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WHEN THE MUSIC STOPS:

Business Interruption Coverage
and the Ongoing Game of
Financial Musical Chairs

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In the classic children’s game of musical chairs, players circle an ever-decreasing number of chairs, waiting for the music to stop before rushing to grab a seat. Like the music in the game, money flows throughout our economy, trickling up from individual paychecks into the coffers of businesses, who in turn transfer that money among each other, and back out to the individual paychecks, which are then used by consumers to buy products and keep the cycle going. Everything works -- as long as the money, like the music, keeps flowing.

But what happens when the flow of money suddenly stops and one of the players is left without a seat? What happens when businesses are not permitted to open, employees aren’t getting paid, and, for the few “essential” businesses that do remain open, they have no customers, because quarantined consumers have no money with which to buy goods and services? To avoid the deadly COVID-19 virus currently infecting people around the world, mass business closures have been ordered on an unprecedented scale. Florida businesses currently are in the midst of this extraordinary work stoppage, involving potentially billions of

dollars in lost revenue, with no definite end in sight. The music has stopped and each player is scrambling for a chair.

Of course, there are many groups who were able to grab a chair when the cash stopped flowing. Under the CARES Act, some families will be receiving direct payments in an amount of \$3,400 for a typical family of four.¹ The airline industry will be receiving billions in economic relief,² and the Federal Reserve is now purchasing corporate debt at an increasing rate.³ But there are many others who have been left without a chair, including thousands of small businesses throughout Florida. Many are still closed by government order, and federal and state relief meant to ease the pain has been slow in coming.

¹ Remarks by President Trump at Signing of H.R. 748, The CARES Act, THE WHITE HOUSE (Mar. 27, 2020), <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-signing-h-r-748-cares-act/>

² 2020 CARES Act Grants, FEDERAL AVIATION ADMIN., https://www.faa.gov/airports/cares_act/ (last modified April 13, 2020, 11:13:31 AM)

³ Federal Reserve Takes Additional Actions to Provide up to \$2.3 trillion in Loans to Support the Economy, BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM (Apr. 9, 2020), <https://www.federalreserve.gov/newsevents/press-releases/monetary20200409a.htm>

As these businesses look around for sources of cash, one obvious target is their insurance company. Business interruption coverage has long been a source of money for businesses incurring lost revenue and other expenses as a result of an unexpected calamity. But, as evidenced by their policy wording, closures due to pandemic are risks that many of these insurers did not plan to cover.

There are powerful lobbies who would like nothing more than for insurers with business interruption policies to foot the bill for this lockdown. Various state legislatures have pending bills (of dubious constitutionality) that would require business interruption insurers to retroactively provide coverage,⁴ and we have concerns that other states will soon introduce similar bills. So far, no such bills have been introduced in Florida, but lawsuits already have been filed seeking business interruption coverage, and the plaintiff's bar is actively recruiting cases.

It is certainly fair (and probably necessary) to ask whether it is good public policy - or even legal - to force insurers to provide business interruption coverage in this situation, when the vast majority of these insurers neither planned to cover this risk nor charged premiums in anticipation of this risk. The potential exposure cannot be underestimated - to the business insurance industry, the expected value of business interruption claims are akin to a Category 5 hurricane hitting the entire United States. Simply stated, the insurance industry cannot plan for, reserve,

or sustain such devastating losses, and shifting the risk of such extensive monetary losses onto property and business insurance carries its own significant and unpredictable consequences, which could very well include inability to pay claims for which coverage was expected to be provided.⁵

In this paper we will explore business interruption coverage, the various forms in which this coverage has been sold, exclusions that have been asserted, and early lawsuits that have already been filed. We will also discuss the various arguments for and against coverage. Finally, we will discuss how litigation over this coverage may play out in Florida.

Business interruption coverage can present complex factual and legal issues, and it is our goal to help our readers understand how the coverage works, with the understanding that most extant business interruption policies were not written with an eye towards footing the bill when the global flow of money suddenly stops. We are expressly not providing legal advice in this paper, because each case will present unique factors, circumstances, and policy wording, all of which must be evaluated before action is taken on a particular claim. But, we do believe that it is generally true that these policies do NOT provide coverage, and, further, that it would be bad policy and bad law to force the property and business insurance industries to finance the historical financial repercussions of Covid-19.

⁴ These states include New York, Massachusetts, and New Jersey. Claire Wilkinson, *N.Y. Introduces Bill on Pandemic-related Business Interruption Claims*, BUSINESS INSURANCE (Mar. 30, 2020), <https://www.businessinsurance.com/article/00010101/NEWS06/912333772/NY-introduces-bill-on-pandemic-related-business-interruption-claims>. Pennsylvania and Louisiana have also introduced similar bills. Claire Wilkinson, *Pennsylvania bill would force COVID-19 business interruption coverage*, BUSINESS INSURANCE (Apr. 7, 2020), <https://www.businessinsurance.com/article/20200407/NEWS06/912333911/Pennsylvania-bill-would-force-COVID-19-business-interruption-coverage-coronaviru>

⁵ David A. Sampson, president and CEO of the American Property Casualty Insurance Association commented that requiring insurers to cover the business continuity losses related to COVID-19 would “immediately subject insurers to claim payment liability that threatens solvency and the ability to make good on the actual promises made in existing insurance policies.” Jessica Hanna, *APCIA: Insurance Perspective on COVID-19*, AMERICAN PROPERTY CASUALTY INS. ASS’N (March 26, 2020), <http://www.pciaa.net/pciwebsite/cms/content/viewpage?sitePageId=59762>.

The authors of this paper (Frank Zacherl, Miranda Lundeen Soto, and Oliver Sepulveda) have collectively almost 60 years of litigation experience, with well over 200 significant trials under our collective belts. Mr. Zacherl is a seasoned trial lawyer, and also serves the chair of our firm’s Class Action Practice Group. He has successfully defended hundreds of class actions for insurers over the last 28 years. Ms. Lundeen Soto is a board-certified Civil Trial lawyer, and has defended hundreds of large insurance claims. We have significant experience advising and representing insurers on a wide variety of issues, including claims handling, complex coverage issues, and litigation management.

Our firm (Shutts & Bowen) is a statewide Florida firm with extensive experience in complex insurance litigation, and we have dozens of seasoned insurance litigators who stand ready to advise and defend on this important issue.

I. What is Business Interruption Coverage?

Business Interruption coverage (“BI Coverage”) protects an insured business from a loss in business income due to the interruption of its normal operations caused by some damage to its property.⁶ BI Coverage is often sold with property damage insurance and is typically limited to interruptions that are caused by a peril that otherwise covered by the policy.⁷ For example, a restaurant that is damaged by a fire may recover the property damage loss it incurred as a result of that fire. If the restaurant also carried business interruption coverage, it may recover the income that it would have made while it was closed due to the property damage.⁸

Typically, business interruption policies provide coverage for losses incurred during the period that the business is actually shut down, also known as the “period of restoration.” In order to recover under their policy, insureds must have an actual suspension of their operation and not merely a drop in business.⁹ Further, the “period of restoration” for which insureds may recover is typically defined as the length of time needed to repair the damage that caused the interruption.¹⁰

⁶ 11A Couch on Ins. § 167:1.

⁷ 31 Fla. Jur. 2d Insurance § 2438 (“The object of business interruption insurance is to insure against loss from the interruption of the business as a whole, whatever part of it may be conducted in or with the property that suffers from the peril insured against.”).

⁸ *Ramada Inn Ramogreen, Inc. v. Travelers Indem. Co. of Am.*, 835 F.2d 812, 813 (11th Cir. 1988) (insurer paid loss of earnings to an insured restaurant when the building was closed due to a fire).

⁹ See *Hotel Properties, Ltd. v. Heritage Ins. Co. of Am.*, 456 So. 2d 1249, 1250 (Fla. 3d DCA 1984); see also *Ramada Inn*, 835 F. 2d 812; *Mama Jo’s, Inc. v. Sparta Ins. Co.*, 2018 WL 3412974, at *10 (S.D. Fla. June 11, 2018) (holding that there was no coverage because “[t]he restaurant remained open every day, customers were always able to access the restaurant, and suppliers were always able to access the restaurant”).

¹⁰ See *U.S. Capital/Fashion Mall, LLC v. Am. Zurich Ins. Co.*, 10-62010-CIV, 2011 WL 197364, at *1 (S.D. Fla. Jan. 20, 2011); see also *Dictiomatic, Inc. v. U.S. Fid. & Guar. Co.*, 958 F. Supp. 594, 602 (S.D. Fla. 1997) (“Under the terms of the policy, Dictiomatic is entitled to recover its actual loss of business income during the period of time necessary to restore the business operation.”).



Insureds who meet the criteria for coverage under their business interruption policies can expect to recover the loss in business income that would have been earned had the business interruption not occurred.¹¹ In other words, BI Coverage provides what the business would have provided for itself had its operation not been suspended.¹²

A. Typical Policy Language

Business Interruption policies are often tailored to the needs of the insured, and there are generally no “one-size-fits-all” policy forms. That said, while the policy language may vary from policy to policy, some terms and phrases are common to most policies.

As previously noted, the purpose of BI Coverage is “to compensate an insured for losses stemming from an interruption of normal business operations due to damage or destruction of property from a covered hazard.”¹³ The triggering language typically found in BI Coverage policies reflects that general purpose.

Examples of common policy wording are as follows:¹⁴

(1) “Loss resulting from necessary interruption of business . . . caused by loss . . . covered herein . . . to real and personal property . . . ,”

(2) “The actual loss of Business Income you sustain due to the necessary ‘suspension’ of your ‘operations’ during the ‘period of restoration’,”

(3) Coverage “against loss of earnings resulting directly from the necessary interruption of the insured’s business caused by loss or damage by a peril insured against to a building or personal property on the premises designated in the declarations,” and

(4) Some policies provide coverage for the “actual or potential impairment of operations” as opposed to a “suspension” of operations.

Business interruption policies typically require that the interruption or suspension be caused by “direct physical loss,” which typically means a change to the property requiring some form of repair.¹⁵ And some policies impose a “waiting period” before the coverage kicks in.

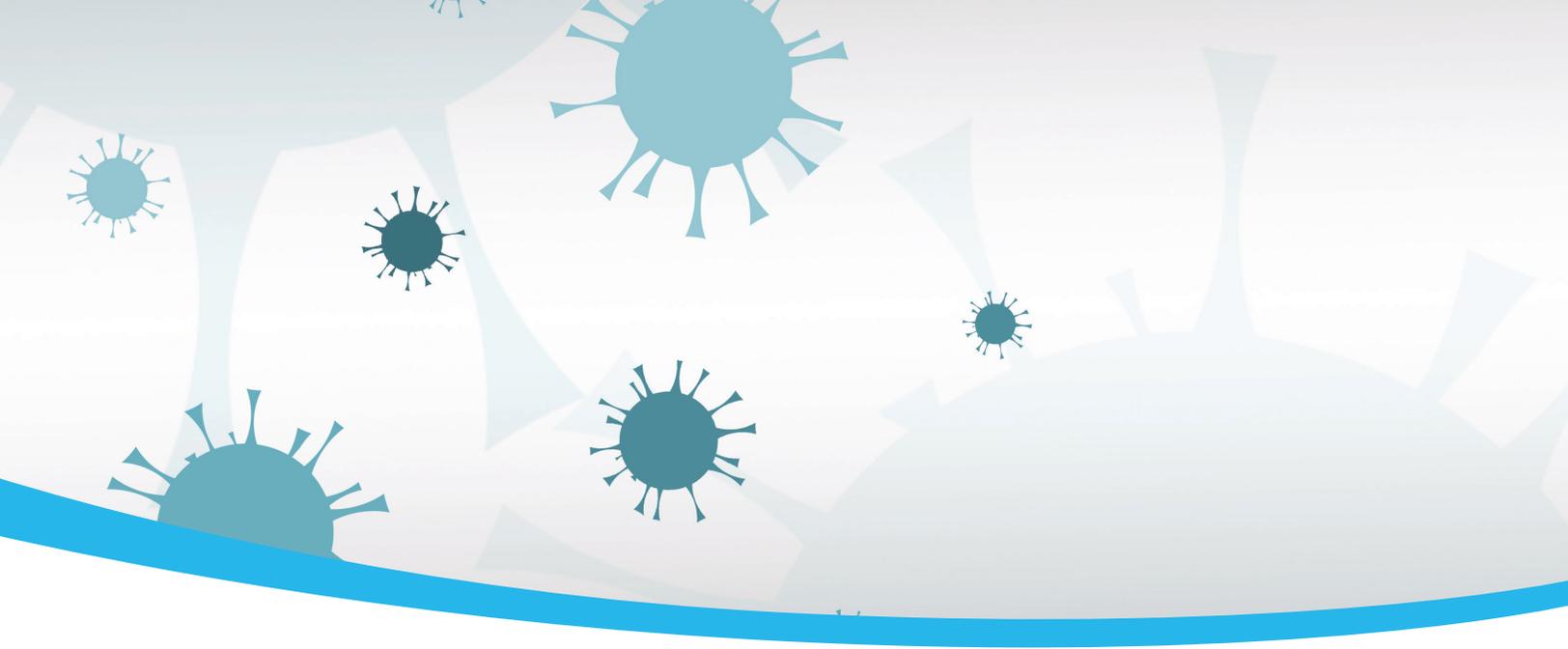
¹¹ See *Am. Auto. Ins. v. Fisherman’s Paradise*, 93-2349CIVGRAHAM, 1994 WL 1720238 (S.D. Fla. Oct. 3, 1994).

¹² 11A Couch on Ins. § 167:1 (“Business interruption insurance is designed to do for the business what the business would have done for itself had no loss occurred.”).

¹³ 11A Couch on Ins. § 167:9; see also 31 Fla. Jur. 2d Insurance § 2438 (“The object of business interruption insurance is to insure against loss from the interruption of the business as a whole, whatever part of it may be conducted in or with the property that suffers from the peril insured against.”).

¹⁴ All of the examples used herein are from actual policies

¹⁵ *Mama Jo’s, Inc.*, 2018 WL 3412974, at *9



In addition to these common terms, some policies detail specific policy wording that provides coverage for interruptions that are the result of causes other than damage to the insured's property. One example is Civil Authority Coverage, which can provide coverage for losses caused by "the prohibition of access to your premises ... by a civil authority."¹⁶ Another example is coverage for losses that result from damage to the property of a "dependent business premises," which could include a customer or a supplier.

Lastly, there are policies which specifically include coverage for losses caused by pandemics. These policies contain an endorsement called a "Pandemic Event Endorsement," which provides business interruption coverage for "pandemic events" defined as "the announcement by a Public Health Authority that a specific

Covered Location is being closed as a result of an Epidemic declared by the CDC or WHO."

In each of these cases, it is instructive to note that the policy was written to cover specific losses under specific conditions. It is never the case that coverage is provided for all losses under all circumstances.

B. Exclusions

There are various exclusions that exclude coverage for losses arising out of the transmission of communicable diseases or viruses, like COVID-19, and these exclusions are commonly applied to exclude coverage for liability or property damage. The exclusions may also apply to exclude BI Coverage when the policy states that the "covered causes" or "perils insured against" are limited by said exclusions.¹⁷

¹⁶ For example, a curfew imposed as a result of a riot could be covered under civil authority coverage. See *Brothers, Inc. v. Liberty Mut. Fire Ins. Co.*, 268 A.2d 611 (D.C. 1970). At first blush it would seem that civil authority coverage would more appropriately apply to the current situation involving closures relating to Covid-19. However, even Civil Authority Coverage often requires that the restriction of access to the business must be related to some property damage suffered by the business or adjacent premises. *Id.* at 613 (finding that a business fall-off due to a riot-related curfew was not recoverable as a "direct loss" to the insured property by a riot or commotion, because the term "direct loss" was interpreted to mean a loss resulting from physical damage to the property or contents).

¹⁷ *Lubell & Rosen LLC v. Sentinel Ins. Co., Ltd.*, 0:16-CV-60429-WPD, 2016 WL 8739330 (S.D. Fla. June 10, 2016).

1) Communicable Disease or Biological Agent Exclusion:

The most obvious exclusion that may apply is the “communicable disease” exclusion or “biological agent” exclusion. These exclusions, which preclude coverage for losses arising from communicable diseases or biological agents, will likely apply to preclude coverage of any loss that arises from the COVID-19 virus.¹⁸ In one case, an insured sought coverage for a suit filed against him related to the transmission of the Herpes Simplex Virus.¹⁹ The policy, however, specifically excluded from the definition of bodily injury certain things that were communicable, including disease, bacteria, virus or other organisms.²⁰ The trial court found no coverage and the appellate court affirmed, noting that “the trial court correctly concluded that State Farm did not owe a duty of defense or indemnification, because the complaint did not allege ‘bodily injur[ies]’ covered by the policy. Rather, the complaint alleged injuries expressly excluded by the policy.”²¹

2) Mold or Indoor Air Exclusion:

Another exclusion that may apply is the Mold exclusion or Indoor Air exclusion.²² In a case involving that exclusion, the insured sought

coverage under a commercial garage liability policy when defending a wrongful death suit involving an employee’s inhalation of carbon monoxide.²³ The court found that coverage was excluded by the “Indoor Air” exclusion, which read as follows:

Mold, Fungi, Virus, Bacteria, Air Quality, Contaminants, Minerals or Other Harmful Materials.

b. ‘Bodily injury’ or ‘property damage’ arising out of, caused by, alleging to be contributed to in any way by any toxic, hazardous, noxious, irritating, pathogenic or allergen qualities or characteristics of indoor air regardless of cause...

d. ‘Bodily injury’ or ‘property damage’ arising out of, caused by, or alleging to be contributed to in any way to toxic or hazardous properties of minerals or other substances.²⁴

The court found that the policy wording was “plain and unambiguous” and that “[t]he alleged injuries arose out of a toxic and hazardous substance that was a characteristic of the indoor air.”²⁵

¹⁸ See *Clarke v. State Farm Florida Ins.*, 123 So. 3d 583 (Fla. 4th DCA 2012).

¹⁹ *Id.* at 583.

²⁰ *Id.* at 584.

²¹ *Id.*

²² See *Century Sur. Co. v. Broward Collision, Inc.*, 13-62096-CIV, 2014 WL 11761921, at *2 (S.D. Fla. Dec. 19, 2014).

²³ *Id.* at *1. ²⁴ *Id.* at *2. ²⁵ *Id.* at *3.

²⁴ *Id.* at *2.

²⁵ *Id.* at *3.

3) Pollution Exclusion:

Lastly, depending on the definitions in the policy, the Pollution Exclusion may apply to preclude coverage for claims related to COVID-19.²⁶ In *Nova Cas. Co. v. Wasserstein*, 424 F. Supp. 2d 1325 (S.D. Fla. 2006), an insured sought coverage for a lawsuit brought by workers that were injured due to exposure to harmful chemicals and “living organisms”.²⁷ The court discussed the application of a Pollution Exclusion which precluded coverage for bodily injury or property damage “which would not have occurred in whole or in part but for the actual, alleged, or threatened discharge, dispersal, seepage, migration, release, or escape of ‘pollutants.’”²⁸ The policy defined “pollutants” as “any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals, and waste.”²⁹ The underlying complaint alleged that the plaintiffs were exposed to “‘living organisms,’ ‘microbial populations,’ ‘airborne and microbial contaminants,’ and ‘indoor allergens.’”³⁰ The court focused on whether these substances were excluded by the policy and, more specifically, whether they were “contaminants”.³¹

Ultimately, the court found that they were “contaminants” and explained that:

complaints, had a ‘contaminating’ effect.

[T]hese substances infected the plaintiffs’ bodies or made them impure by contact, thereby fitting the ordinary meaning of a ‘contaminant,’ and having an effect commonly known as ‘contamination.’ Thus . . . these causes are excluded from coverage.³²

COVID-19 would likely be considered a contaminant under the *Waserstein* court’s interpretation, but that interpretation is not globally accepted.³³ Thus, application of this exclusion will depend in part on the litigation venue and whether it applies a broad interpretation of “pollutants” and exposure to those pollutants.

C. Guidance for Situations Where There is No Specific Exclusion

Obviously a large number of policies were issued and delivered without exclusionary language like the wording discussed above. In these cases, coverage will generally turn on the issues discussed in the next section. Insurers can expect that their policyholders will argue that the presence of COVID-19 in their business constituted property damage triggering business interruption coverage.

²⁶ See *Nova Cas. Co. v. Wasserstein*, 424 F. Supp. 2d 1325, 1334 (S.D. Fla. 2006) (finding that “living organisms” fit the ordinary definition of a “contaminant”).

²⁷ *Id.* at 1329.

²⁸ *Id.*

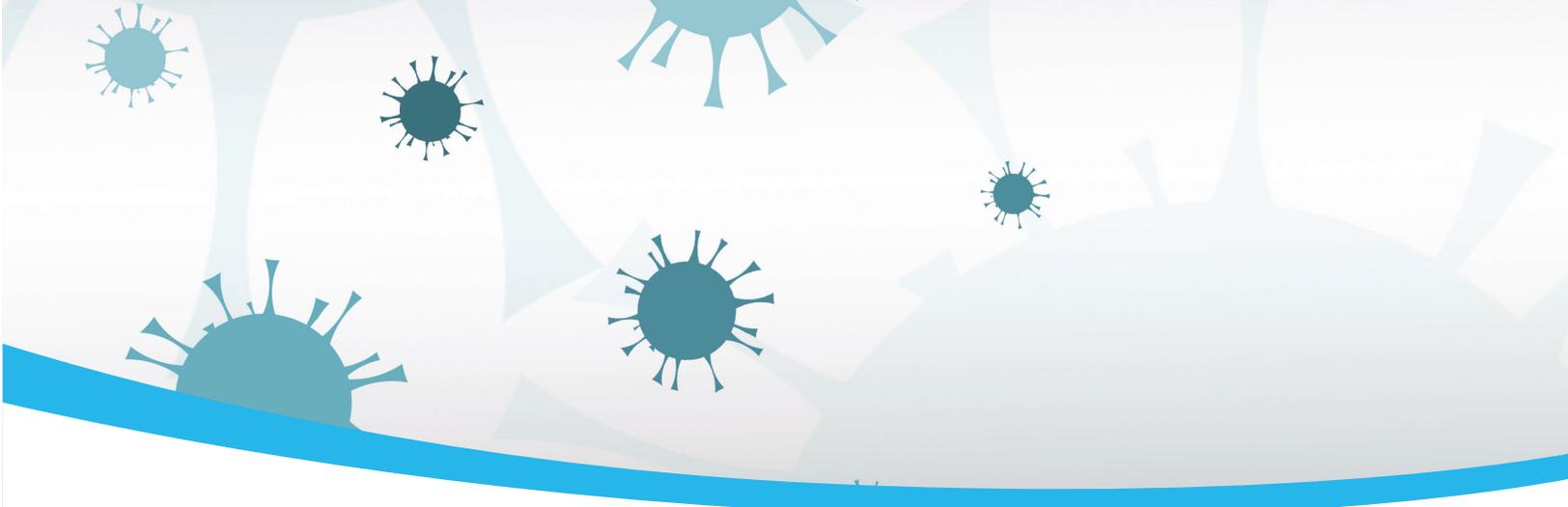
²⁹ *Id.*

³⁰ *Id.* at 1333-35.

³¹ *Id.* at 1333-35.

³² *Id.* at 1334-35. (internal citations omitted).

³³ See *Westport Ins. Corp. v. VN Hotel Group, LLC*, 761 F. Supp. 2d 1337, 1344 (M.D. Fla. 2010), *aff’d*, 513 Fed. Appx. 927 (11th Cir. 2013) (finding that *Legionella* bacteria are not “pollutants” and stating that “[t]he broad realm of ‘pollutants’ under *Wasserstein* is too far afield from the enumerated examples of ‘pollutants’—smoke, vapor, soot, fumes, acids, alkalis, chemicals, and waste—to support adoption of *Wasserstein*’s reasoning”).



Likewise, insureds that were forced to close their business will attempt to seek coverage under civil authority provisions of their policies. Businesses that were struggling prior to the pandemic may seek to recover profits that would never have materialized.

The policy wording will be critical in these cases. Reported decisions in Florida and various other jurisdictions provide insightful guidance on how to deal with these sorts of claims, but the policy wording will control in the first instance. Insurers can prepare for the litigation onslaught by gathering the tools they need (i.e. cases, experts, and arguments) and preparing a playbook for the coming BI Coverage litigation. It might be advisable to develop actuarial and underwriting evidence as well, in particular cases, to demonstrate that this coverage was neither contemplated nor reserved.

II. Coverage Arguments

In order to prevail in a lawsuit to recover under a business interruption policy, a plaintiff must prove two key elements

as they relate to the alleged business interruption:

(1) that the business sustained “direct physical loss” to property that is covered under the policy and (2) that there was a resultant interruption to the business (“suspension of operations”).^{34 35}

There is a relative dearth of case law relating to insurance coverage for pandemics, and thus, we will likely see some creative arguments from those seeking pandemic/closure coverage under these policies.

A. Direct Physical Loss

Plaintiff’s attorneys will initially try to overcome the “direct physical loss” requirement. However, insureds that cannot prove the presence of COVID-19 in their premises should not be permitted to recover under any circumstances, because they will be unable to show the requisite property damage. Despite this clear requirement, a scuba shop in Florida has already sought coverage and is asking a court to declare that the risk of contamination by COVID-19 is tantamount to property damage.³⁶

³⁴ See *Dictiomatic, Inc. v. U.S. Fid. & Guar. Co.*, 958 F. Supp. 594, 602 (S.D. Fla. 1997).

³⁵ Obviously the plaintiff will also have to prove causation and damages, but these factors are subject to ordinary proof requirements under Florida law that are not specific to BI Coverage, and need not be covered in this paper.

³⁶ See Complaint, *Mace Marine, Inc., d/b/a Conch Republic Divers v. Tokio Marine Specialty Insurance Co.*, Case No. 20-CA-000120-P (Fla. 16th Cir. Ct. Apr. 6, 2020).

In another Florida suit, a restaurant owner has instituted a class action lawsuit stating that the class members suffered direct physical loss due to the various government closure orders.³⁷

We believe this argument should not succeed for many reasons, including because (as discussed below) the threat of contamination is not a “direct physical loss” even under a broad interpretation of that term. However, if an insured can prove the presence of COVID-19 on or in the insured premises, plaintiff’s counsel may have a better argument that said presence constitutes a “direct physical loss” which entitles the insured to coverage.

This precise argument has not been addressed by any court; however, courts in other jurisdictions have found that property damage can exist due to the presence of harmful substances.³⁸ These cases could support a position that the presence of COVID-19 on the insured property caused the required property damage.

However, while Florida courts have not adopted a specific interpretation of “direct physical loss” in the context of a business interruption policy, one court has noted that “[a] direct physical loss ‘contemplates

an actual change in insured property then in a satisfactory state, occasioned by accident or other fortuitous event directly upon the property causing it to become unsatisfactory for future use or requiring that repairs be made to make it so.’”³⁹ In *Mama Jo’s, Inc. v. Sparta Insurance Co.*, 2018 WL 3412974 (S.D. Fla. June 11, 2018), the court was discussing whether a claim for cleaning dust and construction debris⁴⁰ was covered; the court found no coverage because it was not a “direct physical loss” under the aforementioned interpretation of that term.⁴¹ The court also considered a broader interpretation which would entitle coverage if the property becomes “uninhabitable” or substantially “unusable,” but found that there would not be coverage because the business remained open.⁴²

Notably, the *Mama Jo’s* court cited a decision by the Third Circuit Court of Appeals in its discussion of the broader interpretation of “direct physical loss”.⁴³ The Third Circuit held that the mere presence of asbestos, or the threat of future damage from that asbestos, was insufficient to trigger business interruption coverage.⁴⁴ The court drew the distinction between the presence of asbestos and the contamination of a property by the release of asbestos fibers, the latter of which would trigger coverage.⁴⁵

³⁷ See Complaint, *El Novillo Restaurant v. Certain Underwriters at Lloyd’s London*, Case No. 20-cv-021525 (S.D. Fla. Apr. 9, 2020).

³⁸ See *Gregory Packing Inc. v. Travelers Property Casualty Co. of America*, No. 12-4418, 2014 WL 6675934 (D.N.J. Nov. 25, 2014) (property damage occurred when ammonia was released into a facility); *Sentinel Mgmt. Co. v. New Hampshire Ins. Co.*, 563 N.W.2d 296 (Minn. Ct. App. 1997) (holding that property damage occurred when building was contaminated by asbestos and noting that “[d]irect physical loss also may exist in the absence of structural damage to the insured property”).

³⁹ *Mama Jo’s, Inc.*, 2018 WL 3412974, at *9.

⁴⁰ The court rejected the claim for property damage directly caused by the dust and debris because the insured’s expert on that issue was excluded. *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.* (citing *Port Auth. of New York & New Jersey v. Affiliated FM Ins. Co.*, 311 F.3d 226, 236 (3d Cir. 2002)).

⁴⁴ *Affiliated FM Ins.*, 311 F. 3d at 236.

⁴⁵ *Id.*

Plaintiffs will likely draw analogies to asbestos cases and argue that the presence of COVID-19 on the premises is akin to a release of asbestos fibers, thereby rendering the premises uninhabitable because COVID-19 can spread through contact with contaminated surfaces. However, this argument should present an uphill battle for many reasons. First, the broad uninhabitable/unusable interpretation of “direct physical loss” is the minority view. Second, in that Third Circuit case, the court explained that the loss would occur if large quantities of asbestos fibers were present such that the effect is comparable to that of a fire, water, or smoke.⁴⁶ This comparison is likely unavailing in the case of COVID-19. Third, unlike asbestos, COVID-19 is an organism with a limited lifespan and, thus, does not have the same impact as asbestos fibers, which can linger for long periods of time.

B. Suspension of Operations and Mitigation of Damages

Another line of attack will address the requirement that the business operations are actually suspended. Insureds that have not completely closed their doors will argue that their operations have been constructively or effectively suspended, such that BI Coverage would be triggered. However, courts have repeatedly rejected such arguments in the past noting that an actual suspension, as opposed to an adverse

effect on business, is required.⁴⁷

In *Hotel Properties, Ltd. v. Heritage Insurance Co. of America*, 456 So. 2d 1249 (Fla. 3d DCA 1984), a hotel operator sought to recover for losses resulting from a fire that damaged an on-premises restaurant.⁴⁸ The insured argued that its business was interrupted because the occupancy of hotel rooms was reduced due to the closing of the restaurant.⁴⁹ The court rejected that argument, finding that the diminution in business did not constitute an interruption.⁵⁰

Similarly, in *Ramada Inn Ramogreen, Inc. v. Travelers Indemnity Co. of America*, 835 F.2d 812 (11th Cir. 1988), the Eleventh Circuit found that a hotel operator was not entitled to business interruption coverage when a restaurant on the premises, which was specifically insured under its policy, burned down. There, the insurance policy designated the hotel and the restaurant as separate locations with separate coverage, and the insurer made payment for the business interruption to the restaurant.⁵¹ The insured also sought coverage for the business losses to the hotel operation.⁵² The court found that there was no coverage for the hotel operation, noting that “the hotel operation was able to accommodate the same number of patrons, albeit their actual number of customers may have been reduced.”⁵³

⁴⁶ Id.

⁴⁷ See *Hotel Properties, Ltd. v. Heritage Ins. Co. of Am.*, 456 So. 2d 1249, 1250 (Fla. 3d DCA 1984); see also *Ramada Inn*, 835 F. 2d 812; *Mama Jo’s, Inc.*, 2018 WL 3412974, at *10 (holding that there was no coverage because “[t]he restaurant remained open every day, customers were always able to access the restaurant, and suppliers were always able to access the restaurant”).

⁴⁸ 456 So. 2d at 1249.

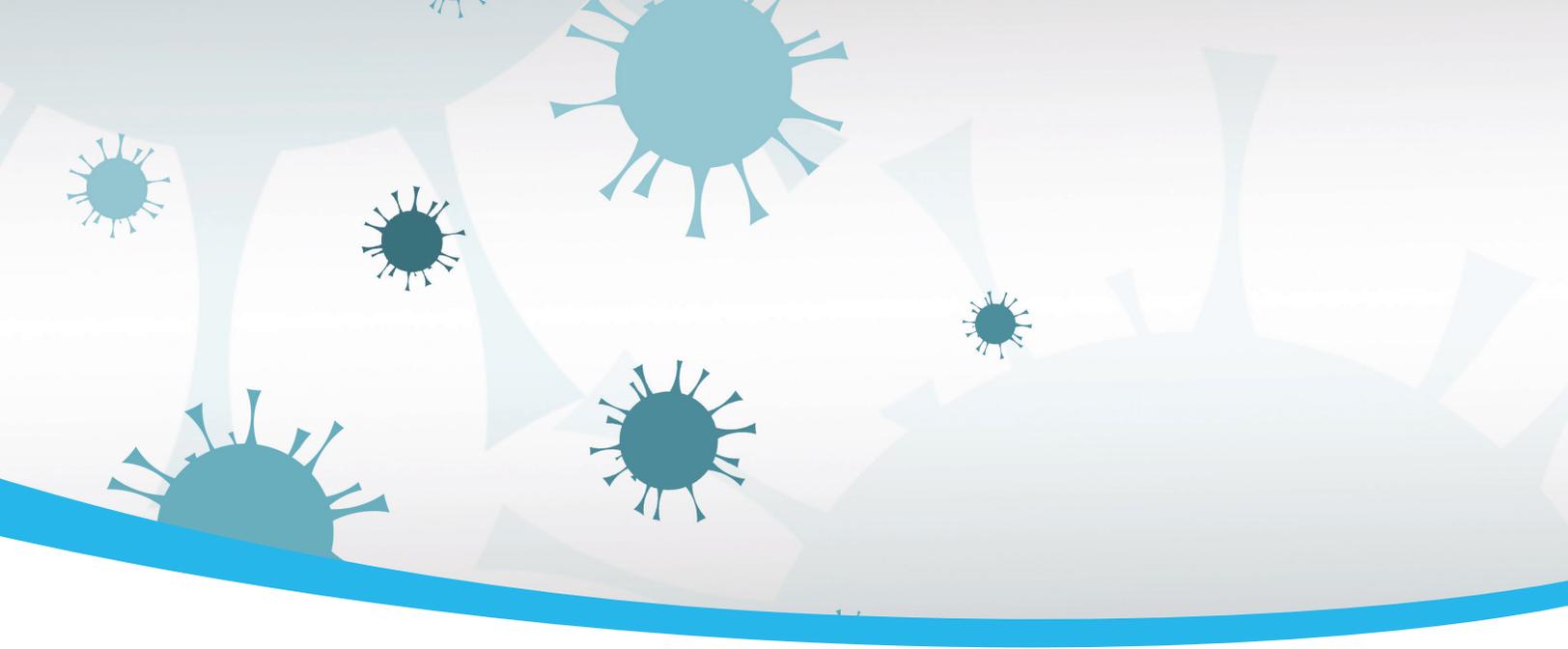
⁴⁹ Id. at 1250.

⁵⁰ Id.

⁵¹ Id. at 813.

⁵² Id.

⁵³ Id. at 814.



As noted above, this “suspension” requirement will likely have the greatest effect on those businesses that attempt to mitigate their losses by remaining open during the pandemic (an example would be a restaurant that switches its operations to delivery and pick up, or starts selling groceries). While insurance policies typically require that insureds mitigate their losses, courts have found that anything short of a cessation of operations does not trigger business interruption coverage.⁵⁴ Insureds seeking coverage have attempted to create ambiguity by relying on so-called “resumption of operations” provisions that either limit or condition coverage based on the insured’s partial or complete resumption of operations.⁵⁵ Courts have noted, however, that these provisions simply mean that an insured is required to resume operations as quickly as possible after the operations cease, effectively imposing an obligation

to mitigate damages on these insureds.⁵⁶

We expect that insureds will aggressively attack the “suspension” requirement on this basis, arguing that insureds should not be precluded from seeking coverage when they attempt to mitigate their damages by remaining partially open. They will argue that the policy should not be construed in a way that encourages businesses to totally close. This same argument was made and rejected by a court noting that, “[a]n insured is not ‘punished’ by continuing business at a lower level following an event causing a physical loss or damage because, if in fact the insured is able to continue business following the event, the coverage never applied in the first place.”⁵⁷

In one Florida case, a court found coverage when an insured was forced to suspend “a portion of its operation.”⁵⁸ There, Del

⁵⁴ See, e.g., *Home Indem. Co. v. Hyplains Beef, L.C.*, 893 F. Supp. 987, 993 (D. Kan. 1995), *aff’d*, 89 F.3d 850 (10th Cir. 1996) (“The court finds that the plain language of the Policy in this case is unambiguous and that it requires a cessation of operations to trigger coverage.”).

⁵⁵ See *Id.*; *Pennbarr Corp. v. Ins. Co. of N. Am.*, 976 F.2d 145 (3d Cir. 1992).

⁵⁶ 2016). ⁵⁶ *Hyplains, Beef, L.C.*, 893 F. Supp. at 993.

⁵⁷ *Id.*

⁵⁸ *Del Monte Fresh Produce, N.A., Inc. v. Ace Ins. Co.*, 00-4792-CIV, 2002 WL 34702174 (S.D. Fla. Oct. 3, 2002).

Monte Fresh Produce sought coverage for business interruption losses related to flooding caused by Hurricane Mitch.⁵⁹ The rain from the hurricane caused damage to a plantation’s levees, dikes and drainage systems.⁶⁰ These systems were covered under the policy.⁶¹ The insured argued that this damage to its flood control systems resulted in extensive flooding, which, in turn, caused damage to various banana plants (which were not covered under the policy).⁶² The court found that the policy did provide coverage for the reduction in banana crop yield (despite lack of coverage for damaged banana plants) noting that “if an insured cause, here damage to the infrastructure, sets in motion or creates an uninsured condition, here damage to the banana plants, insurance coverage exists.”⁶³⁶⁴

The court also rejected the insurer’s argument that the loss was not an “interruption of business” because the Plantation’s operations were not completely suspended.⁶⁵ The court, applying *Ramada Inn*, reasoned that the banana plants were a vital and integral part of the Plantation’s operation and their loss resulted in a forced suspension of a portion of its operation.⁶⁶

As always, when analyzing coverage under insurance policies, the precise policy wording governs. While most BI Coverage requires an “interruption” or a “suspension,” some policies provide coverage upon an “impairment of operations” theory. An insured whose policy uses the term “impairment” may find that a complete cessation of business is not required because the word “impairment” suggests something less than a full cessation.⁶⁷

C. Civil Authority Coverage

As noted above, Civil Authority Coverage is often sold in tandem with, or as part of, business interruption coverage. However, generally the same issues of proof described above will apply to this category of coverage. In Florida, we are likely to see this coverage invoked in connection with the wide swath of “stay-at-home” orders issued by local governments that urge citizens to stay at home. Local governments have also deemed certain business non-essential, like bars, hotels, and nightclubs, while deeming others to be “essential,” like grocery stores, pharmacies, and hardware stores. In these cases, the local governments have ordered those “non-essential” businesses to close until further notice.⁶⁸

⁵⁹ Id. at *3.

⁶⁰ Id.

⁶¹ Id.

⁶² Id.

⁶³ Id. at *6.

⁶⁴ The court cited the “efficient proximate cause doctrine,” which “provides that where there is a concurrence of different perils, the efficient cause—the one that set the other in motion—is the cause to which the loss is attributable.” *Jones v. Federated Nat’l Ins. Co.*, 235 So. 3d 936, 939 (Fla. 4th DCA 2018). It is unlikely that the doctrine will apply to most claims because most, if not all, of the claims associated with this pandemic will be directly attributable to COVID-19.

⁶⁵ Id. at *9.

⁶⁶ Id. at *10. The court relied heavily on a decision by the Supreme of New Hampshire, *Studley Box and Lumber Co. v. National Fire Ins. Co.*, 85 N.H. 96, 154 A. 337 (1931), which the Eleventh Circuit distinguished in *Ramada Inn*.

⁶⁷ See *Impairment*, Black’s Law Dictionary (11th ed. 2019) (“The quality, state, or condition of being damaged, weakened, or diminished.”).

⁶⁸ See, e.g., Miami-Dade County Emergency Order 07-20 (Mar. 19, 2020), <https://www.miamidade.gov/information/library/coronavirus-emergency-order-07-20-businesses.pdf>.

Insureds that are considered non-essential businesses, and thus required to close, will argue that the civil authority coverage is triggered because of the forced closure of their business. However, depending on the policy wording, they will likely still need to prove that the closure was the result of property damage to their property.⁶⁹ Essential businesses will face even an even greater hurdle because the coverage can only be triggered when a civil authority actually prohibits access to the business; it is not sufficient that access is made less desirable to consumers.⁷⁰

D. Exclusions

If insureds are able to meet the requirements to trigger BI Coverage, as discussed *infra* there are numerous different policy exclusions that may outright preclude coverage for any claim arising out of COVID-19. However, it should be noted that court enforcement of these exclusions is not universal. For example, in one case the insured (a law firm) sought to recover losses

under a business interruption policy due to sewage water that backed up and flooded the parking garage of the office building where the firm was located.⁷¹ The law firm's policy, however, included an exclusion for damage caused by water that backs up from a sewer or drain, and the insurer argued that this exclusion excluded coverage for the claim.⁷² The insured argued that the only exclusion that applied was a "Business Income and Extra Expense Exclusion", which imposed certain limitations specifically to the business interruption coverage.⁷³ In other words, according to the insured, no other exclusion, including the Sewer Water Exclusion, applied to its claim. The court rejected this argument and concluded that the business interruption coverage could be limited by all of the applicable policy's exclusions because the unambiguous wording of the policy required that result.⁷⁴ The court then dismissed the insured's suit because it found that the Sewer Water Exclusion applied to the claim.⁷⁵

⁶⁹ See *Brothers, Inc.*, *supra*; see also *Dickie Brennan & Co., Inc. v. Lexington Ins. Co.*, 636 F.3d 683, 686-87 (5th Cir. 2011) (holding that restaurant owners could not recover business income lost due to a mandatory evacuation precipitated by the approach of Hurricane Gustav and noting that "[a]lthough it does not expressly address the proximity issue, the Lexington policy requires proof of a causal link between prior damage and civil authority action"); *S. Texas Med. Clinics, P.A. v. CNA Fin. Corp.*, CIV.A. H-06-4041, 2008 WL 450012, at *10 (S.D. Tex. Feb. 15, 2008) ("When, as here, the only relevance of prior damage to other property in deciding whether to issue a civil authority order that would preclude access to the insured's property is to provide a basis for fearing future damage to the area where the insured property is located, the causal link between the prior damage and the civil authority order is missing.").

⁷⁰ See *By Development, Inc. v. United Fire & Cas. Co.*, 2006 WL 694991 (D.S.D. 2006), judgment *aff'd*, 206 Fed. Appx. 609 (8th Cir. 2006) (finding that road closures near the property made access to the insured's property more difficult but did not equal a denial of access as per the terms of the policy); *Southern Hospitality, Inc. v. Zurich American Ins. Co.*, 393 F.3d 1137, 1141 (10th Cir. 2004) (finding insured hotel operators who suffered losses after the 9/11 terrorist attacks could not recover under their civil authority coverage because the FAA had denied access to the flights, not to the hotels, and the hotels had not been ordered closed); *Abner, Herrman & Brock, Inc. v. Great Northern Ins. Co.*, 308 F. Supp. 2d 331, 336 (S.D. N.Y. 2004) (holding that an investment advisory firm could not recover because even though area traffic was diverted its building was still accessible).

⁷¹ *Lubell & Rosen LLC*, 2016 WL 8739330 at *1.

⁷² *Id.* at *2-3.

⁷³ *Id.* at *3-4.

⁷⁴ *Id.* at 1333-35.

⁷⁵ *Id.* at *5.



Finally, in some cases, insureds have attempted to get around certain policy exclusions using the “ensuing loss” exception. This exception is contained in many commercial policies and provides that when an excluded loss (e.g. damage caused by faulty workmanship) subsequently causes another loss (i.e. the ensuing loss) that second loss may be covered. Insureds have argued that the suspension of business is a separate ensuing loss, despite being caused by an excluded loss. Courts in Florida have rejected these arguments, noting that the business interruption stems directly from the excluded risk.⁷⁶

E. Amount of the Loss

In addition to the disputes over whether there is coverage, in cases where coverage is found there will also be disputes as to the extent of the coverage. For example, some insureds may seek to recover income lost due to the inability to take advantage of increased demand during the pandemic (e.g. manufacturers that cannot produce

goods that are in high demand during the pandemic).

However, courts have held that these sorts of windfall profits are not recoverable.⁷⁷ In *American Automobile Insurance Co. v. Fisherman’s Paradise*, 93-2349CIVGRAHAM, 1994 WL 1720238 (S.D. Fla. Oct. 3, 1994), the insured owner of several boat dealerships sought coverage for the period of time that the stores were closed due to damage caused by Hurricane Andrew.⁷⁸ The insured argued that it would be entitled to the likely profits that it would have made had it been able to take advantage of the post-hurricane demand for boats.⁷⁹ The court disagreed, noting that “windfall profits are not within the scope of the policy.”⁸⁰

Insurers also need to be cognizant of the potential for fraud that a widespread disaster may bring.⁸¹ Some insureds may seek to take advantage of the pandemic and attempt to recover business losses that were inevitable, regardless of the occurrence of the pandemic. For example,

⁷⁶ See *Nat’l Union Fire Ins. Co. of Pittsburgh, Pa. v. Texpak Group N.V.*, 906 So. 2d 300, 302 (Fla. 3d DCA 2005) (“Since defective design or specifications are not perils covered by this policy, economic damage or loss resulting from these causes are excluded from coverage as well.”); *Divine Motel Group, LLC v. Rockhill Ins. Co.*, 3:14-CV-31-J-34JRK, 2015 WL 4095449, at *9 (M.D. Fla. July 7, 2015), *aff’d*, 655 Fed. Appx. 779 (11th Cir. 2016) (“The key factor missing from this circular argument is the identification of any cause of loss that is not excluded from the Policy’s coverage.”).

⁷⁷ See *Am. Auto. Ins. v. Fisherman’s Paradise*, 93-2349CIVGRAHAM, 1994 WL 1720238 (S.D. Fla. Oct. 3, 1994).

⁷⁸ *Id.* at *1.

⁷⁹ *Id.* at *2.

⁸⁰ *Id.*

⁸¹ Disasters, like the current pandemic, often present opportunities for groups to file claims that are exaggerated or completely false. Background on: Insurance Fraud, Insurance Handbook, INSURANCE INFORMATION INSTITUTE, <https://www.iii.org/publications/insurance-handbook/regulatory-and-financial-environment/background-on-insurance-fraud> (last visited Apr. 13, 2020).

a local movie theater or bar that was already on the verge of closure may seek coverage for the closure.⁸² Courts have rejected such arguments noting that BI Coverage “may not be used to put a business in a better position than it would have occupied without the interruption.”⁸³

In *Dictiomatic, Inc. v. U.S. Fid. & Guar. Co.*, 958 F. Supp. 594 (S.D. Fla. 1997), the insured, a developer of hand-held electronic translators, sought to recover alleged business losses incurred when it had to close its offices due to damage caused by Hurricane Andrew.⁸⁴ The evidence at trial showed, however, that prior to Hurricane Andrew the insured was suffering from loss of business due to lack of interest in its product.⁸⁵ The court explained that there was property damage which caused a suspension of operations, but the insured “failed to prove that but/for the 20 day suspension of operations, it sustained an actual loss of business income which was caused solely by the hurricane and not by other factors.”⁸⁶

III. Litigation in Florida

In the coming weeks and months, insurers should expect to receive an onslaught of

claims from businesses seeking to recover the income lost as a result of the effects that COVID-19 has had on the economy. These claims could include many different factual circumstances discussed herein, including (1) business income losses due to closures related to the presence of COVID-19 on the insured’s premises, (2) damage to some other property (i.e. a supplier or customer) that allegedly causes a suspension of a business, and (3) the government-mandated closure of an office building.

Indeed, there are already cases being filed in Florida,⁸⁷ and other states.⁸⁸ These initial lawsuits are raising many of the same issues that are discussed above. For example, Conch Republic Divers, a scuba shop in Key West, FL, is suing its insurer and argues that the presence or danger of COVID-19 on the property renders the property unusable and non-functioning until the property is sanitized.⁸⁹ Conch Republic is asking the court to declare that the “risk of contamination” by COVID-19 is tantamount to a direct physical loss. Similarly, the owners of El Novillo, a group of restaurants in Miami-Dade County, have filed a class action and alleged that they suffered direct physical loss “due to the suspension of their

⁸² JohnMartin’s Irish Pub & Restaurant was “quietly” planning not to renew its lease just before the forced business closures. Carlos Frias, Here’s Why a Beloved Gables Irish Pub Won’t Reopen After the Coronavirus Crisis Ends, MIAMI HERALD (Apr. 7, 2020, 7:37 PM), <https://www.miamiherald.com/miami-com/restaurants/article241838506.html>.

⁸³ *Dictiomatic, Inc.*, 958 F. Supp. at 604.

⁸⁴ *Id.* at 601.

⁸⁵ *Id.* at 603.

⁸⁶ *Id.* at 603 (emphasis supplied).

⁸⁷ See Complaint, *Mace Marine, Inc.*, Case No. 20-CA-000120-P, *supra*; Complaint, *Prime Time Sports Grill, Inc. d/b/a Prime Time Sports Bar v. Certain Underwriters at Lloyd’s London*, Case No. 20-cv-00771-CEH-JSS (M.D. Fla. Apr. 2, 2020); Complaint, *El Novillo Restaurant v. Certain Underwriters at Lloyd’s London*, Case No. 20-cv-021525, *supra*.

⁸⁸ An insured in Texas has filed suit against Certain Underwriters at Lloyd’s seeking coverage under a “Pandemic Event Endorsement,” which has not been addressed by any court. See Complaint, *SCGM, Inc. v. Certain Underwriters at Lloyd’s*, Case No. 20-CV-01199 (S.D. Tex. Apr. 3, 2020). Also, Mark Geragos, a celebrity attorney, has filed several lawsuits on behalf of himself, restaurant owners, and commercial landlords, seeking a quick determination that their policies provide coverage for physical loss due to the virus. Colin Kalmbacker, *Superstar Lawyer Sues LA Mayor for Destroying His Business with Stay-at-Home Order*, LAW & CRIME (Apr. 10, 2020), <https://lawandcrime.com/covid-19-pandemic/superstar-lawyer-mark-geragos-sues-la-mayor-eric-garcetti-for-destroying-his-business-with-stay-at-home-order/>.

⁸⁹ Complaint, *Mace Marine, Inc.*, Case No. 20-CA-000120-P, *supra*.

operations from the pandemic and civil authorities.”⁹⁰ Notably, none of the cases filed thus far have alleged actual presence of or contamination by COVID-19, which is likely to be an outcome-determinative issue and a fact they cannot prove.

Additionally, all of the cases that have been filed are seeking coverage under the civil authority provisions of their policies. Every complaint highlights the executive orders issued by the state and local municipalities. And, in some cases, like El Novillo, plaintiffs are alleging that the stay-at-home orders themselves constitute direct physical loss. However, for essential businesses that were not ordered to close (like Prime Time Sports Grill and El Novillo) these arguments are likely to fail. Even non-essential businesses, who may have a better claim under civil authority coverage, should have difficulty in overcoming the direct physical loss requirement.

It seems that the plaintiff’s attorneys are aware of the weaknesses in their positions because the complaints are filled with unnecessary facts pertaining to pandemic to evoke an emotional response, and they are designed to obtain quick declarations by the court. For example, in the class action filed by El Novillo, the complaint highlights the number of confirmed cases and deaths from COVID-19 in the U.S. and seeks a declaration that the forced closures trigger coverage under a standard all-risk policy. Furthermore, plaintiff’s attorneys seem to be crafting arguments to avoid certain exclusions. For example, Conch Republic is asking the court to declare that a “pandemic”—as opposed to

property damage arising from a virus—is not subject to any exclusion.

Despite these weaknesses, insureds will certainly continue to seek coverage and file lawsuits to determine whether there is coverage. In fact, a group of restaurants has formed an industry group, likely as a way to pressure insurers to provide coverage.⁹¹ Given the unprecedented nature of the current circumstances, these initial lawsuits will likely yield opinions that will affect the entire insurance industry as it deals with the onslaught of claims. Thus, it is critically important to keep an eye on these early lawsuits.

D. Public Policy Considerations

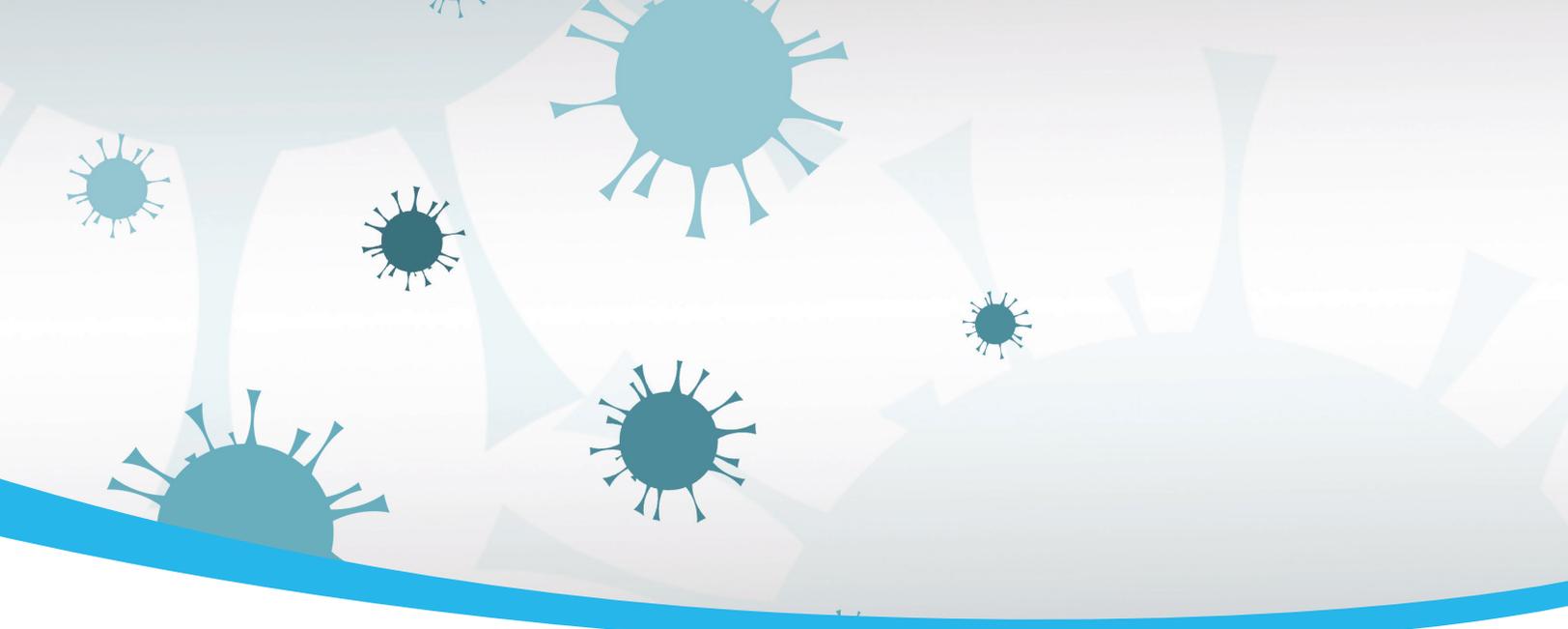
Courts considering whether to afford coverage in these cases must of course start with the facts and circumstances of the particular claim being litigated, and the policy wording should control the outcome of most of these cases.

These courts must carefully consider, however, the impact of forcing property and business insurers to provide coverage in cases where the insurer did not plan to assume this risk. The assumption of certain specified risks is the essential component of an insurance contract,⁹² and the ability to accurately assess risk is the backbone of the entire insurance industry. If courts require insurers to provide coverage for the vast amount of businesses that suffered losses as a result of the pandemic, deleterious impacts on the claims-paying ability of these insurers will certainly ensue.

⁹⁰ Complaint, El Novillo Restaurant v. Certain Underwriters at Lloyd’s London, Case No. 20-cv-021525, *supra*.

⁹¹ Several restaurants have formed the Business Interruption Group and have said they are willing to support federal subsidies for insurers that cooperate. BUSINESS INTERRUPTION GROUP, <https://werbig.org/> (last visited Apr. 13, 2020).

⁹² 1 Couch on Ins. § 1:9.



It is estimated that nationally, businesses would lose hundreds of billions of dollars each month that the widespread closures are in place. However, the surplus for US home, auto, and business insurers combined is only \$800 billion.⁹³ Imposing such an unexpected expense on insurance carriers would, inevitably, affect the industry's ability to pay out on the valid claims across various different coverages, and could seriously impact the capitalization of many business and property insurers. The last time an event like this occurred (the 9-11 terrorist attacks), insurance carriers paid out almost \$40 billion, and the U.S. Congress had to pass the Terrorism Risk Insurance Act to support the industry.⁹⁴

These issues should be brought directly to the forefront in any litigation pertaining to BI Coverage, to inform judges of the potential far-ranging impact of their decisions.

E. Conclusions and Final Thoughts

In sum, while many insureds are gearing

up for a fight, the fact is that under the typical policy forms for BI Coverage, losses related to the COVID-19 virus are not covered. Insureds should have difficulty proving that the virus caused property damage to trigger the coverage. Many essential businesses will not be covered because they were not forced to close. And many insureds will find that their policy expressly excludes losses resulting from COVID-19.

Despite the above, many Florida businesses are desperate, and they are looking to their insurance policies as a means of survival. Insurers must be prepared. Property and business insurers facing these claims should develop overarching strategies for handling Covid-19 BI coverage litigation, including identifying favorable venues, identifying claims with favorable facts, and initiating declaratory judgment actions. The goal will be to expeditiously obtain favorable opinions on the issues that would most likely arise in BI Coverage cases related to COVID-19.

⁹³ See, Jessica Hanna, APCI: Insurance Perspective on COVID-19, AMERICAN PROPERTY CASUALTY INS. ASS'N (March 26, 2020), <http://www.pciaa.net/pciwebsite/cms/content/viewpage?sitePageId=59762>.

⁹⁴ 9/11 and Insurance: The Eight Year Anniversary - Insurers Paid Out Nearly \$40 Billion, INSURANCE INFORMATION INSTITUTE (Sep. 10, 2009), <https://www.iii.org/press-release/9-11-and-insurance-the-eight-year-anniversary-insurers-paid-out-nearly-40-billion-091009>.

Outside of litigation, insurers should seek opinions pertaining to COVID-19 coverage from state regulators, and engage in discussions with state legislatures about the devastating effect that retroactive application of coverage for the pandemic may cause.

Our conclusion is that it is dangerous public policy, not to mention bad law, to force business and property insurers to pay claims for which they neither planned nor reserved. When the music stops, insurance carriers cannot be left without a chair.

Permitting this result would jeopardize the claims-paying ability of our nation's business insurers, which could lead to far worse consequences in the future, including the inability of property and business owners to find coverage from financially healthy companies.

The fact remains that most businesses simply did not pay for coverage for losses related to a pandemic. Insurance carriers did not expect to provide such coverage and did not reserve for exposure to that risk. The plaintiff's bar is already attempting to vilify insurers when these claims are denied, and they will pressure regulators, legislators, and the courts to create coverage where there is none.

Insurance companies, like every other business in this country, have also had to cope with the effects economic shutdown, yet they must continue to fulfill their obligation to pay valid covered claims. They should not also be expected to shoulder the financial burden of this pandemic, particularly when doing so could result in a collapse of the industry.

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