PARDON THE INTERRUPTION: OBSTACLES TO A SUCCESSFUL COVID-19 BUSINESS INTERRUPTION CLAIM

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I. INTRODUCTION

The COVID-19 pandemic has caused a tremendous amount of financial hardship, as more than 100,000 small businesses have permanently closed their doors due to loss in revenue as a result of government mandated lockdowns. Estimates suggest small businesses lost $393 to $668 billion per month at the height of the pandemic. Desperate for financial relief, these businesses rightfully turned to their insurance policies for coverage that the pandemic could have triggered. In a high profile example, the All England Lawn Tennis and Croquet Club, host of the Wimbledon Championships, paid $1.9 million per year in pandemic insurance following the 2003 outbreak of the SARS virus. This foresight enabled the All England Club to escape catastrophic losses following cancellation of the 2020 tournament, and instead collected a $142 million dollar pay out. However, this is not the norm for small businesses. Rather, most restaurants, hair salons, taverns, dental offices, and the like, sought coverage for losses caused by the pandemic under the more common “business interruption” provision in their policies. Unsurprisingly, insurers responded with blanket denials. Even former President of United States, Donald Trump, chimed in, opining that insurers should pay virus claims if they are not specifically excluded by their policies.

While the nation is sympathetic toward these small businesses, the problem facing these insureds is that standard commercial insurance policies were not intended nor designed to provide coverage against

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5 Id.

6 Sams, supra note 2.

7 See id.

8 Id.
communicable diseases, such as COVID-19. Following the 2003 SARS outbreak, many insurers specifically added an exclusion for any losses caused by future viruses. Even more detrimental to coverage claims, standard business interruption provisions only cover losses stemming from suspended business activity if the suspension was triggered by “direct physical loss of or damage to property.”

This Comment explores business interruption coverage in the context of the COVID-19 virus. Part I of this Comment will explain the fundamentals of business interruption policies and analyze how courts have historically interpreted “direct physical loss.” Part II will walk through the first decisions regarding COVID-19 coverage claims. Lastly, Part III will analyze the practical implications of these initial COVID-19 decisions and discuss the broader impact of these decisions on pending legislation and the insurance industry at large.

II. BUSINESS INTERRUPTION INSURANCE BACKGROUND

A. Basic Overview of the Provision

One potential avenue for insureds seeking reimbursement for losses due to COVID-19 is business interruption coverage, which is also known as loss of income coverage. Many insurers include business interruption coverage in their traditional property policies, or offer additional coverage that can be negotiated via an endorsement (an amendment to a standard policy). Typical policy language provides that an insured is protected from losses of business income as a result of “direct physical loss or damage.” The Insurance Service Office (ISO), which develops, issues, and regulates standard policy forms used


10 Id.

11 Id.


14 Id.

by insurers, has issued two model business income coverage forms: the Business Income and Extra Expense Coverage form (CP 00 30) and the Business Income Coverage form without extra expense (CP 00 32). The Business Income and Extra Expense Coverage form is the industry standard and the most widely used income coverage policy. The standard policy language provides that:

[The insurer] 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 premises which are described in the Declarations and for which a Business Income Limit Of Insurance is shown in the Declarations. The loss or damage must be caused by or result from a Covered Cause of Loss. With respect to loss of or damage to personal property in the open or personal property in a vehicle, the described premises include the area within 100 feet of such premises.

Further, the policy defines business income as “A) Net Income (Net Profit or Loss before income taxes) that would have been earned or incurred; and B) Continuing normal operating expenses incurred, including payroll.” Understanding the complexities of this provision and conducting a thorough analysis are fundamental to resolving whether or not losses from COVID-19 are covered under business interruption policies. Specifically, to affirm or deny coverage, courts will have to determine whether, under the language of the policy, COVID-19 causes “direct physical loss of or damage to property.”

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18 See id.
20 Id.
B. Interpreting “Direct Physical Loss or Damage” 22

A fundamental tenet of insurance law dictates that there must be some sort of event that triggers coverage, and that the event is defined by the language of the insurance policy.23 In most instances, courts find a triggering of coverage when an exigency causes an actual effect on the insured’s property.24 As discussed, the triggering language in business interruption policies states an insurer must pay for loss of income when the insured must suspend business operations due to “direct physical loss or damage.”25 In many instances, “direct physical loss” is triggered when tangible property has been physically altered by fire or water.26 However, the analysis becomes more complicated when the damage does not physically alter the property, but instead renders it useless—such that the business owner must suspend operations.27 Courts have interpreted “direct physical loss or damage” in multiple ways with three distinct lines of reasoning supporting these interpretations.28

First, courts may employ a strict interpretation approach, in which they view the “direct physical loss” language as requiring actual physical damage to property.29 For example, the Fifth Circuit declined coverage for a group of New Orleans restaurants that were forced to evacuate prior to the arrival of a hurricane, and held that the mandatory evacuation did not constitute direct physical loss or damage to property.30 In a similar example, the Second Circuit declined coverage for an airline when the airline had to shut down after the 9/11 attacks, after finding the airport had incurred no physical damage.31 Likewise, the Eighth Circuit held that an embargo on a meat importer, which caused a U.S. factory to lose business from its sole provider, did not constitute a direct physical loss or trigger coverage under the business interruption policy.32 Consequently, absent physical damage, courts

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22 Standard Business Interruption Policy (CP 00 30 10 12), supra note 19.
24 Id.
25 See, e.g., supra note 19.
26 Plitt et al., supra note 23.
27 Id.
29 Dickie Brennan & Co. v. Lexington Ins. Co., 636 F.3d 683, 687 (5th Cir. 2011); see French, supra note 12, at 16.
30 Dickie Brennan & Co., 636 F.3d at 687; see French, supra note 12, at 16.
31 United Air Lines, Inc. v. Ins. Co. of Pa., 439 F.3d 128, 129 (2d Cir. 2006); see French, supra note 12, at 16.
32 Source Food Tech., Inc. v. U.S. Fid. & Guar. Co., 465 F.3d 834, 838 (8th Cir. 2006); see French, supra note 12, at 16.
that apply a strict interpretation will refuse to find any coverage under an insured’s policy.

Second, some courts take a more liberal approach and will find a “direct physical loss” when a nontangible substance renders a property uninhabitable. For example, the Third Circuit held that while there is no “physical loss or damage” due to the mere presence of asbestos, there is coverage if the contamination reaches a level such that the property is unusable, uninhabitable, or if there is an imminent threat of the asbestos rendering the property uninhabitable. Further, courts applying a similar analysis have found coverage, despite no physical damage, when gas, ammonia, sulfur, or carbon monoxide seeped into the insured’s property, or *E. coli* was found in the property’s water supply. Thus, courts following this more liberal approach will find there has been a “physical loss or damage” despite no actual physical damage to the property, when there is an invisible substance rendering the property sufficiently uninhabitable.

Lastly, other courts hold that there is “direct physical loss or damage” based on the mere inability for the insured to safely access their property. Under this interpretation, business interruption coverage is trigged despite no tangible damage to the property nor the presence of a non-tangible toxic substance. For example, unlike the Fifth Circuit, a Georgia appellate court held that a government order, ordering the evacuation of a restaurant in anticipation of a hurricane triggered the direct physical loss language, and therefore also invoked coverage under the insured’s business interruption policy. Essentially, courts that employ this reasoning find coverage based on any government order mandating the insured evacuate their property.

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34 Port Auth. Of N.Y. & N.J., 311 F.3d at 236; see French, supra note 12, at 28.
35 W. Fire Ins. Co. v. First Presbyterian Church, 165 Colo. 34, 38–40 (1968); see French, supra note 12, at 22.
40 See e.g., Assurance Co. of Am. v. BBB Serv. Co., 593 S.E.2d 7, 8 (Ga. App. 2003); see also French, supra note 12, at 23.
41 French, supra note 12, at 23.
42 Assurance Co. of Am., 593 S.E.2d at 7.
Thus, as discussed in more detail in Part III, depending on the jurisdiction each insured is located and what interpretation of direct physical loss the court employs, insureds will have varying degrees of success.

III. BUSINESS INTERRUPTION DECISIONS IN THE COVID-19 ERA

The earliest COVID-19 cases are being decided weekly, and, unsurprisingly, business interruption disputes have largely been in favor of the insurer.\textsuperscript{43} Disputes where policies have contained a virus exclusion have frequently been decided for the insurer, as it is very unlikely that an insured will prevail over explicit language excluding viruses like COVID-19.\textsuperscript{44} Even in the event the insured’s policy did not contain a virus exclusion, courts have often found in favor of the insurer by focusing their analysis on whether the effects of COVID-19 constituted a “direct physical loss or damage.”\textsuperscript{45} However, despite the odds and these early wins for insurers, federal courts have also started to construe coverage in favor of the insureds.\textsuperscript{46}

A. Early Wins for the Insurers\textsuperscript{47}

In the first case to address the issue of whether COVID-19 caused “direct physical loss or damage,” a Michigan trial court judge, in an oral decision, dismissed the insured’s business interruption claims against the insurer.\textsuperscript{48} Here, the plaintiffs, restaurant owners, sought coverage after the Governor of Michigan issued an executive order closing dine-in businesses.\textsuperscript{49} Employing a strict interpretation of “direct physical loss or damage” policy language previously discussed in Part II, the trial court held that under Michigan law, the phrase “direct physical loss” required damage that is “tangible” and that “alters the physical integrity of the property.”\textsuperscript{50} The court explained that, not only did the plaintiffs

\textsuperscript{45} Id.
\textsuperscript{47} Since this Comment was written, out of 204 motions to dismiss, the insurer has won 168 times, an 82% success rate. See Judicial Rulings on the Merits in Business Interruption Cases, supra note 43. Insurers have won 9 motions for summary judgment. Id.
\textsuperscript{49} Id. at 1–2.
\textsuperscript{50} Id. at 6.
never allege any physical damage to the property, they also never alleged COVID-19 was ever present on the property. Consequently, absent the plaintiffs pleading physical damage, or at the very least, documented presence of COVID-19, the court found there was no direct “physical loss.”

In an almost identical set of facts, a D.C. court held that the plaintiffs, the owners of a number of prominent restaurants, did not meet their burden to claim business interruption coverage as a matter of law. The plaintiffs argued that the plain language of their policy required that the businesses suffer a “direct physical loss,” which, according to the dictionary, meant that the businesses suffered a “deprivation” as an “immediate” consequence to a “physical substance.” Therefore, the plaintiffs contended that: (1) the loss of use of their restaurant was direct because the closures were the immediate result of the mayor’s order closing their business, (2) their losses were physical because COVID-19 is a tangible, and (3) there was a loss because they were deprived of using their properties.

The court rejected each one of plaintiffs’ arguments in turn. First, the court held that the orders were not direct because the order did not affect any direct changes to the properties. Second, the court held that there was no physical loss because the plaintiffs offered no evidence that COVID-19 was actually present at their properties. Third, the court held that there was no loss, because the plain reading of the provision requires that the loss be a physical intrusion, which the executive order was not.

Further, the court found that none of the cases cited by the plaintiffs supported the proposition that a government order, standing alone, could constitute a direct physical loss under an insurance policy. The court also pointed out that in each of the cases cited by the plaintiffs—whether it be ammonia, gas, or even a foul odor—the insured’s property was proven uninhabitable, whereas there was no evidence in the plaintiff’s case that the properties were actually unsafe. Instead, the court found the plaintiffs’ situation analogous to cases where the

51 Id.
52 Id. at 7.
54 Id. at *2.
55 Id. at *2–*3.
56 Id.
57 Id.
58 Id.
59 Id.
60 Id. at *3.
61 Id. at *3, *5.
insured’s property was closed purely due to a government order, like in the case of a hurricane. Consequently, the court held that a government order standing alone did not constitute a direct physical loss.

Further, a court in the Western District of Texas held that the insured had no coverage under the business interruption provision because the policy had an exclusion that specifically barred coverage for losses caused by viruses. Here, the plaintiffs were a group of small Texas barbershops that were closed after the Governor of Texas signed an executive order closing all non-essential businesses. The plaintiffs, seeking to avoid the virus exclusion, plead that the virus was not present at their business, and their losses were entirely due to the governor’s order. However, the court was unpersuaded, and held that the shutdown would never have been issued if not for the virus.

In addition to finding for the insurer based on the virus exclusion, the court performed an analysis of whether the virus constituted a “direct physical loss” and determined precedent supporting the insurer was more persuasive. The court began its analysis by repeating the often-cited rule that courts must “honor [the] plain language” of insurance policy and not “revise [it] as desired.” The court held that the plain language of the policy required “an accidental direct physical loss to the property in question.” Yet, the court also acknowledged several decisions in which courts found “physical loss[,] even without tangible destruction to the covered property.”

Specifically, the court agreed with the plaintiffs that COVID-19 is like “ammonia, E. coli, and/or carbon monoxide (i.e. cases in which the loss is caused by something invisible to the naked eye), and in such cases, some courts have found direct physical loss despite the lack of physical damage.” However, despite agreeing with the plaintiffs that “some courts have found physical loss even without tangible destruction to the covered property,” the court dismissed the claim by finding the

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62 Id. at *4–*5.
63 Id.
65 Id. at 356.
66 Id. at 359.
67 Id. at 361.
68 Id. at 359–61.
69 Id. at 358.
70 Id. at 359.
71 Id.
72 Id. at 360 (citing Port Auth. of N.Y. & N.J. v. Affiliated FM Ins. Co., 311 F.3d 226, 236 (3d Cir. 2002)).
“line of cases requiring tangible injury to property . . . more persuasive.”

B. The First Win for the Insureds

The first decision in favor of the insureds occurred on August 12, 2020 in the Western District of Missouri, where the court denied the insurer’s motion to dismiss the policyholder’s claims. Here, the plaintiffs purchased “all-risk” policies that included a “Building and Personal Property Coverage Form” and a “Business Income (and Extra Expense) Coverage Form.” The policies provided that insurers would pay for “accidental [direct] physical loss or accidental [direct] physical damage,” but did not define “physical loss” or “physical damage.” Additionally, the policies did not contain a virus exclusion.

In their complaint, the plaintiffs alleged that some customers, employees, and visitors to the insured properties were infected with COVID-19 and thereby the insured properties have also been infected with the virus. The plaintiffs also alleged that the presence of the virus and governor’s executive orders caused a direct physical loss or direct physical damage by denying them their use of the property and forcing them to suspend operations. In response, the insurers argued that the policy covered only physical loss or damage to property—as in the case of a fire or storm—and thus the requirement of physical damage precluded coverage for plaintiffs’ claims.

In rejecting the defendant-insurer’s argument, the court agreed with the plaintiffs that the policy expressly covered “physical loss or physical damage,” meaning that (1) either a “loss” or “damage” is required, and (2) “loss” is distinct from “damage.” The court reasoned that the insurer’s “focus on an actual physical alteration ignore[d] the coverage for a ‘physical loss.’” Additionally, given that the insurers did not
define “direct physical loss” or “direct physical damage,” the court’s only option was to “rely on the plain and ordinary meaning of the phrase.”

Looking to the dictionary, the court concluded that “direct” meant a “logical or causal relationship,” “physical” meant “having material existence,” and loss meant a “deprivation.” Thus, based on the plaintiffs’ allegations that COVID-19 virus “is a physical substance” that lives on surfaces, that it attached to the plaintiff’s property, and that it deprived the plaintiffs of their property by making it “unsafe and unusable,” the court held that the plaintiffs’ complaint plausibly alleged a “direct physical loss” based on “the plain and ordinary meaning of the phrase.”

IV. ANALYSIS

Prior to the aforementioned cases, any analysis of whether business owners would be able to get coverage under their business interruption provisions for COVID-19 claims had been speculative. Now that initial decisions regarding COVID-19 business interruption claims have started to take shape, it seems that most insureds have an arduous, yet conceivable path to successfully argue for coverage. At the very least, these initial decisions suggest that insureds should be able to get some sort of leverage when mediating coverage disputes with their insurers. However, these initial decisions hint at the additional hurdles that insureds face and foreshadow broader legislative and economic implications on the horizon.

A. Can Insureds Obtain Coverage

When analyzing how courts interpret “direct physical loss or damage,” it is helpful to divide these approaches into three groups: (1) tangible damage to the insured’s property; (2) a non-tangible substance rendering the insured’s property uninhabitable; and (3) a government mandate forcing the closure of the insured’s properties. In theory, academics and lawyers could analyze how COVID-19 business interruption claims would neatly fit into each category, and then forecast how these COVID-19 claims would be decided in each jurisdiction. However, what the first decisions reveal is that, not only

84 Id. (citing Vogt v. State Farm Life Ins. Co., 963 F.3d 753, 763 (8th Cir. 2020)).
85 Id.
86 Id. (citing Vogt, 963 F.3d at 963).
do many these COVID-19 business interruption claims fail to fit neatly into one of these categories, but that there are also additional exclusions and practical issues that could still potentially bar coverage.  

Admittedly, the initial COVID-19 business interruption decisions reveal nothing novel about courts that take a strict interpretation approach. Insureds that have policies in jurisdiction requiring tangible physical damage are unlikely to obtain any coverage under their policies. A saving grace for insureds was that the Judicial Panel on Multidistrict Litigation, a federal panel consisting of seven judges, considered consolidating COVID-19 business interruption claims into one multidistrict litigation to promote the efficient resolution of claims. This consolidation would have allowed for a global resolution of business interruption disputes, thereby giving policyholders with unfavorable policy language, less persuasive facts, and generally weaker cases, an opportunity to win coverage. However, on August 12, 2020 the Judicial Panel concluded that any commonality amongst policyholders was artificial and an industry wide panel would be inappropriate. Consequently, due to the state of COVID-19 business interruption litigation as of May 2021, insureds in jurisdictions that require tangible damage should probably not expect any coverage.

More controversial and interesting is how courts have treated cases when a non-tangible substance (such as the COVID-19 virus) renders the insured’s property uninhabitable, and the future issues that will inevitably arise. Here, plaintiffs argue that COVID-19 is analogous to situations where gas, asbestos, or ammonia made an insured’s property uninhabitable, and where courts subsequently found that the insured suffered a “direct physical loss within the plain language of their policies.” In fact, as previously discussed, that is exactly what the one and only successful group of COVID-19 litigants argued in Studio 417, 

88 See infra Part IV Section B.
90 See id.
92 Id.
Inc. v. The Cincinnati Ins. Co.\textsuperscript{95} However, of note is the practical significance of pleading that the COVID-19 virus was actually present at the insured’s property. Again, in the second category, it is not enough that there was an executive order closing the business; rather, the insureds must prove the existence of the invisible substance rendering their property useless.\textsuperscript{96} In situations where claimants alleged business interruption due to COVID-19 and failed to raise this important point, courts dismissed their claims.\textsuperscript{97}

While Studio 417, Inc. represents victory for the insureds, it must also be acknowledged that the plaintiffs merely survived a motion to dismiss based on the allegations in their complaint.\textsuperscript{98} If anything, this first step in litigation highlights the issues to come. The burden of proof to survive a motion to dismiss is quite a low bar,\textsuperscript{99} but similarly situated litigants will face significant evidentiary hurdles to success when proceeding with litigation. The Studio 417 plaintiffs survived the motion to dismiss by stating “COVID-19 particles attached to and damaged their property, which made their premises unsafe and unusable.”\textsuperscript{100} While the particle attachment argument was enough to defeat a 12(b)(6) motion, plaintiffs may face insurmountable challenges when tasked with actually proving that COVID-19 was present at their businesses and subsequent causation.

Analogous decisions within the secondary category or policy types demonstrate these potential challenges. In this category, because insureds win by arguing that the presence of an invisible toxin which renders their business uninhabitable, the insureds must prove the presence of a non-tangible substance to justify a “direct physical loss.”\textsuperscript{101} While proving the presence of a non-tangible substance can be a difficult evidentiary challenge, some plaintiffs have been able to meet the burden of proof.

For example, in West Fire Insurance Co. v. First Presbyterian Church, the Colorado Supreme Court held that gas leaking into the church was a direct physical loss trigging coverage.\textsuperscript{102} The parties stipulated to the fact that the “gasoline and vapors infiltrated and contaminated . . . the church . . . making [it] uninhabitable and . . . use

\textsuperscript{96} See id. at 800–04.
\textsuperscript{98} Studio 417, Inc., 478 F.Supp.3d at 805.
\textsuperscript{99} See id. at 799.
\textsuperscript{100} Id. at 800.
\textsuperscript{102} W. Fire Ins. Co. v. First Presbyterian Church, 437 P.2d 52, 55 (1968).
Likewise, in Matzner v. Seaco Insurance Co., the court held on a motion for summary judgment that carbon monoxide in the plaintiffs’ building caused a direct physical loss. The plaintiffs’ were able to prove such loss because the fire department measured high levels of carbon monoxide and employees from both chimney and heating services visited the building and concluded that there was a carbon monoxide build up. Further, in TRAVCO Insurance Co. v. Ward, the court held in a declaratory judgment that the insured’s drywall caused a direct physical loss. The insured proved such loss by hiring an occupational safety and health engineer who visited the home and concluded that the drywall was releasing sulfur gas inside the home twenty times higher than ambient levels.

Consequently, in all of these cases, where litigation proceeded beyond the pleadings phase, the insureds needed actual evidence of the presence of a non-tangible substance. Fortunately, in these cases, the insureds and their insurers either stipulated to the presence of a non-tangible substance, or the insureds were able to prove its existence through expert testimony. However, proving the presence of a non-tangible substance without stipulation or expert testimony may present a significant evidentiary challenge.

Absent a stipulation from an insurer agreeing that COVID-19 was present at an insured’s business, which is highly unlikely given the nature of insurance disputes, claiming an insured’s business was sufficiently interrupted by COVID-19 rather than an executive order may be nearly impossible. First, given that most insureds’ businesses closed due to an executive order, arguably the real source of the business interruption, it is unlikely that COVID-19 was ever present or tested for being present at the business. Second, in the unlikely event that the insured did test the surfaces at their business for COVID-19, the CDC estimates that coronavirus dies on surfaces within hours and is completely eliminated through normal routine cleaning with soap and

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103 Id. at 54.
105 Id. at *1.
107 Id. at 703.
Thus, COVID-19’s life-span on surfaces is hardly enough time for an insured to argue for a significant amount of financial relief.

Rather, an insured’s best argument might be that one of their employees tested positive for the virus and was present at the business for an extended period of time while infected. However, given the duration the average person has COVID-19, coverage would be justified for one to two weeks at most— if not less— given that an insured would logically ask a sick employee not to come in to work. While the Studio 417 plaintiffs were careful to plead that the virus existed at their workplace, they never affirmatively stated that the virus was in fact detected. These allegations in the complaint may have been enough to survive a motion to dismiss, but the path forward is a difficult one. Insureds bringing business interruption claims for losses caused by COVID-19 will have to prove that their property was infected with COVID-19 for a prolonged period of time to get significant financial relief. Given the transient nature of the virus, plaintiffs will face a seemingly insurmountable challenge in proving this kind of prolonged exposure and infection.

Lastly, few courts have applied the rationale of the third category: finding for the insureds based on a government mandate. This is likely due to the fact the government mandate test is the easiest burden for the insureds to satisfy. As previously discussed, courts that take this approach merely require that the government issue an executive order that prevents the insured from accessing or using their property. Logically, in almost every COVID-19 business interruption claim the insured will be able to demonstrate that the government forced them to close their business through an executive order, and the insureds subsequent deprivation of property use results in direct physical loss.

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113 Id. at 799.
114 In North State Deli LLC et al. v. The Cincinnati Insurance Co. et al., in a break with state precedent, the Superior Court granted summary judgment in favor of the insured, finding that the phrase “physical loss” did not require physical damage to the insured’s property. Instead, the court found that insured’s loss of use of its property due to an executive order constituted “physical loss.” See North State Deli, LLC v. Cincinnati Ins. Co., No. 20-CVS-02569, 2020 WL 6281507, at *3 (N.C. Super. Oct. 09, 2020).
This argument is analogous to executive orders shutting down businesses in anticipation of hurricanes. In these cases, insureds successfully argued for coverage when courts applied the logic of the third category. Thus, given how easy it is for insureds to win coverage disputes in jurisdictions that follow this approach, insurers are unlikely to waste resources litigating coverage issues. It is more likely that insureds will opt for settlement negotiations, during which they can use the favorable case law to maximize their payout. Thus, it appears that insureds in these jurisdictions will easily navigate their coverage dispute and a formal decision involving litigation is less likely to occur.

B. Ordinance or Law Exclusion

However, even for insureds with policies in the third category, obtaining coverage may not be simple. Despite the expansive definition of “direct physical loss” given by courts following the third line of reasoning, if the insured’s policy has certain exclusions, the insured will be out of luck. The first courts addressing COVID-19 business interruption claims have already discussed the virus exclusion, which bars coverage if the provision specifically excludes viruses. Unfortunately, this may not be the only hurdle, as additional exclusions could also bar coverage. Insurers could potentially argue that the “ordinance or law exclusion,” commonly found in property policies, also serves as a bar to coverage. The standard language of the ordinance or law exclusion usually provides:

[The insurer] will not pay for loss, damage, cost or expense directly or indirectly caused by or resulting from . . . the enforcement of compliance with any ordinance or law . . . regulating the use of any property . . . The Ordinance or Law exclusion applies . . . even if the property has not been damaged.

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116 See id.
117 See id.
120 Id.
Under the ordinance or law exclusion, insureds are precluded from coverage when the enforcement of any ordinance or law leads to certain costs or damages.\footnote{122 Id.}

Traditionally, this exclusion applies when an inspection reveals that the insured’s business is not compliant with zoning laws or newly established building codes require the insured to upgrade their wiring, or add handicap access, for example.\footnote{123 Ordinance or Law, MURPHY INS. AGENCY, https://www.dfmurphy.com/business-insurance/Property/Ordinance-or-Law.aspx (last visited Mar. 21, 2021).} The exclusion makes clear that the insurer is not responsible for the costs associated with the insured bringing their property up to code to comply with the new laws.\footnote{124 Id.}

Conceivably, insurers will be able to argue that executive orders, which required the closure of all non-essential business, fit squarely within the ordinance or law exclusion. While executive orders may not have been contemplated by the parties—or even traditionally applied to ordinance or law exclusions—they may fit within the plain language of the provision barring coverage. Even worse for insureds, the language of the exclusion makes clear that there does not have to be any damage to the property in order to exclude coverage. In some ways, the ordinance or law of exclusion is more detrimental than the commonly discussed “contamination” or “pollution exclusions.” At least with a pollution exclusion, insureds can argue that the virus is not a pollutant, and that the language of exclusions must be interpreted narrowly.\footnote{125 Thomas F. Segalla & James D. Macri, But Is It Really A Pollutant? A National Overview of Pollution Exclusion Litigation, WESTLAW J. 1 (Apr. 29, 2015), https://media.goldbergsegalla.com/uploads/tfs-jdm_westlawenvironmental_april2015.pdf.} However, given the broad language of the ordinance or law provision, and how precisely an executive order fits within exclusion’s scope, making a persuasive case for coverage may be nearly impossible for insureds with this type of policy.

Lastly, the preamble to the ordinance or law exclusion makes clear that even if the insured can point to another cause of loss, the exclusion runs concurrently and will still bar coverage.\footnote{126 Id.} The standard ISO form ordinance or law exclusion specifies that the insurer does not pay for the loss “regardless of . . . the cause of the excluded cause of loss . . . or whether any cause or event contributed concurrently . . . with the excluded cause of loss.”\footnote{127 Medley et al., supra note 121.} This jumbled language provides that even if the insured can point to damages caused by a direct physical loss,
completely separate from an ordinance or law, ordinance or law exclusion will still apply.\footnote{128}

As applied to COVID-19 business interruption claims, courts in jurisdictions that apply the rationale of the second category would likely first find that the virus constituted a direct physical loss because (1) was present at the insured’s property, (2) made the property uninhabitable, and (3) rendered the property useless. However, if an insured’s policy also contains an ordinance or law exclusion, and the insurer is able to show that an executive order in effect, and ordinance or law exclusion will negate coverage—despite the fact that the insured successfully argued there was a direct physical loss.

Of course, the outcomes of insurance disputes will always depend on the specific policy language at issue,\footnote{129} and as detrimental as the ordinance or law exclusion sounds, there may be hope for insureds.\footnote{130} For example, in \textit{Carpe Diem Spa, Inc. v. Travelers Cas. Ins. Co. of Am.}, the policy’s ordinance or law exclusion prevented coverage for “loss or damage caused by [a]ct[s] or decisions ... of any person, group, organization or governmental body.”\footnote{131} Unfortunately, the policy contained a virus exclusion, so the court did not specifically address whether an “executive order” fit this expansive definition.\footnote{132} However, as discussed above, the insurer may have a strong argument to exclude coverage.

Conversely, in \textit{Elegant Massage, LLC v. State Farm Mut. Auto. Ins. Co.}, the policy excluded from coverage “any loss due to ‘[t]he enforcement of any ordinance or law’ ‘regulating the ... use ... of any property.’”\footnote{133} Further, the policy provided that the “ordinance or law must '(a) regulate the construction, use or repair ... or (b) requir[e] the tearing down of any property.”'\footnote{134} Therefore, given the policy’s limiting language surrounding the ordinance or law exclusion, the court refused to apply to the exclusion to COVID-19 closure orders, concluding that executive orders closing small businesses did not fit this narrower definition. The court explained that the “Executive Orders, which were temporary restrictions that impacted the Plaintiff’s business, were not ordinances or laws such as safety regulations or laws passed by a legislative body regulating the construction, use, repair, removal of

\footnote{128} See id.
\footnote{129} See supra Part II.
\footnote{132} \textit{Id.} at *3.
\footnote{133} \textit{Elegant Massage, LLC}, 2020 WL 7249624, at *13.
\footnote{134} \textit{Id.}
debris, or physical aspects of the property.” Consequently, whether or not an ordinance or law exclusion will bar coverage depends on the specific policy language at issue. However, in whatever form the exclusion exists in each insured’s policy, it is a widely popular exclusion that could be an additional bar on coverage for insureds—even in the most forgiving of jurisdictions.

C. Impact, Necessary Evils, and Controversial Legislation

In summary, it appears that many business interruptions claims will be an uphill battle. To most people, the COVID-19 pandemic has been incredibly disruptive and completely unanticipated. On March 24, 2020, former President Donald Trump said the nation would be open by Easter. But a year later, the pandemic rages on, both death and economic devastation continue to ensue.

Governments have not been willing to let insurance companies—which properly assessed the risk so as to provide policies for customers at an affordable price—continue to function according to the status quo. Rather, state and federal lawmakers have flooded their respective assemblies with bills designed to retroactively rewrite insurance policies in an attempt to force insurers to pay business interruption claims that would not have otherwise been covered.

Predictably, insurance lobbies are fighting back. For example, the American Property Casualty Insurance Association issued a statement, logically arguing that if insurers are “forced to pay for losses that are not covered under existing insurance policies, the stability of the sector could be impacted and that could affect the ability of consumers to address everyday risks that are covered by the property

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135 Id.
139 Packman, supra note 138.
casualty industry.” Likewise, the National Association of Professional Insurance agents released a statement noting that “retroactively rewriting [policies] . . . inject[s] new uncertainties into [the] current economic crisis.” Essentially, insurers must convincingly argue that the government’s attempt is to “help” small businesses simultaneously undermines the entire insurance industry by potentially bankrupting insurers that never intended to take on such catastrophic losses.

Despite the chaos for many, the insurance industry was prepared for the scope and duration of the pandemic. As demonstrated by the initial COVID-19 decisions, most insurers learned from the SARS pandemic in 2003, and introduced exclusions for viruses, pandemics, and executive orders into their business policies almost twenty years ago. This was not purely reactionary, but rather a calculated decision on behalf of insurers to bring premiums in line with coverage and potential payouts. Some may view these exclusions as unfair and may find it difficult to be sympathetic to an insurance carrier. However, a delicate balance exists for carriers that must be able to exclude coverage for certain events, so they can take on an appropriate amount of risk in other areas and provide coverage for their insureds without risking the possibility of going bankrupt.

In fact, insurance carriers are heavily regulated for the very purpose of avoiding the risk of insolvency. For example, when insurance policies are not correctly priced, natural disasters negatively effects both the insurer and customer by potentially forcing insurance companies out of business. Thus, as unsympathetic as an insurance conglomerate may appear after denying the claim of a “mom and pop shop” told by the government “they are not essential,” the decision is also one of the “necessary evils” that underlay the current insurance market.

141 Id.
145 See id.
147 See Davis, supra note 144.
V. Conclusion

In conclusion, most successful business interruption claims for COVID-19 will be reserved for insureds who live in jurisdictions that allow for claims based purely on executive orders—that is, if the policy does not contain the commonly found virus exclusion or an expansive ordinance or law exclusion. Insureds in other jurisdictions may struggle to show tangible physical loss or demonstrate that COVID-19 was ever present at their business, rendering it sufficiently uninhabitable. As for insurance industry lobbying, while on its surface it looks like it will be an additional hurdle for insureds, it is really a sideshow that is unrelated to the merits of each case. The insurance industry is merely advocating against obviously unconstitutional legislation, which would not pass or be overturned, regardless of the industry’s lobbying efforts.

Lastly, many small businesses have likely learned, albeit at a costly price, the number one rule of insurance litigation: “always read the policy.” COVID-19 has served as a stark wake-up call, reminding business owners to pay careful attention to their insurance policies and loss prevention plans.