INSURANCE COVERAGE ISSUES FOR

COVID-19 RELATED BUSINESS LOSSES

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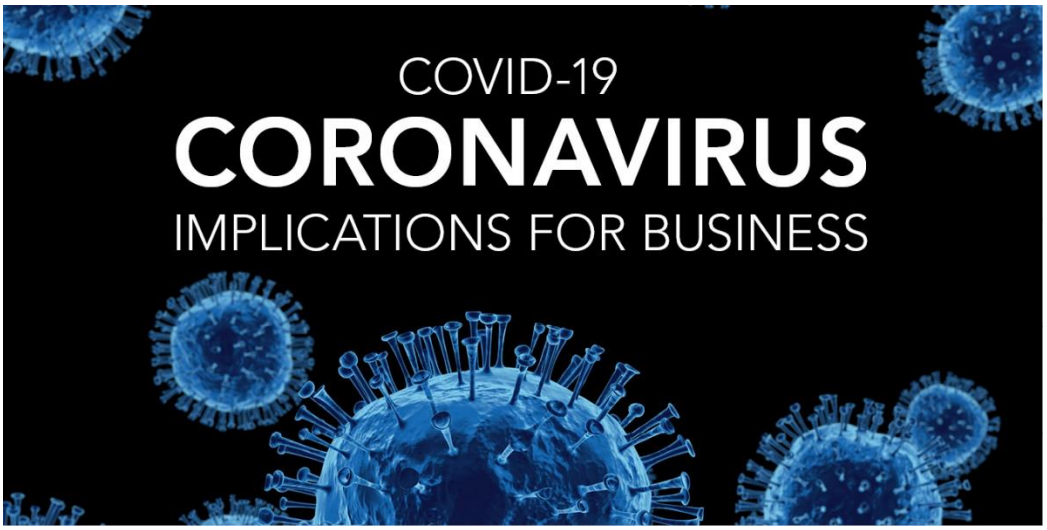
I. INTRODUCTION

In the wake of this current pandemic and concomitant government shut-down orders, there will be a massive influx of claims related to business interruption and associated losses. Due to the unprecedented situation, general limitations in policy language, as well as particular coverages and specific exclusions, must be analyzed anew. A majority of state legislatures, as well as the Federal Congress, have introduced diverse proposed laws that would impact, and generally increase, the responsibilities of insurers for claims related to COVID 19 and the commensurate government orders.

This article explores several tactics and arguments available to insurers to fight any legislation that seeks to either nullify aspects of existing insurance policies, or to retroactively reform the contract of insurance. Policy defenses will also be discussed and will be relevant to the extent not hampered by valid COVID-related insurance regulations and laws

VARIATIONS OF PROPOSED LEGISLATION



II. VARIATIONS OF PROPOSED LEGISLATION – AN OVERVIEW

A. **Proposed Federal Legislation**

The "Business Interruption Insurance Coverage Act of 2020" (H.R. 6494) in the U.S. House of Representatives is described as "a bipartisan bill to ensure businesses who purchase interruption insurance won't get their claims denied because of major events, such as the Coronavirus pandemic …." Unlike legislation pending in the states, the federal iteration does not distinguish between small or large businesses. It proposes to instead require an insurer to provide coverage for any company with business interruption coverage. The legislation would mandate, among other things, that, as to any insurer offering business interruption coverage, they must make available coverage, prospectively and retroactively, for losses from: (1) "viral pandemics" and, (2) "forced closure of businesses, or mandatory evacuation, by law or order of any government or governmental officer or agency."

To compensate, the bill requires policyholders to pay potential premium increases that result from that coverage, but those increases are allowed where the type of coverage subject to the increase does not "differ materially from the terms, amounts, and other coverage limitations applicable to losses arising from events other than those [described above]." H.R. 6494 would also void any exclusions that could preclude a policyholder's coverage for any business interruption caused by the events described above.

B. State Law Proposals – A Sampling of Bills Under Consideration

1. Michigan

H.B. 5739 has been introduced in the Michigan House of Representatives. This is a relatively straightforward bill. It would require that insurers that provide business interruption coverage must provide such coverage for business interruption for COVID-19-related losses, to qualifying policyholders, so that it would apply to the policyholders employing fewer than 100 employees. It would be in effect for the duration of the State's declared state of emergency, and thus, presumably, would apply retroactively to the date of that declaration.

2. Pennsylvania

There are several proposed bills regarding business interruption coverage in the Pennsylvania Legislature. They include:

a. H.B. 2372

This bill, (like the very similar New Jersey bill A-3844), aims to ensure that insurance coverage is provided for business interruption that is: "due to global virus transmission or pandemic" for the "duration of the declaration of disaster emergency" as ordered in Pennsylvania. The bill mandates that any property insurance policy issued to an insured with 100 or fewer full-time employees, and that was in effect on March 6, 2020, and which includes coverage for loss of use,

loss of occupancy, and business interruption, will be construed to provide coverage for such business interruption losses where they are due to COVID-19 or "global virus transmission or pandemic."

b. H.B. 2386

H.B. 2386 does not force otherwise-exempt insurers to provide coverage for business interruption losses that are due to the COVID-19 crisis. Instead, the bill proposes creating a grant program to fund those businesses that have had their claims denied. The legislation permits businesses that employ 200 or fewer employees, and which have made, and been denied, a COVID-19-related business interruption policy claim for a period within the duration of the governor's proclamation of emergency, to pursue a claim with the COVID-19 Disaster Emergency Business Interruption Grant Program.

The bill does require that any business benefiting from the grant program not lay-off any of its employees for the duration of the declared emergency.

c. SB 1114

SB 1114, introduced in the Pennsylvania Senate, would require that policies which provide coverage for losses related to property damage, including business interruption losses, are "construed to include among the covered perils coverage for loss or property damage due to COVID-19 and coverage for loss due to a civil

authority order related to the declared disaster emergency and exigencies caused by the COVID-19 disease pandemic."

This bill is meant to override *any* policy language that may bar coverage for pandemic-related losses based on the inherent policy powers of the State to act for the public good in the case of an emergency. It ties a business' prospective recovery to its size, such that small businesses, defined as those meeting the requirements of 13 C.F.R. § 121, or that have received funding through the U.S. Small Business Administration, would receive one-hundred percent of the policy limits for qualified claims. Other (larger) businesses are eligible to receive seventy-five percent of the policy limits for eligible claims. The bill also grants the Pennsylvania Supreme Court exclusive jurisdiction of any challenges regarding either the validity or the constitutionality of the bill.

d. SB 1127

This Senate Bill is somewhat unique, as it concentrates its efforts on creating detailed rules of policy interpretation that pertain to first-party insurance provisions dealing with COVID-19 related losses in Pennsylvania. The following rules of interpretation are the most relevant and noteworthy:

i. If a person positively identified as having been infected with COVID-19 has been present in, or if the presence of the coronavirus has otherwise been detected in, a

business location, that location is deemed to have experienced property damage.

ii. Those businesses and organizations which are located in municipalities where the presence of a person with COVID-19 has been identified, or in which the presence of COVID-19 has otherwise been detected, are deemed to have experienced property damage.

iii. Similarly, businesses or organizations located within municipalities where the presence of COVID-19 has been identified, with or without the presence of a COVID-19 positive individual, shall be "deemed to have experienced the actual, and not merely suspected, presence of a communicable disease."

iv. The March 19, 2020 Order that mandated the closure of non-essential businesses, "constitutes an order of civil authority under a first-party insurance policy limiting, prohibiting or restricting access to non-life-sustaining business locations in this Commonwealth as a direct result of physical damage at or in the immediate vicinity of those locations."

v. The March 19, 2020 Order is deemed "an order prohibiting ingress to and egress from all non-life sustaining business locations in this Commonwealth as a direct result of physical damage at or in the immediate vicinity of those locations namely, the presence of the COVID-19."

If enacted, SB 1127 would apply to all active insurance policies with effective dates on or before March 6, 2020. The bill includes a "savings clause" which further provides that the rules of interpretation set forth in the legislation could be superseded by parties' mutual intent as clearly and expressly communicated to each other. The bill also gives the Pennsylvania Supreme Court exclusive jurisdiction of any challenges to the validity or constitutionality of the legislation.

3. South Carolina

S.B. 1188 has been introduced in the South Carolina Senate. It would require all business interruption coverage to include, as a covered peril, loss of use and occupancy or business interruption that results from the COVID-19 pandemic. Insurers would be prevented from denying coverage claims on the basis of: (1) COVID-19 being a virus, (2) there being no physical damage to the property of the insured, or (3) losses due to a governmental, or civil authority, order. Like some

other legislation being proposed in the states, this bill offers a reimbursement framework for insurers who pay for claims pursuant to the act.

4. New York

a. A-10226

The New York Assembly proposes amendments that expand the applicable category of businesses that will benefit from the bill, and defines eligible businesses as those which employ 250 or fewer employees (in contrast with the definition in the initial draft which limited eligibility to businesses employing 100 or fewer employees). It also now includes a provision explicitly overriding any policy provision that would preclude coverage for business interruptions due to a virus or disease. The bill also would now mandate polices automatic renewal for those policies providing business interruption coverage that expire amidst a state of emergency declared due to COVID-19. The bill was again amended, expanding its applicability to include those policies that provide business interruption coverage, as well as coverage provided for contingent business interruption.

b. A-10327

The bill before the New York Assembly is meant to secure business interruption coverage for COVID-19-related losses incurred by some companies that operate in the health services industries. Some of the included entities are mental health outpatient providers and substance abuse treatment providers.

5. Massachusetts

The Massachusetts Senate introduced S.D. 2888. It requires that any property insurance policy that includes business interruption coverage, in force in Massachusetts, be "construed to include among the covered perils under such policy coverage for business interruption directly or indirectly resulting from the global pandemic known as COVID-19, including all mutated forms of the COVID-19 virus."

Unlike some bills, S.D. 2888 explicitly states: "no insurer in [Massachusetts] may deny a claim for the loss of use and occupancy and business interruption on account of (a) COVID-19 being a virus (even if the relevant insurance policy excludes losses resulting from viruses); or (ii) there being no physical damage to the property of the insured or to any other relevant property."

S.D. 2888 does contain two significant restrictions. Firstly, subject to any time limits in the relevant policy, the coverage required would only continue "until such time as the emergency declaration issued by the governor, dated March 10, 2020, and designated as executive order number 591, is rescinded by the governor." Secondly, S.D. 2888 "only applies to policies issued to insureds with 150 or fewer full-time-equivalent employees in [Massachusetts]." This amount of 150 is quite higher than the 100-employee threshold used in most other states' bills.

There is a framework within the bill by which insurers that indemnify businesses under the act may seek reimbursement from the Commissioner of Insurance. However, the bill also authorizes the commissioner to seek reimbursement from Massachusetts insurers who sell coverage for business interruption.

The bill indicates that insurers who fail to comply with the its requirements could face civil liability under "Chapter 176D of the [Massachusetts] General Laws," which forbids insurers from participating in any "unfair or deceptive act or practice in the business of insurance." Violating that provision is important, because to transgress it may also amount to a violation of the Massachusetts consumer protection statute, which statute allows for the potential of treble damages and attorneys' fees being recovered from the offending insurer.

6. Ohio

H.B. 589 is proposed in order to "protect small businesses from catastrophic losses" caused by the COVID-19 crisis. It seeks to mandate that qualifying property insurance policies, (those that include business interruption coverage, and were issued to companies located in Ohio with 100 or fewer employees), include among the covered perils "business interruption due to global virus transmission or pandemic during the state of emergency." This applies to a "qualifying" property insurance policy, which is defined as one that insures "against loss or damage to

property, which includes the loss of use and occupancy and business interruption, in force in [Ohio] on the effective date of this section[.]"

H.B. 589 is to be in effect "for the duration of the state of emergency" that was "issued on March 9, 2020, to protect the well-being of Ohio citizens from the dangerous effects of COVID-19." This bill, like others, sets out a process for insurers who pay business interruption claims under the proposed law to seek reimbursement from the Superintendent of Insurance by way of a pool that would be collectively funded by all insurers that cover risks in Ohio.

7. Louisiana

The two bills proposed in the Louisiana House of Representatives and Louisiana Senate are similar in most respects. H.B. 858 and S.B. 477 both would require any property insurance policy with business interruption coverage in force in Louisiana as of March 11, 2020, to be taken to include coverage for COVID-19-related losses. The coverage proposed extends from the state of emergency declared on March 11, 2020, until the end of that state of emergency. The prominent differences between the two Louisiana bills are that H.B. 858 only pertains to "policies issued to insureds with less than one hundred full-time employees, in [Louisiana]," while S.B. 477 does not contain any such limitation. This failure to limit the benefit of the statute to employers of a certain number of individuals is not the norm among the proposed bills across the nation.

EVALUATION OF POTENTIAL CHALLENGES TO PROPOSED LEGISLATION

III. EVALUATION OF POTENTIAL CONSTITUTIONAL CHALLENGES TO THE PROPOSED LEGISLATION

A. The Fifth Amendment

There are two clauses of the Fifth Amendment to the United States Constitution that seem, on their face, to be a likely source of relief, these being the "takings clause" and the due process clause. However, while there are some COVID-19 coverage bills that, if enacted, could possibly be defeated by a Fifth Amendment claim, the case law sets a low bar for government compliance with the constitutional requirements. As such, as will be discussed below, the "Contracts Clause" is a more likely avenue for relief than is the Fifth Amendment. Laws enacted during and in the wake of the Great Depression were repeatedly upheld even though they compelled industries to provide relief that ordinarily would not be the obligation of the company/industry. The law developed during that time is still, in large part, the controlling law on these issues to-date.

1. The Takings Clause

The Takings Clause is the last clause of the Fifth Amendment, and reads as follows: "nor shall private property be taken for public use, without just compensation." The query begins by determining whether there is private property involved in the alleged taking. The Courts have said that the "…takings analysis is not an appropriate analysis for the constitutional evaluation of an obligation imposed

by Congress merely to pay money." *Eastern Enterprises v. Apfel*, 524 U.S. at 540, 118 S.Ct. at 2154 (1998), cited in *Swisher Intern., Inc. v. Schaefer,* 550 F.3d 1046, 1055 (US Court of Appeals, Eleventh Circuit, 2008). The Swisher Court noted that this has been the position of the various courts since the *Eastern Enterprises* case was decided.[1] It is not entirely certain that the insurer's interest in the policy would be considered "property" for purposes of the Takings Clause, as the types of property usually encompassed within the Takings Clause are takings that affect real estate, an interest in an intangible of value, such as intellectual property, or a bank account/accrued interest. *Swisher*, at p. 1055, citing *Eastern Enterprises*, supra.

However, in this case, and unlike the Swisher case, which assessed levies on tobacco manufacturers as a means of a "buyout" for tobacco growers and tobacco quota holders, there is an argument to be made that a "taking" has occurred, rather than just a mandate by Congress to pay money. That is because the insurer does have contract rights which it has invested in, and which could thus be considered property to which a "takings" analysis would apply. Unfortunately, the contract rights which, if impaired, qualify as a "taking", are quite limited in scope. This is

[1] "…in the post-*Eastern Enterprises* cases construing the Coal Act, and in analogous contexts, several circuit courts of appeals have applied a substantive due process analysis, rather than a takings analysis." *Swisher* at p. 1056. The Swisher Court also noted that "Five Supreme Court Justices have expressed the view that the Takings Clause does not apply where there is a mere general liability (i.e. no separately identifiable fund of money) and where the challenge seeks to invalidate the statute rather than merely seeking compensation for an otherwise improper taking." *Id*. at p. 1057, citing *Eastern Enterprises* at 539-47.

true even when the contract interfered with by a law was "of great value" and would have produced "large profits" to the complaining party. This was made plain in *Omnia Commercial Co v United States*, 261 US 502, 507–08; 43 S Ct 437; 67 L Ed 773 (1923), where the Court, which had denied a purchaser their rights under a contract to purchase steel which the government had commandeered from the manufacturer for its own purposes. A distinction was made in subsequent cases, based on *Omni*, supra, between contracts which are incidentally impacted by a law, versus contractual rights that are directly targeted by the statute.

In this case, there is an argument to be made that there is a property interest subject to a "taking", because most of the proposed laws effectively eviscerate certain defenses, otherwise available to insurers, with regard to claims for which coverage is otherwise questionable and/or not available under the contract. A test has, over time, been developed to determine whether there has been a "taking" such that compensation is required. It is set forth here:

> In deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole—here, the city tax block designated as the "landmark site."
> Secondly, appellants, focusing on the character and impact of the New York City law, argue that it effects a "taking" because its operation has significantly diminished the value of the Terminal site. Appellants concede that the decisions sustaining other land-use regulations, which, like the New York City law, are

> reasonably related to the promotion of the general welfare, uniformly reject the proposition that diminution in property value, standing alone, can establish a "taking," see *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303 (1926)

Penn Cent Transp Co v City of New York, 438 US 104, 130–31; 98 S Ct 2646, 2662–63; 57 L Ed 2d 631 (1978). Boiled down, in deciding whether there has been a "taking" that requires compensation, Courts are to consider: (1) the economic impact of the government action on the owner of the property interest; (2) the degree of interference with the property owner's vested expectations; and (3) the "character" of the government action.

In the case of the legislation described above, the factors to be considered are likely to include:

a. The total economic impact on insurers.

As to the instant legislation, that impact could focus on problems such as: (i) potential insolvency resulting from the laws; (ii) the potential to lose future business if policies must be made overly expensive to cover the losses caused by the legislation; and, (iii) loss of investment due to the perception that the investment is made more precarious where legislatures, during a pandemic which may result in further waves of "injuries", can retroactively define the terms of a policy or

otherwise require an insurer to pay claims that it was otherwise, at least in part, not liable to pay.

b. Interference with insurers' investment expectations.

Obviously, a great deal of work goes into underwriting analysis to assess and appropriate risk under an insurance policy. The general effect of all of the proposed legislation is to require coverage for most instances of loss of business income/business interruption losses where an individual or entity has a policy, whether a property policy, CGL policy, or any other type of policy that may, under some circumstances, cover such losses.

Clearly, the expectation of the insurers was *not* that the vast majority of companies insured would all simultaneously experience months-long business income and interruption losses. They certainly did not anticipate that anyone with a policy who had such a loss would be, in essence, automatically covered without regard to the exclusions and the distinct coverage language of the policy which would otherwise have nullified a claim.

c. The "character" of the government action.

This is a broad area of consideration – in this instance, one aspect of the "character" of the legislation at issue would be that it seems to help the government in a situation where they were arguably the cause of most of the business closures and have taken little financial responsibility to assist small businesses, and the legislation thus

essentially requires the insurer to cover for the unilateral choices made by various governmental entities. Further, the legislation is retroactive in nature, which relates back to the problem of the insurers having not underwritten to cover such losses that, but for the legislation, would be uncovered claims. Whether or not the legislation was well-considered and whether other options were explored to remedy the problem are issues that also could be raised on a case-by-case basis.

On the other side of this "character" question, is that the various proposed bills are meant to, metaphorically, provide shelter in a storm during an extreme, unanticipated emergency situation. The other side of this argument is that the government should have anticipated that a pandemic was likely to occur at some time, (as many scientists have suggested), and should have either prepared insurers for the possibility that they would be "left holding the ball", or enacted other legislation to ensure that, in the event of a pandemic, the government is otherwise prepared to assist those at risk of significant business and income losses. Had the government been more prepared in that regard, they could have designated sufficient funding sources in advance and not relied solely on the insurance company to pick up the government's slack.

The case history shows that it is a very narrow avenue to showing the existence of a property interest to which the Takings Clause applies. Where it is applicable, what is then required is "just compensation" from the government.

d. "Just Compensation"

If there is a taking to which the Takings Clause applies, then the Compensation to be paid by the government is not an actual value, but that which is deemed a "fair", "reasonable" value by the trier of fact upon the evidence presented.

2. The Due Process Clause

While a litigant, as noted above, has a better chance of proving a violation of due process than of showing a taking requiring compensation, it is still an extremely high bar to meet.

a. Government's burden:

If the government can show that the statute has a "legitimate legislative purpose furthered by rational means," due process is satisfied. *Gen. Motors Corp. v. Romein,* 503 U.S. 181, 191, 112 S.Ct. 1105, 1112, 117 L.Ed.2d 328 (1992).

b. Burden of Plaintiff

Economic legislation "come[s] to the Court with a presumption of constitutionality." *Usery v. Turner Elkhorn Mining Co.,* 428 U.S. 1, 15, 96 S.Ct. 2882, 2892, 49 L.Ed.2d 752 (1976). To establish that a statute violates its due process rights, the complaining party must demonstrate that the legislature has acted arbitrarily and irrationally. *Id.* at 15, 96 S.Ct. at 2892.

While it is doubtful that most, if any, of the proposed bills would be deemed arbitrary and irrational, there are some circumstances that may, if present, lend

themselves to the argument that the government failed to meet that bar. For example, if no other avenues of relief were considered, the legislation was rushed through, (with little consideration or discussion given to establish a rational basis for the bill), or if the legislation affects an entity or industry that is not regulated highly enough by the government to anticipate that it would be subject to the imposition placed on them by the bill. *Eastern Enterprises*, supra; *Swisher*, supra.

c. Retroactive Legislation

When a statute has retroactive effect, the government must also, in addition to showing that the statute itself has a legitimate purpose, prove that the statute's retroactive application itself furthers a legitimate legislative purpose and is achieved by rational means. *Pension Benefit Guar. Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 730, 104 S.Ct. 2709, 2718, 81 L.Ed.2d 601 (1984).

"Provided that the retroactive application of a statute is supported by a legitimate legislative purpose furthered by rational means, judgments about the wisdom of such legislation remain within the exclusive province of the legislative and executive branches" *Id*. at p. 729. In the *Eastern Enterprises* case, the retroactivity violated due process where the assessment levied by the Coal Act, when retroactively applied, required payment of the assessment by a company that had long ago left the industry. The Court in *Swisher* (at p. 1053*)* explained this in detail as follows:

> The remedy in the Coal Act, as applied to Eastern, "bears no legitimate relation to the interest which the Government asserts in support of the statute." *Id.* The unprecedented scope of retroactivity was a significant determinant in the unconstitutionality of the statute. *Id.* Liability of former employers has been upheld when the statutes were remedial, but this statute was not remedial because Eastern was not responsible for the expectation of lifetime health benefits for retired miners. *Id.* at 550, 118 S.Ct. at 2159. The expectation of lifetime benefits was created by agreements made long after Eastern had left the coal business. *Id.* This case represented the rare instance in which the severe retroactive application of legislation is so egregious as to violate the due process clause. *Id.*

In challenging any state or federal action mandating coverage for COVID-related business losses on due process grounds, the retroactivity will improve the chances of succeeding in challenging such laws. The broader the law, the less thoughtfully considered and debated, the more hastily crafted, and the more attenuated the connection between the law and the problem that the law is supposed to ameliorate, the more likely such a challenge is to succeed. In the case of the insurance industry, the fact that it is a highly regulated business will work against it; however, the more the law deviates from what an insurer might reasonably find

foreseeable because of its highly regulated status, and the more distant the law is from the types of regulations typically imposed, the more likely it is that a statute could be found to violate due process.

B. The Contracts Clause

The Contracts Clause in Article I, Section 10, Clause 1 of the United States Constitution, provides that no state shall pass any law "impairing the Obligation of Contracts." The authoritative cases all agree that the Contracts Clause of the United States Constitution provides broader protections to entities whose contracts are affected by legislation than either the Takings Clause or the Due Process Clause. ("The principles embodied in the Fifth Amendment's Due Process Clause have never been held coextensive with prohibitions existing against state impairments of pre-existing contracts. Rather, the limitations imposed on States by the Contract Clause have been contrasted with the less searching standards imposed on economic legislation by the Due Process Clauses." Pension Ben Guar Corp v RA Gray & Co, 467 US 717, 718; 104 S Ct 2709, 2712; 81 L Ed 2d 601 (1984). There is also quite a divergence of opinion amongst the various state and federal courts as to what level of infringement on a contract between private parties will be tolerated.

Nonetheless, ever since the remedial laws enacted during the Great Depression and the World Wars, which required such things as wholesale factory-takeovers, mortgage and rent moratorium, minimum wages, etc., the bounds of what

is tolerated under the Contracts Clause have expanded far beyond the plain language of the Clause.

1. The Requirement of a Valid Contract

The first step in evaluating whether the Contracts Clause is violated is to ensure the existence of a valid, non-executory contract. In the case of an insurance policy, the existence of a valid contract should not be at issue.

2. Standards for Evaluating Contract Clause Disputes

Enduring precedents for the balancing of state powers versus private contracts were established through the "unprecedented emergencies" caused by the Great Depression. Courts took judicial notice of that emergency in upholding mortgage moratoriums, for example. Stated succinctly, the standard is that: "Legislation adjusting the rights and responsibilities of contracting parties must be upon reasonable conditions and of a character appropriate to the public purpose justifying its adoption. US Tr. Co of New York v New Jersey, 431 US 1, 22–23; 97 S Ct 1505, 1517–18; 52 L Ed 2d 92 (1977)(internal citations omitted).

a. Presumptions

The presumption is to favor legislative judgment as to what is necessary and reasonable in enacting a particular law. ("As is customary in reviewing economic and social regulation, however, courts properly defer to legislative judgment as to the necessity and reasonableness of a particular measure." *US Tr. Co of New York*

v New Jersey, supra. The reason for the deference, despite the plain language of the Clause, was aptly stated here: "[a]lthough the language of the Contract Clause is facially absolute, its prohibition must be accommodated to the inherent police power of the State 'to safeguard the vital interests of its people.'" *Calfarm Ins Co v Deukmejian*, 48 Cal 3d 805, 828 (1989).

b. Balancing Factors

United States Trust Co. v. New Jersey, 431 U.S. 1, 97 S.Ct. 1505, found that, while "…the absolute language of the Clause must leave room for "the 'essential attributes of sovereign power,' . . . necessarily reserved by the States to safeguard the welfare of their citizens," that power has limits when its exercise effects substantial modifications of private contracts. Despite the customary deference courts give to state laws directed to social and economic problems, **"[l]egislation adjusting the rights and responsibilities of contracting parties must be upon reasonable conditions and of a character appropriate to the public purpose justifying its adoption."** *Allied Structural Steel Co v Spannaus*, 438 US 234, 243–44; 98 S Ct 2716, 2722; 57 L Ed 2d 727 (1978)(emphasis added) (internal citations omitted).

The severity of the infringement on contract determines how closely the infringement will be scrutinized by the Court, and then that is balanced against the

public interest purported to be served by the legislation. *Allied Structural Steel Co,* supra.

c. Applications of the Balancing of Interests

As hinted at above, by history and precedent, serious national emergencies have been considered a significant enough public interest to allow for significant infringement on private contract rights.

> "In *Home Building & Loan Assn. v. Blaisdell*, the Court upheld against a Contract Clause attack a mortgage moratorium law that Minnesota had enacted to provide relief for homeowners threatened with foreclosure. Although the legislation conflicted directly with lenders' contractual foreclosure rights, the Court there acknowledged that, despite the Contract Clause, the States retain residual authority to enact laws "to safeguard the vital interests of [their] people." *Id*. **In upholding the state mortgage moratorium law, the Court found five factors significant. First**, the state legislature had declared in the Act itself that an emergency need for the protection of homeowners existed. *Id*. **Second**, the state law was enacted to protect a basic societal interest, not a favored group. *Id*. **Third**, the relief was appropriately tailored to the emergency that it was designed to meet. *Ibid*. **Fourth**, the imposed conditions were reasonable. *Id.* And, **finally**, the

> legislation was limited to the duration of the emergency."
> *Allied Structural Steel Co v Spannaus*, 438 US 234, 242; 98 S Ct 2716, 2721 (1978) (emphasis added) (internal citations omitted).

3. Considerations for Challenging Statutes Under the Foregoing Factors.

This synopsis of some other seminal cases under the Contracts Clause provides further insight into how the Courts evaluate the factors mentioned in the preceding section above.

> *W. B. Worthen Co. v. Thomas*… dealt with an Arkansas law that exempted the proceeds of a life insurance policy from collection by the beneficiary's judgment creditors. Stressing the retroactive effect of the state law, the Court held that it was invalid under the Contract Clause, since **it was not precisely and reasonably designed to meet a grave temporary emergency in the interest of the general welfare**. In *W. B. Worthen Co. v. Kavanaugh*, the Court was confronted with another Arkansas law that diluted the rights and remedies of mortgage bondholders. The Court held the law invalid under the Contract Clause**. "Even when the public welfare is invoked as an excuse**," Mr. Justice Cardozo wrote for the Court, **the security of a mortgage cannot be cut down "without moderation or reason or in a spirit of oppression."** *Id.*

Allied Structural Steel Co., 438 US at 243 (emphasis added)(internal citations omitted).

With the foregoing in mind, each bill or enacted statute or regulation will need to be analyzed individually to see where it falls using the balancing test and the five factors cited in *Allied*. The significant shutting down of businesses, caused by forced government closures and shelter in place orders, and the astronomical losses to the small business sector in particular, all due to a global pandemic emergency, seems fairly akin to the situation presented by the mortgage moratorium in *Blaisdell*, supra. The proposed legislation regarding COVID and business losses meets the first test from that case so long as they declare in the bill, or otherwise make plain, that the bill is based on an "emergency need for the protection of homeowners." Conversely, if there is no such statement and it appears that there may be another motivation for the legislation, there would be an argument to differentiate such COVID legislation from *Blaisdell*.

As to the second factor, the laws are enacted to protect, from a narrow view, the interests of businesses that have certain types of insurance policies that insure business losses but exclude or otherwise do not cover losses sustained as a result of the COVID crisis. In a broader view, the interest being protected is the interest of the economy as a whole. If the legislation can be shown to be beneficial to boosting the economy where otherwise the economy would suffer dramatically, it would

likely meet the second factor. Under the narrower justification, there may be, depending on the phrasing of the statute and the reasons given therefore, an argument that certain types of businesses were being treated as a "favored group". Of course, many of the laws limit recovery by the insured to entities with a certain number of employees, only – however, this argument is obviously detrimental to the insurer as the natural result of prevailing on that argument would be to expand, rather than narrow, the coverage that would be required of the insurer.

The third factor requires some consideration on a "bill-by-bill" basis. Whether the relief presented in the bills is appropriately tailored to the emergency will, most likely, be found met in the majority of cases. The effect of the laws, generally speaking, is to provide business loss/interruption coverage, and avoid significant amounts of litigation over whether coverage exists, and thus avoid the potential collapse of tens of thousands of businesses and the U.S. economy as a whole. However, there may be an argument against the propriety of the tailoring, to the extent that other or joint avenues of relief, such as utilizing an unemployment fund, a worker's compensation policy, or funding from some other source that is, arguably, as equally or substantially tied to meeting the emergency at issue.

As for the fourth factor, reasonableness of conditions, there are factors weighing for and against both parties, insurer and state. The potential for insurer insolvency, and the entirety of the burden placed on insurers, where other entities

tied to propping up small business interests do not share that burden, should be argued as unreasonable. Driving insurers out of business or limiting their ability to pay future claims would impact society in other negative ways – funds may not be available for other types of claims, investors may balk, underwriting expectations are undermined, and premiums will necessarily increase, thus leading to more uninsured or inadequately insured entities in the future. These are all valid considerations for the Court.[2]

On the other side of the argument, it is frequently noted in these cases and their like that insurance is a highly regulated industry which should not be surprised by retroactive measures, and that such measures, as a result, are more reasonable as applied to a member of a highly regulated industry. In a California case evaluating a Contracts Clause dispute, the court noted that: "Insurance, moreover, is a highly regulated industry, and one in which further regulation can reasonably be anticipated. As we said in *Carpenter v. Pacific Mut. Life Ins. Co.* (1937) 10 Cal.2d

[2] "These [pension] plans, like other forms of insurance, depend on the accumulation of large sums to cover contingencies. The amounts set aside are determined by a painstaking assessment of the insurer's likely liability. Risks that the insurer foresees will be included in the calculation of liability, and the rates or contributions charged will reflect that calculation. The occurrence of major unforeseen contingencies, however, jeopardizes the insurer's solvency and, ultimately, the insureds' benefits. Drastic changes in the legal rules governing pension and insurance funds, like other unforeseen events, can have this effect." *Los Angeles Dept. of Water & Power v. Manhart*, 435 U.S. 702, 721, 98 S.Ct. 1370, 1382, 55 L.Ed.2d 657.

Allied Structural Steel Co v Spannaus, 438 US 234, 246–47; 98 S Ct 2716, 2723–24; 57 L Ed 2d 727 (1978)

307, 74 P.2d 761: "'It is no longer open to question that the business of insurance is affected with a public interest.... Neither the company nor a policyholder has the inviolate rights that characterize private contracts. The contract of the policyholder is subject to the reasonable exercise of the state's police power.'" *Calfarm Ins Co v Deukmejian*, 48 Cal 3d 805, 829–31 (1989).

As to the fifth and final factor, to-date it appears that the proposed legislation is limited to cover losses during the duration of this emergency. To the extent any of them purport to re-define policy language as it pertains to matters not related to this COVID-specific situation, insurers may argue that this fifth factor is not met, as there will be impositions imposed upon the insurer contrary to the plain language of the contract in circumstances where no emergency situation applies.

CONTRACT DEFENSES TO COVID-19 RELATED CLAIMS

IV. CONTRACT DEFENSES TO COVID 19 RELATED CLAIMS

In the absence of legislation, or where the applicable legislation does not absorb all contract defenses, or is found to be invalid, quite a few policy terms, definitions, exclusions and additional coverages need to be thoroughly analyzed for what treatment they might receive with regard to various claims made due to the pandemic and commensurate orders to shelter-in-place and close businesses.

A. Physical Loss Requirement and Exclusions

Most policies - property, CGL, business interruption and the like, include the proviso that there must be a physical loss of some kind in order to trigger coverage. Some policies define "physical loss" (or similar terminology), while others do not. The courts of varying states have of course provided different analyses according to their own statutes and case precedents. Dictionary terms are often resorted to, with, in most cases, ambiguities being resolved in favor of the insured. The ultimate question here is, how will the courts determine if COVID-19 or the loss of use of the business property constitutes a physical harm to the insured property or business.

Most instructive with regard to the present query of whether COVID related losses, involving policies requiring a physical loss to invoke coverage, are the cases dealing with claims for the presence on the property of mold, e.coli, and asbestos. As to claims involving governmental authorities closing a business/property, the most relevant to-date involve closures of specific buildings, places, or industries,

rather than a nationwide closure of a majority of industries, buildings and places. The reason for the government orders, a pandemic, is also a new element not involved in prior jurisprudence.

As for claims for business interruption requiring physical loss and civil authority closures, the case arising out of the shutting down of Reagan Airport as a result of the terror attacks of September 11, 2001 is instructive, though dependent on the applicable policy language requiring "direct physical loss or damage". The Court held that, because there was no damage to the airport itself, that there had been no direct physical loss or damage. *United Airlines, Inc v Ins Co of State of Pa*, 385 F Supp 2d 343 (SDNY, 2005), sub nom. *United Air Lines, Inc v Ins Co of State of PA*, 439 F3d 128 (2nd Cir., 2006).

The claim was described as a "system-wide loss of revenue resulting from the September 11, 2001 terrorist attacks at the World Trade Center ("WTC") and the Pentagon, including losses related to '"the total shutdown of the United States aviation system by the Federal Aviation Administration (the 'FAA') and related charges resulting in a loss of income to UAL approaching $1.2 billion."' *Id.*

In a case for business interruption based on an inability to access their offices and a concurrent shutdown of power by the utility company, in relation to an incoming storm, there was found to be no direct physical loss to the building. *Newman Myers Kreines Gross Harris, PC v Great N Ins Co*, 17 F Supp 3d 323

(SDNY, 2014). The Court stated that: "The words "direct" and "physical," which modify the phrase "loss or damage," ordinarily connote actual, demonstrable harm of some form to the premises itself, rather than forced closure of the premises for reasons exogenous to the premises themselves, or the adverse business consequences that flow from such closure."

The *Newman* Court related the following authorities when it declined Plaintiff's proposition that its loss was covered regardless of the lack of damage to the premises:

> …[T]he Court is unaware of authority supporting, Newman Myers's argument that "direct physical loss or damage" should be read to include to extend to mere loss of use of a premises, where there has been no physical damage to such premises. *See United Airlines, Inc. v. Ins. Co. of State of Pa.*, 385 F.Supp.2d 343, 349 (S.D.N.Y.2005), *aff'd* 439 F.3d 128 (2d Cir.2006) ("The inclusion of the modifier 'physical' before 'damages' ... supports [defendant's] position that physical damage is required before business interruption coverage is paid."); *Philadelphia Parking Auth.*, 385 F.Supp.2d at 287–88 (noting that "'direct physical' modifies both loss and damage," and therefore "the interruption in business must be caused by some physical problem with the covered property ... which must be caused by a 'covered cause of loss' "). *Newman*, at 331-32.

Of course, other courts have convoluted this direct reasoning and, in other cases, found that, for example, a home that was in danger of damage from a rockslide, though only neighboring homes, and not the insured's, had suffered damage from the rockslide that occurred, did suffer "direct physical loss". The Court reasoned that the home had been rendered unusable by increased risk of rockslide even though the structure was not touched by the actual event that triggered the claim. *Murray v. State Farm Fire & Cas. Co.*, 203 W.Va. 477, 509 S.E.2d 1, 17 (1998)

1. *Motorists Mut. Ins. Co. v Hardinger* and *Port Authority of N.Y. & N.J. v. Affiliated FM Ins. Co.*

The *Hardinger* case is a Pennsylvania dispute on a homeowner's policy that was decided in the U.S. Court of Appeals for the Third Circuit, in 2005, and can be found at 131 Fed Appx. 823. It involved a claim for loss due to e.coli contamination of a drinking well on the property. The policy did not define "physical loss". The State of Pennsylvania had no prior cases from its highest court addressing whether loss of use of the property qualified as a physical loss. The case also deals with the pollution exclusion.

Due to the lack of Pennsylvania authority on the issue, the Court looked to the case of *Port Authority of N.Y. & N.J. v. Affiliated FM Ins. Co.*, 311 F.3d 226, 235 (3d Cir. 2002), which involved asbestos contamination of property that made it

unusable. The *Hardinger* Court stated that "While we agree that asbestos presents unique concerns, we find *Port Authority* instructive in a case where sources unnoticeable to the naked eye have allegedly reduced the use of the property to a substantial degree." *Hardinger* at p. 826. The Court adopted the standard in that case, as set forth here:

> In the case of asbestos, *Port Authority* stated the following as the "proper standard for 'physical loss or damage' to a structure": only if an actual release of asbestos fibers from asbestos containing materials has resulted in contamination of the property such that its *function is nearly eliminated or destroyed, or the structure is made useless or uninhabitable,* or if there exists an imminent threat of the release of a quantity of asbestos fibers that would cause such *loss of utility*. *Id.* at 236 (emphasis added). *Hardinger*, 131 Fed Appx at 826.

The Court then remanded the case, finding a question of fact as to whether the "functionality of the Hardinger's property was nearly eliminated or destroyed, or whether their property was made useless or uninhabitable." Id. at 826-27. Applying these principles to the present circumstances, it is reasonable to presume that many, if not most, courts would find that the business property suffered a physical loss if the presence of a viral contaminant meant that the business property could not be used, and thereby caused a business loss, as well as coverage for ameliorative action such as decontamination.

However, in both *Port Authority* and *Hardinger*, testing revealed the presence of the contaminants on the property. It may be possible to differentiate COVID-related claims on the basis that no testing of the physical site was done. Where, however, someone on the insured property, or otherwise in physical contact with employees, tested positive for COVID-19, courts would almost certainly find that physical loss occurred. Again, Port Authority is instructive as to what courts might do, because it also addressed, not only an "actual release of asbestos fibers…[resulting] in contamination of the property such that its *function is nearly eliminated or destroyed, or the structure is made useless or uninhabitable,* or if there exists an imminent threat of the release of a quantity of asbestos fibers that would cause such *loss of utility.*" *Hardinger* at 826, citing *Port Authority* (emphasis in Hardinger). Therefore, courts following this line of cases may decide that there was an imminent threat of contamination with the virus, particularly that the government took that position when declaring a state of emergency and proclaiming the crisis a "pandemic", which term itself implies an omnipresent infectious disease.

While discussing the co-existence of the declared emergencies and government-ordered business closures, an interesting question arises. Will the courts decide that the losses should be measured from the time of the property loss (business loss) due to: (1) COVID presence or "imminent threat" of its presence, relying on varying rationales for re-opening on a certain date that is either before, or

after, the applicable government shutdown order began or expired; or (2) based solely on the length of time of government orders keeping business closed? Many statutes cover the time of the emergency order(s), but laws that attack the policy defenses in other ways, such as setting forth policy definitions and the like, without reference to the government order(s), may leave room for claims based on extended periods of business loss caused by the pandemic and contamination, or an "imminent threat" of such contamination, or the ongoing existence of a "pandemic" situation as declared by an organization such as the Centers for Disease Control or the World Health Organization.

In some cases, if a claim is asserted based on factors other than government closures, it may behoove insurers to employ epidemiologists or other experts capable of testing for the presence of the contaminant or whether there is any imminent risk of a COVID outbreak at the subject business.

In one more note regarding whether there is physical loss triggering coverage, of interest as to dates of loss not encompassed by any government order forcing the loss, is a case from the United States Court of Appeals for the Sixth Circuit (applying Michigan law). *Universal Image Productions, Inc v Fed Ins Co*, (475 Fed Appx 569, 6th Cir. 2012), using the standard that a building that is uninhabitable or unusable has suffered physical loss, found that Universal failed to show that the building met either of those requirements.

In *Universal*, a potentially toxic mold was found in the building's HVAC system. That made one floor of the building unusable, but another floor was available for use during that time. The HVAC system had to be shut down for repairs, such that temperatures in the building rose to one-hundred degrees Fahrenheit. The Court found "that Universal has failed to present a genuine issue of material fact regarding the uninhabitability or usability of the Evergreen building. First and foremost, no expert recommended that Universal evacuate the building.

While Carmichael discussed some concerns regarding air quality, as a mechanical engineer, he conceded that he does not have the expertise to testify regarding such matters. Accordingly, there is no evidence in the record indicating that Universal was unable to remain in the Evergreen building during remediation. Moreover, Universal cannot recover for alleged uninhabitability relating to air-quality issues. Indeed, the insurance policy excludes "air" from the definition of both "building" and "personal property."" *Id*. at 574-75. The high temperatures were also not considered a reason affecting the usability of the property.

2. The Pollution Exclusion

Hardinger is also instructive on the application of the pollution exclusion to an unseen microbial presence. Of course, the terms of the exclusion vary by degrees, but in that case, it applied to loss caused by "solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids [,] alkalis, chemicals and

waste." As there was no Pennsylvania controlling law on point, the Third Circuit noted different approaches where courts which "…have addressed whether bacteria fit under similar pollution exclusions are divided." *Hardinger* at 827.

It compared the cases of *Keggi v. Northbrook Prop. and Cas. Ins. Co.*, 199 Ariz. 43, 47 (Ariz.App.Div.2000), (which found that bacteria was not a pollutant under identical exclusion language to that in *Hardinger*), and *E. Mut. Ins. Co. v. Kleinke*, Index # 2123–00, RJI # 0100062478 (N.Y.Super.Ct. Jan. 17, 2001), which, analyzing a "similar pollution exclusion", found that the exclusion was ambiguous as to whether e.coli bacteria was included in the policy definition of pollutant (with such ambiguities typically resolved against the insurer), to the cases like *Landshire Fast Foods of Milwaukee v. Employers Mut. Cas. Co.*, 269 Wis.2d 775. The latter held that '"bacteria, when it renders a product impaired or impure"' falls within '"the ordinary, unambiguous definition of 'contaminant'"'. *Hardinger* at 829, quoting *Landshire*.

The *Hardinger* Court declined to follow *Landshire*, finding the applied Wisconsin law in *Landshire* inconsistent with Pennsylvania's approach of determining the presence of an ambiguity "by reference to a particular set of facts". *Id*. In *Landshire*, which involved contamination with bacteria, the Court simply accepted the conclusion from a prior case that the language of the exclusion was

unambiguous, though different alleged pollutants (brine and ammonia) were involved.

There are basically two varieties of decisions that affect whether a biological agent will fall within a pollution exclusion. If a general term like "contaminant" is used, if found ambiguous, as some courts have determined, certain courts will then decide that, if the biological agent isn't something traditionally thought of as a "pollutant", (which is generally deemed something that the business may do to pollute the environment), it is outside the parameters of the exception. Other courts will apply the dictionary definition of contaminant, which is very broad, and exclude any loss that is caused by something that fits within the literal definition of the terms used in the policy.

The following case aptly describes the divide:

> Roughly speaking, most states fall "into one of two broad camps." *Apana v. TIG Ins. Co.*, 574 F.3d 679, 682 (9th Cir.2009). The first camp consists of courts that "have concluded that the clause is intended to preclude coverage for environmental pollution, not for 'all contact with substances that can be classified as pollutants.' " *Keggi v. Northbrook Prop. & Cas. Co.*, 199 Ariz. 43, 13 P.3d 785, 790 (2000) (quoting *Stoney Run Co. v. Prudential–LMI Comm. Ins. Co.*, 47 F.3d 34, 38 (2d Cir.1995)). The second camp consists of courts that have refused to read such a distinction into seemingly unambiguous pollutant exclusions. *See, e.g., Bituminous Cas. Corp. v. Sand Livestock Systems, Inc.*, 728 N.W.2d 216, 221 (Iowa 2007) ("But the plain language of the

> exclusions at issue here makes no distinction between 'traditional environmental pollution' and injuries arising from normal business operations.").
>
> *TRAVCO Ins Co v Ward*, 715 F Supp 2d 699, 715–16 (ED Va, 2010)

An "all risk" policy will also, at least in some jurisdictions, result in closer scrutiny of the pollution exclusion to ensure that the expectations of the insured were not unduly thwarted. Overall, between the courts that require the excluded loss to be from a "traditional pollutant", and those that will look at specific language and give it a literal interpretation, the results of suits over those exclusions, where not affected by any adoption of the proposed legislation, will vary significantly on a state-by-state basis.

3. Fungi and Bacteria Exclusions

So long as there is no ambiguous language, COVID-19 losses are unlikely to be excluded by a fungi and bacteria exclusion, as it is a virus. Unless the policy specifically references "virus" within that exclusion, seeking relief under that exclusion is probably a fruitless effort.

4. Communicable Disease Exclusion

The applicability of the communicable disease exclusion is likely to turn significantly on the precise language used, and what type of causation that language requires. COVID-19 is clearly a communicable disease by plain definition.

However, questions may arise as to whether the business loss, (as opposed to a personal injury whereby one person transmits a disease to another), is directly or proximately caused by a communicable disease, or whether courts will deem the loss more directly caused by the concomitant shelter-in-place orders.

Some policies' exclusionary language not only excludes bodily injury, property damage, personal injury, and other types of injuries arising out of the transmission of "any communicable disease", but extend the exclusion to losses arising out of an "alleged transmission of any communicable disease." (For example, see *Alexis v Southwood Ltd Pship*, 792 So 2d 100, 102 (La Ct App), writ den 802 So 2d 616 (La, 2001). The "alleged transmission" language may save some exclusions from otherwise being discarded for failing to meeting the causation requirement.

5. Force Majeure Clauses

There are two major points of interest about the potential applicability of Force Majeure clauses. One is whether a pandemic or emergency government closure of businesses is specifically, unambiguously referenced in the policy, (in which case the specific language should control), versus such causes of loss being only part of a "catch-all" provision. The other is the application of the common law test of foreseeability to Force Majeure clauses where a "catch-all" provision is relied upon for relief from contractual obligations.

If there is a "catch-all" provision relied upon, the courts traditionally vary in how they interpret such clauses. Some will automatically turn to the common law test of foreseeability, or rather, lack thereof, to determine if the event in question fits within the "catch-all"), as some courts will do only if they find an ambiguity after applying standard contract interpretation principles to the "catch-all" phrase. In some cases, remarkably, Courts have required the foreseeability test to be met even where the occurrence at issue was specifically listed in the force majeure clause. (See, for example, *Gulf Oil Corp., v. Fed. Energy Regulatory Comm'n*, 706 F.2d 444, 454 (3rd Cir. 1983)).

The question of whether the losses caused by this pandemic and the related business closures were "foreseeable", in common law terms, requires the courts to determine whether the cause is an "unforeseen event which [makes] performance impracticable." *Eastern. Air Lines v. McDonnell Douglas Corp.*, 532 F.2d 957 (5th Cir. 1976). *Eastern Air Lines* ultimately applied the plain language of the Force Majeure clause which specifically, in that case, referenced the event at issue within the clause, and refused to evaluate the clause under the common law rules. In doing so, it provided a good definition of what type of impracticability, under the common law, generally provides relief from performance as an unforeseeable force majeure event, stating:

> The rationale for the doctrine of impracticability is that the circumstance causing the breach has

> made performance so vitally different from what was anticipated that the contract cannot reasonably be thought to govern. However, because the purpose of a contract is to place the reasonable risk of performance on the promisor, he is presumed, in the absence of evidence to the contrary, to have agreed to bear any loss occasioned by an event which was foreseeable at the time of contracting. Underlying this presumption is the view that a promisor can protect himself against foreseeable events by means of an express provision in the agreement. *Eastern Airlines* at 991-92.

Given that an event like the current pandemic has not occurred in about one-hundred years in the United States, there is certainly room to argue that, even if not specifically listed, a pandemic that causes the government to shut down virtually all business activity that could not be performed from home was unforeseeable. It is a closer question whether the event makes performance impracticable for an insurer. Certainly, unforeseen circumstances that lead to insolvency would arguably qualify. In a Court that takes the *Eastern Airlines* point of view, even if foreseeable, an express provision in the contract excluding an event as a force majeure should be honored.

6. Civil Authority Coverage

In a Texas case, where the plaintiff medical service company closed its locations in relation to an emergency evacuation order for a possible hurricane landing, the policy language requiring "direct loss or physical damage" made the

business interruption claim unrecoverable on a civil authority coverage part. The Court found that the direct cause of the closure was not physical damage, but the Governor's order which was based on his concern that a hurricane may land and cause significant damage. While the Governor testified that he did take into account, in making his decision, that the hurricane had made landfall and caused damage in Florida, he said that he would have ordered the evacuation for the impending hurricane whether or not it had actually caused any property damage elsewhere. Thus, the Court found that the decision to order evacuation, being unrelated to any direct physical loss or damage, did not require coverage under the policy. S Texas Med Clinics, PA v CNA Fin Corp, No. CIV.A. H-06-4041, 2008 WL 450012, at *1 (SD Tex, February 15, 2008).[3]

Conversely, in *Assurance Co. of Am. v. BBB Serv. Co.*, 265 Ga.App. 35 (Ga.Ct.App.2003), a Georgia court of appeals affirmed the trial court's finding of coverage for lost business income due to a hurricane under a similar civil authority coverage provision. The civil authority coverage part indicated that: "We will pay for the actual loss of 'business income' you sustain and necessary 'extra expense' caused by action of civil authority that prohibits access to your premises due to direct

[3] The policy in question stated that: "We will pay for the actual loss of Business Income you sustain and necessary Extra Expense caused by action of civil authority that prohibits access to the described premises due to direct physical loss of or damage to property, other than at the described premises, caused by or resulting from any Covered Cause of Loss."

physical loss of or damage to property, other than at the 'covered premises,' caused by or resulting from any Covered Cause of Loss." *BBB Service* at 7. In that case, unlike the foregoing Texas case, a member of the group in charge of making decisions relating to emergency-weather testified that the group specifically told the chairman of the county commission to issue an evacuation order due to "the fact that the storm had been causing damage in its path, the forecast that the storm was headed to Brevard County, and the anticipated impact of the storm if it reached Brevard County." *Id.* at 8.

The trial court found that civil authority coverage applied, "implicitly finding that **a** basis for the evacuation order was actual damage to property other than the insured premises." *Id.* at 8. The *BBB Service* court, on appeal, determined the insured's evidence had shown that "actual damage to property other than the insured premises was a basis for the evacuation order" and it would not find that the trial court's decision based on such evidence was clearly erroneous. *Id.* at 9.

These authorities illustrate that the reasoning given for orders that were issued, orders which caused business interruption and losses, was very germane to the question of whether civil authority coverage would apply. The question, based on the foregoing cases, and where there is similar policy language, is whether the government orders resulting in business closures related to the current pandemic were due to government considerations of an event that *would* trigger coverage, i.e.,

physical loss or damage occurring elsewhere. In a circular way, this takes us back to contemplation of an earlier part of this synopsis again, as to what constitutes physical loss or damage.

How the courts treat these civil authority claims as it relates to orders issued by various governmental entities in response to a pandemic will be an issue of first impression. In the best-case scenario, courts will say that the closures were to prevent individuals from falling ill, and not to prevent property damage (or any "contamination" that could be perceived as a physical loss).

V. CONCLUSION

It has been about one-hundred years since the last pandemic that was proportional to the impact of COVID-19. In those one-hundred years, the entire economy has evolved, as have the nature and types of insurance coverage (and exclusions) that are prevalent, and the ever-expanding regulation of the insurance industry has also changed the jurisprudence of insurance law significantly since that last world-wide pandemic. The situation is both novel and, with the introduction of so many bills that will further impact insurer's defenses, rights, and obligations, it is very dynamic. We at Hardin Thompson, P.C. will continue to keep up-to-date with the ever-changing landscape of legislation and developing case law pertaining to insurers and COVID-19 related claims, and how to best defend cases or challenge legislation in those circumstances. If you are interested in any further information

or discussion about these matters, or wish to explore any assistance that we may offer to you, please feel free to contact us at any time.

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