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Physical Losses, Invisible Damages: Finding Coverage for Business Interruption Insurance Claims Sustained During the COVID-19 Pandemic

Mason Medeiros

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I. INTRODUCTION

The COVID-19[1] pandemic had a large impact on businesses throughout the United States.[2] To mitigate the economic effects of the pandemic, businessowners with insurance often turned to their policy for relief.[3] Many insureds[4] have sought coverage for losses incurred by the COVID-19 pandemic.[5] However, with COVID-19 business interruption insurance claims continually being denied and courts commonly finding for the insurers, insureds are often left without recourse.[6] But are courts coming to the proper conclusion in these cases? And is there another way to cover an insured's losses?

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* University of Minnesota Law School JD Candidate, Class of 2023; B.A., Vanderbilt University, 2020. Thank you to Professors Jon Lee and Daniel Schwarcz, and editor Jesse Smith for their invaluable guidance and advice throughout the note-writing process; to the staff and editors of the Minnesota Journal of Law, Science, and Technology for their feedback and comments on previous drafts of this Note; and to my friends, family, and partner, Sofia Consing for their continued encouragement and support. All opinions expressed in this Note, and any mistakes herein, are my own.

1. Although COVID-19 is the name of the disease caused by the SARS-CoV-2 virus, throughout this paper it will be used to refer to both the disease and the virus itself.

2. *See* Alexander Bartik et al., *The Impact of COVID-19 on Small Business Outcomes and Expectations*, 117 PNAS 17656, 17666 (2020) (discussing the effects of the COVID-19 pandemic on small businesses in the United States).

3. *See generally Covid Coverage Litigation Tracker*, U. PENN. L. SCH., https://cclt.law.upenn.edu/ [hereinafter *Covid Coverage Litigation Tracker*] (last visited Jan. 16, 2021) (showing the number of insurance litigation resulting from the COVID-19 pandemic).

4. Throughout this paper, business owners will be referred to as insureds and policyholders.

5. *Covid Coverage Litigation Tracker*, *supra* note 3.

6. *Id.*

This Note will address these two questions in an attempt to find coverage for insureds for losses incurred during the COVID-19 pandemic. The analysis will focus on business interruption insurance claims in four parts. First, this Note will look at the district and appellate courts' COVID-19 business interruption insurance litigation decisions to determine the main arguments that courts are making in favor of insurers based on the standard language of business interruption insurance policies. Second, it will analyze the policy language to find ambiguity and apply it to the doctrine of *contra proferentem* to make an argument for coverage. Third, this Note will refute the insurer's argument that the COVID-19 pandemic is an uninsurable event that they cannot cover. Finally, this Note will compare the insurance industry's response to COVID-19 with its response to the 9/11 terrorist attacks and show that the federal government can use the Terrorism Risk Insurance Act (TRIA) of 2002 as a blueprint for providing coverage to insureds in the current and future viral pandemics.

In doing so, this Note will build off the previous scholarship on COVID-19 business interruption insurance litigation, particularly the works of Christopher French, Erik Knutsen, and Paul McHugh. French and Knutsen primarily focused on the arguments on both sides of the coverage debate[7] and the insureds' arguments at court with a focus on the issues arising from the insurers' early denial of claims.[8] McHugh, on the other hand, focused on the various legislative attempts to create coverage for insureds dealing with COVID-19 pandemic losses and advocating for private sector involvement.[9] Using these sources as a backdrop, this Note expands the argument for coverage in cases without a virus exclusion by looking deeper into the ambiguity created by the standard policy language and applying it to the doctrine of *contra proferentem*. Furthermore, it will call for the federal government to provide assistance to

7. *See* Christopher C. French, *COVID-19 Business Interruption Insurance Losses: The Cases for and Against Coverage*, 27 CONN. INS. L.J. 1, 5 (2020) ("This Essay sets forth the arguments for and against business interruption policies covering COVID-19 business interruption losses. It is the first Essay to do so.").

8. *See* Erik S. Knutsen & Jeffrey W. Stempel, *Infected Judgment: Problematic Rush to Conventional Wisdom and Insurance Coverage Denial in a Pandemic*, 27 CONN. INS. L.J. 185, 185, 190–94 (2020).

9. *See* Paul McHugh, *Business Interruption Insurance in the Time of Covid-19: Who Should Foot the Bill?*, 19 J.L. & POL'Y, 491, 491, 515–20 (2021).

insureds through a federal reinsurance program in addition to immediate executive action.

This analysis will show that standard business interruption insurance policies, in the absence of an explicit virus exclusion, provide coverage for losses incurred by the COVID-19 pandemic and that the government has previously set a precedent of being able to assist the insurance industry in paying such potential claims.

II. BACKGROUND

A. THE COVID-19 PANDEMIC

1. COVID-19 Transmission

Coronaviruses, such as the one that causes COVID-19, are not a new infectious agent. They are present in everyday life and range from common infections like a cold to more deadly diseases such as the Middle East respiratory syndrome (MERS).[10] However, COVID-19 has had a greater impact on the world because it is more infectious than other deadly coronaviruses that have arisen over the years.[11]

COVID-19 is typically spread through water droplets and other particles containing the virus that are released when a person infected by the virus exhales, coughs, or sneezes.[12] As others around that person breathe in the infected particles, or the particles land on another's eyes, nose, or mouth, they become infected by the virus.[13] These particles can also contaminate surfaces that they come in contact with.[14] The chance of this spread increases when people are in close contact with one another and in the absence of coverings over the nose and mouth to catch the particles.[15] The spread of the virus can occur before

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10. Yella Hewings-Martin, *How Do SARS and MERS Compare with COVID-19?*, MED. NEWS TODAY (Apr. 10, 2020), https://www.medicalnewstoday.com/articles/how-do-sars-and-mers-compare-with-covid-19#Coronaviruses-past-and-present.

11. *Id.* ("SARS and MERS have significantly higher case fatality rates than COVID-19. Yet COVID-19 is more infectious . . . .").

12. *COVID-19: Frequently Asked Questions*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/coronavirus/2019-ncov/faq.html (last updated Mar. 11, 2022).

13. *Id.*

14. *Id.*

15. *Id.*

a person knows they are infected, making COVID-19 harder to stop.[16] Some estimate that each person infected with COVID-19 will infect two to three others.[17]

2. The United States' Response to COVID-19 Infection

As COVID-19 infection rates and hospitalizations rose rapidly in the United States, the government took measures to slow the spread.[18] Although the Centers for Disease Control and Prevention (CDC) released various guidance documents during the pandemic,[19] and the federal government took precautionary measures such as closing the borders to international travelers,[20] the response to COVID-19 has generally been determined on a state-by-state basis.[21] Many states

16. Roz Plater, *As Many as 80 Percent of People with COVID-19 Aren't Aware They Have the Virus*, HEALTHLINE (May 28, 2020), https://www.healthline.com/health-news/50-percent-of-people-with-covid19-not-aware-have-virus; *see also* Laura Nightengale, *Superspreaders: These Factors Affect How Fast COVID-19 Can Spread*, OSF HEALTHCARE (Jul. 18, 2020), https://www.osfhealthcare.org/blog/superspreaders-these-factors-affect-how-fast-covid-19-can-spread/ (describing how some people, "superspreaders," are more susceptible to spreading the virus).

17. Veronica Bravo & Janie Haseman, *COVID-19: How Coronavirus Spreads so Quickly and How You Can Slow it Down*, USA TODAY, https://www.usatoday.com/pages/interactives/news/coronavirus-covid-spread-quickly-how-to-slow-it-down/ (last visited Nov. 30, 2021). This number has varied depending on the stage of the pandemic and the current variant. *What You Need to Know About Variants*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/coronavirus/2019-ncov/variants/about-variants.html (last updated Feb. 25, 2022) (stating that the Delta variant "may spread more easily" than previous variants and the Omicron variant "spreads more easily than other variants").

18. *Summary of Guidance for Public Health Strategies to Address High Levels of Community Transmission of SARS-CoV-2 and Related Deaths, December 2020*, CTRS. FOR DISEASE CONTROL & PREVENTION (Dec. 11, 2020), https://www.cdc.gov/mmwr/volumes/69/wr/mm6949e2.htm.

19. *See generally COVID-19: Search Guidance Documents*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/coronavirus/2019-ncov/communication/guidance-list.html?Sort=Date%3A%3Adesc (last visited Nov. 30, 2021) (providing a collection of guidance documents released by the CDC in relation to the COVID-19 pandemic).

20. *See* Ally J. Levine, *State by State, COVID-19 Grinds U.S. to a Halt*, REUTERS (Mar. 24, 2020), https://graphics.reuters.com/HEALTH-CORONAVIRUS-USA/0100B5LQ46H/index.html ("On March 11, President Donald Trump suspended travel from 26 European countries to the U.S. for a month.").

21. *See id.*; James H. Fowler et al., *Stay-at-Home Orders Associate with Subsequent Decreases in COVID-19 Cases and Fatalities in the United States*, 16 PLOS ONE 1, 1–2 (2021) ("[T]he United States is a federal political system where public health is normally the purview of the fifty states . . . As a result,

implemented "stay at home" orders to help curb the spread of COVID-19.[22]

California issued the first COVID-19 stay-at-home order on March 19, 2020.[23] This order, coming after many states closed recreational and non-essential businesses such as movie theatres and gyms, required people to stay at home unless traveling for essential purposes.[24] Essential purposes included traveling for doctor's visits, grocery stores, and working at essential businesses.[25] During the pandemic, all but eight states issued a statewide stay-at-home order.[26] While these orders helped reduce the spread of the COVID-19 virus,[27] they also had a negative impact on businesses.[28]

responses to COVID-19 varied across states and counties and led to spatial and temporal variation in implementation of mitigation procedures.").

22. *See* Levine, *supra* note 20 ("With little direction from the federal government, state and local leaders began instituting their own restrictions to slow the spread of the coronavirus in their jurisdictions."); Levine, *supra* note 20.

23. Press Release from Governor Gavin Newsom (Mar. 19, 2020), https://www.gov.ca.gov/2020/03/19/governor-gavin-newsom-issues-stay-at-home-order/#:~:text=SACRAMENTO%20%E2%80%93%20Today%2C%20Governor%20Gavin%20Newsom,can%20also%20be%20found%20here.

24. Levine, *supra* note 20.

25. *Id.*

26. *See* Jiachuan Wu et al., *Stay-at-Home Orders Across the Country: What Each State is Doing—or Not Doing—Amid Widespread Coronavirus Lockdowns*, NBC NEWS (Apr. 29, 2020), https://www.nbcnews.com/health/health-news/here-are-stay-home-orders-across-country-n1168736 (showing that, out of the fifty United States, all but North Dakota, South Dakota, Nebraska, Iowa, and Arkansas issued a stay-at-home order in at least part of the state and that of the states that issued a stay-at-home order, all but Wyoming, Utah, and Oklahoma issued the order state-wide).

27. *See* Fowler et al., *supra* note 21, at 5 (discussing the decrease in COVID-19 case growth within a state after the implementation of a stay-at-home order).

28. *See, e.g.*, Robert Fairlie, *The Impact of COVID-19 on Small Business Owners: Evidence from the First Three Months After Widespread Social-Distancing Restrictions*, 29 J. ECON. & MGMT. STRATEGY 727, 728 (2020) ("[T]he number of working business owners plummeted from 15.0 million in February 2020 to 11.7 million in April 2020 because of COVID-19 mandates and health- and economic-driven demand shifts."); Kathryn Zickuhr, *How COVID-19 is Affecting Small Businesses in D.C.*, D.C. POL'Y CTR. (Apr. 30, 2020), https://www.dcpolicycenter.org/publications/small-businesses-coronavirus (discussing the effect of the COVID-19 pandemic on small businesses in Washington, D.C.).

Stay-at-home orders forced many businesses to shut down.[29] This led to large losses for industries that rely on person-to-person interaction, such as personal and laundry services, travel, and restaurants.[30] These businesses were not deemed essential and could not be operated while stay-at-home orders were active.[31] Many of the affected businesses were small businesses that operated on slim profit margins.[32] Even if they could stay open during the pandemic, the costs of complying with new safety protocols imposed a significant burden.[33] As a result, the number of active business owners decreased by 3.3 million after the stay-at-home orders were issued.[34] At least 200,000 of these businesses permanently closed in 2020.[35] For those that were able to reopen, it may take five or more years to fully recover.[36]

The current decreasing case numbers, however, have allowed states to ease restrictions and greatly helped businesses, who are now able to reopen and serve the public.[37] Even so, the

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29. *See* Fairlie, *supra* note 28, at 730 (discussing the loss of 3.3 million active business owners in the United States after states implemented stay-at-home orders).

30. *See id.* at 735 (showing the percent change in the number of business owners by industry between February and June 2020).

31. *See* Connie Lin, *What is an 'Essential' Business Anyway? A Cheat Sheet for Getting Through the COVID-19 Pandemic*, FAST COMPANY (Mar. 31, 2020), https://www.fastcompany.com/90484557/what-is-an-essential-business-anyway-a-cheat-sheet-for-getting-through-the-covid-19-pandemic (providing a list of businesses that were generally considered to be essential during the COVID-19 pandemic).

32. *See* André Dua et al., *US Small-Business Recovery After the COVID-19 Crisis*, MCKINSEY & CO. (July 7, 2020), https://www.mckinsey.com/industries/public-and-social-sector/our-insights/us-small-business-recovery-after-the-covid-19-crisis ("Among respondents to our survey, close to a third were operating at a loss or breaking even prior to the crisis.").

33. *Id.*

34. Fairlie, *supra* note 28, at 730.

35. *See* Juliana Kaplan, *85% of Small Businesses Were Fully Open in March, Report Finds*, BUS. INSIDER (May 5, 2021), https://www.businessinsider.com/85-small-businesses-fully-open-kabbage-report-2021-5 ("[A]n extra 200,000 businesses in the US closed in 2020.").

36. *See* Dua et al., *supra* note 32 ("Recovery will take time . . . [and] will depend on both economic vulnerability to the COVID-19 response and the prevailing macroeconomic outlook in their respective industries. Across all businesses, that could take five years or longer.").

37. *See* Kaplan, *supra* note 35 ("Increased vaccinations, the ability to hire staff, and lifted restrictions all contributed to the more robust reopening numbers.").

growing number of COVID-19 variants threatens to send the United States back into more lockdowns, and could halt the recovery process of businesses across the country.[38]

B. INSURANCE LAW IN THE UNITED STATES

1. Regulation by the Individual States

In the United States, insurance is heavily regulated by the individual states, with each state largely developing its own rules and policies of interpretation.[39] This policy of individual regulation was developed by the McCarran-Ferguson Act of 1945.[40] Congress created the Act "to restore the supremacy of the states in the realm of insurance regulation"[41] and "to provide insurers with certain exceptions from antitrust laws."[42] This allows state law to supersede federal laws of general applicability that would regulate "the business of insurance."[43] To determine if a law deals with the business of insurance, courts typically consider three factors: "(1) whether the practice has the effect of transferring or spreading a policyholder's risk; (2) whether the practice is an integral part of the policy relationship between the insurer and the insured; and (3) whether the practice is limited to entities within the insurance industry."[44]

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38. *See, e.g.*, Kathy Katella, *5 Things to Know About the Delta Variant*, YALE MED., https://www.yalemedicine.org/news/5-things-to-know-delta-variant-covid (last updated Mar. 1, 2022) (discussing the COVID-19 Delta variant and how it differs from the original COVID-19 strain); Adrianna Rodriguez, *First Known Death from Omicron Variant Reported in the UK. Everything To Know About the Latest COVID Strain*, USA TODAY, https://www.usatoday.com/story/news/health/2021/11/29/omicron-variant-symptoms-mutations-vaccines/8791946002 (last updated Dec. 13, 2021) (discussing the COVID-19 Omicron variant, including concerns that current vaccines will not be effective against it).

39. *Commercial Insurance: Regulation*, INS. INFO. INST., https://www.iii.org/publications/commercial-insurance/how-it-functions/regulation [hereinafter *Commercial Insurance: Regulation*] (last visited Nov. 30, 2021).

40. 15 U.S.C. §§ 1011–15; *e.g.*, STEVEN PLITT ET AL., 1 COUCH ON INSURANCE § 2:4 (3d ed. 2021).

41. Barnett Bank of Marion Cnty. v. Nelson, 517 U.S. 25, 40 (1996) (quoting Dep't of Treasury v. Fabe, 508 U.S. 491, 500 (1993)).

42. PLITT ET AL., *supra* note 40.

43. *Id.* at § 2:5.

44. *Id.*; *see, e.g.*, Kentucky Ass'n of Health Plans v. Miller, 538 U.S. 329, 339 (2003) (applying the three factors to determine if practices constituted the "business of insurance").

2. Role of Ambiguity, Contra Proferentem, and the Reasonable Expectations Doctrine

Although the individual states regulate insurance, some rules are common across multiple legal schemes. One of the most common rules classifies insurance contracts as a type of adhesion contract,[45] where the parties have significantly uneven bargaining power.[46] Often, the signing party does not have the power to negotiate or modify the terms of the contract.[47] In insurance policies, the purchaser is usually only able to review the policy after purchasing it.[48] Even if the purchaser has such an opportunity, they have little, if any, bargaining power over the terms.[49] Because of this, courts often construe coverage broadly and exclusions to coverage narrowly in favor of the insured.[50] In doing so, courts have adopted special rules of interpretation to deal with ambiguity in insurance policies.[51] The standard test to find ambiguity in an insurance policy "is whether the policy language can be reasonably interpreted in different ways."[52] Once the court finds ambiguity, which can be

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45. *See, e.g.*, Sonson v. United Servs. Auto. Ass'n, 100 A.3d 1, 2 (Conn. App. Ct. 2014) (quoting Rumbin v. Utica Mut. Ins. Co., 757 A.2d 526, 529 n.6 (Conn. 2000)) ("Standardized contracts of insurance continue to be prime examples of contracts of adhesion."); Travelers Indem. Co. v. Bloomington Steel & Supply Co., 718 N.W.2d 888, 895 (Minn. 2006) ("At the same time, as we have recognized, insurance contracts are contracts of adhesion.").

46. *Adhesion Contract (Contract of Adhesion)*, CORNELL L. SCH. LEGAL INFO. INST., https://www.law.cornell.edu/wex/adhesion_contract_(contract_of_adhesion) (last visited Dec. 1, 2021).

47. *See id.* ("Because adhesion contracts do not afford consumers a realistic opportunity to bargain, the consumers are often faced with adhesion contracts on a take-it-or-leave-it basis. Under such conditions, the consumer has little to no ability to negotiate more favorable terms.").

48. French, *supra* note 7, at 10 ("Insurance policies arguably are not really contracts because they are non-negotiable, and the purchaser generally does not get a chance to review the policy before purchasing it.").

49. *4 Things You Need to Know About a Contract of Adhesion and Insurance*, CLAIMSMATE (July 11, 2016), https://claimsmate.com/4-things-you-need-to-know-about-a-contract-of-adhesion-and-insurance/ ("Few—if any—insurance companies allow you to negotiate your contract or change the terms.").

50. *See* French, *supra* note 7, at 10–12 (discussing the basic rules courts apply when reviewing an insurance policy during a coverage dispute).

51. *Id.* at 12.

52. *Id.* at 13.

encouraged by the reasonable expectations doctrine, courts often apply the doctrine of *contra proferentem*.[53]

In its original form, the doctrine of reasonable expectations was a way of finding coverage for the insured.[54] In the presence of ambiguity, the court considers the reasonable expectations of the insured party at the time the policy was purchased to determine if there is coverage.[55] Because insureds typically do not have a chance to review or negotiate policy terms prior to purchasing the policy, courts adopt this doctrine to protect them "from policy language that unfairly favors [the] insurers . . . ."[56] Following this doctrine, courts can disregard language in the policy if it does not align with the coverage that the insured reasonably believed they had.[57]

Today, the doctrine of reasonable expectations is rarely used by courts in its original form.[58] Rather, courts today use it as

53. *See id*. at 12–15 (discussing the doctrines of *contra proferentem* and reasonable expectations in the interpretation of insurance policies).

54. *See, e.g.*, President v. Jenkins, 853 A.2d 247, 254 (N.J. 2004) ("When members of the public purchase policies of insurance they are entitled to the broad measure of protection necessary to fulfill their reasonable expectations. They should not be subjected to technical encumbrances or to hidden pitfalls and their policies should be construed liberally in their favor to the end that coverage is afforded to the full extent that any fair interpretation will allow." (quoting Kievit v. Loyal Protective Life Ins. Co., 170 A.2d 22, 26 (N.J.1961))).

55. *Id.*; *see* French, *supra* note 7, at 14 (discussing how, under the reasonable expectations doctrine, "the policyholder should receive the coverage that it reasonably thought it had purchased, even if the claim is not covered under the express terms of the policy language").

56. French, *supra* note 7, at 14.

57. *Id.* at 15 ("[T]he policy language is not always controlling because the policyholder's expectations regarding the coverage it is purchasing is not based upon the policy language itself and it has no ability to reject the policy language."); *see also* RESTATEMENT (SECOND) OF CONTRACTS § 211(3) (AM. L. INST. 1981) ("Where the other party has reason to believe that the party manifesting such assent would not do so if he knew that the writing contained a particular term, the term is not part of the agreement."); *id.* at cmt. c (mentioning insurance policies and other standard form contracts as instances where the written language sometimes needs to be overruled).

58. *See* KENNETH S. ABRAHAM & DANIEL SCHWARCZ, INSURANCE LAW AND REGULATION 65 (7th ed. 2020) ("Although many courts continue to incorporate some version of the reasonable expectations doctrine into their analysis, many other courts have completely rejected the doctrine in its entirety . . . Courts that continue to embrace some version of the doctrine almost universally limit its application to consumer-oriented policies.").

another tool to find ambiguity, but do not extend it to overrule the plain, unambiguous, language of the policy.[59]

The doctrine of *contra proferentem* allows courts to construe ambiguities in the contract against the drafter.[60] For insurance policies, this often leads to courts interpreting the policy against the insurance company and in favor of the insured, leading to it occasionally being referred to as "the contra-insurer rule."[61] Under *contra proferentem*, a court will often not look to extrinsic evidence in deciding the question of ambiguity.[62] Rather, because the insurance companies had the power to draft the contract as they saw fit, they could have clearly defined the coverage limits and avoided the ambiguity.[63]

3. The Role of the ISO and the Virus Exclusion Policy

While the individual states regulate insurance within their jurisdiction, some organizations provide guidance for insurance providers. One of the primary organizations that does so is the Insurance Services Office (ISO).[64] The ISO "develops standard policy forms and files or lodges them with each State's insurance

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59. *See* Bell v. Progressive Direct Ins. Co., 757 S.E.2d 399, 407 (S.C. 2014) ("[W]hile we now hold that reasonable expectations may be used as another interpretative tool, the doctrine cannot be used to alter the plain terms of an insurance policy.").

60. Jeffrey Gordon & Paul Sullivan, *Contra Proferentem Doesn't Always Mean 'Against the Insurer'*, JD SUPRA (July 22, 2016), https://www.jdsupra.com/legalnews/contra-proferentem-doesn-t-always-mean-89102/.

61. *See, e.g.*, Jefferson Block 24 Oil & Gas LLC v. Aspen Ins. U.K. Ltd., 652 F.3d 584, 595 (5th Cir. 2011) ("Moreover, '[i]f the extrinsic evidence does not yield a conclusive answer as to the parties' intent, it is appropriate for a court to resort to other rules of construction, including the contra-insurer rule, which state that any ambiguity in an insurance policy should be resolved in favor of the insured.'" (quoting McCostis v. Home Ins. Co., 31 F.3d 110, 113 (2d Cir. 1994))).

62. Randy D. Henry, *An Analysis of Interpretation of Insurance Contracts: Common Law Versus Strict* Contra *Proferentem*, 36 J. INS. REG. 1, 4 (2017); *see* ABRAHMAN & SCHWARCZ, *supra* note 58, at 51 (stating that the majority rule for *contra proferentem* is to only look at extrinsic evidence, such as past judicial decisions, definition, regulations, and the facts of the loss after determining that the policy language is ambiguous). *But see* Peak v. Adams, 799 N.W.2d 535, 544 (Iowa 2011) (rejecting the majority rule and allowing extrinsic evidence even when the policy itself is not ambiguous).

63. Henry, *supra* note 62, at 4.

64. *See Frequently Asked Question: General Questions*, VERISK, https://www.verisk.com/insurance/about/faq/ (last visited Dec. 2, 2021). After expanding their business, the ISO typically does not use the name ISO in recent communications, instead going by the name Verisk. *Id*.

regulators."[65] Insurers across the country then apply the forms, or a variant of them, to their policies.[66]

In 2006, the ISO filed form CP 01 40 07 06, titled "Exclusion Of Loss Due to Virus Or Bacteria."[67] This form was written to address ISO's concerns that standard business interruption policies did not exclude coverage for viral outbreaks such as SARS.[68] If included in an insurance policy, it explicitly "state[s] that there is no coverage for loss or damage caused by or resulting from any virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness or disease."[69] The ISO wrote this exclusion to protect insurers in the event of a "pandemic or hitherto unorthodox transmission of infectious material" that would lead to coverage under a policy, and intended it to apply to "property damage, time element and all other coverages."[70]

4. Business Interruption Insurance

Business interruption coverage is a common form of insurance in the United States. Many business owners purchase it to protect themselves and their businesses in the event of a disaster that temporarily shuts them down.[71] In particular, "[i]t pays your bills that continue during the interruption and any

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65. Hartford Fire Ins. Co. v. California, 509 U.S. 764, 772 (1993).

66. U.S. Fire Ins. Co. v. J.S.U.B., Inc., 979 So. 2d 871, 879 n.6 (Fla. 2007); *see also* Daniel Schwarcz, *Reevaluating Standardized Insurance Policies*, 78 U. CHICAGO L. REV. 1263, 1274 (2011) ("[C]ourts and commentators in recent years have sporadically observed that some companies have particularized language in their policies that deviates from the industry norm.").

67. Larry Podoshen, New Endorsements Filed to Address Exclusion of Loss Due to Virus or Bacteria, INS. SERVS. OFF., (July 6, 2006) [hereinafter ISO Circular].

68. Angela Elbert, *Revisionist Insurance History for Virus-Related Damage and Losses: Don't Believe the Insurance Industry's Assertion that the Coronavirus Can't Cause Physical Loss of or Damage to Property*, JD SUPRA (Apr. 14, 2020), https://www.jdsupra.com/legalnews/revisionist-insurance-history-for-virus-20156/.

69. ISO Circular, *supra* note 67, at 8.

70. *Id.* at 6.

71. *See* Kimberly Lankford, *What is Business Interruption Insurance Coverage and What Does it Cover?*, U.S. NEWS (Apr. 23, 2021), https://money.usnews.com/money/personal-finance/saving-and-budgeting/articles/what-is-business-interruption-insurance ("Some businesses also have business interruption insurance, also called business income insurance, which can cover lost income and continuing expenses while the business is closed or being repaired because of the disaster.").

profit you would have earned."[72] Business interruption insurance typically includes a restoration period dictating the amount of time that the policy will pay for covered losses incurred from the interruption.[73] Additionally, similar to other types of insurance coverage, business interruption insurance policies are typically "drafted by insurers and then sold on a take-it-or-leave-it basis."[74]

Modern business interruption insurance policies, however, limit what type of disasters will trigger coverage.[75] One limitation commonly included in business interruption insurance policies is a statement limiting coverage to damages and suspensions of business "caused by direct physical loss of or damage to property."[76]

Although business interruption insurance is widely available to business owners, many small business owners do not have coverage.[77] Only 30–40% of small business owners have business interruption insurance.[78] This leaves many business owners without recourse if a peril forces them to temporarily close.[79]

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72. *Id.*

73. *See Do I Need Business Interruption Insurance?*, INS. INFO. INST., https://www.iii.org/article/do-i-need-business-interruption-insurance [hereinafter *Do I Need Business Interruption Insurance?*] (last visited Dec. 2, 2021) (detailing business interruption insurance coverage and what a restoration period is).

74. French, *supra* note 7, at 7.

75. *See, e.g.,* Lankford, *supra* note 71 (providing examples of what is not covered under a standard business interruption policy).

76. Mark Ian Binsky & Glenn A. Jacobson, *Is Business Interruption Insurance Immune to the COVID-19 Virus?*, HARMONIE GROUP, https://www.harmonie.org/business-interruption-insurance-covid19 (last visited Dec. 2, 2021).

77. *See Business Interruption/Businessowners Policies (BOP)*, NAT'L ASS'N INS. COMM'RS, https://content.naic.org/cipr_topics/topic_business_interruption businessowners_policies_bop.htm [hereinafter *Business Interruption/Businessowners Policies (BOP)*] (last updated Dec. 9, 2020).

78. *Id.*

79. *See Do I Need Business Interruption Insurance?*, *supra* note 73 (discussing the benefit of having business interruption insurance).

C. THE INSURANCE INDUSTRY'S RESPONSE TO 9/11

The insurance industry has faced large-scale disruptions in the past, such as the 9/11 terrorist attacks.[80] The 9/11 terrorist attacks cost insurers worldwide an estimated $40–50 billion,[81] making it the most expensive insurance event in history.[82] Approximately 33% of this cost went to business interruption expenses.[83] Prior to this event, insurers often did not consider terrorism as a risk because the losses were small and the events were uninsurable intentional acts.[84] Instead, they were concerned about losses caused by "acts of war" and therefore excluded them from the policy.[85] These war exclusions only excluded coverage for "actions of a military force directed by a sovereign power."[86] However, the terrorist attacks, because a government did not orchestrate them, were found to be coverable.[87] The insurance industry, by not explicitly excluding acts of terrorism from policies, had to cover the losses.[88]

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80. *See generally* INT'L ASS'N FOR THE STUDY OF INS. ECONS., INSURANCE AND SEPTEMBER 11 ONE YEAR AFTER: IMPACT, LESSONS AND UNRESOLVED ISSUES (Patrick Liedtke & Christophe Courbage eds., 2002) (containing a series of essays discussing the effects of the 9/11 terrorist attacks on the insurance industry in the US and abroad).

81. This amount is in United States Dollars.

82. Patrick M. Liedtke & Christophe Courbage, *September 11: Might of the Moment—Enduring Effects*, *in* INSURANCE AND SEPTEMBER 11 ONE YEAR AFTER: IMPACT, LESSONS AND UNRESOLVED ISSUES, *supra* note 80, at 1–2.

83. *Terrorism Risk Insurance Act (TRIA)*, NAT'L. ASS'N INS. COMM'RS, https://content.naic.org/cipr_topics/topic_terrorism_risk_insurance_act_tria.htm (last updated Oct. 28, 2021).

84. *Id.*

85. Robert P. Hartwig, *The Impact of September 11 Attacks on the American Insurance Industry*, *in* INSURANCE AND SEPTEMBER 11 ONE YEAR AFTER: IMPACT, LESSONS AND UNRESOLVED ISSUES, *supra* note 80, at 17 ("[A]ct of war exclusions are found in virtually every commercial property and personal property insurance policy.").

86. *War Exclusion*, INT'L RISK MGMT. INST., https://www.irmi.com/term/insurance-definitions/war-exclusion (last visited March 3, 2022). The war, however, does not need to be declared to fall under the exclusion. *Id.*

87. *See* William Bailey, *The Impact of 9/11 on the United States Insurance Industry's Business Interruption Underwriting*, *in* INSURANCE AND SEPTEMBER 11 ONE YEAR AFTER: IMPACT, LESSONS AND UNRESOLVED ISSUES, *supra* note 80, at 150 ("It is estimated that the terrorist attack against the United States on September 11, 2001, will cost the insurance industry US $40 billion. It appears that business interruption coverage will be the largest single component of the total losses.").

88. *Id.*

After being forced to cover the losses caused by 9/11, the insurance industry wanted to find a way to prevent itself from shouldering the costs of another attack.[89] Insurers began to cut back and stop offering coverage for terrorist attacks, defining them as uninsurable risks.[90] The ISO further filed for permission from all states to exclude terrorism coverage from commercial insurance policies.[91] This left the majority of commercial insurance policyholders without coverage. Fighting for coverage, many industries requested federal intervention to supply coverage for terrorist attacks.[92] This led to the passage of TRIA.[93]

Congress initially passed TRIA as a three-year federal reinsurance[94] program to protect insurers in the case of terrorist attacks.[95] Since then, it has been extended multiple times and is currently in effect through 2027.[96] The program has three primary goals: "to (1) create a temporary federal program of shared public and private compensation for insured terrorism losses to allow the private market to stabilize; (2) protect consumers by ensuring the availability and affordability of insurance for terrorism risks; and (3) preserve state regulation of insurance."[97]

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89. *See id.* at 151 ("The insurance industry's earlier response, 'We will pay,' was revised to 'We will pay—for this one—but not another one. We don't have the capital to survive another event like this and still be able to pay for all of our other, existing commitments.'").

90. *Terrorism Risk Insurance Act (TRIA)*, *supra* note 83.

91. *Id.* These exclusion filings were approved in every state (as well as Washington DC, Guam, and Puerto Rico) except for California, Florida, Georgia, New York, and Texas. *Id.*

92. *Id.*

93. *Id.*

94. Reinsurance is the method of insurance companies sharing risk by purchasing insurance policies from other providers as a way of limiting their loss in the event of a large-scale disaster or a large number of claims. Caroline Banton, *What is Reinsurance?*, INVESTOPEDIA, https://www.investopedia.com/ask/answers/08/reinsurance.asp (last updated June 23, 2021).

95. BAIRD WEBEL, TERRORISM RISK INSURANCE: OVERVIEW AND ISSUE ANALYSIS FOR THE 116TH CONGRESS 1 (2019).

96. *Id.*; *see also Terrorism Risk Insurance Act (TRIA)*, *supra* note 83 ("On Dec. 20, 2019, President Donald Trump signed into law the Terrorism Risk Insurance Program Reauthorization Act of 2019 (P. L. 116-94), which extended the Terrorism Risk Insurance Program (TRIP) for seven years through Dec. 31, 2027.").

97. WEBEL, *supra* note 95, at 3.

In accomplishing these goals, TRIA does two noticeable things. First, it establishes a minimum threshold for government involvement and a way for the government to recoup losses that it may sustain.[98] The federal government will not begin to help an insurer until the insurer has to pay out a deductible "equaling 20% of [their] direct earned premiums for the commercial property and casualty lines of insurance specified in TRIA."[99] Then, the government will cover "81% of [the] insurer's losses above its deductible until the amount of losses totals $100 billion."[100] However, these provisions will only apply if the act of terrorism generates an aggregate loss to the insurance industry of greater than $200 million.[101]

To ensure that this will not damage the government's finances, the United States Treasury Department "is required to recoup 140% of the government outlays through surcharges on property and casualty insurance policies" for attacks that cause less than $37.5 billion in insured losses.[102] For losses greater than $37.5 billion, the treasury secretary can decide how much to recoup based on the size of the uncompensated losses incurred by the insurance industry.[103]

Second, TRIA preserves the states' power to regulate the insurance industry.[104] State control over insurance within its borders is a core aspect of American insurance regulation.[105] To protect this, TRIA explicitly states that "[n]othing in this title shall affect the jurisdiction or regulatory authority of the insurance commissioner of a state."[106] However, to ensure that the act would have its intended effect of protecting insureds suffering from an act of terrorism, it included two exceptions: (1) The act "preempts any state definition of an 'act of terrorism' in favor of the federal definition," and (2) the act "preempts state

98. *See id.* at 3–6 (describing terrorism loss sharing criteria).

99. *Id.* at 4.

100. *Id.*

101. *Id.*

102. *Id.* at 5.

103. *Id.* The numbers included in this paragraph were valid as of 2019. The values have been continually updated since TRIA was passed. *Id.* at 5 n.18.

104. *See id.* at 6.

105. *See infra* Part II.B.1. and accompanying footnotes (discussing the state control of insurance regulations).

106. WEBEL, *supra* note 95, at 6.

laws with respect to insurance policy exclusions for acts of terrorism."[107]

While COVID-19 has greatly impacted the insurance industry, this is not the first industry-altering event that has occurred. By looking at the current state of business interruption insurance claim litigation, courts can find ambiguity, supported by the reasonable expectations doctrine, that will allow the doctrine of *contra proferentem* to find coverage for insureds. Additionally, the federal government's intervention through TRIA that protected the insurance industry and policyholders after 9/11 shows that COVID-19 and future viral pandemics are insurable risks that the government can help cover.

III. ANALYSIS

A. THE CURRENT STATE OF COVID-19 BUSINESS INTERRUPTION INSURANCE LITIGATION

The COVID-19 pandemic caused many businesses to shut down or restrict business operations.[108] Many business owners, in an attempt to cover their losses, looked to their business interruption insurance policies.[109]

As of January 16, 2022, insureds have filed 2,111 COVID-19 related insurance claims in the United States courts.[110] Of these, 1,970 have sought coverage for business income, and 680 claims involved an insurance policy without a virus or broad communicable disease exclusion.[111] Regardless of the policy, however, the majority of cases have been resolved in favor of the insurers.[112]

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107. *Id.* TRIA included a third, now expired, exception that "preempted state rate and form approval laws for terrorism insurance from enactment to the end of 2003." *Id.*

108. Fairlie, *supra* note 28, at 730.

109. *See generally Covid Coverage Litigation Tracker*, *supra* note 3 (showing the number of business interruption insurance litigation cases that have been filed during the COVID-19 pandemic).

110. *CCLT Case List*, COVID COVERAGE LITIG. TRACKER, U. PENN. L. SCH., https://cclt.law.upenn.edu/cclt-case-list/ (last visited Jan. 16, 2021).

111. *Covid Coverage Litigation Tracker*, *supra* note 3.

112. *See* Eli Flesch, *Hotel in Versace Mansion Gets Split Virus Coverage Ruling*, LAW360 (Nov. 10, 2021), https://plus.lexis.com/api/permalink/57675918-cff2-4291-8f16-ad5796eba3bd/?context=1530671 ("In state courts, a relatively more favorable venue for policyholders, more than 66% [of] pandemic coverage

Districts courts have primarily based their decisions on two arguments: (1) Whether the loss of use caused by the pandemic is a physical loss or damage as required by the business interruption policy,[113] and (2) the applicability of a virus exclusion in a policy.[114]

A typical business interruption insurance policy covers losses caused by a "physical loss of or damage to" the property.[115] Many courts have found that coverage is not applicable because there has not been a physical loss of or damage to the property.[116] For instance, in *Zwillo V, Corporation v. Lexington Insurance Company*, Zwillo claimed that Lexington Insurance "wrongfully denied coverage under [their] policy" after the COVID-19 virus and stay-at-home orders led to "an 80 percent loss of revenue."[117] The court, in granting Lexington's motion to dismiss, found that "the term 'direct physical loss of or damage to' does not encompass simple deprivation of use."[118] Other courts have found that no "physical loss of or damage to" the property has occurred because "[t]he coronavirus does not physically alter the appearance, shape, color, structure, or other material dimension of the property."[119]

Insureds, however, can sometimes prevail against a motion to dismiss if they allege the physical presence of the virus on

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suits have still been tossed, according to the University of Pennsylvania Carey Law School.").

113. *See e.g.,* John DiMugno, *The Implications of COVID-19 for the Insurance Industry and Its Consumers: 2021 Developments*, 43 INS. LITIG. REP. NL 1 (2021) (discussing various COVID-19 business interruption cases where courts have come to different conclusions regarding what entails physical or loss or damage to the property).

114. Knutsen & Stempel, *supra* note 8, at 269–70 (discussing the reliance by insurers on virus exclusions and why they sometimes may not apply).

115. Binsky & Jacobson, *supra* note 76.

116. *See, e.g.,* Zwillo V, Corp. v. Lexington Ins. Co., 504 F. Supp. 3d 1034, 1040 (W.D. Mo. 2020) ("[T]he term 'direct physical loss of or damage to' does not encompass simple deprivation of use."); Michael Cetta, Inc. v. Admiral Indemnity Co., 506 F. Supp. 3d 168, 176 (S.D.N.Y. 2020) ("The plain meaning of the phrase 'direct physical loss of or damage to' therefore connotes a negative alteration in the tangible condition of property.").

117. 504 F. Supp. 3d at 1036.

118. *Id.* at 1040. The Court additionally found that a virus exclusion in the policy also prevented recovery. *Id.* at 1041.

119. Sandy Point Dental, PC v. Cincinnati Ins. Co., 488 F. Supp.3 d 690, 694 (N.D. Ill. 2020).

their property.[120] In *Studio 417, Incorporated v. Cincinnati Insurance Company*, the Court denied Cincinnati Insurance Company's motion to dismiss by finding that Studio 417's allegations "that COVID-19 particles attached to and damaged their property, which made their premises unsafe and unusable" constituted a direct physical loss.[121]

Insureds have also commonly lost in court because their insurance policy contains a virus exclusion.[122] A virus exclusion, such as the one drafted by the ISO,[123] typically excludes coverage for loss or damage caused by viruses directly or indirectly.[124] When an express viral exclusion applies, the insurer has a strong argument that they do not need to cover the losses even if they would otherwise fall under the policy.[125]

Some insureds, in an attempt to avoid the virus exclusion, are arguing that the government shutdowns, rather than the virus, caused their losses.[126] This argument can make it harder to show a physical loss or damage that the policy covers.[127] However, when the policy provides civil authority coverage,

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120. *See* Studio 417, Inc. v. Cincinnati Ins. Co., 478 F. Supp. 3d 794, 800 (W.D. Mo. 2020) (finding that "[p]laintiffs have adequately alleged a direct physical loss" by claiming that the COVID-19 virus is a physical substance that was present on the surfaces of their business).

121. *Id.* at 802–03.

122. *See, e.g.,* Lisette Enters. v. Regent Ins. Co., 537 F. Supp. 3d 1038, 1047 (S.D. Iowa 2021) ("Plaintiff's claim is rendered non-compensable by the Virus Exclusion."); Ben Zigterman, *Virus Exclusion Dooms NJ Wedding Venue's COVID Suit,* LAW360 (Oct. 27, 2021) https://www.law360.com/classaction/articles/1435015/virus-exclusion-dooms-nj-wedding-venue-s-covid-suit (discussing the applicability of a virus exclusion policy in a New Jersey business interruption claim).

123. *See infra* Part II.B.3. (discussing the ISO standard virus exclusion).

124. *Lisette Enters*, 537 F. Supp. 3d at 1047.

125. *See* Zigterman, *supra* note 122 and accompanying text (discussing the applicability of a virus exclusion policy in a New Jersey business interruption claim).

126. *E.g.,* Nguyen v. Travelers Cas. Ins. Co. of Am., 541 F. Supp. 3d 1200, 1217–18 (W.D. Wash. 2021) ("COVID-19, and more specifically the Governor's Proclamations, may have limited the uses of the property by preventing certain indoor activities previously conducted on the premises, but they did not cause dispossession of the buildings, chairs, dental tools, etc."); Kahn v. Pa. Nat'l Mut. Cas. Ins. Co., 517 F. Supp. 3d 315, 326–27 (M.D. Penn. 2021) ("Even if South Carolina's various orders did prohibit access to Mauldin's, there is no allegation that the orders arose due to 'direct physical loss of or damage to' nearby property.").

127. *See*, *e.g.*, *Nguyen*, 541 F. Supp. 3d at 1217–18; *Kahn*, 517 F. Supp. 3d at 326–27.

some courts have found that the executive orders causing businesses to temporarily close are enough to invoke business interruption insurance coverage even when a virus exclusion is present.[128] For instance, in *Seifert v. IMT Insurance Company*, the court found that the insured's alleged losses were caused by the executive orders rather than the virus itself and denied the insurer's motion to dismiss.[129] Writing for the court, Judge Tunheim analyzed the policy's requirement of a " direct physical loss of or damage to property."[130] He found that the inclusion of the word "of" in connection with physical loss gives it a separate meaning from the phrase "damage to."[131] Therefore, the insured was able to show a "physical loss of property by alleging that executive orders forced a business to close because the property was deemed dangerous to use and its owner was thereby deprived of lawfully occupying and controlling the premises to provide services within it."[132] The insured is thus able to make a valid claim under only the executive orders without having to worry about the presence of the virus or a virus exclusion.[133] This interpretation, however, is not commonly adopted by other courts, leading to many claims being dismissed.[134]

Recently, many insureds have appealed their dismissed claims.[135] Unfortunately for the policyholders, the venue change has led to similar results.[136] The appellate courts are still

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128. Seifert v. IMT Ins. Co., 542 F. Supp. 3d 874, 881–82 (D. Minn. 2021); Knutsen & Stempel, *supra* note 8, at 262–63.

129. *Seifert*, 542 F. Supp. 3d at 882.

130. *Id.* at 878.

131. *Id.* at 879 ("As courts have stated when considering similar business interruption claims, 'to' and 'of' are not interchangeable; that is, they mean distinctly different things.").

132. *Id.* at 880.

133. *See id.* at 882 (finding that because the insured alleged that the losses were caused by the executive orders rather than the virus, and because no contamination of the premises or staff was argued, the virus exclusion was not applicable).

134. *See, e.g.,* Kahn v. Pa. Nat'l Mut. Cas. Ins. Co., 517 F. Supp. 3d 315, 326–27 (M.D. Penn. 2021) (discussing a civil authority coverage provision).

135. *See generally Appeals*, COVID COVERAGE LITIG. TRACKER, U. PENN. L. SCH., https://cclt.law.upenn.edu/appeals/ (last visited Dec. 3, 2021) (showing the results of appellate cases in the COVID-19 insurance coverage litigation pursuit).

136. *See id.*; *see also* Eli Flesch, *1st Calif. Virus Coverage Appeal Goes Against Hotelier*, LAW360 (Nov. 15, 2021), https://www.law360.com/articles/1440765 (discussing the win granted to the insurer in the first COVID-19 coverage case heard on appeal in California).

generally finding in favor of the insurers by finding that (1) a virus exclusion prevents recovery under the policy, or (2) there was no physical loss of or damage to the property.[137]

B. The Lack of an Explicit Virus Exclusion Creates Ambiguity that Courts Should Resolve in Favor of the Insured

Courts have erroneously ruled in favor of insurers in cases that do not involve a virus exclusion. Without a virus exclusion, and considering the reasonable expectations of insureds, these policies are inherently ambiguous regarding whether they cover losses incurred by COVID-19. Because such ambiguity exists, the doctrine of *contra proferentem* applies.[138] By finding ambiguity and applying this doctrine, courts can find that, in the absence of a virus exclusion, and in the presence of the virus, business interruption insurance policies cover losses incurred because of the COVID-19.

1. Finding Ambiguity in Policies Without a Virus Exclusion

Courts must find ambiguity in an insurance policy before they can apply the doctrine of *contra proferentem*.[139] Generally, ambiguity is present when "the policy language can be reasonably interpreted in different ways."[140] For COVID-19 business interruption insurance claims, the ambiguity

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137. *See, e.g.,* Mudpie, Inc. v. Travelers Cas. Ins. Co. of Am., 15 F.4th 885, 894 (9th Cir. 2021) (finding that the virus exclusion policy barred Mudpie's claim); Gilreath Family & Cosmetic Dentistry, Inc. v. Cincinnati Ins. Co., No. 21-11046, 2021 WL 3870697, at *2 (11th Cir. Aug. 31, 2021) (finding that Gilreath did not allege any harm that qualified as a physical loss or damage); Santo's Italian Café LLC v. Acuity Ins. Co., 15 F.4th 398, 402 (6th Cir. 2021) ("The novel coronavirus did not physically affect the property in the way, say, fire or water damage would."). However, it is important to note that *Santo's Italian Café* references, in dicta, that the restaurant does not argue that the virus itself caused damage, potentially showing that this could be a valid argument. *Id.*

138. *See infra* Part II.B.2 (discussing ambiguity and its role in the doctrines of *contra proferentem* and reasonable expectations).

139. *See* French, *supra* note 7 at 12–13 ("In many states, the ambiguity test is whether the policy language can be reasonably interpreted in different ways. If the policyholder and insurer both have reasonable interpretations, then the policy language should be construed in favor of coverage because it is deemed ambiguous.").

140. *Id.* at 13.

surrounds the requirement of a "physical loss of or damage to [the] property."[141]

The physical loss or damage requirement is standard in most business interruption insurance policies.[142] At first glance, this requirement seems straightforward—insureds must show that the property was physically damaged. However, the question then shifts to whether a virus has the capability to do so. Courts have heavily debated this question in the early stages of COVID-19 insurance cases and have reached conflicting results.[143] The ability of different courts to find both that the presence of the virus can cause physical damage and that it cannot[144] shows that there are two reasonable interpretations of the physical loss or damage requirement. Therefore, the disagreement among the courts provides evidence that this provision is ambiguous.[145]

The definition of the word "physical" furthers the argument for ambiguity. In the phrase "physical loss or damage," "physical" is likely defined as "having material existence: perceptible especially through the senses and subject to the laws of nature."[146] The virus itself, although not visible to the naked eye, is still perceptible through the senses with the help of an electron microscope and is subject to the laws of nature.[147] When the virus is then found on the premises, its presence causes damage to the property by making it unusable. Although this

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141. Binsky & Jacobson, *supra* note 76.

142. *Id.*

143. *Compare* Michael Cetta, Inc. v. Admiral Indem. Co., 506 F. Supp. 3d 168, 176 (S.D.N.Y. 2020) ("The plain meaning of the phrase 'direct physical loss of or damage to' therefore connotes a negative alteration in the tangible condition of property."), *with* Studio 417, Inc. v. Cincinnati Ins. Co., 478 F. Supp. 3d 794, 800 (W.D. Mo. 2020) (finding that "[p]laintiffs have adequately alleged a direct physical loss" by claiming that the COVID-19 virus is a physical substance that was present on the surfaces of their business).

144. *Supra* Part III.A. (discussing how some courts find that the presence of the COVID-19 virus creates a physical loss or damage while others have found that it doesn't).

145. *See* French, *supra* note 7, at 13 ("[I]f the same language has been interpreted in different ways by different courts, then the inconsistencies may be treated and indicia that the policy language is ambiguous.").

146. *Physical,* MERRIAN-WEBSTER, https://www.merriam-webster.com /dictionary/physical (last visited Jan. 21, 2022).

147. *See generally* Cynthia S. Goldsmith & Sara E. Miller, *Modern Uses of Electron Microscopy for Detection of Viruses*, 22 CLINICAL MICROBIAL REV. 552 (2009) (discussing how electron microscopes can be used to see and detect viruses).

damage is not immediately visible, it still prevents the use of the premises by causing contamination, thereby satisfying the physical loss requirement.[148]

Additionally, the insurance industry identified the ability of a viral outbreak to satisfy a business interruption insurance policy's physical loss or damage requirement long ago. In 2006, the ISO released a circular detailing their new proposed virus exclusion that was filed throughout the country.[149] The ISO acknowledged that general contamination exclusions in insurance policies do not cover viruses and that "viral and bacterial contaminations are specific types that appear to warrant particular attention."[150] If viruses were unable to satisfy the physical loss or damage requirement, it would be unnecessary to address them in a separate exclusion. At a minimum, this shows that a reasonable person can interpret the policy as being satisfied by viral contamination, making the policy's physical loss or damage provision ambiguous.

Finally, the reasonable expectations doctrine further highlights the ambiguity created by the lack of a virus exclusion. The application of the reasonable expectations doctrine will depend on the reasonable expectations of the insured when they purchased the policy.[151] Insureds purchase business interruption coverage to protect themselves and their businesses from "monetary losses due to periods of suspended operations when a covered event . . . causes physical property damage."[152] This is the type of loss that COVID-19 has caused—shutdowns and lost income.[153] In purchasing their policy, insureds expect that sudden losses such as these will be covered. Furthermore, they are generally unable to negotiate the policy before signing and are not expected to read it after,[154] showing that it is

148. *See* Gregory Packaging, Inc. v. Travelers Prop. Cas. Co. of Am., 2014 U.S. Dist. LEXIS 165232, at *13–17 (discussing various cases where a contamination rendering a property unusable satisfies the physical loss requirement of a business interruption insurance policy).

149. ISO Circular, *supra* note 67, at 1.

150. *Id.*

151. French, *supra* note 7, at 14.

152. *Business Interruption/Businessowners Policies (BOP)*, *supra* note 77.

153. Fairlie, *supra* note 28, at 730.

154. *See* Eugene R. Anderson & James J. Fournier, *Why Courts Enforce Insurance Policyholder's Objectively Reasonable Expectations of Insurance Coverage*, 5 CONN. INS. L.J. 335, 363 (1998) (discussing how insureds usually

unlikely they would understand a viral pandemic is not a covered loss unless a virus exclusion is explicitly stated in the policy. Therefore, it is reasonable for an insured to believe that a viral pandemic, such as COVID-19, is a covered loss even if the insurer did not intend it to be. Under the modern interpretation of the reasonable expectations doctrine,[155] this expectation further supports the contention that the policy is ambiguous.

The differences in courts' opinions, the ISO's identification for the need to have a virus exclusion, and the reasonable expectations of insureds show the presence of ambiguity in a business interruption insurance policy without a virus exclusion. Because ambiguity exists, courts can apply the doctrine of *contra proferentem*. When the insured shows that the virus has infected the premises, this doctrine will allow courts to find coverage under the insured's policies.

2. Coverage Under the Doctrine of *Contra Proferentem*

The doctrine of *contra proferentem* is one of the primary tools courts use to address ambiguity in insurance policies.[156] Applying this doctrine will allow courts to find coverage for insureds under their business interruption policies.

Like most insurance policies, insureds typically do not have an opportunity to negotiate terms for business interruption policies.[157] Instead, insurers force them to accept the policy "on a take-it-or-leave-it-basis."[158] Because insureds are not allowed to make changes to the policy, business interruption insurance policies are the type of adhesion contract that *contra proferentem* addresses.

Under *contra proferentem*, a court views the insurance policy as an adhesion contract and interprets any ambiguities in favor of the insureds.[159] The insurers have the ability to draft the insurance policy as they see fit,[160] and were notified by the

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only agree to a general policy and coverage when purchasing insurance coverage and often do not read the full policy after receiving it).

155. *See* ABRAHAM & SCHWARCZ, *supra* note 58, at 65 (discussing how courts today use the reasonable expectations doctrine as a tool of interpretation to find ambiguity).

156. French, *supra* note 7, at 12–13.

157. French, *supra* note 7, at 7.

158. *Id.*

159. *Id.* at 12–13.

160. *Id.* at 7.

ISO's 2006 circular that standard policy language was not enough to prevent recovery of virus-based losses and had time to make the necessary changes.[161] Not doing so shows a choice by the insurance company to leave the policy ambiguous.

Applying *contra proferentem*, courts must interpret the ambiguity created by the physical loss or damage requirement in standard business interruption policies in favor of the insureds.[162] The policy is ambiguous as to whether physical loss includes contamination by viruses such as COVID-19.[163] Therefore, the policy should be interpreted against the insurers and in favor of finding coverage for pandemic induced losses when the COVID-19 virus was present on the premises.

This solution, however, will likely face opposition because it lacks the implementation of a "restoration period." Restoration periods are standard in business interruption insurance policies to limit the period that the insurer must cover the losses.[164] Because the virus, even if located on the property, can be removed relatively quickly with standard cleaning products, the restoration period is short if it exists at all.[165]

Judge Tunheim's opinion in *Seifert v. IMT Insurance Company*[166] may help resolve this issue. His opinion concluded, in part, "that if a government deems a property dangerous to use and an owner is thus unable to lawfully realize the business property's physical space," this can be seen as a "cognizable impairment of function and value" that amounts to a physical loss of the property.[167] This loss, rather than the cleanup of the virus itself, can provide the restoration period. Although some may argue that this would constitute a separate loss and therefore a separate occurrence than the presence of the virus, both are caused by the same event. The virus itself, when present on the property, causes the damage that engages insurance coverage. However, with the government's declaration that the virus and pandemic have made businesses unsafe, the

161. ISO Circular, *supra* note 67, at 1.
162. French, *supra* note 7, at 12–13.
163. *Infra* Part III.B.1.
164. *Do I Need Business Interruption Insurance?*, *supra* note 73.
165. *See How to Clean and Disinfect Your Home Against COVID-19*, PENN MED. (Apr. 10, 2020), https://www.pennmedicine.org/updates/blogs/health-and-wellness/2020/april/cleaning-against-covid.
166. 542 F. Supp. 3d 874 (D. Minn. 2021).
167. *Id.* at 880.

loss of the business is extended until the premises are deemed safe. This provides the period of time that is required for the premises to become usable again, forming a longer restoration period.

Applying the ambiguity created by the physical loss or damage requirement to the doctrine of *contra proferentem*, combined with Judge Tunheim's loss of use formulation to create a restoration period, shows that insureds should be covered for pandemic-related losses under their business interruption insurance policies. However, some insurers believe that even if the policy covers the losses, they should not have to pay them.[168]

C. The Argument that the COVID-19 Pandemic is an Uninsurable Event

Some insurance companies have promoted an alternate argument for denying COVID-19 business interruption claims—that the COVID-19 pandemic is an uninsurable event.[169] They argue that, because of the large number of claims that the pandemic has produced, they will face insolvency if forced to pay.[170] However, by the nature of their income and the way business interruption policies are written, insurance companies will likely be able to survive financially.

Insurance companies have a strong financial backing that will allow them to survive paying COVID-19 business interruption claims. Insurers make money in two ways: the payment of insurance premiums and the investment of such premiums.[171] For example, Cincinnati Insurance Companies, even without a virus exclusion in their business interruption insurance policies,[172] earned $5.98 billion from premiums alone

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168. *See* Knutsen & Stempel, *supra* note 8, at 223–27 (discussing insurance companies' fear of insolvency if they are forced to pay for COVID-19 business interruption claims).

169. *Id.*

170. *Id.*

171. *How Insurance Companies Really Make Money and 2 Reasons Why You Should Care*, FRANKLIN L. FIRM, LLP (June 26, 2018, 9:00 AM), https://franklin-lawfirm.com/blog/how-insurance-companies-really-make-money-and-2-reasons-why-you-should-care/.

172. *E.g.,* Sneak & Dawdle, LLC v. Cincinnati Ins. Co., 2021 U.S. Dist. LEXIS 185331 (M.D. Ala., Sept. 28, 2021) ("While the [business interruption] policy contains a fungi and bacteria exclusion, it does not contain a virus exclusion.").

in 2020.[173] Cincinnati Insurance then made many investments with this income for a total reported revenue of $7.536 billion.[174] Cincinnati Insurance earns this money by selling various types of insurance,[175] thus providing protection even if they need to pay out a higher number of a single claim type than anticipated. This income method—coming from premiums and investments—is standard among larger insurers across the country.[176] Having such a strong financial backing will allow insurers to pay without facing insolvency.

Furthermore, the structure of business interruption insurance policies will limit the amount that insurers have to pay. Business interruption policies commonly include policy limits and restoration periods that cap the insurer's responsibility.[177] Policy limits, also known as coverage limits, place a maximum ceiling on what the insurer will pay for a covered claim.[178] Therefore, the policy already limits the maximum amount that insurers will need to pay. Additionally, restoration limits will further limit the cost of these claims. Restoration periods limit the amount of time that an insurer "will help pay for lost income and extra expenses while the business is being restored."[179] Their duration is usually thirty days, but can be extended up to a year through endorsements.[180]

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173. *Cincinnati Financial Reports Fourth-Quarter and Full-Year 2020 Results*, CINCINNATI INS. CO. (Feb. 10, 2021), https://cincinnatifinancialcorporation.gcs-web.com/news-releases/news-release-details/cincinnati-financial-reports-fourth-quarter-and-full-year-2020.

174. *Id.*

175. *See Products Marketed*, CINCINNATI INS. CO., https://www.cinfin.com/about-us/products-marketed (last visited Jan. 23, 2022) (showing products offered by Cincinnati Insurance Companies in each state).

176. Knutsen & Stempel, *supra* note 8, at 227 ("Insurers receive hundreds of billions of dollars in premium income alone each year, which in turn has usually been invested for some time before the funds are required to be paid in claims. Insurance is generally a more consistently profitable business than most, advantaged by its ability to amass large sums that can be invested, perhaps for years . . . before payment.").

177. *Do I Need Business Interruption Insurance?*, *supra* note 73.

178. *What is an Insurance Limit?*, ALLSTATE, https://www.allstate.com/tr/insurance-basics/limit.aspx (last updated Oct. 2019).

179. *Do I Need Business Interruption Insurance?*, *supra* note 73.

180. *Id.* An endorsement, otherwise referred to as a rider, "is [an] amendment to an existing insurance contract that changes the original policy's terms" by adding or removing coverage. *Do You Know How to Use an Insurance Rider or Endorsement?*, NAIC (Dec. 30, 2020), https://content.naic.org/article

This period will shorten the time that insurers need to cover the lost business income, one of the primary claims insureds are making in COVID-19 insurance litigation.[181] With these limits in place, insurers have already limited the costs that they would otherwise have to pay under the policies, making it more feasible to cover the claims made by insureds during the pandemic.

Finally, not all COVID-19 claims will have to be covered. For insurers to cover claims, the claims must (1) be made under a policy that does not have a virus exclusion, and (2) show that the COVID-19 virus has been on the property to create a physical loss or damage.[182] Without satisfying both elements, the claims will not need to be paid, further preventing insurance companies from becoming insolvent.

Insurance companies, through their income strategies and artificial limiting of policies, have set themselves up to be financially secure even when forced to pay out a multitude of claims.[183] Furthermore, they have been on notice of the need for a virus exclusion to avoid paying viral pandemic-related claims since 2006.[184] Even if COVID-19 claims will lead to insolvency—an unlikely result—the lack of planning by some insurers does not make the COVID-19 pandemic an uninsurable event.

D. 9/11 AND THE TERRORISM RISK INSURANCE ACT AS A PATHWAY TO FIND COVERAGE

The COVID-19 pandemic is not the first large-scale event impacting the insurance industry.[185] One particularly large industry-wide event was the 9/11 terrorist attacks on the World Trade Center.[186] These attacks created the most expensive

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/consumer_insight_do_you_know_how_use_insurance_rider_or_endorsement .htm.

181. *See Covid Coverage Litigation Tracker*, *supra* note 3 (showing that COVID-19 insurance claims have mostly been for business income).

182. This path to coverage acts as a synthesis of the previous discussion. The lack of a virus exclusion allows the ambiguity regarding the physical loss or damage requirement to exist. *Supra* Part III.B.1. The presence of the COVID-19 virus will then allow that requirement to be met. *Supra* Part III.A.

183. FRANKLIN L. FIRM, LLP, *supra* note 171.

184. ISO Circular, *supra* note 67, at 1.

185. *See generally Significant Major Insurance and Reinsurance Industry Loss Events*, REINSURANCE NEWS, https://www.reinsurancene.ws/insurance-industry-losses-events-data/ (last visited Jan. 24, 2020) (listing recent large-scale events causing loss in the insurance industry).

186. *Id.*

insurance event in history, costing insurers worldwide approximately $40–50 billion.[187] Even in the face of such large, industry-changing losses, insureds in the United States received coverage for their losses.[188] This is because (1) a policy exclusion was found ambiguous and therefore did not exclude losses from terrorist attacks,[189] and (2) the government created a program to help cover future losses.[190] The process followed in the wake of 9/11 should act as a roadmap for the COVID-19 pandemic. Using similar strategies, the government can create coverage for both the current claims and to protect the insurance industry and insureds in future viral pandemics.

1. 9/11 Insurance Coverage and the War Exclusion

After the attacks on 9/11, many affected insureds sought recovery under their business interruption insurance policies.[191] Similar to the COVID-19 litigations, the coverage in the 9/11 claims relied on a singular definition—what "war" meant in an exclusion.[192]

Unsurprisingly, insurers were not eager to cover the large number of losses created by 9/11.[193] Terrorism attacks, due to their localized nature and historically small losses, were not risks that were generally considered during the underwriting process.[194] However, the insurers were forced to provide coverage for insureds after discovering that the standard war exclusion in policies did not exclude coverage for terrorist attacks.[195] The standard war exclusion excluded coverage for losses incurred by "1) [w]ar, including undeclared or civil war; 2) [w]arlike action by a military force . . . or 3) insurrection, rebellion, revolution . . . or action taken by governmental

187. Liedtke & Courbage, *supra* note 82, at 1.
188. Bailey, *supra* note 87, at 150.
189. *Id.*
190. *Terrorism Risk Insurance Act (TRIA)*, *supra* note 83.
191. *See* Bailey, *supra* note 87, at 153–54 (discussing the business interruption insurance claims after 9/11).
192. *Id*. at 150.
193. *See id.* (discussing the insurance industry's response to losses incurred by 9/11).
194. *Terrorism Risk Insurance Act (TRIA)*, *supra* note 83.
195. Bailey, *supra* note 87, at 150.

authority in hindering or defending against any of these."[196] Although this exclusion seems promising for insurers, "war" was often defined as "armed conflict between sovereign nations."[197] Because the 9/11 attacks were caused by an extremist group rather than a nation, it categorized as a terrorist attack rather than an act of war.[198] Because the policies did not explicitly exclude terrorist attacks, insurers had to cover the losses.[199]

Similarly, the COVID-19 cases have been decided based on a single definition—this time of the word "physical"—and the application of exclusions.[200] The word "physical," similar to the war exclusion in the 9/11 claims, does not on its face deny coverage to claims. Instead, it creates an ambiguity that allows courts to rule in favor of the insureds and find coverage.[201] Because coverage is available, the 9/11 claims have set a standard that an explicit exclusion is needed to deny coverage.[202] In policies that do not have a virus exclusion, there is no negation of coverage if the insureds can show that the virus was present on the premises, and the courts should rule accordingly.

The COVID-19 and 9/11 litigation situations are similar in more than just the core analysis. They also both created large losses for the insurance industry that the industry does not believe it can cover, especially when faced with future events of the same kind.[203] To fix this, the federal government should

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196. Greg Munro, *Exclusions for War and Terrorism: Who Will Pay for Man-Made Catastrophes?*, 17 FAC. J. ARTICLES & OTHER WRITINGS 25, 29 (2002), https://scholarworks.umt.edu/faculty_barjournals/17/.

197. Bailey, *supra* note 87, at 150; *see also, e.g.*, Pan Am. World Airways, Inc. v. Aetna Casualty & Sur. Co., 505 F.2d 989, 1012 (2d Cir. 1974) ("English and American cases dealing with the insurance meaning of 'war' have defined it in accordance with the ancient international law definition: war refers to and includes only hostilities carried on by entities that constitute governments at least *de facto* in character.").

198. Bailey, *supra* note 87, at 150.

199. *See id*.

200. *See supra* Part III.A (discussing the ambiguity created by the "physical loss of damage to" covered property requirement and the applicable exclusions).

201. *See supra* Part III.B (applying the policy's ambiguity to the doctrine of *contra proferentem* to find coverage for insureds).

202. *See* Bailey, *supra* note 87, at 150 ("Terrorism is covered under most policies . . . not necessarily in explicit terms but rather than by virtue of not being specifically excluded in the grant of coverage section of the standard policy . . . .").

203. *See id.* at 151 ("The insurance industry [responded] . . . '[w]e don't have the capital to survive another event like this and still be able to pay for all of our other, existing commitments.'"); *Terrorism Risk Insurance Act (TRIA)*,

create a national program to help cover future similar events like it did with TRIA in the wake of 9/11.

2. 9/11 as a Blueprint for Covering Future Viral Pandemic Insurance Claims

The combined efforts of the insurance industry and the federal government following the attacks on 9/11 show a path to coverage for the current COVID-19 insurance litigation and future viral pandemics. Insurance is primarily regulated on a state-by-state basis, with the federal government interfering only in special cases.[204] However, to ensure that insurance companies would continue covering terrorism after 9/11, the government created a program to offset potential losses that the insurance industry might face.[205] This program, called TRIA,[206] provides a blueprint the government can follow to assist the insurance industry and find coverage for insureds in the current COVID-19 pandemic.

Congress implemented TRIA to fill a gap in coverage created by insurance companies after 9/11.[207] Following paying out insurance claims created by the terrorist attacks on 9/11, the insurance industry was unwilling to cover similar future losses.[208] As a result, many insurance companies stopped offering terrorism coverage, and those that still did charged premiums that were unaffordable for many consumers.[209] They labeled terrorism losses as an uninsurable risk, and the ISO received "permission to exclude terrorism from all commercial

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supra note 83 ("Fearing future losses were unsustainable and uncertain of the large-scale risk, insurers defined terrorism as an uninsurable risk."); Knutsen & Stempel, *supra* note 8, at 223–27 (discussing insurance companies' fear of insolvency if they are forced to pay for COVID-19 business interruption claims).

204. *Commercial Insurance: Regulation*, *supra* note 39.

205. WEBEL, *supra* note 95, at summary ("Under TRIA, the government would share the losses on commercial property and casualty insurance should a foreign terrorist attack occur, with potential recoupment of this loss sharing after the fact.").

206. *Id.*

207. *Id.*

208. *See* Bailey, *supra* note 87, at 151 ("The insurance industry's earlier response, 'We will pay,' was revised to 'We will pay—for this one—but not another one.'").

209. *Terrorism Risk Insurance Act (TRIA)*, *supra* note 83. This was largely caused by the reinsurance industry's decision to "severely cut back on their terrorism coverage" if they continued to offer it at all, leaving insurers without protection if they decided to take on the risk. *Id.*

insurance coverage" in 45 states.[210] TRIA filled this gap by creating a federal program to help insurance companies pay for claims over a set threshold.[211] In turn, the government then had a chance to recoup these costs through surcharges on the cost of the terrorism insurance policies.[212]

The COVID-19 pandemic has placed insurers in a similar position to where they were after the 9/11 attacks—they fear financial insolvency if forced to take on the current or future viral pandemic losses.[213] Insureds are therefore currently facing a coverage gap, and it is possible that any insurer offering viral pandemic coverage in the future will do so at exorbitant rates. COVID-19 will not be the last viral pandemic.[214] To protect insureds now and in future viral pandemics, the government should create a program similar to TRIA to provide coverage and protect insureds.

This program can take after the blueprint provided by TRIA.[215] Using the COVID-19 pandemic as a baseline, the government can analyze the business interruption and other insurance losses the insurance industry has suffered. The government can use this data to generate a minimum level that the losses must meet before the government becomes involved.

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210. *Id.* Terrorism was excluded in commercial insurance coverage in every state except California, Florida, Georgia, New York, and Texas. *Id.*

211. WEBEL, *supra* note 95, at 3. The size of the loss needed for TRIA to apply has changed over time. *Id*. The most recent amount threshold is $200 million, with insurers paying a deductible "equaling 20% of an insurer's annual direct earned premiums for the commercial property and casualty lines of insurance specified in TRIA." *Id*. at 4.

212. *Id.* at 5. In 2019, the recoupment provisions required the Treasury "to recoup 140% of the government outlays" for "attacks that that result in under $37.5 billion in insured losses." *Id.* The Treasury Secretary has discretionary authority over recouping all or only a portion of government outlays for larger events. *Id.* at 5–6.

213. *See* Knutsen & Stempel, *supra* note 8, at 223–27 (discussing insurance companies' fear of insolvency if they are forced to pay for COVID-19 business interruption claims); Bailey, *supra* note 87, at 151 (discussing the insurance industry's unwillingness to pay for future terrorism losses).

214. *See* Michael Penn, *Statistics Say Large Pandemics Are More Likely than We Thought*, DUKE GLOB. HEALTH INST. (Aug. 23, 2021), https://globalhealth.duke.edu/news/statistics-say-large-pandemics-are-more-likely-we-thought ("[T]he probability of a pandemic with similar impact to COVID-19 is about 2% in any year, meaning that someone born in the year 2000 would have about a 38% chance of experiencing one by now.").

215. For discussion and analysis of the most recent version of TRIA, see WEBEL, *supra* note 95, at 2–6 and McHugh, *supra* note 9, at 510–20 (proposing a TRIA-based plan for pandemic insurance coverage).

After that, the program can follow the same principles as TRIA and promote two major principles. First, similar to TRIA's "make available" provisions,[216] it can mandate that insurers have a reasonably-priced viral pandemic insurance available for consumers, with the minutia of such policies determined by the individual states. Second, it will have the government cover claims above the deductible level set based on the insurer's size and allow the government to recoup those losses through surcharges on the insurers. By doing so, the government will ensure that insureds are covered in the future and eliminate the need for the discussion of coverage under the physical loss or damage requirement of the standard business interruption insurance policy.[217]

Some insurers, while supporting a federal program to lower pandemic risk to businesses, oppose a federal program modeled after TRIA.[218] They argue that the pandemic risks, due to their large scope and correlated losses, cannot be properly accounted for with traditional underwriting techniques.[219] Instead, insurers propose the "Business Continuity Protection

216. *See* WEBEL, *supra* note 95, at 11 ("TRIA's 'make available' provisions addressed the availability problem in the terrorism insurance market, as insurers were required by law to offer commercial terrorism coverage.").

217. Rep. Mike Thompson (D-CA-5) has introduced a bill to Congress that would require insurers to make viral pandemic coverage available to insureds under their business interruption insurance policy. Business Interruption Insurance Coverage Act of 2020, H.R. 6494, 116th Cong. (2020). This bill does not appear to provide coverage to those currently suffering COVID-19 business interruption losses and does not include government help for payment of claims similar to TRIA or what is discussed above. *Id.* Additionally, Rep. Carolyn Maloney (D-NY) has introduced H.R. 7011, the Pandemic Risk Insurance Act of 2021. Claire Wilkinson, *Second Version of PRIA Introduced*, BUS. INS. (Nov. 2, 2021), https://www.businessinsurance.com/article/20211102/NEWS06/912345671/Second-version-of-PRIA-introduced-Pandemic-Risk-Insurance-Act-Carolyn-Maloney-Ne. This proposed legislation is modeled after TRIA and requires "insurers to offer pandemic risk coverage in all critical commercial lines of insurance, including business interruption and specialty lines such as event cancellation." *Id.* This program, however, does not contain any recoupment provision and has been met with backlash from the American Property Casualty Insurance Association. *Id.* For a deeper discussion of the various legislative proposals, see generally McHugh, *supra* note 9.

218. Susanne Sclafane, *P/C Insurers Back a Federal Pandemic Loss Fund but Not a Backstop Like TRIA*, INS. J. (May 19, 2020), https://www.insurancejournal.com/news/national/2020/05/19/569115.htm.

219. *Id.*

Program."[220] This program, run by the Federal Emergency Management Agency (FEMA), would provide businesses the option to "purchase federal revenue replacement assistance through state-regulated insurance entities that participate with BCPP on a voluntary basis."[221] FEMA would then make payments to the participating businesses "once there is a presidential viral emergency declaration."[222]

In many ways, this proposal mirrors the National Flood Insurance Program (NFIP). The NFIP is a federal insurance program, also managed by FEMA, that provides flood insurance to homeowners, business owners, and renters.[223] Although the program provides coverage, the premiums insureds pay "are not priced to be actuarially sound" and therefore are not an accurate representation of risk.[224] Additionally, many insureds under the program have long-standing subsidies that further lower the rates they pay.[225] While this makes the program beneficial for those seeking protection from floods, it has led to the NFIP incurring a large amount of debt.[226] At the end of 2021, this debt totaled $20.525 billion.[227]

There is no indication that a fully federally funded pandemic insurance program would lead to a different result. Rather, pandemics provide a larger challenge to the government to develop actuarially sound rates. Insurers have already admitted that they cannot underwrite pandemics with traditional

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220. *Insurers, Agents Propose Pandemic Business Relief Plan; Plaintiffs Offer BIG Compromise*, INS. J. (May 22, 2020), https://www.insurancejournal.com/news/national/2020/05/22/569611.htm.

221. *Id.*

222. *Id.* Other features of the BCPP include: (1) Businesses "would have to certify" that the funds are being used for "retaining employees and paying necessary operating expenses," and (2) protection is only provided if purchased a minimum of 90 days before the viral emergency declaration. *Id.*

223. *Flood Insurance*, FEMA, https://www.fema.gov/flood-insurance (last visited Feb. 2, 2022).

224. Ike Brannon & Ari Blask, *Reforming the National Flood Insurance Program: Toward Private Flood Insurance*, CATO INST. (July 19, 2017), https://www.cato.org/policy-analysis/reforming-national-flood-insurance-program-toward-private-flood-insurance.

225. *Id.*

226. *Id.*

227. CONG. RSCH. SERV., NATIONAL FLOOD INSURANCE PROGRAM BORROWING AUTHORITY 3, https://sgp.fas.org/crs/homesec/IN10784.pdf (last updated Dec. 9, 2021). The debt remains this high even after the NFIP had $16 billion of its debt cancelled on Oct. 26, 2017. *Id.*

techniques.[228] Although viral pandemics are far less common than floods,[229] the large correlated losses would lead to the government program taking on a large amount of debt that it may not be able to pay back.[230] Therefore, a pandemic reinsurance program, sponsored by the government and containing a recoupment provision similar to that of the TRIA, is a better option because it will better limit the amount of coverage provided by the government.

TRIA has set a precedent for federal intervention in the insurance industry and has created a blueprint for a long-standing federal program to bolster the insurance industry.[231] While the proposed program will protect insureds in the future, the government also needs to provide coverage to insureds now. With courts consistently ruling in favor of the insurers,[232] many insureds are stuck without the proper coverage they need to adequately recover.[233] To remedy this situation, the government can include a retroactive coverage provision in the recovery program to cover past COVID-19 related business interruption insurance claims. However, this method would likely take a long time to get through Congress, and many business owners need payments as soon as possible.[234]

3. Executive Orders as an Alternative Path to Coverage

To speed up the process of assisting insureds, the President can enact an executive order creating a short-term payment

228. Susanne Sclafane, *supra* note 218.

229. *See* Michael Penn, *supra* note 214 (finding that there is a 2% chance of a viral pandemic, such as COVID-19, occurring in any given year).

230. Susanne Sclafane, *supra* note 218.

231. *See* WEBEL, *supra* note 95, at 2–3 (discussing the passing of a bill extending TRIA until Dec. 31, 2027).

232. *See supra* Part III.A. (discussing the Covid-19 business interruption insurance litigation and common outcome in favor of the insurers).

233. Fairlie, *supra* note 28, at 728 (discussing the decreased number of business owners in the first few months of the pandemic); Dua et al., *supra* note 32 ("Recovery will take time . . . [and] will depend on both economic vulnerability to the COVID-19 response and the prevailing macroeconomic outlook in their respective industries. Across all businesses, that could take five years or longer.").

234. *See How a Bill Becomes a Law*, NAT'L HUM. GENOME RSCH. INST., https://www.genome.gov/about-genomics/policy-issues/How-Bill-Becomes-Law (last visited Jan. 26, 2022) (explaining the multiple steps required for a bill to become a law); Kaplan, *supra* note 35 ("[A]n extra 200,000 businesses in the US closed in 2020.").

program for business owners. The President has the ability to authorize such payment programs, as seen by the Executive Order on Economic Relief Related to the COVID-19 Pandemic signed into action on January 22, 2021.[235] This order authorized the government to send out payments to businesses and individuals to relieve some of the financial distress caused by the pandemic.[236] By effecting a similar executive order, the President can create at least partial coverage for insureds that surcharges can later recoup in association with the program discussed above. Even if the government cannot absorb the full amount of every claim, covering at least a portion of the insured's losses may greatly help businesses recover from the pandemic.

This plan, however, may face backlash because it is similar to the Paycheck Protection Program (PPP) loans and would potentially be subject to the same type of abuse. The PPP loans provided assistance to "small and midsize businesses to help them survive the coronavirus crisis."[237] Under the program, banks and financial institutions provided loans, backed by the Small Business Administration, to businesses.[238] These loans could be used for payroll costs such as employee compensation and benefits payments, and non-payroll costs such as rent, utilities, and property damage costs.[239] For many businesses, these loans could later be forgiven.[240] Some have argued, however, that these loans did not have their intended effect. One of the main reasons for this is that the payments generally did not go to the businesses hit the hardest by the pandemic.[241]

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235. Exec. Order No. 14002, 86 Fed. Reg. 7229 (Jan. 22, 2021).

236. *Id.* at 7229.

237. Jordan Weissmann, *The Paycheck Protection Program Was a Flop*, SLATE (July 24, 2020), https://slate.com/business/2020/07/paycheck-protection-program-was-a-flop.html.

238. *How Does the Paycheck Protection Program Impact the National Income and Product Accounts (NIPAs)?*, U.S. DEP'T COM. BUREAU ECON. ANALYSIS, https://www.bea.gov/help/faq/1408 (last updated May 17, 2021); Owen Yin, *What is the Paycheck Protection Program? (A Simple Guide)*, BENCH (May 5, 2021), https://bench.co/blog/operations/paycheck-protection-program/.

239. *What do Business Need to Know About Paycheck Protection Program Loan Forgiveness*, PAYCHEX WORX, https://www.paychex.com/articles/compliance/payroll-protection-program (last updated May 7, 2021).

240. *See id.* (discussing the steps to take and requirements needed for a PPP loan to be forgiven).

241. Amanda Fischer, *Did the Paycheck Protection Program Work for Small Businesses Across the United States?*, WASH. CTR. EQUITABLE GROWTH (July 15,

While the government intended the program to help small businesses, many larger organizations such as Shake Shack and the Church of Scientology also received loans.[242] Furthermore, the number of loans provided often varied by the number of financial institutions in the area.[243]

An executive order authorizing a program to cover pandemic-related business interruption may have similar problems. However, the federal government can use the PPP loans as a guide to make changes to ensure that the businesses most in need of the coverage receive it. Additionally, by administering the program themselves rather than using private banks and financial institutions, the government will be able to check each company requesting payments. Finally, the government can require documentation from each business that shows what losses they incurred and that they had business interruption insurance during the pandemic. This will limit the number and value of payments the government needs to make. Additionally, this will allow the government to set a minimum threshold for losses that it will cover, similar to the deductible requirements of TRIA.[244]

A potentially more significant issue for this plan is whether the federal government has the authority to step in and pay insurance claims. As a general principle, the individual states are responsible for their insurance law regulation.[245] This was made official in the McCarran Ferguson Act, which stated that "[t]he business of insurance . . . shall be subject to the laws of several States" and that "[n]o Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance."[246] This plan, however, would not violate the McCarran Ferguson Act because it does not create a law regulating the insurance industry.

An executive order authorizing a program to pay insureds' business interruption insurance claims does not create a law regulating the insurance industry. Rather, it generates a

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2020), https://equitablegrowth.org/did-the-paycheck-protection-program-work-for-small-businesses-across-the-united-states/.

242. Weissmann, *supra* note 237.

243. Fischer, *supra* note 241.

244. *See* WEBEL, *supra* note 95 (discussing the deductible provision of TRIA).

245. *Commercial Insurance: Regulation*, *supra* note 39.

246. 15 U.S.C. § 1012.

pathway for insureds to receive coverage outside of their insurer claim processes. The insurers themselves are free to continue their standard business practices and will be unaffected. Therefore, the federal government has the authority to implement this plan as it does not violate the McCarran Ferguson Act.

Recent executive orders have shown that the President has the authority to create a program providing payments to those in need.[247] Using that power to create a program to cover insureds' pandemic related business interruption claims will ensure that they are getting proper coverage even if their insurers and the courts believe that their claims are invalid.

By creating a federal program that ensures future viral pandemic coverage for insureds and implementing a strategy to help insureds with their current losses, many insureds can receive the help and peace of mind they need now and in the future.

IV. CONCLUSION

The COVID-19 pandemic is an unprecedented event that has significantly affected the world. From countless infections to government-mandated stay-at-home orders, businesses lost income and were forced to close.[248] Many business owners believed that their business interruption insurance policies would cover these losses, but insurers have repeatedly denied these claims. A closer look at the policy language, however, reveals ambiguity that should lead to coverage under the doctrine of *contra proferentem*.[249] And, by using 9/11 insurance developments as a guide, the government can step in to assist the insurance industry and protect insureds in the current and future pandemics.[250]

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247. *See* Exec. Order No. 14002, *supra* note 235, at 7229 (implementing a plan to provide relief payments to individuals, families, and businesses to relieve the financial effects of the COVID-19 pandemic).

248. Kaplan, *supra* note 35.

249. *See supra* Part III.B. (discussing how the doctrine of *contra proferentem* can be applied to the ambiguity in a standard business interruption insurance policy in the context of COVID-19 to provide coverage for insureds).

250. *See supra* Part III.D. (discussing the potential of using a TRIA-based federal reinsurance program and an executive order as an alternative path to provide coverage for insureds).

The current COVID-19 business interruption insurance litigation highlights the primary arguments occurring in the courts: First, that viral exclusions prevent coverage for losses sustained from the pandemic, and second, that the COVID-19 virus cannot cause the physical damage required by the policy. However, for policies without a virus exclusion, the standard physical loss or damage requirement is ambiguous at best. This ambiguity is made prominent by the plain meaning of the word "physical,"[251] and by some courts' rulings that the presence of the virus on the property can create a valid claim.[252]

Faced with this ambiguity, the courts can then apply the doctrine of *contra proferentem*. This doctrine will allow the courts to apply a central tenet of insurance law—that ambiguities in the insurance policy should be resolved in favor of the insured—and find coverage for the insureds.[253]

In addition, some insurers are claiming that the COVID-19 pandemic is an uninsurable event that they cannot cover. But, while the losses may be significant, the strong financial backing of insurance companies and the insurance industry will be enough to keep insurers afloat.[254]

Finally, to ensure that business interruption insurance policies cover insureds during the current COVID-19 pandemic and potential future pandemics, the federal government needs to step in and create a plan similar to TRIA. TRIA cemented terrorism insurance into the American insurance industry when insurers did not want to provide it.[255] By using TRIA as a blueprint, alongside an executive order providing coverage for current business interruption claims, the government can again protect the public, both now and in the future.

The current result of COVID-19 business interruption insurance litigation is setting a dangerous precedent for future extreme events. By continually finding that insurers do not need

251. *See supra* Part III.B.1. (analyzing how the word "physical" is ambiguous in the context of COVID-19 business interruption insurance claims).

252. *See* Studio 417, Inc. v. Cincinnati Ins. Co., 478 F.Supp.3d 794, 400 (W.D. Mo. 2020) (finding that "Plaintiffs adequately alleged a direct physical loss" by claiming that the COVID-19 virus is a physical substance that is present on the surfaces of their business).

253. *See* French, *supra* note 7, at 12–15 (discussing the doctrines of *contra proferentem* and reasonable expectations in insurance policy interpretation).

254. Knutsen & Stempel, *supra* note 8, at 227.

255. WEBEL, *supra* note 95, at 2–6, 11.

to cover their insureds' claims even in the absence of a virus exclusion, the courts are allowing insurers to profit off ambiguous policies that do not clearly set out the scope of coverage. While this Note advocates for courts to rule in favor of the insureds in a relatively small group of cases—those in which the policy does not include a virus exclusion—it will force insurers to be clear in their drafting and force them to include well-known and available exclusions for risks they are not willing to cover. This, combined with a federal pandemic reinsurance program similar to TRIA, will ensure that insureds are protected and will have clearer policies in future pandemics and other extreme events affecting the insurance industry.

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