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BUSINESS INTERRUPTION INSURANCE IN THE TIME OF COVID-19: WHO SHOULD FOOT THE BILL?

*Paul McHugh**

Private-sector preparedness is not a luxury; it is a cost of doing business in the post-9/11 world. It is ignored at a tremendous potential cost in lives, money, and national security.

– *9/11 Commission Report*¹

COVID-19-related business closures led to thousands of business interruption insurance claims and lawsuits across the country. However, throughout the history of business interruption policies, obstacles such as virus exclusions and “physical damage” requirements have been added in response to prior pandemics and catastrophic losses. These exclusions and requirements have led to many hurdles and outright denials for those seeking payment on their policies. So, then, can business owners still find some economic refuge in these policies? Despite outright denials in many courts, at least a handful of federal judges as well as a number of members of Congress seem to think so. Some courts have been using traditional canons of contract interpretation to allow plaintiffs to survive summary judgment motions on their claims, and there is a federal push to pass legislation that would require coverage due to COVID-19-mandated closures. This Note posits that any solution to this economic fallout through business interruption insurance must

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¹ NAT'L COMM'N ON TERRORIST ATTACKS UPON THE U.S., THE 9/11 COMMISSION REPORT 398 (2004).

consider the rational economic needs of insurers and incentivize private capital investment to prevent any one industry—or in the event of federal legislation, the taxpayer—from shouldering this monumental burden.

INTRODUCTION

Business interruption insurance is a type of supplemental insurance available to businesses which, unlike traditional property insurance, covers losses beyond simple property damage and includes such liabilities as lost profits, fixed operating costs, costs associated with moving to temporary locations, and similar unexpected expenses.² It typically kicks in after natural disasters such as fire, wind, or storms, or other events such as theft, government-mandated closures, or terrorism, which result in damage to a business, rendering it partially or wholly inoperable.³ This could include damage to warehouses, suppliers, or to merchandise ready to ship, and is not confined to damage to traditional brick and mortar shops.⁴ Today, nearly all business interruption insurance policies require that there be physical damage to the business before the insurance policy will pay out to the policyholder.⁵

In the wake of ongoing COVID-19-related mandated closures, claims by business owners on these policies have risen to record breaking numbers.⁶ It is worth noting that the outcomes of business

² Tyrone R. Childress et al., *Time for a Policy Checkup: Maximizing Insurance Coverage for Coronavirus Losses*, JONES DAY (Feb. 2020), <https://www.jonesday.com/en/insights/2020/02/time-for-a-policy-checkup>; *What Is Business Interruption Insurance?*, NATIONWIDE, <https://www.nationwide.com/lc/resources/small-business/articles/what-is-business-interruption-insurance> (last visited Mar. 7, 2021).

³ *What Is Business Interruption Insurance?*, ALLSTATE (Nov. 2019), <https://www.allstate.com/tr/business-insurance/business-interruption-coverage.aspx>.

⁴ *Id.*

⁵ Jennifer M. Oliver, *Contractual Distancing: Pandemic Insurance Litigation Spreads with Business Interruption Claim Denials*, NAT'L L. REV. (Apr. 19, 2020), <https://www.natlawreview.com/article/contractual-distancing-pandemic-insurance-litigation-spreads-business-interruption>.

⁶ Maria Sassian, *The Future of American Insurance and Reinsurance Releases a Digital Business Interruption Insurance Explainer*, INS. INFO. INST.

interruption insurance will seemingly affect businesses of all sizes at similar rates.⁷ Estimates state that approximately 33% of small businesses have some form of business interruption insurance, compared to about 35% for all businesses regardless of size.⁸ Similarly, although one may believe that larger industries are better equipped to handle these losses, they are not immune from the economic fallout either.⁹ Airlines, hospitality, retail and entertainment industries have already seen bankruptcy filings, and it is likely that we will continue to see bankruptcies and restructurings absent significant change.¹⁰ This is clearly a concern of the insurance industry generally, as evidenced by a statement from a senior vice president of the National Association of Mutual Insurance Companies (“NAMIC”), who stated: “no insurance company or industry could cover the pandemic’s costs to businesses and the economy—nor should the onus be primarily on insurers.”¹¹

These business interruption claims have almost universally been denied, with some insurers even preemptively stating they will not

(Oct. 16, 2020), <https://www.iii.org/insuranceindustryblog/the-future-of-american-insurance-and-reinsurance-releases-a-digital-business-interruption-insurance-explainer/>. There were over 800 lawsuits filed in the United States in 2020 seeking coverage for business interruption insurance as a result of COVID-19. Cecelia Lockner et al., *COVID-19 Business Interruption Suits: An Overview of Decisions to Date*, JD SUPRA (Dec. 18, 2020), <https://www.jdsupra.com/legalnews/covid-19-business-interruption-suits-an-41312/>.

⁷ Thomas Wade, *Coronavirus and Business Interruption Insurance Coverage*, AM. ACTION FORUM (Apr. 14, 2020), <https://www.americanactionforum.org/insight/coronavirus-and-business-interruption-insurance-coverage/>.

⁸ *Id.*; *U.S. House Introduces Business Interruption Insurance Bills for Small Businesses*, CLUB INDUS. (May 5, 2020), <https://www.clubindustry.com/news/u-s-house-introduces-business-interruption-insurance-bills-for-small-businesses>.

⁹ Michael J. Bowe & Lauren Tabaksblat, *You Can’t Sue a Germ: Comparing the 2008 Financial Crash to the COVID-19 Economic Crisis*, BROWN RUDNICK (June 25, 2020), <http://brownrudnick.com/article/you-cant-sue-a-germ-comparing-the-2008-financial-crash-to-the-covid-19-economic-crisis/>.

¹⁰ *Id.*

¹¹ Karen Epper Hoffman, *Business Interruption: Insurers Balk at Paying Claims*, CFO (Sept. 10, 2020), <https://www.cfo.com/risk-management/2020/09/pandemic-losses-out-in-the-cold/>.

cover COVID-19-related business interruption claims.¹² Tom Baker, a University of Pennsylvania law professor, has been researching business interruption cases since the start of the pandemic, and noted that approximately three out of every four cases brought by businesses seeking payment on their policies have been dismissed at the pleadings stage.¹³ Unsurprisingly, such wide scale insurance denial at a time of global economic strife, with potentially hundreds of billions of dollars at stake, has led to a surge in litigation surrounding the issue.¹⁴ As of the first week of August 2020, there have been over 800 lawsuits filed on the issue of business interruption insurance, a number that exceeds the lawsuits filed on this issue as a result of hurricanes Sandy, Irma, and Harvey combined.¹⁵ Estimates of potential losses facing the insurance industry vary wildly, with investment bank Berenberg projecting \$50 billion to \$70 billion, Lloyd's estimating \$107 billion,¹⁶ and the American Property Casualty Insurance Association ("APCIA") estimating between \$255 billion and \$431 billion per month.¹⁷ Whatever the actual amount may turn out to be, it is clear that in "what is expected to be one of the greatest domestic and global

¹² Erin Shaak, *Class Action: State Farm Has 'Preemptively Denied' COVID-19 Business Interruption Claims*, CLASSACTION (June 26, 2020), <https://www.classaction.org/news/class-action-state-farm-has-preemptively-denied-covid-19-business-interruption-claims#embedded-document>.

¹³ Jef Feeley & Katherine Chiglinksky, *Insurers Winning Most, but Not All, COVID-19 Business Interruption Lawsuits*, INS. J. (Nov. 30, 2020), <https://www.insurancejournal.com/news/national/2020/11/30/592047.htm>.

¹⁴ Michael Bentivegna, *Update: Business Interruption Claims Due to COVID-19*, EISNERAMPER (Aug. 27, 2020), <https://www.eisneramper.com/business-interruption-claims-covid-19-0820/>.

¹⁵ *Id.*

¹⁶ Jeff Dunsavage, *COVID-19 & Beyond: Study Highlights Claims Trends*, INS. INFO. INST. (Oct. 6, 2020), <https://www.iii.org/insuranceindustryblog/covid-19-beyond-study-highlights-claims-trends/>.

¹⁷ Eileen Gilligan, *APCIA Releases Update to Business Interruption Analysis*, AM. PROP. CASUALTY INS. ASS'N (Apr. 28, 2020), <https://www.apci.org/media/news-releases/release/60522/>. See also Susanne Sclafane, *P/C Insurers Back a Federal Pandemic Loss Fund but Not a Backstop like TRIA*, INS. J. (May 19, 2020), <https://www.insurancejournal.com/news/national/2020/05/19/569115.htm>.

economic loss events in history,”¹⁸ there is incentive and determination on the part of the insurance industry to fight these claims however possible.¹⁹

Crucially, many of these lawsuits turn on whether there has been “physical loss” or “physical damage,” a requirement of the vast majority of these policies.²⁰ Insurers have been arguing the perhaps common-sense notion that there has been no physical damage as a result of government-mandated closures and, therefore, the denial of coverage is plainly justified.²¹ This line of reasoning has been successful in a number of cases. It was recently exemplified in the Washington, D.C. Superior Court case *Rose’s 1, LLC et al. v. Erie Insurance Exchange*, where the court granted summary judgment to Erie Insurance Exchange, asserting that it need not pay out on a business interruption claim because, absent the presence of COVID-19, there could be no “physical damage” as required by the insurance contract.²² The court reasoned that government-mandated shutdown orders did not entitle the insured to coverage absent a direct physical damage to the property, and that the insured in this case did not provide any evidence that COVID-19 was physically present in their businesses.²³ This is in contrast, however, to other lower court rulings on the exact same issue.²⁴ In *North State Deli, LLC v. The Cincinnati Insurance Company*, a North Carolina Superior Court grappled with the definition of “direct physical loss.”²⁵ The court ultimately determined that to hold the term to require literal physical damage would “conflate[] ‘physical loss’ and

¹⁸ Hoffman, *supra* note 11.

¹⁹ See, e.g., *Turek Enters., Inc. v. State Farm Mutual Auto. Ins. Co.*, 484 F. Supp. 3d 492 (E.D. Mich. 2020); *Circus Circus LV, LP v. AIG Specialty Ins. Co.*, No 2:20-cv-01240-JAD-NJK, 2021 WL 769660 (D. Nev. Feb. 26, 2021), *appeal docketed*, No. 21-15367 (9th Cir. Mar. 2, 2021).

²⁰ Wade, *supra* note 7.

²¹ Bentivegna, *supra* note 14.

²² See *Rose’s 1, LLC v. Erie Ins. Exch.*, No. 2020 CA 002424 B, 2020 WL 4589206, at *4–5 (D.C. Super. Ct. Aug. 6, 2020).

²³ *Id.* at 5.

²⁴ See, e.g., *North State Deli, LLC v. Cincinnati Ins. Co.*, No. 20-CVS-02569, 2020 WL 6281507 (N.C. Super. Ct. Oct. 9, 2020); *Gregory Packaging, Inc. v. Travelers Prop. Cas. Co. of Am.*, Civ. No. 2:12-CV-04418, 2014 WL 6675934 (D.N.J. Nov. 25, 2014).

²⁵ *North State Deli*, 2020 WL 6281507, at *3.

‘physical damage.’”²⁶ To rectify this perceived issue, the court held that “direct physical loss” applies to “the inability to utilize or possess something in the real, material, or bodily world,” and that such a definition logically applies to extend coverage to situations where business owners are prevented from using their property, such as in the case of government-mandated closures.²⁷

As evidenced above, courts are split as to what satisfies the “physical loss or damage” requirement, and in some instances, whether that requirement can be upheld at all.²⁸ Courts in some jurisdictions have held that contaminants and other circumstances that make property constructively unusable can be sufficient to constitute a physical loss, focusing more on the “loss” rather than the “damage.”²⁹ Plaintiffs may also be able to argue that a virus is in fact itself a physical harm causing damage to their business.³⁰ Depending on the court, however, this may prove to be a losing argument.³¹ Many federal district courts have rejected this argument, some rather passionately.³² In one opinion from the Southern District of New York, denying a motion for a preliminary injunction, the court stated that “coronavirus damages lungs. It

²⁶ *Id.*

²⁷ *Id.*

²⁸ Barclay Richard Nicholson & Peyton L. Craig, *COVID-19 and Business Interruption Claims: The Looming US Battle Ahead*, NORTON ROSE FULBRIGHT (Apr. 8, 2020), <https://www.nortonrosefulbright.com/en-us/knowledge/publications/96a8191e/covid-19-and-business-interruption-claims-the-looming-us-battle-ahead>.

²⁹ Childress, *supra* note 2.

³⁰ *See, e.g.*, Gregory Packing Inc. v. Travelers Prop. Cas. Co. of Am., Civ. No. 2:12-CV-04418, 2014 WL 6675934, at *6 (D.N.J. Nov. 25, 2014) (finding that an ammonia discharge inflicted damage to Gregory Packaging’s Facility).

³¹ *See, e.g.*, Sandy Point Dental, PC v. Cincinnati Ins. Co., No. 20 CV 2160, 2020 WL 5630465, at *3 (N.D. Ill. Sept. 21, 2020) (holding that closure due to COVID-19, especially without proof of the virus’s physical presence, is insufficient to satisfy a showing of “physical harm,” a prerequisite for insurance coverage).

³² *Id.* (citing, *inter alia*, decisions from the Southern District of New York, Western District of Texas, and Superior Court of the District of Columbia holding that coronavirus does not amount to physical loss).

doesn't damage printing presses.”³³ This holding, and indeed this very quotation, have been cited favorably in numerous other district court decisions as well.³⁴

These variations in what may constitute a loss for purposes sufficient to trigger business interruption insurance mean the analysis is one that is fact-specific, and this issue may be one reason we have seen such a large volume in litigation—particularly since the fact-specific nature of these cases may make consolidation impractical or impossible.³⁵ However, many plaintiffs still face an uphill battle. In the aftermath of the 2002–2004 SARS outbreak, many insurers added explicit virus exclusions into their business interruption policies.³⁶ Even though some courts, as well as pending legislation in Congress,³⁷ have advanced policy reasons to ignore this exclusion, because of the exclusion's own unambiguous terms as well as the insured's implicit assent to the terms of their policy, many courts have summarily rejected plaintiffs' claims seeking payment on these policies.³⁸

There may also be hope for some plaintiffs to succeed on their claims through the basic principles of contract law.³⁹ Federal trial courts in a number of states have applied this basic framework when analyzing whether a virus exclusion applies to COVID-19 related claims.⁴⁰ In the case of *Urogynecology Specialist of Florida, LLC v.*

³³ *Sandy Point Dental*, 2020 WL 5630465, at *3 (citing *Social Life Magazine, Inc. v. Sentinel Ins. Co. Ltd.*, No. 20 C 3311 (S.D.N.Y. 2020)).

³⁴ *See, e.g., id.*

³⁵ Childress, *supra* note 2.

³⁶ John DiMugno, *The Implications of COVID-19 for the Insurance Industry and Its Customers*, 32 CAL. INS. L. & REG. REP. 1 (2020).

³⁷ *See* Business Interruption Insurance Coverage Act of 2020, H.R. 6494, 116th Cong. (2020); Never Again Small Business Protection Act of 2020, H.R. 6497, 116th Cong. (2020).

³⁸ Tyrone R. Childress, Matthew L. Jacobs & Jason B. Lissy, *COVID-19 Ruling Serves as Cautionary Tale for Policyholders to Satisfy Pleading Requirements*, JONES DAY (July 2020), <https://www.jonesday.com/en/insights/2020/07/covid19-ruling-serves-as-cautionary-tale-for-policyholders-to-satisfy-pleading-requirements>.

³⁹ *See Urogynecology Specialist of Fla. LLC v. Sentinel Ins. Co.*, No. 6:20-CV-1174-Orl-22EJK, 2020 WL 5939172, at *3 (M.D. Fla. Sept. 24, 2020).

⁴⁰ *See e.g., id.*; *Turek Enterprises, Inc. v. State Farm Mut. Auto. Ins. Co.*, 484 F. Supp. 3d 492, 499 (E.D. Mich. 2020); *Martinez v. Allied Ins. Co. of Am.*, 483

Sentinel Insurance Company, LTD, this meant an analysis as to whether the included virus provision was ambiguous, with any genuine ambiguity weighing in favor of covering the claim as a matter of public policy, or at the very least allowing the claim to survive a summary judgment motion.⁴¹ There, the virus exclusion at issue stated that it did not cover “loss or damage caused directly or indirectly by the presence, growth, proliferation, spread, or any activity of ‘fungi, wet rot, dry rot, bacteria, or virus.’”⁴² The court determined that the enumerated exclusions of fungi, wet rot, and dry rot did not logically follow to also include COVID-19, as they were materially different, and subsequently denied Sentinel’s motion to dismiss.⁴³ This is a significant win for plaintiffs looking to enforce their business interruption policies because it suggests that, despite the inclusion of what might be considered a catchall exclusion for viruses, other qualifying terms or exclusions may limit their scope.⁴⁴ Although this holding does not mean that plaintiffs will ultimately be paid on their insurance policies, it does give them ammunition to survive a motion for summary judgment, making it all the more likely that they may be able to get their case before a jury, where they will likely benefit at least in some small way as the more sympathetic party.⁴⁵

Part I of this Note examines the current proposed federal legislation in the United States Congress. It discusses the attempts by Congress to cover COVID-19-related business interruption claims and their potential shortfalls, especially as it relates to insurers’ unchecked ability to increase premiums on those policies.⁴⁶ Part II of this Note then analyzes the way these same

F. Supp. 3d 1189, 1191 (M.D. Fla. 2020); 10E, LLC v. Travelers Indem. Co. of Conn., 483 F. Supp. 3d 828, 835 (C.D. Cal. 2020) (applying basic contract principles in determining viability of COVID-19-related business insurance claims).

⁴¹ *Urogynecology Specialist of Fla.*, 2020 WL 5939172, at *3.

⁴² *Id.* at *4.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ See H.R. 6494, 116th Cong. (2020) (proposing to limit the ability to increase insurance premiums); H.R. 6497, 116th Cong. (2020) (proposing optional coverage by insurers covering viral pandemics).

goals have manifested themselves into bills at the state level. It examines the large overlap in the federal and state approaches, while noting the exception that several states have added more specificity in terms of exact dollar caps.⁴⁷ Part III then analyzes the Terrorism Risk Insurance Act (“TRIA”) which was passed in the aftermath of the terrorist attacks that took place on September 11, 2001.⁴⁸ This Act has enjoyed considerable political support and is currently a contender for the basis of any COVID-19 related insurance bill, so this Note will discuss where it has been successful, and in what areas it has fallen short.⁴⁹ Next, Part IV examines the approach to business interruption insurance taken up in the wake of the 2002 SARS outbreak. As is still seen today, much of the debate there was centered on the issue of “physical” damage.⁵⁰ This outbreak is also largely what led insurers to include virus exclusions in these contracts, so the historical context here will provide insight into the needs of both the insured and the insurers.⁵¹

Finally, Part V proposes a blend of the most promising aspects of currently proposed federal and state bills, as well as the proven effective portions of TRIA. This proposal includes a call for a federal act to mandate business interruption coverage where businesses were forced to close either through government-mandated closures or directly from COVID-19 itself. Such a bill should be retroactive to March 1, 2020, and as the New York assembly thoughtfully considered, should permit those who were covered as of that date, but let their policies expire, to reinstate those policies at the same costs they were paying as of March 1, 2020.⁵² It should further seek to address the potential issues with H.R. 6494 and H.R. 6497⁵³ by still permitting insurers to raise premiums with

⁴⁷ See, e.g., A10226B, 2019–2020 Leg. Sess., Reg. Sess. (N.Y. 2020); S.B. 477, 2020 Leg. Sess., Reg. Sess. (La. 2020).

⁴⁸ See DiMugno, *supra* note 36, at 20–21 (discussing the history and key provisions of TRIA).

⁴⁹ *Id.*

⁵⁰ See Charles S. LiMandri et al., *Pandemic of Coverage Litigation for Business Income Losses Due to Coronavirus Plagues Insurance Industry*, 32 CAL. INS. L. & REG. REP. 1 (2020).

⁵¹ DiMugno, *supra* note 36, at 1–3.

⁵² See N.Y. Assem. B. A10226B.

⁵³ See discussion *infra* Part I.

the goal of recuperating some of their losses.⁵⁴ However, it should require an independent actuarial organization such as the Academy for Actuaries to determine the level of such an increase, which in no event should meet or exceed the cost of the claims.⁵⁵ Just as was created in TRIA, a proposed solution to this issue in relation to COVID-19 should also require a federal backstop mechanism to cover insurance industry losses over a specified cap.⁵⁶ Lastly, the act should seek to incentivize private investment capital in the insurance industry by creating a period in which individuals and equity funds could invest directly into insurance companies, with those investments not subjected to the capital gains tax.

I. PROPOSED FEDERAL LEGISLATION

A. H.R. 6494

Introduced on April 14, 2020, H.R. 6494 is currently before the United States House of Representatives Committee on Financial Services.⁵⁷ The bill, alternatively known as the “Business Interruption Insurance Coverage Act of 2020,” is sponsored by Representative Mike Thompson and is currently co-sponsored by nine other members of Congress, all of whom are Democrats.⁵⁸ As its name implies, the purpose of the bill is to include business interruption due to virus pandemics and mandated business closures among the claims covered by business interruption insurance.⁵⁹ The bill takes a strong stance in favor of the insured by requiring that all insurers who offer business interruption insurance shall include coverage in their policies for “any viral pandemic . . . forced closure of businesses, or mandatory evacuation . . . [or] power shut-off conducted for public safety purposes”⁶⁰ The bill then aims to squarely tackle the issue as it relates to COVID-19 by voiding any

⁵⁴ See H.R. 6494, 116th Cong. (2020); H.R. 6497, 116th Cong. (2020).

⁵⁵ See H.R. 6494, 116th Cong. (2020); H.R. 6497, 116th Cong. (2020).

⁵⁶ DiMugno, *supra* note 36, at 20.

⁵⁷ H.R. 6494.

⁵⁸ *Id.* § 1.

⁵⁹ *Id.*

⁶⁰ *Id.* § 2.

exemptions currently in effect as of the date of the Act's enactment that conflict with the required coverages enumerated in Section 2.⁶¹

H.R. 6494 § 2 states in part:

Effective upon the date of the enactment of this Act, each insurer that offers or makes available business interruption insurance coverage . . . shall make available, in all of its policies providing business interruption insurance, coverage for losses resulting from—

(A) any viral pandemic;

(B) any forced closure of businesses, or mandatory evacuation, by law or order of any government or governmental officer or agency, including the Federal Government and State and local governments; or

(C) any power shut-off conducted for public safety purposes.⁶²

It further explicitly denies states the right to approve any of the aforementioned exclusions in business interruption insurance.⁶³ If there is any consolation in this bill for the insurance industry, it is found in Section 3(C)(2).⁶⁴ This section permits insurers to reinstate provisions that exclude coverage outlined in Section 2(1) “if the insured fails to pay any increased premium charged by the insurer for providing such business interruption insurance.”⁶⁵ Notably, the bill does not cap or otherwise instruct the amount insurers are permitted to raise premiums as a result and fails to further flesh out how this process might work, raising questions such as whether an insurer could, consistent with H.R. 6494, simply raise the premium by the amount (or just under the amount) of the claim, and then refuse to pay out unless that increased premium is met.⁶⁶ Such an act would clearly go against the public policy purpose of the bill, but

⁶¹ *Id.* §§ 2–3.

⁶² *Id.* § 2.

⁶³ *Id.* § 3.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

the Act's own terms nonetheless imply some support that these very actions may be permissible.⁶⁷

B. H.R. 6497

There are a number of similar bills also before the House Committee on Financial Services, such as H.R. 6497, also known as the Never Again Small Business Protection Act of 2020.⁶⁸ This bill, sponsored by Pennsylvania Republican Representative Brian Fitzpatrick, was introduced on the same day as H.R. 6494.⁶⁹ It currently has six cosponsors and enjoys bipartisan support, unlike H.R. 6494.⁷⁰ Also unlike H.R. 6494, H.R. 6497 does not seek to mandate that insurers include coverage for viral pandemics, orders of federal or state governments, and the like, but rather only mandates that they offer coverage for these incidents as optional additional coverage.⁷¹ However, the bill has the same exceptions to the mandate, as does H.R. 6494, in that it allows insurers to deny such coverage in the presence of an affirmative written statement from the insured authorizing the exclusion of such coverage or in the event that the insured fails to pay any additional premium for the coverage.⁷² In this way, both bills are susceptible to the same criticism—that they fail to cap or otherwise guide the application of additional fees, raising the concern that these additional fees could be equal to, or nearly equal to, the amount of the claim itself, thereby eliminating any potential benefit to the insured.⁷³ Interestingly, despite the proposed bill's name, it makes no mention or specific effort to target small businesses in particular.⁷⁴

⁶⁷ *Id.*

⁶⁸ H.R. 6497, 116th Cong. § 1 (2020).

⁶⁹ *Id.*; Press Release, Brian Fitzpatrick, Fitzpatrick, Cisneros, Hurd, Suozzi Introduce Landmark Bipartisan Business Interruption Insurance Bill to Protect Small Businesses (Apr. 24, 2020) (on file with author); *see also* H.R. 6494.

⁷⁰ H.R. 6497; Press Release, Brian Fitzpatrick, Fitzpatrick, Cisneros, Hurd, Suozzi Introduce Landmark Bipartisan Business Interruption Insurance Bill to Protect Small Businesses (Apr. 24, 2020) (on file with author).

⁷¹ H.R. 6497 § 2.

⁷² *Id.* § 4.

⁷³ *Compare* H.R. 6497, *with* H.R. 6494.

⁷⁴ H.R. 6497.

However, the bill goes far beyond simply creating an option to purchase business interruption insurance under circumstances such as those posed by COVID-19.⁷⁵ As outlined in Sections 5 and 6, it directs the Federal Advisory Committee on Insurance established by the Secretary of the Treasury to “conduct a study regarding the effectiveness and efficiency of using a [f]ederal backstop mechanism, private equity pools, risk assessments, and market pricing to reinsure insurers for excessive losses under coverage made available pursuant to Section 2 of this Act,” to be concluded within 180 days of the bill’s enactment.⁷⁶ Depending on the findings of such a study, this means that the government could wind up reinsuring insurers above a certain monetary threshold, or encourage private funds to act as a type of investor, or reinsurer, of the insurance industry. Such a program is certainly beneficial to the insurance industry and may in fact be required to prevent bankruptcies or insolvencies, but when liability estimates range from as low as \$50 billion⁷⁷ to as high as \$431 billion per month,⁷⁸ the federal government could be left on the hook for limitless liability that seems difficult, if not impossible, to convincingly estimate.

II. PROPOSED STATE LEGISLATION

There are currently at least eight state legislatures that have also introduced legislation aimed at combating the issue of COVID-19 coverage under business interruption insurance.⁷⁹ All eight of these

⁷⁵ *Id.*

⁷⁶ *Id.* § 5.

⁷⁷ Dunsavage, *supra* note 16.

⁷⁸ Jef Feeley & Katherine Chiglinsky, *Monthly Loss of \$431 Billion Spurs Insurance Claims Across the U.S.*, BLOOMBERG (Apr. 8, 2020), <https://www.bloomberg.com/news/articles/2020-04-08/monthly-loss-of-431-billion-spurs-insurance-claims-across-u-s>.

⁷⁹ SULLIVAN & CROMWELL, INSURANCE UPDATE: LEGISLATIVE, REGULATORY AND LITIGATION ACTIVITY IN THE U.S. IN RESPONSE TO COVID-19: DEVELOPMENTS AFFECTING BUSINESS INTERRUPTION INSURANCE, WORKERS’ COMPENSATION AND AUTO INSURANCE 5 (2020), <https://www.sullcrom.com/files/upload/SC-Publication-COVID-19-Insurance-Developments-Business-Workers-Compensation-Auto.pdf>.

states—Louisiana, Massachusetts, Michigan, New Jersey, New York, Ohio, Pennsylvania, and South Carolina—currently have some form of proposed legislation that seeks to expand business interruption insurance to businesses affected by COVID-19 and eliminate denials based on a lack of traditional “physical loss or damage.”⁸⁰ Many of these bills also explicitly state that upon ratification, they would become retroactive to March 2020.⁸¹ The majority of the proposed bills also provide that the amount a business may receive in relief is the same as the upper limits of their original policy.⁸² Although the states do not have the same level of capital available as the federal government, those state bills that provide for a funding mechanism operate similarly to the proposed federal backstop mechanism.⁸³ However, instead of reimbursing insurers over a specified cap, they would reimburse the insurers proportional to the scope of their business in the state.⁸⁴

These proposed bills are essentially the same in goal and in approach as the federal bills, but there are some noteworthy differences. In New York, for example, bill A 10226 would provide that should a business interruption insurance policy expire during a state of emergency, the policy would automatically be renewed at its current rate.⁸⁵ In the Louisiana Senate, S.B. 506, a supplemental COVID-19 related bill, would also allow the insured to purchase plans that include disinfecting places of business where individuals have had a positive diagnosis for COVID-19, up to ten cents per square foot.⁸⁶ This is significant because it is one of the only proposed pieces of legislation in the business interruption insurance sphere that puts an exact amount on the proposed relief.⁸⁷

⁸⁰ *Id.* at 5–6.

⁸¹ *Id.* at 4; *but see* S.B. 2888, 191st Leg., Reg. Sess. (Mass. 2020); S.B. 5739, 100th Leg., Reg. Sess. (Mich. 2020); S.B. 1188, General Assemb., 123rd Sess. (S.C. 2020) (omitting specific reference to retroactivity).

⁸² SULLIVAN & CROMWELL, *supra* note 79, at 5.

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ A10226B, 2019–2020 Leg. Sess., Reg. Sess. (N.Y. 2020).

⁸⁶ S.B. 477, 2020 Leg. Sess., Reg. Sess. (La. 2020).

⁸⁷ SULLIVAN & CROMWELL, *supra* note 79, at A-3.

III. TERRORISM RISK INSURANCE ACT

In the wake of the terrorist attacks on September 11, 2001, the United States Congress passed the Terrorism Risk Insurance Act (“TRIA”), which is a form of federal reinsurance of the insurance industry, capping their terrorism-related losses at \$100 billion from a terrorist act.⁸⁸ Furthermore, prior to reaching the \$100 billion cap, the federal government will also pay 80% of a claim for the portion that is in excess of the aggregate amount of claims of the entire insurance industry, plus the claimant’s individual deductible.⁸⁹ The currently proposed Pandemic Risk Insurance Act is substantially similar in approach to the Terrorism Risk Insurance Act, and appears to be the approach with the most political support behind it to date.⁹⁰ Being that it may very well be the outline for a new national emergency, it is important to note the congressional findings that led to its enactment, as well as what economic successes TRIA has managed to accomplish to make it so politically popular nearly two decades later.

Unsurprisingly, many of the congressional findings from the Terrorism Risk Insurance Act can logically be applied to any forthcoming COVID-19 related insurance legislation. Congress found that the existence of a functioning insurance market is crucial to economic growth, urban development, housing, and trade.⁹¹ It further found that the ability of insurance companies to cover risks from terrorist attacks can be a crucial factor in the economic recovery post-attack.⁹² It is easy to imagine that such logic could be applied to viral pandemics as well since common sense would appear to dictate that a strong insurance industry, sufficiently able to cover legitimate claims, would aid in the recovery from any large scale economic disaster, regardless of the source.

It should also be noted that TRIA is not without its critics, many of whom are from the insurance industry itself.⁹³ This is largely due

⁸⁸ DiMugno, *supra* note 36, at 20.

⁸⁹ *Id.*

⁹⁰ *Id.* at 20–21.

⁹¹ Terrorism Risk Insurance Act of 2002, 15 U.S.C. § 101 (2002).

⁹² Terrorism Risk Insurance Act of 2002, H.R. 3210, 107th Cong. § 101(a)(3) (2002).

⁹³ Sclafane, *supra* note 17.

to the fact that TRIA does not act like traditional reinsurance.⁹⁴ Specifically, TRIA creates a system which only takes effect after a triggering event, rather than before.⁹⁵ This allows the federal government to allocate less funding to the program and is typically more efficient, because by the time the federal government pays out, it has an idea of the exact cost of the damage it is replacing.⁹⁶ While this all works well in theory, it does place the majority of the upfront financial burden on the insurance industry.⁹⁷ This is because the insurance industry itself is the first payor in the event of catastrophic loss, requiring its constituents to have large capital available to meet potential demand.⁹⁸

Two major insurer trade organizations, the National Association of Mutual Insurance Companies (“NAMIC”) and the American Property Casualty Insurance Association (“APCIA”), have openly spoke about their concerns over modeling any pandemic-related program after TRIA.⁹⁹ They have distinguished the effects of COVID-19 from terrorist events, stating: “[t]he pandemic risk is fundamentally different from a terrorist attack. Terrorist attacks, as awful as they are, do have limits in geography. They have limits in scope and frequency. This pandemic would be like having 9/11 every day for 60 or 90 days.”¹⁰⁰

Insurers further distinguish between their approaches to these catastrophes, warning that while the typical, risk-based strategy is appropriate for mitigating harm after terrorist events, the same cannot be said for pandemics like COVID-19.¹⁰¹ They claim that these normally utilized practices would be detrimental to the public health in the case of a pandemic.¹⁰² They state, for example, that

⁹⁴ Wendy Peters, *5 Key Questions About Terrorism Insurance (TRIA)*, WILLIS TOWERS WATSON (Sept. 2, 2019), <https://www.willistowerswatson.com/en-US/Insights/2019/09/5-key-questions-about-terrorism-insurance>.

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *See id.* (stating that insurers must first sustain aggregate losses in excess of their own deductibles in order to trigger the payment of federal funds).

⁹⁹ Sclafane, *supra* note 17.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

insurers normally charge higher rates to those that are higher risk, but that this is not an option in relation to COVID-19 since the risk has already been realized.¹⁰³ One method they could use to minimize liability would be to incentivize businesses to continue to operate, although in many situations this would be directly at odds with the public interest or even perhaps federal or state law.¹⁰⁴

The Academy for Actuaries, in contrast to NAMIC and APCIA, largely supports the premise of a TRIA-like COVID-19 relief act.¹⁰⁵ Their support, however, is not without some criticisms as well.¹⁰⁶ It specifically criticized the idea that the federal government might require “actuarially determined premiums for insurers to pay to the government for reinsurance.”¹⁰⁷ The concern here is that there is not a reasonable enough degree of specificity to determine the actuarial cost of these claims.¹⁰⁸ They worry that this could require insurers to pay huge sums of money to the government based on flimsy accounting principles, for claims that may not even arise for years or even decades, which would naturally be an inefficient allocation of capital during a time when relief funds are needed desperately for many.¹⁰⁹ There is also the concern that natural market forces will play a role in any action that Congress inevitably decides to take and that in the event loss is excessively placed on the shoulders of the insurance industry, it will likely make up for those losses by increasing insurance rates.¹¹⁰

IV. THE 2002 SARS OUTBREAK AND ITS LASTING EFFECTS ON BUSINESS INTERRUPTION INSURANCE

Following the 2002 SARS outbreak and the extensive ensuing litigation, many insurance companies added explicit virus and

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

bacteria exclusions into their business interruption policies.¹¹¹ The first of such exclusions was introduced in 2006 by the Insurance Services Office (“ISO”).¹¹² While seeking regulatory approval for the exclusion, the ISO specifically mentioned SARS as a reason for adding the exclusion; however, they also made sure to state that “[t]he universe of disease-causing organisms is always in evolution,” and as such, that the exclusion should not be limited solely to SARS.¹¹³ The argument that the insurance industry meant for this inclusion to cover diseases like COVID-19 is even stronger when one notes that COVID-19, caused by SARS-CoV-2, is actually related to the virus that causes SARS-CoV,¹¹⁴ seemingly falling exactly into the type of “evolution” contemplated by the ISO.¹¹⁵

Still, not all policies contain such an exclusion. But that has not deterred many insurers from refusing to pay out on bacteria and virus-related claims.¹¹⁶ In cases where no such virus exclusion exists, insurers have been known to seek refuge through pollution exclusions.¹¹⁷ Courts are reluctant to find that bacteria falls under the pollution exclusion;¹¹⁸ however at least one court—the Southern

¹¹¹ See, e.g., Larry Podoshen, *New Endorsements Filed to Address Exclusion of Loss Due to Virus or Bacteria*, INS. SERV. OFF. (July 6, 2006), <https://www.propertyinsurancecoveragelaw.com/files/2020/03/ISO-Circular-LI-CF-2006-175-Virus.pdf> (providing, in relevant part, that the insurer “will not pay for loss or damage caused by or resulting from any virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness or disease”).

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ Yujiro Toyoshima et al., *SARS-CoV-2 Genomic Variations Associated with Mortality Rate of COVID-19*, 65 J. HUMAN GENETICS 1075 (2020); Ralph S. Baric, *Emergence of a Highly Fit SARS-CoV-2 Variant*, 382 NEW ENG. J. MED. 2684 (2020).

¹¹⁵ Podoshen, *supra* note 111, at 9.

¹¹⁶ Hoffman, *supra* note 11.

¹¹⁷ DiMugno, *supra* note 36, at 24.

¹¹⁸ See, e.g., *Johnson v. Clarendon Nat’l Ins. Co.*, No. G039659, 2009 WL 252619, at *2, *13 (Cal. Ct. App. Feb. 4, 2009) (holding that mold does not fall under virus exclusion); *Westport Ins. Corp. v. VN Hotel Grp., LLC*, 761 F. Supp. 2d 1337, 1343–44 (M.D. Fla. 2010) (holding that legionella does not fall under virus exclusion).

District of Florida—has held that it does.¹¹⁹ Regardless, after dealing with the losses incurred from SARS, virus exclusions are by far the norm today in business interruption insurance.¹²⁰

Even in cases where virus exclusions are explicitly written into business interruption insurance contracts, at least some courts are willing to ignore such exclusions.¹²¹ However, even where courts are willing to ignore these exclusions, or where they did not exist in the original insurance contract, there has still been another major hurdle for those seeking to be paid out on these policies—the “physical loss or damage requirement.”¹²² This requirement is typically in contemplation of natural disasters such as hurricanes, fires, or earthquakes.¹²³ It is unclear whether a virus that can “live on surfaces for up to four days” is sufficient to state a claim for “physical loss or damage.”¹²⁴ Regardless, although there is debate as to how courts will interpret the “physical loss or damage” requirement, there is a body of case law to suggest that many may find that the presence of COVID-19 satisfies such a requirement.¹²⁵ For example, in *Cooper v. Travelers Indemnity Co. of Illinois*, the U.S. District Court for the Northern District of California held that the presence of E. coli in a bar was sufficient for the purposes of the “physical damage” inquiry.¹²⁶ Logic seems to dictate that if the presence of E. coli is sufficient for a finding of “physical loss or damage,” then the presence of COVID-19 would be sufficient. Support for this contention exists throughout several of the federal circuit courts. The First, Third, Fourth, and Eighth Circuits have all affirmed cases finding the prerequisite “physical damage” without

¹¹⁹ See *First Specialty Ins. Corp. v. GRS Mgmt. Assocs., Inc.*, No. 08-81356-CIV, 2009 WL 2524613, at *3–5 (S.D. Fla. Aug. 17, 2009).

¹²⁰ DiMugno, *supra* note 36.

¹²¹ LiMandri et al., *supra* note 50.

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Friends of Danny DeVito v. Wolf*, 227 A.3d 872, 890 (Pa. 2020) (concluding that COVID-19 bacteria, which can survive on surfaces for up to four days, puts places where it exists in a “disaster area” subject to state-mandated closure orders).

¹²⁵ *Id.*; see sources cited *infra* note 127.

¹²⁶ *Cooper v. Travelers Indem. Co. of Ill.*, No. C-01-2400-VRW, 2002 WL 32775680, at *5 (N.D. Cal. Nov. 4, 2002), *aff’d*, 113 F. App’x 198 (9th Cir. 2004).

the literal, traditional use of the phrase.¹²⁷ In these cases, there was no physical damage to the structure of the business itself.¹²⁸ There are, of course, numerous cases that suggest just the opposite—that literal damage to property is required—suggesting that, at least for now, whether or not an insured can recover on their claim may very well come down to which court they find themselves in.¹²⁹

V. A PROPOSED SOLUTION TO AMALGAMATE CURRENT BILLS,
DETER ABUSE, AND DIVERSIFY CURRENT LOSSES IN
ANTICIPATION OF FUTURE EARNINGS

The groundwork laid by federal bills H.R. 6494 and H.R. 6497, as well as the numerous state bills, is commendable and an excellent framework for the legislation that should ultimately emerge to address the COVID-19 pandemic as it relates to business interruption insurance, but these efforts are not beyond reproach.¹³⁰ As discussed previously, many of these bills are susceptible to abuse

¹²⁷ See *Essex Ins. Co. v. BloomSouth Flooring Corp.*, 562 F.3d 399, 406 (1st Cir. 2009) (losses from odor in defective carpeting were caused by physical injury to property); *Port Auth. of N.Y. and N.J. v. Affiliated FM Ins. Co.*, 311 F.3d 226, 235–36 (3d Cir. 2002) (losses from large quantities of asbestos in the air of a building can be sufficient for a finding of physical damage); *TRAVCO Ins. Co. v. Ward*, 715 F. Supp. 2d 699, 709 (E.D. Va. 2010), *aff'd*, 504 F. App'x. 251 (4th Cir. 2013) (losses resulting from defective drywall, even when fully intact and functional, were caused by “loss of use of tangible property” constituting “property damage”); *By Dev., Inc. v. United Fire & Cas. Co.*, No. Civ. 04-5116, 2006 WL 694991, at *4–6 (D.S.D. Mar. 14, 2006), *aff'd sub nom*, 206 F. App'x 609 (8th Cir. 2006) (finding that the presence of bacteria and other non-traditional forms of “physical damage” may be sufficient to meet the physical loss or damage requirement).

¹²⁸ See sources cited *supra* note 127.

¹²⁹ See, e.g., *Dickie Brennan & Co. v. Lexington Ins. Co.*, 636 F.3d 683, 686–87 (5th Cir. 2011) (losses caused by mandatory evacuation prior to a hurricane were not caused by direct physical loss of or damage to property); *Source Food Tech., Inc. v. U.S. Fid. & Guar. Co.*, 465 F.3d 834, 838 (8th Cir. 2006) (losses resulting from embargo due to “mad cow disease” were not caused by physical loss); *United Air Lines, Inc. v. Ins. Co. of Pa.*, 439 F.3d 128, 129 (2d Cir. 2006) (losses caused by government shut down of airport following 9/11 terrorist attack were not caused by physical loss).

¹³⁰ See generally H.R. 6494, 116th Cong. (2020); H.R. 6497, 116th Cong. (2020); SULLIVAN & CROMWELL, *supra* note 79.

in that they fail to meaningfully limit increased premiums and policy costs, or impose specific dollar amounts in all relevant areas including federal or state backstop caps, or the amount to be received by the insured.¹³¹ Perhaps most significantly, these bills would put significant financial strain on both the insurance industry and the federal and state governments that seek to cap their losses.¹³² Many of these proposed funding mechanisms are simply a version of a tax and spend plan, which makes little sense given that hundreds of thousands of businesses are shut down, people are out of work, and these plans would essentially have those fortunate enough—but largely still struggling—to foot a significant portion of the bill, while also still leaving insurance companies extraordinarily vulnerable.¹³³ While financial strain across all sectors of the United States economy is likely inevitable in the wake of COVID-19, that does not prevent us from attempting to ameliorate such difficulties.¹³⁴ The most efficient way to do this is to spread the costs among as many people and corporations as possible, while creating incentive and opportunity to share in the post-COVID economic gains. It is for these reasons that any final federal bill seeking to address these problems should: (1) require insurers to cover COVID-19 business interruption claims regardless of physical damage, especially in cases of government-mandated closures; (2) be retroactive to March 1, 2020; (3) allow insurers to increase premiums to recover some of their losses, subject to an independently and actuarially determined percentage cap that in no event shall be equal to or exceed the amount of the claim; (4) permit the federal and state governments to create backstop programs covering insurance sector losses above a specific dollar amount to

¹³¹ See discussion *infra* Part I, Sections A–B.

¹³² Alison Frankel, *COVID-19 Response “Could Bankrupt the Insurance Industry”*: *Insurance Defense Lawyer*, REUTERS (Apr. 15, 2020, 7:30 AM), <https://www.reuters.com/article/us-otc-covid19/covid-19-response-could-bankrupt-the-insurance-industry-insurance-defense-lawyer-idUSKCN21W2YE>.

¹³³ See H.R. 6497, 116th Cong. (2020); SULLIVAN & CROMWELL, *supra* note 79, at 42–52.

¹³⁴ Kim Parker et al., *Economic Fallout From COVID-19 Continues to Hit Lower-Income Americans the Hardest*, PEW RES. CTR. (Sept. 24, 2020), <https://www.pewresearch.org/social-trends/2020/09/24/economic-fallout-from-covid-19-continues-to-hit-lower-income-americans-the-hardest/>.

be determined by a Federal Advisory Committee on Insurance established by the Secretary of the Treasury, which would be limited to COVID-19-related losses and would terminate after such claims have been settled; and (5) create incentive for private sector investment by creating a window for investments into these corporations, the profits of which would not be subject to the capital gains tax. These measures, taken together, will help address the substantial economic need to keep businesses open and insurers solvent, all while deterring abuse and minimizing the losses on any one sector—especially the federal government.¹³⁵ The federal government can benefit from all the savings it can reasonably expect, in order to help alleviate the burden of COVID-19 in other meaningful areas as well.¹³⁶

A. *Scope of Coverage*

It is clear that the United States and insurance companies alike have a substantial interest in making sure that these business interruption insurance claims are paid out, and in a way that is financially viable for all parties involved.¹³⁷ With roughly 100,000 small businesses already closed for good¹³⁸ and as many as 7.5 million businesses at risk of closing permanently,¹³⁹ it is clear that continued loss of business and the subsequent increase in unemployment—which more than tripled during the pandemic to over 20 million unemployed as of May of 2020—could have a

¹³⁵ See Chye-Ching Huang et al., *Putting the Size of the Needed COVID-19 Fiscal Response in Perspective*, CTR. ON BUDGET & POL'Y PRIORITIES (July 24, 2020), <https://www.cbpp.org/research/federal-budget/putting-the-size-of-the-needed-covid-19-fiscal-response-in-perspective>.

¹³⁶ *Id.*

¹³⁷ DiMugno, *supra* note 36, at 25.

¹³⁸ Heather Long, *Small Business Used to Define America's Economy. The Pandemic Could Change That Forever.*, WASH. POST (May 12, 2020, 5:00 PM), <https://www.washingtonpost.com/business/2020/05/12/small-business-used-define-americas-economy-pandemic-could-end-that-forever/>.

¹³⁹ Greg Iacurci, *7.5 Million Small Businesses Are at Risk of Closing, Report Finds*, CNBC (Apr. 14, 2020, 3:08 PM), <https://www.cnbc.com/2020/04/14/7point5-million-small-businesses-are-at-risk-of-closing-report-finds.html>.

devastating effect on the economy.¹⁴⁰ Additionally, although insurance companies certainly have an interest in not paying out on their claims, doing so could devastate millions of shuttered businesses, which harms insurance companies in the long run because they lose millions of potential customers.¹⁴¹ Further still, business interruption insurance is in almost all cases a form of supplemental insurance to an existing property insurance policy—business owners with such policies typically pay extra for this coverage beyond simple property insurance and as such are disproportionately likely to be desired customers for insurance agencies.¹⁴² These economic incentives, coupled with the sheer quantity of legislation aimed at tackling this issue, make it clear that there is a compelling, widespread interest in addressing it, and doing so in the most effective way possible, accounting for the multiple interests at stake.¹⁴³

As both history as well as the decisions of courts around the country inform us, the best way to address the issue of widespread denial of interruption insurance claims is to simply make sure that these policies are enforced.¹⁴⁴ This can and should be done, as many courts have held, by striking virus exclusions from these policies, and similarly concluding that virus and bacteria do not fall under pollutant exclusions.¹⁴⁵ Thus, any final bill should adopt the language of the proposed federal bills, clearly stating that business interruption insurance policies must pay out an amount consistent with the policy in the event of either government-mandated

¹⁴⁰ Rakesh Kochhar, *Unemployment Rose Higher in Three Months of COVID-19 Than It Did in Two Years of the Great Recession*, PEW RSCH. CTR. (June 11, 2020), <https://www.pewresearch.org/fact-tank/2020/06/11/unemployment-rose-higher-in-three-months-of-covid-19-than-it-did-in-two-years-of-the-great-recession>.

¹⁴¹ Paul Carroll, *The Messaging Battle on COVID-19: Are Insurers Losing?*, INS. THOUGHT LEADERSHIP (Apr. 27, 2020), <https://www.insurancethoughtleadership.com/the-messaging-battle-on-covid-19-are-insurers-losing/>.

¹⁴² Julia Kagan, *Business Interruption Insurance*, INVESTOPEDIA, <https://www.investopedia.com/terms/b/business-interruption-insurance.asp> (last updated July 9, 2020).

¹⁴³ See generally SULLIVAN & CROMWELL, *supra* note 79.

¹⁴⁴ DiMugno, *supra* note 36, at 1.

¹⁴⁵ *Id.* at 27.

shutdowns or COVID-19-related claims.¹⁴⁶ Relatedly, for this act to be effective, it must be, as many of this country's legislatures have recognized, retroactive to March 2020 in order to cover the full scope of the economic fallout from this global pandemic.¹⁴⁷

B. Loss-Spreading Mechanisms

While much of the financial burden will still fall to the insurance companies, it may become impossible for the insurance industry to cover the immense liability from this magnitude of claims without becoming insolvent, just as it was post-September 11, when Congress passed TRIA to address this very issue.¹⁴⁸ TRIA has enjoyed relatively strong political success and has been reauthorized numerous times since its passage in 2002.¹⁴⁹ It is reasonable then to believe that this success can be emulated in a solution to the same issue as it exists today under COVID-19, as evidenced by its backstop mechanism being essentially copied in H.R. 6497.¹⁵⁰ Due to the success and longevity of the federal backstop mechanism implemented through TRIA, little revision is required in order to meet the needs of the current pandemic.¹⁵¹ An effective act would include a provision creating a federal backstop program, which is essentially a reinsurance program whereby insurance companies can opt in to pay a premium to the federal government. That premium would then go into a fund dedicated to paying out the federal share of business interruption claims. Insurers that participate in this program would be subject to a deductible like any other insured, but after meeting their deductible, the federal government would reimburse insurers 95% of the payments made to customers on these claims.¹⁵² However, the upper cap, beyond which the federal government will cover all losses, will likely need to be readjusted

¹⁴⁶ H.R. 6494, 116th Cong. (2020); H.R. 6497, 116th Cong. (2020).

¹⁴⁷ SULLIVAN & CROMWELL, *supra* note 79, at 4, A1–A14.

¹⁴⁸ Terrorism Risk Insurance Act of 2002 § 101, 15 U.S.C. § 101 (2002).

¹⁴⁹ TRIA—Terrorism Risk Insurance Act, REAL EST. ROUNDTABLE, <https://www.rer.org/policy-issues/capital-credit/tria---terrorism-risk-insurance-act> (last visited Feb. 28, 2021).

¹⁵⁰ H.R. 6497.

¹⁵¹ REAL EST. ROUNDTABLE, *supra* note 149.

¹⁵² DiMugno, *supra* note 36, at 21.

for COVID-19. In TRIA, this limit was \$100 billion, above which all losses were realized by the federal government, not the insurance industry.¹⁵³ But with estimated liability related to COVID-19 to be in the hundreds of billions *per month*, this cap will almost certainly have to be raised and should be determined by a Federal Advisory Committee on Insurance established by the Secretary of the Treasury, as contemplated by H.R. 6497.¹⁵⁴

C. Incentive for Private Sector Investment

Although the government and the insurance companies themselves will have to inevitably front most of the losses and costs associated with paying out these interruption claims (truly an unprecedented economic burden), any additional financial support can greatly reduce these anticipated losses.¹⁵⁵ Furthermore, as discussed earlier, one of the downfalls of a backstop program is the potentially limitless liability on behalf of the government.¹⁵⁶ Any incentive, therefore, to utilize private capital to reduce this liability is certainly beneficial—especially when it can benefit those willing to invest their private capital as well.

While there are a number of ways to incentivize private capital to invest in troubled markets, perhaps the most effective in this context would be to waive capital gains taxes on investments placed into the insurance industry during a specified time period. This would be effective for a number of reasons. First, and most importantly, it creates a compelling financial incentive for private equity funds and individuals to invest into the insurance industry by saving them from as high as a 20% tax in the event the interest is held for more than one year.¹⁵⁷ It would also result in as high as a 37% tax savings in the event the investment would have fallen under

¹⁵³ *Id.* at 20.

¹⁵⁴ See Sclafane, *supra* note 17 (describing legislative proposals increasing aggregate maximum cap on losses); H.R. 6497.

¹⁵⁵ See generally DiMugno, *supra* note 36 (discussing availability of potential insurance claims and role of legislative solutions).

¹⁵⁶ Sclafane, *supra* note 17.

¹⁵⁷ See Jason Fernando, *Capital Gains Tax*, INVESTOPEDIA (Feb. 28, 2021), https://www.investopedia.com/terms/c/capital_gains_tax.asp.

the short-term capital gains tax.¹⁵⁸ This certainly makes an investment into this industry more enticing compared to other industries—many of which are similarly dealing with the economic fallout of COVID-19—especially when coupled with the fact that many of these companies have been seeing gradual comebacks from their March 2020 lows.¹⁵⁹ This is true almost universally throughout the insurance industry.¹⁶⁰ March 2020 saw five-year lows in stock prices for nearly all major U.S. insurance companies. However, all are recovering in part from those lows, albeit not to the extent of their pre-COVID value, signaling to investors that there is still room for further growth and further profits.¹⁶¹ For example, this trend can be seen in two of the largest insurers in the United States, American International Group, Inc. and MetLife, Inc. In March of 2020, these two insurance giants were trading at a low of \$18.78 and \$23.53, respectively.¹⁶² As of October 2020, these values had climbed back up to \$32.38 and \$40.94, but still shy of their pre-COVID 2020 highs of \$54.47 and \$52.61, suggesting room for potential continued further growth.¹⁶³ This creates ample room for capable investors to make rational investment choices, with the added bonus that any returns would be tax free. Additionally, this incentive would likely not be subject to widespread abuse or tax dodging because individuals and corporations alike still maintain a financial incentive to diversify their investments, especially when entering a hurting

¹⁵⁸ See Tina Orem, *2020 Capital Gains Tax Rates—And How to Calculate Your Bill*, NERDWALLET (Nov. 16, 2020), <https://www.nerdwallet.com/article/taxes/capital-gains-tax-rates>.

¹⁵⁹ *Health Insurance Stocks Poised for Gains After COVID-19*, FORBES (May 18, 2020, 7:30 AM), <https://www.forbes.com/sites/greatspeculations/2020/05/18/health-insurance-stocks-poised-for-gains-after-covid-19>.

¹⁶⁰ *Id.*

¹⁶¹ Al Root, *What Catastrophe? It's Time to Buy Insurance Stocks*, BARRON'S (May 29, 2020, 8:00 PM), <https://www.barrons.com/articles/insurance-stocks-look-undervalued-after-covid-19-selloff-51590796800>.

¹⁶² *American International Group, Inc. YTD Market Summary*, GOOGLE FIN. (Nov. 8, 2020), <https://www.google.com/finance/quote/AIG:NYSE>; *MetLife, Inc. YTD Market Summary*, GOOGLE FIN. (Nov. 8, 2020), <https://www.google.com/finance/quote/MET:NYSE>.

¹⁶³ See sources cited *supra* note 162.

market with potential for losses.¹⁶⁴ However, such potential losses should not scare away relatively well-off investors since the tax incentives create a solid possibility of above-average returns, and in the event there are any capital losses, they could nonetheless be used to reduce taxable income and any capital gains the investor may have earned in other areas.¹⁶⁵ Lastly, although avoidance of a capital gains tax means the government loses out on potential revenue, this likely would be accounted for by the fact that these investments are designed to directly reduce its own financial burden to the insurance companies. Regardless, such gains likely would never have materialized at all, absent the tax incentive provided for in the proposed legislation.

Claims in favor of lowering capital gains tax rates have been argued in the United States Congress for years, and there is at least some evidence to suggest that lowering—or in this case eliminating—the capital gains tax in this limited context will provide exactly the type of relief necessary to effectively spread the cost of covering these insurance claims.¹⁶⁶ The most important effects of eliminating capital gains taxes in this context are the contribution to overall economic growth and crucially, increased investment in high-risk areas.¹⁶⁷ Low or zero tax rates on capital gains increase the amount of investing done by venture capitalists and “angel investors,” or those that invest in new or risky businesses—exactly the type of investors insurance companies should seek to attract at the moment.¹⁶⁸ Although insurance companies are far from new businesses, they can certainly still be

¹⁶⁴ Nick K. Lioudis, *The Importance of Diversification*, INVESTOPEDIA (Jan. 29, 2019), <https://www.investopedia.com/investing/importance-diversification/>.

¹⁶⁵ Orem, *supra* note 158.

¹⁶⁶ See generally John W. Lee, *Critique of Current Congressional Capital Gains Contentions*, 15 VA. TAX REV. 1 (1995) (criticizing lowering the capital gains tax but recognizing years of attempts in Congress to lower the tax rate and many arguments in favor, including the possibility of increased use of risk capital).

¹⁶⁷ *What is the Effect of a Lower Rate for Capital Gains?*, TAX POL’Y CTR. (May 2020), <https://www.taxpolicycenter.org/briefing-book/what-effect-lower-tax-rate-capital-gains>.

¹⁶⁸ Chris Edwards, *Six Reasons to Keep Capital Gains Tax Rates Low*, CATO INST., (Dec. 28, 2012), <https://www.cato.org/publications/commentary/six-reasons-keep-capital-gains-tax-rates-low>.

seen as a risky investment.¹⁶⁹ Even though, as mentioned earlier, there is a case to be made that there is room for growth and significant returns, there is also substantial uncertainty surrounding upcoming legislation aimed at the insurance industry¹⁷⁰ and just how much the industry may be required to compensate insureds for their COVID-19-related losses. These investments, then, are still far from a sure thing.¹⁷¹

Additional investment into the insurance industry through venture capitalists and angel investors alike will provide the industry with much needed capital and should have the immediate effect of increasing their share prices, as well as encourage the influx of additional capital from other investors.¹⁷² Chris Edwards, the director of tax policy studies at the Cato Institute, argues that lower capital gains taxes lead to higher economic productivity, resulting in an expanded economy as well as increased aggregate tax revenue as a result.¹⁷³ While advocating for a zero capital gains tax, even in this limited scope, may seem drastic, similar entreaties have been advanced since 1997.¹⁷⁴ These arguments and other economic realities led Alan Greenspan, the former Federal Reserve Chairman, to famously state that “the appropriate capital gains tax was zero.”¹⁷⁵

¹⁶⁹ See John Bromels, *Why These Insurance Stocks Have Fallen by Double Digits So Far in 2020*, NASDAQ (July 9, 2020, 9:42 PM), <https://www.nasdaq.com/articles/why-these-insurance-stocks-have-fallen-by-double-digits-so-far-in-2020-2020-07-10> (arguing that insurance stocks have not recovered as quickly as other sectors and may be considered a poor investment currently).

¹⁷⁰ See Mark A. Packman, *Legislation Enabling Policyholders to Obtain Insurance Coverage for Coronavirus Claims Is Constitutional Part I*, THE NAT'L L. REV. (May 26, 2020), <https://www.natlawreview.com/article/legislation-enabling-policyholders-to-obtain-insurance-coverage-coronavirus-claims> (discussing proposed legislation that could require insurers to pay out on business interruption claims due to COVID-19).

¹⁷¹ See Bromels, *supra* note 169.

¹⁷² Edwards, *supra* note 168.

¹⁷³ *Id.*

¹⁷⁴ See NIELS BELHUIS ET AL., STUDIES IN ENTREPRENEURSHIP MARKETS: THE ECONOMIC COSTS OF CAPITAL GAINS TAXES 24 (2007), <https://www.fraserinstitute.org/sites/default/files/EconomicCostsCapitalGainsTax.pdf>.

¹⁷⁵ *Id.* at 4.

His primary concerns were that capital gains taxes “impede entrepreneurial activity and capital formation.”¹⁷⁶

Opponents of capital gains tax cuts argue that it does not increase GDP and that it concentrates the excess capital in the hands of the wealthiest Americans. These contentions both may have some merit, but do not take away from the benefits at hand and significantly, even assuming *arguendo* that they are true, are not negative enough to outweigh the potential benefit. Billionaires in America have added over \$1 trillion to their collective net worth since the start of the COVID-19 pandemic in March 2020.¹⁷⁷ Interestingly, much of this increased wealth is attributed to a favorable stock market.¹⁷⁸ Clearly then, this is both a profitable and an attractive avenue of investment for America’s wealthiest individuals, meaning that the right economic incentive—like a tax elimination—is likely to steer this capital into the insurance industry, where it can benefit those struggling from the pandemic, and not just the super-rich.¹⁷⁹ Since this concentration of wealth has already been going on for months in the context of the pandemic, it makes sense to embrace this reality and manipulate it in a way that helps insurers stay financially viable and pay out on more claims, ultimately benefiting small businesses across the country.¹⁸⁰

Another argument those against decreasing capital gains tax cite is that it is not a major factor in creating economic growth.¹⁸¹ While it may not be a *major* factor in economic growth—it is still nonetheless a factor.¹⁸² Moreover, this finding is in the context of a

¹⁷⁶ *Id.*

¹⁷⁷ Matt Egan, *America’s Billionaires Have Grown \$1.1 Trillion Richer During the Pandemic*, CNN (Jan. 26, 2021, 10:24 AM), <https://www.cnn.com/2021/01/26/business/billionaire-wealth-inequality-poverty/index.html>.

¹⁷⁸ *Id.*

¹⁷⁹ Taxes are often used to influence decision-making in the hopes of addressing problems or encouraging behavior that is beneficial to society as a whole. See, e.g., Kai Ryssdal & Sabri Ben-Achour, *Taxes Shape Our Behavior. Here’s What to Look for in the New Bill*, MARKETPLACE (Dec. 21, 2017), <https://www.marketplace.org/2017/12/21/tax-shape-behavior-what-to-look-for/>.

¹⁸⁰ Egan, *supra* note 177.

¹⁸¹ See John W. Lee, *Critique of Current Congressional Capital Gains Contentions*, 15 VA. TAX REV. 1, 86 (1995).

¹⁸² See *id.*

tax *reduction*, not a tax *elimination*.¹⁸³ It follows that such a drastic shift would create a similarly more drastic effect on economic growth, and even if this increased effect is statistically insignificant, any growth at such a dire economic time ought to be encouraged. Furthermore, an inconsequential effect on economic growth as a whole does not negate the very real benefit of increased investment into a struggling industry which has the effect of reducing the public sector's liability.¹⁸⁴ This cuts against the argument that such a tax elimination simply decreases tax revenue only to create more wealth for the richest Americans. First, as previously discussed, America's wealthiest individuals have already financially benefitted significantly from the COVID-19 pandemic. For better or worse, this is an economic reality. Making peace with that reality, a tax incentive is the best way to ensure those benefits are shared where small business owners are struggling the most. Second, while the government misses out on roughly 20–40% of the capital gains in income, it benefits by saving 100% of the amount of the capital invested. Since this money is directly invested into insurance companies, it increases their liquid capital, and reduces the amount of money they need to borrow from the government to settle their claims.

CONCLUSION

COVID-19 has and continues to wreak havoc on the global economy.¹⁸⁵ Months of mandated closures, decreases in foot traffic, and additional health considerations and costs have caused over 100,000 American small businesses to close for good.¹⁸⁶ Being that little has changed for small businesses, this trend will almost certainly continue absent financial intervention, or until vaccines have been administered to the majority of the population, or the United States reaches herd immunity.¹⁸⁷ The government, as

¹⁸³ *See id.*

¹⁸⁴ DiMugno, *supra* note 36.

¹⁸⁵ *See* Frankel, *supra* note 132.

¹⁸⁶ Long, *supra* note 138.

¹⁸⁷ Estimates of how and when herd immunity will be reached have changed since the start of the pandemic, but public health research group PHICOR recently stated that herd immunity can be reached when roughly 70% of the population

evidenced in past crises, has the power and ability to alleviate the economic burden faced by American businesses.¹⁸⁸ It can do this best by empowering the private sector, through the insurance industry, to shoulder the majority of the burden, while it covers excessive losses and market failures, to prevent bankrupting an entire industry. Any solution to this problem must address it in such a way that protects our insurance institutions and prepares them to combat the next economic crisis. Although it is, perhaps understandably, a politically unpopular industry to many, if the United States were to impose legislation to the benefit of businesses without considering the rational economic needs of insurance companies as well, it would do so to the long-term detriment of those businesses it seeks to protect.

has either been fully vaccinated or been infected and recovered from COVID-19. They predict that if current trends continue without major changes, the United States could reach herd immunity around the end of summer 2021. Matthew Conlen & Charlie Smart, *When Could the United States Reach Herd Immunity? It's Complicated*, N.Y. TIMES, (Feb. 20, 2021), <https://www.nytimes.com/interactive/2021/02/20/us/us-herd-immunity-covid.html>.

¹⁸⁸ DiMugno, *supra* note 36.