pandemic? Or should we think about how insurers can play a meaningful role in economic recovery while still protecting the industry’s capital base?

Stephen Catlin, *Setting the Right Tone: Insurers Must Clarify the Role Insurances Can Play in Recovering from Future Pandemics*, BEST’S REV. (Aug. 2020), <http://news.ambest.com/articlecontent.aspx?refnum=299423&altsrc=43>.

⁶⁸ See, e.g., Sergio F. Oehninger & Daniel Hentschel, *Will European Insurers’ Positive Response to COVID-19 Claims Influence US Insurers?*, HUNTON INS. RECOVERY BLOG (July 13, 2020), <https://www.huntoninsurancerecoveryblog.com/2020/07/articles/business-interruption/will-european-insurers-positive-response-to-covid-19-claims-influence-us-insurers/>.

The positive response in Europe is in stark contrast with the insurance industry's preliminary positions in the United States. The headlines on this side of the hemisphere demonstrate certain insurers' attempts to avoid liability for COVID-19 related losses, despite accepting billions in premiums from policyholders in exchange for broad coverage promises.

In addition, the regulatory structure abroad may make for more collaborative attack on coverage problems. Describing the role of the Financial Conduct Authority [FCA] in England regarding COVID coverage, one article noted:

Business interruption insurance generally only covers losses where a company is forced to close temporarily from property damage, like a fire. The FCA said those types of policies did not offer protection from pandemics, but it was interested in the minority that have so-called nondamage extensions.

Those extensions can protect against the closure of a property either from the outbreak of an infectious disease or by the denial of access by a public authority.

The FCA said it had examined more than 500 policies from 40 insurers and narrowed down its selection to just 17 policy wordings it felt were both the most contentious and representative.

Id. Martin Croucher, *FCA Picks 8 Insurers for Pandemic Coverage Test Case*, LAW360 (June 1, 2020), <https://www.law360.com/articles/127811> (“Colin Edelman QC of Devereux Chambers, Leigh-Ann Mulcahy QC and Richard Coleman QC of Fountain Court Chambers will represent the FCA in the case, instructed by Herbert Smith Freehills LLP.”). For additional background on the Financial Conduct Authority, see Daniel Schwarcz, *Redesigning Consumer Dispute Resolution: A Case Study of the British and American Approaches to Insurance Claims Conflict*, 83 TUL. L. REV. 735 (2009).

In the test case litigation in the U.K., policyholders largely prevailed, but upon somewhat different issues and policy language than has to date been litigated in the United States. See *The Fin. Conduct Auth. v. Arch In. (UK)* [2020] EWHC 2448 (Comm) (UK).

In addition, continental insurers may have been nudged toward a less confrontational style due to judicial decisions supporting policyholders. See, e.g., Oehninger, *supra* (noting that after initially stating it would appeal trial court ruling requiring it to provide business interruption coverage to policyholder with lost revenue due to COVID-19, AXA has relented and agreed to provide coverage; “AXA reportedly has already agreed to pay over 200 COVID-19 related claims.”). See also *id.* (“Despite initially denying liability, Swiss insurance company, Helvetia Insurance, announced that most of its policyholders in the hospitality industry have accepted settlements following coverage disputes for COVID-19 related business interruption losses. The settlements reportedly included policyholders from Switzerland, Austria, and Germany.”).

defensive. COVID business interruption claims were to be strongly resisted, even where policies lacked a virus exclusion, on the ground that these claims failed to satisfy the “physical loss or damage” trigger for coverage. And, to perhaps state the obvious, insurers were denying COVID claims.⁶⁹ Unsurprisingly, this produced litigation by upset policyholders on the brink of financial ruin.⁷⁰

⁶⁹ For an example of rather brusque insurer denial of coverage, *see* Letter from Susan Sabouni, Property Claims Supervisor, Philadelphia Indemnity Insurance Company, to Steve Powell, Chief Officer of Policyholder, The Goddard School (May 7, 2020) (on file with author). The Letter repeats portions of the policy verbatim for nine pages and then simply states that the insurer “considers the issues outlined above to be dispositive of coverage” and that the insurer’s “Policy does not provide coverage to the Goddard School for the Claim” and thus “respectfully [?] declines coverage for the Claim” in connection with the school’s forced closure due to government order because of the COVID pandemic, even though the policy also contained a “Communicable Disease Endorsement.” *See id.* at 10. The insurer stated that the policyholder’s loss was “not ‘due to an outbreak of a ‘communicable disease’ . . . that caused[d] an actual illness” at the School. The insurer did, however, agree to “reimburse the Goddard School for the cost of disinfecting the insured premises due to reported symptoms of COVID-19 within the premises.” *Id.* at 10.

⁷⁰ *See* Randy Ellis, *Coronavirus in Oklahoma: Tribes Sue Insurance Companies Over Business Interruption Coverage*, THE OKLAHOMAN (Mar. 25, 2020 1:22 AM), <https://oklahoman.com/article/5658477/coronavirus-in-oklahoma> (describing Chickasaw and Choctaw nations suits involving various insurers); *Coronavirus Coverage Issues Loom: Policy Details Crucial to Determine Success of Commercial Claims*, BUS. INS. 4 (April 2020) (surveying possible COVID-related claims implicating Property Business Interruption insurance, Directors and Officers Liability insurance, Cyber Risk insurance, Medical Malpractice insurance, and Workers Compensation insurance); Joseph P. Monteleone, *COVID-19’s Management Liability Concerns*, INS. EXCH. AGENCY (Sept. 14, 2020), <https://www.ieagency.com/post/covid-19s-management-liability-insurance-concerns> (noting that COVID-related losses will prompt substantial coverage claims involving D&O Insurance, Transactional Risk, and EPL insurance as well as Property Insurance); Patricia Vowinkel, *An Insurance Journey: Significant Coronavirus-Related Losses and Legal Battles Over Coverage May Force Some Insurers to Rethink Their Strategic Game Plans*, BEST’S REV., 1 (May 2020); Bob Reville, *Making Waves: COVID-19 Reveals a Possible Future Upswell of Liabilities for Insurers*, BEST’S REV., 16 (Aug. 2020); Celeste Bott, *Coronavirus Litigation: The Week in Review*, LAW360 (Oct. 8, 2020 7:15 PM), <https://www.law360.com/articles/1318126/coronavirus-litigation-the-week-in-review> (summarizing recent legal developments, including several insurer wins; also noting that the “Judicial Panel on Multidistrict Litigation has centralized in Illinois over 30 lawsuits accusing Society Insurance Co. of wrongfully denying coverage for business losses during the COVID-19 pandemic, but declined to create MDLs to group similar cases against The Hartford, Travelers, Cincinnati Insurance Co., and Lloyd’s of London underwriters.”); Lauren Berg, *In-N-Out Sues Zurich To Cover COVID-19 Shutdown*, LAW360 (May 29, 2020

To be sure, policyholder counsel were not silent during the time of insurer pleas of poverty and assertion of absolute defenses to coverage. But they seemed to have reduced prominence in both insurance trade and lay media.⁷¹

10:56 PM), <https://www.law360.com/articles/1278397>.; *See also* Hannah Smith, *A Closer Look: Coronavirus Insurance Lawsuit Trends*, PROPERTY CASUALTY 360 (Sept. 4, 2020 12:00 AM), <https://www.propertycasualty360.com/2020/09/04/a-closer-look-coronavirus-insurance-lawsuit-trends/?slreturn=20210107191656> (“The main issue that courts must decide in addressing these claims is whether businesses whose operations were shut down during the crisis can demonstrate ‘direct physical loss or damage.’”) (describing several lawsuits where insurers had prevailed in motions to dismiss, including *French Laundry Partners, LP v. Hartford Fire Ins. Co.*, *In-N-Out Burgers v. Zurich American Ins. Co.*, and several claims where insurers had prevailed in motions to dismiss including *Plastic Surgeons of Lexington, PLLC v. Liberty Mut. Ins. and Ohio Sec. Ins. Co.* and noting that in *Gavrilides Management Co. v. Michigan Ins. Co.*, the “plaintiff alleged that the physical requirement of the policy was met because customers could not physically use the dine-in services. The judge denied this allegation, determining that in order to meet the requirement, the insured must show a physical alteration of the premises.”). *See also id.* (“So far, courts have ruled in favor of insurers in cases of business interruption coverage vs. COVID-19. But the vast majority of these cases are still yet to be seen.”). For additional examples of COVID coverage complaints, *see* Complaint and Demand for Jury Trial, Prime Time Sports Grill, Inc. v. DTW1991 Underwriting Ltd, No. 8:20-cv-00771-CEH-JSS (M.D. Fla. May 4, 2020); *see also*, Motion to Dismiss Pursuant to Rule 12(b)(6), *supra* (contending that plaintiff restaurant was not “ordered to close” by Florida Gov. Ron DeSantis Order of March 17, 2020 but was permitted to continue operating restaurant at fifty percent occupancy).

Insurers of course approve of the *Gavrilides Management* decision and were undoubtedly pleased that the insurance trade press has given prominent display to the case even though it is a “mere” state trial court case, albeit one of the first decisions in the area. *See* Wilson Elser, *Michigan Judge Rules Direct Physical Loss Required to Trigger Business Interruption Coverage*, LEXOLOGY (Jul. 23, 2020), <https://www.lexology.com/library/detail.aspx?g=a9de8e82-e549-44f9-83df-7b66cfd10009> (noting that “Judge [Joyce Draganchuk] stated that direct physical loss [of or damage to the property] must be something ‘with material existence . . . that alters the physical integrity of the property.’”).

⁷¹ *See, e.g.*, Christine Spinella Davis, *Business Interruption Coverage for COVID-19 Losses: You Can Satisfy the “Physical Loss or Damage” Requirement in Your Commercial Property Policy*, BRADLEY (Apr. 24, 2020), <https://www.itpaystobecovered.com/2020/04/business-interruption-coverage-for-covid-19-losses-you-can-satisfy-the-physical-loss-or-damage-requirement-in-your-commercial-property-policy> (“Temporary loss of use and loss of functionality alone may satisfy the physical loss or damage requirement in a property policy.”); Mark Packman & Jason Rubinstein, *COVID-19 Claims May Survive Insurers’ Physical Loss Defense*, LAW360 (Sept. 1, 2020), <https://www.law360.com/articles/1306134>

Because COVID-19 does not destroy or tangibly alter the structure of property, the insurers have asserted there is no coverage for claims arising from the pandemic. Initial decisions on this issue broke the insurance industry's way. But the litigation of disputes has barely begun. There is significant evidence to suggest there are many legal paths available to plaintiffs as they struggle with losses related to COVID-19. We explore the findings and implications to date.

Policyholder counsel, for example, argued:

In most property insurance policies, business interruption coverage is triggered when the property at issue suffers "direct physical loss or damage." Structural damage to the property, however, is not a requirement for coverage; proof that contamination or other relatively intangible conditions like bacteria, gases, and fumes that "rendered the insured property temporarily or permanently unusable or uninhabitable may support a finding that the loss was a physical loss to the insure property."

Additionally, many insurance policies include civil authority coverage, which covers losses that occur when government authorities restrict access to the area where a business is located or that the business depends on for its operations.

Many property insurance policies also provide contingent business interruption coverage, triggered by damage to or disruption of a business's suppliers, customers, or other key partners. While the policyholder itself need not be physically damaged, it does need to have coverage for the type of damage that affected its suppliers, business partners, or customers.

Packman & Rubinstein, *supra*. Pamela D. Hans & Marshall Gilinsky, *Insurance Coverage for Losses Stemming from the Coronavirus*, INS. J. (Feb. 26, 2020), <https://www.insurancejournal.com/news/national/2020/02/26/559383.htm> (citing *Mellin v. Northern Sec. Ins. Co.*, 115 A.3d 799, 805 (N.H. 2015) and also citing *Gregory Packaging, Inc. v. Travelers Prop. Cas. Co. of Am.*, 2014 U.S. Dist. LEXIS 165232, *15-17 (D.N.J. Nov. 25, 2014) "[C]ourts considering non-structural property damage claims have found that buildings rendered uninhabitable by dangerous gases or bacteria suffered direct physical loss or damage.").

Business owners are submitting claims for business interruption insurance losses, but many insurance companies' knee-jerk reaction is to deny. This has led to a proliferation of lawsuits. While the viability of these suits depends on each business's unique circumstances and policy language, the prospects look very good for many Pennsylvania business owners.

There has also been, in our view, something of a race-to-the-courthouse problem in that a number of the initial policyholder claims appear to be brought by counsel without substantial experience in insurance coverage litigation, something that more seasoned coverage lawyers noted with some dismay (along with voicing concerns that the efforts of some plaintiff counsel to consolidate proceedings was hurtful to the COVID coverage cause).⁷²

Many Pennsylvania businesses bought all-risk commercial property insurance policies that contain business interruption coverage. The coverage provisions are broad . . .

Many insurance companies will dispute that COVID-19 losses satisfy the direct physical loss or damage requirement. . . . Courts have rejected this view on numerous occasions in numerous contexts.

Patrick Campbell, Charles Casper & Brett Waldron, *Pa. Insureds' Path to Pandemic Biz Interruption Coverage*, LAW360 (May 19, 2020 5:50 PM), <https://www.law360.com/appellate/articles/1274214/pa-insureds-path-to-pandemic-buz-interruption-coverage> (also arguing that there should be coverage even if policy has virus exclusion due to rule that exclusions are construed narrowly and government shutdown orders rather than the virus itself are the cause of business interruption).

⁷² See, e.g., Chip Merlin, *What is Multidistrict Litigation (MDL) and Will It Impact Virus Business Income Claims?*, PROP. INS. COVERAGE L. BLOG (May 10, 2020), <https://www.propertyinsurancecoveragelaw.com/2020/05/articles/commercial-insurance-claims/what-is-multidistrict-litigation-mdl-and-will-it-impact> (writing by noted policyholder coverage attorney expresses some doubt about efficacy of consolidation). A large and prominent policyholder firm was less tentative and more critical of consolidation.

Savvy policyholders and experienced counsel may also find consolidated and class action proceedings ill-suited to the resolution of insurance coverage disputes. That is because claim-specific differences are likely to predominate over common issues in three fundamental respects: (1) the specific facts of any particular insurance claim, and how that claim is best presented and substantiated, often vary greatly from claim to claim, place to place, and industry to industry; (2) the specific language of any given insurance policy is critical, and there can be enormous variation in policy language on the material issues implicated by COVID-19; and (3) insurance coverage is a matter of state law, which varies widely across jurisdictions on issues of importance for many policyholders.

For these reasons, sophisticated insureds should carefully review their own insurance policies, claims, and circumstances before signing on to any

As discussed in the next section, we take issue with the insurance industry's rush to judgment opposing COVID-related coverage across the board. We also are concerned that insurers are exaggerating both their potential financial responsibility if COVID coverage claims succeed and the industry's purported inability to absorb such claims.

First, the estimated costs. Insurers have suggested that if covered, the costs of business interruption claims would range as high as \$800 billion per month.⁷³ But

of the current efforts to aggregate coronavirus-related insurance cases into MDL or class action proceedings.

David Goodwin, Allan B. Moore & Rani Gupta, *Policyholders Beware: The Risks of Multi-District and Class Action Treatment of COVID-19 Insurance Claims*, COVINGTON, 1–2 (May 4, 2020), <https://www.cov.com/-/media/files/corporate/publications/2020/05/policyholders-beware-the-risks-of-multidistrict-and-class-action-treatment-of-covid-19-insurance-claims.pdf>.

Strong claims should be timely noticed and pursued aggressively by experienced insurance coverage counsel, particularly if insurers do not meet their obligations to pay promptly. Decisions to pursue coverage litigation must take into account the most favorable jurisdictions, procedures, and timing to maximize recovery for policyholders affected by COVID-19. In knowledgeable counsel is able to litigate the strongest claims first, those cases will set appropriate precedents that will establish insureds' rights to recover COVID-19 losses and benefit other policyholders.

Id. at 5.

In addition, despite being defendants, insurers have considerable power to shape early case outcomes by making motions to dismiss when presented with favorable facts, policy language, or courts while simply answering the complaint when faced with unfavorable facts, policy language or tribunals, thereby delaying any legal rulings from these less favorable forums until the industry could accumulated the momentum of early Rule 12 victories.

⁷³ As reported in one prominent industry periodical:

It's hard to quantify the full financial impact COVID-19 will have on the industry. But one thing is certain, this pandemic is on track to become the largest event in insurance history.

"It is truly a catastrophic event the proportion of which we have not seen before," Stefan Holzberger, chief rating officer for AM Best, said. "The breadth and depth of the event, how it is affecting multiple

geographics and multiple segments of the insurance market—this is really something that dwarfs the other major events in recent history.”

...

And yet, the insurance industry has been prepared to handle this event.

...

There is a caveat to this, however. The industry’s ability to absorb the impact of COVID-19 hinges on business interruption. As of early May, seven states had introduced legislation requiring insurers to provide retroactive business interruption coverage, in some cases regardless of whether policies included a virus exclusion, as most do.

If forced to pay retroactive BI, the insurance industry could be facing losses of \$150 billion to \$200 billion per month, according to the Best’s Commentary, *Legislation to Nullify BI Exclusions Poses Existential Threat to P/C Insurers*. The Insurance Information Institute’s estimates are even higher. The III [Insurance Information Institute] forecasts costs of up to \$380 billion per month, which it said would “break” the insurance industry within months. That scenario, however, is unlikely [because of lack of coverage.]

If you take business interruption out of the equation, the industry as a whole is on solid financial footing.

Kate Smith, *The COVID Catastrophe: The Global Pandemic is on Track to be the Costliest Event in Insurance History. It’s also a Defining Moment for the Industry Special Risk Section Sponsored by Lexington Insurance*, BEST’S REV. (Jun. 2020), <http://news.ambest.com/articlecontent.aspx?refnum=297254&altsrc=123>. See also Robert Hartwig, Greg Niehaus & Joseph Qui, *Insurance for Economic Losses Caused by Pandemics*, 45 Geneva Risk and Ins. Rev. 134, 135 (2020) (estimating losses at one trillion dollars per month for business interruption alone).

We like hyperbole as well as the next authors, but we think it is a bit much to suggest that possible business interruption coverage would “dwarf” the financial consequences of major insurance events such as the asbestos mass tort or pollution claims. We are not dismissive of the potential magnitude of COVID claims but remain concerned that the insurance industry has been a bit cavalier in suggesting such large losses and generally wailing gloom and doom in the event of coverage. It may be a good public relations strategy that will gain sympathy from the courts but strikes us as overblown. And, as discussed later in the article, there is something concerning about attempts to convince courts and policymakers that insurers are too vulnerable to be saddled with COVID losses when the alternative is saddling much more vulnerable small businesses with these losses. If that is the fate decreed by contractual agreement, perhaps there is no escape (save for invocation of reasonable expectations, unconscionability, and public policy canons for construing those

at this juncture, we have not seen any detailing of this estimate or the methodology behind it. We remain skeptical, particularly so in light of the commonly found sublimits (either temporable or monetary) on coverage for business interruption occasioned by government order that insurers contend is contained in most policies and which appears popular in policy forms. One article provides a flavor of the industry's tone.

The Insurance Information Institute and American Property Casualty Insurance Association place the estimates much higher: The APCA forecast losses of up to \$668 billion per month, while the III estimated retroactive BI could cost the industry up to \$380 billion per month. "That's an industry-breaking event," James Lynch, chief actuary for the II, said. "That would break the industry in two directions. One, the financial load it would place on companies to have to pay claims they had priced the business for, and had specifically excluded, would create financial ruin. Moreover, that intervention into clear policy language would call into question the entire insurance business model."

....

"They're trying to make the case that they're shutting down because of physical loss and damage from the virus," said RiskGenius CEO Chris Cheatham, whose company uses software to help insurers evaluate policy language. "That's not an accident. That's not how people talk."

Bob Hartwig, director of the Risk and Uncertainty Management Center at the University of South Carolina's Darla Moore School of Business, said politicians were fed such language from plaintiffs' attorney groups who are "looking at this as a potentially huge payday."

....

"The State of New York cannot alter the laws of physics to satisfy its trial lawyer masters," Hartwig said. "That's essentially what happened. They developed this language in an attempt to overrule the virus exclusion."

"All legal scholars agree this will fail a Constitutional test. There's no question about it."

contracts) from this bothersome result. But, as discussed later, the insurance industry's extreme anti-coverage position is incorrect.

The battle over business interruption will, without doubt, make its way into the courts. And most agree the courts will side with insurance companies.

“The exclusion for viruses is not an ambiguous one,” Lynch said. “It’s an exclusion of loss due to virus or bacteria. When it was filed, the filing specifically mentioned the potential for a pandemic similar to SARS CoV-1. And the current pandemic is SARS CoV-2. So I don’t think there’s a lot of ambiguity here about what the exclusion was meant to exclude.

Stefan Holzberger, chief rating officer of AM Best, agreed.

“Those well-defined, long-instituted, regulator-approved exclusions for pandemics or viruses should hold,” Holzberger said. “The business interruption policies that have that exclusion, which is the vast majority in the U.S., should not have to honor claims associated with a loss of revenue related to COVID-19.

[Holzberger further predicted that if legislation negating virus exclusions was enacted and upheld in court] we would see widespread insolvency because the magnitude of lost revenue in relation to the capital surplus is so great. The insurance industry could not bear those losses. Which is why they weren’t covered in the first place.”⁷⁴

⁷⁴ Smith, *supra* note 73. Best’s Review loved the inflammatory quote about trial lawyers so much, it was emphasized in a pull-quote from the sidebar in large print, complete with a 20-year-old picture of Professor Hartwig, a former insurer lobbyist before entering academia.

The property/casualty industry estimates that business interruption losses from the coronavirus just for small businesses in the U.S. could be between \$220-\$383 billion per month—or a quarter to half of total industry surplus available to pay all P/C claims.

David A. Sampson, president and CEO of the American Property Casualty Insurance Association, said the \$200-383 billion per month loss estimate assumes there could be as many as 30 million claims from small business that suffered coronavirus-related losses. According to APCIA, that is 10 times the most claims ever handled by the industry in one year. The industry processed more than three million from the 2005 hurricane season that included Hurricanes Katrina, Rita, Wilma and several other storms, the trade group said.

Second, as to insurer ability to pay: if the insurance industry were a sovereign nation, it would have the third largest economy in the world.⁷⁵ Insurers receive hundreds of billions of dollars in premium income alone each year,⁷⁶ which in turn has usually been invested for some time before the funds are required to be paid in claims. Insurance is generally a more consistently profitable business than most, advantaged by its ability to amass large sums that can be invested, perhaps for years (or decades in the case of liability insurance) before payment. This “float,” as Warren Buffett calls it, enables even insurers with weak underwriting to survive and even thrive. Insurers with sound underwriting and investment do particularly well.⁷⁷

So, what of the effect of the insurance industry’s initial media messaging? We are not in a position to pinpoint entirely the impact of the industry’s anti-coverage messaging on legal developments to date. We cannot count the claims that

Sampson said the combined capital of the top business insurance underwriters represents only a fraction of the amount that might be expected in coronavirus losses from just small businesses.

“Insurance stability is especially important in a time of increased natural catastrophes. Spring flood season is underway, hurricane season is around the corner, and wildfires pose a threat year-round,” he said.

Simpson, *supra* note 66.

⁷⁵ See Richard V. Ericson, Aaron Doyle & Dean Barry, *Insurance as Governance*, 1, 4 (2003) (noting the degree to which insurance shapes behavior by setting contours of coverage and conduct in order to obtain insurance).

⁷⁶ Ranked by 2019 net premiums written, the smallest of the Top 200 (HCI Ins. Group) collects \$228,488,000 in annual premiums; 82 insurers have \$1 billion or more in annual premium income. See *Top 200 U.S. Property/Casualty Writers*, BEST’S REV. (July 2020), http://www.ambest.com/review/displaychart.aspx?Record_Code=274586&src=43&_ga=2.171650912.1123988532.1612739172-73892297.1612560642. Some household name insurers have astounding volumes of premium income, e.g.: State Farm (\$65.1 billion); Berkshire Hathaway (\$53.75 billion); Progressive (\$37.6 billion); Allstate (\$34 billion); Liberty Mutual (\$32.3 billion); Travelers (\$27.2 billion); USAA (\$23 billion); Chubb INA (\$18.2 billion); Nationwide (\$18 billion); AIG (\$14.8 billion); Farmers (\$14.5 billion); Harford (\$11.9 billion); American Family (\$11.8 billion); Auto-Owners (\$8.6 billion); Fairfax (\$7.6 billion); Erie (\$7.5 billion). *Id.* Cincinnati Insurance, a defendant in several prominent COVID coverage actions, received almost \$5.4 billion in premiums in 2019. *Id.*

⁷⁷ See Jeffrey W. Stempel, Erik S. Knutsen & Peter N. Swisher, *Principles of Insurance Law* § 1.06 (5th ed. 2020) (“A Note on Insurer Operations”); Stempel & Knutsen, *supra* note 33, at § 1.01 (describing insurer operations, using in part description provided by Buffett (who is typically ranked as one of the world’s ten richest people) in his annual letter to Berkshire Hathaway shareholders; Berkshire’s success, according to Buffett, is due in large part to investment funds generated by its insurance and reinsurance operations).

were not filed because a business or a business' lawyer read in the newspaper that "COVID claims are not covered." Nor can we precisely discern the effect on judges as the majority of COVID-related claims were dismissed in favor of insurers at the pleadings stage (though we find that result quizzical). We have yet to learn the effect of the messaging on lay juries, as these cases have not yet made it far enough in litigation (because most are bounced out on the pleadings alone).

But we are able to say that perhaps it is more influential to get out in front of a story and control the narrative than to be correct. If nearly every insurance trade publication, lawyers' publication and popular news press sees the same message, surely there must be some even subliminal effect on how one approaches the insurance coverage question for COVID cases. Moreover, and most concerning to us, there appear to be absolutely no ramifications if the message proffered in the media is actually incorrect! Are we entering a new phase of insurer public relations tactics that are, at least in part, designed with a motive to affect coverage results in legal cases?

In Part III below, we explain how the main coverage question of "direct physical loss or damage" is counter to the main thrust of the insurance industry's message in the media to date. We conclude with our thoughts as to where the issues will resolve in the end.

III. THE KEY COVERAGE ISSUE: DISCERNING THE (REASONABLE) MEANING(S) OF "DIRECT PHYSICAL LOSS OR DAMAGE"⁷⁸

A. THE INSURER ARGUMENT FOR REQUIRING TANGIBLE DESTRUCTION TO TRIGGER COVERAGE

Insurer efforts to dismiss business interruption claims as strained have resonated with most in the industry, including respected authorities who should in our view be less dismissive of claims of loss or damage. A prominent editor of the Fidelity, Casualty & Surety (FC&S) organization has, for example, approached the question as follows.

When policies don't define a term, courts generally refer to a standard dictionary. Merriam-Webster defines damage as "loss or harm resulting from injury to person, property or reputation." This

⁷⁸ In this article, we focus almost exclusively on coverage issues concerning first-party property insurance and its business interruption component as these policies have been those at issue in the first wave of coverage litigation. We expect significant coverage litigation concerning liability insurance to emerge in the future.

is not definitive, so we look at the definitions of loss and harm. Loss is defined as “destruction, ruin,” and harm is defined as “physical or mental damage.”

The virus does not harm physical property. The virus may be cleaned off like other germs or bacteria. The property does not need to be replaced or repaired, just sanitized as advised by public health authorities.⁷⁹

Continuing in this vein, and seeking a trifecta of sorts of no coverage pursuant to government order provisions plus the prevalent pollution exclusion, she wrote:

ISO has a mandatory virus and bacteria exclusion, but what about carriers not using ISO forms? What about carriers that have adopted parts of ISO forms, such as the business interruption language, but have not adopted the rest and did not adopt the mandatory endorsement?

....

The issue at hand with the virus is business interruption and action of civil authority. Is there coverage when local authorities require bars, restaurants, gyms and other establishments to close because of the chances of spreading the virus? For this, we need to look at an endorsement; for the sake of discussion, we are looking at the Business Income (and Extra Expense) Coverage Form CP 00 30. Coverage is provided for the actual loss of business income due to the necessary suspension of business operations during the period of restoration. The period of restoration must be due to direct physical loss of or damage to coverage property. Also covered is loss triggered by a civil authority prohibiting access to the insured property because of damage to other property, but two conditions must apply. That other property must be within one mile of the insured property, and the action of the civil authority is taken in response to dangerous physical conditions resulting from the loss, continuation of the covered cause of loss that caused the damage, or to allow the authority unimpeded access to the property.

⁷⁹ Christine G. Barlow, *Does COVID-19 Cause Physical Loss?*, NAT'L UNDERWRITER 1, 10 (May 2020), <https://www.property-casualtydigital.com/propertycasualty/202005?pg=12#pg12>.

So herein lies the rub. Coverage is provided only when a property has been physically damaged. COVID-19 does not cause physical damage to property. Even if it is considered physical damage, then you have the pollution exclusion to deal with, and the virus is a pollutant. Pollutants are excluded when they are dispersed, discharged, seep, migrate or otherwise escape. So it comes down to whether an individual can be considered to be dispersing, discharging, or otherwise releasing the virus, action that would trigger the pollution exclusion.

Recently a physician from San Francisco attended a conference with hundreds of other physicians in New York. Upon returning home, he felt ill and was tested for the virus, which came back with positive results. Those people attending the conference were possibly exposed to the virus. Does this count as dispersing the virus, even though unintentionally? It seems so.

This is different from closing businesses, because the threat of the threat of exposure or spread of the virus, a threat is not physical damage, and therefore there is no coverage.⁸⁰

B. THE FLAWS OF THE INSURER-ADVANCED CONVENTIONAL WISDOM

1. Dictionary Fetishism: Improperly Collapsing “Loss” and “Damage”

Notwithstanding our respect for this author and the FC&S organization,⁸¹ we are constrained to disagree. Although the “Order of Civil Authority” coverage provided in many policies is limited to four weeks of lost income⁸² and the presence of the basic ISO virus exclusion may typically preclude coverage,⁸³ the FC&S

⁸⁰ *Id.* at 10–11.

⁸¹ And Ms. Barlow’s dismissiveness toward COVID claims may be mild compared to what is coming from another prominent coverage expert. *See* Bill Wilson, WHY INSURANCE DOESN’T COVER THE COVID-19 PANDEMIC (2020) (e-book format released Oct. 29, 2020). Mr. Wilson is the author of the widely celebrated coverage analysis WHEN WORDS COLLIDE: RESOLVING INSURANCE COVERAGE AND CLAIMS DISPUTES (2018).

⁸² *See supra* notes 30–35 and accompanying text discussing order of civil authority coverage.

⁸³ *See infra* notes 180–202 and accompanying text discussing virus exclusion.

analysis is severely deficient regarding the question of physical loss or damage and utterly absurd regarding application of the pollution exclusion.⁸⁴

Property insurance policies can vary significantly. While many do not include business interruption or “business income” coverage (a plus for insurers in light of the lost business revenue caused by COVID), many also lack a virus exclusion (a plus for policyholders). But almost all make a finding of “direct physical loss or damage” an initial requirement for coverage.⁸⁵ As discussed below, in decades of coverage litigation preceding COVID claims, courts have divided over the meaning of these terms. But prior to examining case law, courts might profitably examine the facial clarity of these terms, neither of which is usually defined in the insurance policy despite its separate “Definitions” section that normally contains specifically defined terms.

FC&S’s analysis tends not to look to case law but to focus on policy text. This is historically a typical insurer response, as a contextless reading of insurance policy terms most often favors the insurer. This is so because the policyholder litigating the claim probably suffered a loss within the grey areas of coverage (otherwise, why litigate?). The potential pitfalls of the standard insurer textual approach are reflected in its analysis above: seek out the plain meaning of policy terms so as to have the interpretive analysis stop at the plain meaning stage of determining policy coverage—and thus avoid any interpretive ambiguity in the meaning of those terms (otherwise, the policyholder-favoring tools of *contra proferentem* or reasonable expectations are visited upon the entire analysis).

First, the insurer COVID coverage language assessment tends to collapse the terms “loss” and “damage” into one—a rhetorical move that is both unwarranted

⁸⁴ Due to space limitations, we will not present a full examination of the pollution exclusion in the context of COVID-19 in this article. But for reasons we have set forth at length elsewhere, it is absurdist textual literalism to argue that infection of premises by a virus (or bacteria, fungus or the like) is “pollution” as the term is ordinarily understood. It is similarly laughable to suggest that a conference attendee is “dispersing” “pollutants” when sneezing. What, pray-tell, is next, insurers asserting that an attendee’s nausea at the office cocktail party is a pollution event? Such broad construction of an exclusion—part of the insurance policy upon which the insurer bears the burden of persuasion must be narrowly and strictly construed against the insurer who—would operate to undermine the basic purpose of property insurance or liability insurance. See STEMPEL & KNUTSEN, *supra* note 33, at § 14.11; Jeffrey W. Stempel, *Reason and Pollution: Construing the “Absolute” Pollution Exclusion in Context and in Light of its Purpose and Party Expectations*, 34 TORT & INS. L.J. 1 (1998); Jeffrey W. Stempel, *Unreason in Action: A Case Study in the Wrong Approach to Construing the Liability Insurance Pollution Exclusion*, 50 FLA. L. REV. 463 (1998).

⁸⁵ See French, *supra* note 4, at n. 21–22 and accompanying text.

(we think the two words are distinct) and misleading in its use of “the dictionary.” As the fetishism of textualism in American judicial interpretation of insurance policy terms rages on, we think that taking the insurer-led textual charge head-on leads to the opposite result that the insurers advocate. Indeed, this is doubly bizarre because historically, insurers have favored a textualist and literalist approach to policy language—probably because historically they have benefitted from such application. But here, in determining coverage for “direct physical loss or damage,” the use of one of the key textualist interpretive tools—the use of dictionary definitions to discern the ordinary lay meaning of policy terms—actually spins counter to insurer interests, when deployed properly.

Regarding the distinction between the words “loss” and “damage”, it should be noted that courts typically subscribe to the “surplusage” canon of construction, which posits that each word in a document (statute, contract, regulation) should be given its own meaning and not treated as a mere repetition by synonym.⁸⁶ Although it is in some ways a problematic canon,⁸⁷ it is nonetheless one of the “rules” of interpretation. And insurers, when it suits their purpose, embrace the surplusage canon.

For example, when litigating the application of the pollution exclusion, insurers routinely argue that each of the seventeen words in the exclusion (e.g., irritant, contaminant, chemical, waste) deserves independent meaning rather than reinforcing a core concept of pollution,⁸⁸ with courts frequently agreeing and giving

⁸⁶ The “surplusage” canon of construction posits that “[i]f possible every word and every provision should be given effect (*verba cum effectu sunt accipienda*). None should needlessly be given an interpretation that causes it to duplicate another provision or to have no consequence. ‘These words cannot be meaningless, else they would not have been used.’ ANTONIN SCALIA & BRYAN GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 174 (2012) (citing *U.S. v. Butler*, 297 U.S. 1, 65 (1936) (Roberts, J.)).

⁸⁷ See Laurence Solan & Jeffrey W. Stempel, *Rethinking Redundancy: The False Premises and Practices of the Surplusage Canon* (Jan. 2020) (manuscript on file with author) (describing drawbacks of surplusage and tendency for drafters to use redundancy as a means of attempting to achieve clarity). Accord, Ethan J. Leib & James Brudney, *The Belt-and-Suspenders Canon*, 105 IOWA L. REV. 735 (2020) (suggesting that in practice many courts treat drafting repetition as clarifying a particular intent rather than using each word to convey its own concept).

⁸⁸ The typical definition of “pollutants” in a standard form general liability, which has been widely used for thirty years or more, includes “any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals, and waste” with wasted “include[ing] materials to be recycled, reconditioned or reclaimed.” See, e.g., Commercial General Liability Policy Form CG 00 01 01 96, in DONALD S. MALECKI & ARTHUR L. FLITNER, *COMMERCIAL GENERAL LIABILITY* 271 (6th ed. 1998).

the words literal application even though they are contained in an exclusion that is, according to contract construction rules, supposed to be strictly and narrowly construed against the insurer with the insurer bearing the burden of persuasion to demonstrate the applicability of the exclusion.⁸⁹ If the insurers are to be consistent in their interpretative arguments, the word “loss” should be viewed as meaning something different than “damage.”

Perhaps more important, if one is “making a fortress” out of the dictionary (something cautioned against by the great Second Circuit Judge Learned Hand),⁹⁰ that fortress provides quite a lot of protection to policyholders—and this should be conceded by insurer advocates, who have to date disappointingly taken a self-serving view of the terms “loss” and “damage,” with too much acquiescence from courts. Even if one is not ready to concede that dictionary definitions favor policyholders more than insurers, it seems to us undeniable that there are many dictionary entries supporting the policyholder perspective. This in turn means that policyholder textual arguments are reasonable. And this further means that the term

⁸⁹ See, e.g., *Quadrant Corp. v. Am. States Ins. Co.*, 110 P.3d 733 (Wash. 2005) (taking broad view of pollution exclusion as precluding coverage for policyholder negligence in application of sealant exposing apartment resident to noxious fumes). See William P. Shelley & Richard C. Mason, *Application of the Absolute Pollution Exclusion to Toxic Tort Claims: Will Courts Choose Policy Construction or Deconstruction?*, 33 TORT & INS. L.J. 749 (1998) (detailing a prominent insurer counsel advocate’s broad application of the exclusion to cover claims of policyholder negligent injury with any involvement of chemicals).

⁹⁰ See *Cabnell v. Markham*, 148 F.2d 737, 739 (2d Cir. 1945) (“But it is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning.”) By this, Judge Hand sensibly meant that words should be construed in accord with party intent and overall purpose rather than through textual assessment alone. We agree and also note that there may well be extrinsic evidence supporting the insurance industry’s view that when drafting property policies, it intended to provide coverage only for the sort of tangible structural injury that comes from external forces such as fire, windstorm, a sudden flooding, vandalism or other actions that wreak palpable destruction on property. But to date, insurers have not done so, preferring to fight on the metaphorical “hill” of ahistorical, acontextual textualism. In COVID decisions to date, they have been holding that hill. Should they start to die on the hill (e.g., if courts begin in greater degree to recognize that “physical loss or damage” does not inexorably mean tangible destruction), one would expect them to proffer supporting extrinsic evidence that this is what was meant or intended or required by sound risk management practice. If they cannot provide such evidence, policyholders deserve to win on the “physical loss or damage” question, even in jurisdictions with a weak application of the *contra proferentem* principle.

“physical loss or damage” is sufficiently ambiguous that policyholders should enjoy the benefit of the *contra proferentem* principle and avoid dismissal of their claims on this basis unless insurers can proffer sufficient extrinsic evidence to support their preferred meaning of the term—something insurers have not done to date.

2. Dictionary Definitions Support Policyholders as Least as Much as Insurers

In arguing that coverage requires tangible destruction that can not be easily rectified, FC&S refers to the Merriam-Webster dictionary, editions of which are on our respective desks, but selects and presents the definitions in a pronouncedly anti-policyholder fashion. The more complete excerpt of key terms presented below provides an alternative meaning of “loss” that distinguishes it from “damage.”

damage [means] **1** : loss or harm resulting from injury to person, property, or reputation . . .

loss [means] **1** : DESTRUCTION, RUIN **2 a** : the act of losing possession **b** : the harm or privation resulting from loss or separation **c** : an instance of losing . . . **4 a** : failure to gain, win, obtain, or utilize . . . **5** : decrease in amount, magnitude, or degree. . .

lose [means] **1 a** : to bring to destruction . . . **3** : to suffer deprivation of: part with esp. in an unforeseen or accidental manner . . . *vi* **1**: to undergo deprivation of something of value . . .

physical [means] **1 a** : having material existence : perceptible esp. through the senses and subject to the laws of nature . . . **b** : of or relating to material things . . .⁹¹

Applying this mix of Merriam-Webster definitions suggests that one might reasonably find a “physical loss” when a policyholder is deprived of something material—such as use of one’s business, especially if the loss takes place in an unanticipated manner through something like a pandemic that spurs government-ordered use of the business property.

Similarly, it is perfectly reasonable to state that one’s physical property has been lost or harmed or injured by a virus on surfaces or in the air on the property. Insurers argue that because the virus can be “wiped off,” there has been no loss or

⁹¹ MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 291, 689, 689, 877 (10th ed. 1996).

damage. The “virus damages lungs, not property”⁹² has become an insurance industry aphorism akin to “the CGL [commercial general liability] policy is not a performance bond,” a cliché invoked by CGL insurers seeking to avoid coverage for damage inflicted by defective construction.⁹³ Actually, the damages-lungs-not-property mantra is more misleading.

The not-a-performance-bond trope is true as a general rule. But, as courts have come to recognize almost uniformly, this general rule is not applicable where a CGL policyholder’s negligence inflicts damage (defined as “physical injury to tangible property”) upon other property and the CGL coverage is not based on merely correcting substandard work but compensating victims for damage done to other property by the substandard work.⁹⁴

The damages-lungs-not-property trope is not true—period—or is only true if one excises the word “loss” from the trigger term “physical loss or damage.” Even under the view that a cleaning will make infected property “as good as new” (which may not be the case), the property has nonetheless been lost to its owner for at least some period of time, perhaps a significant period of time depending upon the cleaning and public health requirements to which the property is subject (let alone serious public relations issues with regard to perceived safety of the premises).

Further, a facility in which COVID has been found is, at least temporarily, “damaged” goods. The susceptibility of COVID to cleaning is relevant to questions of the degree of injury and the period of restoration required for a COVID-infected business. COVID infection is not the same as a fire or explosion, and in many cases is more easily rectified than water damage from a burst pipe. But there nonetheless is at least some physical damage and considerable physical loss of property if the cleaning and disinfecting is time-consuming or if government authorities restrict operation of the facility.

In addition, remediation of COVID damage to property is likely to be fleeting in many situations. COVID-inflicted injury may be susceptible to

⁹² Transcript of Teleconference Order to Show Cause at 5:3–4, *Soc. Life Magazine, Inc. v. Sentinel Ins. Co.*, No. 20 Civ. 3311 (S.D.N.Y. May 14, 2020).

⁹³ See Jeffrey W. Stempel, *Rediscovering the Sawyer Solution: Bundling Risk for Protection and Profit*, 11 RUTGERS J. OF L. & PUB. POL’Y 170, 210, n. 89 (2013) (noting the prevalence of this argument by liability insurers in defective construction cases). See, e.g., *Nationwide Mut. Ins. Co. v. Wenger*, 278 S.E.2d 874 (Va. 1981) (exemplifying a general liability insurer arguing to receptive court that coverage for construction defects, absent injury to non-policyholder property, would improperly convert the liability policy into a performance bond).

⁹⁴ See STEMPEL & KNUTSEN, *supra* note 33, at § 14.13; STEMPEL, SWISHER, & KNUTSEN, *supra* note 77, 657–61. See, e.g., *Am. Family Mut. Ins. Co. v. Am. Girl*, 673 N.W.2d 65 (Wis. 2004).

disinfection but may be repeated within hours as customers or employees return to a restaurant, bar, retail outlet, or factory. COVID damage may even be re-imposed almost as quickly as it first struck if members of the cleaning crew are COVID-positive, which may be the case even if the workers show no detectable symptoms of infection.

A brief survey of other dictionaries reveals a nesting of definitions of the key words of COVID coverage disputes that is more consistent with our broader view of the meaning of the terms “physical loss or damage” than the seemingly cherry-picked FC&S emphasis on irreversible tangibility as a prerequisite to finding such loss or damage. Consider the following entries, all from mainstream sources.

damage [means] [i]mpairment of the usefulness or value of person or property . . .

loss [means] **b.** The condition of being deprived or bereaved of something or someone . . .

lose [means] **2.a.** To come to be deprived of the ownership, care, control of (something one has had) . . . ⁹⁵

or

damage [means] **1.** Harm or injury to property or a person, resulting in loss of value or the impairment of usefulness.

loss [means] **1.** The act or an instance of losing . . . **b.** The condition of being deprived or bereaved of something or someone.

lose [means] **2a.** To be deprived of (something one has had).

physical [means] **2.** Of or relating to materials things . . . ⁹⁶

or

damage . . . See breakage, harm [as a noun]. See injure [as a verb].

loss [means] The act or an instance of losing something : losing, misplacement. . . . See also deprivation.

deprivation [means] The condition of being deprived for what one once had or ought to have : deprival, dispossession, divestiture, loss, privation.

lose [means] To be unable to find : mislay, misplace.

⁹⁵ THE AMERICAN HERITAGE COLLEGE DICTIONARY 350, 801, 1031 (3rd ed. 1993).

⁹⁶ THE AMERICAN HERITAGE COLLEGE DICTIONARY 357, 817, 818, 1050 (4th ed. 2004).

physical [means] **1.** Composed of or relating to things that occupy space and can be perceived by the senses: concrete, corporeal, material, objective, phenomenal, sensible, substantial, tangible.⁹⁷

or

damage [means] **1.** Impairment of the worth or usefulness of person or property: harm.

loss [means] **1.** The damage or suffering that is caused by losing.

2. One that is lost.

lose [means] **3.** To be deprived of . . .

physical [means] **1.** Of or relating to the body rather than the emotions or mind. **2.** Material rather than imaginary. **3. a.** Of, pertaining to, or produced by nonliving matter and energy.⁹⁸

Perhaps most surprising is that many standard-fare dictionaries actually use the term “damage” in defining the term “loss” to indicate that “loss” can mean “loss of use” or deprivation of property.

3. Apt Use of Dictionaries in COVID Coverage Controversies Often Supports Coverage

This is perhaps the time to note that in most every dictionary, the order of definitions does not proceed from most popular to least used, as many people (including lawyers) often mistakenly think. Rather, the presentation proceeds from earliest usage to most recent usage.⁹⁹ The first definition presented is simply the oldest and not the primary or best or most widely used or accepted definition. In many cases, the oldest definition may be considerably less popular or representative or “correct” than definitions listed later in the dictionary entry. As a result, we believe it is inappropriate for courts or commentators to argue that a term is clear and unambiguous based on presentation order in the dictionary. For example, a lawyer’s argument that definition number one is what was meant because it is the first definition seems to us quite misplaced.

Insurers might seize upon this to suggest that a definition of “loss” that includes “destruction” or “ruin” is *the* clearly correct definition because it emerged

⁹⁷ ROGET’S II: THE NEW THESAURUS 105, 265, 117, 265, 314 (3d ed 1995).

⁹⁸ WEBSTER’S II NEW RIVERSIDE DICTIONARY 177, 407, 406, 515 (rev. ed. 1996).

⁹⁹ WEBSTER’S NINTH NEW COLLEGIATE DICTIONARY 19 (9th ed. 1984) (the “[o]rder of senses [in the dictionary] is historical.”).

relatively later in the usage. But that is too ambitious a claim. Rather, each of the different definitions in a dictionary entry would appear to us to be per se reasonable constructions of the word, at least in the absence of context. Contextual material may make it clear that Definition X should prevail rather than Definition Y. But to claim that the words of the definitions themselves admit of clear choice strikes us as simply incorrect.

In examining dictionary definitions, it is also important to remember the dangers of motivated reasoning. As noted D.C. Circuit Judge Harold Leventhal apparently observed when discussing court use of legislative history, it can be a bit like “looking out over a crowd and spotting your friends.”¹⁰⁰ But the same, of course, is true regarding selection of a preferred dictionary definition. Insurers (and, of course, policyholders as well) know what they want to be the answer and will naturally be drawn, at least subconsciously, to the definition that best meets their coverage dispute and litigation needs. In addition, dictionary use may mislead through simple happenstance when a judge (or law clerk or counsel writing a brief that influences the judge) reaches for the dictionary that just happens to be on the closest desk or shelf or reads only the first dictionary entry resulting from a browser search. To the extent that there are differences in dictionaries, this human foible of taking the path of least resistance may mislead. In addition, it has been our experience that many dictionary users operate under the false impression that the first definitional entry in a dictionary is the primary or main meaning of a term when, as noted above, it is merely the earliest use of the term.

Thus, decision by dictionary is more than a little problematic. Notwithstanding this human tendency, we think the above excerpts (and we could have listed another dozen or two of similar definitions or associations) establishes that the words “physical loss or damage” admit of construction quite favorable to policyholders.¹⁰¹ FC&S and others supporting insurers in the COVID coverage

¹⁰⁰ See, e.g. Patricia M. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195, 214 (1983) (citing a conversation with Judge Leventhal), *quoted in Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005); *Conroy v. Aniskoff*, 507 U.S. 511, 519 (1993) (Scalia, J., concurring) (paraphrasing Leventhal); Abner J. Mikva, *Statutory Interpretation: Getting the Law to Be Less Common*, 50 OHIO ST. L.J. 979, 981–82 (1989); Adam M. Samaha, *Looking Over a Crowd—Do More Interpretive Sources Mean More Discretion?*, 92 N.Y.U. L. REV. 554 (2017) (discussing the genealogy and meaning of the quote attributed to Judge Leventhal).

¹⁰¹ Another possible avenue for assessing the meaning of text is corpus linguistics analysis, which involves assessing the collates and clusters of words as an aid to interpretation. See Lawrence M. Solan & Tammy Gales, *Corpus Linguistics as a Tool in Legal Interpretation*, 6 B.Y.U. L. REV. 1311, 1315 (2017). Although in our view, it would be a mistake to attach talismanic power to the use of big data in assessing insurance policy

battles are simply not being fair or reasonable in arguing that this key coverage provision “clearly” or “unambiguously” requires some sort of structural change of insured property as a prerequisite to coverage. Too many courts have accepted this unsupportable shibboleth. Even if their decisions finding no coverage are correct (due to the presence of a virus exclusion or other bar to coverage), these courts have done unnecessary “damage” to norms of insurance policy construction that impacts not only COVID coverage claims but construction of insurance policies as a whole.

As discussed below, insurers typically argue that “damage” entails a requirement of structural change in covered property and that “loss” is largely a synonym for “damage.” In our view, the term “loss” connotes something quite different than “damage.” For example, dictionaries commonly define “loss” as deprivation of something (whether as a result of “damage,” or theft or something else). Government shutdown orders (described below) by definition deprive policyholders of the use of their property—property that is physical, corporeal, choate, and tangible. Although alternative definitions of loss are also common in dictionaries, definitions connoting deprivation, lack of access, or the like are sufficiently common that a reasonable interpreter must concede that the concept of “loss” proffered by a policyholder forced to curtail operations is at least a reasonable meaning of the term.

According to well-established ground rules for insurance policy interpretation, if both policyholder and insurer have set forth reasonable constructions of a term, the term is ambiguous and questions of meaning should be resolved against the insurer that drafted the policy and in favor of the policyholder.

When this interpretative debate takes place at the motion to dismiss stage of litigation, *contra proferentem* (which translates as “against the drafter”) logically should have particular force. An early ruling favoring the insurer’s implicit argument (that “loss” or “damage” requires structural change in property) effectively involved the court ruling as a matter of law that a definition of loss drawn from dictionaries is not reasonable—an absurd result. If such a construction of the term “loss” was not reasonable, it presumably would not be in a published dictionary.

4. Prior Insurer Industry Action Contradicts Insurers’ Current Interpretation Angle

In addition to taking an insurer-serving approach to defining “physical loss or injury,” the FC&S assertion that COVID claims fail to involve triggering loss is

term meaning, this sort of broader based linguistic analysis may be superior to simply “looking it up” in the dictionary at random due to the potential unconscious bias or happenstance of dictionary use.

inconsistent with prior FC&S action. Consider, for example, the following FC&S assessment that predated the COVID pandemic by eight years. An insurance agent made the following inquiry.

Our insured accidentally threw away some digital x-ray sensors in the trash. Now, they want to be compensated for them. The BOP policy, Section 1 Property, Coverage agreement states, “We will pay for direct physical loss”

I believe the coverage agreement precludes coverage as this is not “direct physical loss.” Nothing happened to them—they were simply thrown away.

Do you believe coverage exists?

Oregon Subscriber¹⁰²

FC&S replied as follows.

There is no exclusion that applies to this loss. There does not need to be any impact on or damage to the items themselves for there to be a direct physical loss—just like when items are stolen. But *there is a loss in that they are no longer available to the insured*.¹⁰³

If FC&S was being consistent with this prior analysis, it would have to acknowledge that businesses forced to close due to either site-specific infection or government mandate have suffered a loss in that the physical business facilities are “no longer available” to them, at least until a government order is lifted or infected property is cleaned and otherwise rehabilitated.

This prior inconsistent statement in the insurance press raises the spectre of how important it is to view all media on an issue in its context and not simply that purpose-built for a particular cause. If insurers wish to flood the current press with commentary, past press on the same and related issues will require defense or acknowledgement, to be fair.

¹⁰² *Direct Physical Loss Under BOP*, NAT’L UNDERWRITER (June 27, 2011), <https://www.nuco.com/fcs/2011/07/12/direct-physical-loss-under-bop-422-12966>.

¹⁰³ *Id.*

5. Prior Judicial Treatment of the “Physical Loss or Damage”
Clauses Has Been More Favorable to Policyholders than Initial
COVID Coverage Decisions Suggest

The COVID insurance coverage cases to date have shown that courts prefer some allegations of tangible physical harm to property that alters its essential character and structure in order to trigger business interruption or civil authority coverage for pandemic-related losses. “Direct physical loss of or damage to property” thus seems to require that some external force touches the property and alters it in order for insurance coverage to attach. There is no definition of the coverage clause or its individual composite words in any property insurance policy. In attempting to provide meaning to the coverage clause, courts may have inadvertently hyper-focused on the parsed-out words of the clause as standing alone (i.e. “physical,” “loss” and “damage”). The dictionary sections noted in the prior section underline the problems with doing so, because dictionary definitions are inconsistent, are presented in chronological and not frequency order, and can be cherry-picked to “say” what one wants.

Review of the current batch of COVID coverage cases shows that it is possible in some jurisdictions that a policyholder does not need tangible structural harm to property in order to trigger the coverage clause in the policy. The virus does not need to “wreck” some property; it just has to be present to make the property unusable to the policyholder. This reasoning tracks the better-reasoned decisions of courts interpreting “direct physical loss” in other property insurance contexts.¹⁰⁴ Courts have held that the following causes of loss are covered as “direct physical loss or damage:”

- a) noxious particles post-9/11 World Trade Center disaster;¹⁰⁵
- b) contamination with radioactive dust and radon gas;¹⁰⁶

¹⁰⁴ See Scott G. Johnson, *What Constitutes Physical Loss or Damage in a Property Insurance Policy?*, 54 TORT TRIAL & INS. PRAC. L.J. 95 (2019) (surveying caselaw and finding trend and dominance of better reasoned decisions finding loss or damage without palpable destruction or tangible structural alteration of property); Steven Plitt, *Direct Physical Loss in All-Risk Policies: The Modern Trend Does Not Require Specific Physical Damage, Alternation*, CLAIMS J. (Apr. 15, 2013), <https://www.claimsjournal.com/magazines/idea-exchange/2013/04/15/226666.htm>.

¹⁰⁵ Schlamm, Stone & Dolan, LLP v. Seneca Ins. Co., 800 N.Y.S.2d 356 (Sup. Ct. 2005).

¹⁰⁶ Am. All. Ins. Co. v. Keleket X-Ray Corp., 248 F.2d 920, 925 (6th Cir. 1957).

- c) smoke from wildfires cancelling a theatre performance;¹⁰⁷
- d) unpleasant odor making premises uninhabitable (i.e. “locker room” smell, cat urine, or meth lab);¹⁰⁸
- e) drywall releasing poisonous gas rendering home uninhabitable;¹⁰⁹
- f) asbestos in carpeting impaired building’s function;¹¹⁰
- g) asbestos in buildings;¹¹¹
- h) mold spores and bacteria rendering home uninhabitable;¹¹²
- i) release of unknown substance in sewage treatment plant causing plant shutdown;¹¹³
- j) hidden building decay due to seawater damage;¹¹⁴
- k) e-coli contamination in a well;¹¹⁵
- l) carbon monoxide poisoning;¹¹⁶
- m) trace amounts of benzene in beverages;¹¹⁷
- n) metal parts contaminated with lead;¹¹⁸
- o) salad dressing exposed to vaporized agricultural chemicals;¹¹⁹

¹⁰⁷ Or. Shakespeare Festival Ass’n v. Great Am. Ins. Co., No. 1:15-cv-01932-CL, 2016 WL 3267247, at *5 (D. Or. June 7, 2016).

¹⁰⁸ Essex Ins. Co. v. BloomSouth Flooring Corp., 562 F.3d 399 (1st Cir. 2009) (“locker room” smell); Mellin v. N. Sec. Ins. Co., Inc. 115 A.3d 799 (N.H. 2015) (cat urine odor); Farmers Ins. Co. of Or. v. Trutanich, 858 P.2d 1332 (Or. 1993) (meth lab odor).

¹⁰⁹ TRAVCO Ins. Co. v. Ward, 715 F. Supp. 2d 699, 708 (E.D. Va. 2010).

¹¹⁰ Sentinel Mgmt. Co. v. Aetna Cas. & Sur. Co., 615 N.W.2d 819, 826 (Minn. 2000).

¹¹¹ Yale Univ. v. Cigna Ins. Co., 224 F. Supp. 2d 402, 413 (D. Conn. 2002); Bd. of Educ. of Twp. High School Dist. No. 211 v. Int’l Ins. Co., 720 N.E.2d 622, 625–26 (Ill. App. Ct. 1999).

¹¹² Sullivan v. Standard Fire Ins. Co., 956 A.2d 643 (Del. 2008); Prudential Prop. & Cas. Ins. Co. v. Lillard-Roberts, No. CV-01-1362-ST, 2002 WL 31495830, at *8–10 (D. Or. June 18, 2002) (applying Oregon law).

¹¹³ Azalea, Ltd. v. Am. States Ins. Co., 656 So. 2d 600, 602 (Fla. Dist. Ct. App. 1995).

¹¹⁴ Three Palms Pointe, Inc. v. State Farm Fire & Cas. Co., 250 F. Supp. 2d 1357, 1360–61 (M.D. Fla. 2003).

¹¹⁵ Motorists Mut. Ins. Co. v. Hardinger, 131 F.App’x 823, 823 (3d Cir. 2005).

¹¹⁶ Matzner v. Seaco Ins. Co., No. Civ. A. 96-0498-B, 1998 WL 566658 (Mass. Super. Aug. 12, 1998).

¹¹⁷ National Union Fire Ins. Co. of Pittsburgh v. Terra Indus., 346 F.3d 1160 (8th Cir. 2003).

¹¹⁸ Stack Metallurgical Servs., Inc. v. Travelers Indem. Co. of Conn., No. 05-1315-JE, 2007 WL 464715, at *2 (D. Or. Feb. 7, 2007).

¹¹⁹ Henri’s Food Prods. Co. v. Home Ins. Co., 474 F. Supp. 889, 892 (E.D. Wis. 1979) (applying Wisconsin law).

- p) loss of soil supports due to adjacent landslide, even though home itself not damaged;¹²⁰
- q) buildup of gas beneath church rendering church uninhabitable;¹²¹
- r) ammonia release;¹²²
- s) infestation of brown recluse spiders;¹²³
- t) organisms in canned creamed corn;¹²⁴ and
- u) cereal oats treated with a non-FDA approved pesticide, even though chemically identical to approved pesticide.¹²⁵

There are also a much smaller group of cases which deny claims for what appear to be very similar or even identical causes of loss like:

- a) mold, which apparently could be removed by cleaning;¹²⁶
- b) odors or bacteria in an HVAC system;¹²⁷ and
- c) asbestos contamination which apparently did not alter the structure of the building.¹²⁸

The reasoning featured in the first list of cases finding coverage for more ephemeral physical losses also tracks the better-reasoned decisions in recent cases involving coverage for cyber-losses under property policies. Insurance claims for electronic data losses also went through a similar wave as COVID insurance claims as courts wrestled with whether or not electronic data stored on a computer could experience a “direct physical loss or damage” because it appears to be intangible and

¹²⁰ Hughes v. Potomac Ins. Co. of D.C., 199 Cal. App. 2d 239, 248 (1962).

¹²¹ W. Fire Ins. Co. v. First Presbyterian Church, 437 P.2d 52, 55 (Colo. 1968).

¹²² Gregory Packaging, Inc. v. Travelers Prop. & Cas. Co. of Am., No. 2:12-cv-04418, 2014 WL 6675934 at *5–6 (D.N.J. Nov. 25, 2014) (applying New Jersey and Georgia law).

¹²³ Cook v. Allstate Ins. Co., No. 48D02-0611-PL-01156, 2007 Ind. Super. LEXIS 32, at *7–9 (Ind. Super. Ct. Nov. 30, 2007).

¹²⁴ Pillsbury Co. v. Underwriters at Lloyd's, 705 F. Supp. 1396, 1401 (D. Minn. 1989).

¹²⁵ Gen. Mills, Inc. v. Gold Medal Ins. Co., 622 N.W.2d 147, 152 (Minn. Ct. App. 2001).

¹²⁶ Mastellone v. Lightning Rod Mut. Ins. Co., 884 N.E.2d 1130, 1144–45 (Ohio Ct. App. 2008).

¹²⁷ Universal Image Prods. v. Chubb Corp., 703 F. Supp. 2d 705, 713 (E.D. Mich. 2010).

¹²⁸ Great N. Ins. Co. v. Benjamin Franklin Fed. Sav. & Loan Ass'n, 793 F. Supp. 259 (D. Or. 1990), *aff'd*, 953 F.2d 1387 (9th Cir. 1992).

is unseen by the naked eye, existing as data on a hard drive or in the online cloud.¹²⁹ Courts have treated losses relating to electronic data and computer equipment in sometimes strange ways.

The more reasonable and now widely accepted approach has been to find that electronic data losses are capable of being covered as a “direct physical loss” under a property policy when the data is corrupted, lost or damaged. Many courts have found that, although data cannot be seen or touched, it nevertheless exists in some fashion electronically and microscopically as property and can suffer a direct physical loss.¹³⁰ Indeed, it would be foolish to have a property policy cover data loss if the data were stored in hard paper copy and destroyed, but then deny coverage for a similar loss if the data exists in electronic form. That would make for perverse record-keeping incentives.

Holding that a virus like COVID-19 can at least potentially damage property makes sense in this regard. The virus does render surfaces unusable to humans for a period of time. It is potentially deadly and spreads quickly, through touched surfaces or the air. One would assume insurers would not want business owners putting employees and customers in infected stores if such would vastly increase the risk of an even larger claim if a person became ill or died (though such a claim would be made under a different insurance product: liability insurance or workers compensation).

The long list of cases that have considered various external forces’ impact on property as a “direct physical loss” demonstrate that courts are willing to find coverage if the force is a disease-causing agent or poison, if it is purely airborne, and if it does not permanently affect or even alter in any way the physical property insured. “Loss” or “damage” can mean “lost to the policyholder” in terms of use, in a variety of ways that do not involve actual physical destruction of the property.

The case law supports a conclusion that physical damage from a virus does not have to be permanent; it can be transient.¹³¹ With a virus like COVID-19, an

¹²⁹ See Stempel & Knutsen, *supra* note 33, at §23; Erik S. Knutsen & Jeffrey W. Stempel, *The Techno-Neutrality Solution to Navigating Insurance Coverage for Cyber Losses*, 122 PA. STATE U. L. REV. 645, 646–47 (2018).

¹³⁰ See, e.g., *Ashland Hosp. Corp. v. Affiliated FM Ins. Co.*, No. 11-16-DLB-EBA, 2013 WL 4400516, at *5 (E.D. Ky. Aug. 14, 2013) (finding disk drive damage due to excessive temperatures is a “direct physical loss” at a microscopic level); *Se. Mental Health Ctr., Inc. v. Pac. Ins. Co.*, 439 F. Supp. 2d 831, 837 (W.D. Tenn. 2006) (finding data corrupted by power loss at pharmacy is a covered “direct physical loss”).

¹³¹ See, e.g., *Phibro Animal Health Corp. v. Nat’l Union Fire Ins. Co. of Pittsburgh*, No. A-5589-13T3, 2016 WL 3884255, at *9–10 (N.J. Super. Ct. App. Div. July 14, 2016) (finding that medicine given to chickens that stunted their growth constituted

insured property may be impacted, and a loss may ensue in two typical scenarios: immediately after an infected customer or employee becomes ill on the premises or, more broadly, while the virus itself is highly prevalent in the community in question and therefore must be on the premises.

For the first scenario—that of immediate infection of an employee—it would seem that physical loss or damage would be simple to prove. There was virus present on the property. No one can tell where it spread or on what surfaces. It may well be in the air or ventilation system. Entry to the property is thus dangerous until the illness reasonably subsides, decontamination has occurred, and it is again safe to enter.

But for the second scenario—that of virus generally prevalent in the community—can coverage attach simply because the illness is potentially ‘out there?’ In that instance, reasoning such as that featured in the *Studio 417, Inc. v. Cincinnati Insurance Company*¹³² case is helpful: where the virus is so highly prevalent such that a large proportion of the population is ill (and sometimes without any knowledge of being ill) to the degree that civil authorities are making orders restricting both use of property and peoples’ movement, then one can probably assume actual presence of virus on the property somehow, especially at a place of business open to the public. At a certain point in time, the harm will of course subside. Those cases holding that physical damage does not have to be permanent to trigger coverage support reasoning that coverage would last as long as the danger is rendering the property unfit for use.

A number of cases have found coverage due to the imminent threat of physical loss or damage:

- a) government shutdown due to impending riots;¹³³
- b) evacuation from an imminent building collapse;¹³⁴
- c) an impending hurricane.¹³⁵

property damage, despite the possibility of the chickens being restored to their original conditions, because property damage need not be permanent).

¹³² No. 20-cv-03127-SRB, 2020 WL 4692385 (W.D. Mo. Aug. 12, 2020) (applying Missouri law).

¹³³ See, e.g., *Sloan v. Phoenix of Hartford Ins. Co.*, 207 N.W.2d 434, 437 (Ct. App. Mich. 1973) (finding loss of use due to government shutdown in response to riots is covered even though there is no direct physical loss to property).

¹³⁴ See, e.g., *Hampton Foods, Inc. v. Aetna Cas. & Sur. Co.*, 787 F.2d 349, 352 (8th Cir. 1986).

¹³⁵ See, e.g., *Houston Cas. Co. v. Lexington Ins. Co.*, No. H-05-1804, 2006 WL 7348102, at *6 (S.D. Tex. June 15, 2006) (finding coverage for business interruption due to

- d) imminent landslide;¹³⁶
- e) imminent threat of release of asbestos fibres.¹³⁷

However, other cases have found that fears of future threats did not constitute a covered loss because there was no loss to property.¹³⁸

The threat of something can make property uninhabitable. The threat of COVID-19 is quite serious: the virus is highly contagious, spreads through the air and surfaces, and can be deadly. Those in close indoor quarters to the virus also have a high possibility of contracting the disease. To that end, the COVID-19 situation perhaps differs from those cases that have found that future threats did not equate to a loss in property. The possibility of damage in the COVID-19 situation is relatively high if virus is in the vicinity. It is not like taking a preventative measure after an event out of concern for a follow-up event (like ordering a curfew after a socially disruptive event). Rather, it is a highly likely scenario that putting someone in close indoor proximity to the virus will make that person ill. It is more similar to the impending earthquake and hurricane cases where one knows the event is on its way, than it is to those where losses stemmed from concerns of more vague future events occurring. With COVID-19, a significant number of people sufficiently exposed indoors will get sick.

This highlights one other area of coverage concern: actual physical damage versus loss of use or function of property to the policyholder. There is support in

evacuation arising from impending Hurricane Floyd, even though policyholder did not suffer physical damage to property from hurricane).

¹³⁶ See, e.g., *Murray v. State Farm Fire & Cas. Co.*, 509 S.E.2d 1, 16–17 (W. Va. 1998) (finding threat of imminent landslide enough to satisfy “direct physical loss” for coverage to attach).

¹³⁷ *Port Auth. v. Affiliated FM Ins. Co.*, 311 F.3d 226, 236 (3d Cir. 2002).

¹³⁸ See, e.g., *United Air Lines v. Ins. Co. State of Pa.*, 439 F.3d 128, 133–35 (2d Cir. 2006) (finding no civil authority coverage where a government halt of airport operations is based on fears of future attacks after Sept. 11, 2001 and no property damage to adjacent property); *Paradies Shops, Inc. v. Hartford Fire Ins. Co.*, No. 1:03-CV-3154-JEC, 2004 WL 5704715, at *6–8 (N.D. Ga. Dec. 15, 2004) (finding no property damage from air ground stop order after Sept. 11, 2001 as the order did not prohibit access to airports and their businesses); *Syufy Enters. v. Home Ins. Co. of Ind.*, No. 94-0756 FMS, 1995 WL 129229, at *2 (N.D. Cal. Mar. 21, 1995) (finding curfews imposed to curb looting were not the result of damage to adjacent property); *Two Caesars Corp. v. Jefferson Ins. Co. of N.Y.*, 280 A.2d 305, 307–08 (D.C. Cir. 1971) (finding acts of avoiding civil unrest had no causal relation to damage to property).

case law such as *Gregory Packaging*¹³⁹ where loss of use or function of a particular property can equate to direct physical loss without tangible physical harm to the property. While property may not be permanently damaged by COVID-19, a policyholder loses the use of that property in a reasonable fashion if there is an infection on the premises or the virus present in the surroundings. Some courts have held that the disjunctive “or” between “physical loss of or damage to” property must mean that “loss” must mean something different than “damage” (typically it is held to mean an absence of property, as in theft). In that regard, “loss” could mean “loss of use” or “loss of function” such that it renders the property useless to the policyholder (i.e. if you lost the useful use of the property, it is as if you lost it, even though it did not physically go away). In fact, the textualist dictionary analysis as noted above also provides support for “loss” equating to “loss of use.”

There is, however, a line of cases often cited by courts adjudicating this first wave of COVID insurance coverage cases—from *Source Food Technology, Inc. v. United States Fidelity and Guaranty Co.*¹⁴⁰ and *Mama Jo’s, Inc. v. Sparta Insurance Co.*¹⁴¹—that would hold that only tangible physical alteration of property would qualify as “direct physical loss or damage.” But unlike in those cases, where the courts held respectively that an import ban did not damage imported beef or construction dust did not damage music speakers, the COVID-19 situation has a dangerous substance actually physically present on the property, either in the air or through employees and customers spreading it. This tracks the reasoning in COVID insurance coverage cases finding for the policyholder like *Studio 417*,¹⁴² *Blue Springs Dental Care v. Owners Ins. Co.*¹⁴³ and *Mudpie, Inc. v. Travelers Casualty Ins. Co. of America*,¹⁴⁴ where the courts there held that pleading actual physical presence of the virus made the analytical difference in proving coverage through a “direct physical loss.”¹⁴⁵ Indeed, in many of the past non-COVID cases that found a “direct physical loss” due to the invasion of some harmful substance, the substance

¹³⁹ *Gregory Packaging, Inc. v. Travelers Prop. Cas. Co. of Am.*, No. 2:12-CV-04418 WHW, 2014 WL 6675934, at *8 (D. N.J. Nov. 25, 2014) (applying New Jersey and Georgia law).

¹⁴⁰ 465 F.3d 834 (8th Cir. 2006) (applying Minnesota law).

¹⁴¹ 823 Fed. App’x 868 (11th Cir. 2020) (applying Florida law).

¹⁴² 2020 WL 4692385 (W.D. Mo. Aug. 12, 2020) (applying Missouri law).

¹⁴³ No. 20-CV-00383-SRB, 2020 U.S. Dist. LEXIS 172639 (W.D. Mo. Sept. 21, 2020).

¹⁴⁴ No. 20-CV-03213-JST, 2020 WL5525171 (N.D. Cal. Sept. 14, 2020) (applying California law).

¹⁴⁵ We discuss these cases, particularly *Studio 417*, *supra* note 142, in more detail in the next section, *infra*, as we find their reasoning quite superior to that of most of the courts dismissing policyholder claims on grounds of no physical loss or damage—as a matter of law.

merely resulted in the property owner not being able to use the property until decontamination occurred. This strongly suggests that dismissing COVID claims merely because property can be disinfected is incorrect.

In some jurisdictions, merely partially restricted access to a property does not equate to a prohibition of access by civil authority.¹⁴⁶ In other instances, a recommendation from a civil authority (as opposed to a direct command) may be not enough to provide coverage because access was not “prohibited.”¹⁴⁷ For COVID-19-related losses, it can be challenging to argue that government ordered alterations in service provision—such as a mandated move from in-person dining to take-out and delivery only—results in lost or restricted access to the property or even use of the property.¹⁴⁸ However, on balance, a restaurant faced with this imposed condition could certainly argue that a large proportion of its property typically used for dine-in customers has been rendered entirely unusable by a civil authority.¹⁴⁹

As the cases now stand, courts appear to be receptive to finding coverage for direct physical loss or damage if the policyholder alleges some factual aspects of physical presence of the virus on the commercial premises. The courts in *Studio 417* and *Blue Springs Dental Care* found the possibility of coverage for this reason and

¹⁴⁶ See, e.g., *Ski Shawnee, Inc. v. Commonwealth Ins. Co.*, No. 3:09-CV-02391, 2010 WL 2696782 (M.D. Pa. July 6, 2010) (stating there is no coverage when Department of Transport closed main route to policyholder’s ski resort because customers could travel to the resort via an alternate route); *Abner, Herrman & Brock, Inc. v. Great N. Ins. Co.*, 308 F. Supp. 2d 331 (S.D.N.Y. 2004) (noting that after World Trade Center disaster, civil authority coverage only provided where order completely prohibited access to property and not during periods where traffic restrictions made access merely more difficult); *54th St. Ltd. Partners v. Fid. & Guar. Ins. Co.*, 306 A.D.2d 67 (asserting that although traffic to property was diverted, the public was not denied access).

¹⁴⁷ See, e.g., *Kean Miller LLP v. Nat’l Fire Ins. Co. of Hartford*, No. 06-770-C, 2007 WL 2489711, at *6 (M.D. La. Aug. 29, 2007) (holding that an advisory to stay off streets during Hurricane Katrina did not prohibit access; no civil authority coverage).

¹⁴⁸ See, e.g., *Phila. Parking Auth. v. Fed. Ins. Co.*, 385 F. Supp. 2d 280 (S.D.N.Y. 2005) (finding that government order eliminated need for policyholder’s parking services but did not prohibit access to its garage).

¹⁴⁹ Although this line of argument was unsuccessful in *Henry’s La. Grill, Inc. v. Allied Ins. Co. of Am.*, No. 1:20-cv-2939-TWT, 2020 WL 5938755 (N.D. Ga. Oct. 6, 2020) (applying Georgia law), where the policyholder restaurant argued that a physical change to the property had occurred because the restaurant had to reconfigure its premises for take-out, not dine-in, as a result of governmental orders. The court held that “loss” means “total destruction” and simply moving things around was not a “loss” or “damage.” See also *Hajer v. Ohio Sec. Ins. Co.*, No. 6:20-cv-00283, 2020 WL 7211636 (E.D. Tex. Dec. 7, 2020) (applying Texas law) (finding no damage and dismissing case after policyholder argued it had to physically alter its rug business to follow governmental safety order).

the court in *Mudpie* notes it would have, had the policyholder alleged the presence of the virus.

At its heart, this logic follows the case law stemming from *Gregory Packaging* as opposed to the *Source Foods/Mama Jo's* line of reasoning. Whether or not there needs to be tangible physical damage to property in order for coverage to be triggered, there must be some invasion of the virus physically on the premises in question for coverage to attach.

IV. THE DISAPPOINTING EARLY CASELAW CONCERNING COVID-19 BUSINESS INTERRUPTION CLAIMS

A. THE PREVAILING ANALYSIS

Cases testing the extent of business interruption insurance coverage for COVID-19 pandemic-related losses are still winding their way through the legal system. To date, court decisions have been made largely in the context of motions to dismiss a policyholder's claim on the pleadings, with no factual record except the pleadings taken by the court as true. Thus, the emerging caselaw is currently limited in its predictive ability as a fulsome canvassing of the issues.

Two distinct lines of reasoning and factual trends have emerged thus far in the case law. Courts are split as to whether the main coverage clause which requires "direct physical loss of or damage to" covered property is even triggered as a result of COVID-19 business interruption losses.

The majority of decisions to date have held that, for "direct physical loss of or damage to" property to have occurred, the property in question must have been physically altered in some tangible fashion. As COVID-19 does not permanently alter the physical characteristics of property, but rather makes people ill by infecting through the air or on touchable surfaces, most courts have found that there is thus no coverage for business interruption losses unless the policyholder specifically alleges the actual physical presence of the virus was on its premises (i.e. on surfaces, in the air, or through infected customers or employees).

If a policyholder alleges physical presence of the virus, some courts to date have found that the covered property was requisitely affected directly and physically by the alleged presence of the virus, even though the virus is microscopic and the property itself appears to be capable of decontamination. The loss of use of the property either through necessary decontamination or as a result of virus presence was enough for those courts to hold that business interruption coverage was triggered as a result of "direct physical loss of or damage to" property.

When determining coverage for losses resulting from civil authority orders, courts have split along the same line. If a policyholder can allege the actual physical presence of the virus on adjacent property that resulted in the order being made, the claim is not dismissed. However, if there are no allegations of the physical presence of the virus on other or adjacent property that prompted governmental authorities to restrict property access, governmental orders to quell the spread of the virus are not enough to trigger loss of use of the property to a degree that it is “direct” and “physical.” These courts denying coverage rest their reasoning on a causation analysis: the virus, not the orders, caused the loss and the virus does not cause direct physical loss unless actual tangible property damage is alleged.

If a property policy has an exclusion for losses caused by viruses or bacteria, courts appear to be ready to deny coverage to policyholders on the face of the exclusionary language, without much more than a cursory analysis. Courts appear to link the cause of any governmental orders restricting property access to the reason for those orders: the virus, an excluded cause of loss. If the virus exclusion has an anti-concurrent cause clause, courts appear even more ready to deny coverage for business interruption or civil authority claims without much substantive analysis.

The cases wrestling with coverage for pandemic-related losses due to COVID-19 commonly engage with lines of reasoning from three prior precedents: the 11th Circuit 2020 decision in *Mama Jo’s, Inc. v. Sparta Insurance Co.*¹⁵⁰ (applying Florida law), the 2014 U.S. District Court for the District of New Jersey case of *Gregory Packaging, Inc. v. Travelers Property and Casualty Co. of America*¹⁵¹ (applying New Jersey and Georgia law), and the 8th Circuit 2006 decision in *Source Food Technology, Inc. v. United States Fidelity and Guaranty Co.*¹⁵² (applying Minnesota law). These cases highlight the tension between two possible approaches to pandemic-related insurance coverage issues: a strict requirement that the insured property suffer tangible physical alteration to property as a result of some external force (the *Mama Jo’s* and *Source Food* approach) versus the notion of loss of “use” of the property equating to physical loss or damage to property, even though the physical property itself is not permanently altered by some external force (the *Gregory Packaging* approach).

In *Mama Jo’s*, the policyholder restaurant was denied its business interruption and remediation claims when the restaurant’s lighting and audio equipment was coated with dust from outside road construction. Under Florida law, the court held that surfaces that can be cleaned have not suffered a direct physical

¹⁵⁰ 823 Fed. App’x 868 (11th Cir. 2020) (applying Florida law).

¹⁵¹ No. 2:12-CV-04418, 2014 WL 6675934 (D. N.J. Nov. 25, 2014) (applying New Jersey and Georgia law).

¹⁵² 465 F.3d 834 (8th Cir. 2006)(applying Minnesota law).

loss: the damage must be tangible and physical, resulting in an actual change in the property. Although dust in the accumulations involved in that case is a tangible contaminant, the court regarded the property as undamaged because it could be wiped away, even though cleaning on this scale exceeded that required for normal business operations.

In *Source Food Technology*, a beef wholesaler brought a claim for business interruption insurance due to lost revenue resulting from an embargo of Canadian beef after reports of “mad cow” disease. Source Food’s sole supplier of beef was located in Ontario, Canada. The beef was not contaminated by mad cow disease. The claim for losses was as a result of the inability to ship the beef across the border. The court held that there was no direct physical loss or damage to the beef—it simply could not be shipped across the border. Thus, there was no coverage for the loss. The court specifically refused to adopt the position that “direct physical loss or damage is established whenever property cannot be used for its intended purpose.”¹⁵³

A different approach was taken by the court in *Gregory Packaging*.¹⁵⁴ In that case, the accidental release of ammonia in a juice box manufacturing plant required that the facility be decontaminated and evacuated. According to the court, the ammonia release physically transformed the air within the manufacturer’s facility to make it unsafe. Because the facility was unusable for a period of time, the court held that the property suffered a direct physical loss. Even though, under Georgia law, coverage requires an actual physical change in property, the court held that that requirement was satisfied because the ammonia release physically changed the facility’s condition to such a state that it needed repair.

B. MISAPPLYING TRADITIONAL CONTRACT AND INSURANCE LAW

Our own preference is for the *Gregory Packaging* approach rather than the *Mama Jo’s* or *Source Foods* approach. But we find the early cases dismissing policyholder COVID claims disturbing not only because of their doctrinal choices but also because they in our view reflect a reductionist view and absence of judicial humility. In particular, the courts finding no “direct physical loss or damage” have been insufficiently appreciative of the range of meanings for these words that in turn makes it inappropriate for courts to declare a lack of triggering loss or damage as a matter of law.

¹⁵³ *Id.* at 838 (citing *Marshall Produce Co. v. St. Paul Fire & Marine Ins. Co.*, 98 N.W.2d 280 (Minn. 1959)).

¹⁵⁴ 2014 WL 6675934 (applying New Jersey Law).

1. Glib Tautology and False Consensus Bias

Particularly troubling examples are *Social Life Magazine, Inc. v. Sentinel Insurance Company*¹⁵⁵ (in which the court blithely declared that there was no loss or damage to covered property because COVID “damages lungs. It doesn’t damage printing presses”), *Sandy Point Dental, PC v. Cincinnati Insurance Company*,¹⁵⁶ *Gavrilides Management Company. v. Michigan Insurance Company*,¹⁵⁷ and *Rose’s 1, LLC v. Erie Insurance Exchange*.¹⁵⁸

The *Social Life Magazine* statement may make for a clever punchline but it is not even particularly accurate as a medical statement, let alone as an analysis of potential insurance coverage.¹⁵⁹ COVID’s impact is not confined to lungs but includes many other organs such as kidneys and the brain as well as senses of hearing and smell.¹⁶⁰ More to the point for insurance purposes, viral infestation of a printing

¹⁵⁵ No. 1:20-cv-03311-VEC (S.D.N.Y. Apr. 29, 2020).

¹⁵⁶ No. 20 CV 2160, U.S. Dist. LEXIS 171979 (N.D. Ill. Sept. 21, 2020).

¹⁵⁷ No. 20-000258-CB (Mich. Cir. Ct., Ingham Cty. July 1, 2020) (explaining that direct physical loss to property requires tangible alteration or damage that impacts the integrity of the property, and dismissing the case because plaintiff failed to allege that the coronavirus had any impact to the premises).

¹⁵⁸ No. 2020 CA 002424 B, 2020 WL 4589206, at *5 (D.C. Super. Aug. 6, 2020) (granting summary judgment for insurer on restaurant’s claims of lost business caused by coronavirus closure orders because there was no direct physical loss to property).

¹⁵⁹ A similar sort of reasoning featured in *Plan Check Downtown III, LLC v. Amguard Ins. Co.*, No. cv 20-6954-GW-Skx, 2020 WL 5742712 (C.D. Cal. Sept. 10, 2020) (applying California law), where a restaurant’s claim was dismissed because the court anchored its finding that “loss” requires tangible alteration to property because otherwise any regulatory change from any governmental order that affected any business in any fashion would trigger business interruption insurance. It went further to opine that even a snowstorm interferes with “use” of premises for the business by customers and employees and surely covering losses from snowstorms would make business interruption coverage far too broad.

¹⁶⁰ The same concept was picked up by the court in *Uncork & Create LLC, v. Cincinnati Ins. Co.*, No. 2:20-cv-00401, 2020 WL 6436948 (S.D.W. Va.) (applying West Virginia law) which denied coverage and went so far as to state that it would deny coverage even if there was physical presence of the virus. The court held that COVID-19 does not harm inanimate structures, can be eliminated with disinfectant and routine cleaning. *Id.* at 5. The court went so far as to state that even the actual presence of the virus on the property is not enough to trigger the coverage clause “physical damage or physical loss to the property.” *Id.* at 6. *See also* *Promotional Headwear Int’l v. Cincinnati Ins. Co.*, No. 20-cv-2211-JAR-GEB, 2020 WL 7078735 (D. Kan. Dec. 3, 2020) (applying Kansas law) where the court (on a motion to dismiss on the pleadings!) does not accept the policyholder’s allegations that the virus contaminated its property, citing both *Source Food Technology, Inc.* and *Mama Jo’s, Inc.*;

facility does, for the reasons discussed above, damage the facility's air quality and its equipment. Although the "fix" may be relatively straight-forward cleaning, it is damage nonetheless and renders the facility unusable until cleaned—a process that may become so repetitive due to re-infection as to constitute long-term damage and loss of use. More important, if this and other pandemic injury result in government-ordered limitations on operation of the policyholder's property, this produces rather direct physical loss to the policyholder.

Sandy Point Dental makes a similarly breezy and overly restrictive reading of the direct physical loss or damage trigger. Although the court recognizes that Illinois law is applicable, it cites no Illinois cases regarding loss or damage¹⁶¹ even though there are important state law decisions finding that adulterated air or surfaces can constitute physical damage to property.¹⁶² If *Sandy Point Dental* had merely

Terry Black's Barbecue, LLC v. State Auto. Mut. Ins. Co., No. 1:20-cv-665-RP, 2020 WL 7351246 (W.D. Tex. Dec. 14, 2020) (applying Texas law) (citing Uncork & Create, LLC and holding that, even assuming the virus is present, the court held it can be cleaned).

¹⁶¹ The *Sandy Point Dental* court's citation of Illinois law is limited to general pronouncements, including the axiom that a court construing an insurance policy should be "giving effect to every provision, if possible, because it must be assumed that every provision was intended to serve a purpose." No. 20-cv-2160, 2020 U.S. Dist. LEXIS 171979, at *3-4 (quoting *Valley Forge Ins. Co. v. Swiderski Elecs., Inc.*, 860 N.E. 307, 314 (Ill. 2006)). But this "surplusage" canon of construction (discussed *supra* text accompanying notes 85–86) augers in favor of giving "loss" a sufficiently distinct meaning from "damage." But instead of doing this, the *Sandy Point Dental* court treats the words as synonyms but then focuses only on the term "damage," which connotes more tangibility than "loss." The court also notes that Illinois requires words in a policy to be giving their "plain, ordinary, and popular meaning." See U.S. Dist. LEXIS 171979 at *4 (citing *Central Ill. Light Co. v. Homes Ins. Co.*, 821 N.E.2d 206, 213 (Ill. 2004)). As previously discussed, (*see supra* text accompanying notes 90–99), there is ample evidence in dictionaries and thesauruses suggesting the plain and ordinary meaning approach augers in favor of finding loss when a policyholder's use of property is restricted by viral infection or government order.

¹⁶² Illinois has had more than its share of asbestos coverage cases, the bulk of which have concluded that the presence of asbestos materials in a structure or in the interior air of a building constitutes physical damage. See, e.g., *J.R. French Auto. Castings, Inc. v. Factory Mut. Ins. Co.*, No. 02-c-9479, 2003 U.S. Dist. LEXIS 13060 (N.D. Ill. July 23, 2003) (noting that the presence of human remains in a press machine constituted contamination that was physical damage even though equipment not tangibly structurally altered but no coverage because of exclusionary language in policy); *Affiliated FM Ins. Co. v. Board of Educ.*, No. 90-c-6040, 1992 U.S. Dist. LEXIS 15151 (N.D. Ill. Oct. 5, 1992) (noting that contaminated air is physical damage and the inability to use because of contamination is physical loss); *Lapham-Hickey Steel Corp. v. Prot. Mut. Ins. Co.*, 655 N.E.2d 842 (Ill. 1995) (finding no duty to defend because a formal lawsuit was not filed but suggesting that contamination can

followed this applicable law, it would have reached a correct decision on the motion to dismiss. But the court simply failed to locate (whether due to deficient advocacy or something else) or examine these precedents.

In addition, the *Sandy Point Dental* court seems to have forgotten that even in a world of heightened pleading requirements, the court faced with a Rule 12(b)(6) motion to dismiss must (absent extreme circumstances) treat the allegations of the plaintiff's complaint as true.¹⁶³ Instead, the court in essence second-guessed those allegations, with the judge refusing to accept them at face value.

And in perhaps its lowest moment of judicial craft, *Sandy Point Dental* sought to distinguish an important decision favoring the policyholder.

Plaintiff heavily relies on *Studio 417 Inc. v. The Cincinnati Insurance Company*, 20 C 3127-SRB, 2020 U.S. Dist. LEXIS 147600 (S.D. Mo. Aug. 12, 2020), a Missouri case that found that the coronavirus caused a physical loss to property warranting insurance coverage. That court rested its decision on that policy's expansive language, language very different from the policy in the instant case. The unambiguous language in the instant policy warrants a different conclusion—physical damage that demonstrably alters the property is necessary for coverage, and the coronavirus does not cause physical damage.¹⁶⁴

Unfortunately, *Sandy Point's* characterization is simply not true. The Cincinnati policy form at issue in *Studio 417* (and the *KC Hopps* and *Blue Springs Dental* cases also decided in the Western District of Missouri) is the same (at least regarding the direct physical loss requirement and the absence of a virus exclusion) as the Cincinnati policy at issue in *Sandy Point*.

In an opinion read from the bench, *Gavrilides Management*,¹⁶⁵ like *Sandy Point*, conflates the term “loss” and the term “damage,” robbing them of their respectively different connotations and emphases. Worse yet, it engrafts on the term

be physical damage and lack of access can be physical loss of property); *Universal Underwriters Ins. Co. v. LKQ Smart Parts, Inc.*, 963 N.E.2d 930 (Ill. Ct. App. 2011) (noting that the deprivation of use of a vehicle is physical loss) (but there was also tangible physical damage to vehicle); *Board of Educ. v. Int'l Ins. Co.*, 720 N.E.2d 622 (Ill. Ct. App. 1999) (finding that the presence of asbestos fibers in air constituted physical damage to property).

¹⁶³ See *Ashcroft v. Iqbal*, 556 U.S. 662 (2009); BROOKE D. COLEMAN, ET AL., *LEARNING CIVIL PROCEDURE* 285–302 (3d ed. 2018).

¹⁶⁴ No. 20-cv-2160, 2020 U.S. Dist. LEXIS 171979, at *7 n. 2.

¹⁶⁵ No. 20-000258-CB (Mich. Cir. Ct., Ingham Cty. July 1, 2020).

(having collapsed loss and damage into one) a requirement that property must have been permanently, structurally altered to be considered sufficiently “damaged” to merit coverage from the property insurer that, in return for premium dollars (sometimes years of premium dollars), promised to indemnify the policyholder from property loss and attendant business revenue loss.

Although one can argue that this was a correct reading of Michigan law, we are not convinced in that there appears to be no controlling Michigan precedent requiring this approach, which essentially denies coverage unless property is crushed.¹⁶⁶ Consequently, although not compelled to take a more nuanced view of the loss-or-damage requirement, the *Gavrilides Management* judge could (and in our view should) have done so.

Rose's I, LLC v. Erie Insurance Exchange,¹⁶⁷ is disturbing in that, as that court acknowledges, the policyholder proffered definitions of the terms “loss” and “damage” that supported its position. But the court essentially ignored these definitions and adopted definitions it prepared—refusing to recognize that reasonable alternative constructions of a term or provision create ambiguity requiring resolution against the insurer. This is certainly true at the pleading stage. Although *Rose's I* was a summary judgment decision, we think the same caution in terminating a case in the face of reasonable conflicting constructions of a policy should govern.

It appears that despite the summary judgment posture of the case, the record before the court did not include any extrinsic or discovery-unearthed evidence illuminating the meaning of policy language. Rather, the parties appear to have briefed the case based on textual argument alone, making the posture of the case akin to a 12(b)(6) motion. But instead of deferring to the facts as alleged and resolving any reasonable doubts against the nonmovant, the *Rose's I* court granted summary judgment after it concluded—based on nothing we can discern—that “loss” requires “a direct physical intrusion on to the insured property.”¹⁶⁸ As we

¹⁶⁶ Although there are federal trial court cases requiring structural change to property to constitute sufficient physical loss or damage, there does not appear to be state court precedent binding on the *Gavrilades* court. *But see* *Universal Image Prod. v. Chubb Corp.*, 703 F. Supp. 2d 705 (E.D. Mich. 2010) (finding that intangible harms such as odor or mold contamination insufficient to constitute physical loss or damage even though property was rendered unusable).

¹⁶⁷ No. 2020-CA-002424-B, 2020 WL 4589206 (D.C. Super. Ct. Aug. 6, 2020) (granting summary judgment for insurer on restaurant's claims of lost business caused by coronavirus closure orders because there was no direct physical loss to property).

¹⁶⁸ *Id.* at *7.

hope we have demonstrated, government orders limiting or forbidding use of physical facilities constitute a physical loss to the owner.

*Diesel Barbershop, LLC v. State Farm Lloyds*¹⁶⁹ displays a similarly disturbing approach to textual analysis. The court, like others finding for insurers, collapses what should be the distinct terms “loss” and “damage” and despite the many dictionary and thesaurus entries supporting a reading of the policy favorable to policyholders, selects the entries most favorable to the insurer contention requiring tangible and rather substantial, long-lasting, structural and character altering injury before there can be coverage. Likewise, the real loss of a physical facility due to COVID-spurred government restriction is given short shrift. To be fair, the *Diesel Barbershop* court recognizes cases that “some courts have found physical loss even without tangible destruction to the covered property.”¹⁷⁰ However, “[e]ven so,” *Diesel Barbershop* found “that the line of cases requiring tangible injury to property are more persuasive here.”¹⁷¹ That was in essence the scope and depth of the court’s “analysis.”

The problem with the court’s conclusion is that it was to a large degree not the court’s decision to make if it was following the rules of insurance policy construction. Because ambiguities are to be resolved in favor of the policyholder that did not draft the language at issue, a policyholder that proffers a reasonable construction of disputed language (such as “loss” or “damage”) is entitled to the benefit of the doubt—at least regarding a Rule 12(b)(6) motion where another well-established “rule” is that the allegations of plaintiff policyholder’s complaint must be accepted as true. Discovery may later provide information refuting those allegations and supporting the defendant insurer. But until such time as such discovery takes place, the factual universe upon which the court decides is supposed to be limited to the complaint.

Although research (such as reading dictionaries or cases) may bring extrinsic material into the inquiry, the policyholder need not shoulder the ultimate burden of persuasion at this stage of the litigation. It need only set forth a reasonable construction of the policy language that supports its claim for coverage. Policyholders seeking COVID coverage have done that. They may ultimately lose

¹⁶⁹ No. 5:20-CV-461-DAE, 2020 WL 4724305, at *5 (W.D. Tex. Aug. 13, 2020) (granting a motion to dismiss because the coronavirus did not cause a direct physical loss, and “the loss needs to have been a ‘distinct, demonstrable physical alteration of the property.’”) (citing *Hartford Ins. Co. of Midwest v. Mississippi Valley Gas Co.*, 181 F.App’x 465, 470 (5th Cir. May 25, 2006)).

¹⁷⁰ *Id.* at *14–15.

¹⁷¹ *Id.* at *15–16 (concluding that “the other cases [finding loss or damage] are distinguishable.”).

due to further factual development establishing lack of loss or damage or due to application of a virus exclusion or other factors. But they should not lose on the loss/damage issue at this stage of litigation.

These and other decisions¹⁷² in which courts are willing to declare as a matter of law that the words “direct physical loss or damage” require structural

¹⁷² See, e.g., *Mark’s Engine Co. No. 28 Rest., LLC v. Travelers Indem. Co. of Conn.*, No. 2:20-cv-04423-AB-SK, 2020 WL 5938689 (C.D. Cal. Oct. 2, 2020) (applying California law) (involving a restaurant that claimed losses due to orders requiring take-out or delivery service only); *Promotional Headwear Int’l v. Cincinnati Ins. Co.*, No. 20-cv-2211-JAR-GEB, 2020 WL 7078735 (D. Kan. Dec. 3, 2020) (applying Kansas law) (citing both *Source Food* and *Mama Jo’s* to hold that physical alteration of property required for coverage to attach); *Infinity Exhibits, Inc. v. Certain Underwriters at Lloyd’s London*, No. 8:20-cv-1605-T-30AEP, 2020 WL 5791583 (M.D. Fla. Sept. 28, 2020) (applying Florida law); *Hillcrest Optical, Inc. v. Cont’l Cas. Co.*, No. 1:20-CV-275-JB-B, 2020 WL 6163142 (S.D. Ala. Oct. 21, 2020) (applying Alabama law); *Raymond H Nahmad DDS PA v. Hartford Cas. Ins. Co.*, No. 1:20-cv-22833-BLOOM/Louis, 2020 WL 6392841 (S.D. Fla. Nov. 2, 2020) (applying Florida law); *Palmer Holdings & Invs., Inc. v. Integrity Ins. Co.*, No. 4:20-cv-154-JAJ, 2020 WL 7258857 (S.D. Iowa) (applying Iowa law); *T&E Chicago LLC v. Cincinnati Ins. Co.*, No. 20 C 4001, 2020 WL 6801845 (N.D. Ill. Nov. 19, 2020) (applying Illinois law); *Whiskey River on Vintage, Inc., v. Ill. Cas. Co.*, No. 4:20-cv-185-JAJ, 2020 WL 7258575 (S.D. Iowa Nov. 30, 2020) (applying Iowa law); *Zwillo V, Corp. v. Lexington Ins. Co.*, No. 4:20-00339-CV-RK, 2020 WL 7137110 (W.D. Mo. Dec. 2, 2020) (applying Missouri law); *Water Sports Kauai, Inc. v. Fireman’s Fund Ins. Co.*, No. 20-cv-03750-WHO, 2020 WL 6562332 (N.D. Cal. Nov. 9, 2020) (applying Hawai’ian law); *Long Affair Carpet & Rug, Inc. v. Liberty Mut. Ins. Co.*, No.: SACV 20-01713-CJC(JDEx), 2020 WL 6865774 (C.D. Cal. Nov. 12, 2020) (applying California law); *Michael Cette, Inc. v. Admiral Indem. Co.*, 20 Civ. 4612 (JPC), 2020 WL 7321405 (S.D.N.Y. Dec. 11, 2020) (applying New York law); *Real Hosp., LLC v. Travelers Cas. Ins. Co. of Am.*, No. 2:20-cv-00087-KS-MTP, 2020 WL 6503405 (S.D. Miss. Nov. 4, 2020) (applying Mississippi law); *Henry’s Louisiana Grill, Inc. v. Allied Ins. Co. of Am.*, No. 1:20-CV-2939-TWT, 2020 WL 5938755 (N.D. Ga. Oct. 6, 2020) (applying Georgia law); *Newchops Rest. Comcast LLC v. Admiral Indem. Co.*, No. CV 20-1869, 2020 WL 7395153 (E.D. Pa. Dec. 17, 2020) (applying Pennsylvania law); *Brian Handel DMD, PC v. Allstate Ins. Co.*, No. 20-3198, 2020 WL 6545893 (E.D. Pa. Nov. 6, 2020) (applying Pennsylvania law); *Hajer v. Ohio Security Ins. Co.*, No. 6:20-cv-00283, 2020 WL 7211636 (E.D. Texas Dec. 7, 2020) (applying Texas law); *Terry Black’s Barbecue, LLC v. State Auto. Mut. Ins. Co.*, No. 1:20-CV-665-RP, 2020 WL 7351246 (W.D. Tex. Dec. 14, 2020) (applying Texas law); *Santo’s Italian Café LLC v. Acuity Ins. Co.*, No. 1:20-cv-01192, 2020 WL 7490095 (N.D. Ohio) (applying Ohio law); *Graspa Consulting, Inc. v. United Nat’l Ins. Co.*, No. 20-23245-CIV-WILLIAMS, 2021 WL 199980 (S.D. Fla. Jan. 20, 2021) (applying Florida law); *S. Fla. ENT Assocs, Inc. v. Hartford Fire Ins. Co.*, No. 20-23677-Civ-WILLIAMS/TORRES, 2020 WL 6864560 (S.D. Fla. Nov. 13, 2020) (applying Florida law); *Plan Check Downtown III, LLC v. AmGUARD Ins. Co.*, No. Cv 20-6954-GW-SKx, 2020

alteration of the property only reflect judges succumbing to false consensus bias—the tendency of humans to be overconfident that others see things as they do. Significant research suggests this is a particular problem in the interpretation of contracts and other writings. For example, in one study, respondents were given contract language to read and construe. They then were asked whether they thought other readers could reach a different interpretation.¹⁷³

Overwhelmingly, they expressed confidence that others would agree with their reading of the words and that there was no significant interpretive issue as to the document's meaning. Overwhelmingly, they were wrong. The same contract language was being read by other respondents who were reaching a different conclusion as to the meaning of the words.

This tendency, which also accords with cognitive traits such as self-serving bias (the tendency for people to think they are better at things than is actually the case),¹⁷⁴ can be particularly pernicious in judges who by job description need to be decisive (and move on to the next case), and are consistently the object of deference or even adulation (e.g., more likely to be invited to be graduation speakers or faculty in residence than all but a few celebrity lawyers), and who by definition in an adversary system have half the disputants praising each decision.

The net result can often be a brusque, reductionist, insufficiently reflective approach to reading documentary text, including but not limited to statutes, regulations, rules, exhibits, and contracts in addition to insurance policies. The judge, despite frequently reading the text in a vacuum without background contextual information, the aid of a linguist, or more than the closest dictionary or those cited by counsel, quickly determines that she “knows” what the disputed language means. More troublingly, the judge “knows” this so well that she dispenses with further inquiry and dismisses the case.

WL 5742712 (C.D. Cal. Sept. 10, 2020) (applying California law); *Kirsch v. Aspen Am. Ins. Co.*, No. 20-11930, 2020 WL 7338570 (E.D. Mich. Dec. 14, 2020) (applying Michigan law); *Mortar & Pestle Corp. v. Atain Specialty Ins. Co.*, No. 20-cv-03461-MMC, 2020 WL 7495180 (N.D. Cal. Dec. 21, 2020) (applying California law). *But see, e.g.*, *Seifert v. IMT Ins. Co.*, No. 20-1102 (JRT/DTS), 2020 WL 6120002 (D. Minn. Oct. 16, 2020) (applying Minnesota law) (holding that Minnesota law does not require a showing of structural damage to qualify for coverage).

¹⁷³ See Lawrence Solan, et al., *False Consensus Bias in Contract Interpretation*, 108 COLUM. L. REV. 1268 (2008).

¹⁷⁴ See Linda Babcock & George Loewenstein, *Explaining Bargaining Impasse: The Role of Self-Serving Biases*, 11 J. ECON. PERSPECTIVES 109 (1997) (describing phenomenon and its impact in prompting disputants or negotiating parties to overvalue their own skills, conduct, and position in transactions or litigation).

Although this is troubling to us in any case, it is particularly troubling in the insurance context, where the ground rules of adjudication discussed below, if properly followed, are essentially designed to give policyholders the benefit of the doubt. To borrow a baseball term, “ties” are supposed to “go to the runner.” But like the umpire whose right thumb jerks upward if the ball is in the vicinity of first base before the runner has clearly planted a foot, courts taking an aggressively self-reverential view about the meaning of policy language bend the rules in the opposite direction.

In a world where reasonable people may debate the meaning of “direct physical loss or damage” in various contexts, courts should be reluctant to declare meaning as a matter of law. In view of the differing dictionary definitions and case outcomes, such an approach ordinarily amounts to error in COVID claims.

We realize of course that where controlling law provides a clear precedent, it must be followed. If, for example, the Supreme Court of State X has declared in no uncertain terms that both “loss” and “damage” in the property insurance setting always requires tangible, permanent (unless repaired by more than cleaning) injury to the structure or character of property, that precedent must be followed by trial courts no matter how much a trial judge thinks it incorrect. But where case law is mixed, unclear, or absent, trial courts should be taking the more modest approach to perceived certainty of textual meaning.

To be fair, many, perhaps even most, of the courts dismissing policyholder COVID claims have at least considered caselaw taking the broader view of “direct physical loss or damage.” But they have then quickly pivoted to the narrower view of certainty unwarranted in light of the dictionary definitions favoring the broader view. Couple this with the established insurance policy interpretation principles favoring policyholders that have been given short shrift by courts dismissing COVID coverage claims and the result is error—at least on the questions of whether loss or damage has occurred (and most certainly at the motion to dismiss stage of litigation).

Depending on the specifics of each case, insurers may prevail on any number of other defenses to coverage such as the virus exclusion or non-COVID defenses such as misrepresentation or intentional destruction or insurers may limit their liability based on calculation of lost business income as well as policy limits or sub-limits. But they generally should not be prevailing on the loss/damage question to the extent reflected in opinions to date. A brief review of a few important insurance concepts underscores this assessment.

2. Reasonable Policyholder Expectations of Coverage for Pandemic-related Losses

Consider policyholder and insurer expectations of coverage for pandemic-related losses. If there is rampant confusion as to the scope of coverage such that litigation is arriving at mixed results, perhaps there is a more insidious problem with what is driving that litigation. The reasonable policyholder likely expected that a product marketed and labelled as “business interruption insurance” or “civil authority coverage” would extend coverage to the policyholder’s income stream in the event the policyholder was unable to access or reasonably use its business premises. The reasonable policyholder purchasing an “all risk” policy likely would not have thought that such coverage would hang on how the damage—if any—to the property occurred. Rather, their focus would likely be on their income loss due to either virus contamination or prevention of use of their property due to governmental orders.

Particularly in the case of civil authority coverage, few policyholders would likely expect that, in many instances in order to trigger coverage, there would have to be some physical damage to adjacent property that would prompt a civil authority to restrict access to the policyholder’s property. Policyholders may ironically be better off if their property or adjacent property had burned down, rather than operations ceased by a virus, strange though it may seem. By the mere label of the product alone—“business interruption insurance”—there are likely many policyholders who simply believe that the insurance insures their profit stream. The impetus for that belief may well, in the end, rest with issues of misleading nomenclature by insurers and misleading sales by brokers and agents.

From an insurer’s standpoint, the reasonable insurer may well not have meant nor expected to cover losses relating to a pandemic like COVID-19 in the contexts of business interruption insurance included in commercial property policies. By its nature, a pandemic is a clash event that has the potential to seriously strain insurer resources. Yet surely the industry had modelled a pandemic because it has already seen the effects of SARS, MERS, Ebola, H1N1, swine flu, and HIV/AIDs. And there were products on the market specifically designed to cover pandemic-related losses. The existence of related products like event cancellation insurance makes the generalized insurer contention of “whoever would have predicted COVID-19?” a bit strained.

The more compelling insurer response to pandemic-related losses is perhaps to assert that the business interruption product was never meant to be “guaranteed

profit insurance.”¹⁷⁵ It is an insurance add-on coverage to property insurance. There surely must be some risks in commerce that are not covered by a property policy. For example, no one would expect business interruption coverage for profit losses in a nuclear war (though of course there are exclusions for nuclear causes of loss). But what of, say, a zombie apocalypse or alien invasion, that required governments to issue “stay at home” orders or risk being eaten by green beings? Would the standard business interruption coverage tied to commercial property policies kick in then? Is there then a direct physical loss of or damage to property? Likely not. There are zombies or aliens running about. The property is likely just fine. But again, property owners may have difficulty accessing their property or even be barred from it due to civil authority orders or otherwise.

Some insurers included a virus exclusion in their policy wording before the pandemic struck. Does that mean that those insurers without a virus exclusion did not mean to exclude such losses? Is the virus exclusion itself a rock-solid denial of coverage, under all loss scenarios?

Perhaps instead the business interruption (and by corollary, the civil authority) insurance product needs to be retooled and re-messaged to communicate precisely what is and what is not meant to be covered. Otherwise, in the insurance world, if coverage is unclear, ties go to the policyholder—or at least they should. The insurer must provide coverage until new policy language is drafted in new versions of insurance policies.

3. Causation, Civil Authority Coverage and the Virus Exclusion

The trigger of coverage for civil authority business interruption losses rests largely on arguments of insurance causation. Policyholders continue to allege that a civil authority order caused their pandemic-related business interruption losses by restricting their access to their property. To date, courts have perhaps incorrectly declined coverage because they have held that the cause of the policyholder’s losses is not the order and that no physical loss or damage occurred to prompt the order in the first place.

It is important to keep in mind how causation works in the insurance law context and how it is different than principles of tort causation. In assessing insurance causation in a property loss context, one should work backward from the

¹⁷⁵ A notion picked up by the court in *Real Hosp., LLC v. Travelers Cas. Ins. Co. of Am.*, No. 2:20-cv-00087-KS-MTP, 2020 WL 6503405, at *8 (S.D. Miss. Nov. 4, 2020) (emphasis omitted) (applying Mississippi law), which held that “this is a commercial property policy, not a stand-alone business interruption policy—Plaintiff’s operations are not what is insured—the building and the personal property in or on the building are.”

loss claimed (here, the loss of profit) and ask what external force affected the property to result in the loss and thus potentially trigger the coverage claimed? The analysis is not a temporal one (i.e. last in time) but rather one of effect: what “hurt” the policyholder such that it suffered the loss claimed? For property claims, the answer to insurance causation questions is usually straightforward: what external force damaged the property? The insurance causation analysis does not involve analyzing chains of causation, as one might do in a tort analysis. Fault, blame, or responsibility play no part in insurance causation. Instead, a court is to determine what external force “hurt” the policyholder such that it triggered the particular loss claimed. The inquiry is decidedly contractual.

The loss to the policyholder is the lost profit from an inability to operate the business. The “hurt,” so to speak, in the civil authority coverage case, is actually arising from the order of the civil authority restricting access to the property (whether employee or customer access). The virus did not need to touch any of the policyholder’s property to result in the economic loss that affected the policyholder. Even the threat of the virus is not necessary. The cause of the loss is thus the civil authority order which restricted access to the policyholder’s property.

In a jurisdiction that adheres to the proximate cause doctrine of insurance causation, the proximate cause of the loss in this scenario—for civil authority coverage insurance purposes—is the governmental order. It is analytically incorrect to chase down what made the governmental authority issue the order in the first place—unless the coverage provisions specifically require such a causal inquiry.

In some cases, such an inquiry is necessary if—and only if—the coverage grant requires a finding that the loss must flow from a covered cause which results in direct physical loss or damage to adjacent property. Only if the coverage granting language specifically asks for such an analysis should a court attempt to ask “why” a governmental order was issued. And even then, it should only ask the simple question: was the order issued due to a covered cause which resulted in direct physical loss or damage to property adjacent to the policyholder?

In the case of a civil authority coverage case where there is a virus exclusion in the policy, the causation analysis is a bit more nuanced. If the coverage grant for civil authority insurance does not require direct physical loss or damage to property, but merely the restriction of access to the property, then the virus exclusion has no effect on coverage for the policyholder. The cause of the loss is the governmental order, not the virus.

While the prevention of the virus was the impetus for the order, coverage cannot be ousted simply because the “topic” of the order was “about” the COVID-19 virus. The topic did not harm the policyholder, nor did the virus; the actual effect of the order did. Policyholders should not lose coverage because of the topic of the

times behind a governmental order or even the reasoning behind the order. Coverage should only be ousted when the order did not cause the harm claimed.

However, if the coverage grant for civil authority insurance requires direct physical loss or damage to property, then the policyholder would apparently need to prove that the reasoning behind the civil authority order was indeed related to property damage which occurred. Such can be alleged with the COVID-19 virus by indicating the virus was present in frankly any adjacent property that was in an area affected by COVID-19, so long as that jurisdiction will consider that the presence of the virus can constitute direct physical loss or damage.

The issue is, of course, less clear if the property policy contains a virus exclusion. Some virus exclusions have an anti-concurrent cause clause such that coverage is ousted as long as virus contamination played some role in the ensuing loss. One can argue that the virus did not play a concurrent role in the loss (although it may have been a reason for the order—but the exclusion does not ask about the ‘story’ behind the order—its focus is the cause of the loss claimed for insurance purposes).

An example of such a scenario occurred when the policyholder massage spa in *Elegant Massage, LLC v. State Farm Mutual Automobile Insurance Company*¹⁷⁶ was forced to close due to a specific governmental order that mandated the closure of spas and massage services due to the inability of those particular businesses to maintain safe social distancing in a time of particularly serious virus spread. The spa and massage business was thus forced to close as a direct result of this specific order. The spa also voluntarily closed even after the order was lifted, because it could not maintain the required social distancing measures and still conduct its business. The policyholder argued the order, not the virus, caused its losses. The court agreed, because the policyholder’s specific type of business was targeted by the order—it was not just a general health measure. The court also noted that Virginia does not support anti-concurrent causation clauses; insurers must draft specific language to oust coverage and there must be a direct connection between the exclusion and the loss (not some tenuous connection anywhere in the chain of causation).

The catch-22 is realized when a coverage grant tied to direct physical loss to property is coupled with a virus exclusion. In that instance, alleging that the civil authority coverage is a result of virus contamination may well trigger the virus exclusion.¹⁷⁷

¹⁷⁶ No. 2:20-cv-265, 2020 WL 7249624 (E.D. Va. Dec. 9, 2020) (applying Virginia law).

¹⁷⁷ Professor Dan Schwarcz has been quoted as taking the view that where a policy has a virus exclusion, the case against coverage is “open and shut.” Caroline Glenn, *Insurers Are Telling Businesses Their Policies Don’t Cover Coronavirus Shutdown*. *John Morgan Attorneys Say They’re Wrong*, ORLANDO SENTINEL (May 4, 2020),

4. Ambiguity in Property Coverage for Pandemic-related Losses

It may well be that the coverage clause “direct physical loss of or damage to property” is by now so tortured and unpredictable in caselaw as to be rendered ambiguous in terms of insurance policy construction. Indeed, three courts have found just that.

In *Elegant Massage, LLC v. State Farm Mutual Automobile Insurance Company*,¹⁷⁸ the court noted that the coverage clause does not overtly require structural damage for coverage to attach. Because there was such a “spectrum” of meanings of “direct physical loss of or damage,” the court interpreted the clause in a light most favourable to the policyholder. If the property (here, a spa which requires close contact with, and touching of, patrons) was deemed uninhabitable, inaccessible and dangerous to use as a result of governmental orders because of the high risk for spreading COVID-19, then the policyholder suffered direct physical loss. The court drew analogies to those cases where the policyholder could not use its property due to toxic gasses from drywall or odor or asbestos.

In *North State Deli, LLC v. The Cincinnati Insurance Co.*,¹⁷⁹ the court scoured the wide variety of dictionary definitions and determined that “loss” can equate to the loss of a full range of rights and advantages of property use. It held the coverage clause was ambiguous and thus settled on a reasonable definition which favours coverage: that “direct physical loss” can mean loss of use or access, even if the property is not structurally altered.

Finally, in *Hill and Stout PLCC v. Mutual of Enumclaw Insurance Company*,¹⁸⁰ the court held that physical “loss” must mean something different than physical “damage.” “Loss” could mean “deprivation.” The dental practice at issue in that case had direct physical deprivation of its premises as a result of the

<https://www.orlandosentinel.com/coronavirus/jobs-economy/os-bz-coronavirus-insurance-denials-morgan-lawsuits-20200504-pbrpq6z7ofbevau67cpgq4nzqi-story.html>. Although one of us (Stempel) tends to agree that coverage is probably inapt in most such cases, the other (Knutsen) is hesitant. In any event, we think the issue is closer than commonly thought because of the long history of causation doctrine that tends not to look beyond the immediate cause of loss if the cause is a sufficiently dominant factor in bringing about the loss. See Erik S. Knutsen, *Confusion About Causation in Insurance: Solutions for Catastrophic Losses*, 61 ALA. L. REV. 957 (2010); Peter Nash Swisher, *Insurance Causation Issues: The Legacy of Bird v. St. Paul Fire & Marine Ins. Co.*, 2 NEV. L.J. 351 (2002).

¹⁷⁸ 2020 WL 7249624 (E.D. Va. Dec. 9, 2020) (applying Virginia law).

¹⁷⁹ *North State Deli, LLC v. The Cincinnati Ins. Co.*, No. 20-CVS-02569, 2020 WL 6281507 (N.C. Super. Oct. 9, 2020) (Trial Order).

¹⁸⁰ No. 20-2-07925, 2020 WL 6784271 (Wash. Super.) (Trial Order).

governmental order stopping dental visits because the practice could not see patients or practice dentistry. To that end, because the pleadings were silent about the meaning of “loss,” the court held that physical “loss” is an ambiguous phrase, and the case could proceed.

A review of the various dictionary definitions above for these terms certainly should be leading other courts to also consider ambiguity. In some cases, asbestos contamination is a direct physical loss. In others, it is not. In some cases, prevention of access to property by a government order is a direct physical loss. In others, it is not. Under the doctrine of *contra proferentem*, a finding of ambiguity leads to the policy terms being interpreted in favor of the policyholder. If policyholders and insurers alike—and clearly courts—cannot predict the meaning of the phrase and what it is supposed to do as the main coverage trigger for perhaps the most prevalent insurance product on the market, and if so much litigation is produced resulting from this confusion, then ambiguity of the coverage clause may be a reasonable conclusion for courts to make.

C. THE POTENTIAL FOR COVID INSURANCE COVERAGE CASES AS A BLUEPRINT FOR BETTER DECISION-MAKING

A few cases (three decided by the same Western District of Missouri court) have found coverage for COVID-related losses, albeit in a motion to dismiss context and without a full factual record: *Studio 417, Inc. v. Cincinnati Insurance Company*,¹⁸¹ *K.C. Hopps v. Cincinnati Insurance Company*,¹⁸² *Blue Springs Dental Care v. Owners Insurance Company*,¹⁸³ and *Elegant Massage, LLC v. State Farm Mutual Automobile Insurance Company*.¹⁸⁴ The other cases denying coverage have attempted to distinguish these cases on a number of grounds primarily related to the specific facts plead by the policyholders (i.e. the presence of a virus-specific exclusion or the specific allegations of virus particles actually physically present on insured property).

¹⁸¹ No. 20-cv-03127-SRB, 2020 WL 4692385 (W.D. Mo. Sept. 12, 2020) (applying Missouri law).

¹⁸² 2020 U.S. Dist. LEXIS 144285 (W.D. Mo. Aug. 12, 2020) (applying Missouri law). *K.C. Hopps v. Cincinnati* is a short opinion that incorporates the Court’s analysis in *Studio 417* because that case “involves the same Defendant, similar insurance provisions, and similar factual allegations as those asserted in this case. Defendant also moved to dismiss *Studio 417* under Rule 12(b)(6) based on similar legal arguments that it presents in this case.” *Id.* at *2.

¹⁸³ 2020 U.S. Dist. LEXIS 172639 (W.D. Mo. Sep. 21, 2020).

¹⁸⁴ 2020 WL 7249624 (E.D. Va. Dec. 9, 2020) (applying Virginia law).

The *Studio 417* and *Elegant Massage* cases remain the most analytically satisfying decisions to date,¹⁸⁵ as they most thoroughly deal with competing precedents and convey a broader understanding of the importance of insurance as a risk-based commercial product packaged to commercial policyholders. The other decisions denying coverage, in the main, tend to resort to a restrictive line of case precedents that narrow insurance recovery based largely on a purely textual parsing of insurance policy language, on a “know it when I see it” basis. Those decisions do not convey a broader understanding of what the coverage clause or property policies generally are meant to do in the consumer marketplace.

The *Studio 417* case more fully accounts for the historical caselaw interpreting the “direct physical loss or damage” coverage clause—both for and against coverage. The case also demonstrates the most doctrinally defensible analysis of the insurance causation elements of the claim. The policyholders in that case operated restaurants and hair salons. They claimed for pandemic-related losses under their business interruption and civil authority coverage contained in their all-risk property policies. Their claims were denied. The policy in question provided coverage for a “direct loss,” which is defined as “accidental physical loss or accidental physical damage.” Notably, there was no virus exclusion in this policy.

The policyholders alleged that customers and employees were infected with COVID-19 and the insured property became contaminated with the virus as a result. They argued that the virus is a physical substance that is active on tangible surfaces, and renders property unsafe and unusable. This quality of the virus forced the policyholders to suspend operations or at least reduce them. The policyholders also alleged that civil authorities in Missouri and Kansas issued orders that required suspension of businesses at various places, including closure orders. The policyholders alleged that both the presence of COVID-19 on the property plus the government closure orders resulted in direct physical loss or damage to the property and denied the policyholders the full use of the property.

The court found that there is a possibility of coverage despite the fact that the virus could be cleaned from physical surfaces or dies naturally within a few days. The fact that access to the property was prohibited or severely restricted was enough to find a possibility of coverage at this stage. In this regard, the court relied on the *Gregory Packaging, Inc. v. Travelers Property and Casualty Co. of America*¹⁸⁶ case,

¹⁸⁵ This is not said in derogation of *Blue Springs Dental v. Owners Ins.*, which unlike *K.C. Hopps* contains extensive discussion and analysis. Although *Blue Springs Dental* involved somewhat different policy language and business activities, its analysis is heavily shaped by *Studio 417*, discussed at length in this section.

¹⁸⁶ No. 2:12-cv-04418 (WHW)(CLW), 2014 WL 6675934, at *1 (D.N.J. Nov. 25, 2014) (applying New Jersey law).

where ammonia contamination at a juice packaging plant triggered insurance coverage because the manufacturer's buildings were uninhabitable due to the contamination. Even though the policyholders in *Studio 417* likely could not prove that COVID-19 was specifically on their premises, the fact that the virus was so widespread was enough to obviate the issue for the court.

The court held that COVID-19 is a physical substance which lives on surfaces and is transmitted through the air. COVID-19 makes property unsafe and unusable, resulting in "direct physical loss of or damage to" property. One does not need to prove tangible physical alteration of property to trigger coverage.

The court also held that loss of use of property is different than "damage;" otherwise, the word "damage" would be rendered superfluous in the coverage clause. The fact that the property could not be used due to COVID-19 was enough for the court to hold the policyholders had suffered a potential loss of the property. The court distinguished the line of cases that require policyholders to prove a tangible physical alteration to the property in order to trigger the coverage clause. The court distinguished the *Source Food Technology, Inc. v. U.S. Fidelity & Guarantee Company*¹⁸⁷ case, which granted summary judgment to an insurer who denied coverage when the policyholder's meat could not cross the Canadian border due to meat infection concerns. The *Studio 417* court held that the policyholders' allegations posit contamination of the property with a physical substance: the COVID-19 virus. This was therefore a different situation than the *Source Foods* case where there was no evidence the beef was actually contaminated by mad cow disease.

The policyholders also had potential coverage under a claim for civil authority insurance. According to the court, government orders affected hair salons by forcing their closure and affected restaurants by not allowing diners to dine inside the premises. Only drive-through or pick-up or delivery orders were allowed for restaurants. This was sufficient for the court to find that access was prohibited to such a degree as to trigger the civil authority coverage. The court held that the virus was physically present in property other than the policyholder's, because it was "everywhere" and therefore that satisfied the "direct physical loss or damage" coverage requirement.

The court specifically held that the civil authority coverage clause required access to be prohibited but the language did not mandate that all access had to be fully prohibited. The fact that access to the policyholders' property was impeded to a significant degree was sufficient for coverage to attach. Along the same logic, the court held that the policyholders also had potential coverage under the property policy's ingress and egress, dependent property, and sue and labor provisions.

¹⁸⁷ 465 F.3d 834, 835 (8th Cir. 2006) (applying Minnesota law).

The same federal court denied an insurer's motion to dismiss the claims of policyholder dental clinics in *Blue Springs Dental Care v. Owners Insurance Company*¹⁸⁸ The dental clinics claimed business interruption and civil authority losses when Missouri and corresponding counties issued 'stay at home' orders to quell the virus spread. Three dental clinics completely closed and one remained open only for essential and emergency dental cases. The policyholder pled that its property was damaged because of the presence of COVID-19 on and around its property such that it had to either end or reduce its operations due to actual contamination. It also alleged that employees, customers, and other visitors likely were infected with the coronavirus and thus operations were suspended to prevent physical damage to property and to the people on it. The 'stay at home' orders and general fear of infection or spreading COVID-19 on the property itself meant that customers could not access the property.

The insurer in this case argued that the fact that the one clinic was offering some services meant that its operations were not suspended within the meaning of coverage under the policy. The insurer also argued that the policyholder's clinics suffered no "direct physical loss of or damage to" property. As was the case in *Studio 417*, there was no exclusion for pandemics or communicable diseases in the applicable policy.¹⁸⁹

The court found that COVID caused the policyholder's alleged physical loss in that the virus physically occupied and contaminated the dental clinics. This deprived the policyholder of use of the clinics, making them unsafe. The court also held that the policyholder necessarily suspended its operations to prevent physical damage from COVID. The COVID virus was the cause of the suspension and implicated business interruption coverage.

The court also held that the policyholder would be entitled to civil authority coverage because the orders by the state and counties do not need to be directed specifically at insured property or property adjacent to it in order to trigger coverage. The court cited *Studio 417* with approval, reiterating that policyholders do not need to completely lose all access to property—coverage could be had for partial impeded access. In this case, although three of the clinics closed entirely and the other had only limited dental services for emergency patients, access was prohibited to such a

¹⁸⁸ 2020 U.S. Dist. LEXIS 172639.

¹⁸⁹ Nor was there a virus exclusion in the policies at issue in *K.C. Hopps v. Cincinnati Ins. Co.*, 2020 U.S. Dist. LEXIS 144285 (W.D. Mo. 2020). It thus appears that Cincinnati sold a significant number of policies without a virus exclusion and may face significant coverage responsibility in cases where courts take a similar view of the "direct physical loss or damage" requirement and where government orders mandated closure.

degree as to trigger coverage. The court left open the question as to the effect of the order that targeted essential versus non-essential businesses.

The important factor in the *Studio 417* and *Blue Springs Dental Care* cases is that the policyholders alleged specific physical damage through the presence of COVID-19 virus on the insured property in question. That allowed the court to find a direct physical loss, and thus the potential for coverage. The fact that contamination was not permanent was not an issue restricting the coverage analysis. The court also held that direct physical loss could be had through loss of use of the property. The court also had little issue with connecting the causal chain of the presence of COVID-19 virus on property, its prevalence in the community, and the inability of the policyholders to use their property as a result of governmental orders arising directly from the presence of COVID-19.

The court in *Elegant Massage* granted coverage to a massage spa when the spa was forced to close due to governmental orders. The spa's business model required the touching and close proximity to customers which was the very risk the orders were trying to quell in prevention of the virus. After the mandatory closure order ended, the spa still voluntarily closed as it was exceedingly difficult to comply with the mandated physical distancing requirements and still provide massage services. As mentioned above, the court found the coverage clause "direct physical loss of or damage to property" ambiguous because the clause does not specifically require distinct, structural damage for coverage to attach. If the insurer wished such a requirement, it could have added that language. Therefore, by interpreting the clause in a fashion most favorable to the policyholder, the court held that the loss of use of the policyholder's property qualified as a "direct physical loss." The court, however, denied civil authority coverage to the policyholder as it would not show a causal link between any damaged surrounding properties and its own. Simply put, there was no structural damage to the policyholder's premises—only loss of use and access.

V. CASELAW AND THE VIRUS EXCLUSION

As is by now clear, we are concerned, perhaps to the point of being dismayed, that so many courts have so credulously embraced the view that as an absolute matter of law viral infection of premises cannot be physical loss or damage to insured premises and that there is no coverage even where government authorities have deprived policyholders of use of their property. This reading of policy language—especially its cocksure construction that refuses to recognize alternative reasonable reading of the words—poses significant potential problems not only for COVID coverage cases but for property insurance disputes generally.

That said, this first wave of cases may be an example of erroneous judicial reasoning that nonetheless arguably reaches a correct result, at least in many instances. Of the COVID coverage decisions made as this article was written, all but a handful had favored insurers. In nearly all of these cases granting insurer dismissal motions on the basis of what we regard as incorrect application of the physical-loss-or-injury trigger, the policies at issue also contained a virus exclusion. As discussed below, the standard ISO virus exclusion is broadly drafted and was intended by insurers to preclude coverage for certain virus-related losses. In some cases, drafting, communication, or claims-handling errors of an insurer may make a virus exclusion ineffective. Or there may be particular facts of a claim that negate the virus exclusion, like issues of causation.¹⁹⁰

As discussed below, despite the apparent clarity of the virus exclusion, it may well be ineffective in some loss situations. In addition, the prevalence of virus exclusions in policies is unclear. As noted above, in the decisions to date, a fourth of the policies at issue lacked a virus exclusion. A preliminary study of liability insurance policies suggests that the majority of these policies lack a virus exclusion.¹⁹¹ Regarding property insurance, however, insurers contend that eighty percent or more of the policies contain virus exclusions. Although that figure that accords with the policies in court decisions to date,¹⁹² it is a sufficiently high percentage that we harbor concerns that may be overstated. For example, the policies of Cincinnati Insurance Company, involved in nearly 200 cases filed, tend not to have a virus exclusion.¹⁹³

Prior to the SARS tragedy of the early Twenty-first Century, insurance policies did not contain virus exclusions, although many did have bacteria, fungus, or mold exclusions. And there is, of course, the pollution exclusion that we think has no application to infection-related loss but that insurers continue to occasionally push as a defense to coverage. Insurers effectively accepted that their policies of the pre-SARS era did not exclude—at least not with sufficient clarity—viral infection losses and responded by drafting a rather comprehensive virus exclusion.

The exclusion and its rationale were presented to regulators in a 2006 ISO circular.¹⁹⁴ The key operative phrase of the exclusion reads: “We will not pay for

¹⁹⁰ See, e.g., *Elegant Massage, LLC v. State Farm Mut. Auto. Ins. Co.*, No. 2:20-cv-265, 2020 WL 7249624 (E.D. Va. Dec. 9, 2020) (applying Virginia law) (finding no direct connection between exclusion and loss; governmental order, not virus, direct cause of loss; and exclusion inapplicable).

¹⁹¹ See Baker, *supra*, note 10.

¹⁹² See *id.* (identifying 174 cases filed against Cincinnati as of Oct. 21, 2020).

¹⁹³ *Id.*

¹⁹⁴ ISO VIRUS EXCLUSION, *supra* note 25.

loss or damage caused by or resulting from any virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness or disease.”¹⁹⁵ Some virus exclusions also contain an anti-concurrent cause clause, which attempts to exclude coverage regardless as to whether the damaged complained of is concurrently caused with another non-virus-related cause or not.¹⁹⁶ In particular, the circular stated:

While property policies have not been a source of recovery for losses involving contamination by disease-causing agents, the specter of pandemic or hitherto unorthodox transmission of infectious material raises the concern that insurers employing such policies may face claims in which there are efforts to expand coverage and to create sources of recovery for such losses, contrary to policy intent.¹⁹⁷

Case law to date has supported application of the ISO virus exclusion to exclude coverage for COVID-related losses in a near-automatic fashion, without subjecting the exclusion to any meaningful analysis.¹⁹⁸ The virus exclusion has been

¹⁹⁵ *Id.*

¹⁹⁶ *See, e.g.*, the policy at issue in *Diesel Barbershop, LLC v. State Farm Lloyds*, No. 5:20-cv-461-DAE, 2020 WL 4724305 F.Supp.3d (W.D. Tex. 2020) (applying Texas law).

1. We do not insure under any coverage for any loss which would not have occurred in the absence of one or more of the following excluded events. We do not insure for such loss regardless of: (a) the cause of the excluded event; or (b) other causes of the loss; or (c) whether other causes acted concurrently or in any sequence with the excluded event to produce the loss; or (d) whether the event occurs suddenly or gradually, involves isolated or widespread damage, arises from natural or external forces, or occurs as a result of any combination of these: . . .

j. Fungi, Virus Or Bacteria

. . . (2) Virus, bacteria or other microorganism that induces or is capable of inducing physical distress, illness or disease.

Id.

¹⁹⁷ ISO VIRUS EXCLUSION, *supra* note 25.

¹⁹⁸ *See, e.g.*, *Seifert v. IMT Ins. Co.*, No. 20-1102 (JRT/DTS), 2020 WL 6120002 (D. Minn. Oct. 16, 2020) (applying Minnesota law) (holding that losses resulted from order, not virus, but anti-concurrent loss provision in virus exclusion ousts coverage because virus is part of causal chain of loss); *Founder Inst. Inc. v. Hartford Fire Ins. Co.*, No. 20-cv-04466-VC, 2020 WL 6268539 (N.D. Cal. Oct. 22, 2020) (applying California law) (rejecting

policyholder argument that governmental orders were about spread of saliva and respiration droplets, not virus; virus exclusion applies); *Border Chicken AZ LLC v. Nationwide Mut. Ins. Co.*, No. CV-20-00785-PHX-JJT, 2020 WL 6827742 (D. Ariz. Nov. 20, 2020) (applying Arizona law); *Chattanooga Prof. Baseball LLC v. Nat'l Cas. Co.*, No. CV-20-01312-PHX-DLR, 2020 WL 6699480 (D. Ariz. Nov. 13, 2020) (applying Arizona law); *Franklin EWC, Inc. v. Hartford Fin. Servs. Grp., Inc.*, No. 20-cv-04434 JSC, 2020 WL 5642483 (N.D. Cal. Sept. 22, 2020) (applying California law); *Mark's Engine Co. No. 28 Rest., LLC v. Travelers Indem. Co. of Conn.*, No. 2:20-cv-04423-AB-SK, 2020 WL 5938689 (C.D. Cal. Oct. 2, 2020) (applying California law); *Raymond H Nahmad DDS PA v. Hartford Cas. Ins. Co.*, No. 1:20-cv-22833-BLOOM/Louis, 2020 WL 6392841 (S.D. Fla. Nov. 2, 2020) (applying Florida law); *W. Coast Hotel Mgmt., LLC v. Berkshire Hathaway Guard Ins. Co.*, No. 2:20-cv-05663-VAP-DFMx, 2020 WL 6440037 (C.D. Cal. Oct. 27, 2020) (applying California law); *Palmer Holdings & Invs., Inc. v. Integrity Ins. Co.*, No. 4:20-cv-154-JAJ, 2020 WL 7258857 (S.D. Iowa) (applying Iowa law); *Whiskey River on Vintage, Inc., v. Ill. Cas. Co.*, No. 4:20-cv-185-JAJ, 2020 WL 7258575 (S.D. Iowa Nov. 30, 2020) (applying Iowa law); *Natty Greene's Brewing Co. v. Travelers Cas. Ins. Co. of Am.*, No. 1:20-CV-437, 2020 WL 7024882 (M.D.N.C. Nov. 30, 2020) (applying North Carolina law); *Wilson v. Hartford Cas. Co.*, No. 20-3384, 2020 WL 5820800 (E.D. Pa. Sept. 30, 2020) (applying Pennsylvania law); *N&S Rest., LLC v. Cumberland Mut. Fire Ins. Co.*, No. 20-05289 (RBK/KMW), 2020 WL 6501722 (D.N.J. Nov. 5, 2020) (applying New Jersey law); *Long Affair Carpet & Rug, Inc. v. Liberty Mut. Ins. Co.*, No.: SACV 20-01713-CJC(JDEx), 2020 WL 6865774 (C.D. Cal. Nov. 12, 2020) (applying California law); *Real Hosp., LLC v. Travelers Cas. Ins. Co. of Am.*, No. 2:20-cv-00087-KS-MTP, 2020 WL 6503405 (S.D. Miss. Nov. 4, 2020) (applying Mississippi law); *Newchops Rest. Comcast LLC v. Admiral Indem. Co.*, No. CV 20-1869, 2020 WL 7395153 (E.D. Pa. Dec. 17, 2020) (applying Pennsylvania law); *Brian Handel DMD, PC v. Allstate Ins. Co.*, No. 20-3198, 2020 WL 6545893 (E.D. Pa. Nov. 6, 2020) (applying Pennsylvania law); *Hajer v. Ohio Security Ins. Co.*, No. 6:20-cv-00283, 2020 WL 7211636 (E.D. Texas Dec. 7, 2020) (applying Texas law); *Vizza Wash, LP v. Nationwide Mut. Ins. Co.*, No. 5:20-cv-00680-OLG, 2020 WL 6578417 (W.D. Tex. Oct. 26, 2020) (applying Texas law); *Terry Black's Barbecue, LLC v. State Auto. Mut. Ins. Co.*, No. 1:20-CV-665-RP, 2020 WL 7351246 (W.D. Tex. Dec. 14, 2020) (applying Texas law); *AFM Mattress Co. v. Motorists Com. Mut. Ins. Co.*, 2020 WL 6940984 (N.D. Ill. Nov. 25, 2020) (applying Illinois law); *Boulevard Carroll Ent. Grp. v. Fireman's Fund Ins. Co.*, No. 20-11771 (SDW)(LDW), 2020 WL 7338081 (D.N.J. Dec. 14, 2020) (applying New Jersey law); *Santo's Italian Café LLC v. Acuity Ins. Co.*, No. 1:20-cv-01192, 2020 WL 7490095 (N.D. Ohio) (applying Ohio law); *1210 McGavock St. Hosp. Partners, LLC v. Admiral Indem. Co.*, No. 3:20-cv-694, 2020 WL 7641184 (M.D. Tenn. Dec. 23, 2020) (applying Tennessee law); *Boxed Foods Company, LLC v. Cal. Capital Ins. Co.*, No. 20-cv-04571-CRB, 2020 WL 6271021 (N.D. Cal. Oct. 27, 2020) (applying California law); *LJ New Haven LLC v. AmGUARD Ins. Co.*, No. 3:20-cv-00751 (MPS), 2020 WL 7495622 (D. Conn. Dec. 21, 2020) (applying Connecticut law); *Mortar & Pestle Corp. v. Atain Specialty Ins. Co.*, No. 20-cv-03461-MMC, 2020 WL 7495180 (N.D. Cal. Dec. 21, 2020) (applying California law).

held to oust coverage because courts have found that, even though some policyholders lost business income due to governmental orders closing or limiting access to their buildings, that access was lost because the governmental orders were issued due to a virus. In short, the courts link the causal chain back to the virus, an excluded cause. Courts summarily find no coverage in those cases where the virus exclusion has an anti-concurrent cause clause (and such a clause is permissible in that particular state).

We are not so certain the application of the virus exclusion to COVID-19-related cases is as straightforward as these court decisions suggest, especially those involving losses caused by governmental orders.¹⁹⁹ We are reminded of the similar path taken by courts first interpreting another seemingly impenetrable exclusion: the absolute pollution exclusion.²⁰⁰ We might suggest that a more nuanced, contextual approach to the ISO virus exclusion is at least warranted, paying attention to drafting and underwriting history and what was meant in that 2006 ISO circular sent to insurance regulators. No court to date has examined what insurers actually meant to exclude in 2006 and how that plays out—or not—in the property insurance context of the 2019–2020 COVID pandemic. Keep in mind—the 2006 ISO virus exclusion was drafted in response to the SARS crisis, a very different disease scenario without the marked and intermittent governmental closures of the COVID-19 pandemic. It may be that, after such an analysis, the exclusion does exclude most if not all COVID-19-related business interruption losses. But we think it is at least intellectually honest to run the gauntlet with it, as was done with the absolute

But see *Elegant Massage, LLC v. State Farm Mut. Auto. Ins. Co.*, No. 2:20-cv-265, 2020 WL 72496234 (E.D. Va. Dec. 9, 2020) (applying Virginia law) (holding virus exclusion not applicable because cause of loss for massage spa is government closure order, not virus); *Taps & Bourbon on Terrace, LLC v. Underwriters at Lloyds London*, No. 20093025, 2020 WL 6380449 (Pa. Com. Pl. Oct. 26, 2020) (Trial Order) (refusing to dismiss case at pleadings stage, even though virus exclusion at issue).

¹⁹⁹ At least one court appears to have had the same concerns, although in a context where the complete insurance policy was not supplied to the court. In *Urogynecology Specialist of Fla., LLC v. Sentinel Ins. Co.*, No. 6:20-cv-1174-Orl-22EJK, 2020 WL 5939172 (M.D. Fla. Sept. 24, 2020) (applying Florida law), the court allowed the policyholder's case to proceed, despite the presence of a virus exclusion, because the court surmised that COVID-19 may be different than other "virus"-type claims and perhaps it may be inappropriate to lump it in with other environmental pollutants like fungi, bacteria, or dry rot.

²⁰⁰ See Jeffrey W. Stempel, *Reason and Pollution: Correctly Construing the "Absolute" Pollution Exclusion in Context and in Accord with Its Purpose and Party Expectations*, 34 TORT & INS. L.J. 1 (1998); Jeffrey W. Stempel, *Unreason in Action: A Case Study of the Wrong Approach to Construing the Liability Insurance Pollution Exclusion*, 50 FLA. L. REV. 463 (1998).

pollution exclusion before it (recall that exclusion was eventually found wanting, and certainly did not merit as broad an application as insurers enjoyed in the early years of the exclusion).

However, incredibly, a number of courts have dismissed cases at the pleadings stage because of a cursory read of the virus exclusion and, in so doing, also denied specific policyholder requests for discovery about the ISO virus exclusion and its genesis.²⁰¹ After raising what appear to be reasonable queries about what the ISO circular was meant to do, policyholders are apparently faced with a door slammed shut about further factual discovery on the issue. Still other courts have preferred instead to offer—without the assistance of any evidence or context beyond pleadings—their own guesses as to what the boundaries of the exclusion surely must be.²⁰²

Most noteworthy perhaps is this question: if a policy does not include a virus exclusion, must that then be taken to mean that it covers virus-related losses?²⁰³ Such virus exclusion language has been available since 2006, in direct response to the SARS pandemic. If an insurer has not specifically excluded viruses as a cause of loss, then pandemic-related losses resulting from virus contamination or civil authority orders attempting to quell virus spread would appear to be within the concept of covered losses (as long as the policyholder can prove there was a “direct physical loss of or damage to” covered property).

A. CASES WITHOUT A VIRUS EXCLUSION

In those cases without a virus exclusion, courts did not outright dismiss the policyholder’s claim and instead at least inquired about the potential for “physical loss or damage.” Unlike the policyholders in *Studio 417*, the policyholder in *Mudpie, Inc. v. Travelers Casualty Insurance Company of America*²⁰⁴ did not allege the virus

²⁰¹ See, e.g., *Mortar & Pestle Corp. v. Atain Specialty Ins. Co.*, No. 20-cv-03461-MMC, 2020 WL 7495180 (N.D. Cal. Dec. 21, 2020) (applying California law) (denying restaurant policyholder leave to discover genesis of ISO form and circular); *Boxed Foods Co. v. Cal. Capital Ins. Co.*, No. 20-cv-04571-CRB, 2020 WL 6271021 (US Dist. Ct., N.D. Cal.) (applying California law) (denying discovery request about ISO circular and virus exclusion genesis on dismissal).

²⁰² See, e.g., *LJ New Haven LLC v. AmGUARD Ins. Co.*, No. 3:20-cv-00751 (MPS), 2020 WL 7495622 (D. Conn. Dec. 21, 2020) (applying Connecticut law) (citing ISO circular policyholder submits that exclusion likely limited to “on contact” or “on surface” contamination only; court disagrees and chastises policyholder for importing what is not in the policy (despite clause being an exclusion!)).

²⁰³ See French, *supra* note 4.

²⁰⁴ 2020 WL 5525171 (applying California law).

entered the property. Its business interruption claim rested solely on the governmental “stay at home” order in effect. Thus, the policyholder’s putative class action was dismissed. The court held that the lead plaintiff policyholder, a children’s clothing store, did not lose its property nor did it have that property damaged by the virus.

The court took a broad view of “direct physical loss of or damage to” property, in that it would consider loss of functionality as triggering coverage without requiring physical alteration of the property. However, to qualify for coverage, a policyholder would have to prove some intervening physical force made the premises uninhabitable or unusable (as was the case in *Gregory Packaging* with the ammonia).

The court did not accept that loss of property functionality or access due to governmental orders equated to “direct physical loss;” the policyholder could go back to its property after the “stay at home” order ended. Loss of use was thus held to be not a direct physical loss in this instance. The court distinguished this claim, based solely on the governmental order causing a loss of use, from that in *Studio 417* where the claimants had alleged actual physical virus microbes damaged the inside of their premises, rendering it unusable.

The court also denied coverage under the civil authority provisions of the store’s policy because it found no causal link between any damage to adjacent property and the subsequent denial of access to the store. Because the “stay at home” orders were preventative, and did not involve actual physical damage, there was no causation between the policyholder’s business losses and the government closure order.

The policyholder restaurant in *Malaube, LLC v. Greenwich Insurance Company*²⁰⁵ alleged that Miami’s order to close all restaurants to indoor dining (and thus permit only takeout and delivery) as a result of COVID-19, plus the Florida governor’s statewide executive order closing all dining on-site restaurants, both resulted in prohibited access to its restaurants and thereby interrupted its business income. The policyholder argued that the full use of its property was limited by the government orders. The case did not survive a motion to dismiss.

The court cited *Mama Jo’s, Inc.* and *Source Foods* and held that, under Florida law, an actual, tangible change in insured property must accompany a claim for coverage for “direct physical loss of or damage to” insured property. It distinguished the *Studio 417* case because, in that case, the policyholders alleged the actual presence of virus microbes on the property. The only allegations of loss in *Malaube* involve losses arising from the two Florida emergency orders. Because

²⁰⁵ No. 20-22615-CIV, 2020 WL 5051581 (S.D. Fla. Aug. 26, 2020) (applying Florida law).

there was no physical intrusion of the property that resulted in an actual physical change to the property, under the *Mama Jo's/Source Foods* line of authority, the court held there was no potential for coverage and the claim was dismissed.

A similar result was reached in *Rose's 1 LLC v. Erie Insurance Exchange*,²⁰⁶ on a motion for summary judgment in the Superior Court of the District of Columbia. Some DC restaurants were seeking business interruption coverage based on the DC mayor's order that closed all non-essential businesses (which included the restaurants) and told residents to stay inside except for essential reasons. The court held that there were no cases in this jurisdiction where a government edict, standing alone, is considered a direct physical loss, thereby triggering coverage, unless there was some physical damage to property. The court relied on *Brothers., Inc. v. Liberty Mutual Fire Insurance Company*,²⁰⁷ a case where coverage was denied after a curfew was imposed in DC following riots after Martin Luther King's assassination. The curfew was held to be preventative in nature, and not a result of any physical damage to property. In fact, the point of the curfew was to prevent physical damage to property, so coverage could not possibly be triggered, according to the court.

The San Diego barbershop policyholder in *Pappy's Barber Shops, Inc. v. Farmers Group, Inc.*²⁰⁸ had its claims for business interruption and civil authority coverage dismissed. The policyholder alleged that the local order banning non-essential gatherings plus then the state-wide "stay at home" order resulted in direct physical loss of or damage to their insured property. The policyholder argued that the precautionary measures taken by the government were the cause of the loss, not the actual presence of virus on any physical surface. The court held that the governmental orders did not prohibit access to the policyholder's place of business and the orders were not issued due to direct physical loss of or damage to either the policyholder's property or other property. Because there were no allegations of what the court considered were direct physical loss or damage, the claim was dismissed.

The overarching pattern is that cases without a virus exclusion at least prompt the courts to grapple with whether or not coverage is to be had for "direct physical loss of or damage to property." Nearly all cases which did not feature a virus exclusion have denied coverage if the policyholder did not allege actual physical loss on the premises.²⁰⁹ And of course most right-thinking policyholders

²⁰⁶ 2020 WL 4589206 (D.C. Super. Ct. Aug. 6, 2020).

²⁰⁷ 268 A.2d 611 (D.C. 1970).

²⁰⁸ No. 20-CV-907-CAB-BLM, 2020 WL 5500221 (S.D. Cal. Sept. 11, 2020) (applying California law).

²⁰⁹ See, e.g., *Infinity Exhibits, Inc. v. Certain Underwriters at Lloyd's London*, No. 8:20-cv-1605-T-30AEP, 2020 WL 5791583 (M.D. Fla. Sept. 28, 2020) (applying Florida law) (relying on *Mama Jo's* court requires actual physical damage for coverage; case dismissed

could not allege such loss because to do otherwise would bring the claim squarely within the virus exclusion. So, the common route taken by policyholders—if unsuccessful to date—has been to argue that the governmental orders closing or limiting property access are the cause of the business interruption loss, and not the virus.

B. CASES WITH A VIRUS EXCLUSION

As stated, insurers have been successful in having those cases that featured a virus exclusion dismissed by courts. In probably the earliest claim focusing on pandemic-related losses, a Michigan state court granted the insurer's motion to dismiss the policyholder's claim for business interruption losses in *Gavrilides Management Company v. Michigan Insurance Company*²¹⁰ The policyholder in that case owned two restaurants and alleged that it lost revenue due to COVID-19 related closure orders and restrictions. The court held that, because the restaurants only alleged loss of use of their facilities, and not physical loss or damage, the restaurants did not suffer any covered loss. The virus exclusion in the policy operated to oust coverage regardless of whether there had been direct physical loss or damage to property.

as no facts plead to show physical property damage); *Uncork & Create LLC v. Cincinnati Ins. Co.*, No. 2:20-cv-00401, 2020 WL 6436948 (S.D.W. Va. Nov. 2, 2020) (applying West Virginia law) (distinguishing *Studio 417* as there was alleged virus contamination in that case; however, court goes on to state that even if virus was present, coverage would likely not attach as premises can be cleaned); *Oral Surgeons, PC v. The Cincinnati Ins. Co.*, No. 20-20-CV-222-CRW-SBJ, 2020 WL 5820552 (S.D. Iowa Sept. 29, 2020) (applying Iowa law) (finding no allegations of direct physical loss); *Promotional Headwear Int'l v. Cincinnati Ins. Co.*, No. 20-cv-2211-JAR-GEB, 2020 WL 7078735 (D. Kan. Dec. 3, 2020) (applying Kansas law) (declining to accept allegations that virus contaminated property court cites to *Source Food* and *Mama Jo's* to require physical alteration); *Water Sports Kauai, Inc. v. Fireman's Fund Ins. Co.*, No. 20-cv-03750-WHO, 2020 WL 6562332 (N.D. Cal Nov. 9, 2020) (applying Hawai'ian law) (distinguishing *Studio 417* and *Mudpie*, where actual threats of contamination were alleged, court finds no actual exposure at stores in this case); *Terry Black's Barbecue, LLC v. State Auto. Mut. Ins. Co.*, No. 1:20-CV-665-RP, 2020 WL 7351246 (W.D. Tex. Dec. 14, 2020) (applying Texas law) (finding no allegations of virus on property; assuming virus there, it does not cause physical loss and can be cleaned); *S. Fla. ENT Assocs, Inc. v. Hartford Fire Ins. Co.*, No. 20-23677-Civ-WILLIAMS/TORRES, 2020 WL 6864560 (S.D. Fla. Nov. 13, 2020) (applying Florida law) (finding no allegations of virus presence); *Kirsch v. Aspen Am. Ins. Co.*, No. 20-11930, 2020 WL 7338570 (E.D. Mich. Dec. 14, 2020) (applying Michigan law) (finding no allegations of virus on property).

²¹⁰ No. 20-000258-CB (Mich. Cir. Ct., Ingham Cty. July 1, 2020).

In *Diesel Barbershop LLC v. State Farm Lloyds*,²¹¹ a U.S. District Court in the Western District of Texas dismissed the policyholder barbershop's claims for pandemic-related losses. The policy featured a fungi, virus or bacteria exclusion, which had an anti-concurrent cause clause:

1. We do not insure under any coverage for any loss which would not have occurred in the absence of one or more of the following excluded events. We do not insure for such loss regardless of:
 - (a) the cause of the excluded event; or
 - (b) other causes of the loss; or
 - (c) whether other causes acted concurrently or in any sequence with the excluded event to produce the loss; or
 - (d) whether the event occurs suddenly or gradually, involves isolated or widespread damage, arises from natural or external forces, or occurs as a result of any combination of these:

j. Fungi, Virus Or Bacteria

...

- (2) Virus, bacteria or other microorganism that induces or is capable of inducing physical distress, illness or disease.

The policyholder sought business interruption coverage for COVID-related losses due to the state and county orders restricting access to, or closing altogether of, non-essential businesses. The court preferred the line of cases requiring a direct tangible injury in order to trigger property coverage for a "direct physical loss." It held that Texas law would mandate there be a tangible injury for coverage to be triggered. The policyholder did not allege that the virus was physically on its property and caused tangible harm. Rather, it alleged that the cause of its loss was the governmental orders restricting access to its properties. This was not sufficient to create the potential for coverage as no direct physical loss or damage was alleged, according to the court.

Regardless as to the issue of direct physical loss, the court found that the virus exclusion and its anti-concurrent cause clause would prohibit both business interruption and civil authority coverage for the policyholder. The underlying root cause of the alleged losses was the virus—an excluded cause—according to the court because the virus was the reason for the orders to be issued by the state and county in the first instance.

²¹¹ No. 5:20-CV-461-DAE, 2020 WL 4724305, at *5 (W.D. Tex. Aug. 13, 2020) (applying Texas law).

The key to the court’s reasoning in *Diesel Barbershop* was the view that the virus exclusion negated any possibility for coverage for COVID-19 related losses. The court also preferred to interpret “direct physical loss” as requiring not only a tangible injury to the property in question but a physical injury of sufficient magnitude that the property had been permanently structurally altered—an injury not alleged by the policyholder in that case.

A similar result to *Diesel Barbershop* was reached in *Turek Enterprises, Inc. v. State Farm Mutual Automobile Insurance Company*²¹² in a motion to dismiss heard in the U.S. District Court for the Eastern District of Michigan. In that case, a chiropractic clinic’s claim for business interruption coverage was dismissed. The clinic claimed for losses due to its inability to access its property as a result of governmental “stay at home” orders. Like *Diesel Barbershop*, the property policy in *Turek* had a similar virus exclusion with an anti-concurrent cause clause. The policyholder clinic specifically argued that COVID-19 virus particles did not attach to or damage any property (presumably to get around the virus exclusion). The court found that this case was similar to the *Source Food* case, in that there was no contamination of the insured property and therefore no possibility of coverage.

The court in *Turek* distinguished *Studio 417* and preferred the reasoning of *Diesel Barbershop* and *Gavrilides Management Company LLC v. Michigan Insurance Company*²¹³ in holding that Michigan law required a tangible injury to property to trigger the “direct physical loss or damage” coverage clause. The court did not accept the policyholder’s argument that COVID-19 was not the proximate cause of the loss and the virus exclusion was only limited in its applicability to the costs of decontamination. Instead, the court held that the governmental orders preventing property access were not the sole cause of the policyholder’s loss—the virus was also a cause, thus triggering the anti-concurrent cause portion of the virus exclusion. The court made this holding despite the policyholder raising the fact that the 2006 ISO virus exclusion circular submitted to insurance regulators indicated that the exclusion was meant to preclude losses due to contamination by disease-causing agents.

²¹² No. 20-11655, 2020 WL 5258484 (E.D. Mich. Sept. 3, 2020) (applying Michigan law).

²¹³ No. 20-000258-CB (Mich. Cir. Ct., Ingham Cty. July 1, 2020) (holding that, when a city order prevented customers from dining in the restaurant, it did not suffer a direct physical loss because there was no physical alteration or tangible damage to the integrity of the building).

Similarly, in *10E, LLC v. Travelers Indemnity Company of Connecticut*,²¹⁴ a restaurant in downtown Los Angeles had its claim for business interruption and civil authority-related losses dismissed on motion after it alleged that the Los Angeles Mayor's public health restrictions prohibiting in-person dining at restaurants resulted in lost income. The insurance policy in this case had an exclusion for losses due to virus and bacteria.²¹⁵

The court held that there was no direct physical loss or damage triggering coverage as nothing physically changed in the property. Under California law, the court held that losses from inability to use property do not amount to "direct physical loss of or damage to property." A distinct, demonstrable physical alteration to the property is required for coverage to attach. Furthermore, the court held that temporary impairment to property does not equate to direct physical loss. The policyholder's civil authority claim was dismissed because the virus exclusion ousted coverage for COVID-19 related losses. The government-ordered dining restrictions were entirely attributable to the virus, an excluded cause. Additionally, the court found that no particular adjacent property was damaged so the civil authority coverage could not be triggered in the first place.

The court in *Martinez v. Allied Insurance Company of America*²¹⁶ dismissed a dental office's claim for business interruption insurance because the policy contained a virus exclusion.²¹⁷ The policyholder claimed that the COVID-19 virus and Florida's emergency shutdown orders, including orders limiting non-essential dental procedures, caused the interruption of its income stream. It also alleged damages due to decontamination of its office. The court dismissed the claim solely on the language of the virus exclusion by holding that all of the office's losses were related to the virus, an excluded cause of loss. This is, in fact, the predominant pattern of courts faced with the virus exclusion when deciding pandemic-related coverage issues: a knee-jerk dismissal.

In perhaps the most shocking example of all, the United States District Court for the Western District of Missouri in *Zwillo v. Corporation. v. Lexington Insurance*

²¹⁴ No. 2:20-cv-04418-SVW-AS, 2020 WL 5359653 (C.D. Cal. Sept 2, 2020) (applying California law).

²¹⁵ *Id.* at *1 (noting that the policy reads, "We will not pay for loss or damage caused by or resulting from any virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness or disease.").

²¹⁶ No. 2:20-cv-00401-FtM-66NPM, 2020 WL 5240218 (M.D. Fla. Sept. 2, 2020) (applying Florida law).

²¹⁷ *Id.* at *3 (noting that the exclusion was for loss or damage caused "directly or indirectly," by "[a]ny virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness or disease.").

*Company*²¹⁸ dismissed a policyholder's claim based on an extremely broadly worded pollution exclusion which included the word "virus" in a long list of possible pollutant contaminants. The court distinguished the *Studio 417*, *KC Hopps*, and *Blue Springs Dental* cases—cases in its own district!—on the basis that the word "virus" was here in an all-encompassing pollution exclusion and not a stand-alone "virus" exclusion. The court did not accept the policyholder's arguments that this pollution exclusion was obviously aimed at environmental or industrial pollution, not pandemic-related losses.

Where cases to date have ruled in favor of an insurer based on knee-jerk embrace of a faulty concept of direct physical loss or injury, the courts may nonetheless have blundered toward the right result in some situations involving the virus exclusion—if insurers win the causation battle. We think that is a big "if" but realize courts may decide to the contrary. If that becomes the majority rule, observers will tend to minimize the significance of judicial decisions construing the physical loss or injury trigger, at least where there is a virus exclusion. Notwithstanding this, we remain critical of the "no direct physical loss or damage" decisions even if they can be defended on the "no harm, no foul" grounds of a more persuasive basis such as the virus exclusion.

But it is far from clear how many policies at issue actually contain a virus exclusion or how that exclusion operates in all loss scenarios. Insurers have promoted the view that nearly all policies contain the exclusion but a quarter of the case law to date involves policies with no such exclusion. Consequently, better juridical reasoning regarding loss and damage may make thousands of policies and millions of dollars in coverage available to policyholders.

VI. CONCLUSION

Insurers have won the bulk of the early COVID coverage battles, with analysis in too many of these early decisions that mangles fundamental insurance policy interpretation doctrine. Fortunately, there is a cluster of better reasoned cases that one hopes will be persuasive to the appellate courts that will ultimately determine the outcome of the COVID coverage war.

The insurance industry's media thrust at the early stages of the COVID pandemic which pushed the no-coverage-for-COVID message appeared to set the stage for the early salvo of claim dismissals from courts across the country. Whether due to media influence or simple subpar analysis, many court decisions fall short in that they have, in varying degrees:

²¹⁸ No. 4:20-00339-CV-RK, 2020 WL 7137110 (W.D. Mo. Dec. 2, 2020) (applying Missouri law).

- a) ignored or wrongfully rejected state law precedents regarding the “direct physical loss or damage” coverage trigger;
- b) read pro-insurer precedents too broadly, failing to distinguish the ubiquity, reach, and impact of COVID as compared to the more distant and non-physical loss of these precedents;
- c) ignored or summarily distinguished similarly analogous cases of insurance coverage for contaminating substances, precedents which would have provided helpful guidance on the insurance coverage issue for COVID-related losses;
- d) artificially distinguished insurance policy wording from the wording in past precedents when, in fact, the relevant policy wording is identical to the cases at hand;
- e) provided no reasoning as to why one line of coverage cases is preferred over another;
- f) fallen into a hyper-literalist dictionary-based argument which cherry-picks only certain dictionary definitions and ignores others which run counter to the conclusions reached;
- g) refused to even consider insurance policy term ambiguity in the wake of conflicting dictionary definitions and case precedents, thereby failing to invoke the policyholder-friendly tools of insurance policy interpretation: *contra proferentem* and reasonable expectations;
- h) refused to read pleading allegations at face value and as presumptively true, as required at the motion to dismiss stage of litigation; and,
- i) dispensed with policyholder claims without any further factual findings or discovery, at the pleadings stage, in a context where factual knowledge of the COVID-19 virus is evolving on a near-daily basis, and where allegations should be enough to get the policyholder in the door of the litigation system.

In response to this list, insurers would certainly argue that the presence of a virus exclusion in the cases on which they have prevailed validates dismissal²¹⁹ even

²¹⁹ And, as reflected in the tally of decisions to date, courts are receptive to this insurer argument. See Baker, *supra* note 10; Erin Ayers, *Insurers Prevail in Two More COVID-19-related BI Lawsuits*, ADVISEN, (last visited Jan. 25, 2020) https://www.advisen.com/tools/fpnproc/fpns/articles_new_1/P/376369872.html?rid=376369872&list_id=1 (discussing Tracker findings); Mike Curley, *Travelers Ducks Counterclaims*

if judicial analysis of the loss or damage questions has been unduly abrupt and reductionist. We reject a “no harm, no foul” justification because there is harm when courts warp prevailing contract and insurance law in a rush to judgment.²²⁰ In particular, the collapsing and narrowing of the concepts of directness, physicality, loss and damage sets unwise precedent sure to wrongfully deprive policyholders of coverage in future non-COVID cases. If the virus exclusion is conclusive, bully for insurers—but if that is the case, decisions should be made on the basis of this express exclusion rather than tortured reasoning about loss and damage.

The judiciary’s excessively textual focus-cum-myopia also unnecessarily raises doubts about the correctness of the decisions. If it is fact correct that there cannot be loss or damage without structural change in tangible property or that the concept of damage requires a particularized showing of viral contamination of specific surfaces, one would expect supporting evidence in the drafting history of property policies or similar materials providing context and illuminating the policy purpose and coverage intent. But overconfident hermeneutics-lite decisions in favor of insurers deprive policyholders, the judicial system, and society of access to materials that can determine whether a court’s reading of policy verbiage is correct.

Ironically, this type of background information might support the insurer position. The drafting history of the standard ISO virus exclusion, for example, does strongly suggest that insurers were seeking to avoid contamination liability, although the case against civil authority shutdown is less clear.²²¹ We understand that insurers, who think they can consistently win drafting wars, are reluctant to concede the usefulness of contextual materials and undermine future arguments seeking to restrict court consideration to only policy text. But the insurers’ long term

in Geragos COVID-19 Suit, LAW360, (last visited Jan. 25, 2020) <https://www.law360.com/articles/1321151/travelers-ducks-counterclaims-in-geragos-covid-19-suit> (California federal district court finds “a virus exclusion in [law firm] policy bars coverage.”).

²²⁰ In addition, it appears that many insurance policies lack a virus exclusion. See Baker, *supra* note 10 (last visited Oct. 21, 2020) (noting that in cases with decisions, one-fifth of policies lack virus exclusions); Josh Czaczkas, et. al., *Why We Don’t Need COVID-19 Immunity Legislation*, BALKINIZATION (Sept. 26, 2020), <https://balkin.blogspot.com/2020/09/why-we-dont-need-covid-19-immunity.html> (noting that the majority of general liability insurance policies lack virus exclusion). In the rush to enact limitations on liability for COVID claims, state legislatures appear not to have investigated the prospect that such limitations on liability inure to the benefit of insurers rather than policyholders, at least in the short term. Insurers would presumably argue that in the absence of such legislation, they will be forced to raise premiums or restrict coverage.

²²¹ See ISO VIRUS EXCLUSION, *supra* note 25.

agenda should not strangle immediate judicial decision-making. Courts interested in correctly deciding COVID coverage cases would presumably be interested in seeing this material rather than making it moot through a Rule 12 dismissal.

Apart from its possible (we think probable) infection of the judiciary, the insurance industry's public relations narrative is troubling. The insurance industry claims that COVID coverage is a death knell even though it also claims that nearly all policies provide only four weeks of civil authority coverage while all policies of course have policy limits and perhaps even other sub-limits on business interruption coverage or applicable exclusions as well as conditions that policyholders may fail to meet. In light of the liability limiting tools at their disposal, the insurer claims of imminent poverty if COVID is covered seems melodramatic.

The insurer claim of disaster rings particularly hollow in light of the European experience more receptive to coverage. While insurer profitability may have declined for the moment, the insurance industry remains alive and well in both the E.U.²²² and the U.K., where a key test case went well for policyholders.²²³ And in the U.S., insurers appear to be doing just fine in spite of—or in some cases because of—the pandemic.²²⁴

²²² See *Munich Re Reports €800M of COVID-19-Related Losses During Q3*, INS. J. (Oct. 21, 2020), <https://www.insurancejournal.com/news/international/2020/10/21/587446.htm>. Although 800 million euros is of course a good deal of money, it is not the hundreds of billions of dollars American insurers claim they will lose (allegedly each month) if COVID business interruption claims must be paid. The Munich Re experience thus suggests that policy limits, sub-limits, and specific exclusions give carriers substantial economic protection even if their defenses of no-direct-physical-loss-or-damage are rejected by courts.

²²³ See Carolyn Cohn & Kirstin Ridley, *London Court Rules Some Insurers Should Not Have Denied Business Interruption Claims*, INS. J. (Sept. 15, 2020), <https://www.insurancejournal.com/news/international/2020/09/15/582641.htm> (describing *Financial Conduct Authority v. Arch Insurance (UK) Ltd*, [2021] UKSC 1).

²²⁴ See Leslie Scism & Allison Prang, *Travelers More Than Doubles Quarterly Income*, WALL ST. J. (Oct. 20, 2020), <https://www.wsj.com/articles/travelers-profit-rose-in-third-quarter-11603192181> (noting Traveler's \$827 million third quarter profit compared to \$396 million in 2019, which included \$400 million in subrogation revenue from claims against Pacific Gas & Electric in connection with California fires; and how Travelers stock rose by \$3.12 per share). Travelers was also aided in that its auto insurance business did better than usual because of pandemic-stimulated reductions in driving and hence in collisions. We realize that property insurance is expected to have a less successful 2020 than auto or liability insurance but note that insurers have multiple means of enduring difficult times and profiting over the proverbial long-haul, where their longevity records is considerably better than that of their small business policyholders.

Meanwhile, business policyholders appear to be experiencing the type of debacle insurers claim they face if coverage claims succeed. Insurers seem to sing this tune with ease when threatened. We have heard it before regarding asbestos, pollution, product liability, bad faith, and punitive damages claims. But even the massive asbestos mega-tort, Superfund, and other pollution claims—not to mention the credit swap defaults of the Great Recession—did minimal long-lasting damage to insurers and their ability to accumulate capital and regain profitability. In times of such stress, many more policyholders than insurers fail.

Although insurer claims of industry-wide doom tend to ring hollow, their means of survival is not without collateral consequence. The asbestos, pollution, and Superfund coverage wars produced broad exclusions in standard policies and made coverage more expensive and difficult (but not impossible) to obtain. COVID-19 will surely spur restrictions of coverage and increases in premiums—but this is likely even if insurers prevail in today's coverage battles.

The immediately relevant question is whether today's policyholders seeking coverage under policies issued prior to the pandemic—particularly those lacking a virus exclusion—are entitled to coverage. Too many initial decisions on the issue have implicitly embraced a flawed insurer narrative in abruptly turning policyholders away.