

COVID-19 BUSINESS INTERRUPTION INSURANCE LOSSES: THE CASES FOR AND AGAINST COVERAGE

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The financial consequences of the government-ordered shutdowns of businesses across America to mitigate the COVID-19 health crisis are enormous. Estimates indicate that small businesses have lost \$255 to \$431 billion per month and more than 44 million workers have been laid off. When businesses have requested reimbursement of their business interruption losses from their insurers under business interruption policies, their insurers have denied the claims. The insurance industry also has announced that business interruption policies do not cover pandemic losses, so they intend to fight COVID-19 claims “tooth and nail.” More than 450 lawsuits throughout the country already have been brought against insurers, including dozens of class actions. Legislators in several states have proposed legislation that would require insurers to pay business interruption claims regardless of whether the claims are covered by the wording of the policies. In the absence of a government bailout, the losers of this epic insurance battle—either insurers or their insureds’ businesses—will likely face bankruptcy. Thus, the financial consequences of this battle, and its implications for America’s economy, cannot be overstated.

This is the first scholarly Essay to discuss the arguments for and against business interruption policies covering COVID-19 business interruption losses. In doing so, it sets forth the strongest arguments on each side of the fight regarding the meaning of the applicable policy language in the context of the existing caselaw and the purpose of business interruption insurance. It also addresses the insurance industry’s claim that pandemic losses are not covered by business interruption policies because such losses are simply uninsurable. Finally, it discusses the competing public policies that support each side.

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I. INTRODUCTION

COVID-19 has brought havoc on the world. As of June 30, 2020, over 500,000 people had died worldwide, including more than 126,000 deaths in the United States.¹ Not only is this new iteration of the SARS virus deadly like its predecessor, but it is also highly contagious due to its ability to be transmitted through the air and on surfaces where it can survive for hours or days depending upon the type of surface material.² Indeed, the virus was detected on a contaminated cruise ship seventeen days after the ship had been evacuated.³

Governors across the country issued stay-at-home orders, which prevented countless businesses from operating and caused massive layoffs. By June 11, 2020, over 44 million people in the U.S. had applied for unemployment benefits since the pandemic hit the country with full force in March.⁴ The unemployment rate in the U.S. reached Great Depression numbers that have been projected to average at least 15 percent during the second and third quarters, and the gross domestic product (GDP) has been projected to be down at least 12 percent in the second quarter.⁵ In addition to staggering losses by large businesses, small businesses were estimated to be losing \$255 to \$431

¹ Sarah Almkhatar, et al., *Coronavirus in the U.S.: Latest Map and Case Count*, N.Y. TIMES (last updated June 30, 2020, 8:00 AM), <https://www.nytimes.com/interactive/2020/us/coronavirus-us-cases.html>.

² *New Coronavirus Stable for Hours on Surfaces: SARS-CoV-2 Stability Similar to Original SARS Virus*, U.S. DEP'T OF HEALTH & HUMAN SERVS., NAT'L INST. OF HEALTH (Mar. 17, 2020), <https://www.nih.gov/news-events/news-releases/new-coronavirus-stable-hours-surfaces>.

³ See Leah F. Moriarty, et al., *Morbidity and Mortality Weekly Report (MMWR)*, CDC (Mar. 27, 2020), https://www.cdc.gov/mmwr/volumes/69/wr/mm6912e3.htm?s_cid=mm6912e3_w (“SARS-CoV-2 RNA was identified on a variety of surfaces in cabins of both symptomatic and asymptomatic infected passengers up to 17 days after cabins were vacated on the Diamond Princess . . .”).

⁴ Tiffany Hsu, *Sobering Jobs Outlook: ‘We’re Expecting a Long Haul’*, N.Y. TIMES (June 11, 2020), <https://www.nytimes.com/2020/06/11/business/economy/unemployment-claims-coronavirus.html>.

⁵ Phill Swagel, *CBO’s Current Projects of Output, Employment, and Interest Rates and a Preliminary Look at Federal Deficits for 2020 and 2021*, CBO (Apr. 24, 2020), <https://www.cbo.gov/publication/56335>.

billion per month due to the government-ordered shutdowns.⁶ The United States Department of Labor estimates that 40 percent of businesses never reopen after experiencing a disaster.⁷ Of those that reopen, at least 25 percent fail within two years.⁸

To avoid such a fate, most large businesses and approximately 40 percent of small businesses purchase business interruption insurance, which is intended to cover lost revenues and other monetary damage caused by business interruptions.⁹ Many businesses have been paying premiums on such policies for years.¹⁰ Naturally, these businesses turned to their insurers for help when faced with the devastating losses caused by COVID-19. In response, the insurance industry announced that COVID-19 business interruption losses are not covered by their policies and that pandemic losses are simply uninsurable.¹¹ The insurance industry also claimed that property insurers only collect approximately \$6 billion per month in premiums which would bankrupt the industry if they were required to cover the

⁶ Press Release, Am. Prop. Cas. Ins. Ass'n, APCIA Releases New Business Interruption Analysis (Apr. 6, 2020) (available at <http://www.pciaa.net/pciwebsite/cms/content/viewpage?sitePageId=60052>).

⁷ John Grossmann, *A Business Ponders Whether its Location is Perfect, or a Disaster*, N.Y. TIMES (Dec. 7, 2011), <https://www.nytimes.com/2011/12/08/business/smallbusiness/a-business-tries-to-decide-whether-its-location-is-perfect-or-a-disaster.html>.

⁸ *Id.*

⁹ Suzanne Barlyn, *U.S. Insurers Want Taxpayers to Back Pandemic Coverage for Businesses*, REUTERS (April 29, 2020), <https://www.reuters.com/article/us-health-coronavirus-insurance-pandemic/u-s-insurers-want-taxpayers-to-back-pandemic-coverage-for-businesses-idUSKCN22B1J8>.

¹⁰ See, e.g., Alexia Elejalde-Ruiz, *Business Owners Bleeding Money During the Coronavirus Shutdown May Expect Insurance to Cover Their Losses. But Often They're in for a Shock*, CHI. TRIB. (April 16, 2020), <https://www.chicagotribune.com/coronavirus/ct-coronavirus-business-interruption-insurance-lawsuits-20200416-b5kl3xaweja7refbqfr4cpg3u-story.html> (reporting that one policyholder asked, "How could they take our fees for 10 years and then not pay out?" after being told of the insurer's position).

¹¹ See Am. Prop. Cas. Ins. Ass'n, *supra* note 6 ("Many commercial insurance policies, including those that have business interruption coverage, do not provide coverage for communicable diseases or viruses such as COVID-19. Pandemic outbreaks are uninsured because they are uninsurable."); see also Julia Jacobs, *Arts Groups Fight Their Insurers Over Coverage on Virus Losses*, N.Y. TIMES (May 5, 2020), <https://www.nytimes.com/2020/05/05/arts/insurance-claims-coronavirus-arts.html>.

losses.¹² Consequently, according to the CEO of one of the world's largest insurers, "[t]he industry will fight [paying COVID-19 business interruption claims] tooth and nail."¹³

By June 22, 2020, the insurance industry's blanket denial of coverage for COVID-19 business interruption losses had spawned over 450 lawsuits, including dozens of class actions, across the country.¹⁴ It also prompted legislators in at least eight states to propose legislation that would require insurers to pay the claims regardless of the policy language at issue.¹⁵

In the absence of a government bailout for the losers of this epic battle, court determinations regarding which parties will suffer the financial losses caused by COVID-19 business interruptions will determine the fate of the insurance industry and many large and small businesses. Thus, the financial stakes for insurers, small and large businesses, and America's economic future could not be higher.

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. It intends to make the strongest arguments each side has regarding the meaning of the applicable policy language

¹² See Am. Prop. Cas. Ins. Ass'n, *supra* note 6.

¹³ Jacobs, *supra* note 11; see also Evan G. Greenberg, *What Won't Cure Corona: Lawsuits*, WALL ST. J. (April 21, 2020), <https://www.wsj.com/articles/what-wont-cure-corona-lawsuits-11587504920> ("Some businesses and policy makers think business-interruption coverage should pay out for the pandemic's damage, even though those risks aren't covered in these policies, nor were premiums collected for the exposure If implemented, it would bankrupt the insurance industry to prop up other parts of the economy.").

¹⁴ See, e.g., *Covid Coverage Litigation Tracker*, University of Pennsylvania Carey Law School (as of June 22, 2020), <https://cclt.law.upenn.edu/>; Jim Sams, *Number of Federal COVID-19 Business Interruption Lawsuits at 101 and Rising*, CLAIMS J. (May 21, 2020), <https://www.claimsjournal.com/news/national/2020/05/21/297180.htm>; Elejalde-Ruiz, *supra* note 10; Leslie Scism, *Politicians Push Insurers to Resolve Mounting Disputes Over Covid-19 Losses*, WALL ST. J. (April 13, 2020), <https://www.wsj.com/articles/politicians-push-insurers-to-cover-business-losses-11586794059>; Jacobs, *supra* note 11.

¹⁵ See, e.g., Elejalde-Ruiz, *supra* note 10; Huw Jones & Carolyn Cohn, *Forced Pandemic Payouts Risk Financial Instability: Insurance Regulators*, REUTERS (May 7, 2020), <https://www.reuters.com/article/us-health-coronavirus-insurance-regulato/forced-pandemic-payouts-risk-financial-instability-insurance-regulators-idUSKBN22J225>.

when read in the context of existing caselaw with the purpose of business interruption insurance in mind. Although the actual wording of the policies is important, which courts decide the cases will also be critical to the outcomes. This is because insurance disputes are governed by state law and the law can vary considerably from state to state.¹⁶ In analyzing these issues, this Essay also addresses the insurance industry's claim that pandemics are uninsurable, and it weighs the competing public policies that support each side.

II. BUSINESS INTERRUPTION INSURANCE

Business interruption insurance protects a business' income stream when its operations are shut down by a covered peril. The purpose of business interruption insurance is to return the policyholder to the position it would have occupied if the covered peril had not occurred.¹⁷

Typically, business interruption insurance is purchased as part of an "all risk" property insurance policy. All risk property policies

¹⁶ See, e.g., Peter J. Kalis et al., POLICYHOLDER'S GUIDE TO THE LAW OF INSURANCE COVERAGE §26.03[B] (1st ed. 1997 & Supp. 2020) ("Insurance contracts are interpreted according to state law. Not surprisingly, the manner in which the courts of the various states address similar interpretive issues can vary widely from one state to the next."); Larry Kramer, *Choice of Law in Complex Litigation*, 71 N.Y.U. L. REV. 547, 553–54 (1996) ("Conflicts scholars don't fight bitterly about the differences among approaches [to determining choice law] because we disagree about their aesthetic qualities. We fight because the differences matter in terms of outcomes.").

¹⁷ *Cont'l Ins. Co. v. DNE Corp.*, 834 S.W.2d 930, 934 (Tenn. 1992) (citing *Nw. States Portland Cement Co. v. Hartford Fire Ins. Co.*, 360 F.2d 531 (8th Cir. 1966)) ("The purpose of business interruption insurance is to protect the insured against losses that occur when its operations are unexpectedly interrupted, and to place it in the position it would have occupied if the interruption had not occurred."). See also Gregory D. Miller & Joseph D. Jean, *Effect of Post-Loss Economic Factors in Measuring Business Interruption Losses: An Insured's and Insurer's Perspectives*, in NEW APPLEMAN ON INSURANCE: CURRENT CRITICAL ISSUES IN INSURANCE LAW 25, 25 (2010) ("Business interruption insurance, at its core, is intended to place the insured in the position it would have been in had it not suffered a loss."); Jon C. Rice, *Business Interruption Coverage in the Wake of Katrina: Measuring the Insured's Loss in a Volatile Economy*, 41 TORT TRIAL & INS. PRAC. L.J. 857, 857 (2006) ("The purpose of business interruption coverage is to place the insured in the position it would have occupied had no interruption occurred.").

are the broadest form of property insurance available because they cover all losses the policyholder suffers unless the peril causing the loss is specifically excluded.¹⁸ Unlike the policy language used in some other lines of insurance—often identical from insurer to insurer because the insurers all use the same policy form drafted by the Insurance Services Office, Inc. (ISO)—the policy language in business interruption insurance policies can vary from insurer to insurer.¹⁹ Despite some variations from insurer to insurer, the language in business interruption policies, like other lines of insurance, is drafted by insurers and then sold on a take-it-or-leave-it basis.²⁰

A. POTENTIALLY APPLICABLE COVERAGES

Under most business interruption policies, there are four policy provisions that potentially provide coverage for COVID-19 business interruption losses. Because the language used by insurers can vary, however, the four examples set forth below are just that—examples.

¹⁸ See, e.g., Jeff Katofsky, *Subsiding Away: Can California Homeowners Recover from Their Insurer for Subsidence Damages to Their Homes?*, 20 PAC. L. J. 783, 785 (1989) (“In an ‘all-risk’ policy, *all losses except those specifically excluded are covered*. This is the broadest form of coverage and has been so interpreted by the courts.”) (emphasis in original).

¹⁹ See, e.g., *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 772 (1993) (“Defendant Insurance Services Office, Inc. (ISO), [is] an association of approximately 1,400 domestic property and casualty insurers. . . . [ISO] is the almost exclusive source of support services in this country for [Commercial General Liability (CGL)] insurance. ISO develops standard policy forms and files or lodges them with each State’s insurance regulators; most CGL insurance written in the United States is written on these forms.”) (internal citations omitted); *U.S. Fire Ins. Co. v. J.S.U.B., Inc.*, 979 So.2d 871, 879 n.6 (Fla. 2007) (“[ISO] is an industry organization that promulgates various standard insurance policies that are utilized by insurers throughout the country. . . .”).

²⁰ See, e.g., James M. Fischer, *Why Are Insurance Contracts Subject to Special Rules of Interpretation?: Text Versus Context*, 24 ARIZ. ST. L.J. 995, 996 (1992) (“[T]here is little, if any, freedom to negotiate the standardized language of the insurance contract that determines the scope of coverage.”); Susan Randall, *Freedom of Contract in Insurance*, 14 CONN. INS. L.J. 107, 125 (2007) (“[I]n some lines of insurance, all insurance companies provide identical coverage on the same take-it-or-leave-it basis.”).

The first potential source of coverage arises under the basic insuring agreement, which states, “We will pay for the actual loss of Business Income you sustain due to the necessary suspension of ‘your operations’ . . . caused by direct physical loss of or damage to covered property”²¹ Under this language, business interruption coverage is triggered if the policyholder’s business is interrupted because of physical loss or damage to some or all of the policyholder’s property that the policyholder needs to generate income for the business. If a tornado rips the roof off a policyholder’s restaurant, for example, then the restaurant will cease operations until repairs can be completed. This type of event, where it is obvious the policyholder’s property has been tangibly damaged, is an example of where business interruption coverage is commonly triggered. Notably, however, the term “damage” and the phrase “direct physical loss of or damage” are not defined in the policy, so there is no basis in the policy language itself to conclude that tangible, physical damage is required in order to trigger coverage.

The second potential source of coverage is the Civil Authority provision, which states, “When a Covered Cause of Loss causes damage to property other than property at the [policyholder’s business], we will pay for the actual loss of Business Income you sustain . . . caused by action of civil authority that prohibits access to the described premises”²² Under this language, if a civil authority prevents a policyholder from doing business due to “damage” to someone else’s property, then coverage is triggered. Again, “damage” is undefined, but a classic example of this scenario is a downed powerline on the street in front of a business that prompts local officials to close the business until the powerline is repaired.

The third potential source of coverage is the Contingent Properties provision, which provides, “We will pay for the actual loss of Business Income you sustain due to physical loss or damage at the premises of a ‘dependent property’ or a ‘secondary dependent property’ caused by or resulting from any Covered Cause of Loss”²³ Under this coverage, a policyholder’s business interruption losses are covered if they are caused by a supplier or a customer’s inability

²¹ Complaint Exhibit A at 68, *JDS 1455, Inc. v. Society Insurance*, No. 1:20-cv-02546 (N.D. Ill. Apr. 24, 2020) [hereinafter *Business Owners Policy*].

²² *Id.* at 85.

²³ *Id.* at 72.

to do business with the policyholder due to physical loss or damage at the supplier's or customer's own properties. Although "physical loss or damage" is again undefined, an example of this scenario is a corn processing plant that is unable to operate its business because its corn supplier's business is hit by a tornado. Thus, the supplier is unable to deliver corn needed for the policyholder's corn processing operations.

The fourth potential source of coverage is the Contamination provision, which states, "If your 'operations' are suspended due to 'contamination,' [then] we will . . . pay for the actual loss of Business Income . . . you sustain caused by (a) 'Contamination' that results in an action by a public health or other governmental authority that prohibits access to the [policyholder's business]" ²⁴ Contamination is defined as "a . . . dangerous condition in your . . . premises."²⁵ Unlike the other three business interruption coverage provisions that are predicated upon "physical loss or damage" to some property—either the policyholder's or a third party's—contamination coverage is triggered by a "dangerous condition" at the policyholder's premises.

B. POTENTIALLY APPLICABLE EXCLUSIONS

There are also two exclusions in some business interruption policies that may be applicable to COVID-19 claims. The first is the "virus" exclusion, which ISO introduced in 2006 following the SARS outbreak. The key portion of the exclusion states, "We will not pay for loss or damage resulting from any virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness or disease."²⁶ In seeking regulatory approval for the exclusion, the insurance industry stated that "[a]lthough building and personal property arguably could become contaminated (often temporarily) by such viruses and bacteria, . . . property policies have not been a source of recovery for losses involving contamination by disease-causing

²⁴ *Id.* at 71.

²⁵ *Id.* at 72.

²⁶ INSURANCE SERVICES OFFICE, ISO FORM CP 01 40 07 06 - EXCLUSION OF LOSS DUE TO VIRUS OR BACTERIA 8 (ISO Circular July 6, 2006) [hereinafter ISO Circular], <https://www.propertyinsurancecoveragelaw.com/files/2020/03/ISO-Circular-LI-CF-2006-175-Virus.pdf>.

agents”²⁷ Although it specifically referenced the SARS virus when seeking approval of the virus exclusion, the insurance industry stated that the exclusion was not limited to just that virus because “the universe of disease-causing organisms is always in evolution.”²⁸

The second potentially applicable exclusion is the “pollution” exclusion. This exclusion commonly states, “We will not pay for loss or damage caused by or resulting from the discharge, dispersal, seepage, migration, release or escape of ‘pollutants’”²⁹ Pollutants is defined as “any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste. Waste includes materials to be recycled, reconditioned or reclaimed.”³⁰

III. RULES OF INSURANCE POLICY INTERPRETATION

A. BASIC RULES

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. They nonetheless are generally treated by courts as contracts when disputes arise regarding the meaning of policy language.³¹ The interpretation of policy language is a question of law for courts to determine.³² The policy language that grants coverage is construed broadly, while provisions

²⁷ *Id.* at 10.

²⁸ *Id.* at 5.

²⁹ Business Owners Policy, *supra* note 21, at 82.

³⁰ *Id.* at 31.

³¹ *See, e.g.*, *Sonson v. United Servs. Auto. Ass’n*, 100 A.3d 1, 2, 5 (Conn. App. Ct. 2014) (“Standardized contracts of insurance continue to be prime examples of contracts of adhesion The interpretation of a contract presents a question of law subject to de novo review.”) (citations omitted) (internal quotation marks omitted); *Pryor v. Colony Ins.*, 414 S.W.3d 424, 430 (Ky. Ct. App. 2013) (“[M]ost insurance policies are contracts of adhesion To ascertain the construction of an insurance contract, one begins with the text of the policy itself.”).

³² *See, e.g.*, STEVEN PITT, ET AL., 2 COUCH ON INSURANCE § 21:3 (3d ed. 2016) (“As a general rule, the construction and effect of a written contract of insurance is a matter of law, to be determined by the court and not by the jury.”) (citation omitted); ROBERT H. JERRY, II & DOUGLAS R. RICHMOND, UNDERSTANDING INSURANCE LAW 133 (5th ed. 2012) (“[T]he interpretation of [an insurance] contract is a question of law and is therefore reserved to the court.”).

that exclude or limit coverage are construed narrowly.³³ Exclusionary language should not be interpreted in a way that allows it to swallow the basic coverage provided by the policy.³⁴ Courts also attempt to interpret the policy as a whole, reconciling all of its provisions.³⁵

In construing policy language,³⁶ courts do so with the purpose of the insurance in mind—the way a layman would understand the policy language.³⁷ This means that courts often refer to standard

³³ See, e.g., *Powell v. Liberty Mut. Fire Ins. Co.*, 252 P.3d 668, 672 (Nev. 2011) (quoting *Nat'l Union Fire Ins. v. Reno's Exec. Air, Inc.*, 682 P.2d 1380, 1383 (Nev. 1984)) (“While clauses providing coverage are interpreted broadly so as to afford the greatest possible coverage to the insured, clauses excluding coverage are interpreted narrowly against the insurer.”).

³⁴ See, e.g., *Harris v. Gulf Ins. Co.*, 297 F. Supp. 2d 1220, 1226 (N.D. Cal. 2003) (rejecting insurer’s interpretation of an exclusion in policy because it “would render the coverage provided by the policy illusory.”); *Alstrin v. St. Paul Mercury Ins. Co.*, 179 F. Supp. 2d 376, 398 (D. Del. 2002) (rejecting insurer’s interpretation of an exclusion where, if applied, “there would be little or nothing left to that coverage,” because “[n]o insured would expect such limited coverage from a policy”); *Titan Idem. Co. v. Newton*, 39 F. Supp. 2d 1336, 1348 (N.D. Ala. 1999) (finding coverage even though “[t]he limitations of [the] policy completely swallow up the insuring provisions.”); *Bailer v. Erie Ins. Exch.*, 687 A.2d 1375, 1380 (Md. 1997) (“If the exclusion totally swallows the insuring provision, the provisions are completely contradictory. That is the grossest form of ambiguity”).

³⁵ See, e.g., *Rothenberg v. Lincoln Farm Camp, Inc.*, 755 F.2d 1017, 1019 (2d Cir. 1985) (“[A]n interpretation that gives a reasonable and effective meaning to all the terms of a contract is generally preferred to one that leaves a part unreasonable or of no effect.”); *Fireman’s Fund Ins. Co. v. Allstate Ins. Co.*, 234 Cal. App. 3d 1154, 1169 (1991) (quoting *State Farm Mut. Auto. Ins. Co. v. Crane*, 217 Cal. App. 3d 1127, 1132 (1990)) (“In short, an insurance contract is to be construed in a manner which gives meaning to all its provisions in a natural, reasonable, and practical manner, having reference to the risk and subject matter and to the purposes of the entire contract.” (citation omitted)).

³⁶ The terms “interpretation” and “construction” are used interchangeably when it comes to interpreting insurance policies. Technically, interpretation involves attempting to discern the parties’ mutual intent regarding the language, while construction involves discerning the legally binding effect of the language. Because there is no mutual intent to discern when it comes to understanding an insurance policy, insurance policies technically are construed by courts, not interpreted. See, e.g., Michelle E. Boardman, *Contra Proferentem: The Allure of Ambiguous Boilerplate*, 104 MICH. L. REV. 1105, 1109–10 (2006). Nonetheless, in this Essay, the terms are used interchangeably because courts and commentators often use the term interpretation when discussing the construction of policy language.

³⁷ See, e.g., *Fageol Truck & Coach Co. v. Pac. Indem. Co.*, 117 P.2d 669, 671 (Cal. 1941) (quoting *Cutting v. Atlas Mut. Ins. Co.*, 85 N.E. 174, 175 (Mass.

dictionaries when construing the policy language, as opposed to using technical meanings or the insurance industry's own understanding of the terms.³⁸

As discussed in the next part, in addition to these basic rules of contract interpretation, courts have developed some special rules regarding the interpretation of policies. These special rules have been created due to the imbalance of power and knowledge that favors insurers during the creation and sale of insurance policies. Additionally, these rules address the public policies implicated by insurance's role as a social safety net—it is intended to compensate injured parties and protect policyholders from suffering devastating losses they cannot financially bear individually.

B. CONTRA PROFERENTEM

The doctrine of *contra proferentem* provides that any ambiguities in contract language should be construed against the drafter.³⁹ Because insurers draft the policies, the doctrine dictates that ambiguities should be construed against insurers.⁴⁰ In many states, the

1908) (the policy “must be given ‘such a construction . . . as, if fairly warranted, will best carry out the object for which the contract was entered into, namely, that of securing indemnity to the insured for the losses to which the insurance relates.”) (omission in original); *Glidden v. Farmers Auto. Ins. Ass’n*, 312 N.E.2d 247, 250 (Ill. 1974) (a policy should be interpreted “in the particular factual setting in which the contract was issued.”); *Century Bank v. St. Paul Fire & Marine Ins. Co.*, 482 P.2d 193, 194 (Cal. 1971) (Policy “language is to be construed in accord with the reasonable understanding of a layman”); *Pac. Indem. Co. v. Interstate Fire & Cas. Co.*, 488 A.2d 486, 488 (Md. 1985) (“In [interpreting policy language], we accord words their ordinary and accepted meanings. The test is what meaning a reasonably prudent layperson would attach to the term.”); *Kissil v. Beneficial Nat’l Life Ins. Co.*, 319 A.2d 67, 70 (N.J. 1974) (“The policy should be read as the ordinary policyholder would understand it.”).

³⁸ See, e.g., *Scott v. Cont’l Ins. Co.*, 44 Cal. App. 4th 24, 29 (1996) (“In seeking to ascertain the ordinary sense of words, courts in insurance cases regularly turn to general dictionaries.”); *JERRY & RICHMOND*, *supra* note 32, at 138 (“In affording terms their ordinary meaning, courts frequently consult standard English language dictionaries.”).

³⁹ See, e.g., *Boardman*, *supra* note 36, at 1121 n.64 (quoting 17A C.J.S. *Contracts* § 337 (2003)) (“The language of a contract will be construed most strictly or strongly against the party responsible for its use”).

⁴⁰ See, e.g., *Crane v. State Farm Fire & Cas. Co.*, 485 P.2d 1129, 1130 (Cal. 1971) (“Any ambiguity or uncertainty in an insurance policy is to be resolved against

ambiguity test is whether the policy language can be reasonably interpreted in different ways.⁴¹ 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.⁴² And, as is often the case when it comes to standardized policy language that is interpreted by numerous courts across the country, if the same language has been interpreted in different ways by different courts, then the inconsistencies may be treated as indicia that the policy language is ambiguous.⁴³

the insurer.”); Crawford v. Prudential Ins. Co. of Am., 783 P.2d 900, 904 (Kan. 1989) (quoting Fowler v. United Equitable Ins. Co., 438 P.2d 46, 48 (Kan. 1968) (“Since an insurer prepares its own contracts, it has a duty to make the meaning clear, and if it fails to do so, the insurer, and not the insured, must suffer.”); Ethan J. Leib & Steve Thel, *Contra Proferentem and the Role of the Jury in Contract Interpretation*, 87 TEMP. L. REV. 773, 774 n.4 (2015) (quoting Phillips v. Lincoln Nat’l Life Ins. Co., 978 F.2d 302, 312 (7th Cir. 1992) (“[T]he *contra proferentem* rule . . . is followed in all fifty states and the District of Columbia, and with good reason. Insurance policies are almost always drafted by specialists employed by the insurer. In light of the drafters’ expertise and experience, the insurer should be expected to set forth any limitations on its liability clearly enough for a common layperson to understand; if it fails to do this, it should not be allowed to take advantage of the very ambiguities that it could have prevented with greater diligence.”) (alterations in original).

⁴¹ See, e.g., New Castle Cty. v. Nat’l Union Fire Ins. Co. of Pittsburgh, 243 F.3d 744, 750 (3d Cir. 2001) (quoting New Castle Cty. v. Nat’l Union Fire Ins. Co. of Pittsburgh, 174 F.3d 338, 344 (3d Cir. 1999) (“The settled test for ambiguity is whether the provisions in controversy are reasonably or fairly susceptible of different interpretations or may have two or more different meanings.”); Bonner v. United Servs. Auto. Ass’n, 841 S.W.2d 504, 506 (Tex. Ct. App. 1992) (“The court must adopt the construction of an exclusionary clause urged by the insured as long as that construction is not unreasonable, even if the construction urged by the insurer appears to be more reasonable or a more accurate reflection of the parties’ intent.”).

⁴² *Id.*

⁴³ See, e.g., Crawford v. Prudential Ins. Co. of Am., 783 P.2d 900, 908 (Kan. 1989) (“[T]he reported cases are in conflict, the trial judge and the Court of Appeals reached different conclusions and the justices of this court [disagree] Under such circumstances, the clause is, by definition, ambiguous and must be interpreted in favor of the insured.”); Allstate Ins. Co. v. Hartford Accident & Indem. Co., 311 S.W.2d 41, 47 (Mo. Ct. App. 1958) (“Since we assume that *all* courts adopt a reasonable construction, the conflict is of itself indicative that the word as so used is susceptible of at least two reasonable interpretations, one of which extends the coverage to the situation at hand.”); Cohen v. Erie Indem. Co., 432 A.2d 596, 599

C. REASONABLE EXPECTATIONS DOCTRINE

Another interpretive rule, unique to insurance policies, is the “reasonable expectations doctrine.”⁴⁴ Although courts use different versions of the reasonable expectations doctrine, one version provides that 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.⁴⁵

Courts can justify the creation and use of the reasonable expectations doctrine on several grounds. For one, policyholders need protection from policy language that unfairly favors insurers because policyholders have no input into the drafting of the policy language and typically do not get to see the policy language before purchasing a policy.⁴⁶ Indeed, the Restatement (Second) of Contracts specifically recognizes that courts can refuse to enforce terms contained in

(Pa. Super. Ct. 1981) (“The mere fact that [courts do not agree on the meaning of the language] . . . creates the inescapable conclusion that the provision in issue is susceptible to more than one interpretation.”).

⁴⁴ See, e.g., BARRY R. OSTRAGER & THOMAS R. NEWMAN, HANDBOOK ON INSURANCE COVERAGE DISPUTES §1.04[b], at 34–48 (19th ed. 2019) (identifying courts in forty-two states that have expressed support for, or applied a form of, the reasonable expectations doctrine).

⁴⁵ See, e.g., *AIU Ins. Co. v. Superior Court*, 799 P.2d 1253, 1264 (Cal. 1990) (insurance policies should be interpreted broadly to “pro[te]ct the objectively reasonable expectations of the insured.”); *Nat’l Mut. Ins. Co. v. McMahon & Sons, Inc.*, 356 S.E.2d 488, 495–96 (W. Va. 1987) (the reasonable expectations doctrine dictates that a policy be construed in a manner that a reasonable person standing in the shoes of the insured would expect the language to mean, even though painstaking examination of the policy provisions would have negated those expectations); ROBERT E. KEETON, ALAN I. WIDISS & JAMES M. FISCHER, *INSURANCE LAW: A GUIDE TO FUNDAMENTAL PRINCIPLES, LEGAL DOCTRINES, AND COMMERCIAL PRACTICES* §§ 6.3(a)(5), at 538 n. 98 (2d ed. 1988) (“In general, courts will protect the reasonable expectations of applicants, insureds, and intended beneficiaries regarding the coverage afforded by insurance contracts even though a careful examination of the policy provisions indicates that such expectations are contrary to the expressed intention of the insurer.”).

⁴⁶ See, e.g., Eugene R. Anderson & James J. Fournier, *Why Courts Enforce Insurance Policyholders’ Objectively Reasonable Expectations of Insurance Coverage*, 5 CONN. INS. L.J. 335, 363 (1998); Boardman, *supra* note 36, at 1120; Robert E. Keeton, *Insurance Law Rights at Variance with Policy Provisions*, 83 HARV. L. REV. 961, 968 (1970); Randall, *supra* note 20, at 107.

standardized insurance policies that a policyholder would reject if it could.⁴⁷ Thus, the 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.

Additionally, public policy supports the doctrine. Because policyholders are required to buy some lines of insurance (e.g., auto insurance),⁴⁸ and they need other types of insurance in order to avoid financial ruin when catastrophic events occur (e.g., health insurance and business interruption insurance), insurance serves the necessary function of a social safety net in order to compensate injured parties for their losses.⁴⁹ Insurance policies should be interpreted expansively to advance these public policies.

Finally, state statutes enable insurance regulators to reject policy language that is unreasonable, unfair, ambiguous, or contrary to public policy.⁵⁰ Courts similarly should do so when needed.

⁴⁷ See RESTATEMENT (SECOND) OF CONTRACTS § 211(3) cmt c. (AM. LAW INST. 1981) (recognizing that some terms in standardized contracts should not be enforced if the other party would have rejected the term if it could and specifically listing insurance policies as a type of standard contract that needs to be regulated due to the risk of insurers overreaching).

⁴⁸ See, e.g., JERRY & RICHMOND, *supra* note 32, at 924–25; Anderson & Fournier, *supra* note 46, at 368; Randall, *supra* note 20, at 125.

⁴⁹ See, e.g., St. Paul Fire & Marine Ins. Co. v. Jacobson, 826 F. Supp. 155, 163–64 (E.D. Va. 1993) (discussing public policy of compensating innocent victims outweighs public policy of not permitting coverage for intentional actions); St. Paul Fire & Marine Ins. Co. v. Asbury, 720 P.2d 540, 542 (Ariz. Ct. App. 1986) (noting Arizona public policy favors compensating injured persons); Kenneth S. Abraham, *Four Conceptions of Insurance*, 161 U. PA. L. REV. 653, 668 (2013) (discussing insurance's role as a public utility); Jeffrey W. Stempel, *The Insurance Policy as Social Instrument and Social Institution*, 51 WM. & MARY L. REV. 1489, 1497 (2010) (discussing the socially important role that insurance plays).

⁵⁰ See, e.g., KENNETH S. ABRAHAM & DANIEL SCHWARCZ, *INSURANCE LAW AND REGULATION* 143, 146 (6th ed. 2015); Randall, *supra* note 20, at 146.

IV. THE CASE FOR INSURERS

A. COVID-19 BUSINESS INTERRUPTION LOSSES ARE NOT CAUSED BY “PHYSICAL LOSS OF OR DAMAGE TO PROPERTY”

According to insurers, COVID-19 business interruption losses are not covered because their policies unambiguously require that the losses be caused by “physical loss of or damage to property” in order to be covered. This means theft or tangible, physical damage to property must cause the business interruption. COVID-19 business interruption losses are not caused by theft or tangible, physical damage to property. To the contrary, the losses have been caused by government orders shutting businesses down in order to slow the spread of the virus and reduce the number of people simultaneously getting sick and dying. No property has been physically lost or damaged such that business operations were suspended as a result. Consequently, business interruption insurance, which covers business interruption losses due to theft or tangible, physical property damage, does not cover COVID-19 business interruption claims.

To support this argument, insurers can cite numerous cases in which courts have held that “physical loss of or damage” requires either theft or tangible injury to property.⁵¹ According to the reasoning of these cases, losses that result from business interruptions caused by the fear of illness or death are not the result of tangible, physical loss or damage. Consequently, COVID-19 business interruption losses are not covered.

⁵¹ See, e.g., *Dickie Brennan & Co. v. Lexington Ins. Co.*, 636 F.3d 683 (5th Cir. 2011) (finding that business interruption losses incurred by operators of New Orleans restaurants due to a mandatory evacuation of the city prior to the arrival of Hurricane Gustav were not caused by direct physical loss of or damage to property); *Source Food Tech., Inc. v. U.S. Fid. & Guar. Co.*, 465 F.3d 834 (8th Cir. 2006) (deciding that business interruption losses resulting from embargo due to “mad cow disease” that prevented insured from shipping uncontaminated beef were not caused by physical loss); *United Air Lines, Inc. v. Insurance Co. of Pa.*, 439 F.3d 128, 129 (2d Cir. 2006) (determining the airline could not show that its lost earnings resulted from physical damage to its property or from physical damage to an adjacent property when government shut down airport following 9/11 terrorist attack).

B. COVID-19 BUSINESS INTERRUPTION LOSSES ARE
EXCLUDED BY THE POLLUTION AND VIRUS EXCLUSIONS

Even if COVID-19 business interruption losses were somehow considered the result of physical loss or damage to property, insurers argue such claims still would not be covered because the pollution and virus exclusions bar such claims. The pollution exclusion states a “loss . . . caused by or resulting from the discharge, dispersal, seepage, migration, release or escape of ‘pollutants’” is not covered.⁵² “Pollutants” are defined as “any solid, liquid, gaseous . . . irritant or contaminant”⁵³ The COVID-19 virus, and its transmission, qualifies as a solid, liquid or gaseous irritant or contaminant. Thus, losses caused by the virus are excluded from coverage by the pollution exclusion.

Even more applicable, however, is the virus exclusion. The virus exclusion was specifically created to exclude coverage for losses caused by viruses. The COVID-19 virus is a variation of the virus that causes SARS, which is one of the viruses specifically listed in the ISO Circular that explained what was intended to be covered by the exclusion.⁵⁴ Thus, for policies that contain a virus exclusion, there should be no question that the virus exclusion applies to COVID-19 business interruption losses.

C. PANDEMIC CLAIMS ARE UNINSURABLE CORRELATED
LOSSES

Insurers also argue that the reason pandemic claims, such as COVID-19 business interruption losses, are not covered by their policies is because the losses associated with pandemics are uninsurable correlated risks.⁵⁵ Correlated risks are losses caused by perils that result in numerous losses occurring in the same geographic area at approximately the same time.⁵⁶ Because many types of natural

⁵² See Business Owners Policy, *supra* note 21, at 82.

⁵³ See *id.* at 31.

⁵⁴ See ISO Circular, *supra* note 26.

⁵⁵ See Am. Prop. Cas. Ins. Ass’n, *supra* note 6 (“Pandemic outbreaks are uninsured because they are uninsurable.”).

⁵⁶ See Véronique Bruggeman et al., *Insurance Against Catastrophe: Government Stimulation of Insurance Markets for Catastrophic Events*, 23 DUKE

catastrophes, such as floods and earthquakes, are considered correlated risks, private insurers generally refuse to insure them.⁵⁷ Private insurers avoid insuring correlated risks because of insurers' alleged inability to accurately predict when, where, and how many losses associated with the peril will occur.⁵⁸ This uncertainty makes it difficult to establish actuarially sound premiums and spread the risk across a large enough pool of insureds with diverse risk profiles.⁵⁹

Pandemics are an extreme type of correlated risk because they happen on a world-wide basis. As such, insurers purportedly did not intend to cover them under business interruption policies and did not charge a premium for them.⁶⁰

ENVTL. L. & POL'Y F. 185, 187 (2012); J. David Cummins, *Should the Government Provide Insurance for Catastrophes?*, FED. RES. BANK ST. LOUIS REV., 337, 342–43 (July 2006); Adam F. Scales, *A Nation of Policyholders: Governmental and Market Failure in Flood Insurance*, 26 MISS. C. L. REV. 10–11 (2006).

⁵⁷ See, e.g., *Correlated Risks*, WORLD FINANCE (June 30, 2010), <http://www.worldfinance.com/home/risk-encyclopaedia/correlated-risks> [https://perma.cc/CQ3D-865A].

⁵⁸ *Id.*

⁵⁹ See Bruggeman et al., *supra* note 56, at 187.

⁶⁰ See Am. Prop. Cas. Ins. Ass'n, *supra* note 6; Greenberg, *supra* note 13. Whether a portion of the premium charged by insurers for the all risk policies that cover business interruption losses was intended to cover pandemic risks is, of course, a factual issue, but the premium charged for an all risk policy covers *all risks*, except risks that are expressly excluded. If a risk, such as pandemics, is not excluded, then it is covered regardless of whether insurers specifically considered the risk when creating the premium rate. Moreover, premium rates are not based upon an aggregation of premium amounts charged for each of the countless risks covered by all risk policies. Rather, they are based upon broad factors, such as the value of the property insured, the type of materials used in the construction of the property (e.g., brick versus lumber), the nature of the activities conducted in the property (e.g., welding versus office administration), the presence of risk reduction measures in or near the property (e.g., fire sprinklers and fire hydrants), and the location of the property (e.g., a high crime area versus a low crime area). See, e.g., *How to Get an Affordable Commercial Property Insurance Policy*, NATIONWIDE, <https://www.nationwide.com/lc/resources/small-business/articles/property-insurance-rates>; *How to Calculate Commercial Property Insurance Rates*, EK INSURANCE, <https://ekinsurance.com/commercial-property/how-to-calculate-commercial-property-insurance-rates.html>.

D. PUBLIC POLICY DICTATES INSURERS SHOULD NOT BE
REQUIRED TO PAY COVID-19 BUSINESS INTERRUPTION
LOSSES

According to the insurance industry, it would be bad public policy to require insurers to pay COVID-19 business interruption losses.⁶¹ The insurance industry makes two arguments to support its position.

One, because the policies unambiguously do not cover pandemic business interruption losses, courts would need to rewrite the policies or ignore the clear language in them in order to find coverage. This would violate the public policy that favors enforcing contracts as written. Public policy favors enforcing contracts due to freedom of choice and to ensure that parties' rights and obligations are predictable.⁶² Failing to enforce the policies as written would vitiate this public policy.

Two, requiring insurers to cover all COVID-19 business interruption losses would bankrupt the insurance industry.⁶³ Property-casualty insurers collect approximately \$6 billion a month in premiums. The American Property Casualty Insurance Association estimates that the monthly COVID-19 business interruption losses just for businesses with 100 or fewer employees is \$255 to \$431 billion per month, for which no premiums allegedly have been charged or collected.⁶⁴ The net worth of property-casualty insurers is only approximately \$800 billion.⁶⁵ Consequently, the insurance industry

⁶¹ See Am. Prop. Cas. Ins. Ass'n, *supra* note 6; Greenberg, *supra* note 13.

⁶² See, e.g., MICHAEL HUNTER SCHWARTZ & DENISE RIEBE, *CONTRACTS: A CONTEXT AND PRACTICE CASEBOOK 5* (2009) (“[P]redictability promotes our free market economy by providing certainty for those involved in exchanging goods and services. If a merchant knows the legal consequences of her negotiating efforts or of the language she selects for her contracts, she can act accordingly. This predictability encourages people to enter into contracts, secure in the knowledge that those contracts will be enforced.”); Eric A. Posner, *A Theory of Contract Law Under Conditions of Radical Judicial Error*, 94 NW. U.L. REV. 749, 751 (2000) (“Long-term contracts raise a straightforward, but seemingly intractable problem: in the long term events are so hard to predict, that parties will not be able to allocate future obligations and payments in a way that maximizes the value of their contract.”).

⁶³ See Greenberg, *supra* note 13.

⁶⁴ See Am. Prop. Cas. Ins. Ass'n, *supra* note 6; Greenberg, *supra* note 13.

⁶⁵ See Am. Prop. Cas. Ins. Ass'n, *supra* note 6.

simply cannot afford to cover the losses. Although the insurance industry should not be expected to provide financial security to people and businesses in the event of a pandemic, it is an important industry that should be preserved to help pay for less significant losses caused by other perils. Thus, it would be bad public policy to allow the insurance industry to become bankrupt, especially by forcing insurers to pay claims they contend are not covered by their policies.

V. THE CASE FOR POLICYHOLDERS

A. COVID-19 BUSINESS INTERRUPTION LOSSES WERE CAUSED BY “CONTAMINATION”

For policyholders with business interruption coverage for losses caused by “contamination,” COVID-19 business interruption losses should be covered. Some policies expressly cover business interruption losses caused by “contamination” that “results in an action by a . . . governmental authority that prohibits access to the described premises”⁶⁶ “Contamination” is defined as a “dangerous condition in your . . . premises.”⁶⁷ There should be little dispute that the government-ordered shutdowns of the policyholders’ businesses were the result of dangerous conditions at the policyholders’ places of business—potentially infected property, employees and customers—that created a risk of illness and death if business operations continued.

B. COVID-19 BUSINESS INTERRUPTION LOSSES WERE CAUSED BY “PHYSICAL LOSS OF OR DAMAGE TO PROPERTY”

Under the rules of policy interpretation, COVID-19 business interruption losses are covered because they were caused by government orders shutting down policyholders’ businesses due to “physical loss of or damage” to the policyholders’ property. The phrase “physical loss of or damage” is undefined, so it should be interpreted expansively as a layperson would understand the phrase.⁶⁸

⁶⁶ See Business Owners Policy, *supra* note 21, at 82.

⁶⁷ *Id.* at 31.

⁶⁸ See cases cited *supra* note 37.

It should also be interpreted in accordance with the reasonable expectations of policyholders.⁶⁹ Finally, any ambiguities in the meaning of the phrase should be construed against insurers and in favor of policyholders.⁷⁰

Applying these rules of policy interpretation to the policy language at issue, government orders shutting down businesses because of actual or threatened COVID-19 contamination either in the air or on surfaces of the policyholders' properties constitutes "physical loss of or damage to property." First, if there is actual contamination of a policyholder's business premises with COVID-19, then there should be little dispute that the property is unusable in that condition because there is a substantial risk of people getting sick and dying. Some of the government shutdown orders were expressly issued because COVID-19 contamination was "*causing property loss and damage.*"⁷¹

Second, even if the properties do not have tangible, physical damage, policyholders have still suffered physical loss or damage if they cannot use their properties because it would be unsafe to do so. Numerous courts have reached this conclusion in a variety of contexts.

For example, the Third Circuit has held the presence of e-coli bacteria in a well that supplied water to an insured house could constitute physical loss or damage to the house if it made the house useless or uninhabitable even though the well itself was not covered by the policy.⁷² Similarly, other courts have held the presence of

⁶⁹ See cases cited *supra* note 45.

⁷⁰ See sources cited *supra* notes 39–40.

⁷¹ See, e.g., Bill de Blasio, New York City Mayor, Emergency Exec. Order No. 101, 1 (Mar. 17, 2020) ("WHEREAS, this order is given because of the propensity of the virus to spread person-to-person and also because the virus is causing property loss and damage") (emphasis in original), <https://www1.nyc.gov/assets/home/downloads/pdf/executive-orders/2020/eo-101.pdf>.

⁷² *Motorists Mut. Ins. Co. v. Hardinger*, 131 F. App'x 823, 826–27 (3d Cir. 2005).

wildfire smoke,⁷³ ammonia,⁷⁴ or carbon dioxide⁷⁵ in insured properties rendered the properties unsafe and thus, business interruption coverage was triggered even though no tangible, physical injury to the properties had occurred.

The Colorado Supreme Court held gas beneath a church that rendered the property unsafe for occupancy constituted a “physical loss” of the church even though the church had not suffered a tangible, physical injury.⁷⁶ Another court held the loss in value of a house that became unsafe due to a nearby landslide was also covered even though the house itself was not physically damaged by the landslide.⁷⁷ Other courts have held a foul odor present in a property can constitute physical loss or damage—if the property needs to be remediated to remove the odor or becomes uninhabitable due to the odor—even though the insured property itself did not suffer a tangible, physical injury.⁷⁸

⁷³ See *Oregon Shakespeare Festival Ass'n v. Great Am. Ins. Co.*, No. 1:15-cv-01932-CL, 2016 WL 3267247, at *7-8 (D. Or. June 7, 2016) (holding that a theater event cancelled due to wildfire smoke was covered because “the infiltration of smoke into the interior of the theater is a covered ‘physical loss of or damage to property’”).

⁷⁴ See *Gregory Packaging, Inc. v. Travelers Prop. Cas. Co. of Am.*, No. 2:12-cv-04418, 2014 WL 6675934, at *6 (D.N.J. Nov. 25, 2014) (finding that a business interruption caused by “ammonia discharge inflicted ‘direct physical loss of or damage to’ . . . facility . . . because the ammonia physically rendered the facility unusable for a period of time.”).

⁷⁵ See *Matzner v. Seaco Ins. Co.*, No. 96-0498-B, 1998 WL 566658, at *3 (Mass. Super. Aug. 12, 1998) (deciding that loss of use of an apartment due to buildup of carbon monoxide in the building was covered because “the phrase ‘direct physical loss or damage’ is ambiguous [and can include more than] tangible damage to the structure of insured property.”).

⁷⁶ See *Western Fire Ins. Co. v. First Presbyterian Church*, 437 P.2d 52, 55 (Colo. 1968) (deciding that loss of use of church due to dangerous buildup of gas beneath church that rendered it uninhabitable constituted “direct physical loss”).

⁷⁷ See *Hughes v. Potomac Ins. Co. of D.C.*, 199 Cal. App. 2d 239, 249 (Cal. App. 1962) (finding that a house that had not been physically damaged by a landslide was covered because it was unsafe to use as a result of the loss of lateral support soil).

⁷⁸ See *Essex Ins. Co. v. BloomSouth Flooring Corp.*, 562 F.3d 399, 406 (1st Cir. 2009) (“we are persuaded both that odor can constitute physical injury to property . . . [and] that an unwanted odor permeated the building and resulted in a loss of use of the building”); *Mellin v. N. Sec. Ins. Co., Inc.*, 115 A.3d 799, 805 (N.H. 2015) (finding that the loss of use of a condo due to cat urine odor coming from a neighboring property was covered because “physical loss may include not

Courts have also held that government orders to evacuate properties due to a potential threat, such as a hurricane,⁷⁹ building collapse,⁸⁰ or a riot,⁸¹ can trigger business interruption coverage. Similarly, courts have held the inability to access insured property can trigger business interruption coverage even though the insured property itself did not suffer any tangible, physical damage.⁸² Finally, one court has held that “physical damage” occurred when a soft drink product had an off-taste and thus was unsalable even though the product was safe to drink.⁸³

only tangible changes to the insured property, but also changes that are perceived by the sense of smell and that exist in the absence of structural damage.”); *Farmers Ins. Co. of Oregon v. Trutanich*, 858 P.2d 1332, 1336 (Or. 1993) (finding that the cost to remove an odor in a house from a meth lab constituted “a direct physical loss.”).

⁷⁹ See *Assurance Co. of Am. v. BBB Serv. Co.*, 593 S.E.2d 7, 9 (Ga. App. 2003) (holding Wendy’s restaurants could recover business interruption coverage when ordered to shut down and evacuate due to Hurricane Floyd even though the hurricane did not ultimately cause tangible physical damage to the restaurants); *Houston Cas. Co. v. Lexington Ins. Co.*, No. CIV.A. H-05-1804, 2006 WL 7348102, at *6 (S.D. Tex. June 15, 2006), (holding business interruption due to government-ordered evacuation in anticipation of Hurricane Floyd was covered even though insured property did not suffer a tangible physical injury), *report and recommendation adopted sub nom.* No. H-05-1804, 2006 WL 8446160 (S.D. Tex. July 11, 2006).

⁸⁰ See *Hampton Foods, Inc. v. Aetna Cas. & Sur. Co.*, 787 F.2d 349, 352 (8th Cir. 1986) (deciding that business interruption loss due to government-ordered evacuation of a building due to the risk of collapse was a covered business interruption loss if the policyholder could prove its lost profits even though none of the policyholder’s property had a tangible physical injury).

⁸¹ See *Allen Park Theatre Co. v. Michigan Millers Mut. Ins. Co.*, 210 N.W.2d 402, 403 (Mich. App. 1973) (holding loss of use of theaters due to a government shutdown order in response to riots was covered even though there was no tangible physical damage to the theaters); *Sloan v. Phoenix of Hartford Ins. Co.*, 207 N.W.2d 434, 436-37 (Mich. App. 1973) (same); *Southlanes Bowl, Inc. v. Lumbermen’s Mut. Ins. Co.*, 208 N.W.2d 569, 570 (Mich. App. 1973) (holding loss of use of bowling alleys, restaurants, taverns, snack bars, cocktail lounges and motels due to a government shutdown order in response to riots was covered even though there was no tangible physical damage to the properties).

⁸² See *Fountain Powerboat Indus., Inc. v. Reliance Ins. Co.*, 119 F. Supp. 2d 552, 557 (E.D.N.C. 2000) (“Loss sustained due to the inability to access the [insured] facility and resulting from a hurricane is a covered event with no physical damage to the property required.”).

⁸³ See *Pepsico, Inc. v. Winterthur Int’l Am. Ins. Co.*, 24 A.D.3d 743, 744 (N.Y. App. 2005) (off-tasting product that could not be sold was a covered loss under all risk policy even though the product was not physically injured).

Thus, in the COVID-19 context, because the threat of serious illness or death at the policyholders' business premises was so high, governments shuttered businesses. Following the reasoning of the cases discussed above, the policyholders suffered "physical loss of or damage to property" even if COVID-19 was not proven to be present in their businesses. The risk of people getting sick and dying from being in the policyholders' business premises was so high that the business premises were rendered uninhabitable and unusable. That is enough to trigger coverage.

Third, policyholders reasonably expect coverage under business interruption policies when their business operations are interrupted due to catastrophic events beyond their control. Indeed, that is the very reason businesses purchase business interruption insurance. Imagine business owners' surprise when they learned from their insurers that, after paying premiums for business interruption coverage year after year, their business interruption loss claims were denied, and they likely would need to file for bankruptcy if the government does not bail them out. Because policyholders typically do not get to see the policy language before they buy business interruption insurance, their expectations regarding the scope of coverage is not based on the policy language itself.⁸⁴ Instead, it is based on the type of insurance being purchased (e.g., business interruption insurance) and the nature of their businesses. People buy business interruption insurance to cover their lost revenues when their business operations are interrupted for reasons beyond their control. Consequently, when their businesses were ordered to shut down due to COVID-19, the business owners reasonably expected their business interruption insurance would cover the losses.

Fourth, the presence of the virus exclusion in some policies is proof that policies that do not contain the exclusion cover COVID-19 losses. If all risk policies did not cover business interruption losses caused by viruses because viruses cannot cause "physical loss or damage to property," then the virus exclusion would be unnecessary. There is no need to exclude losses caused by perils which are not covered under the insuring agreement language of a policy in this first instance. Thus, the rule of policy interpretation which dictates that policies should be construed as a whole, reconciling all the policy

⁸⁴ See *supra* note 46 and accompanying text.

provisions, dictates that business interruption losses caused by viruses can constitute “physical loss of or damage.” Otherwise, the virus exclusion would be unnecessary surplusage with no purpose.

Indeed, in other contexts, courts have reached the same conclusion. For example, in *United States Fire Insurance Co. v. J.S.U.B, Inc.*,⁸⁵ the Supreme Court of Florida had to consider whether construction defects could constitute covered occurrences under the basic insuring agreement language in commercial general liability policies. The policies at issue also contained “business risk” exclusions that purported to exclude coverage for defective work done by the policyholder. In finding construction defects could be covered occurrences, the court reasoned that the presence of the business risk exclusions in the policies proved construction defects could be covered because the exclusions would be unnecessary surplusage otherwise:

If . . . [construction defects] are never CGL “occurrences” for purposes of the initial coverage grant, then the business risk exclusions are entirely unnecessary. . . . Why would the insurance industry exclude damage to the insured’s own work or product if the damage could never be considered to have arisen from a covered occurrence in the first place?⁸⁶

Thus, the very presence of the virus exclusion in some policies proves that coverage for business interruption losses caused by viruses is provided by policies that do not contain the exclusion.

⁸⁵ 979 So. 2d 871 (Fla. 2007).

⁸⁶ *Id.* at 886–87 (quoting *Am. Family Mut. Ins. Co. v. Am. Girl, Inc.*, 673 N.W.2d 65, 78 (Wis. 2004)).

C. THE POLLUTION AND VIRUS EXCLUSIONS DO NOT APPLY

1. Pollution Exclusion

The pollution exclusion does not apply to COVID-19 business interruption losses because the exclusion is so broadly worded that it could be interpreted to swallow almost all the coverage provided by the policy. Consequently, because exclusions are considered ambiguous if they can be interpreted in a way that swallows the basic coverage provided by the policy, the pollution exclusion is not applicable to COVID-19 claims.⁸⁷ “Pollutant” is defined to include “any solid, liquid, gaseous or thermal irritant or contaminant”⁸⁸ All materials are either a solid, liquid or gas. And, depending upon its application, almost everything can be an irritant or contaminant. Thus, if applied literally the way insurers advocate, then almost no coverage is provided under property policies due to the presence of the pollution exclusion. Such a result is not permitted under insurance law.

As one court has noted, the language in the pollution exclusion is so broad that nearly everything that causes a loss could be excluded: “the terms ‘irritant’ and ‘contaminant’ are virtually boundless, for ‘there is no substance or chemical in existence that would not irritate or damage some person or property.’”⁸⁹ Further, as another court stated, the literal application of the exclusion would lead to absurd results:

Applying these definitions in a “purely literal interpretation . . . surely stretch[es] the intended meaning of the policy exclusion,” and could lead to absurd results “contrary to any reasonable policyholder's expectations.” For example, “[t]aken at face value, the policy's definition of a pollutant is broad enough that it could be read to include items such as soap, shampoo, rubbing alcohol, and bleach insofar as

⁸⁷ See cases cited *supra* note 34.

⁸⁸ Business Owners Policy, *supra* note 21, at 94.

⁸⁹ *Nautilus Ins. Co. v. Jabar*, 188 F.3d 27, 30 (1st Cir. 1999) (quoting *Pipefitters Welfare Educational Fund v. Westchester Fire Ins. Co.*, 976 F.2d 1037, 1043 (7th Cir.1992)).

these items are capable of reasonably being classified as contaminants or irritants.”⁹⁰

Consequently, because the coverage provided by the policy cannot be illusory,⁹¹ the exclusion must be ambiguous and, thus, it should be interpreted narrowly in favor of the policyholder.

Numerous courts have reached the same conclusion when interpreting similarly worded pollution exclusions.⁹² In doing so, many of them also have noted that the pollution exclusion was intended to apply only to environmental contamination caused by industrial waste disposal activities, so they declined to apply the exclusion in other contexts.⁹³

⁹⁰ *Mellin v. N. Sec. Ins. Co., Inc.*, 115 A.3d 799, 806 (N.H. 2015) (quoting *Nautilus Ins. Co. v. Jabar*, 188 F.3d 27, 30 (1st Cir. 1999), and *Century Sur. Co. v. Casino W., Inc.*, 329 P.3d 614, 617 (Nev. 2014)).

⁹¹ See cases cited *supra* note 34.

⁹² See, e.g., *MacKinnon v. Truck Ins. Exch.*, 73 P.3d 1205, 1216 (Cal. 2003) (“[Because the insurer’s] broad interpretation of the pollution exclusion leads to absurd results and ignores the familiar connotations of the words used in the exclusion, we do not believe it is the interpretation that the ordinary layperson would adopt.”); *Keggi v. Northbrook Prop. & Cas. Ins. Co.*, 13 P.3d 785, 790 (Ariz. Ct. App. 2000) (concluding pollution exclusion was at best ambiguous regarding whether bacteria was a “contaminant” under pollution exclusion). See also *Westport Ins. Corp. v. VN Hotel Grp., LLC*, 761 F. Supp. 2d 1337, 1344 (M.D. Fla. 2010) (“*Legionella* bacteria are not ‘pollutants,’ and the Pollution Exclusion is inapplicable.”), *aff’d*, 513 F. App’x 927 (11th Cir. 2013); *Johnson v. Clarendon Nat. Ins. Co.*, No. G039659, 2009 WL 252619, at *13 (Cal. Ct. App. Feb. 4, 2009) (discussing that mold is not a “pollutant” under pollution exclusion).

⁹³ See, e.g., *MacKinnon*, 73 P. 3d at 1216 (quoting *Motorists Mut. Ins. Co. v. RSJ, Inc.*, 926 S.W.2d 679, 681 (Ky. Ct. App. 1996) (“The drafters’ utilization of environmental law terms of art (‘discharge,’ ‘dispersal,’ ... ‘release,’ or ‘escape’ of pollutants) reflects the exclusion’s historical objective—avoidance of liability for environmental catastrophes related to intentional industrial pollution.”); *Stoney Run Co. v. Prudential-LMI Commercial Ins. Co.*, 47 F.3d 34, 39 (2d Cir. 1995) (noting that the pollution exclusion did not apply to carbon monoxide in a building that killed some occupants because the exclusion was only intended to apply to industrial environmental pollution); *Island Assoc., Inc. v. ERIC Group, Inc.*, 894 F. Supp. 200, 203 (W.D. Pa. 1995) (“[A]n insurer that wishes to exclude ‘everyday activities gone slightly awry’ from coverage cannot rely on a broad reading of a pollution exclusion clause.”); *Thompson v. Temple*, 580 So.2d 1133, 1134 (La. App. 4 Cir. 1991) (“Pollution exclusion clauses are intended to exclude coverage for active industrial polluters, when businesses knowingly emitted pollutants over extended

2. Virus Exclusion

For some COVID-19 business interruption losses, the virus exclusion does not apply because the policies at issue simply do not contain the exclusion. For claims under policies that do contain a virus exclusion, policyholders may argue the exclusion should not apply because insurers obtained regulatory approval of the exclusion by misrepresenting the coverage provided under existing all risk property policies in the absence of the exclusion. Specifically, when seeking regulatory approval of the exclusion, ISO represented that “[a]lthough building and personal property arguably could become contaminated (often temporarily) by . . . viruses and bacteria, . . . property policies have not been a source of recovery for losses involving contamination by disease-causing agents”⁹⁴

Policyholders may argue ISO’s statement in this regard is not accurate. By 2006 when the virus exclusion was introduced, numerous courts across the country had held that losses involving contamination by “disease-causing agents” could constitute covered physical loss or damage if the contamination “eliminated or destroyed” the function of the property or rendered the property “useless or uninhabitable.”⁹⁵ If courts were to determine that regulatory approval of the virus exclusion was obtained based upon a misrepresentation by the insurance industry that property policies had not been a source of

periods of time.”). *See also* OSTRAGER & NEWMAN, *supra* note 44, at 1699–1703 (discussing cases where courts refused to apply the pollution exclusion to claims that were not traditional environmental claims).

⁹⁴ ISO Circular, *supra* note 26, at 6.

⁹⁵ *Motorists Mut. Ins. Co. v. Hardinger*, 131 F. App’x 823, 826–27 (3d Cir. 2005) (noting that the presence of e-coli in a well could constitute physical loss if it rendered the home useless or uninhabitable); *Cooper v. Travelers Indem. Co. of Illinois*, No. C-01-2400-VRW, 2002 WL 32775680, at *5 (N.D. Cal. Nov. 4, 2002) (“[T]he closure of the tavern on February 17, 1999 [due to e-coli contamination of well] was a necessary suspension of [policyholder’s] operation of the tavern that resulted from direct physical damage to the property at the insured premises.”); *Port Auth. of New York & New Jersey v. Affiliated FM Ins. Co.*, 311 F.3d 226, 236 (3d Cir. 2002) (“[T]he policies cover ‘physical loss,’ as well as damage. When the presence of large quantities of asbestos in the air of a building is such as to make the structure uninhabitable and unusable, then there has been a distinct loss to its owner.”); *Shelter Mut. Ins. Co. v. Maples*, 309 F.3d 1068, 1071 (8th Cir. 2002) (noting that an uninhabitable house that had to be demolished due to presence of mold could be a covered loss).

recovery for claims based upon “disease-causing agents” that rendered a property unusable, then the exclusion could be voided.⁹⁶

Courts declining to enforce an exclusion based upon insurers’ misrepresentations during the regulatory approval process regarding an exclusion’s impact on the existing coverage provided by policy forms has some precedent. For example, during the extensive litigation regarding the meaning of the “sudden and accidental” or “qualified” pollution exclusion, the supreme courts in several states refused to enforce the exclusion because they concluded the insurance industry had made misrepresentations during the regulatory approval process for the exclusion.⁹⁷ Specifically, the courts found that insurers misrepresented the intended impact the exclusion would have on coverage for pollution claims under commercial general liability policies.⁹⁸ If a similar conclusion were reached regarding the virus exclusion, then some courts might refuse to enforce the exclusion.

D. PANDEMIC LOSSES ARE NOT UNINSURABLE

The insurance industry’s contention that “pandemic outbreaks are uninsured because they are uninsurable” is belied by the fact some insurers currently sell policies that specifically cover pandemic losses.⁹⁹ For example, the organizers of the Wimbledon tennis championship reportedly have been paying almost \$2 million a year

⁹⁶ See RESTATEMENT (SECOND) OF CONTRACTS § 164(1) (AM. LAW INST. 1981) (“If a party’s manifestation of assent is induced by either a fraudulent or a material misrepresentation by the other party upon which the recipient is justified in relying, the contract is voidable by the recipient.”).

⁹⁷ See, e.g., *Sunbeam Corp. v. Liberty Mut. Ins. Co.*, 781 A.2d 1189, 1192–93 (Pa. 2001) (“Thus, having represented to the insurance department, a regulatory agency, that the new language in the 1970 policies—‘sudden and accidental’—did not involve a significant decrease in coverage from the prior language, the insurance industry will not be heard to assert the opposite position when claims are made by the insured policyholders.”); *Morton Int’l, Inc. v. General Accident Ins. Co. of Am.*, 629 A.2d 831, 875 (N.J. 1993) (applying regulatory estoppel to prevent the insurers from taking a position regarding the meaning of “sudden and accidental” that was inconsistent with their representations to state insurance commissioners); *Joy Techs., Inc. v. Liberty Mut. Ins. Co.*, 421 S.E.2d 493, 500 (W. Va. 1992) (applying same regulatory estoppel).

⁹⁸ See cases cited *supra* note 97.

⁹⁹ See Am. Prop. Cas. Ins. Ass’n, *supra* note 6.

for insurance to cover the cancellation of the tennis event due to a pandemic since the SARS outbreak in 2003.¹⁰⁰ Wimbledon reportedly will receive a \$141 million insurance payout due to the cancellation of the event this year as a result of COVID-19.¹⁰¹ The British Open golf tournament was also cancelled due to COVID-19, and it similarly is covered by insurance.¹⁰²

In addition, since 2018, Marsh & McLennan has been selling pandemic insurance that it calls PathogenRX.¹⁰³ In marketing the product, Marsh & McLennan's website states:

Over the last few decades, diseases such as Zika, MERS, SARS, and now COVID-19 have had dramatic financial implications for myriad industries. . . .

. . . .

To meet the growing concerns and risks surrounding outbreaks, epidemics, and pandemics, in 2018 Marsh partnered with Munich Re and Metabiota to create PathogenRX, an integrated pandemic risk quantification and insurance solution that provides financial protection to businesses and their global operations. Using straightforward triggers such as mortality or infections in a defined area, the policy provides indemnity protection that can make an insured whole in the event of a demonstrable loss.¹⁰⁴

Similarly, beginning in 2014, NAS Insurance Services Inc., in conjunction with Ark Specialty Program of Lloyd's of London, began selling business interruption insurance for government-ordered

¹⁰⁰ *Wimbledon Shows How Pandemic Insurance Could Become Vital for Sports, Other Events*, INS. J. (April 13, 2020), <https://www.insurancejournal.com/news/international/2020/04/13/564598.htm>.

¹⁰¹ *Id.*

¹⁰² *See, e.g.*, Cindy Boren & Matt Bonesteel, *British Open Canceled For The First Time Since World War II*, Wash. Post (April 6, 2020), <https://www.washingtonpost.com/sports/2020/04/06/british-open-canceled-first-time-since-world-war-ii/>.

¹⁰³ *See PathogenRX: An Innovative Solution for Pandemic and Epidemic Risks*, MARSH, <https://www.marsh.com/us/campaigns/pathogenrx.html> (last visited June 17, 2020).

¹⁰⁴ *Id.*

shutdowns due the Ebola virus.¹⁰⁵ Thus, the proposition that insurers do not and cannot insure pandemic losses because such losses are uninsurable is refuted by the fact some insurers are selling insurance specifically intended to cover pandemic losses.

E. PUBLIC POLICY DICTATES COVID-19 BUSINESS
INTERRUPTION LOSSES SHOULD BE COVERED

There are also several public policies that support a finding of coverage for COVID-19 business interruption losses. First, insurance serves a quasi-public function as a social safety net by transferring risks from individuals to a larger group or community.¹⁰⁶ In the absence of insurance, most people and their businesses would be financially devastated if they: (1) were the victim of a catastrophe, (2) became unemployed for a lengthy period of time, or (3) were stricken with cancer or some other life-threatening disease. Public policy supports the transfer of such risks from the individual to a larger group. If there is no actual transfer of the risk of business interruption losses from individuals to insurers, however, then that public policy would be frustrated.

Second, compensating injured parties is another overriding societal concern. Public policy strongly favors compensating injured parties through insurance payments.¹⁰⁷ Indeed, the public policy

¹⁰⁵ See Stephanie Goldberg, *NAS Offers Coverage for Ebola-Related Business Closures*, BUS. INS. (Oct. 17, 2014 12:00 AM), <https://www.businessinsurance.com/Essay/20141017/NEWS06/141019880/NAS-offers-coverage-for-Ebola-related-business-closures#>.

¹⁰⁶ See, e.g., Abraham, *supra* note 49, at 668; Christopher C. French, *The Role of the Profit Imperative in Risk Management*, 17 U. PA. J. BUS. L. 1081, 1092–93 (2015); Stempel, *supra* note 49, at 1497.

¹⁰⁷ See, e.g., *St. Paul Fire & Marine Ins. Co. v. Jacobson*, 826 F. Supp. 155, 163–64 (E.D. Va. 1993) (discussing that the public policy of compensating innocent victims outweighed public policy of not permitting coverage for intentional action); *St. Paul Fire & Marine Ins. Co. v. Asbury*, 720 P.2d 540, 542 (Ariz. Ct. App. 1986) (noting that the public policy favors compensating injured persons); *Hudson v. State Farm Mut. Ins. Co.*, 569 A.2d 1168, 1170–71 (Del. 1990) (refusing to void coverage for intentional wrongdoing under an automobile policy because of the competing public policy behind the state motor vehicle financial responsibility law); *Grinnell Mut. Reinsurance Co. v. Jungling*, 654 N.W.2d 530, 539, 541 (Iowa 2002) (“Compensating [the policyholder’s] innocent victims . . . outweighs the concern that [the policyholder] will unjustly benefit from coverage.”).

favoring the compensation of injured parties is the primary reason automobile insurance is mandatory.¹⁰⁸ If the businesses injured by COVID-19 will not be compensated for their losses by business interruption insurance, then the public policy of compensating injured parties through insurance would be frustrated.

Third, public policy favors the enforcement of legal commitments. Insurers should honor their commitments to their policyholders when they accept premiums year after year in exchange for paying losses if and when they occur. As one court has stated, “[o]ne [public] policy is that an insurance company which accepts a premium for covering all liability for damages should honor its obligation.”¹⁰⁹ That means insurers, not policyholders, should bear the financial burden of losses when losses occur.

Fourth, public policy favors preventing damages and injuries from occurring. Indeed, the prevention and deterrence of injurious conduct are some of the principal public policies that underly the criminal justice and tort systems.¹¹⁰ Injuries should be prevented if possible. That, in fact, is the very reason governors issued lock-down orders related to COVID-19—the prevention of unnecessary deaths of people due to a rapid and overwhelming spread of the virus if social distancing were not imposed. For similar reasons, numerous courts

¹⁰⁸ See, e.g., JERRY & RICHMOND, *supra* note 32, at 924–25 (stating that the obvious purpose of mandatory auto insurance is to provide victims of automobile accidents with access to funds to cover their losses); ABRAHAM & SCHWARCZ, *supra* note 50, at 656–57, 706 (discussing state legislatures’ and courts’ refusal to enforce “intentional act” exclusions, “family” exclusions, and “physical contact” requirements in auto policies due to the public policy favoring the compensation of auto accident victims).

¹⁰⁹ Creech v. Aetna Cas. & Sur. Co., 516 So.2d 1168, 1174 (La. Ct. App. 1987).

¹¹⁰ See, e.g., DAN B. DOBBS, PAUL T. HAYDEN & ELLEN M. BUBLICK, *THE LAW OF TORTS* § 14 (2d ed. 2019) (“Courts and writers almost always recognize that another aim of tort law is to deter certain kinds of conduct by imposing liability when that conduct causes harm.”); *Travelers Indem. Co. v. PCR, Inc.*, 889 So.2d 779, 795 (Fla. 2004) (“[A]n equally basic aim of imposing liability for compensatory damages resulting from negligent conduct is to deter such conduct”); *Villaman v. Schee*, Nos. 92-15490, 92-15562, 1994 WL 6661, at *4 (9th Cir. Jan. 10, 1994) (“tort law is designed in part to deter negligent conduct”); Valerie Wright, *Deterrence in Criminal Justice: Evaluating Certainty vs. Severity of Punishment*, THE SENTENCING PROJECT, 1 (Nov. 2010) (“[T]he criminal justice system as a whole provides some deterrent effect”), <https://web.archive.org/web/20171130140441/http://sentencingproject.org/wp-content/uploads/2016/01/Deterrence-in-Criminal-Justice.pdf>.

have held the costs incurred to prevent damage are covered under property policies in some situations.¹¹¹ If policies did not cover the costs associated with preventing imminent injuries, then policyholders would be incentivized to simply wait for the injuries to occur rather than prevent them from occurring in the first place. Public policy favors pro-action to prevent injuries, not a reaction after injuries occur.

Insurers themselves recognize the wisdom of preventing damage and injuries before they occur. Consequently, property policies contain “sue and labor” clauses pursuant to which insurers agree to pay the costs policyholders incur to minimize a loss once the loss begins to occur.¹¹² In the business interruption context, this goal is advanced through “extra expense” coverage, which serves the same purpose as “sue and labor” clauses by reimbursing the policyholder for the costs it incurs while attempting to minimize the business interruption loss and to return the business to full operations as soon as possible.¹¹³

Thus, in the context of COVID-19 business interruption losses, it should not matter whether a policyholder’s business was shut down because it was demonstrably contaminated with the virus. As a matter of public policy, business interruption losses caused by prophylactic government orders to shut down operations also should be covered.

¹¹¹ See, e.g., *Assurance Co. of Am. v. Wall & Assocs. LLC of Olympia*, 379 F.3d 557, 559, 563 (9th Cir. 2004) (property policy that covered “direct physical loss involving collapse” was construed to provide “coverage not only for actual collapse but also for imminent collapse”); *401 Fourth St., Inc. v. Inv’rs Ins. Grp.*, 879 A.2d 166, 168, 174 (Pa. 2005) (property policy that covered “direct physical loss involving collapse” was construed to include coverage for “imminent falling down of a building or part thereof.”); *Doheny W. Homeowners’ Ass’n v. Am. Guarantee & Liab. Ins. Co.*, 70 Cal. Rptr.2d 260, 261, 264–65 (property policy that covered “direct physical loss involving collapse” was construed to cover “imminent or actual collapse” in order to avoid “the absurdity of requiring an insured to wait for a seriously damaged building to fall”).

¹¹² See, e.g., *OSTRAGER & NEWMAN*, *supra* note 44, at 1546 (“It is now generally recognized that the purpose of a sue and labor clause is to provide an incentive for an insured to act to mitigate any loss or damage to the insured subject matter.”); *Albany Ins. Co. v. Anh Thi Kieu*, 927 F.2d 882, 894 (5th Cir. 1991) (“Sue and labor expenses are sums spent by the assured in an effort to mitigate damages and loss.”); *Armada Supply Inc. v. Wright*, 858 F.2d 842, 853 (2d Cir. 1988) (“Sue and labor expenses are those reasonable costs borne by the assured to mitigate the loss and thus reduce the amount to be paid by the underwriter.”).

¹¹³ See *Business Owners Policy*, *supra* note 21, at 69–70.

Otherwise, policyholders would be incentivized to stay open and wait for their businesses to test positive for the virus before shutting down. Such an approach would lead to more people getting sick and dying. It also would lead to potential liabilities for the businesses that could have prevented the spread of the disease by closing instead of staying open while waiting for a positive COVID-19 test result in order to recover under their business interruption policies.

VI. CONCLUSION

Regardless of the actual wording of the policy language, insurers will contend that the language unambiguously does not cover COVID-19 business interruption losses—either because the losses are not due to “physical loss of or damage” to property or because of the presence of the virus and pollution exclusions. They also will contend that pandemics are uninsurable losses that they never intended to cover and for which they did not collect premiums. Ultimately, they will assert that if they nonetheless are required to cover such claims, then the entire property insurance industry will be bankrupted.

Policyholders, on the other hand, will contend COVID-19 business interruption losses unquestionably are covered if their policies provide “contamination” coverage and do not contain a virus exclusion. Moreover, COVID-19 business interruption losses are even covered by policies that do not include “contamination” coverage. This is because, under the rules of policy interpretation, the undefined phrase “physical loss of or damage” has been, and should be, construed to include coverage for business interruption losses caused by unsafe property conditions or government-ordered shutdowns. As such, policyholders do not need to prove there was tangible, physical damage to property caused by COVID-19 in order to recover.

Further, policyholders will argue that no exclusions in the policies apply. First, they will argue the pollution exclusion was intended to apply only to environmental pollution claims and its application in other contexts would allow the exclusion to swallow the policy’s basic coverage. Then, they will argue the virus exclusion should not be enforced because the insurance industry made misrepresentations to regulators in order to get the exclusion approved.

Policyholders will also argue that public policy favors finding coverage for COVID-19 losses in order to fulfill the purposes of insurance. Insurance is intended to serve as a social safety net to cover financially devastating losses and compensate injured parties.

Ultimately, whether COVID-19 business interruption losses are covered by insurance will be dictated by the policy language at issue and the applicable state law, which can vary considerably from state to state. Consequently, which courts decide the cases could be the most important factor in determining whether the insurance industry or their customers will be bankrupted by COVID-19 if a government bailout is not forthcoming.