

BUSINESS INTERRUPTION INSURANCE: THE FUTURE OF PANDEMIC EXCLUSIONS

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I. INTRODUCTION

Warren Buffett once said, “[p]redicting the rain doesn’t count, building the ark does.”² He was speaking about investing.³ However, the parallels between building an “ark” of reliable stocks to protect your investments and an “ark” of insurance protections are uncanny.⁴ Being able to predict that one-day rain will come and a business could face a potential loss or liability is useless without an ark to keep the business afloat.⁵ Thus, having business insurance is an essential piece of owning and operating a business of any size.⁶

In 2003, the Severe Acute Respiratory Syndrome (“SARS”) outbreak offered a glimpse of a viral disease producing a pandemic that had the potential to severely affect business operations.⁷ The outbreak was ultimately contained, but not before it spread across Asia, Europe, North America, and South America.⁸ Following the SARS outbreak, the All-England Lawn Tennis Club—which led the day-to-day operations of Wimbledon—opted into the niche practice of purchasing business interruption coverage, specifically for pandemic-related losses.⁹ The renowned tennis tournament

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² Scott Mautz, *Warren Buffett’s Little Known ‘Noah Rule’ Is the Key to Surviving Adversity*, INC. (Nov. 4, 2019), <https://www.inc.com/scott-mautz/warren-buffetts-little-known-noah-rule-is-key-to-surviving-adversity.html>.

³ *Id.*

⁴ *Get Business Insurance*, U.S. SMALL BUS. ADMIN., <https://www.sba.gov/business-guide/launch-your-business/get-business-insurance> (last visited Jan. 10, 2021).

⁵ *Id.*

⁶ *Id.*

⁷ *SARS Basic Fact Sheet*, CTRS. FOR DISEASE CONTROL AND PREVENTION, <https://www.cdc.gov/sars/about/fs-sars.html> (last visited Jan. 10, 2021); *Wimbledon Shows How Pandemic Insurance Could Become Vital for Sports, Other Events*, INS. J. (Apr. 13, 2020), <https://www.insurancejournal.com/news/international/2020/04/13/564598.htm>.

⁸ *SARS Basic Fact Sheet*, *supra* note 7.

⁹ *About the AELTC*, WIMBLEDON, https://www.wimbledon.com/en_GB/atoz/about_aeltc.html (last visited Jan. 10, 2021); *Wimbledon Shows How Pandemic Insurance Could Become Vital for Sports, Other Events*, *supra* note 7.

paid a yearly premium of almost two million dollars for seventeen years.¹⁰ On average, Wimbledon spends over thirty-eight million dollars on prizes and operation costs and earns approximately three hundred and sixty-three million dollars annually.¹¹ The COVID-19 pandemic coupled with a governmental shutdown led to the cancelation of the 2020 Wimbledon Tournament.¹² The cancelation of the tournament created lost profits of over three hundred and twenty-four million dollars.¹³ However, Wimbledon will not carry this loss entirely on its own.¹⁴ It is set to receive a hefty insurance payout from its pandemic coverage.¹⁵ Wimbledon will collect an estimated payout of one hundred and forty-two million dollars from its insurer.¹⁶ Although Wimbledon is still facing a significant loss, its pandemic coverage will considerably reduce the financial impact.¹⁷

Wimbledon's pandemic protection faded as insurers no longer wanted to offer this type of coverage after such a large payout.¹⁸ Presently, organizations face a complicated reality. Even if they want to pay the increased premiums for pandemic coverage, insurers are under no obligation to offer this coverage.¹⁹ Likewise, the insurance industry is built on the allocation of risk.²⁰ An insurer will only craft a policy if it finds that the benefits of offering that coverage are greater than the risk that it will have to make a significant payout.²¹ In other words, an insurer will only draft policies and offer coverage where there is a small probability of the triggering event happening or when the premiums create enough of a cushion to make the coverage profitable.²²

Thus, the issue presents itself: what should a businessperson do? Should she demand this coverage and hope that, for the right price, insurers are responsive to the request? Or should there be government intervention to help aid insureds in obtaining coverage for pandemic losses? This note will

¹⁰ *Wimbledon Shows How Pandemic Insurance Could Become Vital for Sports, Other Events*, *supra* note 7. Over these seventeen years, a total of over thirty-one million dollars was paid in insurance premiums. *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Wimbledon Shows How Pandemic Insurance Could Become Vital for Sports, Other Events*, *supra* note 7.

¹⁷ *Id.*

¹⁸ Katie Scott, *Wimbledon Boss Confirms that the Championship Will Not Have Pandemic Insurance in 2021*, *INS. TIMES* (June 29, 2020), <https://www.insurancetimes.co.uk/news/wimbledon-boss-confirms-the-championship-will-not-have-pandemic-insurance-in-2021/1433726.article>.

¹⁹ *Id.*

²⁰ *Insurance 101, About the Industry*, *INS. INFO. INST.*, <https://www.iii.org/article/insurance-101> (last visited Jan. 10, 2021).

²¹ *Id.*

²² *Id.*

evaluate a few potential outcomes of proposed state and federal legislation focused on aiding businesses currently affected by the COVID-19 pandemic, as well as establish a standard of pandemic coverage for future outbreaks.

Section II of this note discusses the formation of commercial insurance and the eventual creation of business interruption insurance. How courts interpret insurance contracts will be presented in Section III of this note. Section IV examines the proposed federal and state bills, as well as presents the constitutional limitations of these bills. Finally, section V evaluates the constitutionality of the proposals and presents arguments as to why the proposed federal bill would create a thriving system and allow businesspersons to build the best ark for their future.

II. THE HISTORY AND EXPANSION OF INSURANCE LAW

A. The Foundation of Insurance

The insurance industry functions through contractual obligations.²³ Individuals and businesses alike form contracts—typically with insurance agencies—for financial protection against particular losses.²⁴ Essentially, these actors are engaging in a system of shifting risks.²⁵ An insured party is lessening its risk of loss by obtaining coverage and the insurer is making a profit from insurance premiums when the loss does not occur.²⁶ Today's insurance industry is highly regulated and complex.²⁷ However, it did not begin this way.²⁸

Today's insurance industry is cemented in offsetting potential risks through contractual obligations.²⁹ There is an ancient story of risk sharing that some scholars point to as the beginning of today's concept of "insurance."³⁰ The story begins with two farmers living along a riverbank.³¹ Both farmers made a living by growing rice, shipping it on the river, and selling it at the city located upriver.³² The farmers would ship their rice in individual boats.³³ However, undoubtedly, every year, one farmer would face an accident or experience theft, and in turn, lose most, if not all, of his crop

²³ 16 SAMUEL WILLISTON, WILLISTON ON CONTRACTS § 49:1 (4th ed. 1993), Westlaw (database updated May 2021).

²⁴ *Id.*

²⁵ J.L. Longnaker, *History of Insurance Law*, 477 INS. L.J. 642, 642 (1962).

²⁶ ROBERT W. KLEIN, A REGULATOR'S INTRODUCTION TO THE INSURANCE INDUSTRY 7 (2d ed. 2005).

²⁷ Longnaker, *supra* note 25.

²⁸ *Id.*

²⁹ *Id.* at 643.

³⁰ *Id.* at 644.

³¹ *Id.*

³² *Id.*

³³ Longnaker, *supra* note 25.

for that year.³⁴ The farmers realized that if each of them were to ship half of their crop on the other farmer's boat, the likelihood of at least half of their crops making it to the market was much greater.³⁵ While there is no proof that these farmers actually existed, this story illustrates the idea of sharing risks to lessen a loss.³⁶

The concept of insurance began to resemble contractual obligations as early as 2500 B.C., with businesspeople and traveling salespeople.³⁷ Due to a lack of trust, the parties entered into agreements stating that the salespeople would receive a "loan of money and goods," and the businesspeople would receive "[fifty] percent of the profits that the salesperson made."³⁸ To ensure that the salespeople returned with the profits, the salespeople's wives, children, and property were often used as consideration for these agreements.³⁹ Issues arose quickly when salespeople were robbed and, in turn, the salesperson's wives, children, and property, were taken by the businesspeople due to the breach of their agreements.⁴⁰ As a result, these agreements began to include provisions that excused the salesperson in the case of robbery.⁴¹ These terms were codified in 2250 B.C. in the *Code of Hammurabi*.⁴² The *Code of Hammurabi* consists of two hundred and eighty-two edicts and is one of the earliest and most complete written legal codes.⁴³ The edicts ranged from "family law to professional contracts and administrative law" and are considered by some scholars as the first codification of insurance law.⁴⁴ Similar early versions of insurance were found in Ancient Greece, Rome, China, and India.⁴⁵

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.* at 643.

³⁸ *Id.*

³⁹ Longnaker, *supra* note 25, at 643.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ THE CODE OF HAMMURABI (L. W. King trans., Yale L. Sch. 2008) (2250 B.C.), <https://avalon.law.yale.edu/ancient/hamframe.asp>.

⁴⁴ *Id.*; Longnaker, *supra* note 25, at 644.

⁴⁵ *Id.*

B. The Origin of Commercial Insurance in Europe

The origin of commercial insurance, also commonly known as business insurance, can be traced back to the fourteenth century in Northern Italy.⁴⁶ Scholars generally accept that the earliest known insurance policy was written in Genoa, Italy in 1347.⁴⁷ The policy was an agreement to repay a loan “upon the happening of any misfortune to the vessel insured.”⁴⁸ Insurance law continued to expand in this region, primarily focusing on sea merchants and shipping vessels.⁴⁹ In 1411, the Venetian Government recognized the importance of contracting for insurance purposes that they began regulating the practice.⁵⁰ Italian merchants established themselves on Lombard Street in London and brought the practice of making contracts of insurance for their sea vessels to England.⁵¹ The development of Insurance law stayed focused on insuring merchant ships until the Great Fire of London in 1666.⁵²

The Great Fire of London was devastating for the greater London area, causing estimated property damage of over ten million euros, which is equivalent to over one and a half billion euros today.⁵³ Nicholas Barbon, an English businessman, promptly opened the Fire Office in London to insure homes against fire damage, debuting modern property insurance.⁵⁴ Many other property insurers opened throughout London, and by 1690, one in ten homes in London were insured.⁵⁵

C. The United States Expands Business and Commercial Insurance

The foundation of the entire United States’ legal system is rooted in English law and insurance law was no different.⁵⁶ The first insurance company in what would become the United States, *The Philadelphia Contributionship for the Insurance of Houses from Loss by Fire*, was founded

⁴⁶ *Id.*

⁴⁷ *Id.* This has been contested with the discovery of another similar Italian document dated February 13, 1343. Humbert O. Neil, *The Earliest Insurance Contract. A New Discovery*, 39 J. RISK AND INS. 215, 215-16 (1972).

⁴⁸ Longnaker, *supra* note 25, at 646.

⁴⁹ *Id.* at 648.

⁵⁰ *Id.* at 649.

⁵¹ *Id.* at 650.

⁵² *Id.* at 653.

⁵³ James Read, *How the Great Fire of London Created Insurance*, MUSEUM OF LONDON (July 15, 2016), <https://www.museumoflondon.org.uk/discover/how-great-fire-london-created-insurance>.

⁵⁴ *Brief History, Insurance Handbook*, INS. INFO. INST., <https://www.iii.org/publications/insurance-handbook/brief-history> (last visited Mar. 1, 2021).

⁵⁵ Read, *supra* note 53.

⁵⁶ Longnaker, *supra* note 25, at 656.

in 1752.⁵⁷ As modern society grew and became more complex, specialized insurance began to develop.⁵⁸

Business owners quickly realized that insurance for property damage alone would not be enough to keep their businesses afloat in the event of a loss, especially if they were forced to temporarily cease operations.⁵⁹ Now, small businesses and corporations alike know the importance of dependable insurance.⁶⁰ In addition to property insurance, many businesses have expanded their protections by opting into business interruption policies.⁶¹ If a business is forced to close temporarily, business interruption insurance can be used to cover expenses such as taxes, mortgage or lease payments, and employee payroll.⁶² Additionally, this coverage can cover the net income lost due to the closure of the business.⁶³ Business interruption policy language will typically read:

We will pay for the actual loss of Business Income you sustain due to the necessary “suspension” of your “operations” during the “period of restoration.” The “suspension” must be caused by direct physical loss of or damage to property at the described premises. The loss or damage must be caused by or result from a Covered Cause of Loss.⁶⁴

Unless otherwise contracted, the typical policy language for business interruption policies requires that the property be physically lost or damaged.⁶⁵ Property is considered “lost” under these provisions when the insured is permanently deprived of the property.⁶⁶

While it may be in the business owner’s best interest for business interruption policies to cover any event that temporarily closes their operations, it is not in the best interest of insurers.⁶⁷ Thus, there are often exclusions in these policies.⁶⁸ Typically, business interruption insurance does not cover items that are broken due to an otherwise covered event, utility payments, income not listed on the business’s financial records, or flood and earthquake damage as this damage is covered under separate policy

⁵⁷ *Brief History*, *supra* note 54.

⁵⁸ WILLISTON, *supra* note 23, at § 49:27.

⁵⁹ *Do I Need Business Interruption Insurance?*, INS. INFO. INST., <https://www.iii.org/article/do-i-need-business-interruption-insurance> (last visited Jan. 10, 2021).

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Real Hosp., LLC v. Travelers Cas. Ins. Co. of Am.*, 499 F. Supp. 3d 288, 291 (S.D. Miss. 2020).

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Do I Need Business Interruption Insurance?*, *supra* note 59.

⁶⁸ *Id.*

provisions.⁶⁹ More recently, exclusions have included those for terrorist attacks and pandemics, viruses, or communicable diseases.⁷⁰

III. INTERPRETATION OF INSURANCE CONTRACTS ADAPTING TO MODERN TRENDS

A. Historical Contract Doctrines to Excuse Performance

There has been a long understanding that certain events would excuse a party from their contractual obligations.⁷¹ Historically, a party seeking to be excused from a contract could rely on two common law doctrines: impossibility and frustration of purpose.⁷² The two doctrines have developed alongside each other due to their similarities.⁷³ The defense of impossibility is appropriate when: (1) the occurrence of an event makes the contract impossible or impracticable to complete; (2) it was the contracting parties' basic assumption that the event would not occur; and (3) the event was not the fault of the party seeking the defense.⁷⁴

As the doctrine of impossibility was developing, the question quickly became, "what if the fundamental purpose of a contract is destroyed?" The contract principle frustration of purpose can help answer that question.⁷⁵ If a contract is still capable of being performed, but the underlying purpose no longer exists, this contractual defense is applied.⁷⁶ In general, four requirements must be met to use this principle to excuse performance.⁷⁷ The first requirement is that the frustration relates to the party's principal purpose in making the contract.⁷⁸ This is coupled with the requirement that the frustration is substantial.⁷⁹ The transaction becoming less profitable for one party is not enough to excuse performance under this principle.⁸⁰ The second requirement is that when the contract was created, the parties assumed the

⁶⁹ *Id.*; Mayukh Sircar, *Business Interruption and Contractual Nonperformance: Force Majeure*, HUTCHINSON PLLC: BLOG (Apr. 9, 2020), <https://www.hutchlaw.com/blog/business-interruption-and-contractual-nonperformance-force-majeure>.

⁷⁰ *Do I Need Business Interruption Insurance?*, *supra* note 59; Wm. Cary Wright, *Force Majeure Clauses and the Insurability of Force Majeure Risks*, CONSTR. LAW., Fall 2003, at 16.

⁷¹ Wright, *supra* note 70.

⁷² 14 TIMOTHY MURRAY, CORBIN ON CONTRACTS § 74.1 (2021).

⁷³ *Id.*

⁷⁴ 8 MICHAEL M. BAYLSON ET AL., BUSINESS & COMMERCIAL LITIGATION IN FEDERAL COURTS § 89:35 (Supp. 2020).

⁷⁵ *See* Wright, *supra* note 70.

⁷⁶ *Id.*

⁷⁷ E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS § 9.7 (3d ed. 2004).

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Karl Wendt Farm Equipment Co. v. Int'l Harvester Co.*, 931 F.2d 1112, 1119 (6th Cir. 1991) (quoting *Groseth Int'l, Inc. v. Tenneco, Inc.*, 410 N.W.2d 159 (S.D. 1987)).

frustrating event would not occur.⁸¹ Third, the frustrating event must not have been caused by the party asserting the defense.⁸² Lastly, the party must not have assumed greater obligations under the contract than required under the law.⁸³

Many courts have held that a party's failure to cover a foreseeable risk preempts their use of either the defense doctrine of impossibility or frustration of purpose.⁸⁴ Force majeure, or "strike," clauses allow parties to address the risk of supervening events prior to the occurrence of those events.⁸⁵ The International Institute for the Unification of Private Law ("UNIDROIT"), an independent intergovernmental organization that seeks to formulate consistent international legal principles, has summarized the uniform understanding of force majeure events.⁸⁶ It is understood that:

Non-performance by a party is excused if that party proves that the non-performance was due to an impediment beyond its control and that it could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences.⁸⁷

Force majeure clauses allow parties to better allocate risks.⁸⁸ Naturally, the clauses have gained popularity in insurance contracts.⁸⁹ Force majeure clauses generally require specificity.⁹⁰ The best way for parties to protect their interests is to address the possibility of supervening risks expressly and specifically.⁹¹ There are still many clauses that include triggering events that would otherwise be defensible under the doctrines of impossibility or frustration of purpose, such as "an act of God."⁹² Force majeure clauses, where the triggering event is "an act of God," allow for a broader

⁸¹ FARNSWORTH, *supra* note 77.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ See MURRAY, *supra* note 72, at §74.19; see also *E. Air Lines, Inc. v. McDonnell Douglas Corp.*, 532 F.2d 957 (5th Cir. 1976); *Publiker Indus., Inc. v. Union Carbide Corp.*, 1975 U.S. Dist. LEXIS 14305 (E.D. Pa. Jan. 17, 1975).

⁸⁵ 14 JOSEPH M. PERILLO & HELEN HADJIYANNAKIS BENDER, CORBIN ON CONTRACTS §74.19 (2021).

⁸⁶ Overview, UNIDROIT, <https://www.unidroit.org/about-unidroit/overview> (last visited Oct. 1, 2021).

⁸⁷ UNIDROIT, UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS 290 (2016), <https://www.unidroit.org/english/principles/contracts/principles2016/principles2016-e.pdf>.

⁸⁸ Wright, *supra* note 70.

⁸⁹ *Id.*

⁹⁰ PERILLO & BENDER, *supra* note 85.

⁹¹ See *id.*

⁹² *Id.*; see *Drummond Coal Sales, Inc. v. Kinder Morgan Operating LP "C"*, No. 2:16-cv-00345-SGC, 2017 U.S. Dist. LEXIS 115394, at *21 (N.D. Ala. July 25, 2017); *TEC Olmos, LLC v. Conocophillips Co.*, 555 S.W.3d 176, 179 (Tex. App. 2018).

interpretation of force majeure events but also make it more difficult for parties to allocate risks.⁹³

B. Business Interruption Insurance Exclusions Provisions

The fundamental principle of the insurance industry is assessing risks and drafting insurance policies to cover unforeseen events.⁹⁴ The September 11th terrorist attacks were devastating in more ways than one.⁹⁵ The most overwhelming result of the attacks was the loss of nearly three thousand people.⁹⁶ However, the repercussions of the attacks were also felt economically.⁹⁷ The insurance industry was facing the largest and most expensive loss in its history, with property insurers carrying the largest portion.⁹⁸ Two-thirds of the nearly forty billion dollars loss was the responsibility of property insurers.⁹⁹ Unsurprisingly, a mass of litigation followed to determine a plethora of insurance coverage questions, many relating to business interruption coverage.¹⁰⁰

To trigger business interruption coverage, typically, there must be a peril causing a “physical loss or damage to insured property resulting in an interruption of the insured’s operations.”¹⁰¹ The question of litigation became determining if this physical loss needed to be a *direct* physical loss.¹⁰² This was addressed in several cases, including, *United Airlines, Inc. v. Insurance Co. of the State of Pennsylvania*.¹⁰³ In this case, United Airlines sought to recover over one billion dollars in losses that resulted from the September 11th terrorist attacks.¹⁰⁴ United Airlines argued that they were entitled to coverage due to its insurance policy language having no adjective modifying the term “damages.”¹⁰⁵ The court rejected this argument granting summary judgment in favor of the insurer.¹⁰⁶ It reasoned that the policy language was clear and unambiguous that to invoke coverage, the loss must be physical.¹⁰⁷

⁹³ See MURRAY, *supra* note 72, at §74.19 (2021); *TEC Olmos, LLC v. Conocophillips Co.*, 555 S.W.3d at 198.

⁹⁴ *Do I Need Business Interruption Insurance?*, *supra* note 59.

⁹⁵ Scott G. Johnson, *Ten Years After 9/11: Property Insurance Lessons Learned*, 46 TORT TRIAL & INS. PRAC. L.J. 686, 686 (2011).

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 686-87.

¹⁰¹ Johnson, *supra* note 95, at 702.

¹⁰² *Id.*

¹⁰³ *United Airlines, Inc. v. Ins. Co.*, 385 F. Supp. 2d 343 (S.D.N.Y. 2005).

¹⁰⁴ *Id.* at 344.

¹⁰⁵ *Id.* at 349.

¹⁰⁶ *Id.* at 354.

¹⁰⁷ *Id.* at 348.

The New York Supreme Court further clarified that a physical loss was not required to be substantial.¹⁰⁸ Schlamm Stone & Dolan, LLP, a law firm in Manhattan, sought business interruption coverage due to dust particles following the September 11th attacks.¹⁰⁹ The court determined that noxious particles within the air and on surfaces were, in fact, property damage under the definition found within the policy language.¹¹⁰ A direct physical loss is required to invoke business interruption coverage and there must be “a direct correlation between the amount of recovery and the actual damages suffered.”¹¹¹

Insurance policy exclusions, particularly pollution exclusions—also referred to as contamination exclusions—became an issue in business interruption coverage litigation following the September 11th attacks.¹¹² Similar to Schlamm Stone & Dolan, LLP, many businesses throughout New York were affected by a cloud of particles, containing “hydroxyls, chlorides, sulfates, asbestos, lead, [and] mercury.”¹¹³ In response to insureds seeking coverage for losses caused by these particles, insurers raised their contamination exclusions as a rebuttal.¹¹⁴

The courts considered the issue of contamination exclusions in both *Parks Real Estate Purchasing Group v. St. Paul Fire & Marine Insurance Co.* and *Ocean Partners, LLC v. North River Insurance Co.*¹¹⁵ In both cases, the court determined that the policy language of what constituted a “contamination” was ambiguous and should be interpreted by the fact finder.¹¹⁶ While “contamination” was determined to be ambiguous, the exclusions were not inapplicable *per se*.¹¹⁷ Rather, the fact finder is left with the responsibility of determining the meaning of “contamination” within the insurance policy language.¹¹⁸ However, it is important to note that this determination is not the majority rule as courts had almost uniformly interpreted the term by its dictionary definition, finding it to be unambiguous.¹¹⁹

¹⁰⁸ *Schlamm Stone & Dolan, LLP v. Seneca Ins. Co.*, No. 603009/2002, 2005 WL 600021, at *5 (N.Y. Sup. Ct. Mar. 4, 2005).

¹⁰⁹ *Id.* at *1.

¹¹⁰ *Id.* at *4.

¹¹¹ Johnson, *supra* note 95.

¹¹² *Id.* at 722.

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Parks Real Estate Purchasing Grp. v. St. Paul Fire and Marine Ins. Co.*, 472 F.3d 33, 39 (2d Cir. 2006); *Ocean Partners, LLC v. N. River Ins. Co.*, 546 F. Supp. 2d 101, 103 (S.D.N.Y. 2008).

¹¹⁶ *Parks Real Estate Purchasing Grp. v. St. Paul Fire and Marine Ins. Co.*, 472 F.3d at 48; *Ocean Partners, LLC v. N. River Ins. Co.*, 546 F. Supp. 2d at 110.

¹¹⁷ Johnson, *supra* note 95, at 724.

¹¹⁸ *Id.*

¹¹⁹ See, e.g., *Am. Cas. Co. of Reading Pa. v. Myrick*, 304 F.2d 179, 183 (5th Cir. 1962); *J.L. French Auto. Castings, Inc. v. Factory Mut. Ins. Co.*, No. 02 C 9479, 2003 WL 21730127, at *2 (N.D. Ill.

As a general rule, contamination and pollution exclusions are interpreted to apply to a broad range of circumstances.¹²⁰ Their application was not isolated to the litigation surrounding the September 11th attacks. This range of circumstances was illustrated when pollution exclusions became an issue again in 2003 with the SARS epidemic.¹²¹ As a result of the epidemic, there were travel bans and, at the time, a significant transition from “life as usual.”¹²² Seeing this transition, the Insurance Service Office (“ISO”)¹²³ anticipated potential business interruption insurance policy issues if a future epidemic or pandemic were to occur.¹²⁴ In 2006, the ISO sought to remedy this and address the existing pollution exclusion.¹²⁵ The ISO published the “Exclusion for Loss Due to Virus or Bacteria” form.¹²⁶ The pertinent suggested policy language provides that “[the insurer] 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.”¹²⁷ The ISO recognized that the pollution exclusion very broadly encompassed contamination.¹²⁸ Contamination from a virus or bacteria is specific and warrants particular attention.¹²⁹

The pollution exclusion has not been uniformly interpreted by all courts.¹³⁰ Because of this, the ISO has consistently introduced new exclusions for specific contaminating or harmful substances, such as the mold exclusion and a liability exclusion addressing silica dust.¹³¹ When the “Exclusion for Loss Due to Virus or Bacteria” was introduced, property policies had yet to become a source of recovery for losses relating to contamination by disease-causing agents or pandemics.¹³² However, insurers were aware of the

July 23, 2003); *Duensing v. Travelers Cos.*, 849 P.2d 203, 206 (Mont. 1993); *Richland Valley Prods, Inc. v. St. Paul Fire & Cas. Co.*, 548 N.W.2d 127, 131 (Wis. Ct. App. 1996).

¹²⁰ Johnson, *supra* note 95, at 724.

¹²¹ *CDC SARS Response Timeline*, CTRS. FOR DISEASE CONTROL AND PREVENTION (Apr. 26, 2013), <https://www.cdc.gov/about/history/sars/timeline.htm>; Steven A. Bader & Jennifer A. Welch, *The ISO Virus Exclusion Meets COVID-19 Business Interruption Suits*, FOR DEF., Dec. 2020, at 30.

¹²² *CDC SARS Response Timeline*, *supra* note 121.

¹²³ The insurance industry thrives on specific policy language and the ISO provides insurers with many advisory services, including suggested policy language that many insurers use to develop their insurance contracts. *ISO General Questions: Frequently Asked Questions*, VERISK, <https://www.verisk.com/insurance/about/faq/> (last visited Oct. 1, 2021).

¹²⁴ Bader & Welch, *supra* note 121.

¹²⁵ Larry Podoshen, *New Endorsements Filed to Address Exclusion of Loss Due to Virus or Bacteria*, ISO CIRCULAR, July 6, 2006, <https://www.propertyinsurancecoveragelaw.com/files/2020/03/ISO-Circular-LI-CF-2006-175-Virus.pdf>.

¹²⁶ *Id.*

¹²⁷ EXCLUSION OF LOSS DUE TO VIRUS OR BACTERIA para. B. (INT’L ORG. FOR STANDARDIZATION 2006).

¹²⁸ Podoshen, *supra* note 125.

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.*

potential of property arguably being contaminated by a virus or bacteria.¹³³ The specific virus and bacteria exclusions address insurers' concerns of being left to rely on the pollution exclusion and potentially being required to cover losses contrary to policy intent.¹³⁴

The most recent viral outbreak, the COVID-19 pandemic, has spawned a mass of business interruption claims.¹³⁵ Even with explicit provisions excluding coverage for damages caused by viruses, businesses have brought legal actions attacking the viral exclusion clauses.¹³⁶ Insureds are frequently leaning on three arguments: (1) the doctrine of regulatory estoppel,¹³⁷ (2) causation,¹³⁸ and (3) ambiguity.¹³⁹

The first argument relies on the doctrine of regulatory estoppel.¹⁴⁰ This doctrine requires two elements.¹⁴¹ The plaintiff must plead that "(1) [a] party made a statement to a regulatory agency; and (2) [a]fterward, the party took a position opposite to the one presented to the regulatory agency."¹⁴² This argument proved successful in 2008 when the New Jersey Supreme Court rejected the enforcement of a pollution-exclusion clause due to the insurance industry's failure to disclose the intended effects of the exclusion.¹⁴³ The court found that the misrepresentation to the New Jersey Department of Insurance was intentional and allowed insurance companies to profit from "maintaining pre-existing rates for substantially-reduced coverage."¹⁴⁴

However, arguments of regulatory estoppel have proved otherwise unsuccessful in business interruption litigation related to COVID-19.¹⁴⁵ A Pennsylvania court found that the ISO, and the insurance industry as a whole, has presented the insurers' stance to regulatory agencies as excluding coverage for any "loss, cost or expense caused by, resulting from, or relating to any virus . . ." ¹⁴⁶ Ultimately, the court held that the insurance industry did

¹³³ *Id.*

¹³⁴ Podoshen, *supra* note 125.

¹³⁵ See, e.g., *Diesel Barbershop, LLC v. State Farm Lloyds*, 479 F. Supp. 3d 353 (W.D. Tex. 2020); *Malaube, LLC v. Greenwich Ins. Co.*, No. 20-22615-Civ-KMW, 2020 WL 5051581 (S.D. Fla. Aug. 26, 2020); *Gavrilides Mgmt. Co. v. Mich. Ins. Co.*, No. 20-258-CB, 2020 WL 4561979 (Mich. Cir. Ct. July 1, 2020); *Studio 417, Inc. v. Cincinnati Ins. Co.*, 478 F. Supp. 3d 794 (W.D. Mo. 2020); *Blue Springs Dental Care, LLC v. Owners Ins. Co.*, 488 F. Supp. 3d 867 (W.D. Mo. 2020).

¹³⁶ Bader & Welch, *supra* note 121, at 31.

¹³⁷ See *Kennedy Hodges & Assocs. Ltd. v. Hartford Fin. Servs. Grp., Inc.*, No 3:20-cv-852, 2020 WL 3416029 (D. Conn. June 19, 2020).

¹³⁸ See *Robert E. Levy, D.M.D., LLC v. Hartford Fin. Servs. Grp. Inc.*, No. 4:20-cv-00643-SRC, 2020 WL 6582671 (E.D. Mo. Nov. 10, 2020).

¹³⁹ See *Broadway 104, LLC v. AXA Fin., Inc.*, No. 1:20-cv-03813, 2020 WL 2511330 (S.D.N.Y. May 15, 2020).

¹⁴⁰ Bader & Welch, *supra* note 121, at 31.

¹⁴¹ *Simon Wrecking Co. v. AIU Ins. Co.*, 541 F. Supp. 2d 714, 717 (E.D. Pa. 2008).

¹⁴² *Id.*

¹⁴³ *Morton Int'l, Inc. v. Gen. Accident Ins. Co. of Am.*, 629 A.2d 831, 876 (N.J. 1993).

¹⁴⁴ *Id.* at 80.

¹⁴⁵ Bader & Welch, *supra* note 121, at 32.

¹⁴⁶ *Brian Handel D.M.D., P.C. v. Allstate Ins. Co.*, 499 F. Supp. 3d 95, 101 (E.D. Pa. 2020).

not take a contradictory position to the one presented to the states' regulatory agencies.¹⁴⁷ Further, it is important to note that not all states will consider the doctrine of regulatory estoppel when there is clear and unambiguous policy language.¹⁴⁸

Business interruption insurance policyholders have also argued that coverage should be enforced, regardless of viral exclusion clauses, due to an order of civil authority—not a virus—being the proximate cause of the loss.¹⁴⁹ “[T]he efficient proximate cause rule operates when an ‘insured risk’ or covered peril sets into motion a chain of causation which leads to an uncovered loss.”¹⁵⁰ The rule requires the determination of the proximate cause of the loss (i.e., the single act or event that set off the chain of events for the resulting loss).¹⁵¹ This is followed by determining if that proximate cause is a covered triggering event under the insurance policy.¹⁵² It has been difficult for courts to distinguish between a loss caused by civil authority orders and the SARS-CoV-2 virus.¹⁵³ There is a distinct causation chain.¹⁵⁴ The civil authority orders suspending business operations were issued to slow the spread of the virus.¹⁵⁵ This causation argument has left insureds seeking coverage empty-handed due to the efficient proximate cause rule.¹⁵⁶

Insureds are also arguing that the viral exclusion policies are ambiguous.¹⁵⁷ Insurance contracts will be interpreted under the state law of the principal insured location of risk.¹⁵⁸ However, there is uniformity in interpretation when the “words of a contract in writing are clear and unambiguous; its meaning is to be ascertained in accordance with its plainly

¹⁴⁷ *Id.*

¹⁴⁸ *Indep. Barbershop, LLC v. Twin City Fire Ins. Co.*, 499 F. Supp. 3d 331, 336 (W.D. Tex. 2020); see also *Federated Mut. Ins. Co. v. Botkin Grain Co.*, 64 F.3d 537 (10th Cir. 1995); *Buell Indus. v. Greater N.Y. Mutual Ins. Co.*, 791 A.2d 489 (Conn. 2002); *E.I. du Pont de Nemours & Co. v. Allstate Ins. Co.*, 693 A.2d 1059 (Del. 1997); *Am. Sts. Ins. Co. v. Kiger*, 662 N.E.2d 945 (Ind. 1996); *Cessna Aircraft Co. v. Hartford Accident & Indem. Co.*, 900 F. Supp. 1489 (D. Kan. 1995); *Anderson v. Minn. Ins. Guar. Ass'n*, 534 N.W.2d 706 (Minn. 1995).

¹⁴⁹ *Bader & Welch*, *supra* note 121, at 33; see *10E, LLC v. Travelers Indem. Co. of Conn.*, 483 F. Supp. 3d 828, 832 (C.D. Cal. 2020); *Mark's Engine Co. No. 28 Rest., LLC v. Travelers Indem. Co. of Conn.*, 492 F. Supp. 3d 1051, 1053 (C.D. Cal. 2020).

¹⁵⁰ *McDonald v. State Farm Fire & Cas. Co.*, 837 P.2d 1000, 1004 (Wash. 1992) (citing *Safeco Ins. Co. of Am. v. Hirschmann*, 773 P.2d 413, 416 (Wash. 1989)).

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Real Hosp., LLC v. Travelers Cas. Ins. Co. of Am.*, 499 F. Supp. 3d 288, 297 (S.D. Miss. 2020).

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Bader & Welch*, *supra* note 121, at 33; see also *10E, LLC v. Travelers Indem. Co. of Conn.*, 483 F. Supp. 3d 828 (C.D. Cal. 2020); *Mark's Engine Co. No. 28 Rest., LLC v. Travelers Indem. Co. of Conn.*, 492 F. Supp. 3d 1051 (C.D. Cal. 2020).

¹⁵⁷ *Bader & Welch*, *supra* note 121, at 34.

¹⁵⁸ RESTATEMENT (SECOND) OF CONFLICT OF LAWS §193 (AM. L. INST. 1971).

expressed intent.”¹⁵⁹ Courts all across the United States have found that the standard business interruption policy language is explicit and unambiguous, which can be seen by their dismissal of several lawsuits.¹⁶⁰

A Kansas City, Missouri restaurant owner, Zwillow, sought the aid of the judicial system when his insurer, Lexington Insurance Co., denied his business interruption claim.¹⁶¹ Lexington Insurance Co. moved to dismiss the suit, claiming coverage was excluded under the policy.¹⁶² Missouri law dictates that if policy language is unambiguous, then it will be enforced as it is written.¹⁶³ However, if the policy is ambiguous, it will be construed against the insurer.¹⁶⁴ In the interpretation of insurance policies a Missouri court will “‘appl[y] the meaning [that] would be attached [to the policy] by an ordinary person of average understanding . . . purchasing insurance.’”¹⁶⁵ The insured carries the burden of proving there is coverage under a given policy, but the insurer must prove the applicability of the policy exclusions.¹⁶⁶

The policy issued by Lexington Insurance included a Pollution and Contamination Exclusion.¹⁶⁷ The policy defines a pollutant or contamination as “any solid, liquid, gaseous or thermal, irritant or contaminant . . . which after its release can cause damage to human health or cause damage or loss of value or loss of use to property . . . including virus.”¹⁶⁸ While this language unambiguously excludes coverage for COVID-19 claims, Zwillow argued that due to the insurance industry’s adoption of specific viral exclusion clauses the pollution and contamination exclusions should not apply to viruses.¹⁶⁹ This argument was fruitless as the specific policy language still excluded viruses.¹⁷⁰ While the court ultimately dismissed Zwillow’s claim, it did note inconsistency within the district regarding similar claims.¹⁷¹ The court distinguished its decision from three other recent decisions within the district

¹⁵⁹ *M&G Polymers USA, LLC v. Tackett*, 574 U.S. 427, 435 (2015) (quoting 11 SAMUEL WILLISTON, WILLISTON ON CONTRACTS § 30:6 (4th ed. 2012)).

¹⁶⁰ *Real Hosp., LLC v. Travelers Cas. Ins. Co. of Am.*, 499 F. Supp. 3d 288, 293-96 (S.D. Miss. 2020); *Zwillow V, Corp. v. Lexington Ins. Co.*, 504 F. Supp. 3d 1034, 1038-40 (W.D. Mo. 2020); *Mark’s Engine Co. No. 28 Rest., LLC v. Travelers Indem. Co. of Conn.*, 492 F. Supp. 3d; *Turek Enters. Inc. v. State Farm Mut. Auto. Ins. Co.*, 484 F. Supp. 3d 492 (E.D. Mich. 2020); *Mauricio Martinez, DMD, P.A. v. Allied Ins. Co. of Am.*, 483 F. Supp. 3d 1189 (M.D. Fla. 2020).

¹⁶¹ *Zwillow V, Corp. v. Lexington Insurance Co.*, 504 F. Supp. 3d at 1036.

¹⁶² *Id.*

¹⁶³ *Id.* at 1037.

¹⁶⁴ *Id.* (citing *Rice v. Shelter Mut. Ins. Co.*, 301 S.W.3d 43, 47 (Mo. 2009) (en banc)).

¹⁶⁵ *Id.* (quoting *Burns v. Smith*, 303 S.W.3d 505, 509 (Mo. 2010) (en banc)).

¹⁶⁶ *Id.* at 1038 (citing *Fischer v. First Am. Title Ins. Co.*, 388 S.W.3d 181, 187 (Mo. Ct. App. 2012)).

¹⁶⁷ *Zwillow V, Corp. v. Lexington Insurance Co.*, 504 F. Supp. 3d at 1041.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Id.* at 1043.

because of the specific policy language excluding coverage for viruses contained within the Lexington Insurance policy.¹⁷²

The ISO correctly predicted the flood of business interruption litigation initiated by a global pandemic and the results of these claims have favored insurers.¹⁷³ In California, courts have upheld provisions that expressly exclude coverage relating to viruses.¹⁷⁴ Courts in Florida and Michigan have held that virus exclusion provisions bar an insured from recovering from their insurer for business interruption claims related to the COVID-19 pandemic and related governmental closures.¹⁷⁵ In addition to the exclusion provisions, California federal courts have also dismissed actions against insurers such as Travelers Indemnity and Farmers Group, Inc., finding that governmental closures do not constitute “direct physical loss of or damage to property.”¹⁷⁶ This finding has been repeated in favor of other insurers, such as Allstate Insurance Company, Allied Insurance Company of America, and Greenwich Insurance Company in Texas, Georgia, Florida, and Mississippi, respectively.¹⁷⁷

IV. PROPOSED LEGISLATION TO ENFORCE PANDEMIC COVERAGE

A. Proposed Legislation by Various State Governments

As it appears now, businesses will be left without business interruption coverage for pandemic-related governmental closures. This has led many

¹⁷² *Id.* (citing *Studio 417, Inc. v. Cincinnati Ins. Co.*, 478 F. Supp. 3d 794 (W.D. Mo. 2020)); *K.C. Hopps, Ltd., v. Cincinnati Ins. Co.*, No. 20-cv-00437-SRB, 2020 WL 6483108 (W.D. Mo. Aug. 12, 2020); *Blue Springs Dental Care, LLC v. Owners Ins. Co.*, 488 F. Supp. 3d 867 (W.D. Mo. 2020).

¹⁷³ Bader & Welch, *supra* note 121, at 34.

¹⁷⁴ *See e.g., Travelers Cas. Ins. Co. of Am. v. Geragos and Geragos*, 495 F. Supp. 3d 848 (C.D. Cal. 2020); *Mark’s Engine Co. No. 28 Rest., LLC v. Travelers Indem. Co. of Conn.*, 492 F. Supp. 3d 1051, 1058 (C.D. Cal. 2020) (dismissing the claim based on the virus exclusion provision and the stay-at-home order).

¹⁷⁵ *Turek Enters. Inc. v. State Farm Mut. Auto. Ins. Co.*, 484 F. Supp. 3d 492 (E.D. Mich. 2020); *Mauricio Martinez, DMD, P.A. v. Allied Ins. Co. of Am.*, 483 F. Supp. 3d 1189 (M.D. Fla. 2020).

¹⁷⁶ *See, e.g., Travelers Cas. Ins. Co. of Am. v. Geragos and Geragos*, 495 F. Supp. 3d 848 (C.D. Cal. 2020); *Mark’s Engine Co. No. 28 Rest., LLC v. Travelers Indem. Co. of Conn.*, 492 F. Supp. 3d 1051 (C.D. Cal. 2020); *Pappy’s Barber Shops, Inc. v. Farmers Grp., Inc.*, 487 F. Supp. 3d 937, 945 (S.D. Cal. 2020); *10E, LLC v. Travelers Indem. Co. of Conn.*, 483 F. Supp. 3d 828, 837 (C.D. Cal. 2020).

¹⁷⁷ *Louis G. Orsatti, DDS, P.C. v. Allstate Ins. Co.*, No. 5-20-CV-00840-FB-RBF, 2020 WL 5948269 (W.D. Tex. Oct. 7, 2020); *Henry’s La. Grill, Inc. v. Allied Ins. Co. of Am.*, 495 F. Supp. 3d 1289 (N.D. Ga. 2020); *Malaube, LLC v. Greenwich Ins. Co.*, No. 20-22615-Civ-KMW, 2020 WL 5051581 (S.D. Fla. Aug. 26, 2020); *Real Hosp., LLC v. Travelers Cas. Ins. Co. of Am.*, 499 F. Supp. 3d 288 (S.D. Miss. 2020).

corporations and businesses to file for bankruptcy.¹⁷⁸ The lack of coverage has affected not only small businesses, but well-established corporations like J.Crew, Gold's Gym, and Neiman Marcus.¹⁷⁹ In 2020, California,¹⁸⁰ Illinois,¹⁸¹ Louisiana,¹⁸² Massachusetts,¹⁸³ Michigan,¹⁸⁴ New Jersey,¹⁸⁵ New York,¹⁸⁶ Ohio,¹⁸⁷ Pennsylvania,¹⁸⁸ Rhode Island,¹⁸⁹ and South Carolina¹⁹⁰ introduced legislation regarding business interruption coverage as a result of the COVID-19 pandemic.¹⁹¹ In 2021, New York,¹⁹² Pennsylvania,¹⁹³ and Rhode Island,¹⁹⁴ all introduced additional bills and Oregon,¹⁹⁵ Texas,¹⁹⁶ and Washington¹⁹⁷ introduced preliminary bills. Illinois was the only state to pass one of these bills.¹⁹⁸

¹⁷⁸ Emily Pandise, *One Year into Pandemic, Main Street Bankruptcies Continue*, NBC NEWS (Mar. 9, 2021, 11:57 AM CST), <https://www.nbcnews.com/business/consumer/which-major-retail-companies-have-filed-bankruptcy-coronavirus-pandemic-hit-n1207866>.

¹⁷⁹ *Id.*

¹⁸⁰ Assemb. B. 1552, 2019 Cal. Leg., 2019-20 Reg. Sess. (Cal. 2020).

¹⁸¹ S.B. 2135, 101st Gen. Assemb., Reg. Sess. (Ill. 2020).

¹⁸² H.B. 858, 2020 Leg., Reg. Sess. (La. 2020); S.B. 477, 2020 Leg., Reg. Sess. (La. 2020); S.B. 495, 2020 Leg., Reg. Sess. (La. 2020).

¹⁸³ S.B. 2655, 2020 Leg., 191st Gen. Ct. (Mass. 2020).

¹⁸⁴ H.B. 5739, 2020 Leg., Reg. Sess. (Mich. 2020); H.B. 5928, 2020 Leg., Reg. Sess. (Mich. 2020).

¹⁸⁵ Assemb. B. 3844, 219th Leg., Reg. Sess. (N.J. 2020); Assemb. B. 4551, 219th Leg., Reg. Sess. (N.J. 2020); S.B. 3280, 219th Leg., Reg. Sess. (N.J. 2020); Assemb. B. 4675, 219th Leg., Reg. Sess. (N.J. 2020); S.B. 3281, 219th Leg., Reg. Sess. (N.J. 2020); Assemb. B. 4805, 219th Leg., Reg. Sess. (N.J. 2020); S.B. 3169, 219th Leg., Reg. Sess. (N.J. 2020); Assemb. B. 5067, 219th Leg., Reg. Sess. (N.J. 2020); S.B. 3178, 219th Leg., Reg. Sess. (N.J. 2020).

¹⁸⁶ Assemb. B. 10226, 2020 Leg., 2019-20 Leg. Sess. (N.Y. 2020); S.B. 8211, 2020 Leg., 2019-20 Leg. Sess. (N.Y. 2020); Assemb. B. 10327, 2020 Leg., 2019-20 Leg. Sess. (N.Y. 2020); Assemb. B. 10837, 2020 Leg., 2019-20 Leg. Sess. (N.Y. 2020); S.B. 8853, 2020 Leg., 2019-20 Leg. Sess. (N.Y. 2020); Assemb. B. 11147, 2020 Leg., 2019-20 Leg. Sess. (N.Y. 2020); S.B. 8178, 2020 Leg., 2019-20 Leg. Sess. (N.Y. 2020); S.B. 8319, 2020 Leg., 2019-20 Leg. Sess. (N.Y. 2020).

¹⁸⁷ H.B. 589, 133rd Gen. Assemb., Reg. Sess. (Ohio 2020).

¹⁸⁸ H.B. 2372, 2020 Leg., 2019-20 Reg. Sess. (Pa. 2020); H.B. 2386, 2020 Leg., 2019-20 Reg. Sess. (Pa. 2020); H.B. 2759, 2020 Leg., 2019-20 Reg. Sess. (Pa. 2020); H.B. 842, 2020 Leg., 2019-20 Reg. Sess. (Pa. 2020); S.B. 1114, 2020 Leg., 2019-20 Reg. Sess. (Pa. 2020); S.B. 1127, 2020 Leg., 2019-20 Reg. Sess. (Pa. 2020).

¹⁸⁹ H.B. 8064, 2020 Gen. Assemb., Jan. Sess. (R.I. 2020); H.B. 8079, 2020 Gen. Assemb., Jan. Sess. (R.I. 2020).

¹⁹⁰ S.B. 1188, 2020 Gen. Assemb., 123rd Sess. (S.C. 2020).

¹⁹¹ Heather Morton, *Business Interruption Insurance 2020 Legislation*, NAT'L CONF. OF ST. LEGISLATURES (Dec. 11, 2020), <https://www.ncsl.org/research/financial-services-and-commerce/business-interruption-insurance-2020-legislation.aspx>.

¹⁹² Assemb. B. 41, 2021 Leg., 2021-22 Reg. Sess. (N.Y. 2021); Assemb. B. 498, 2021 Leg., 2021-22 Reg. Sess. (N.Y. 2021); S.B. 847, 2021 Leg., 2021-22 Reg. Sess. (N.Y. 2021); Assemb. B. 1937, 2021 Leg., 2021-22 Reg. Sess. (N.Y. 2021); S.B. 4711, 2021 Leg., 2021-22 Reg. Sess. (N.Y. 2021); S.B. 4333, 2021 Leg., 2021-22 Reg. Sess. (N.Y. 2021).

¹⁹³ S.B. 42, 2021 Leg., 2021-22 Reg. Sess. (Pa. 2021).

¹⁹⁴ H.B. 5052, 2021 Gen. Assemb., Jan. Sess. (R.I. 2021).

¹⁹⁵ H.B. 2730, 81st Leg. Assemb., 2021 Reg. Sess. (Or. 2021).

¹⁹⁶ S.B. 249, 87th Leg., Reg. Sess. (Tex. 2021).

¹⁹⁷ S.B. 5351, 2021 Leg., 2021-22 Reg. Sess. (Wa. 2021).

¹⁹⁸ S.B. 2135, 101st Gen. Assemb., Reg. Sess. (Ill. 2020).

The legislation being brought by the various States all have the common feature of being triggered by the COVID-19 pandemic and expanding business interruption coverage.¹⁹⁹ The vast majority of New York's proposed legislation would apply to businesses with fewer than two hundred and fifty employees.²⁰⁰ In comparison, Massachusetts' proposal limits the maximum number of employees to one hundred and fifty.²⁰¹ New Jersey, Ohio, and Louisiana proposed legislation that would only apply to much smaller businesses by limiting its application to businesses with fewer than one hundred employees.²⁰² Louisiana, New Jersey, New York, and Ohio offered legislation that would retroactively apply to policies in effect on the date their respective Governors declared a state of emergency.²⁰³ Massachusetts, Pennsylvania, and South Carolina took positions to apply the proposed legislation, if enacted, to policies in force on the effective date of the Act.²⁰⁴

The insurance industry has vehemently opposed the passage of these bills and has initiated a lobbying campaign to fight against them.²⁰⁵ The insurance companies claim the industry will not withstand the excessive number of claims that would arise if this proposed legislation is passed.²⁰⁶ The legislation would create a significant burden, both logistically and fiscally.²⁰⁷ A group of insurance trade associations has made their disdain for these proposals known.²⁰⁸ In a letter to California democratic representative,

¹⁹⁹ Morton, *supra* note 191.

²⁰⁰ Assemb. B. 10226, 2020 Leg., 2019-20 Leg. Sess. (N.Y. 2020); S.B. 8211, 2020 Leg., 2019-20 Leg. Sess. (N.Y. 2020); Assemb. B. 10837, 2020 Leg., 2019-20 Leg. Sess. (N.Y. 2020); S.B. 8853, 2020 Leg., 2019-20 Leg. Sess. (N.Y. 2020); Assemb. B. 11147, 2020 Leg., 2019-20 Leg. Sess. (N.Y. 2020); Assemb. B. 498, 2021 Leg., 2021-22 Leg. Sess. (N.Y. 2021); S.B. 847, 2021 Leg., 2021-22 Leg. Sess. (N.Y. 2021); Assemb. B. 1937, 2021 Leg., 2021-22 Leg. Sess. (N.Y. 2021); S.B. 4711, 2021 Leg., 2021-22 Leg. Sess. (N.Y. 2021). One bill applied to businesses with one-hundred or fewer employees. S.B. 8178, 2020 Leg., 2019-20 Leg. Sess. (N.Y. 2020).

²⁰¹ S.B. 2655, 2020 Leg., 191st Gen. Ct. (Mass. 2020).

²⁰² Assemb. B. 3844, 219th Leg., Reg. Sess. (N.J. 2020); H.B. 858, 2020 Leg., Reg. Sess. (La. 2020); S.B. 495, 2020 Leg., Reg. Sess. (La. 2020); H.B. 589, 133rd Gen. Assemb., Reg. Sess. (Ohio 2020).

²⁰³ Ohio H.B. 589; La. H.B. 858; N.J. Assemb. B. 3844; N.Y. Assemb. B. 10226.

²⁰⁴ Mass. S.B. 2655; H.B. 2372, 2020 Leg., 2019-20 Reg. Sess. (Pa. 2020); S.B. 1188, 2020 Gen. Assemb., 123rd Sess. (S.C. 2020).

²⁰⁵ Comment from Int'l Ass'n of Ins. Supervisors (May 7, 2020) (on file at https://www.wsia.org/docs/PDF/Legislative/BI/IAIS_Comments_on_BI.pdf); Letter from Nat'l Ass'n of Ins. Comm'rs, to Hon. Nydia M. Velázquez, Chairwoman, U.S. House Comm. on Small Bus., Hon. Jason Crow, Chairman, Subcomm. on Innovation and Workforce Dev., Hon. Steve Chabot, ranking member, U.S. House Comm. on Small Bus., & Hon. Troy Balderson, ranking member, Subcomm. on Innovation and Workforce Dev. (May 20, 2020) (on file at https://www.wsia.org/docs/PDF/Legislative/BI/NAIC_Letter_to_HSBC_on_BI_5.20.20.pdf); Letter from Mike Hunter, Attorney Gen. of Oklahoma, to Donald J. Trump, President of the United States of America (May 18, 2020) (on file at https://www.wsia.org/docs/PDF/Legislative/BI/2020.05.18_BII_Letter.pdf).

²⁰⁶ Nat'l Ass'n of Ins. Comm'rs, *supra* note 205.

²⁰⁷ *Id.*

²⁰⁸ Brody Mullins & Ted Mann, *Restaurants vs. Insurers Shapes Up as Main Event in D.C. Lobbying Fight*, WALL ST. J. (Apr. 19, 2020, 7:56 PM ET), <https://www.wsj.com/articles/restaurants-vs-insurers-shapes-up-as-main-event-in-d-c-lobbying-fight-11587288600>.

Mike Thompson, the association claims “[m]andating coverage of this size and type of exposure while nullifying existing exclusions would amount to an unconstitutional abrogation of insurance contracts and end the very existence of the business interruption insurance market as we know it.”²⁰⁹

Many states have included provisions that would allow insurers to apply for reimbursements on claims paid relating to COVID-19 business interruption coverage to alleviate some of the financial burden placed upon insurers if the proposed legislation is passed.²¹⁰ New York, New Jersey, and South Carolina would finance reimbursements by collecting funds from all insurers licensed in their respective state.²¹¹ Pennsylvania and Ohio’s bills contained similar provisions but limited the collection to property and casualty insurers.²¹² Rhode Island and Massachusetts further narrowed who would finance the reimbursement fund by collecting only from insurers that offered business interruption policies.²¹³

B. Federal Government Proposals

The House of Representatives introduced the “Business Interruption Insurance Coverage Act of 2020” on April 14, 2020.²¹⁴ The purpose of this bill is “[t]o make available insurance coverage for business interruption losses due to viral pandemics, forced closure of business, mandatory evacuations and public safety power shut-offs, and for other purposes.”²¹⁵ The Act further seeks to nullify any exclusion for a viral pandemic, forced closure of business, mandatory evacuations, or public safety power shut-offs in any policy in force on the Act’s enactment date.²¹⁶

The proposal does not prevent the reinstatement of these exclusions.²¹⁷ The exclusions could be reinstated if (1) the insurer received a written statement from the insured affirmatively authorizing the reinstatement, or (2) the insured failed to pay an increased premium which the insurer had provided at least thirty-days-notice and the date on which the exclusion would be reinstated if no payment was received.²¹⁸

²⁰⁹ *Id.*

²¹⁰ S.B. 3281, 219th Leg., Reg. Sess. (N.J. 2020); Assemb. B. 3844, 219th Leg., Reg. Sess. (N.J. 2020); H.B. 842, 2020 Leg., 2019-20 Reg. Sess. (Pa. 2020); Assemb. B. 10226, 2020 Leg., 2019-20 Leg. Sess. (N.Y. 2020); S.B. 1188, 2020 Gen. Assemb., 123rd Sess. (S.C. 2020); H.B. 589, 133rd Gen. Assemb., Reg. Sess. (Ohio 2020); H.B. 8064, 2020 Gen. Assemb., Jan. Sess. (R.I. 2020); S.B. 2655, 2020 Leg., 191st Gen. Ct. (Mass. 2020).

²¹¹ N.Y. Assemb. B. 10226; N.J. S.B. 3281; N.J. Assemb. B. 3844; S.C. S.B. 1188.

²¹² Pa. H.B. 842; Ohio H.B. 589.

²¹³ R.I. H.B. 8064; Mass. S.B. 2655.

²¹⁴ Business Interruption Insurance Coverage Act, H.R. 6494, 116th Cong. (2020).

²¹⁵ *Id.*

²¹⁶ *Id.*

²¹⁷ *Id.*

²¹⁸ *Id.*

A second bill was introduced in the House of Representatives, which Representatives titled the “Never Again Small Business Protection Act of 2020” in mid-April 2020.²¹⁹ This bill, if enacted, would require insurers to make available business interruption insurance that:

- (1) covers solely losses that–
 - (A) result from business interruption due to any order, by any officer or agency of the Federal Government or of any State or local government, requiring cessation of operations during a national emergency; and
 - (B) occur in any area to which such national emergency applies and during the period of such application; and
- (2) covers such losses for a continuous period that begins upon the declaration of the national emergency and is not shorter than [thirty] days.²²⁰

The bill applies limitations in coverage to insureds who terminate “employment of any employee” or “health care insurance coverage.”²²¹ Similar to the Business Interruption Coverage Act of 2020, this bill allows for an exclusion if “(1) the insurer has received a written statement from the insured that affirmatively authorizes such exclusion; or (2) the insured fails to pay any premium charged by the insurer for providing coverage.”²²²

There is both support and opposition to these proposed bills.²²³ Those who support the enactment of these bills see this as a path for businesses to access their insurance coverage when it is needed most.²²⁴ Currently, insurance coverage is accessible for “act of God” events that can potentially devastate businesses through no fault of their own.²²⁵ Supporters of the bill view governmental shutdowns that would be eligible for coverage under the “Never Again Small Business Protection Act of 2020” as equally destructive and equally out of the business owner's control as an “act of God.”²²⁶

The largest voices in opposition are those in the insurance industry.²²⁷ The policies were not written in consideration of covering pandemics.²²⁸ If insurers are forced to cover pandemic-related claims, the concern for

²¹⁹ *Id.*

²²⁰ H.R. 6494.

²²¹ *Id.*

²²² *Id.*

²²³ *U.S. House Introduces Business Interruption Insurance Bills for Small Businesses*, BRIAN FITZPATRICK U.S. REPRESENTATIVE (May 5, 2020), <https://fitzpatrick.house.gov/2020/5/us-house-introduces-business-interruption-insurance-bills-small-businesses>.

²²⁴ *Id.*

²²⁵ *Id.*

²²⁶ *Id.*

²²⁷ Nihal Krishan, *Democrats Plan Legislation to Force Insurance Companies to Payout for Pandemic Losses*, WASH. EXAM’R (Apr. 14, 2020, 01:29 PM), <https://www.washingtonexaminer.com/news/democrats-plan-legislation-to-force-insurance-companies-to-pay-out-for-pandemic-losses>.

²²⁸ *Id.*

bankruptcy shifts from small businesses to insurance companies.²²⁹ There is concern that the language in these proposed bills would apply retroactively and make the insurance companies responsible for covering the policies purposefully excluded.²³⁰ Sean Kevelighan, the CEO of the Insurance Information Institute, compared requiring the payment of these retroactive claims as “a Category [three] hurricane in every major city occurring at the same time, or a wildfire burning all across America.”²³¹ The American Property Casualty Insurance Association has estimated that coverage for small business losses to be approximately eight-hundred billion dollars.²³²

C. The Constitutional Freedom to Contract

The United States Constitution expressly limits a state's ability to impair private contracts.²³³ This limitation would extend to insurance contracts as well. The Contracts Clause of the United States Constitution provides that, “[n]o State shall . . . make any . . . law impairing the Obligation of Contracts.”²³⁴ The framers of the Constitution knew that allowing the states to impose on contractual relations would violate “the first principle of social compact, and to every principle of sound legislation.”²³⁵ However, like the vast majority of Constitutional limitations on individual states’ power, this is not without limitation.²³⁶ The Supreme Court of the United States has long held that “not every modification of a contractual promise . . . impairs the obligation of contract.”²³⁷

In the early 1930s, the Court created a two-part test to determine where the constitutional line lies.²³⁸ The test outlines that if a law (1) operates as a “substantial impairment” to a contract and (2) the legislation does not address a legitimate end with reasonable means, then it will be deemed unconstitutional.²³⁹ The Court established this test in the *Blaisdell* case.²⁴⁰ *Blaisdell* had mortgaged a Hennepin County, Minnesota property in 1928.²⁴¹ The property was later foreclosed upon on May 2, 1932.²⁴² Minnesota law in 1928 allowed for a redemption period of one year in the event of

²²⁹ *Id.*

²³⁰ *Id.*

²³¹ *Id.*

²³² *Id.*

²³³ 16A C.J.S. *Constitutional Law* §506 (2021).

²³⁴ U.S. CONST. art. I, §10, cl. 1.

²³⁵ THE FEDERALIST NO. 44 (James Madison).

²³⁶ *Constitutional Law*, *supra* note 233.

²³⁷ *City of El Paso v. Simmons*, 379 U.S. 497, 506-07 (1965).

²³⁸ *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 416 (1934).

²³⁹ *Id.*; *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 244 (1978).

²⁴⁰ *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. at 416.

²⁴¹ *Id.*

²⁴² *Id.*

foreclosure.²⁴³ Under Minnesota law, when Blaisdell applied for, signed, and accepted his mortgage, his redemption period would have expired on May 2, 1933.²⁴⁴

The year after Blaisdell obtained his mortgage, the worst economic downturn in the post-industrialization era was realized with the stock market crash of 1929.²⁴⁵ The United States entered into the period known as the Great Depression.²⁴⁶ In an attempt to aid those suffering due to the economic downturn, the Minnesota State legislature changed the existing law to allow for the extension of foreclosure periods and passed the Minnesota Mortgage Moratorium Law.²⁴⁷ The Act provided that:

[D]uring the emergency declared to exist, relief may be had through authorized judicial proceedings with respect to foreclosures of mortgages, and execution sales, of real estate; that sales may be postponed and periods of redemption may be extended. The act does not apply to mortgages subsequently made nor to those made previously which shall be extended for a period ending more than a year after the passage of the act (part 1, s 8). The act is to remain in effect ‘only during the continuance of the emergency and in no event beyond May 1, 1935.’ No extension of the period for redemption and no postponement of sale is to be allowed which would have the effect of extending the period of redemption beyond that date.²⁴⁸

Upon foreclosure, Blaisdell brought suit in Minnesota seeking to extend the redemption period.²⁴⁹ The Minnesota Supreme Court entered its judgment that extended the redemption period until May 1, 1935, and required Blaisdell to pay forty dollars per month until that date.²⁵⁰ The statute was upheld on an emergency basis.²⁵¹ The Minnesota Supreme Court recognized that the new law impaired the obligations of pre-existing mortgage contracts but that this impairment was within the state’s police powers since the state legislature had found that there was a “public economic emergency.”²⁵² The Minnesota Supreme Court held that this emergency justified the temporary relief that the statute afforded.²⁵³

²⁴³ *Id.*

²⁴⁴ *Id.*

²⁴⁵ Gene Smiley, *Great Depression, Encyclopedia*, ECONLIB, <https://www.econlib.org/library/Enc/GreatDepression.html> (last visited Oct. 2, 2021).

²⁴⁶ *Id.*

²⁴⁷ *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 416 (1934).

²⁴⁸ *Id.*

²⁴⁹ *Id.*

²⁵⁰ *Id.*

²⁵¹ *Id.*

²⁵² *Id.*

²⁵³ *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. at 416.

The United States Supreme Court then had to determine whether “temporary and conditional relief exceeds the power of the state by reason of the Federal Constitution prohibiting impairment of the obligations of Contracts.”²⁵⁴ The Court considered “the relation of emergency to constitutional power, the historical setting of the contract clause, the development of the jurisprudence of this Court in the construction of that clause and the principles of construction.”²⁵⁵ Ultimately, the Court found that an emergency does not create additional powers, but it may create a situation for an exercise of power.²⁵⁶ Thus, in light of an emergency, the question the court must ask is “whether the power possessed embraces the particular exercise of it in response to particular conditions.”²⁵⁷

The Court ultimately applied the two-part test.²⁵⁸ For a law to be rendered unconstitutional, it must operate as a “substantial impairment” of a contract.²⁵⁹ Contractual obligations are impaired when a law renders them invalid, releases, or extinguishes the obligations completely.²⁶⁰ The second part of the test is a “review of the purpose and necessity of the state law.”²⁶¹ Legislation enacted that, either directly or indirectly, affects contracts does not automatically invalidate the law.²⁶² If the legislation addresses a legitimate goal and utilizes reasonable measures to reach that goal, the law will likely be found constitutional.²⁶³ The “means and end” part of this test often requires the Court to ask if the state law is written in an “‘appropriate’ and ‘reasonable’ way to advance a significant and legitimate public purpose.”²⁶⁴ The Court is still using the two-part test established in *Blaisdell* in the 1930s in the modern era.²⁶⁵

V. EVALUATION OF PROPOSED LEGISLATION

A. State Legislation

The various proposed state legislation can be divided into four categories.²⁶⁶ The first category is bills that would allow for insurers to be

²⁵⁴ *Id.*

²⁵⁵ *Id.*

²⁵⁶ *Id.*

²⁵⁷ *Id.*

²⁵⁸ *Id.* at 413.

²⁵⁹ *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398 at 416.

²⁶⁰ *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 244 (1978).

²⁶¹ *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398 at 413.

²⁶² *Id.*

²⁶³ *Id.*

²⁶⁴ *Energy Rrsvs. Grp., Inc. v. Kan. Power & Light Co.*, 459 U.S. 400, 411-12 (1983).

²⁶⁵ *Sveen v. Melin*, 138 S. Ct. 1815, 1817 (2018).

²⁶⁶ *Business Interruption Insurance and COVID-19: State Legislative Initiatives*, EVERYCRS REPORT.COM (May 11, 2020), <https://www.everycrsreport.com/reports/IN11382.html>.

reimbursed by the State when paying Business Interruption claims for policies with viral exclusions.²⁶⁷ The proposals from New Jersey, New York, Ohio, and the proposal from the Pennsylvania House of Representatives all call for this reimbursement.²⁶⁸ Insurers would pay claims and then apply to the state insurance regulator for reimbursement.²⁶⁹

The next category is the proposals that reimburse insurers for paying Business Interruption claims for policies with either virus exclusions or those that require evidence of physical damage.²⁷⁰ Massachusetts, South Carolina, and Washington D.C., have all proposed bills with this distinction.²⁷¹ Essentially, insurers would be reimbursed for covering losses related to COVID-19, regardless of if the insured could show a direct physical loss.²⁷² Louisiana, Michigan, and the proposal from the Pennsylvania Senate do not provide provisions allowing for insurer reimbursement.²⁷³ It is important to note that the issue of reimbursement is a significant point of difference between the bills proposed in the Pennsylvania House of Representatives and Senate.²⁷⁴

Are the legislative proposals by the various states constitutional? Numerous insurance companies have already raised issues of the constitutionality of these state proposals.²⁷⁵ Under *Blaisdell*, we are provided with a fairly straightforward two-part test to analyze the proposed legislation.²⁷⁶ If the proposals were enacted, they could potentially be deemed unconstitutional if they (1) substantially impair preexisting contracts, and (2) the necessity of the law does not outweigh that burden.²⁷⁷

All of the proposed bills within the various state legislatures apply retroactively to insurance contracts with specific pandemic exclusion clauses.²⁷⁸ Assuming the bills are enacted, the pre-existing terms of all business interruption insurance contracts, held by qualifying small

²⁶⁷ *Id.*

²⁶⁸ Assemb. B. 3844, 219th Leg., Reg. Sess. (N.J. 2020); Assemb. B. 10226, 2020 Leg., 2019-20 Leg. Sess. (N.Y. 2020); H.B. 589, 133rd Gen. Assemb., Reg. Sess. (Ohio 2020); H.B. 2372, 2020 Leg., 2019-20 Reg. Sess. (Pa. 2020).

²⁶⁹ N.J. Assemb. B. 3844; N.Y. Assemb. B. 10226; Ohio H.B. 589; Pa. H.B. 2372.

²⁷⁰ *Business Interruption Insurance and COVID-19: State Legislative Initiative*, *supra* note 266.

²⁷¹ S.B. 2655, 2020 Leg., 191st Gen. Ct. (Mass. 2020); S.B. 1188, 2020 Gen Assemb., 123rd Sess. (S.C. 2020); 67 D.C. Reg. 5235 (May 22, 2020).

²⁷² Mass. S.B. 2655; S.C. S.B. 1188; 67 D.C. Reg. 5235.

²⁷³ *Business Interruption Insurance and COVID-19: State Legislative Initiative*, *supra* note 266.

²⁷⁴ H.B. 2372, 2020 Leg., 2019-20 Reg. Sess. (Pa. 2020).

²⁷⁵ Alexandra Roje, *The Current State of Business Interruption Legislation*, JDSUPRA (May 1, 2020), <https://www.jdsupra.com/legalnews/the-current-state-of-business-14110/>.

²⁷⁶ Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 413 (1934).

²⁷⁷ *Id.*

²⁷⁸ H.B. 589, 133rd Gen. Assemb., Reg. Sess. (Ohio 2020); H.B. 858, 2020 Leg., Reg. Sess. (La. 2020); Assemb. B. 3844, 219th Leg., Reg. Sess. (N.J. 2020); Assemb. B. 10226, 2020 Leg., 2019-20 Leg. Sess. (N.Y. 2020); S.B. 2655, 2020 Leg., 191st Gen. Ct. (Mass. 2020); H.B. 2372, 2020 Leg., 2019-20 Reg. Sess. (Pa. 2020); S.B. 1188, 2020 Gen Assemb., 123rd Sess. (S.C. 2020).

businesses, would be significantly altered.²⁷⁹ No longer would the insurer be liable only for the bargained-for agreement.²⁸⁰ An insurer would be held liable for claims they had explicitly pre-arranged to not be eligible for coverage.²⁸¹ Insurance policies are written for specific types of coverage, triggering events, and particular risks.²⁸² They can be written more broadly with a wider range of coverage. However, it is more common to find policies narrowly written.²⁸³ The narrower the policy coverage, the better the insurer and insured can allocate the risk in a way that is beneficial to each party.²⁸⁴ Altering specific exclusion clauses would be significant under even the most liberal interpretations and, in turn, satisfy the first part of the *Blaisdell* Test.²⁸⁵

Showing that a preexisting contract has been substantially impaired is not sufficient to deem legislation unconstitutional.²⁸⁶ The state would have the opportunity to overcome the presumption of unconstitutionality if the necessity of the law outweighs its burden.²⁸⁷ In the case of the proposed bills, the necessity of enforcing coverage for pandemics—that would otherwise be excluded—must outweigh the burden that would be placed on insurers.²⁸⁸ The heart of the constitutional question lies within the second part of the *Blaisdell* Test.²⁸⁹ This is also commonly referred to as the “means and end” part of the test.²⁹⁰ The question that must be asked is whether the legislative action was written in an “‘appropriate’ and ‘reasonable’ way to advance a significant and legitimate public purpose.”²⁹¹

The claimed purpose of these bills is to ensure the survival of small businesses located in the ten states and the District of Columbia where the

²⁷⁹ Ohio H.B. 589; La. H.B. 858; N.J. Assemb. B. 3844; N.Y. Assemb. B. 10226; Mass. S.B. 2655; Pa. H.B. 2372; S.C. S.B. 1188.

²⁸⁰ Jasmine Dela Luna et al., *COVID-19: States Attempt to Shift Economic Burden to Insurance Industry with New Legislation on Business Interruption Coverage*, *THE NAT'L L. REV.* (Apr. 10, 2020), <https://www.natlawreview.com/article/covid-19-states-attempt-to-shift-economic-burden-to-insurance-industry-new>.

²⁸¹ *Id.*

²⁸² See *Insurance 101*, *supra* note 20.

²⁸³ Wendel Clark, *Differences Between Broad Form and Standard Insurance*, *CHRON*, <https://smallbusiness.chron.com/differences-between-broad-form-standard-insurance-18185.html> (last visited Oct. 2, 2021).

²⁸⁴ Wright, *supra* note 70, at 21.

²⁸⁵ *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 416 (1934).

²⁸⁶ *Id.* at 413.

²⁸⁷ *Id.* at 420.

²⁸⁸ H.B. 589, 133rd Gen. Assemb., Reg. Sess. (Ohio 2020); H.B. 858, 2020 Leg., Reg. Sess. (La. 2020); Assemb. B. 3844, 219th Leg., Reg. Sess. (N.J. 2020); Assemb. B. 10226, 2020 Leg., 2019-20 Leg. Sess. (N.Y. 2020); S.B. 2655, 2020 Leg., 191st Gen. Ct. (Mass. 2020); H.B. 2372, 2020 Leg., 2019-20 Reg. Sess. (Pa. 2020); S.B. 1188, 2020 Gen. Assemb., 123rd Sess. (S.C. 2020).

²⁸⁹ *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. at 413.

²⁹⁰ *Energy Rrsvs. Grp., Inc. v. Kan. Power & Light Co.*, 459 U.S. 400, 411-12 (1983).

²⁹¹ *Id.*

proposals have been brought.²⁹² The survival of America's small businesses is a significant and legitimate public policy concern. In 2014, the Small Business Gross Domestic Product ("GDP") equaled almost six trillion dollars.²⁹³ Small Businesses create an estimated two-thirds of new jobs in the American economy and account for approximately forty-four percent of the United States economic activity.²⁹⁴ The United States is currently experiencing its greatest economic decline since the Great Depression.²⁹⁵ The U.S. economy is driven by consumer spending.²⁹⁶ The mass closing of businesses, whether temporarily or permanently, has left many Americans without jobs and thus produced a significant decrease in consumer spending.²⁹⁷ Arguably, governmental intervention is needed to stop the bleeding of not only American small businesses but the entire U.S. economy.²⁹⁸

On the surface, these bills seem like a stop-gap solution; however, it is merely prioritizing one sector over the other without considering the potential consequences.²⁹⁹ If enacted, these bills are leading insurance companies to failure and bankruptcy themselves.³⁰⁰ Insurance companies are a vital piece of the American economy and one that the economic system cannot see fail.³⁰¹ In 2017 alone, over four hundred and fourteen billion dollars were paid to insureds for property and casualty claims.³⁰² This type of loss coverage could not be replicated with other governmental assistance programs.³⁰³ Further, the insurance industry offers financial stability that other economic sectors cannot.³⁰⁴ Apart from 2008, the insurance industry consistently made a yearly increase to the GDP from 2007 to 2016.³⁰⁵ Once established, it is rare for an insurance company to fail.³⁰⁶ Only a reported

²⁹² Sathima Jones, *States Working to Protect Small Business Through Insurance*, AM. BAR ASS'N (May 6, 2020), <https://www.americanbar.org/groups/litigation/committees/minority-trial-lawyer/articles/2020/states-working-to-protect-small-businesses-through-insurance/>.

²⁹³ Press Release, U.S. Small Bus. Admin. Off. of Advoc., *Small Business Generate 44 Percent of U.S. Economic Activity* (Jan. 30, 2019), (on file at <https://advocacy.sba.gov>).

²⁹⁴ *Id.*

²⁹⁵ Mike Patton, *The Impact of Covid-19 on U.S. Economy and Financial Markets*, FORBES (Oct. 12, 2020, 01:32 PM EDT), <https://www.forbes.com/sites/mikepatton/2020/10/12/the-impact-of-covid-19-on-us-economy-and-financial-markets/?sh=7241fde62d20>.

²⁹⁶ *Id.*

²⁹⁷ *Id.*

²⁹⁸ William Cohan, *Jay Powell Adds Voice to Small Business Cry for Help*, FIN. TIMES (Sept. 23, 2020), <https://www.ft.com/content/60d8bd2b-0bb5-4e8a-99bc-93653277ec42>.

²⁹⁹ Krishan, *supra* note 227.

³⁰⁰ *Id.*

³⁰¹ STEVEN WEISBART, *HOW INSURANCE DRIVES ECONOMIC GROWTH* 6 (2018), <https://www.iii.org/sites/default/files/docs/pdf/insurance-driver-econ-growth-053018.pdf>.

³⁰² *Id.*

³⁰³ *Id.*

³⁰⁴ *Id.*

³⁰⁵ *Id.*

³⁰⁶ *Id.*

eighty-nine insurers were impaired from 2005 through 2016.³⁰⁷ In comparison, during a similar time frame (2006 – 2016), five hundred and twenty-five banks were taken over by the Federal Deposit Insurance Corp.³⁰⁸ The economy depends on a thriving insurance industry.³⁰⁹ Insurers support economic growth by covering losses and as an investor in government and business.³¹⁰ In 2015, Illinois insurers invested over three million dollars in cash, investments, and government bonds.³¹¹

The business of insurance is the business of allocating risks.³¹² An insurer will not be able to confidently allocate risk if it is unknown what they will be required to cover. When an insurer writes a business interruption policy with a specific exclusion, that exclusion was taken into consideration when the cost of the coverage was determined. Pandemic coverage, while niche, was available.³¹³ If state legislatures are allowed to change policies retroactively, insurers have no security that they will only be liable for the policies to which they have agreed.³¹⁴ The burden placed on insurers, if these bills were to be enacted, would be unreasonable and in turn, unconstitutional, under the second part of the *Blaisdell* Test as well.

B. Federal Legislation

In contrast to the proposed legislation in the various states and the District of Columbia, the federal proposal does not seek to change existing policies.³¹⁵ The proposed federal legislation requires insurers to offer pandemic coverage to their insureds on future policies.³¹⁶ An insurer is able to increase premiums for this coverage as they are insuring an additional risk.³¹⁷ The insured also has the option to not pay the increased premiums, thus opting out of pandemic coverage.³¹⁸ The differences between the federal proposal and those offered by various State Governments and the District of Columbia are fundamental to the constitutionality of the bills.

³⁰⁷ WEISBART, *supra* note 301.

³⁰⁸ *Id.*

³⁰⁹ *Id.*

³¹⁰ KATIE SCH. OF INS. AND FIN. SERVS., ECONOMIC IMPACT OF THE INSURANCE INDUSTRY IN ILLINOIS: 2016 STUDY 8 (2016), <https://business.illinoisstate.edu/katie/industry/Update%20Econ%20Impact%20Study%20April%202020%202016.pdf>.

³¹¹ *Id.*

³¹² *Insurance 101*, *supra* note 20.

³¹³ *Wimbledon Shows How Pandemic Insurance Could Become Vital for Sports, Other Events*, *supra* note 7.

³¹⁴ Claire Wilkinson, *N.Y. Introduces Bill on Pandemic-Related Business Interruption Claims*, BUS. INS. (Mar. 30, 2020), <https://www.businessinsurance.com/article/00010101/NEWS06/912333772/NY-introduces-bill-on-pandemic-related-business-interruption-claims>.

³¹⁵ Business Interruption Insurance Coverage Act, H.R. 6494, 116th Cong. (2020).

³¹⁶ *Id.*

³¹⁷ *Id.*

³¹⁸ *Id.*

The proposed “Pandemic Risk Insurance Act” would not apply to the current COVID-19 pandemic-related claim as it would only apply to health emergencies declared after January 1, 2021.³¹⁹ The passing of the proposed “Pandemic Risk Insurance Act” would not be the first time the federal government sought to regulate the insurance industry following a societal altering event.³²⁰ For example, the Terrorism Risk Insurance Act of 2002 (“TRIA”) was enacted by Congress to aid both businesses and individuals in obtaining insurance coverage for property and casualty loss due to a terrorist attack at a reasonable rate.³²¹ TRIA focused on the important economic role that insurance played but also recognized the need to ensure that consumers were offered a fair premium due to the high demand.³²² Before the September 11th terrorist attacks, Terrorism Risk Insurance was not commonly sought.³²³ However, after these attacks, the demand for this coverage increased considerably, including business interruption policies resulting from a terrorist attack.³²⁴ The policies offered by Terrorism Risk Insurance commonly use force majeure clauses to outline these policies.³²⁵ With government regulation ensuring access to Terrorism Risk Insurance and fair pricing, insurers were better able to allocate the risk of ensuring these types of events.³²⁶ This led to lower premiums for consumers by 2005.³²⁷

Insurers would likely follow a similar—if not identical—method of implementing Pandemic Risk Insurance as they did with Terrorism Risk Insurance through force majeure clauses. However, one potential downside to the proposed Pandemic Risk Insurance Act when compared to the Terrorism Risk Insurance Act is the lack of governmental oversight on these policies to ensure that there is fair pricing for consumers. This lack of regulation and monitoring of premium prices could lead to insurers charging extremely high rates for this type of coverage and making it unattainable for small business owners. This is a loophole for insurers to evade actually offering policies with pandemic coverage. If the price is too high, insureds will not pay for it.

With or without the passage of the proposed Pandemic Risk Insurance Act, we will undoubtedly see insurance policies with pandemic coverage

³¹⁹ *Id.*

³²⁰ Wright, *supra* note 70.

³²¹ Terrorism Risk Insurance Act of 2002, 15 U.S.C. § 6701.

³²² *Id.*

³²³ Wright, *supra* note 70.

³²⁴ *Id.*

³²⁵ *Id.*

³²⁶ PRESIDENT’S WORKING GRP. ON FIN. MKTS., TERRORISM RISK INSURANCE 1 (2006), <https://www.treasury.gov/resource-center/fin-mkts/Documents/report.pdf>.

³²⁷ *Id.*

more frequently moving forward.³²⁸ Large corporations, who have the financial ability, will pay the high rates for pandemic coverage. The importance of business interruption coverage has become increasingly apparent as more and more businesses are under significant financial stress. It is in the insured's best interest to seek this type of coverage, and insurers will want to keep up with the demand to not lose out to their competition.

The federal proposal would benefit insureds by offering a quicker and more expansive option for pandemic coverage, but the proposal is still flawed. There are significant loopholes that insurers can take advantage of and consumers will pay the cost. The federal government should further emulate the Terrorism Risk Insurance Act and require governmental oversight to ensure fair pricing. This regulation helped stabilize the insurance industry in a few years regarding Terrorism Risk Insurance.³²⁹ There is no reason to believe it would not do the same for Pandemic Risk Insurance.

VI. CONCLUSION

The concept of insurance has constantly shifted throughout history. Beginning with ancient farmers sharing shipping risks to Benjamin Franklin introducing Fire Insurance to the Western World, the insurance industry evolved with society's needs. Insurance law expanded from classic contract doctrines to more specialized laws to excuse performance. Business Interruption Insurance has become an increasingly popular type of business insurance coverage. The COVID-19 pandemic illuminated the importance of Business Interruption Insurance. There was not any business or individual that was not impacted by the pandemic in some way.

Insurance companies first saw the potential impact of a pandemic in 2003 with the SARS outbreak. In turn, it became increasingly common for insurers to exclude coverage for viral pandemics. The majority of those obtaining insurance coverage did not yet see the importance that this exclusion would hold. However, those who sought out the niche coverage for pandemics reaped the benefits.

Ordinary contract doctrines of impracticability, impossibility, and force majeure clauses were not enough to defeat business interruption insurance policies' standard viral exclusion clauses. The need for governmental intervention is clear. Attempts at remedy have been sought in the courts, state-level legislation, and the proposed Pandemic Risk Insurance bill. The courts have not been able to overcome the clear and unambiguous policy

³²⁸ Calvin Trice & Jason Woleben, *Government Backstop Likely to be Key for Insurance Coverage of Future Pandemics*, S&P GLOB. MKT. INTEL. (Aug. 20, 2020), <https://www.spglobal.com/market-intelligence/en/news-insights/latest-news-headlines/government-backstop-likely-to-be-key-for-insurance-coverage-of-future-pandemics-59963140>.

³²⁹ PRESIDENT'S WORKING GRP. ON FIN. MKTS., *supra* note 326.

language. The proposed legislation in ten states and the District of Columbia would likely be found unconstitutional due to the significant impairment on preexisting contracts while placing an unreasonable burden on insurers.

The federal proposed Pandemic Risk Insurance Act would likely be the most successful among the proposed options. It would aid the inevitable expansion of coverage for pandemics, and it would allow insureds quicker access to this type of coverage while balancing the insurers' interest in collecting an adequate premium. However, the federal bill is not without flaws. Congress should look to the Terrorist Risk Insurance Act to ensure that pandemic insurance is implemented fairly and priced reasonably. This benefits insureds by ensuring pricing is fair while also helping to stabilize the market.

