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Deciphering Property Insurers' Indemnification Obligations After Disasters, Pandemics and Business Interruption Losses: An Analysis of State Supreme Courts and Federal Circuits' Declaratory Judgments

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SYNOPSIS

Beginning in early 2020, governors from California and Texas to Michigan, Pennsylvania, New York, Massachusetts, Virginia, the District of Columbia and North Carolina responded to the "novel coronavirus pandemic" and issued stay-at-home orders. The mandates interrupted small businesses' "non-essential" operations. In the wake, insured businesspersons lost trillions of dollars. After the closures, George Floyd died while in police custody. In response, massive and peaceful demonstrations occurred in numerous states. Some "opportunistic" protesters looted and vandalized already-shuttered businesses. The greater majority of "all-risks" property insurers, however, refused to cover the business-interruption losses. Ultimately, the businesses filed hundreds of single- and class-action lawsuits. Will insured small businesses prevail? There is good and less encouraging news. A multivariate empirical study reveals that insureds are substantially more likely to win coronavirus business-interruption disputes in state supreme courts rather than in federal courts of appeals. But state supreme courts consistently analyze "relevant facts on a case-by-case basis" rather than apply pro-insureds legal doctrines to decide duty-to-indemnify disputes. Even more importantly, some "relevant factors"—i.e., types of insured businesses, types of property risks and states' objective business-

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climate rankings—are markedly more persuasive and predictive than others. This Article discloses and discusses those highly "relevant factors" as well as the substantive legal barriers that small businesses and other entities must overcome in duty-to-indemnify trials. In the end, the Article encourages arguably thrice-harmed businesspersons and their attorneys to weigh carefully the more predictive, persuasive and dispositive factors before litigating business-interruption disputes in this "age of the coronavirus pandemic."

I. INTRODUCTION

From the mid-twentieth to the early twenty-first century, enormously destructive natural and human-caused disasters occurred across the United States.[1] Catastrophic hurricanes and tropical storms thrashed Maryland, Virginia, North Carolina, Louisiana, and Texas.[2] Historic and eerily predictable "structural and wildland" fires erupted in California and Colorado.[3] And "civil commotion, riots and vandalism" erupted in the District of Columbia, Michigan, Wisconsin, and elsewhere during the 1960s.[4]

In 2002, a viral pandemic—the "severe acute respiratory syndrome" (SARS)—infected persons and contaminated property.[5] The purportedly "worst financial crisis since the Great Depression" occurred in 2008.[6] And, during the spring of 2020,

1. *See generally Types of Disasters*, SUBSTANCE ABUSE AND MENTAL HEALTH SERVS. ADMIN., https://www.samhsa.gov/find-help/disaster-distress-helpline/disaster-types (outlining major and yearly natural and human-caused disasters that caused catastrophic loss of life and property) (last visited May 21, 2020).

2. *See generally Hurricane History for the Washington and Baltimore Region*, NOAA, https://www.weather.gov/lwx/hurricane_history (last updated May 25, 2012); *Hurricanes in History*, NOAA, https://www.nhc.noaa.gov/outreach/history (last visited Sept. 1, 2020).

3. *Fire, Nat'l Park Serv.*, https://www.nps.gov/subjects/fire/index.htm (last updated Feb. 8, 2019).

4. *See infra Part IV*; *see also infra notes* 217-55 and accompanying discussion of COVID-19-related losses and the concurrent causation doctrine.

5. *See generally* Martha C. White, *SARS Wiped $40 Billion Off World Markets; What Will Coronavirus Do?*, NBC NEWS (Jan. 24, 2020, 2:55 PM), https://www.nbcnews.com/business/markets/sars-wiped-40-billion-world-markets-what-will-coronavirus-do-n1122151.

6. Ash v. N. Am. Title Co., 223 Cal. App. 4th 1258, 1289-90 (2014) (citing Brain R. Cheffins, *Did Corporate Governance 'Fail' During the 2008 Stock Market Meltdown? The Case of the S&P 500* (ECGI Working Paper No. 124, 2009), https://papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID1430325_code512461.pdf?abstractid=1396126&mirid=1). *See also* Varshisky v. Town of Greenwich, 2018 WL 4945010, at *5 (Conn. Super. Ct. Sept. 20, 2018) (a certified appraiser/broker's disclosing that the real-estate market declined substantially after "the market crash of 2008").

peaceful protests as well as "looting and vandalism"[7] swept the country after an "unarmed and handcuffed" George Floyd died in Minnesota while in police custody.[8]

Unquestionably, those powerful forces destroyed directly or indirectly tangible property and generated collectively or independently massive business-interruption losses and widespread unemployment.[9] Still, as of this writing, a general consensus has emerged. The "Global COVID-19 Pandemic of 2020"[10] has shaken the global economy to its core — generating nationwide stay-at-home orders and interrupting the business activities of nearly every commercial, industrial, and professional entity.[11] Among property insurers, an equally troubling awareness has emerged: Trillions of dollars will be needed to cover business-closure losses, which arose purportedly from the "coronavirus pandemic."[12]

7. *See, e.g.*, Noah Manskar & Natalie Musumeci, *Looters Cost NYC Businesses 'Tens of Millions,' Experts Estimate*, N.Y. Post (June 3, 2020, 8:01 PM), https://nypost.com/2020/06/03/looters-cost-nyc-businesses-tens-of-millions-experts-estimate.

8. *See* Erin Ailworth, Zusha Elinson, Dan Frosch & Ben Kesling, *Floyd's Death in Custody Draws Condemnation From Law Enforcement Officials*, WALL ST. J. (May 28, 2020, 10:29 PM), https://www.wsj.com/articles/george-floyd-arrest-death-in-minneapolis-police-custody-spark-more-protests-11590599760 (reporting that former Minneapolis police officer Derek Chauvin pressed his knee into George Floyd's neck—killing the handcuffed arrestee, triggering nationwide protests and riots, and drawing "rare [and] widespread condemnation from police chiefs and officers across the country").

9. *Cf.* Todd Frankel, *Insurers Knew The Damage A Viral Pandemic Could Wreak on Businesses. So, They Excluded Coverage*, WASH. POST. (Apr. 2, 2020, 1:25 PM), https://www.washingtonpost.com/business/2020/04/02/insurers-knew-damage-viral-pandemic-could-wreak-businesses-so-they-excluded-coverage/ (reporting that SARS pandemic produced millions of dollars in business-interruption losses); Palash Ghosh, *What Is Riot Insurance? A Primer On A Unique Financial Product*, INT'L BUS. TIMES (May 28, 2020, 4:39 PM), https://www.ibtimes.com/what-riot-insurance-primer-unique-financial-product-2984321 (discussing business-interruption insurance, and reporting that demonstrations, looting, and rioting destroyed business properties and caused financial losses in Minnesota after police killed an unarmed and handcuffed arrestee—George Floyd); Kate L. Hyde & Jared Evans, *Business Interruption Claims in the Wake of the Devastating California Wildfires*, KENNEDYS (Jan. 23, 2019), https://www.kennedyslaw.com/thought-leadership/article/business-interruption-claims-in-the-wake-of-the-devastating-california-wildfires (reporting that deadly and destructive wildfires generated multi-billion dollars claims); *see also* Galante v. Galante, No. A-0202-13T4, 2014 WL 8030549, at *1 (N. J. Super. Ct. Mar. 6, 2015) (business owner asserting that the 2008 financial crisis caused part of his huge financial losses).

10. *See* Paul S. White & Siobhán A. Breen, *The Impact of the Global COVID-19 Pandemic On the Insurance Industry*, DRI: FOR THE DEF. (Apr. 2020), https://www.wilsonelser.com/writable/files/Attorney_Articles_PDFs/ftd-2004-white-breen.pdf (explaining the evolution of the "new coronavirus"— Severe Acute Respiratory Syndrome Coronavirus-2 (SARS-CoV-2).

11. *See generally* Ben Winck, *The Worst Global Recession Since World War II: Deutsch Bank Just Unveiled a Bleak New Forecast as the Coronavirus Rocks Economies Worldwide, Mkts*. INSIDER (Mar. 19, 2020, 1:51 PM), https://markets.businessinsider.com/news/stocks/coronavirus-recession-worst-wwii-economic-recovery-global-deutsche-bank-2020-3-1029012757.

12. *See* Jim Sams, *Several Insurance Commissioners Wary of Business Interruption COVID-19 Claims, Carrier Mgmt.* (Apr. 30, 2020), https://www.carriermanagement.com/news/2020/04/30/206125.htm.

Consequently, in the wake of the estimated losses, a highly contentious legal question has evolved: Whether commercial property insurers have a contractual obligation to indemnify businesspersons who present business-interruption claims.[13] resolve the controversy, businessowners have filed a "tidal wave" of state and federal lawsuits—from California and Texas to New York, Maryland, Virginia, North Carolina, Florida and the District of Columbia.[14] As of this writing, COVID-19-related insurance controversies have generated a somewhat surprising question: whether courts are substantially and significantly more likely to decide coronavirus business-interruption disputes in favor of *insureds* or *insurers*.[15]

Arguably, for historical reasons, the answer to this narrow question should be easy. First, since the early 1890s, state supreme courts have decided whether property insurers must indemnify insureds who present business-loss claims.[16] The present

13. *See generally* Brett Carey et al., *Three Ways Insurance Companies Can Navigate the Surge of COVID-19 Business Interruption Claims*, RISK & INS. (Apr. 16, 2020), https://riskandinsurance.com/3-ways-insurance-companies-can-navigate-the-surge-of-COVID-19-business-interruption-claims.

14. *See generally COVID-19: Insurance Litigation and Regulatory Responses*, ALSTON & BIRD, https://www.alston.com/en/-/media/files/insights/publications/2020/04/20200419-updateCOVID19-business-interruption-50-st.pdf (last updated Apr. 19, 2020). *See also* Lyle Adriano, *VA Restaurant Sues Insurer Over Denial of COVID-19 Business Interruption Claim*, INS. BUS. AM. (Apr. 23, 2020), https://www.insurancebusinessmag.com/us/news/hospitality/va-restaurant-sues-insurer-over-denial-of-covid19-business-interruption-claim-220462.aspx; CBS 17 Digital Desk, *Durham Restaurants File Lawsuit Saying Insurance Company Won't Honor Business Interruption Policies*, CBS 17, https://www.cbs17.com/news/local-news/durham-county-news/durham-restaurants-file-lawsuit-saying-insurance-company-wont-honor-business-interruption-policies (last updated May 19, 2020, 5:48 AM); Lorraine Mirabella, *Baltimore Developer The Cordish Cos. Sues Insurer to Recover Pandemic Business Losses*, BALT. SUN (Aug. 24, 2020, 5:16 PM), https://www.baltimoresun.com/coronavirus/bs-md-cordish-pandemic-lawsuit-insurer-20200824-kiwvfipfszdvrpixryqyd5zxji-story.html.

15. *Compare* Mark Plevin, Tacie Yoon & Austin Sutta, *Companies May Be Thwarted by These Business Interruption Defenses*, BLOOMBERG LAW (Apr. 13, 2020, 4:01 AM), https://news.bloomberglaw.com/corporate-governance/insight-companies-may-be-thwarted-by-these-business-interruption-defenses (arguing that "business interruption" coverage may not be available under commercial property insurance contracts) *with* Tamara Bruno, David Klein & Robert L. Wallan, *Many Commercial Property Insurance Policies Provide Coverage for COVID-19 Exposures*, JD SUPRA (Apr. 16, 2020), https://www.jdsupra.com/legalnews/many-commercial-property-insurance-13155/ (citing conflicting judicial decisions and arguing that an "actual or threatened coronavirus contamination" of insured's property is a "physical loss" which triggers business interruption coverage).

16. *See, e.g.*, Conn. Fire Ins. Co. v. W.H. Roberts Lumber Co., 89 S.E. 945, 949 (Va. 1916) (concluding that the fire insurer had no duty to indemnify or cover the insured's lost profit); *see also* French v. Hope Ins. Co., 33 Mass. 397, 400 (1835) (declaring that lost profits are insurable interests and ordering the insurer to indemnify the insured).

business-interruption disputes are essentially duty-to-indemnify disputes.[17] Thus, in light of state supreme courts' historical rulings, jurists should be able to reasonably infer the likely outcomes of these coronavirus duty-to-indemnify controversies.

Second, state, as well as federal courts have a rich history of deciding whether insurers have a duty to indemnify when "pollutants," "contaminants," or "viruses" cause lost profits or interrupt business activities.[18] COVID-19 is questionably a "virus" or "pollutant"—which *contaminates* businesses and makes commercial properties uninhabitable or unusable for intended purposes.[19]Thus, given the legion of judicial and "on point" contamination rulings, commonsensical inferences about the likely outcomes of coronavirus business-interruption disputes should be relatively easy.

After civil authorities across the country issued stay-at-home orders in early 2020, some insureds filed duty-to-indemnify actions in state and federal courts —alleging that the orders directly caused lost profits and requesting declaratory relief.[20] Under the terms of a standard property insurance contract, the "coronavirus pandemic" is arguably a "covered" or an "excluded" peril.[21] Thus, in light of prior "civil authority" controversies and decisions, jurists should be able to make reasonable inferences about the likely dispositions of business-interruption disputes in state and federal courts.

Yet, among jurists and insurance experts, there is uncertainty about how state and federal courts will decide coronavirus indemnification claims.[22] Why? Immediately

17. *See e.g.*, Pacific Coast Eng'g Co. v. St. Paul Fire and Marine Ins. Co., 88 Cal. Rptr. 122, 124 (Cal. App. Ct. 1970) (reaffirming that the purpose of business interruption insurance is to indemnify an insured whose property causes lost profits).

18. *See* Tamara Bruno, David Klein & Robert Wallan, *supra* note 15 (discussing courts' legion of decisions surrounding the nexus between physical property loss and viruses and reporting that COVID-19 can survive for days on doorknobs, faucets, and other hard surfaces normally considered inhospitable to viruses).

19. *See* Grant Nichols, *Is COVID-19 a Covered Pollution Exposure? What to Look for in Your Policy Language*, RISK & INS. (Mar. 23, 2020), https://riskandinsurance.com/is-covid-19-a-covered-pollution-exposure-what-to-look-for-in-your-policy-language (citing the U.S. Environmental Protection Agency's conclusions and stressing that COVID-19 is a "pollutant" and viruses are "biological contaminants").

20. *See generally* Leslie Scism, *Coronavirus Costs Weigh on Travelers' Profit*, WALL ST. J. (Apr. 21, 2020, 7:20 PM), https://www.wsj.com/articles/travelers-posts-lower-profit-as-catastrophe-losses-rise-11587469103; *see, e.g. Chicago Area Businesses File Suit for Denied Business Interruption Claims*, THOMPSON COE (Mar. 31, 2020), https://www.thompsoncoe.com/publications/chicago-area-businesses-file-suit-for-denied-business-interruption-claims/ (discussing claims filed by Chicago businesses alleging that Society Insurance Inc. is legally obligated to indemnify them from lost business income when the businesses were forced to close as a result of COVID-19).

21. *See infra* Part III.B; *see also infra* notes 127-53.

22. *See* Todd Frankel, *Insurers Knew The Damage A Viral Pandemic Could Wreak On Businesses. So, They Excluded Coverage*, WASH. POST. (Apr. 2, 2020, 1:25 PM), https://www.washingtonpost.com/business/2020/04/02/insurers-knew-damage-viral-pandemic-could-wreak-businesses-so-they-excluded-coverage (reporting insurance experts and regulators' assessment and stressing that

before Floyd's death, the "coronavirus pandemic" directly or indirectly shuttered most businesses and decreased profits.[23] However, after Floyd's death, many of those same businesses were damaged, looted or vandalized.[24] Consequently, there is confusion surrounding whether government orders and the looting were *independent* or *concurrent causes* of property owners' lost profits.[25]

Therefore, in light of this major controversy, the author decided to complete a business-interruption case study that began in 2004 and pen this article.[26] Two narrow questions were investigated: 1) whether *state or federal courts* are more likely to force property insurers to cover coronavirus business-interruption losses; and 2) whether *insurance-specific doctrines* or *settled contract principles* are more likely to explain courts' dispositions.[27] As of this writing, relatively few courts have squarely addressed the first question.[28] Nevertheless, inferential evidence strongly

probably most businesses will not receive business-interruption proceeds, even though the novel coronavirus indirectly forced the nationwide closure of businesses).

23. *See* Shan Li & Julia-Ambra Verlaine, *Manhattan Stores Bolster Security To Ward Off Looting*, WALL ST. J. (June 1, 2020, 7:31 PM), https://www.wsj.com/articles/manhattan-stores-looted-as-protests-continue-over-death-of-george-floyd-11591015054 (reporting that the coronavirus forced all nonessential businesses to close in mid-March, and that "looters [invaded] some of SoHo's most well-heeled stores" — allegedly protesting the death of George Floyd); The Editorial Board, *Justice and Disorder*, WALL ST. J. (June 1, 2020, 5:08 PM), https://www.wsj.com/articles/justice-and-disorder-11590959305 (reporting that rioters "in more than 30 cities" used "Antifa-like tactics," promoted violence and looted shops after "the killing of George Floyd").

24. *See* Shan Li & Julia-Ambra Verlaine, *see also* The Editorial Board, *supra* note 23.

25. *See generally* Karen L. Weslowski, *Canada: Causation and Concurrent Causes of Business Interruption Involving COVID-19*, Mondaq (Apr. 30, 2020), https://www.mondaq.com/canada/operational-impacts-and-strategy/925526/causation-and-concurrent-causes-of-business-interruption-involving-covid-19; Lavonne Kuykendall, *Insurers Try To Rebuild Trust*, WALL ST. J (June 27, 2007) (observing that coverage lawsuits reveals sometimes confusing policy language —like "concurrent causation"—confuses customers and allows property insurers to escape liability when both covered and excluded perils cause a property loss).

26. In 2004, the Editorial Board of Texas Tech Law Review invited the author to review the Fifth Circuits' insurance decisions. *See* Willy E. Rice, *The Court of Appeals for the Fifth Circuit 2004-2005 Disposition of Insurance Decisions: A Survey and Statistical Review*, 38 TEX. TECH L. REV. 821 (2006). Among the numerous decisions, only one case — Finger Furniture Co. v. Commonwealth Ins. Co., 404 F.3d 312, 313-15 (5th Cir. 2005) — involved a business-interruption dispute. In *Finger*, the Fifth Circuit decided in favor of the insurer—refusing to award business-interruption damages. *Id*. However, in Lexington Ins. Co. v. Island Recreational Dev. Corp., 706 S.W.2d 754, 756 (Tex. App. 1986), the Texas Court of Appeals declared that the insurer had a duty to indemnify and cover the insured's business-interruption losses. Id. Significantly, the facts and applied doctrines in Finger and Lexington are nearly identical. Yet, the outcomes are vastly different. This single conflict and heightened curiosity motivated the author to conduct a study—reading, analyzing, and coding state and federal courts' business-interruption decisions.

27. *See infra* Part V; *see also infra* notes 259-62.

28. *See* Gavin Souter, *Lawyers File Multiple Class Actions Seeking Virus Coverage*, BUS. INS. (Apr. 20, 2020), https://www.businessinsurance.com/article/20200420/NEWS06/912334128/Lawyers-file-multiple-class-actions-seeking-coronavirus-coverage-COVID-19; Debra Cassens Weiss, *Nearly 300 Federal Suits Stem From*

suggests: State and federal appellate courts are considerably more likely to issue *contradictory* rather than *reasonably predictable* business-interruption decisions.[29]

Stated simply, it is impossible to understand property-insurance coverage without knowing and proving the *cause* of a loss. And, to complicate matters, there are multiple common-law and insurance-specific doctrines of causation. Therefore, Part I of the Article explains "property-insurance coverage" and the meaning of "causation" —focusing particularly on the doctrines of concurrent causation and anti-concurrent causation.

PART II answers necessarily several important insurance-specific questions: 1) whether both "traditional" and "contingent" business interruption claims trigger insurers' duty to indemnify; 2) whether an "interrupted business" is a "covered property interest" or a "covered peril;" and 3) whether business-interruption insurance covers both tangible and intangible property losses.

The Insurance Services Office (ISO) provides optional and limited coverage for coronavirus interruptions.[30] Should businesses purchase "coronavirus insurance?" To help answer the question, PART III examines courts' conflicting declarations and discusses the implications for businesspersons who might purchase property insurance to cover losses that arise from the coronavirus.

Again, according to government statistics, a "small percentage of protestors" looted and vandalized businesses after George Floyd's death.[31] Therefore, arguably, two "covered insurance risks" — the coronavirus and "riotous conduct"— concurrently interrupted businesses and caused financial losses. PART IV addresses the pressing question: whether property insurers have a duty to cover these types of business-interruption losses under the doctrine of concurrent causation. Why is this question important? Under commercial property insurance contracts, losses which originate from "civil commotion, vandalism, riots or looting" are covered.[32] But, losses that arise from viruses and bacteria are excluded.[33]

Pandemic, ABA J. (May 28, 2020, 2:57 PM), https://www.abajournal.com/news/article/200-plus-federal-lawsuits-mention-covid-19-101-business-interruption-cases-filed-whats-next.

29. Christopher French, *The Aftermath of Catastrophes: Valuing Business Interruption Insurance Losses*, 30 Ga. St. U.L Rev. 461, 497 (2014). Debra Cassens Weiss, *supra* note 28.

30. *Insurance Services Office (ISO)*, VERISK, https://www.verisk.com/insurance/brands/iso (last visited June 17, 2020) (stating that the ISO serves property/casualty insurers and provides "policy language" for a broad spectrum of commercial and property insurance contracts).

31. *See* Olga Khazan, *Why People Loot*, THE ATL. (June 2, 2020), https://www.theatlantic.com/health/archive/2020/06/why-people-loot/612577 ("Police leaders generally agree that only a small percentage of the protesters are looting. . .[B]ut the practice is still undeniably widespread. . .in Lower Manhattan, Minneapolis [and] in Los Angeles.").

32. *See* infra Part IV; *see also infra* notes 216-263.

33. *See, e.g.,* Larry Podoshen, *New Endorsements Filed to Address Exclusion of Loss Due to Virus or Bacteria,* ISO CIRCULAR (July 6, 2006), https://www.propertyinsurancecoveragelaw.com/files/2020/03/ISO-

Furthermore, citing anecdotal evidence, consumer-protection and insurance-defense litigators have suggested: Legal doctrines as well as certain extrajudicial factors are likely to influence the dispositions of COVID-related business-interruption disputes.[34] Therefore, PART V presents the findings of an empirical study. It evaluates the independent and concurrent influences of litigants' theories of recovery, affirmative defenses and a host of other "relevant factors" on the likely outcomes of duty-to-indemnify disputes.

Ultimately, based on the analysis of courts' decisions and statistically significant findings, the Article strongly encourages businessowners to litigate business-interruption claims in state rather than federal courts. Generally, insureds are more likely to prevail in state courts. Even more impressive, the findings reveal that businessowners have the greatest probability of winning duty-to-indemnify claims in state courts, which are located in the *"top ten, business friendly states."*[35] The Article also encourages businesspersons to plan for an unsurprising finding: Certain "*relevant factors or facts"*—rather than *settled legal principles*—are statistically and significantly more likely to shape state and federal courts' *conflicting* business-interruption and duty-to-indemnify judgments.[36]

II. Property Insurance Contracts and Business-Interruption Coverage

In the 1940s, the insurance industry began selling a standard comprehensive general liability (CGL) insurance contract.[37] Basically, a CGL contract provides third-party coverage—promising to defend and indemnify against irate customers' personal-injury and property-damage claims.[38] Historically, many businessowners

Circular-LI-CF-2006-175-Virus.pdf (reporting that the ISO's form CP 01 40 07 06 excludes loss or damage caused by or resulting from any virus, bacterium or other microorganism).

34. *Cf.* Sean Mahoney & Ciaran Way, *King's Bench Petition Seeks to Consolidate All Pennsylvania COVID-19 Business Interruption Insurance Cases*, JD SUPRA (May 5, 2020), https://www.jdsupra.com/legalnews/kings-bench-petition-seeks-to-22336/ (identifying numerous extralegal factors—i.e., geographic locations, types of insurance contracts, types of insured businesses, types of business interruptions, types of "covered and excluded perils," and types of "covered property"—which can influence the dispositions of COVID-related, business-interruption disputes).

35. *See generally* Part V.D.

36. *Id.*

37. *See* Daniel Streim, *Policyholders Beware – Cyber Coverage May Provide A False Sense of Security*, MONDAQ (June 5, 2015), https://www.mondaq.com/unitedstates/insurance-laws-and-products/402852/policyholders-beware-cyber-coverage-may-provide-a-false-sense-of-security (reporting that a favorable market spurred the development of standardized commercial general liability insurance in the 1940s).

38. *See Business Owners Policy (BOP) — General Liability Plus Coverage For Property*, HISCOX, https://www.hiscox.com/small-business-insurance/business-owners-policy (last visited June 4, 2020).

mistakenly believe that a CGL insurance contract also covers businessowners' damaged or destroyed property.[39]

Briefly put, absent an endorsement or an extended-coverage provision, a standard CGL insurance contract does not protect a business entity's tangible or intangible property interests.[40] Therefore, if small businessowners want to protect their property against various risks, those entities must purchase property insurance—which covers third-party liability claims and first-party property-loss claims."[41]

A. Property Insurance and Binding Conditions Precedent — "Covered Property" and "Covered Causes of Loss"

The standard property insurance contract is structured to cover damaged, destroyed or loss property.[42] However, "coverage" has a highly restrictive definition.[43] Historically, insurers sold "all-risks" and "specified-risk" contracts.[44] Under specific-risk agreements, insurers promise to indemnify or reimburse only if a specific peril causes a property loss.[45] On the contrary, all-risks insurers promise to insure commercial property against all known, unknown and unanticipated perils.[46]

Fairly recently, the insurance industry revised the standard property insurance contract—slightly changing the definition of "coverage."[47] It reads in pertinent part: "We will pay for *direct physical loss* of or *damage* to *covered property* at the premises . . . caused by or resulting from any *covered cause of loss*."[48]

39. *Id.*

40. *Id*.

41. *Id.*

42. *See* Gap, Inc. v. Fireman's Fund Ins. Co., 11 A.D.3d 108, 112 (N.Y. App. Div. 2004) (noting that property insurance is first-party insurance).

43. *Cf.* Garvey v. State Farm Fire & Cas. Co., 770 P.2d 704, 710 (Cal. 1989) (stressing that "some of the confusion . . . regarding insurance coverage under the 'all-risk' section of a homeowner's insurance policy ―when [a] loss to an insured's property [has occurred]― can be attributed to two causes, one . . .which is a no excluded peril, and the other an excluded peril.").

44. *See* Paul S. White & Siobhán A. Breen, *The Impact of the Global COVID-19 Pandemic On the Insurance Industry*, DRI: FOR THE DEF. (Apr. 2020), https://www.wilsonelser.com/writable/files/Attorney_Articles_PDFs/ftd-2004-white-breen.pdf (discussing "all-risks" and "specific-risk" contracts and citing judicial decisions).

45. *See, e.g.*, Poulton v. State Farm Fire and Cas. Cos., 675 N.W.2d 665, 670 (Neb. 2004) (reaffirming that under a specific perils policy, an insured's personal property is covered if one of the listed perils in the contract damaged the property).

46. *Id.*

47. *See* Robert J. Prahl, *Be Aware of Recent Revisions to ISO Commercial Property Coverage Forms*, E-EDITION ADJUSTING TODAY, https://www.adjustersinternational.com/pubs/adjusting-today/be-aware-of-recent-revisions-to-iso-commercial-property-coverage-forms/2/ (last visited Oct. 6, 2020).

48. *Standard Property Policy*, CP 00 99 04 02, https://static1.squarespace.com/static/5c471ba9620b85081a7025cc/t/5c800b5824a6943bea56819c/1551895385

What is a "covered property"? The standard contract gives an exceedingly long and arguably ambiguous definition. In relevant part, it reads: "*Covered property* . . . means the type of property described in this section: . . . (a) [T]he *building or structure* described in the Declarations, . . . [and] (b) Your *business personal property* located in or on the building described in the Declarations . . . within 100 feet of the described premises."[49]

What is a "covered cause of loss"? Generally, insurers *will* cover the risk of a "direct physical loss, *unless* the loss is excluded or limited in the policy."[50] Consider, for example, several highly relevant and italicized perils which often appear in the contract:

> *The following covered causes of loss do not apply unless riot or civil commotion . . . is [listed] in the Declarations . . .. Riot or civil commotion [includes] acts of . . . looting occurring at the time and place of a riot or civil commotion.*[51]

> *The following covered cause of loss does not apply unless vandalism is [listed] in the Declarations. . . . Vandalism [means] willful and malicious damage to or destruction of the described property. We will not pay for loss or damage . . . to glass . . . that is part of a building, structure, or an outside sign. [B]ut we will pay for . . . damage to other property . . . resulting from breakage of glass by vandals.*[52]

B. Commercial Property Insurance and Competing Doctrines of Causation

There are numerous common-law and statutory theories of causation. For example, before receiving various damages awards under tort and contract-based theories of recovery, insurance consumers as well as other complainants must prove

174/MANDATORY+CP+00+99+04+02+STANDARD+PROPERTY+POLICY.pdf (last visited Sept. 20, 2020).

49. *Id.*

50. Robert J. Prahl, *Be Aware of Recent Revisions to ISO Commercial Property Coverage Forms*, E-EDITION ADJUSTING TODAY, https://www.adjustersinternational.com/pubs/adjusting-today/be-aware-of-recent-revisions-to-iso-commercial-property-coverage-forms/4/ (last visited Oct. 6, 2020).

51. *Standard Property Policy*, *supra* note 48.

52. *Id.* at 4.

cause-in-fact,[53] foreseeability causation, and/or conventional proximate cause.[54] To prevail under various deceptive-trade-practices and consumer-protection statutes, insurance consumers and other aggrieved parties must prove that a violation was the producing cause of an injury and damages.[55]

Nevertheless, before satisfying any common-law or statutory theory of causation, insureds must prove that a "covered peril" *directly caused* their "physical property damage."[56] Which burden of causation must insureds satisfy before courts order insurers to indemnify? Insureds must prove that a "covered peril" was the dominant efficient cause,[57] the efficient proximate cause,[58] or the efficient producing cause[59] of the destroyed property.

C. The Doctrines of Concurrent Causation and Anti-Concurrent Causation

Perhaps, most jurists remember the "pertinent facts" and holding in *Summers v. Tice* — "a staple of the first-year law-school curriculum."[60] In the course of hunting quail, Harold Tice and Ernest Simonson focused their aims on a quail and pointed the guns in the direction of Charles Summers.[61] Both shotguns were simultaneously

53. *See, e.g.*, McDonald v. Bedford Datsun, 570 N.E.2d 299, 301-02 (Ohio Ct. App. 1989) (requiring proof of cause in fact and proximate cause).

54. Auto Lenders Acceptance Corp. v. Gentilini Ford, Inc, 854 A.2d 378, 385-86 (N.J. 2004); Frontline Processing Corp. v. Am. Econ. Ins. Co., 149 P.3d 906, 909-11 (Mont. 2006); Scirex Corp. v. Fed. Ins. Co., 313 F.3d 841, 850 (3d Cir. 2002); FDIC v. Nat'l Union Fire Ins. Co. of Pittsburgh, 205 F.3d 66, 76 (2d Cir. 2000); Jefferson Bank v. Progressive Cas. Ins. Co., 965 F.2d 1274, 1281-82 (3d Cir.1992). *See also*, UDR Tex. Properties, L.P. v. Petrie, 517 S.W.3d 98, 107 (Tex. 2017) ("Proximate cause and producing cause share the common element of causation in fact, with proximate cause including the additional element of foreseeability.").

55. *See, e.g.*, UDR Tex. Properties 517 S.W.3d at 107 ("To recover . . . under a products liability theory requires proof of producing causation") (Willett, J., concurring); Barco Auto Leasing Corp. v. House, 106 520 A.2d 162, 166-67 (Conn. 1987) (discussing producing cause, Connecticut Unfair Trade Practices Act, and consumers' remedies under the Uniform Commercial Code).

56. *See* Garvey v. State Farm Fire & Cas. Co., 770 P.2d 704, 710 (Cal. 1989) ("'Coverage . . . is commonly provided by reference to causation—e.g., "loss caused by" certain enumerated perils. The term "perils" in traditional property insurance parlance refers to fortuitous, active, physical forces such as lightning, wind, and explosion, which bring about the loss. Thus, the "cause" of loss in the context of a property insurance contract is totally different from that in a liability policy.'"); Source Food Tech. Inc. v. U.S. Fid. & Guar. Co., 465 F.3d 834, 837-38 (8th Cir. 2006) (citing Minnesota's law and explaining the parameters of a "direct physical loss").

57. *See* Travelers Indem. Co. v. McKillip, 469 S.W.2d 160, 162 (Tex. 1971) (discussing both the dominant cause and concurrent causation doctrines).

58. *See* Safeco Ins. Co. v. Hirschmann, 773 P.2d 413, 416 (Wash. 1989) (noting that "efficient proximate cause" is an insurance-law doctrine).

59. *See* Leadership Real Estate v. Harper, 638 A.2d 173, 182-83 (N.J. Super Ct. 1993) (explaining the doctrine of efficient producing cause).

60. Kyle Graham, *A Second Look at Summers v. Tice*, CSCHS Newsletter (Cal. Sup. Ct. Historical Soc'y), Fresno, CA), 2020 at 15.

61. *Summers v. Tice*, 199 P.2d 1, 1-2; *see also id*.

discharged. One shot injured Summers' eye and the other damaged his upper lip. Weighing the tortfeasors' "concerted action," the California Supreme Court applied a *concurrent causation doctrine* and declared: Two or more parties are jointly liable if their negligent acts *combine* and *cause* the same loss.[62]

Even before the tort-based ruling in *Summers*, state supreme courts applied a contract-based concurrent causation doctrine to assess whether property insurers had a duty to indemnify.[63] Generally, if covered and excluded perils concurrently cause property damage, the insurer has a duty to indemnify the insured for the percentage of loss arising from the covered peril.[64] The minority position states: Insurers must cover an insured's *total loss* if the covered and excluded perils sequentially, simultaneously or concurrently caused the same property damage.[65]

In the early 1980s, insurers' ire increased markedly after courts began to apply the minority rule.[66] In response, the Insurance Services Office (ISO) crafted, and insurers adopted, an anti-concurrent causation (ACC) provision. Currently, the clause appears in the standard commercial property insurance contract[67] and reads in relevant part:

> *We will not pay for loss or damage caused directly or indirectly by any of the following [excluded perils: an ordinance or law, . . . government action, . . . and fungus-mold]. . . . Such loss or damage is excluded*

62. *Summers*, 199 P.2d at 5.

63. *See, e.g.*, Mammina v. Homeland Ins. Co., 21 N.E.2d 726, 728-29 (Ill. 1939) (performing a concurrent causation analysis and ruling in favor of the insured); Warmcastle v. Scottish Union & Nat'l Ins. Co., 50 A. 941, 941 (Pa. 1902) (performing a concurrent causation analysis and ruling in favor of the insurer).

64. *See, e.g.*, Travelers Indem. Co. v. McKillip, 469 S.W.2d 160, 163 (Tex. 1971) (performing a concurrent causation analysis, requiring insureds to segregate covered and noncovered property losses and requiring the insurer to reimburse the insured for the covered losses).

65. *See* Colella v. State Farm Fire & Cas. Co., 407 F. Appx 616, 622 (3d Cir. 2011) (allowing the insured to recover even though an excluded peril contributed to the loss); Safeco Ins. Co. v. Guyton, 692 F.2d 551, 554 (9th Cir. 1982) (allowing the insured to recover even though an excluded peril contributed to the loss). *See also*, State Farm Mut. Auto. Ins. Co. v. Partridge, 514 P.2d 123, 130 (Cal. 1973) (declaring that coverage under a liability insurance policy is available to an insured whenever an insured risk constitutes simply a concurrent proximate cause of the injuries).

66. *See* Joseph S. Harrington, *Concurrent Causation: An Adjuster's Dilemma*, ADJUSTING TODAY, https://www.adjustersinternational.com/pubs/adjusting-today/concurrent-causation-new/2/ (last visited June 16, 2020) (discussing several 1980s concurrent causation decisions which prompted the Insurance Services Office (ISO) to fashion a standard anti-concurrent causation provision).

67. *Id.* at 2.

> *regardless of any other cause or event that contributes concurrently or in any sequence to the loss. . . .*[68]

II. PROPERTY INSURANCE COVERAGE, INTANGIBLE LOSSES, AND THE BUSINESS INTERRUPTION THEORY OF RECOVERY

Until this point, the term "business interruption" has been used cavalierly—without focusing squarely on specific business losses or damages. It is important to stress, however, that courts have fashioned a "business interruption theory of liability."[69] Typically, before a tribunal awards business-interruption damages, an insured must prove five elements: 1) the damaged property is a "covered property;" 2) a "covered peril" or "covered cause of loss" produced the damage; 3) the peril caused physical damage; 4) the peril caused a specific and quantifiable loss; and 5) the interruption occurred during a specific time period.[70]

First, consider the Business Income and Extra Expense Coverage Endorsement (BIEE). It reads in pertinent part:

> *We will pay for the actual loss of business income. . .due to the necessary "suspension" of your "operations" during the "period of restoration." The "suspension" must be caused by direct physical loss of or damage to property at premises which are described in the Declarations. . . . The loss or damage must be caused by or result from a covered cause of loss.*[71]

Basically, the language in the BIEE provides first-party insurance coverage for an insured's lost profits.[72] Or stated slightly differently, if a covered risk damages or destroys an insured's *physical* property and the destruction interrupts the insured's

68. *See* Standard Commercial Property Insurance Form —CP 00 99 04 02, supra note 52, at 9-10. *See also*, Harrington, *supra* note 66, at 5 (stating that "after decades of legal wrangling and policy adjustments, . . . the ISO [developed] Special Form— (CP 10 30 10 12)).

69. *See generally*, Cosmetics Plus Grp. v. Am. Int'l Grp. (In re Cosmetics Plus Grp.), 379 B.R. 464, 470 (Bankr. S.D.N.Y. 2007) (stating that "any claim for losses under a business interruption policy requires an analysis of . . . several elements."); Kate Hyde & Jared Evans, *Business Interruption Claims in the Wake of the Devastating California Wildfires*, KENNEDYS LAW, LLP (Jan. 23, 2019) https://www.kennedyslaw.com/thought-leadership/article/business-interruption-claims-in-the-wake-of-the-devastating-california-wildfires (identifying the elements).

70. Kate Hyde & Jared Evans, *Business Interruption Claims in the Wake of the Devastating California Wildfires*, KENNEDYS LAW, LLP (Jan. 23, 2019) https://www.kennedyslaw.com/thought-leadership/article/business-interruption-claims-in-the-wake-of-the-devastating-california-wildfires.

71. Business Income and Extra Expense Coverage Form—CP 00 30 04 02 https://www.propertyinsurancecoveragelaw.com/files/file/CP00300402.pdf (last visited Sept. 27, 2020).

72. Cont'l Ins. Co. v. DNE Corp., 834 S.W.2d 930, 934 (Tenn. 1992).

business, the insurer must indemnify the insured.[73] A second amendment—the Business Income From Properties Endorsement (BIFDP)—allows insureds to receive cumulative damages. It reads:

> *We will pay for the actual loss of business income you sustain due to the necessary "suspension" of your "operations" during the "period of restoration." The "suspension" must be caused by direct physical loss of or damage to "dependent property" at a premises described in the Schedule caused by or resulting from a covered cause of loss.*[74]

What is a "dependent property"? The term refers to a third party's property.[75] For example, a "supply chain" of goods, materials, and components spans the globe, allowing retailers and local sellers to purchase goods from those suppliers.[76] However, in the course of events, natural forces, pandemics and human-caused disasters can destroy suppliers' property.[77] And those interruptions can severely undermine sellers' business operations.

Upon first inspection, the BIFDP arguably provides third-party rather than first-party insurance coverage. But a closer scrutiny reveals that the BIFDP modifies the BIEE and extends first-party coverage.[78] The modification is called contingent business interruption insurance (CBI).[79] Fundamentally, under the BIFDP, an insurer promises to pay additional damages, if a covered peril physically damages or destroys a *supplier's* property and the destruction partially or completely suspends the *insured-seller's* operations.[80]

As of this writing, most courts have not determined the precise scope of insurers' duty to indemnify after insureds present traditional and contingent business-

73. *Id.*

74. Business Income From Dependent Properties – CP 15 09 06 07, https://www.propertyinsurancecoveragelaw.com/files/file/CP%2015%2009%2006%2007.pdf (last visited June 22, 2020).

75. *Id.* (stating that "'[d]ependent property' means property operated by others whom you depend on to . . . a) deliver materials or services to you or to others for your account . . . b) accept your products or services . . . c) manufacture products for delivery to your customers under contract of sale . . . or d) attract customers to your business.").

76. *Id.*

77. *Id.*

78. *Id.*

79. *See, e.g.*, Arthur Andersen LLP v. Fed. Ins. Co., 3 A.3d 1279, 1282 (N.J. Super. Ct. App. Div. 2010) (explaining contingent business interruption insurance); CII Carbon, L.L.C. v. Nat'l Union Fire Ins. Co. of La., Inc., 918 So.2d 1060, 1064, 1069 n.1 (La. Ct. App. 2005) (explaining the difference between traditional and contingent business interruption insurance).

80. *Arthur Andersen* LLP, 3 A.3d at 1282.

interruption claims.[81] In fact, only a few reported cases have construed the meaning of contentious terms in the BIEE and BIFDP.[82] Nevertheless, among the small number of judicial decisions, a major disagreement has emerged. Both the BIEE and BIFDP require insureds to prove that a "*necessary suspension*" occurred.[83] But, what is a "necessary suspension"? Courts in several states—California, Maryland, Minnesota, Texas, and Washington—have declared: A "necessary suspension" means the total interruption or complete cessation of an insured's business operations.[84] Also, applying states' insurance-specific rules, several federal courts have required insureds to prove a total or complete cessation of business activities.[85] On the other hand, a few state and federal courts have allowed insureds to collect business-interruption damages after proving only a partial suspension of business operations.[86]

81. *See* Zurich Am. Ins. Co. v. ABM Indus., Inc., 397 F.3d 158, 168 (2d Cir. 2005).

82. *See* Pentair, Inc. v. Am. Guarantee & Liab. Ins. Co., 400 F.3d 613, 615 (8th Cir. 2005).

83. *See* Baxter Int'l., Inc. v. Am. Guarantee & Liab. Ins. Co., 861 N.E.2d 263, 267 (Ill. App. Ct. 2006) (stressing that an insurer is liable only if a covered peril causes a physical property loss or damage and the latter causes a necessary interruption of business).

84. *See e.g.,* Buxbaum v. Aetna Life & Cas. Co., 126 Cal. Rptr. 2d 682, 688, 690-94 (Cal. Ct. App. 2002) (requiring proof of a business's total cessation rather than slowdown, but finding that the law firm continued its operation at a different location); Simkins Indus., Inc. v. Lexington Ins. Co., 401 A.2d 181, 191 (Md. App. 1979) (finding a total suspension of business operations); Forestview The Beautiful, Inc. v. All Nation Ins. Co., 704 N.W.2d 773, 775 (Minn. Ct. App. 2005) (requiring proof of a business's complete cessation); 54th St. Ltd. Partners, L.P. v. Fid. & Guar. Ins. Co., 763 N.Y.S.2d 243, 243 (N.Y. App. Div. 2003) (requiring proof of a business's total interruption or cessation); Quality Oilfield Prods., Inc., v. Mich. Mut. Ins. Co., 971 S.W.2d 635, 639 (Tex. App. 1998) (requiring proof of a business's "cessation or suspension" rather than a "slowdown"); Keetch v. Mut. of Enumclaw Ins. Co., 831 P.2d 784, 786 (Wash. Ct. App. 1992) (requiring the complete cessation of the insured motel's room services).

85. *See, e.g.,* Catholic Med. Ctr. v. Fireman's Fund Ins. Co., 2015 DNH 110 *5 (requiring the total "closure of premises" after a "covered crisis event"); Apartment Movers of Am., Inc. v. Onebeacon Lloyd's of Tex., No. 3:04-CV-0278-B, 2005 U.S. Dist. LEXIS 695, at *8 (N.D. Tex. Jan. 19, 2005) (holding that "a business slowdown is not sufficient to invoke coverage under a business interruption policy"); Am. States Ins. Co. v. Creative Walking, Inc., 16 F.Supp.2d 1062, 1065-66 (E.D. Mo.1998) (declaring that the policy required a total rather than partial cessation of business activity); Royal Indem. Ins. Co. v. Mikob Props., Inc., 940 F. Supp. 155, 160 (S.D. Tex. 1996) (rejecting the insured's business-interruption-loss claim after finding that a fire completely destroyed only one of three apartment buildings); Home Indem. Co. v. Hyplains Beef, L.C., 893 F.Supp. 987, 991 (D. Kan. 1995) (declaring that the plain meaning of "necessary suspension" requires a "complete cessation" of business operations).

86. *See, e.g.,* Studley Box & Lumber Co. v. Nat'l Fire Ins. Co., 154 A. 337, 337-38 (N.H. 1931) (declaring that the policy expressly allowed for a partial suspension of operations and allowing the business to recover after a fire destroyed a stable); Aztar Corp. v. U.S. Fire Ins. Co., 224 P.3d 960, 966-67 (Ariz. Ct. App. 2010) (finding only a "partial suspension" of a casino's operation and ordering the insurer to indemnify); Lite v. Fireman's Ins. Co., 104 N.Y.S. 434, 435-36 (N.Y. App. Div. 1907) (awarding lost profits even though a fire only partially damaged the covered property); Am. Med. Imaging Corp. v. St. Paul Fire and Marine Ins. Co., 949 F.2d 690, 692-93 (3d Cir. 1991) (allowing a recovery of damages for a partial cessation of operations after a fire caused some physical damaged).

A third endorsement—Business Owner Coverage Endorsement (BOCE)[87]—also allows businessowners to collect supplementary lost-profit damages when a civil authority order interrupts business activities. In relevant part, the BOCE states:

> *We will pay for the actual loss of Business Income . . . 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. . . .*[88]

Significantly, the BIEE also covers losses that arise from the effects of government orders—mirroring several key words and phrases that appear in the BOCE.[89] The BIEE reads in pertinent part:

> *When a covered cause of loss causes damage to property other than property at the described premises, we will pay for the actual loss of business income . . . caused by action of civil authority that prohibits access to the described premises, provided that . . . (1) access to the area immediately surrounding the damaged property is prohibited by civil authority . . . and (2) the action of civil authority is [a] response to dangerous physical conditions resulting from the damage . . . of the covered cause of loss.*[90]

III. INSURERS' CONFLICTING INDEMNIFICATION OBLIGATIONS AFTER PANDEMICS, DISASTERS, AND BUSINESS INTERRUPTION LOSSES

Again, in early 2020, economists reported three relevant facts: 1) Small-to-medium-sized businesses generated approximately half of all private sector jobs in the United States;[91] 2) The COVID-19 pandemic permanently closed 100,000 small

87. *See* Businessowners Coverage Form - BP 00 03 07 02, http://freeclaiminfo.com/wp-content/uploads/2018/08/FCI0128-BP-00-03-01-06-Businessowners-Coverage-Form.pdf (last visited June 27, 2020).

88. *Id.* at 8.

89. Business Income and Extra Expense Coverage Form — CP 00 30 06 07, https://www.propertyinsurancecoveragelaw.com/files/file/CP 00 30 06 07.pdf (last visited Sept. 27, 2020).

90. *Id.* at 2.

91. Heather Long, *Small Business Used To Define America's Economy. The Pandemic Could Change That Forever*, WASHINGTON 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/ (citing researchers at the University of Illinois, Harvard Business School,

businesses;[92] and 3) Dentists, owners of dining and entertainment venues as well as many healthcare professionals and retailers experienced the greatest losses.[93] Thus, given the pandemic's purportedly extensive effects, it is not surprising that small-businessowners have filed the majority of business interruption lawsuits.[94] But, reconsider the timely question: Are insurers or insureds more likely to prevail in COVID-related business-interruption actions? Alternatively, are courts more or less likely to force property insurers to indemnify insureds?

In light of courts' historical duty-to-indemnify analyses and decisions, three predictions have emerged: 1) In *state and federal trial courts*, insurers are significantly more likely to win the majority of COVID-related lawsuits; 2) In *state and federal appellate courts*, business entities are more likely to win the majority of business-interruption disputes; and 3) Unrelenting judicial splits are likely to influence insureds and insurers' probability of winning coronavirus lost-profit disputes in *appellate* courts. To be sure, these three business-interruption questions have produced judicial disagreements—even though state and federal courts *consistently apply the same legal, equitable and insurance-specific doctrines* in declaratory judgment actions.[95] Necessarily, those substantive issues and doctrines are discussed below. Moreover, to help explain the stubborn controversies, the probative facts in a few recently filed coronavirus-related, business-interruption lawsuits are included in the analysis.

A. Indemnity Insurance Conflict — Whether "Viruses" and "Contaminants" Are Covered or Excluded Perils Under Pollution Exclusion Clauses

To begin, consider the "most relevant facts or factors" in *L.H. Dining v. Admiral Indemnity Company*.[96] LH-Dining, LLC owns and operates a restaurant in Philadelphia, Pennsylvania.[97] Between March and April 2020, the Governor of

Harvard University and the University of Chicago and reporting that at least 2 percent of small businesses — more than 100,000 — have shut permanently since the pandemic escalated in March 2020).

92. *Id.* ("The carnage has been even higher in the restaurant industry, where 3 percent of restaurant operators have gone out of business, according to the National Restaurant Association.").

93. *See, e.g.*, Thomas Franck, *Hardest-Hit Industries: Nearly Half the Leisure and Hospitality Jobs Were Lost in April*, CNBC (May 8, 2020, 11:14 AM), https://www.cnbc.com/2020/05/08/these-industries-suffered-the-biggest-job-losses-in-april-2020.html.

94. *See generally COVID-19: Insurance Litigation and Regulatory Responses*, ALSTON & BIRD, https://www.alston.com/en/-/media/files/insights/publications/2020/04/20200419-updateCOVID19-business-interruption-50-st.pdf (last updated Apr. 19, 2020),

95. *See infra* notes 10–11 and accompanying text.

96. Complaint, LH Dining L.L.C. v. Admiral Indem. Co., No. 2:20-cv-01869 (E.D. Pa. Apr. 10, 2020), ECF. No. 1, 2020 WL 1817073.

97. *Id.* ¶ 9.

Pennsylvania and the Mayor of Philadelphia ordered "non-life-sustaining and non-essential businesses" to close.[98]

In late 2019, LH-Dining purchased an "all-risk property insurance contract" from Admiral Indemnity Company.[99] Under the terms of a BIEE endorsement, Admiral promised to cover business interruption losses if 1) a "covered cause of loss" forced local or state governments to issue a civil order, and 2) the order prevented an insured and its customers from accessing the insured's business property.[100] The insurance contract also contained an Exclusion of Loss Due to Virus or Bacteria provision which reads in relevant part:

> *Paragraph A—[This endorsement modifies the commercial property coverage. The exclusion in Paragraph B] applies to all coverage under all . . . endorsements . . . that cover property damage to buildings or personal property and . . . endorsements that cover business income, extra expense or action of civil authority.*
> *Paragraph B—We 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.*[101]

LH-Dining asked Admiral to pay business-interruption damages, arguing that 1) The exclusion clause did not preclude a recovery of lost profits;[102] 2) COVID-19 is "an ever-present risk;"[103] and 3) The civil orders caused "a substantial loss of business income."[104] Citing language in the exclusion clause, Admiral rejected LH-Dining's claim and LH-Dining petitioned the Eastern District Court of Pennsylvania for declaratory relief.[105]

98. *Id.* ¶¶ 25–31.

99. *Id.* ¶¶ 11, 17.

100. *Id.* ¶ 16.

101. Admiral Indem. Co.'s Motion for Judgment on the Pleadings Exhibit 1 at 80, LH Dining L.L.C. v. Admiral Indem. Co., No. 2:20-cv-01869 (E.D. Pa. June 5, 2020), ECF. No. 18-3 (emphasis added); *see also* ISO Props., Inc., *Exclusion of Loss Due to Virus of Bacteria Form—CP 01 40 07 06*, N. STAR MUT. INS. CO. (2006), https://northstarmutual.com/UserFiles/File/forms/policyforms/Current/CP%2001%2040%2007%2006.pdf.

102. Complaint, *supra* note 96, ¶ 19.

103. *Id.* ¶ 34.

104. *Id.* ¶ 38.

105. *Id.* ¶¶ 41–44.

Briefly, the Federal Declaratory Judgments Act of 1934[106] and the Uniform Declaratory Judgments Act of 1922[107] allow litigants to petition state and federal courts for equitable relief. Typically, an "interested party" asks a court to interpret a written contract and explain the affected party's rights.[108] To resolve insurance disputes, state courts have created and applied five doctrines to interpret insurance contracts and endorsements.[109] Generally, when state courts apply the doctrines of adhesion, ambiguity or reasonable expectation, insureds are more likely to receive declaratory relief.[110] In contrast, insurers are more likely to secure favorable declarations when courts apply the plain-and-ordinary-meaning rule or the traditional rules of contract construction and interpretation.[111]

Returning to the dispute in *L.H. Dining* and *weighing the "relevant facts" in* the light of the five doctrines, should the Pennsylvania Eastern District Court rule in favor of the restaurant owner? The simple answer is yes. Arguably, the coverage provision is despairingly convoluted and ambiguous.[112] Moreover, the Pennsylvania Supreme Court has been extremely clear: Ambiguous contractual terms must be construed against the insurer.[113] On the other hand, the insurer should prevail because

106. 28 U.S.C. § 2201 (2018) ("In a case of actual controversy within its jurisdiction . . . any court of the United States . . . may declare the rights and other legal relations of any interested party seeking such declaration . . . . Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such."); *see also* Willy E. Rice, *Insurance Contracts and Judicial Discord Over Whether Liability Insurers Must Defend Insureds' Allegedly Intentional and Immoral Conduct: A Historical and Empirical Review of Federal and State Courts' Declaratory Judgments —1900-1997*, 47 AM. U. L. REV. 1131, 1144 (1998) (outlining questions that federal courts must consider before awarding declaratory relief: (1) whether judgment would settle a controversy, (2) whether declaration would clarify legal relations, (3) whether a judgment would increase friction between federal and state courts, and 4) whether an alternative or more effective legal remedy exists).

107. UNIF. DECLARATORY JUDGMENTS ACT § 2, 12A U.L.A. 6 (2008) (allowing an interested person to petition a court for relief and giving courts the power to construe various rights, statuses, or other legal relations under a written instrument); *see also* Rice, *supra* note 106, at 1142–1143 (discussing the history and purpose of the act, outlining a court's discretionary and declaratory powers, and emphasizing that an appellate court may not reverse a trial judge's declaration unless the lower court abused its discretion).

108. Rice, *supra* note 106, at 1144.

109. *See generally id.* at 1162-65 (explaining the five doctrines as: the rules of contract construction; the doctrine of ambiguity; the doctrine of plain meaning; the doctrine of reasonable explanation; and the doctrine of adhesion).

110. *Id.* at 1163–65.

111. *Id.* at 1162–64.

112. Complaint, *supra* note 96, ¶ 16 ("Under the Policy, insurance is extended to apply to the actual loss of business income sustained and the actual, necessary and reasonable extra expenses incurred when access to the Insured Property is specifically prohibited by order of civil authority as the direct result of a covered cause of loss to property in the immediate area of Plaintiffs' Insured Property.").

113. *See* Madison Constr. Co. v. Harleysville Mut. Ins. Co., 735 A.2d 100, 106 (Pa. 1999) (stressing that "contractual terms are ambiguous if they are subject to more than one reasonable interpretation when applied to a particular set of facts.").

the insured admits that COVID-19 is a virus and the insurance contract plainly excludes compensation for a virus-related business loss.[114]

Still, there are two remaining issues which require a more engaged analysis. First, epidemiologists generally agree: COVID-19 is a "disease" or an "illness" and *not a "virus*."[115] The so-called "novel coronavirus" or "severe acute respiratory syndrome coronavirus 2" —SARS-CoV-2— is a "virus"; and it purportedly causes COVID-19.[116] Thus, should the *L.H. Dining* court force Admiral to indemnify the businessowner, if the court embraces the prevailing view that COVID-19 is an "illness?" The highly probable answer is yes—if the court applies the plain-and-ordinary-meaning rule or construes the assertedly ambiguous virus-exclusion clause against Admiral.

But consider: Many businessowners purchase both property and commercial general liability (CGL) insurance.[117] Therefore, a court's commonsensical answers to the questions above can become more challenging. Under CGL insurance contracts, insurers also promise to indemnify if a covered peril destroys an insured's tangible property or prevents the insured from accessing or using the property.[118] Even more relevant, CGL policies usually include an "absolute" or "total" pollution exclusion.[119] The industry-wide Total Pollution-Contamination Exclusion Endorsement reads:

> *This insurance does not apply to . . . (1) the contamination of any environment by pollutants . . . [or to] (2) any . . . property damage arising out of such contamination. . . . Pollutant means any irritant . . . solid, liquid, gaseous or thermal contaminant, including smoke, vapor, soot,*

114. LH Dining Complaint, *supra* note 96, ¶¶ 21, 37; LH Dining Contract Exhibit, *supra* note 101, at 80; *see also* ISO Props., Inc., *supra* note 101.

115. Translating COVID-19, "co," "vi," "d," and "19" mean corona, virus, disease and 2019, respectively. *See, e.g.,* David J. Cennimo, *Coronavirus Disease 2019 (COVID-19)*, MEDSCAPE, https://emedicine.medscape.com/article/2500114-overview (Sept. 16, 2020) (explaining the difference between the virus and disease); Marios Koutsakos & Katherine Kedzierska, *A Race to Determine What Drives COVID-19 Severity*, 583 NATURE 366, 366 (2020), https://www.nature.com/articles/d41586-020-01915-3 ("The *coronavirus* known as severe acute respiratory syndrome coronavirus 2 (SARS-CoV-2) . . . and certain aspects of *the disease it causes* — COVID-19 — continue to baffle clinicians and researchers." (emphasis added)).

116. Cennimo, *supra* note 115.

117. *See, e.g.*, Ins. Corp. of N.Y. v. Cohoes Realty Assocs., 854 N.Y.S.2d 815, 817 (N.Y. App. Div. 2008) (disclosing that the insured purchased two types of coverage: commercial general liability insurance (CGL) and business owners' property insurance).

118. *See* Wausau Business Ins. Co. v. Idleaire Techs. Corp. (In re Idleaire Techs. Corp.), No. 08-51227, 2009 WL 413117, at *4 (Bankr. D. Del. Feb. 18, 2009) (outlining the history of the absolute and total pollution exclusion clauses in commercial liability insurance contracts).

119. *Id*. at *6.

> *fumes, acids, alkalis, chemicals and waste. As used in this endorsement, . . . contamination means any unclean or unsafe damaging or injurious or unhealthful condition arising out of the presence of pollutants, whether permanent or transient.*[120]

Once more, LH-Dining clearly admitted that COVID-19 probably "contaminated" and "would continue to contaminate" the restaurant.[121] And, the SARS virus causes COVID-19. Therefore, assume that LH-Dining insured its property under *both* CGL and property-insurance contracts. *Should* the federal district court still construe the virus exclusion clause against Admiral and in favor of LH-Dining? Is SARS a "pollutant" or "contaminant" under Admiral's virus exclusion clause? To be sure, definitive answers to these questions are elusive. Why?

The Supreme Courts of California, Illinois and New Jersey[122] as well as the Second and Seventh Circuits only apply the pollution exclusion to resolve disputes involving "traditional environmental contamination."[123] Therefore, if the Eastern District Court of Pennsylvania embraces the same practice, the Court would probably force Admiral to cover LH-Dining's COVID-19-related, business-interruption losses. Other state and federal courts, however, have interpreted the CGL pollution exclusion more broadly and concluded: A virus—like "solid, liquid, gaseous or thermal contaminants"—is a "pollutant."[124] Consequently, LH-Dining would be

120. *Id.* at *2.

121. Complaint, *supra* note 96, ¶ 34.

122. *See* MacKinnon v. Truck Ins. Exch., 73 P.3d 1205, 1211, 1217 (Cal. 2003) (refusing to apply the pollution exclusion to pesticide spraying in an apartment building, "which do[es] not remotely resemble traditional environmental contamination"); Nav-Its, Inc. v. Selective Ins. Co. of Am., 869 A.2d 929, 930 (N.J. 2005) (limiting the application of the pollution exclusion to "traditional environmental pollution" and refusing to apply it after the release of toxic fumes from a floor coating/sealant); Am. States Ins. Co. v. Koloms, 687 N.E.2d 72, 82 (Ill. 1997) (restricting the application of the pollution exclusion to "traditional environmental contamination" and refusing to apply the exclusion after the accidental release of carbon monoxide from a furnace).

123. *See* Nautilus Ins. Co. v. Jabar, 188 F.3d 27, 30-31 (1st Cir. 1999) (rejecting the view that a "pollutant" means "any . . . irritant or contaminant" since most substances or chemicals can "irritate or damage a person or property"); *see also* Pipefitters Welfare Educ. Fund v. Westchester Fire Ins. Co., 976 F.2d 1037, 1043 (7th Cir. 1992).

124. *See, e.g.*, Larson v. Composting Concepts, Inc., No. A07-976, 2008 WL 2020489, at *4 (Minn. Ct. App. May 13, 2008) (concluding that the insurer had no duty to indemnify after applying the pollution exclusion and finding that mold, bacteria, and bioaerosols from a compost site were organic contaminants); Assicurazioni Generali, S.p.A. v. Neil, 160 F.3d 997, 1005–06 (4th Cir. 1998) (declaring that the pollution exclusion was unambiguous and applying it to resolve a non-traditional environmental pollutant); U.S. Fire Ins. Co. v. City of Warren, 87 F. App'x 485, 487, 489–90 (6th Cir. 2003) (declaring that the pollution exclusion precluded a recovery of insurance proceeds after pathogens, and all strains of viruses in sewage infiltrated homes and caused health problems); First Specialty Ins. Corp. v. GRS Mgmt. Assocs., Inc., No. 08-81356-CIV, 2009 WL 2524613, at *4–5 (S.D. Fla. Aug. 17, 2009) (concluding that the insurer had no duty to indemnify after applying the pollution exclusion and finding that Coxsackie virus in a swimming pool was a viral contaminant); Evanston Ins.

precluded from receiving coronavirus-related damages, if the Eastern District Court of Pennsylvania adopts this latter view. Perhaps, the Alabama Supreme Court's observation in *Porterfield v. Audubon Indemnity Company*,[125] can provide some guidance:

> *Rarely has any issue spawned as many . . . rationales and . . . court decisions as . . . the pollution-exclusion clause. . . [More than 100 cases support] the proposition that the plain language of the pollution-exclusion clause [denies] coverage. . . . [There is] not just a split of authority, but an absolute fragmentation of authority. . . . [Often, cases that reach] the same conclusion [about] a particular issue [give different], and sometimes inconsistent . . . rationales.*[126]

B. Indemnity Insurance Conflict — Whether "Viruses" or "Contaminants" Cause Physical Property Damage

To begin the analysis in this section, consider a few pertinent questions: Did the 1979 release of radiation from Pennsylvania's Three Miles Island nuclear power plant (TMI)[127] physically destroy or damage commercial and residential structures? Did the radiation contaminate tangible materials? Did the radiation cause business-interruption losses? Did commercial and residential property insurers compensate insured business entities and homeowners after the radiation damaged "physical property?" Were the TMI owners strictly liable for releasing radiation? A careful reading of the Supreme Court's remarkable analysis in Duke Power Co. v. Carolina Environmental Study Group[128] suggests that the answer to each question is yes.[129]

Co. v. Harbor Walk Dev., LLC, 814 F. Supp. 2d 635, 647 (E.D. Va. 2011) (finding pollution exclusions unambiguous and not limited to traditional environmental pollution), aff'd per curiam sub nom. Evanston Ins. Co. v. Germano, 514 F. App'x 362 (4th Cir. 2013).

125. 856 So. 2d 789 (Ala. 2002).

126. *Id.* at 800 (emphasis added).

127. *See* Barasch v. Pa. Pub. Util. Comm'n, 532 A.2d 325, 327 (Pa. 1987) (discussing the uncertainties arising from the nuclear accident at Three Mile Island), *aff'd sub nom*. Duquesne Light Co. v. Barasch, 488 U.S. 299 (1989); Aaron M. Datesman, *Radiobiological Shot Noise Explains Three Mile Island Biodosimetry Indicating Nearly 1,000 mSv Exposures*, SCI. REPS. (July 2, 2020) https://www.nature.com/articles/s41598-020-67826-5.pdf (reporting that the nuclear-power station released a large quantity of the radioactive gas).

128. 438 U.S. 59 (1978), *superseded by statute*, Price-Anderson Amendments Act of 1988, Pub. L. No. 100-408, 102 Stat. 1066 (codified as amended in scattered sections of 42 U.S.C.).

129. *Id*. at 64–74 (disclosing that the Price-Anderson Act, Pub. L. 85-256, 71 Stat. 576 (1957) (codified as amended in scattered sections of 42 U.S.C.) requires the nuclear industry to purchase indemnity insurance, and the industry is *strictly liable* and must indemnify property owners after a release of "non-natural radiation" damages third parties' physical property).

Hence, would the universal answer to the above questions change dramatically if "coronavirus" or "COVID-19" were substituted for "radiation?" To help answer this latter question, consider the probative facts in 837 Foothill Blvd., LLC v. Travelers Indemnity Co. of Connecticut.[130] Foothill, LLC owns and manages a small business center in Los Angeles County, California.[131] In March 2020, the Governor of California and the Mayor of Los Angeles issued stay-at-home orders—instructing all "non-essential" businesses to close.[132] Foothill's tenants stopped using the commercial units and paying rent—citing purportedly "dire risks" associated with COVID-19 and alleging that COVID-19 physically damaged a nearby third party's commercial property.[133]

In November 2019, Foothill and Travelers Indemnity Company executed an "all risks" property insurance contract—covering the center's physical property and operations.[134] Under the terms of a BIEE endorsement, Travelers promised to indemnify Foothill for "business income losses."[135] Ultimately, Foothill asked Travelers to pay business-interruption damages—citing the shutdown's "unprecedented scale," "substantial loss of business income" and "additional expenses."[136] The insurer refused—asserting that the coronavirus (SARS-CoV-2) did not directly and physically damage the center or cause business-interruption losses.[137]

Eventually, Foothill filed a declaratory judgment action in the Superior Court of California. The insured argued that Travelers had a duty to indemnify.[138] The BIEE endorsement, however, does not define "physical loss or damage"—even though the phrase appears sixteen times.[139] As of this writing, the central question before the Superior Court is whether the coronavirus (SARS-CoV-2) can directly and physically cause a "property loss" or "property damage." Should the Superior Court interpret the clause in favor of Foothill? The probable answer is yes, if the Court

130. Complaint for Declaratory Relief, 837 Foothill Blvd., LLC v. Travelers Indem. Co. of Conn., No. 20STCV13929 (Cal. Super. Ct. Apr. 9, 2020), 2020 WL 1818437.

131. *Id.* ¶ 1.

132. *Id.* ¶ 17.

133. *Id.* ¶¶ 17, 19.

134. *Id*. ¶¶ 6, 9, 12; *see also* Cross-Complaint for Declaratory Relief and Demand for Jury Trial Exhibit A at 15-16, 837 Foothill Blvd., LLC v. Travelers Indem. Co. of Conn., No. 20STCV13929 (Cal. Super. Ct. June 1, 2020), 2020 WL 6049435; cf. ISO Props., Inc., *Business Income (and Extra Expense) Coverage Form—CP 00 30 04 02*, MERLIN L. GRP. (2001), https://www.propertyinsurancecoveragelaw.com/files/file/CP00300402.pdf (industry standard form providing substantially similar coverage).

135. Complaint for Declaratory Relief, *supra* note 130, ¶¶ 6, 9.

136. *Id*. ¶ 21.

137. See *id*. ¶ 23.

138. COMPLAINT—837 Foothill Blvd., Id., paragraph 15.

139. *See* ISO Props., Inc., *Business Income* (and Extra Expense) Coverage Form—CP 00 30 04 02, PROP. INS. COVERAGE L. BLOG (2001), https://www.propertyinsurancecovproperty.com/files/file/CP00300400.pdf.

allows the introduction of "relevant" extrinsic evidence to help define the meaning of those terms.

Several state supreme courts allow the introduction of extrinsic evidence to help interpret insurance contracts.[140] In the complaint, Foothill argued that the coronavirus physically damages and destroys property[141]—like, say, the released radiation at TMI's nuclear power plant. Generally, the World Health Organization (WHO)[142] and Centers for Disease Control and Prevention (CDC)[143] maintain that the coronavirus contaminates tangible materials and objects. Foothill argued that SARS-CoV-2 destroys tangible property by contaminating the surfaces of objects and remaining there "up to twenty-eight days."[144] If the superior court embraces WHO's definition of a virus-caused "physical loss or damage," Foothill will probably prevail.

Additionally, the Supreme Court of California and other supreme courts have been exceptionally clear about another matter: Judges must determine the reasonable expectation of the average insured when interpreting the meaning of words and phrases in an insurance contract.[145] Moreover, to afford the greatest possible protection for the average insurance consumer, California courts interpret

140. *See, e.g.*, Montrose Chem. Corp. v. Super. Ct., 861 P.2d 1153, 1159–60 (Cal. 1993) (allowing any extrinsic evidence to interpret contractual terms and the scope of an insurer's obligations); Chubb Custom Ins. Co. v. Prudential Ins. Co. of Am., 948 A.2d 1285, 1289 (N.J. 2008) (permitting lower courts to weigh extrinsic evidence if an ambiguity exists and contractual terms are "susceptible to at least two reasonable alternative interpretations"); State v. Home Indem. Co., 486 N.E.2d 827, 829 (N.Y. 1985) ("If . . . the language in the insurance contract is ambiguous and susceptible of two reasonable interpretations, the parties may submit extrinsic evidence [to help construe the contract].").

141. Complaint, *supra* note 130, ¶ 15.

142. *See* Jason Gale & Ari Altstedter, *How Can I Get It? The Evidence on Virus Transmission*, WASH. POST (July 8, 2020, 1:32 PM), https://www.washingtonpost.com/businesb/how-can-i-get-it-the-evidence-on-virus-transmission/2020/06/30/44df4b98-baab-11ea-97c1-6cf116ffe26c_story.html (reporting that researchers, reviewed by The World Health Organization, aerosolized SARS-CoV-2 and discovered that "fomites" can contaminate physical surfaces—i.e., doorknobs or utensils—and linger for "weeks in near-freezing temperatures" or "survive as long as 24 hours on cardboard, 48 hours on stainless steel, and 72 hours on plastic").

143. *See* Pien Huang, Malaka Gharib & Natalie Jacewicz, *Essential Vocab for COVID-19: From Asymptomatic to Zoonotic*, WBUR NEWS (June 27, 2020), https://www.wbur.org/npr/883975628/essessess-vocab-for-covid-19-from-asymptomatic-to-zoonotic (reporting the Centers for Disease Control and Prevention's research findings and disclosing that "fomites"—virus-contaminated physical objects—possibly could transmit the coronavirus).

144. Complaint, *supra* note 130, ¶ 15.

145. *See, e.g.*, La Jolla Beach & Tennis Club, Inc. v. Indus. Indem. Co., 884 P.2d 1048, 1053–54 (Cal. 1994); Selective Ins. Co. of Am. v. Hudson E. Pain Mgmt. Osteopathic Med. & Physical Therapy, 46 A.3d 1272, 1277 (N.J. 2012) (requiring lower courts to interpret coverage clauses broadly to satisfy insured's reasonable expectations); Fed. Ins. Co. v. Int'l Bus. Machs. Corp., 965 N.E.2d 934, 936 (N.Y. 2012) (instructing lower courts to satisfy the reasonable expectations of the average insured).

coverage provisions broadly and construe the exclusionary clauses narrowly.[146] Therefore, if the Superior Court applies the doctrine of reasonable expectation, Travelers probably will have to indemnify Foothill and pay business-interruption damages.

Still, it is important to emphasize: State and federal courts within California are divided over the meaning of "physical damage." For example, in MRI Healthcare Ctr. of Glendale, Inc. v. State Farm Gen. Ins. Co.,[147] a California Appellate Court declared that a "repaired" MRI machine's failure to "turn on" or "ramp up" was not a "physical loss."[148] The court of appeals stressed: A direct physical loss must be an actual change in an insured's property—precluding the owner's use of the property and requiring the owner to repair it.[149] However, in Total Intermodal Services v. Travelers Property Casualty Company of America,[150] a federal district court in California rejected the MRI court's analysis and conclusion. The federal court declared that two lost or misplaced containers of printers were "physical losses" under the insurance contract—even though the cargo was not physically damaged.[151]

Also, beyond California, state supreme courts and the federal circuits are seriously divided over the meaning of "physical loss or damage." For example, courts in Colorado, New Jersey and Oregon have applied the doctrine of plain-and-ordinary-meaning as well as the ambiguity doctrine and declared: Physical property losses occur when a release of ammonia, gasoline fumes, foul-smelling odors, mold-infestation, or asbestos fibers physically contaminate structurally sound buildings.[152] Other state supreme courts, however, have applied the same doctrines and declared: A mold-contaminated—but architecturally sound—residential or commercial

146. MacKinnon v. Truck Ins. Exch., 73 P.3d 1205, 1213 (Cal. 2003) (citing White v. W. Title Ins. Co., 710 P.2d 309, 313 (Cal. 1985)).

147. 115 Cal. Rptr. 3d 27 (Cal. Ct. App. 2010).

148. *Id.* at 37–38.

149. *Id.* (citing AFLAC Inc. v. Chubb & Sons, Inc., 581 S.E.2d 317, 319 (Ga. Ct. App. 2003)).

150. No. CV 17-04908 AB (KSx), 2018 WL 3829767 (C.D. Cal. July 11, 2018).

151. *Id.* at *3–4.

152. *See* Gregory Packaging, Inc. v. Travelers Prop. Cas. Co. of Am., Civ. No. 2:12–cv–04418 (WHW)(CLW), 2014 WL 6675934, at *6–8 (D.N.J. Nov. 25, 2014) (applying the ambiguity doctrine and concluding that the release of ammonia physically transformed the air in the facility and caused the property to be temporarily unfit for occupancy); W. Fire Ins. Co. v. First Presbyterian Church, 437 P.2d 52, 55-56 (Colo. 1968) (deciding *as a matter of law* that a "direct physical loss" occurred after gasoline contamination made further use of a property highly dangerous); Farmers Ins. Co. v. Trutanich, 858 P.2d 1332, 1335 (Or. Ct. App. 1993) (concluding that a methamphetamine lab's pervasive odor physically damaged a house); Prudential Prop. & Cas. Ins. Co. v. Lillard–Roberts, No. CV-01-1362-ST, 2002 WL 31495830, at *8-9 (D. Or. June 18, 2002) (applying the plain meaning rule and holding that a "'direct' and 'physical loss'" may occur when mold contaminates and makes a property uninhabitable); Port Auth. of N.Y. & N.J. v. Affiliated FM Ins. Co., 311 F.3d 226, 235–36 (3d Cir. 2002) (applying the plain-and-ordinary-meaning doctrine and declaring that a physical loss occurs when asbestos contaminated a building—making it uninhabitable or unusable).

property is not "physically damaged."[153] It is highly probably that travelers will not have to cover Foothill's business-interruption losses, if the California Superior Court concludes that the coronavirus cannot alter the physical integrity of a commercial property.

C. Indemnity Insurance Conflict — Whether A Civil Authority Order Can Cause Business-Interruption Losses

In early 2020, the insurance commissioners of Georgia, Maryland, North Carolina, the District of Columbia and several smaller states revealed: 1) *Each month*, COVID-related business losses range between $255 and $431 billion dollars; and 2) more than 194,000 insurance contracts promise to cover business-interruption losses that arise from civil authority orders.[154] Yet, the overwhelming majority of property insurers will not cover any coronavirus-related losses.[155]

Certainly, whether an insurer has a duty to compensate insureds for coronavirus business losses is a question of law for a court.[156] Still, the commissioners' chilling assessment might be correct. Why? Debatably, it is extremely difficult for an insured to prove a causal nexus between a COVID-related government order and a business-interruption loss. Therefore, to highlight the challenges that insureds are likely to confront in a duty-to-indemnify trial, consider the "relevant facts" and substantive issues in two remarkable and highly instructive Virginia court cases.

In *L & L Logistics and Warehousing Inc., v. Evanston Insurance Co.*,[157] Markel Corporation (Markel) is an insurance holding company; and Evanston Insurance Company (Evanston) is Markel's subsidiary.[158] Respectively, these entities are located in Richmond and Glen Allen, Virginia.[159] The insured —L & L Logistics and

153. *See* Universal Image Prods., Inc. v. Fed. Ins. Co., 475 Fed. App'x 569, 572-75 (6th Cir. 2012) (applying Michigan's plain-and-ordinary-meaning doctrine and declaring that the mold contamination was not a "direct physical loss or damage"); Mastellone v. Lightning Rod Mut. Ins. Co., 884 N.E.2d 1130, 1141, 1144–45 (Ohio Ct. App. 2008) (applying the plain-and-ordinary-meaning doctrine and declaring that mold contamination is not a "physical loss" because mold does not alter or affect a property's structural integrity); Columbiaknit, Inc. v. Affiliated FM Ins. Co., No. Civ. 98-434-HU, 1999 WL 619100, at *4–5, *7 (D. Or. Aug. 4, 1999) (applying the ambiguity doctrine and requiring "distinct and demonstrable" physical damage from mold contamination).

154. Jim Sams, *Several Insurance Commissioners Wary of Business Interruption COVID-19 Claims*, CARRIER MGMT. (Apr. 30, 2020), https://www.carriermanagement.com/newn/2020/04/30/206125.htm.

155. *Id.*

156. *See* Intercept Youth Servs., Inc. v. Key Risk Ins. Co., No. 3:18cv901, 2019 WL 1810988, at *2 (E.D. Va. Apr. 24, 2019).

157. No. 3:20-cv-324, 2020 WL 2213290 (E.D. Va. May 6, 2020).

158. *See* Complaint, *L & L Logistics & Warehousing Inc.*, 2020 WL 2213290, ¶¶ 9–10. *About Markel*, MARKEL, https://www.markel.com/about-markel (last visited Sept. 18, 2020); *Our Insurance Companies*, MARKEL, https://www.markel.com/about-markel/our-insurance-companies (last visited Sept. 18, 2020).

159. Complaint, *supra* note 158, ¶¶ 9–10.

Warehousing Inc, *d/b/a* L.L. Trucking Company (Logistics) —is located in Hawthorne, California.[160] Logistics owned at least one truck, employed at least one driver, and provided transportation services.[161] More relevant, Logistics also operated a trucking school on its premises.[162]

Logistics purchased an "all-risks" property insurance contract from Evanston.[163] The original contract covered business-interruption claims between April 17, 2019 and April 17, 2020.[164] However, when multiple insurance commissioners across the United States were predicting dire business-interruption losses in April 2020, Logistics renewed its insurance contract.[165] Several phrases in Evanston's policy mirror previously highlighted and discussed phrases which appear in the standard Business Owner Coverage Endorsement (BOCE)[166] and Business Income and Extra Expense Endorsement (BIEE).[167] Evanston's contract states:

> *[Insurance is extended and applies] to the actual loss of business income . . . and the actual, necessary and reasonable extra expenses incurred when access to the insured property or other properties are specifically prohibited by order of civil authority as the direct result of a covered cause of loss to property in the immediate area of [the] insured property.*[168]

A few weeks before the contract's renewal, the State of California issued a stay-at-home order.[169] Citing the coronavirus and its purportedly devastating effects, the government order prohibited all gatherings and forced all non-essential businesses to close.[170] Logistics stopped its operations. And, although Evanston's contract contained a virus-exclusion clause, the trucking company sent a notice of loss to Evanston.[171] The property insurer refused to indemnify.[172] In response, Logistics

160. *Id.* ¶ 8.

161. *L&L Trucking*, QUICK TRANSP. SOLS. INC., https://www.quicktransportsolutions.com/truckingcompany/california/l-l-trucking-usdot-2668351.php (last visited Sept. 19, 2020).

162. Complaint, *supra* note 158, ¶ 38.

163. *Id.* ¶¶ 11, 16.

164. *Id.* ¶ 11.

165. *Id.*

166. ISO Props., Inc., *Businessowners Coverage Form*—BP 00 03 07 02, PAC. COAST E&S INS. SERVS. (2001), http://pacificcoastes.com/assets/bp-00-03-07-02.pdf.

167. ISO Props., Inc., *supra* note 89.

168. Complaint, *supra* note 158, ¶ 15 (emphasis added).

169. *Id.* ¶¶ 26–27.

170. *Id.*

171. *Id.* ¶ 13.

172. *Id.*

filed a declaratory judgment action in the District Court for the Eastern District of Virginia.[173] Before, the Federal District Court, Logistics raised various and arguably novel business-interruption claims.[174]

First, Logistics asserted that California's civil order *precluded customers from purchasing Logistics' services*—thereby increasing the trucking company's lost profits.[175] As discussed earlier, sellers of goods and services depend on a network of suppliers.[176] But, various disasters, natural forces and pandemics can destroy suppliers' goods and interrupt sellers' operations.[177] Nevertheless, an insured seller may secure compensation for contingent business losses if 1) the seller purchased a BUSINESS INCOME FROM DEPENDENT PROPERTIES ENDORSEMENT (BIFDP),[178] 2) the insured establishes that a "covered risk" *physically damaged the suppliers' property*, and 3) the third-party destruction suspended the insured's business and generated lost profits. [179] Apparently, Logistics raised a "contingent business interruption" theory of recovery. And if that is true, the company probably will not prevail. Arguably, under the reported facts, Logistics cannot satisfy each element of this theory.

Logistics' second claim is equally novel and surprising: The "[c]oronavirus global pandemic" and California's stay-at-home order caused the trucking company's financial losses.[180] Applying Virginia law,[181] the Eastern District of Virginia Court probably will summarily dismiss this argument. Put simply, California's stay-at-home order exempts persons who provide essential services.[182] And, under federal

173. *Id.* ¶ 1.

174. Complaint, *supra* note 158, ¶¶ 13, 42–44.

175. *Id.* ¶¶ 28, 32–33.

176. *See* Derek Royster & Christian Skodczinski, *Contingent Business Interruption (Supply Chain Disruption)*, INT'L INS. F. (June 20, 2016), http://www.internationalinsuranceforum.cco/prop/wp-content/uploads/2016/05/1IIF-2016_RGL-Forensics_CBI.pdfx_.pdf; *see also, Protecting your Business Against Contingent Business Interruption and Supply Chain Disruption*, INS. INFO. INST., https://www.iii.org/article/protecting-your-business-against-contingent-business-interruption-and-supply-chain-disruption (last visited Sept. 20, 2020).

177. *Protecting your Business Against Contingent Business Interruption and Supply Chain Disruption*, supra note 175.

178. ISO Props., Inc., *supra* note 74.

179. *Id.* (emphasis added)

180. *Id.* ¶ 2.

181. *See* Buchanan v. Doe, 431 S.E.2d 289, 291 (Va. 1993) (declaring that under Virginia rules, "the law of the place where an insurance contract is written and delivered controls issues as to its coverage") (citing Lackey v. Virginia Sur. Co., 167 S.E.2d 131, 133 (1969)).

182. Cal. Exec. Order No. N-33-20 (Mar. 19, 2020), https://www.gov.ca.gov/wp-content/uploads/2020/03/EO-N-33-20-COVID-19-HEALTH-ORDER-03.19.2020-002.pdf (ordering all individuals living in California to stay home "except as needed to maintain continuity of operations of the federal critical infrastructure sectors, as outlined at [the Cybersecurity & Infrastructure Security Agency's website]") (emphasis added); *see also Identifying Critical Infrastructure During COVID-19*, CYBERSECURITY &

regulations, transportation enterprises are "essential businesses" and truck drivers provide "essential services."[183] Conceivably, the Federal District Court would want to know why Logistics voluntarily suspended its trucking services and asked Evanston to pay business-interruption damages.

Logistics also operated a trucking school on its premises.[184] Therefore, the company alleged that California's executive order forced the school to close.[185] Undoubtedly, whether the trucking school provided an "essential service" is a question of law for the court.[186] However, applying Virginia's law, the Eastern District of Virginia Court has already answered the question: Under California and Virginia's coronavirus orders, instructional institutions —like the trucking school — do not provide essential services.[187] Thus, will the Federal District Court force Evanston to pay insurance proceeds to ensure the "long-term survivability" of the trucking school?"[188] Three reasons preclude a definitive answer.

First, reconsider several key phrases and conditions present in Evanston's civil-authority clause. The insurer promised to pay business-loss damages, if 1) a civil authority order "prohibited access" to a "covered property," *or* 2) a government order "prohibited access" to a third party's property; *and* 3) a "covered cause of loss" damaged or destroyed the third party's property "in the immediate area" of the insured's property; *and* 4) A lack of access to an insured's property caused "necessary and reasonable" expenses"[189]

Citing similar phrases in the standard civil authority provision, courts have embraced a so-called "direct nexus" test. [190] The test comprises multiple elements

INFRASTRUCTURE SEC. AGENCY (Aug. 18, 2020), https://www.cisa.gov/identifying-critical-infrastructure-during-covid-19.

183. Rachel Premack, *Truck Drivers Have Emerged as Some of the Most "Essential" Workers of the Coronavirus, but They're Not Getting Paid Like It,* BUS. INSIDER (May 11, 2020, 9:47 AM), https://www.businessinsider.com/truck-driver-pay-essential-coronavirus-workers-2020-5 (reporting that nearly 400,000 U.S. truck drivers own and operate their trucks and the typical rate to take a truckload of goods from North Carolina to Los Angeles plummeted from $4,700 to $2,700 two months after stay-at-home orders were issued).

184. *See* Complaint, *supra* note 158, ¶ 38.

185. *Id.* ¶¶ 28, 38.

186. *See* Erie R. Co. v. Tompkins, 304 U.S. 64, 65, 78 (1938) (requiring that a federal district court apply the choice of law rules of the forum state —Virginia—when jurisdiction is based on the diversity of the litigants).

187. *Cf. In re* Extension to the Modifications of Ct. Operations: Supplement to Gen. Ords. 2020-02 & 2020-03, No. 2:20mc7, 2020 WL 1441770, at *1 (E.D. Va. Mar. 24, 2020) (confirming that California's "stay home" orders closed all non-essential businesses, disclosing that Virginia's orders closed all K-12 schools, and stressing that Virginia's executive orders allow the government to punishment violators).

188. Complaint, *supra* note 157, at ¶ 38.

189. *Id.* at ¶ 15 (emphasis added).

190. *See*, S. Hosp., Inc. v. Zurich Am. Ins. Co., 393 F.3d 1137, 1141 (10th Cir. 2004) (applying the plain-and-ordinary-meaning doctrine and declaring that the policy requires an insured to prove a direct nexus between the civil authority order and the suspension of the insured's business); Dickie Brennan & Co. v. Lexington Ins.

and conditions precedents. Thus, before Logistics can receive business-interruption damages, the company must prove a *direct and causal nexus* between California's stay-at-home order and the trucking school's lost profits. Stated another way, Logistics must prove that certain perils and events—surrounding a third party's destroyed or damaged property—occurred in a *very precise sequence* and prevented students-customers from accessing the school.[191]

In light of the reported facts, Logistics probably cannot prove that California's order "prohibited access" to the trucking school. But it is important to stress: The phrase "prohibited access" has generated split decisions among state courts as well as inter-circuit splits among federal courts. For instance, applying the doctrine of ambiguity, a New York state court declared that post-9/11 traffic restrictions did not prohibit partners and associates from accessing a law-office building.[192] Applying the same doctrine, a federal district court in Louisiana also reached a similar conclusion.[193] However, applying the plain-and-ordinary-meaning rule, the Virginia Supreme Court declared that aviation officials' post-9/11 traffic restrictions prohibited the insured from accessing their commercial property.[194]

Courts are also divided over whether government riot-mitigation orders produce business-interruption losses by prohibiting customers from accessing the insureds' commercial establishments. To illustrate, a federal court in California applied the plain-and-ordinary-meaning rule and declared that a riot-deterrence order did not

Co., 636 F.3d 683, 686 (5th Cir. 2011) (applying the doctrine of plain-and-ordinary-meaning and concluding that the insureds failed to demonstrate a nexus *between any prior property damage* and the local government's evacuation order); Not Home Alone, Inc. v. Phila. Indem. Ins. Co., No. 1:10-CV-54, 2011 WL 13214381, at *5–6 (E.D. Tex., Beaumont Division, Mar. 30, 2011) (applying the plain-and-ordinary-meaning doctrine and declaring that the civil authority provision requires the insured to prove a nexus between the civil authority order and certain physical property damage).

191. *See* Jones, Walker, Waechter, Poitevent, Carrere & Denegre, LLP v. Chubb Corp., No. 09–6057, 2010 WL 4026375, at *3–4 (E.D. La. Oct. 12, 2010) (reaffirming that the civil authority provision requires the insured to establish that a sequence of events occurred and prove that a nexus exists between a civil authority order and certain physical property damage— which prohibits access to the insured property).

192. *See* Abner, Herrman & Brock, Inc. v. Great N. Ins. Co., 308 F.Supp.2d 331, 336–337 (S.D.N.Y. 2004) (applying the ambiguity doctrine and declaring that a 9/11 order did not result in "prohibited access" to the insured's business after the no-access order was lifted and vehicular traffic continued to restrict access in the area).

193. *See* 730 Bienville Partners, Ltd. v. Assurance Co. of Am., No. Civ.A. 02-106, 2002 WL 31996014, at *1–2 (E.D. La. Sept. 30, 2002) (applying the doctrine of ambiguity and declaring that the FAA's flight cancellations did not prohibit consumers from accessing the insured's hotels in New Orleans).

194. PMA Capital Ins. Co. v. US Airways, Inc., 626 S.E.2d 369, 373 (Va. 2006) (applying the plain-and-ordinary-meaning rule and embracing the argument that airport authorities' orders prohibited the insured commercial airliner from using the airport).

prevent customers from accessing the insured's theater.[195] But, a state court in Michigan applied the doctrines of ambiguity and plain meaning—declaring that the governor's riots-preemptive action prevented customers from accessing the insured's business and caused lost profits.[196]

Finally, assuming that Logistics' probative evidence satisfies every element of the "direct nexus" test, the insurer can still cite the Virginia Supreme Court's well-reasoned analysis in *PBM Nutritional's, LLC v. Lexington Insurance Co.*,[197] and raise an immensely powerful, multi-pronged virus- or contaminant-exclusion defense: As a matter of law, Evanston has no duty to indemnify, because 1) SARS-CoV-2 is a novel coronavirus, 2) a virus cannot physically damage a property, 3) a physically damaged property must cause a business-interruption loss, and 4) the insurance contract contains a virus exclusion clause.[198]

To help prove the assertion, consider the relevant facts in *Nutritionals*. PBM manufactures and produces Profylac baby formula.[199] Basically, the formula is a mixture of hot water and dry ingredients.[200] PBM's mixture system comprises several components— a filter housing, tubes, a butterfly valve, and a heat exchanger.[201] The filter contains melamine—a dangerous and toxic contaminant.[202] In the course events, PBM used superheated water to clean the system, which reduced the filters to cellulose.[203] After the baby formula was produced, samples revealed that melamine leached into the water supply and contaminated the formula.[204]

To cover its operations, PBM purchased an "all risk" insurance contract through a "quota share" agreement where Lexington and two other insurers "shared percentages of the risk of coverage."[205] The contract contained an exclusion clause—

195. *Syufy Enters. v. Home Ins. Co. of Ind.*, 1995 WL 129229, at *2–3 (N.D. Cal. Mar.21, 1995) (applying the plain-and-ordinary-meaning rule and concluding that a dusk-to-dawn civil authority order —following the Rodney King verdict — did not specifically prohibit access to a Syufy theater).

196. Sloan v. Phx. of Hartford Ins. Co., 207 N.W.2d 434, 436–437 (Mich. Ct. App. 1973) (applying the ambiguity and plain meaning doctrines and concluding that the governor riots-related order closed of all places of amusement—prohibiting access and directly causing lost profits).

197. 724 S.E.2d 707, 708 (Va. 2012).

198. Complaint, *supra* note 157, at ¶ 13.

199. *PBM*, 724 S.E.2d. at 710.

200. *Id.* at 709–710.

201. *Id.* at 710.

202. *See generally*, Christine Ro, *It's Time To Think About Alternatives To Melamine —Which May Be In The Plate You're Using Right Now*, FORBES SCIENCE (Nov. 29, 2019, 1:15 PM) https://www.forbes.com/sites/christinero/2019/11/29/its-time-to-think-about-alternatives-to-melamine-which-may-be-in-the-plate-youre-using-right-now/#5c0e36fa3964PBM.

203. *PBM*, 724 S.E.2d at 710.

204. *Id.*

205. *Id.*

barring the recovery of insurance proceeds if a "pollutant" caused a loss.[206] Significantly, under the exclusions, "contaminants" and "viruses" were pollutants.[207] Still, disregarding the exclusionary language, PBM destroyed the contaminated formula and sent a notice of loss to each insurer. The manufacturer demanded compensation—alleging that the "all risks" contracts covered business-interruption loss.[208] Lexington and two other insurers denied the claim—asserting that the contaminant-exclusion clauses precluded PBM's recovery.[209]

PBM commenced a declaratory judgment action in a Virginia circuit court. First, under standard pollution-exclusion clauses, the insurers promised to indemnify even if a contaminant causes a business loss. However, the pollution-exclusion provisions in several endorsements disclosed that proceeds were precluded if a virus or containment causes a loss. PBM argued that the allegedly conflicting clauses should be construed against the insurers.[210] PBM also argued: Before refusing to indemnify, the insurers had a contractual duty to prove conclusively that melamine contaminated the Profylac baby formula.[211]

The circuit court declared that the property insurers did not have a duty to cover PBM's "contamination losses"— after examining the "pollution exclusion endorsement" and applying the ambiguity doctrine.[212] Refusing to accept the lower court's declaration, PBM appealed. Before the Supreme Court of Virginia, PBM maintained that the lower court's rulings were erroneous.[213] Applying the doctrine of plain-and-ordinary-meaning, the *Nutritionals* court disagreed. Citing various stipulations and expert testimony, the supreme court found that the infant formula was contaminated.[214] But even more importantly, the *Nutritionals* court declared: Viruses as well as traditional and non-traditional environmental contaminants are excluded perils under the "all risks" insurance contracts.[215]

Returning to the facts in *L & L Logistics,* Evanston's insurance contract included a virus-exclusion clause. SARS-CoV-2 is a viral contaminant.[216] Moreover, Logistics

206. *Id.* at 711.

207. *Id.* at 711–712.

208. *Id.* at 710.

209. *PBM Nutritional's, LLC v. Lexington Ins. Co.,* 724 S.E.2d 707, 709 (Va. 2012).

210. *Id.* at 712.

211. *Id.* at 715.

212. *Id.* at 712.

213. *Id.*

214. *Id.* at 715.

215. PBM Nutritional's, LLC v. Lexington Ins. Co., 724 S.E.2d 707, 714 (Va. 2012).

216. *See generally* Saeed Behzadinasab et al., *A Surface Coating that Rapidly Inactivates SARS-CoV-2*, 31 ACS APPLIED MATERIALS & INTERFACES 34536, 34723 (2020) (finding that the virus spreads rapidly in droplets—contaminating materials and objects); *see also* Virginia Tech, *In one hour, professor's surface coating*

admits that the "novel coronavirus" contaminated its California trucking school and caused business-interruption losses.[217] Yet, Logistics insists that Evanston has a duty to indemnify. Debatably, if the Eastern District of Virginia Court embraces the Virginia Supreme Court's persuasive business-interruption analysis in *Nutritionals*, the California trucking company will not prevail.

IV. CORONAVIRUS BUSINESS CLOSURE ORDERS, "RIOTOUS LOOTING" AND INSURERS' DUTY TO INDEMNITY UNDER THE CONCURRENT CAUSATION DOCTRINE

To repeat, in mid-March 2020, government officials in twenty-two jurisdictions responded to a "novel coronavirus pandemic" and issued mandatory stay-at-home orders.[218] Among other effects, businesses shuttered and began to lose money.[219] Two months later, small groups of allegedly "outside agitators and opportunists" responded to George Floyd's death by vandalizing and looting various businesses in major markets.[220] Therefore, an important legal question has emerged: whether property insurers must indemnify insured small businesses as well as upscale retailers if the insureds' already-shuttered businesses were looted.[221] Stated more

inactivates virus that causes COVID-19, MEDICAL XPRESS (July 15, 2020), https://medicalxpress.com/news/2020-07-hour-professor-surface-coating-inactivates.html.

217. *See* Complaint ¶ 22, 37, L & L Logistics and Warehousing Inc. v. Evanston Ins. Co., No. 3:20-cv-324, 2020 WL 2213290 (E.D. Va. filed May 6, 2020) ("[T]he *deadly virus is a contaminant [that] physically infects* and stays on surfaces of objects . . . [or] formites for up to twenty-eight day. . . . [T]here is an ever-present risk that the *insured properties are contaminated*.") (emphasis added).

218. *See* Christopher J. Boggs, *Coronavirus (COVID-19): Does Business Income Respond*?, INS. J. (Mar. 24, 2020) ("As of this writing, California, Colorado, Connecticut, Illinois, Indiana, Iowa, Kentucky, Maryland, Massachusetts, Michigan, Minnesota, New Jersey, New York, North Carolina, Ohio, Oregon, Pennsylvania, Rhode Island, Vermont and Washington have all shut down restaurants and bars."), https://www.insurancejournal.com/blogs/big-i-insights/2020/03/24/562253.htm; and, Kayla Epstein, *Washington, D.C., Maryland and Virginia Issue Stay-at-Home Orders to Fight Coronavirus*, BUS. INSIDER (Mar. 30, 2020, 12:01 PM) (reporting that authorities instructed all non-essential businesses to close), https://www.businessinsider.com/coronavirus-maryland-governor-larry-hogan-issues-stay-at-home-order-2020-3.

219. *See generally* Thomas Wade, *Coronavirus and Business Interruption Insurance Coverage*, AM. ACTION F. (April 14, 2020), https://www.americanactionforum.org/insight/coronavirus-and-business-interruption-insurance-coverage/.

220. *See, e.g.*, Jessica Guynn, *Broken Glass, Broken Dreams: Small Businesses Ravaged by Protests and COVID-19 Contemplate An Uncertain Future*, USA TODAY (June 16, 2020, 3:49 PM), https://www.usatoday.com/in-depth/money/usaandmain/2020/06/16/george-floyd-protests-coronavirus-small-businesses-damage-looting/5328052002/.

221. *See, e.g.*, Claire Wilkinson, *Riot Losses Mount—Pandemic Complicates Lost Income Claims*, BUS. INS. (June 1, 2020, 12:30 PM) (asking when civil unrest or COVID-19 causes a loss, and reporting the specific facts surrounding the individual and combined effects of shutdown orders and rioting on courts' business-loss decisions), https://www.businessinsurance.com/article/20200601/NEWS06/912334885/Riot-losses-mount-pandemic-complicates-lost-income-claims#.

narrowly, the question is whether insurers must compensate businessowners, if "looting" and coronavirus orders concurrently caused business-interruption losses.

To help uncover a plausible answer, consider the dispute in Chefs' Warehouse v. Liberty Mutual Insurance Co.[222] The Chefs' Warehouse Inc. (Chefs) is a family of companies and a major supplier—distributing "specialty products to over 35,000" high-end restaurants, stores, casinos, hotels, and resorts across the United States and Canada.[223]

Liberty Mutual Insurance Company (Liberty) is a wholly-owned subsidiary of Liberty Mutual Holding Company. Although, its principal place of business is in Massachusetts, Liberty offers services in the State of New York.[224] Under its all-risks, Premier Property Protector™ insurance contract, Liberty agreed to indemnify Chefs if covered risks caused property, business-interruption and account-receivable losses.[225] Liberty's limit of contractual liability was $75 million per loss.[226]

Between mid-March and early-April 2020, civil authorities in New York, California, Illinois and Washington, D.C. ordered all non-essential businesses to close.[227] Chefs' customers —who operate businesses in those venues—complied. Consequently, Chefs' sales and income abruptly declined. Thus, on April 29, 2020, Chefs sent a notice of loss—asking the insurer to indemnify.[228] Three business days later, Liberty rejected the claim.[229]

On June 23, 2020, Chefs commenced a declaratory-judgment action in the District Court for the Southern District of New York.[230] Before the federal court, Chefs asserted that Liberty had a duty to indemnify and gave several reasons: 1) The civil orders precluded Chefs' customers from paying millions of dollars in accounts receivables; 2) The market value of its "specialty goods" inventory diminished significantly after the government orders; 3) The civil authority orders and customers' delinquent accounts are covered perils; and 4) The covered perils directly and indirectly interrupted Chefs' income within several profitable markets.[231]

Again, Liberty rejected Chef's duty-to-indemnify request within three days. Why? In its denial letter, the insurer asserted: 1) A "peril insured against" did not physically

222. Complaint, Chefs' Warehouse Inc. v. Liberty Mut. Ins. Co., No. 20-cv-4825, 2020 WL 3444003 (S.D.N.Y. June 23, 2020).

223. Complaint ¶¶ 8, 11, The Chef's Warehouse Inc., 2020 WL 3444003.

224. *Id.* ¶ 4.

225. *Id.* ¶¶ 47–49, 62.

226. *Id.* ¶¶ 47–49.

227. *Id.* ¶¶ 28, 33–34.

228. *Id.* ¶ 79.

229. Complaint ¶ 82, The Chef's Warehouse Inc., 2020 WL 3444003.

230. *Id.* ¶ 2.

231. *Id.* ¶¶ 45, 53, 60, 62.

damage any of Chefs' property; and 2) A "peril insured against" did not produce any physical property damage—which caused government authorities to issue SARS-CoV-2-related orders.[232] Responding to these defenses, Chefs insisted: Accepting that a civil-authority order and the "novel coronavirus" are respectively excluded and covered perils, they concurrently caused Chefs' business-interruption losses.[233]

Will the Southern District of New York embrace Chefs' concurrent-causation theory and force Liberty to indemnify? Perhaps, the answer depends in part on whether the federal district court applies 1) the anti-concurrent-causation exclusion in Liberty's insurance contract,[234] or 2) the Texas Supreme Court's widely cited analysis[235] and rulings in Travelers Indemnity Company v. McKillip.[236] First, consider the "relevant facts" in McKillip. The McKillips—husband and wife—owned a turkey farm and used several small buildings to breed turkeys.[237] Travelers insured the small business.[238] The property insurance contract read in pertinent part:

> *[This policy insures the property against a] direct loss resulting from any of the perils . . . listed: . . . windstorm, hurricane, hail, explosion, riot, civil commotion, smoke, aircraft and land vehicles. . . . Unless specifically named [in this policy], this company shall not be liable for loss . . . by snowstorm.*[239]

On a fateful day, "a tremendous wind" damaged two barns.[240] Six days later, one of the damaged structures collapsed after a snowstorm.[241] Travelers refused to indemnify. The McKillips commenced a breach-of-contract action. Although finding that "other causes may have contributed to" the destruction, the jury concluded that a windstorm was the dominant efficient cause of the collapsed building.[242] The jury awarded the fair market value of the destroyed building and Travelers appealed. Before the Texas Supreme Court, the insurer argued that the trial court gave an erroneous jury charge.[243] The supreme court agreed. Under Texas's concurrent

232. *Id.* ¶¶ 83–84.

233. *Id.* ¶ 74.

234. *Id.* ¶ 69, 72.

235. 469 S.W.2d 160 (Tex. 1971) (On July 17, 2020, a query of Westlaw's "All State & Federal" database revealed that various state and federal courts as well as jurists had cited *McKillip* more than 500 times).

236. 469 S.W.2d 160 (Tex. 1971).

237. *Id.* at 161.

238. *Id.*

239. *Id.* at 161–62. (emphasis added).

240. *Id.* at 161.

241. *Id.*

242. Travelers Indem. Co. v. McKillip, 469 S.W.2d 160, 161 (Tex. 1971).

243. *Id.*

causation doctrine, an insurer must pay only a certain percentage of loss that arose from a covered peril if both covered and excluded perils combine and cause a loss. The McKillips, therefore, had to segregate covered losses from excluded losses.[244]

On multiple occasions, the Southern District of New York has compared Texas and New York's insurance-specific doctrines and concluded that the two sets of rules are nearly identical.[245] Even more importantly, the same federal district court has cited and applied McKillip— implicitly embracing the Texas Supreme Court's concurrent causation analysis.[246] Thus, if the Southern District of New York applies McKillip and New York's law to resolve the dispute between Chef and Liberty, the insurer or insured will have to segregate and proved covered and excluded losses.[247]

On the other hand, Chefs will probably be disappointed —as it can only receive a certain percentage of business-loss damages under the doctrine of concurrent causation.[248] Furthermore, that disappointment probably will be exacerbated, if the district court applies the language in Liberty's standard anti-concurrent causation (ACC) exclusion. In relevant part, the exclusion reads:

> *We do not cover physical loss or damage directly or indirectly caused by or resulting from any of the following [eight perils] regardless of any other cause or event, whether or not insured under this policy, contributing to the loss concurrently or in any other sequence.*[249]

"Government action" is one of eight excluded perils under the standard ACC clause.[250] But, as disclosed earlier, a "civil authority order" is a covered peril under

244. *Id.* at 162–63.

245. *See* Stonewall Ins. Co. v. Nat'l Gypsum Co., No. 86 Civ. 9671 (JSM), 1992 WL 123144, at *3–5, *9 (S.D.N.Y. May 27, 1992) (citing Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938)) (applying the laws of Texas and New York and using terms like "accord," "similar," "agreement," and "same" to underscore that the two sets of rules are nearly mirror images of each other).

246. *Stonewall Ins. Co.*, 1992 WL 123144, at *18 (citing *McKillip*, 469 S.W.2d 160).

247. *Stonewall Ins. Co.*, 1992 WL 123144, at *18 ("Under New York law, an insurer [must demonstrate] that a particular exclusion applies to bar coverage. Under Texas law, . . . an insured [must] show that [an] occurrence did not fall within the exception.") (citing Vargas v. Ins. Co. of N. Am., 651 F.2d 838, 840 (2d Cir. 1981); *see also McKillip*, 469 S.W.2d 160 (Tex. 1971)).

248. Complaint ¶ 69, The Chef's Warehouse Inc. v. Liberty Mut. Ins. Co., No. 20-cv-4825, 2020 WL 3444003 (S.D.N.Y. June 23, 2020) (explaining that disappointment will likely arise if Chefs means 100% compensation for a loss-of-income claim: "Concurrent causation [occurs] when a loss is brought about through a combination of two or more potential causes. If one of the concurrent causes is covered, there is coverage under the policy") (emphasis added).

249. *Id.*

250. *See* Marianne Bonner, *Concurrent Causation and Anti-Concurrent Causation—Many Property Policies Exclude Concurrent Causation*, THE BALANCE SMALL BUS. (Apr. 30, 2020), https://www.thebalancesmb.com/concurrent-and-anti-concurrent-causation-462346.

the Premier Property Protector™ insurance agreement.[251] And clearly, the COVID-19-related directives in New York, Illinois and California involve "government action." Thus, Chefs' ability to secure any business-interruption compensation will probably become exceedingly more difficult if the Southern District Court of New York applies the ACC exclusion. Why? To repeat, the New York Court of Appeals and the greater majority of state courts have enforced ACC provisions.[252] And a conservative reading of the current ACC exclusion suggests: Liberty has no duty to indemnify because a government "coronavirus pandemic" order caused Chefs' losses "regardless of any other" concurrent or contributing cause.[253]

There is one final point. In late-May 2020, various upscale and shuttered businesses in New York City, Chicago the District of Columbia, Los Angeles, and San Francisco were looted and/or vandalized. [254] These are the "major markets" in which Chefs sold "high-end" specialty goods and lost substantial profits.[255] As reported, the property insurance contract in *McKillip* as well as most property insurance contracts insure property against the risks associated with a riot or civil commotion.[256]

Now, assume that Liberty's Premier Property Protector™ agreement also insures against riots and looting. Will the Southern District of New York force Liberty to pay *business-interruption* damages? The short and probable answer is no. An

251. Complaint ¶ 57, The Chef's Warehouse Inc., 2020 WL 3444003.

252. *See Survey of State Law Regarding Enforceability of Anti-Concurrent Causation Clauses*, TIMONEY KNOX, LLP (Oct. 11, 2017), http://www.timoneyknox.com/insurance-industry/survey-of-state-law-regarding-enforceability-of-anti-concurrent-causation-clauses.

253. *See* Bonner, *supra* note 246.

254. *See generally*, Noah Manskar & Natalie Musumeci, *Looters Cost NYC Businesses 'Tens of Millions,' Experts Estimate*, N.Y. POST (June 3, 2020, 8:01 PM), https://nypost.com/2020/06/03/looters-cost-nyc-businesses-tens-of-millions-experts-estimate/ (reporting that citywide rampant looting and vandalism exploded in New York after George Floyd's death); David Eads et al., *Chicago Police Arrested More People for Protesting Than Looting In Early Days of Unrest, Contradicting City's Claims,* CHI. SUN TIMES (June 17, 2020), https://chicago.suntimes.com/2020/6/17/21294676/chicago-police-arrested-more-people-protesting-looting-early-days-unrest-contradicting-claims; Alex Leary et al., *Large Crowds Expected in Washington Saturday as George Floyd Protests Enter 12th Day*, WALL ST. J. (June 6, 2020), https://www.marketwatch.com/story/large-crowds-expected-in-washington-saturday-as-george-floyd-protests-enter-12th-day-2020-06-06; Matt Hamilton et al., *Looting In Van Nuys, Hollywood, As Curfew Begins in L.A. County*, L.A. TIMES (June 1, 2020), https://www.latimes.com/california/story/2020-06-01/la-braces-for-another-night-of-protests **(**reporting that mass protests in California erupted after George Floyd's death and about 10% of 700 arrestees were looters and burglars who ransacked businesses blocks away from peaceful protesters).

255. Complaint ¶ 28, 45, The Chef's Warehouse Inc., 2020 WL 3444003.

256. *See* Travelers Indemnity Co. v. McKillip, 469 S.W.2d 160, 161 (Tex. 1971); *see also Browse Home Coverage Options*, LIBERTY MUT. INS., (2020), https://www.libertymutual.com/homeowners-insurance-coverage (summarizing and comparing the types of covered perils that commonly appear in Liberty's contracts); and Rosalie Donlon, *Riots, Civil Commotion and Vandalism Generally Covered By Insurance*, PROPERTY CASUALTY 360, (June 1, 2020), https://www.propertycasualty360.com/2020/06/01/riots-civil-commotion-and-vandalism-generally-covered-by-insurance/?slreturn=20200902093044.

insured's stolen goods and business-interruption losses are different property interests. [257] One interest is tangible and the other is intangible.[258] In the end, the commercial property insurers will probably pay the relatively inexpensive damages for looted or stolen property. But experts agree: For most insured small and high-end businesses, it will be difficult to prove convincingly the total market value and dominant cause of a business interruption loss.[259]

V. A CASE STUDY— STATE SUPREME COURTS' AND FEDERAL CIRCUITS' DISPOSITIONS OF DUTY-TO-INDEMNIFY CLAIMS AND IMPLICATIONS FOR CORONAVIRUS BUSINESS-LOSS DISPUTES

After state governments issued lockdown or stay-at-home orders, many insured businessowners sought advice from insurance brokers and lawyers.[260] Insureds wanted to know whether property insurers have a duty to cover COVID-19-related business-interruption losses.[261] Seasoned attorneys' opinions have been nearly unanimous: The specific facts or specific (fact)ors surrounding a specific business-interruption dispute will probably determine whether courts force insurers to indemnify insureds.[262]

Perhaps, that less-than-definitive answer will surprise most insurance consumers. But the opinion is rooted in settled law: In declaratory-judgment trials, courts must examine or weigh specific facts and perform a "case by case basis" analysis before declaring contractual rights or obligations.[263] State supreme courts' rulings are

257. Polytech, Inc., v. Affiliated FM Ins. Co., 21 F.3d 271, 274 (8th Cir. 1994).

258. *Id.*

259. *See generally*, Wilkinson, *supra* note 219 (stating that there will be complications with calculating what business losses were caused by the rioting and looting and what business losses were caused by coronavirus).

260. *See generally*, Leslie Scism, *Coronavirus Costs Weigh on Travelers' Profit; Insurer Books $86 Million in Pandemic-Related Charges and Braces for Policyholder Litigation Over Business Losses*, WALL ST. J., (Apr. 21, 2020, 7:20 PM), https://www.wsj.com/articles/travelers-posts-lower-profit-as-catastrophe-losses-rise-11587469103 (reporting that many entrepreneurs have filed business-interruption coverage claims that could approximate "hundreds of billions of dollars").

261. *See, e.g.*, Paul S. White & Siobhán A. Breen, *The Impact of The Global Covid-19 Pandemic on the Insurance Industry*, DRI: FOR THE DEF. (Apr. 2020), https://www.wilsonelser.com/writable/files/Attorney_Articles_PDFs/ftd-2004-white-breen.pdf (reporting that persons are questioning whether insurance covers businesses which have experienced the effects of COVID-19).

262. *Id.* at 29.

263. *See, e.g.*, Marine Equip. Mgmt. Co. v. United States, 4 F.3d 643, 646 (8th Cir.1993) (requiring an examination of facts on a case-by-case basis in a declaratory judgment trial); Sentinel Ins. Co., Ltd. v. First Ins. Co. of Haw., Ltd., 875 P.2d 894, 911 (Haw. 1994) (requiring a case-by-case basis analysis of relevant facts to decide insurers' indemnification obligation); Northbrook Prop. and Cas. Ins. Co. v. GEO Intern. Corp., 739 N.E.2d 47, 49 (Ill. App. Ct. 2000) (requiring a *case-by-case basis analysis* of relevant facts to decide a duty-to-indemnify controversy) (emphasis added); and Lamar Co., LLC. v. Continental Cas. Co., No. CV-05-320-AAM,

equally clear regarding another matter: A factual analysis of a disputed contractual terms is more important than the application of rules, such as the ambiguity, reasonable expectation, four-corners, or plain-and-ordinary-meaning doctrine.[264]

But the latter rule engenders another timely and important question: What are the "most relevant facts or factors?" Quite simply, courts have not fashioned or embraced a universal standard to identify the most probative evidence. However, after examining just six randomly selected federal circuits' duty-to-indemnify declarations, a consistent finding emerged. The "most relevant and factors" are distributed among the following categories: Types of insured business entities, types of defendants, geographic locations of litigants and courts, types of insurance contracts, types of underlying first- and third-party injuries, types of property interests, types of property losses, types of common law and statutory claims, types of underlying theories of recovery, and types of insurance-specific affirmative defenses.[265]

Significantly, seasoned insurance litigators have also suggested that these same sets of "relevant facts" probably will influence state and federal courts' dispositions of coronavirus business-interruption and duty-to-indemnify controversies.[266]

2006 WL 1210228, at *7 (E.D. Wash. May 4, 2006) (requiring a case-by-case basis analysis of relevant facts to decide a duty-to-indemnify dispute between an insured and insurer).

264. *See, e.g.*, Am. States Ins. Co. v. Dastar Corp., 318 F.3d 881, 893 (9th Cir. 2003) (applying Oregon's law and reaffirming that a duty-to-indemnify question requires both legal and factual analyses to determine if underlying probative facts establish insurance coverage) (Ferguson, J., dissenting) (emphasis added); Am. States Ins. Co. v. Bailey, 133 F.3d 363, 369 (5th Cir. 1998) (applying Texas law and requiring legal or factual analysis of a duty-to-indemnify controversy); Taurus Holdings, Inc. v. U.S. Fid. & Guar. Co., 913 So.2d 528, 537 (Fla. 2005) (stressing that case law may be informative, but an insurance agreement's language is the "most important factor" when deciding whether coverage exists) (emphasis added); and Medmarc Cas. Ins. Co. v. Avent Am., Inc., 612 F.3d 607, 613 (7th Cir. 2010) (stressing that factual allegations are more important than legal theories when deciding a duty-to-indemnify dispute) (emphasis added).

265. *See, e.g.*, Sterngold Dental, LLC v. HDI Global Ins. Co., 929 F.3d 1, 5 (1st Cir. 2019) (presenting the "relevant facts" as geographic location of litigants and courts and the type of insurance contract); French v. Assurance Co. of Am., 448 F.3d 693, 696-97 (4th Cir. 2006) (presenting the "relevant facts" as the types of insurance contracts, types of property interests, and types of property losses); Fed. Ins. Co. v. CompUSA, Inc., 319 F.3d 746, 747-749, 752 (5th Cir. 2003) (presenting the "relevant facts" as types of defendants, types of common law and statutory claims, and types of insurance-specific affirmative defenses); Maher v. Federated Serv. Ins. Co., 666 F. App'x 396, 398-99 (6th Cir. 2016) (presenting the "relevant facts" as types of insured business entities, types of insurance contracts, types of underlying first- and third-party injuries, and types of common law and statutory claims); Am. Fam. Mut. Ins. Co. v. Williams, 832 F.3d 645, 647-48 (7th Cir. 2016) (presenting the "relevant facts" as types of defendants and types of insurance-specific affirmative defenses); and Am. Econ. Ins. Co. v. Jackson, 476 F.3d 620, 621-22, 626 (8th Cir. 2007) (presenting the "relevant facts" as types of defendants, geographic locations of litigations and courts, types of underlying first- and third-party injuries, types of underlying theories of recovery, and types of insurance-specific affirmative defenses).

266. *See, e.g.*, Sean Mahoney & Ciaran Way, *King's Bench Petition Seeks to Consolidate All Pennsylvania COVID-19 Business Interruption Insurance Cases*, JD SUPRA (May 5, 2020), https://www.jdsupra.com/legalnews/king-s-bench-petition-seeks-to-22336/ (suggesting that the following

Uncertainty, however, still exists. As stated above, disputes are generally decided on a case-by-case basis. Therefore, to shed additional light on this important and timely topic, the author decided to complete and report the results of a duty-to-indemnify study and a business-interruption analysis that began in 2002.[267]

A. Source of Data, Sampling Procedures and Relevant Attributes of Insurers and Insureds

Following standard research methodologies, the author fashioned a simple null hypothesis: No statistically significant difference exists between property insurers and their insured businesspersons' likelihood of winning duty-to-indemnify disputes in state and federal declaratory judgment trials. The alternative hypothesis is equally simple: *"Relevant facts"* or "*extralegal factors"*[268] are more likely to explain any statistically significant difference between property insurers' and their insureds' probability of winning duty-to-indemnify disputes.

The author searched law reporters as well as LEXISNEXIS and WESTLAW databases—attempting to uncover every reported and unreported duty-to-indemnify dispute that involved business-interruption as well as other insurance-related claims. The search generated approximately 4,250 decisions.[269]

To secure a representative sample of duty-to-indemnify cases, the author crafted a narrower query which contained only the following phrases: "covered peril!," "excluded peril!," "covered property," "civil authority order!," "peril! insured against," "property loss!," and "business interruption.[270] The second search produced just 209 decisions. Therefore, to secure a fairly sound database, a stratified random sample of the 4000-plus cases was executed. In the end, more than two-thousand declarations (N = 2,278) appeared in the database. However, the focus of this investigation centers on less than eight hundred declarations (N = 758). To create

factors may affect courts' COVID-19-related, indemnification decisions — "*locations* of plaintiffs and defendants," "types of claimed *business losses*," "material differences in business interruption[s]," the presence of a "*viral contamination* and/or pandemics", "the facts of each particular *business loss*," "the circumstances of each *business interruption*," "the actual loss of each business" and "the *nature of the insured's business*") (emphasis added).

267. *See* Rice, *supra* note 26 and accompanying text.

268. *See, e.g.,* Recent Publications, 124 HARV. L. REV. 1343, 1344 (2011) (reviewing and reporting an author's empirical findings: "[The author employs] an expertise in political science and a robust understanding of legal analysis to illuminate the impact [of] extrajudicial institutional factors . . . on the ultimate merits decision of a case. . . . [The author] sketches a ***divided federal court system*** where . . . [appellate courts are] more sympathetic to ***the facts of a case*** than the policy-driven Supreme Court." (emphasis added).

269. The restricted query was: adv: SY(duty /s indemnify) (visited last on July 21, 2020).

270. The exact search among the approximately 4,250 cases was: "peril! insured against" "covered peril!" "excluded peril!" "covered property," "civil authority order!" "property loss!" "business interruption."

multiple binary (0,1) or "dummy"[271] variables or factors, a content analysis of each case was performed.[272] Ultimately, the binary data were inserted into a large matrix. Various statistical procedures were applied to analyze the data. The results are displayed below in four tables.[273]

B. "Relevant" Extralegal and Legal Factors Surrounding the Litigants

TABLE 1 presents six categories of "specific, undisputed and relevant facts" about the insureds and insurers who commenced declaratory-judgment actions in state and federal courts. Those categories are: *geographic origins of the lawsuits*, *types of insured business entities*, *types of "covered property" and "covered perils*," *affirmative defenses*, *types of insurance exclusion provisions*, and *applied doctrines of interpretation*.

271. *See* Claudia M. Landeo & Kathryn E. Spier, *Irreconcilable Differences: Judicial Resolution of Business Deadlock*, 81 U. Chi. L. Rev. 203, 223 n.54 (2014) (discussing probit analysis and the construction of binary (0,1) or "dummy variables"); and William H. Greene, ECONOMETRIC ANALYSIS 116-18 (Prentice Hall 5th ed. 2003) (explaining the purpose and use of dummy variables in regression analysis).

272. *See generally* Mark A. Hall & Ronald F. Wright, *Systematic Content Analysis of Judicial Opinions*, 96 CALIF. L. REV. 63, 77 n.58, 88 n.103, 90-91 nn.111–12, 103 (2008) (presenting a history and description of Professor Rice's published content and statistical analyses of common-law and statutory questions of law) (citations omitted); Daniel Taylor Young, *How Do You Measure a Constitutional Moment? Using Algorithmic Topic Modeling to Evaluate Bruce Ackerman's Theory of Constitutional Change*, 122 YALE L.J. 1990, 2010–13 (2013) (embracing and discussing content analysis); and Robert E. Mitchell, *The Use of Content Analysis for Explanatory Studies*, 31 Pub. Opinion Q. 230, 237 (1967).

273. An EXCEL database of the sampled cases as well as multiple STATA-PROGRAM working files —containing statistical procedures, generated tables and various statistics —are stored at the author's location and/or with this law journal's office.

Deciphering Property Insurers' Indemnification Obligations After Disasters, Pandemics and Business Interruption Losses

TABLE 1. "RELEVANT FACTS" SURROUNDING LITIGANTS' DUTY-TO-INDEMNIFY CLAIMS AND DEFENSES IN STATE AND FEDERAL DECLARATORY JUDGMENT TRIALS

"Relevant, Undisputed, and Specific" Facts or Factors"	State Trial Courts & Federal District Courts (N = 758)	State Appellate Courts & Federal Courts of Appeals (N = 524)
GEOGRAPHIC REGIONS		
Eastern	18.0	15.7
Midwestern	23.3	22.1
Southern	9.4	9.4
Southwestern	32.1	36.6
Western	17.2	16.2
INSURED BUSINESS ENTITIES		
"Financial Service Providers"	59.9	57.0
"Goods & Non-Financial Providers"	22.8	26.1
"Government Contractors & Providers"	17.3	16.9
DISPUTED "COVERED PROPERTY" AND "COVERED PERILS" UNDER VARIOUS PROPERTY INSURANCE CONTRACTS		
"All Risks" — Commercial Perils	34.0	35.2
"Specific Risk" — Fires & Floods	45.8	42.1
"Specific Risk" — Other Perils	20.1	22.6
†INSURERS' AFFIRMATIVE DEFENSES		
Multiple Insurance-Specific Defenses	66.2	67.3
No-Insurable Interest Defense	15.7	19.2
No-Coverage Defense	17.0	22.6
DECISIONS AFTER INSURERS ADOPTED ANTI-CONTAMINANTS & ANTI-VIRUSES EXCLUSION PROVISIONS		
After "Absolute Exclusion" Clauses	48.4	49.2
After "Total Exclusion" Clauses	51.6	50.8
APPLIED DOCTRINES OF INTERPRETATION		
Reasonable Expectation & *AMOL*	40.6	40.1
Ambiguity Doctrine	31.5	35.4
General Rules of Contracts	18.9	16.4
Plain-and-Ordinary-Meaning Rule	9.0	8.1
DISPOSITIONS OF ACTIONS FROM INSUREDS' PERSPECTIVES		
Declaratory Judgment Granted	47.9	53.6 **
Declaratory Judgment Denied	52.1 **	46.4

Levels of statistical significance for the Chi-Square test: ** $p \leq .01$

†Varying and multiple defenses appeared in some cases — causing the column percentages to be greater or less than 100 percent.

There are two columns of percentages. The left column appears under the heading, "State Trial Courts and Federal District Courts (N = 758). In the right column, the percentages appear under the heading, "State Appellate Courts and Federal Courts of Appeals." After the trial and district courts issued 758 declarations, approximately 70% of the insureds and insurers appealed adverse declarations to state and federal courts of appeals (N = 524).

Comparing the two distributions of percentages, some notable findings are revealed. First, the geographic regions[274] of the proceedings and parties are relevant. Initially, trial and district courts in the Midwest and Southwest decided the majority of suits—23.3% and 32.1%, respectively. Subsequently, state and federal appellate courts in the Midwest and Southwest also resolved the majority of duty-to-indemnify disagreements. The respective percentages are 22.1% and 36.6%.

TABLE 1 also describes the *types of insured business entities* that commenced declaratory judgment actions in trial and district courts. Three sets of complainants filed duty-to-indemnify claims — "*financial service providers,"* "*providers of goods and non-financial services,"* and "*government contractors and providers*." Among the inferior state and federal courts, the respective percentages for the three groups are 59.9%, 22.8% and 17.3%.

As discussed earlier, insurers sell a variety of property insurance contracts—covering all types of tangible and intangible property interests as well as excluding all types of perils. But more significantly, each type of insuring agreement can generate duty-to-indemnify disputes.[275] TABLE 1 displays three classes of insurance contracts which have produced duty-to-indemnify clashes in state and federal trial courts. They are *all-risks-commercial*, *specific-risk-fire* and *other-specific-risks* insurance agreements. The respective percentages are 34.0%, 45.8% and 20.1%.

How do property insurers defend themselves in declaratory-judgment trials? Table 1 presents two categories of defenses. One category is labeled "Insurers' Affirmative Defenses"—which comprises several insurance-specific defenses[276] as well as the highly interrelated no-insurable-interest and no-coverage defenses.[277] Among state and federal trial courts, the percentages are 66.2%, 15.7% and 17.0%, respectively.

Once more, before and after the mid-1980s, the insurance industry embraced respectively the absolute and total exclusion defenses—which preclude reimbursements for losses arising from contaminants, viruses and pollution.[278] Some

274. "***Eastern***" includes Delaware, the District of Columbia, Massachusetts, Maryland, New Jersey, New York, and Pennsylvania; "***Midwestern***" comprises Illinois, Indiana, Iowa, Kansas, Michigan, Minnesota, Missouri, Nebraska, North Dakota, Ohio, South Dakota, West Virginia, and Wisconsin; "***Northeastern***" includes Connecticut, Maine, New Hampshire, Rhode Island, Vermont, Puerto Rico, and Guam; "***Southern***" comprises Alabama, Georgia, Florida, Mississippi, Kentucky, North Carolina, South Carolina, Tennessee, and Virginia; "***Southwestern***" includes Arkansas, Louisiana, Oklahoma, and Texas; and, "***Western***" includes Alaska, Arizona, California, Colorado, Hawaii, Idaho, Montana, Nevada, New Mexico, Oregon, Utah, Washington, and Wyoming.

275. *See supra* notes 37–60 and accompanying text.

276. *See generally* Stipcich v. Metro. Life Ins. Co., 277 U.S. 311, 316–17 (1927) (explaining the doctrine of *uberrimae fidei* or "utmost good faith" from which many insurance-specific defenses like concealment, misrepresentation, nondisclosure, breach of warranty and breach of condition evolved).

277. *See* Smith v. Eagle Star Ins. Co., 370 S.W.2d 448, 449-51 (Tex. 1963) (describing the types of insurable interests and the relationship between an insurable interest and insurance coverage).

278. *See supra* notes 118–120 and accompanying text.

cases in the database were decided after the adoptions. Table 1 reveals that approximately half (48.4%) of the insurers raised the absolute exclusion defense and the remainder (51.6%) advanced the total exclusion defense.

The last set of "relevant factors" in Table 1 appears under the heading, "Applied Doctrines of Interpretation." Before state and federal trial courts, forty per cent (40.6%) of the litigants raised the reasonable expectation doctrine and encouraged courts to decide the duty-to-indemnify issue as a matter of law (AMOL). The remaining litigants asked the tribunals to apply the ambiguity doctrine, general rules of contract construction, or the plain-and-ordinary-meaning rule. The displayed percentages are 31.5%, 18.9% and 9.0%, respectively.

Finally, Table 1 shows the dispositions of duty-to-indemnify disputes. Stated briefly, viewed from the insureds' perspectives, state and federal trial courts are statistically and significantly more likely to rule against insureds and in favor of insurers. The reported "granted" and "denied" percentages are 47.9% and 52.1%—respectively. Conversely, in state and federal courts of appeals, insureds are more likely to prevail in declaratory judgment proceedings. The respective percentages are 53.6% and 46.4%.

C. A Bivariate Analysis of Factors Influencing the Award of Declaratory Relief

So, why are some business entities more likely to win duty-to-indemnify controversies in appellate courts? To find the answer, consider the "relevant facts" or factors displayed in Table 2. First, consider the two columns of percentages that appear under the heading, "State Appellate Courts." The statistically significant percentages indicate that key factors—insurers' absolute "contaminant" exclusion provisions, the reasonable expectation doctrine, and the ambiguity doctrine—increase insureds' likelihood of winning duty-to-indemnify controversies in state appellate courts. The corresponding percentages are 60.2%, 65.5% and 61.2% —respectively.

TABLE 2. PROPERTY LOSSES, BUSINESS INTERRUPTIONS, AND THE DISPOSITIONS OF PLAINTIFFS' DUTY-TO-INDEMNIFY AND OTHER CLAIMS PRIMARILY IN STATE AND FEDERAL APPELLATE COURTS

		Dispositions of Duty-to-Indemnify & Other Claims in State Appellate Courts			Dispositions of Duty-to-Indemnify & Other Claims in Federal Appellate Courts		
Classes or Types of Predictor Variables	"Specific, Undisputed, and Relevant Facts" or Factors	Plaintiff Did Not Prevail	Plaintiff Prevailed	Number	Plaintiff Did Not Prevail	Plaintiff Prevailed	Number
		Percent	Percent		Percent	Percent	
TYPES OF INSURED	Financial Service Providers	43.8	56.2	(N = 338)	58.9	41.1	(N = 56) **
SMALL BUSINESSES AND	Goods & Non-Financial Providers	39.4	60.6	(N = 66)	41.7	58.3	(N = 96) **
COMMERCIAL ENTITIES	Government Entities & Contractors	52.1	47.9	(N = 48)	65.2	34.8	(N = 66) **
DISPUTED "COVERED"	"All Risks" — Commercial Perils	45.7	54.3	(N = 81)	55.2	44.8	(N = 143)
PROPERTY AND PERILS	"Specific Risk" — Fires & Floods	42.0	58.0	(N = 288)	70.6	29.4	(N = 17)
INSURANCE CONTRACTS	"Specific Risk" — Other Perils	49.4	50.6	(N = 83)	43.1	56.9	(N = 58)
DECISIONS AFTER INSURERS	Absolute "Contaminant" Exclusion	39.8	60.2	(N = 256) *	47.4	52.6	(N = 97)
CREATED KEY EXCLUSIONS	Total "Contaminant" Exclusion	49.5	50.6	(N = 196) *	57.9	42.1	(N = 121)
APPEALS COURTS APPLIED	Reasonable Expectation & *AMOL*	34.5	65.5	(N = 249) ***	58.6	41.4	(N = 29) ***
DOCTRINES TO CONSTRUCT	Traditional Rules of Contract	55.3	44.7	(N = 103)	71.4	28.6	(N = 14) ***
AND INTERPRET PROPERTY	Ambiguity Doctrine	38.2	61.2	(N = 55)	47.2	52.8	(N = 159)
INSURANCE CONTRACTS	Plain-&-Ordinary-Meaning-Rule	77.8	22.2	(N = 45) ***	55.2	44.8	(N = 16)
MIXED CLAIMS & ACTIONS:	Duty-to-Indemnify and Others	43.4	56.6	(N = 468) **	53.0	47.0	(N = 219) *
DECLARATORY JUDGMENTS	Duty-to-Defend and Others	51.4	48.6	(N = 391)	55.0	45.0	(N = 512)
& OTHER RELATED ACTIONS	Class Actions — Insurance Specific	56.4	43.6	(N = 204) **	68.7	31.3	(N = 99) *
IN LAW AND EQUITY	Class Actions — Non-Insurance	49.5	50.5	(N = 101)	56.9	43.1	(N = 116) *

*** Chi-square test statistically significant at $p \leq .001$
** Chi-square test statistically significant at $p \leq .01$
* Chi-square test statistically significant at $p \leq .05$

Now, consider the two columns of percentages that appear under the heading, Federal Appellate Courts. The findings uncover a completely different reality. Insurers are statistically and substantially more likely to prevail when 1) the insureds are "*financial service providers*" or "*government contractors*," and 2) federal courts of appeals apply the *reasonable expectation* doctrine, *traditional rules of contract construction*, and the *doctrine of plain and ordinary meaning*. Respectively, the *statistically significant percentages* are 58.9%, 65.2%, 58.6% , 71.4% and 55.2%.

Summarizing, Table 2 reveals: 1) Insureds are significantly more likely to win duty-to-indemnify arguments in state appellate courts; and 2) Insurers are more likely to prevail in federal courts of appeals. Therefore, answering the earlier question, insureds are statistically and substantially more likely to prevail in *appellate courts* when *state courts* decide the disputes.

Finally, it is important to repeat an earlier disclosure. The sizable database for this study evolved over several years. Thus, some sampled cases are single-claim judgments—courts' deciding whether an insurer must indemnify when a single underlying legal claim is present.[279] Others are mixed-actions and mixed-claims

279. *See, e.g.*, Salomon v. Philadelphia Ins. Companies, No. 13-10378-DPW, 2014 WL 294320, at *9 (D. Mass. Jan. 23, 2014) (declaring that the insurer had no duty to indemnify because the underlying conflict involved "a single claim.").

judgments[280]—which concomitantly resolved duty-to-indemnify, duty-to-settle[281] and duty-to-defend[282] controversies.

Table 2 also highlights the bivariate relationships between "relevant factors" and the dispositions of duty-to-indemnify controversies which arise from underlying single and mixed-claims lawsuits. The last four rows of percentages reveal the influences of underlying mixed-claims on state and federal appellate courts' dispositions of duty-to-indemnify disagreements. Generally, when state and federal courts of appeals weigh the concurrent and simultaneous effects of multiple and mixed-underlying claims, property insurers are substantially more likely to prevail. And a careful review of the respective percentages in Table 2 will support this conclusion.

Although admittedly not directly on point, the latter finding does not bode well for businessowners who are likely to raise a concurrent causation argument in business-interruption trials. Again, insurance experts have maintained: Coronavirus orders and "riotous conduct" are concurrent causes of massive business closures and interruptions.[283] But, as the findings suggest, appellate courts are less likely to force insurers to indemnify when insureds raise multiple and mixed allegations to justify a favorable declaration of contractual rights.

D. A Bivariate Analysis of State Supreme and Appellate Courts' Dispositions of Duty to Indemnify Clashes in Declaratory Judgment Proceedings

Again, insureds are substantially more like to win duty-to-indemnify disputes in *state appellate courts*. But there are intermediate and supreme courts. So, are insured businesses more likely to win duty-to-indemnify disputes in intermediate or supreme courts? The origin of this timely question evolved from Texas Supreme Court justices' contentious majority and minority opinions in *McGinnes Industrial Maintenance Corp. v. Phoenix Insurance Co.*.[284]

In *McGinnes*, the insured and insurer were "sophisticated" corporate enterprises.[285] The Environmental Protection Agency sued McGinnes for allegedly

280. *See, e.g.*, Maxum Indem. Co. v. Eclipse Mfg. Co., 848 F.Supp.2d 871, 884 (N.D. Ill. Jan. 31, 2012) (reaffirming that an insurer has no duty to indemnify all parties in an underlying ***mixed-multiple-claims*** lawsuit).

281. *See, e.g.*, Perdue Farms, Inc. v. Travelers Cas. and Surety Co. of Am., 448 F.3d 252, 260 (4th Cir. 2006) (refusing to expand a duty-to-indemnify obligation to cover third parties' claims in an underlying ***mixed-action settlement***).

282. *See, e.g.*, Pac. Indem. Co. v. Linn, 766 F.2d 754, 766 (3d Cir. 1985) (declaring the duty to indemnify follows the *duty to defend* and requiring multiple insurers to settle an underlying *multiple-theories-of-liability* lawsuit) (emphasis added).

283. *See supra* note 219 and accompanying text.

284. 477 S.W.3d 786 (Tex. 2015).

285. *Id.* at 789–90.

violating the federal Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA).[286] McGinnes argued that its all-risks insurance contract required Phoenix to defend and indemnify the company against the CERCLA-contamination suit.[287] Citing a Texas appellate court's opinion, four dissenting supreme-court justices argued that Texas's *"pro-business climate*" would be severely undermined if Phoenix were forced to defend McGinnes.[288]

The *McGinnes* majority acknowledged: California, Illinois, and Maine supreme courts declared that insurers are not obligated to indemnify and defend similarly situated companies against a CERCLA suit.[289] Still, the Texas Supreme Court majority rejected the Texas Appellate Court's and *McGinnes* minority justices' *"anti-business climate"* concerns.[290] Citing the decisions of the highest courts in Alabama, Colorado, Connecticut, Iowa, Kentucky, Massachusetts, Michigan, Minnesota, Nebraska, New Hampshire, North Carolina, Vermont and Wisconsin, the *McGinnes* majority declared that Phoenix had a contractual duty to defend McGinnes against the CERCLA-contamination suits.[291]

Now, in light of the revelations in *McGinnes*, consider a restatement of the earlier question: Are states' ***"business climate rankings"***[292] more or less likely to influence the dispositions of duty-to-indemnify and concomitant mixed-claims disputes? Table 3 displays the fifteen most populous states [293]—which are ranked according to their purportedly "objective levels of support" for businesses. Study the first three rows of percentages. In intermediate appellate courts, insureds are significantly and statistically more likely to prevail, if their state has an *"excellent"* or a "poor" *business climate ranking*. The respective percentages are *56.5%* and *54.9%*. Conversely, insured business entities are less likely to prevail (*45.2%*) if their states have a "good" business environment.

Of course, regardless of a state's level of support for businesses, the findings in Table 3 suggest: State supreme courts generally decide duty-to-indemnify quarrels

286. *Id.* at 790.

287. *Id.* at 792–93.

288. *Id.* at 796 n. 7 (citing Chesapeake Operating, Inc. v. Nabors Drilling USA, Inc., 94 S.W.3d 163, 177 (Tex. App. 2002) ("Industry and commerce cannot operate in a climate that allows a contracting party who makes a bad bargain to change the terms of a deal at its option.").

289. *Id.* at 793 n. 35.

290. McGinnes Indus. Maint. Corp. v. Phx. Ins. Co., 477 S.W.3d 786, 794 (Tex. 2015).

291. *Id.* at 793 n. 34.

292. These rankings are based on publicly available government statistics, forty-six research organizations' statistical reports and data from each state's Comprehensive Annual Financial Report. The rankings are average rankings—covering 14 years between 2007 and 2020. *See* CNBC.com staff, *America's Top States for Business in 2019*, CNBC (Jan. 27, 2020, 12:55 PM), https://www.cnbc.com/2019/07/10/americas-top-states-for-business-2019.html; CNBC.com staff, *Top States Past Year Rankings*, CNBC, https://www.cnbc.com/top-states-past-year-rankings/.

293. *See supra* note 288 and accompanying text.

in favor of insured businesses. The percentages are 55.6%, 52.6% and 55.0%, respectively. Yet, in *McGinnes*, the Texas Supreme Court examined just a few supreme-court cases and discovered split decisions—admittedly surrounding a duty-to-defend issue.[294] Do states' "business climate rankings" contribute to split judicial decisions? The answer is a qualified yes.

Consider the seven rows of percentages in Table 3 which appear next to the subheading, *Court Located in Large "Excellent Business Climate" States.* Without a doubt, the business environments in Texas, North Carolina, Georgia and New Jersey have been consistently superb. In those four states, *intermediate* and *supreme courts* are statistically and significantly more likely to decide duty-to-indemnify and related disputes *in favor* of insured businesses. The percentages for both levels of each state's judiciary range from 55.9% to 75.0%.

TABLE 3. THE DISPOSITIONS OF DUTY-TO-INDEMNIFY, PROPERTY LOSS AND MIXED CLAIMS IN STATE APPELLATE AND SUPREME COURTS BY STATES' PRO-BUSINESS CLIMATE RANKINGS

State Supreme Courts' & Appellate Courts' Locations By Commonly Accepted "Objective" Rankings of States' "Pro-Business Climate"		Dispositions of Duty-to-Indemnify and Other Claims in State Appellate Courts: Plaintiff Did Not Prevail	Plaintiff Prevailed	(N = 1,063)	Dispositions of Duty-to-Indemnify and Other Claims in State Supreme Courts: Plaintiff Did Not Prevail	Plaintiff Prevailed	(N = 745)
		Percent	Percent	Number	Percent	Percent	Number
OBJECTIVE RANKINGS OF STATES' BUSINESS CLIMATES ϕ	"Excellent Business Climate"	43.5	56.5	(N = 379) **	44.4	55.6	(N = 198)
	"Good Business Climate"	54.8	45.2	(N = 469)	47.4	52.6	(N = 291)
	"Poor Business Climate"	45.1	54.9	(N = 215) **	45.0	55.0	(N = 256)†
COURTS LOCATED IN LARGE "EXCELLENT BUSINESS CLIMATE" STATES ϕ	Texas Supreme & Appeals Courts	36.4	63.6	(N = 162) ***	44.1	55.9	(N = 34)
	Virginia Supreme & Appeals Courts	66.7	33.3	(N = 3)	60.0	40.0	(N = 10)†
	North Carolina Supreme & Appeals Courts	28.6	71.4	(N = 14)	28.6	71.4	(N = 7)
	Georgia Supreme & Appeals Courts	41.2	58.8	(N = 17)	28.6	71.4	(N = 7)
	Massachusetts Supreme & Appeals Courts	55.0	45.0	(N = 20)	48.1	51.9	(N = 27)†
	Florida Supreme & Appeals Courts	52.3	47.7	(N = 44) ***	66.7	33.3	(N = 12)
	New Jersey Supreme & Appeals Courts	29.6	70.4	(N = 27) ***	25.0	75.0	(N = 8)
COURTS LOCATED IN LARGE "GOOD BUSINESS CLIMATE" STATES ϕ	California Supreme & Appeals Courts	59.1	40.9	(N = 88) ***	47.6	52.4	(N = 21)
	Pennsylvania Supreme & Appeals Courts	62.9	37.1	(N = 35)	57.1	42.9	(N = 21)
	Illinois Supreme & Appeals Courts	46.7	53.3	(N = 60) ***	31.8	68.2	(N = 22)
	Iowa Supreme & Appeals Courts	61.1	38.9	(N = 18)	50.0	50.0	(N = 30)
COURTS LOCATED IN LARGE "POOR BUSINESS CLIMATE" STATES ϕ	Michigan Supreme & Appeals Courts	57.8	42.2	(N = 45)	52.2	47.8	(N = 23)
	New York Court of Appeals & Supremes	57.0	43.0	(N = 79)	33.3	66.7	(N = 33)
	Alabama Supreme & Appeals Courts	19.4	80.6	(N = 31) ***	50.7	49.3	(N = 75)†
	Louisiana Supreme & Appeals Courts	46.7	53.3	(N = 75) ***	35.3	64.7	(N = 17)

*** Chi-square test statistically significant at $p \leq .001$ ** Chi-square test statistically significant at $p \leq .01$

ϕ These rankings are based on publicly available government statistics, forty-six research organizations' statistics, and data from each state's Comprehensive Annual Financial Report. *See* CNBC Top State Reports, *https://www.cnbc.com/2019/07/10/americas-top-states-for-business-2019.html*, and *https://www.cnbc.com/top-states-past-year-rankings/*

† In many states, trial-court decisions may be appealed directly to the supreme court. Federal courts also send questions to state supreme courts. Thus, the number of observed supreme-court cases can exceed the number of appellate-court cases.

294. *McGinnes*, 477 S.W.3d at 794 (re-emphasizing the importance of uniformity when various jurisdictions interpret identical insurance provisions but acknowledging that the current decision cannot achieve uniformity since "courts have already split").

To be sure, the remaining three states' business environments are equally outstanding. Yet, the *intermediate* and *supreme courts* in Virginia and Florida are statistically and markedly more likely to decide *against* insured business enterprises. The percentages range from 52.3% to 66.7%. Intermediate courts in Massachusetts are also considerably more likely (55.0%) to decide *against* insureds. However, although the finding is not statistically significant, the Massachusetts Supreme Court is slightly more likely (*51.9%)* to decide in favor of businesspersons.

Now, review the four rows of percentages in Table 3 which appear next to the subheading, *Court Located in Large "Good Business Climate" States*. Surprisingly, like their sisters in Virginia and Florida, the *intermediate courts* in California and Iowa are statistically and significantly more likely to decide *against* insured businesses. The percentages are 59.1% and 61.1%, respectively. However, before California and Iowa Supreme Courts, businesspersons' have equal probabilities of prevailing—52.4% and 50.0%, respectively.

Most certainly, Pennsylvania and Illinois also have "good" business environments. But the courts in those two jurisdictions respond very differently to insured businesses' duty-to-indemnify claims. The Pennsylvania Supreme Court and its courts of appeals consistently decide *against* insureds—57.1% and 62.9%, respectively. In contrast, the Supreme Court of Illinois and its appeals courts reliably interpret duty-to-indemnify provisions in favor of insured sellers of goods and services. The percentages are 68.2% and 53.3%, respectively.

Finally, among "poor business climate states," litigants' win/loss trends vary considerably. For example, the New York Court of Appeals and Louisiana Supreme Court are more likely to decide indemnification arguments in favor of insured companies and small businesses—66.7% and 64.7%, respectively. And the intermediate courts in Louisiana and Alabama are also statistically and significantly more likely to rule in favor of insureds—53.3% and 80.6%, respectively. On the other hand, Michigan Supreme Court and its intermediate courts are less likely to rule in favor of insured commercial entities. The percentages are 52.2% and 57.8%, respectively.

E. Two-Stage Multivariate Probit Analysis — The Effects of "Relevant Facts" on the Outcome of Indemnification Claims in State and Federal Courts

Earlier, we discovered that several interrelated indemnification questions persistently generate judicial splits: 1) whether a virus, contaminant or civil-authority order can physically destroy or damage a tangible property, 2) whether a virus, contaminant or civil-authority order can cause business-interruption losses, and 3) whether an insurer must indemnify an insured when a virus, contaminant or civil-

authority order causes a business loss.[295] Debatably, these unyielding splits will have major implications for the dispositions of COVID-19-related, business-interruption disputes in state and federal courts.

Up to now, we have reviewed several bivariate relationships between certain "relevant facts" and duty-to-indemnify outcomes. Perhaps, these bivariate findings explain in part the judicial conflicts. Nevertheless, it is unquestionable: Statistically significant bivariate-relationships do not prove that certain "relevant facts" cause judicial splits or that courts have certain pro-insured or pro-insurer "predispositions."

As explained elsewhere, to increase the validity as well as the explanatory, inferential and predictive power of one's research findings, two central questions must be answered: 1) whether a sample of only reported judicial decisions accurately and fully describes supreme and appellate courts' tendency to grant or deny declaratory relief[296] and 2) whether courts only allow certain "relevant factors" and legal doctrines to determine the outcome of disputes.[297] Arguably, case-study findings are more reliable and predictive when researchers 1) test for "selectivity bias" in the sample,[298] 2) use more "powerful" inferential statistics, and 3) measure the exclusive, collective and concurrent effects of multiple "relevant factors" on the dispositions of disputes.

A test for "selectivity bias" is required for numerous reasons. After receiving adverse rulings in lower courts, some litigants accept the declarations and decide not to seek appellate review. Other litigants, however, refuse to accept the trial courts' unfavorable rulings and challenge those decisions in state or federal appellate courts.

295. *See generally supra* notes 95-213 and accompanying text.

296. *See* Willy E. Rice, *Insurance Contracts and Judicial Discord over Whether Liability Insurers Must Defend Insureds' Allegedly Intentional and Immoral Conduct: A Historical and Empirical Review of Federal and State Courts' Declaratory Judgments 1900-1997*, 47 AM. U. L. REV. 1131, 1208–09 (1998) (explaining the inferential limitations associated with a researcher's analyzing *reported* decisions and using only *simple percentages* to explain judicial outcomes and stressing that unreported decisions must be included in the statistical analysis) (emphasis added); and Willy E. Rice, *Insurance Contracts and Judicial Decisions over Whether Insurers Must Defend Insureds that Violate Constitutional and Civil Rights: An Historical and Empirical Review of Federal and State Court Declaratory Judgments 1900-2000*, 35 TORT & INS. L.J. 995, 1088–89 nn. 43–32 (2000).

297. *See supra* note 292.

298. The computation of this statistical test and its relevance have been discussed elsewhere. *See* G.S. MADDALA, LIMITED-DEPENDENT AND QUALITATIVE VARIABLES IN ECONOMETRICS 257–71, 278–83 (1983) (discussing "self-selectivity bias" and "other-selectivity bias"); Willy E. Rice, *Unconscionable Judicial Disdain for Unsophisticated Consumers and Employees' Contractual Rights?—Legal and Empirical Analyses of Courts' Mandatory Arbitration Rulings and the Systematic Erosion of Procedural and Substantive Unconscionability Defenses Under the Federal Arbitration Act, 1800-2015*, 25 B.U. PUB. INT. L.J. 143, 229 n. 560 (2016); and Willy E. Rice, *Federal Courts and the Regulation of the Insurance Industry: An Empirical and Historical Analysis of Courts' Ineffectual Attempts to Harmonize Federal Antitrust, Arbitration and Insolvency Statutes with the McCarran-Ferguson Act-1941-1993*, 43 CATH. U. L. REV. 399, 446-49 nn. 213–19 (1994).

The "selectivity bias" question, therefore, becomes whether a difference exists between litigants who "decide to appeal" and those who "decide not to appeal." If the test indicates a statistically significant difference between the two groups, a researcher can reasonably conclude that diverse characteristics—rather than certain "relevant factors"—explain appealers' likelihood of prevailing or losing in courts of appeals.

Again, the present database contains multiple "relevant facts" about litigants who appealed adverse duty-to-indemnify declarations. The author, therefore, performed a multivariate, Search Term End two-staged probit analysis.[299] This statistical procedure tests for "selectivity bias" and determines the unique, collective and concurrent effects of multiple extralegal and legal factors on the dispositions of duty-to-indemnify disputes in state and federal appellate court.[300]

299. See Willy E. Rice, *Insurance Contracts and Judicial Decisions over Whether Insurers Must Defend Insureds that Violate Constitutional and Civil Rights*, 35 TORT & INS. L.J. 995, 1088-89 nn. 431–32 (2000); Willy E. Rice, *Insurance Contracts and Judicial Discord over Whether Liability Insurers Must Defend Insureds' Allegedly Intentional and Immoral Conduct*, 47 AM. U. L. REV. 1131, 1208–09 n. 386–87 (1998). *See also* Willy E. Rice, *Judicial and Administrative Enforcement of Title VI, Title IX, and Section 504: A Pre- and Post-Grove City Analysis*, 5 REV. LITIG. 219, 287 nn. 406–09 (1986).

300. *See supra* note 295.

Deciphering Property Insurers' Indemnification Obligations After Disasters, Pandemics and Business Interruption Losses

Table 4 presents the results of a multivariate-probit analysis—focusing on 591 appellate and supreme courts duty-to-indemnify cases in the sample.[301] Seven (7) classes of "relevant facts" are illustrated. Also, two distributions of probit values—along with their respective robust standard errors—appear in the table.

TABLE 4. A MULTIVARIATE PROBIT ANALYSIS — THE EFFECTS OF LEGAL AND EXTRA-LEGAL FACTORS ON THE OUTCOMES OF INSURANCE-SPECIFIC PROPERTY LOSS AND DUTY-TO-INDEMNIFY CLAIMS IN STATE AND FEDERAL COURTS OF APPEALS (N = 591)†|

Individual & Combined Effects of Extrajudicial Factors & Legal Doctrines on Outcomes	Litigants Who Decided to Appeal Adverse Declaratory Judgments			Declaratory Judgment Dispositions in State & Federal Appellate Courts		
	Probit Values	Robust Std. Errors	*Z*	Probit Values	Robust Std. Errors	*Z*
INSURED BUSINESSES & ENTITIES						
Financial Service Providers	-.1714	.2074		-.0897	.1131	
Goods & Non-Financial Providers	-.1756	.2215		.2699	.1141	2.36 **
APPELLATE COURTS' LOCATIONS						
Southern States	-.4274	.2147	1.99 *	.4631	.1084	4.27 ***
Southwestern States	-.2122	.2848		.5628	.1436	3.92 ***
Western States	-.3912	.2430		.3218	.1152	2.79 **
FEDERAL APPELLATE COURTS						
Third Circuit Court of Appeals	-.4717	.2967		.2455	.1629	
Fourth Circuit Court of Appeals	-.4986	.2834		.4820	.2174	2.22 *
Fifth Circuit Court of Appeals	-.3981	.2902		-.1256	.1821	
Seventh Circuit Court of Appeals	-.9410	.3646	2.58 **	.9230	.1557	5.93 ***
Tenth Circuit Court of Appeals	.6378	.4025		-.3291	.1577	2.09 *
DISPUTED FIRST-PARTY INSURANCE CONTRACTS						
"All Risks" — Commercial Perils	.2673	.3375		-.3063	.2988	
"Specific Risk" — Business Losses	.2692	.7705		-.1264	.4315	
"Specific Risk" — Property Damage	-.3058	.4661		.6884	.2439	2.82 **
TYPES OF UNDERLYING ACTIONS						
State Cases, Only	2.6706	.3468	7.70 ***	-.5966	.3492	
No Class Actions	-.4864	.3782		.5519	.2674	2.06 *
STATES' PURPORTEDLY "OBJECTIVE" BUSINESS-CLIMATE RANKINGS						
"*Excellent*" — Among Top-13 States	-.3162	.1911		.2305	.1027	2.24 *
"*Poor*" — Among Bottom-13 States	1.0405	.2296	4.53 ***	.0598	.1131	
AFFIRMATIVE DEFENSES & APPLIED DOCTRINES						
Total-Contamination-Exclusion Defense	-.1629	.1896		.1923	.1045	1.84
General Rules of Contract	.0308	.3426		.0938	.2164	
Plain-&-Ordinary-Meaning Doctrine	-.0292	.3164		-.0198	.1602	

Wald test for independent equations ("selectivity bias"): Chi-square = 3.02, *p*-value = .0820

*** Chi-square test significant at $p \leq .001$ ** Chi-square test significant at $p \leq .01$ * Chi-square test significant at $p \leq .05$

†This total includes duty-to-indemnify, property-loss, and some underlying third-party certification and bad-faith claims

301. TABLE 4 at the bottom provides an explanation of the difference between the "original" N=524 in Table 1 and the N=591 in Table 4.

The asterisks describe the probit values' levels of statistical significance.[302] First, examine the probit values which appear under the caption Litigants Who Decided to Appeal Adverse Declaratory Judgments. Those coefficients answer the question: whether or not the "relevant factors" independent, combined and simultaneous effects significantly influenced litigants' decisions to appeal adverse duty-to-indemnify rulings.

Some of the probit values are statistically significant—strongly indicating that some factors influenced litigants' decisions more than others. For example, litigants who resided in Southern states and the Seventh Circuit were less likely to appeal adverse rulings. The respective negative coefficients are -.9410 and -.4274. Conversely, purely state-court litigants and those residing in "poor business environment states" were more likely to appeal unfavorable declarations. The positive probit coefficients are 2.670 and 1.040, respectively.

Still, the dominant question remains: Whether or not "selectivity bias" appears in the sample. Or, stated differently, are there noteworthy differences between litigants who decided to appeal and those who decided not to appeal? To find the answer, a "test for similarities" between two equations—the two distributions of probit values—was required. At the bottom of Table 4, a Wald test for independent equations appears. The Chi-square value is not statistically significant and suggests: No significant self-selection or other-selection bias exists in the sample.

Consider an even more challenging question: Whether the independent, concurrent and simultaneous effects of the seven classes predictors influence appellate courts' dispositions of duty-to-indemnify disputes. And the short answer is, yes. Review the probit values in Table 4 under the heading DISPOSITIONS OF DECLARATORY JUDGMENTS DISPOSITIONS IN STATE AND FEDERAL APPELLATE COURTS. Ten (10) of the "relevant factors" have *statistically significant* probit values. Examine them extremely carefully. Put simply, barring one factor, the positive probit coefficients increase insured business entities' likelihood of winning duty-to-indemnify disputes in declaratory-judgment hearings.

More specifically, the first statistically significant probit coefficient (.2699) suggests that insureds who sell *goods and non-financial services* are more likely to win duty-to-indemnify disputes than other insureds. In addition, insureds are *substantially more likely to prevail* in appellate courts that are located in southern, southwestern and western states. The probit coefficients are .4631, .5628 and .3218—respectively. And, to underscore the influence of *federal courts' geographic locations* on insureds' likelihood of success, consider the next cluster of statistically

302. *See, e.g.*, Michael S. Kang & Joanna M. Shepherd, *The Partisan Price of Justice: An Empirical Analysis of Campaign Contributions and Judicial Decisions*, 86 N.Y.U. L. REV. 69, 100 n.144 (2011) (reporting probit coefficients, t-statistics, standard errors, and the marginal effects of independent and control predictors on individuals' likelihood of voting, and the representative indicators for the 1%, 5%, and 10% levels of statistical significance).

significant coefficients. Respectively, the positive .4820 and .9230 values indicate that insureds are more likely to prevail in the Fourth and Seventh Circuits. On the other hand, the negative coefficient ***(-.3291***) suggests that insured businesses are less likely to win duty-to-indemnify disputes in the Court of Appeals for the Tenth Circuit.

Once more, after governors reported a "coronavirus pandemic" and forced "non-essential" public and private operations to cease in March 2020, business-interruption claims soared.[303] But an overwhelming majority of property insurers refused to indemnify insured businessowners— proclaiming confidently that "all-risks" insurance contracts do not cover business-interruption losses and stating unapologetically that courts would agree.[304]

Now, review the negative -.3063 and -.1262 coefficients under the sub-heading, "Disputed First-Party Insurance Contracts." Although they are *not statistically significant*, they support the insurers' position. Insureds are less likely to prevail when "all-risks" and "specified business risks" property insurance provisions generate duty-to-indemnify disagreements. In contrast, insureds are statistically and substantially more likely to prevail when the dispute involves a duty-to-indemnify clause in a *"specified property risk"* insurance contract, or when insureds file *single actions* rather than class actions. The positive coefficients are .6884 and .5519, respectively.

The last five rows of coefficients in Table 4 are arguably the most enlightening, surprising and important findings. Why? Again, it is important to remember that a multivariate two-stage probit analysis is an extremely powerful statistical test that answers a basis question: What is the *unique* effect of a *single fact* or *factor* on a court's decision, when controlling for *sample-selection bias* as well as for the *collective*, *concurrent* and *multiple effects* of other factors?[305]

Examine closely the two factors that appear under the sub-heading, "States' Business-Climate Rankings." The positive .2305 probit coefficient is statistically significant. And it strongly indicates: After controlling for the concurrent and multiple influences of *every other factor* in Table 4, courts in *exceedingly pro-business states* are substantially more likely to decide duty-to-indemnify disputes in favor of insured *small businesses*, property owners and entrepreneurs. In early 2020,

303. *See generally* Brett Carey et al., *3 Ways Insurance Companies Can Navigate the Surge of COVID-19 Business Interruption Claims*, RISK & INS. (Apr. 16, 2020), https://riskandinsurance.com/3-ways-insurance-companies-can-navigate-the-surge-of-covid-19-business-interruption-claims/.

304. *Cf.* Christopher J. Boggs, *Coronavirus (COVID-19): Does Business Income Respond?*, INS. J. (Mar. 24, 2020), https://www.insurancejournal.com/blogs/big-i-insights/2020/03/24/562253.htm (stating emphatically that all-risk insurance contracts do not cover business closures arising from the coronavirus and that insureds cannot satisfy courts' stringent "coverage" test).

305. *See supra* notes 292–93 and accompanying text.

the "top thirteen pro-business states" were Virginia, Texas, North Carolina, Utah, Washington, Georgia, Minnesota, Nebraska, Colorado, Ohio, Indiana, Florida and Tennessee.[306] Of course, the next probit coefficient (.0598) is not statistically significant. However, it is positive—suggesting that insured business entities are more likely to prevail even if the courts are located in the "poorest business climate states."[307]

Finally, many practitioners believe or insist that courts' application of settled legal theories and equitable doctrines determine the dispositions of duty-to-indemnify and other legal disputes.[308] But seasoned judges *continually* remind both plaintiffs' and defendants that commonsensical analyses of "relevant facts"—on a case-by-case basis—determine the outcomes of legal disputes.[309] Put simply, the last three probit coefficients in Table 4 are instructive and support judges' keen insight. Insurers' "*total contamination exclusion defense*," the *general rules of contract construction*, and the *plain-and-ordinary-meaning doctrine* have no statistically significant effects on the dispositions of duty-to-indemnify claims. The positive and negative probit coefficients are .1923, .0938, and -.0198, respectively.

VI. SUMMARY-CONCLUSION

For many small-to-large businessowners in the United States, the "unimaginable happened" in mid-March 2020.[310] In the wake of a "novel coronavirus pandemic," numerous governors issued stay-at-home orders.[311] Consequently, the mandates interrupted nearly every commercial, industrial, and professional enterprise's "non-essential" operations.[312] Purportedly, trillions of dollars will be required to cover the enormous business-interruption losses.[313]

306. *See supra* note 288 and accompanying text.

307. In early 2020, those states were Delaware, Kentucky, Vermont, New Mexico, Arkansas, Oklahoma, Maine, West Virginia, Louisiana, Alaska, Mississippi, Hawaii, and Rhode Island. *See supra* note 288 and accompanying text.

308. *Cf.* TPM Holdings, Inc. v. Intra–Gold Indus. Inc., 91 F.3d 1, 4 (1st Cir. 1996) (stating that a "judgment is made case by case, based on [certain] factors"); Save Power Ltd. v. Syntek Finance Corp., 121 F.3d 947, 950–51 (5th Cir. 1997) (embracing the court's position in *TPM Holdings*); and Int'l Fid. Ins. Co. v. Sweet Little Mex. Corp., 665 F.3d 671, 678 (5th Cir. 2011) (reaffirming the holdings in *TPM Holdings* and *Save Power*).

309. *See supra* note 304.

310. *See, e.g.*, Jenn Ruiz, *Boosting Your Resume: Tips to Maximize Your Job Hunt During COVID-19*, SALLIE MAE (May 5, 2020), https://www.salliemae.com/blog/bolster-skills-online/ (reporting that the "unimaginable happened[:]" a record seven million Americans became unemployed in the wake of COVID-19-related business closures).

311. *See* White & Breen, *supra* note 10 and accompanying text.

312. *See* Winck, *supra* note 11 and accompanying text.

313. *See* Sams, *supra* note 154 and accompanying text.

Furthermore, many shuttered businesses' financial losses were exacerbated two months later—following the death of George Floyd."[314] Responding to Floyd's death and to assertedly "unnecessarily abusive police tactics," massive and peaceful demonstrations occurred in cities and towns across the United States.[315] And, to be sure, some "errant and opportunistic" demonstrators needlessly looted, vandalized and destroyed all types of closed businesses.[316]

Citing language in their insurance contracts and asserting that the coronavirus and looting independently or concurrently caused their loss profits, insureds are asking property insurers to indemnify. The overwhelming majority of insurers have refused—substantially aggravating the arguably dire emotional and financial statuses of many already-twice-harmed businessowners across the county.[317] In response, insureds have filed more than one hundred coronavirus lawsuits in federal and state courts—which are scattered from California and Texas to Ohio, Pennsylvania, New York, Maryland, Virginia, the District of Columbia and North Carolina.[318]

In a nutshell, insureds are alleging that the coronavirus and government orders are "perils insured against"—thus requiring insurers to pay business-loss damages.[319]

314. *See* Manskar & Musumeci, *supra* note 7 and accompanying text.

315. *See also* Maanvi Singh & Nina Lakhani, *George Floyd Killing: Peaceful Protests Sweep America as Calls for Racial Justice Reach New Heights*, THE GUARDIAN (June 7, 2020), https://www.theguardian.com/us-news/2020/jun/06/protests-george-floyd-black-lives-matter-saturday.

316. *See* Miranda Bryant, *George Floyd Protesters Condemn 'Opportunistic' Looting and Violence*, THE GUARDIAN (May 31, 2020), https://www.theguardian.com/us-news/2020/may/31/george-floyd-protesters-condemn-opportunistic-looting-violence.

317. *See* Bruno et al., *supra* note 15 (reporting that "even before policyholders submitted any claims," the insurance industries preemptively argued that property-insurance contracts do not cover COVID-19-related claims).

318. *See generally COVID-19: Insurance Litigation and Regulatory Responses*, ALSTON & BIRD, https://www.alston.com/en/-/media/files/insights/publications/2020/04/20200419-updateCOVID19-business-interruption-50-st.pdf (last updated Apr. 19, 2020) (providing information on "the legislative activities, regulatory guidance, and court filings related to business interruption coverage for COVID19 related claims"); Lyle Adriano, *VA Restaurant Sues Insurer Over Denial of COVID-19 Business Interruption Claim*, INS. BUS. AM. (Apr. 23, 2020), https://www.insurancebusinessmag.com/us/news/hospitality/va-restaurant-sues-insurer-over-denial-of-covid19-business-interruption-claim-220462.aspx; Terrence Doyle, *Legal Sea Foods Is Suing Its Insurer for Denying Its Coronavirus Claim*, EATER BOSTON (May 5, 2020, 11:56 AM), https://boston.eater.com/2020/5/5/21247972/legal-seafoods-suing-insurer-denying-coronavirus-claim; and CBS 17 Digital Desk, *Durham Restaurants File Lawsuit Saying Insurance Company Won't Honor Business Interruption Policies*, CBS17, https://www.cbs17.com/news/local-news/durham-county-news/durham-restaurants-file-lawsuit-saying-insurance-company-wont-honor-business-interruption-policies (last updated May 19, 2020, 5:48 AM).

319. *See also* Robert L. Wallan et al., *Many Commercial Property Insurance Policies Provide Coverage for COVID-19 Exposures*, PILLSBURY (Apr. 14, 2020), https://www.pillsburylaw.com/en/news-and-insights/commercial-property-insurance-covid-19.html. *See generally* Brett Carey et al., *3 Ways Insurance Companies Can Navigate the Surge of COVID-19 Business Interruption Claims*, RISK & INS. (Apr. 16, 2020),

But, once more, it is important to stress: A coronavirus business-interruption dispute is essentially a duty-to-indemnify controversy.[320] Even more importantly, courts have a long history of deciding this type of indemnification dispute when "pollutants," "contaminants," or "viruses" have allegedly caused lost profits.[321]

Debatably, beginning in March 2020, three "covered perils" in all-risks insurance contracts "harmed" insured businessowners—coronavirus business-closure orders, "opportunistic looters and vandals," and insurers who acted in "bad faith" by summarily rejecting insureds' business-interruption claims without investigating the merits.[322] In light of these developments, the author decided to complete a case study—sampling and evaluating multiple "novel coronavirus" pleadings, selecting a representative sample of traditional duty-to-indemnify decisions, and applying a binary-coding scheme to evaluate purportedly "relevant facts" and their effects on supreme and appellate courts' dispositions of duty-to-indemnity disputes.

To summarize, the findings in this presentation will be exceedingly good news for insureds whose businesses were looted and vandalized. Property insurers will gladly cover those relatively small and inexpensive losses, because the risks—"civil commotion, riots or vandalism"—that caused the tangible losses are "covered perils."[323] In addition, businesses that purchased a specific-risk property insurance contract should also experience little difficulty securing lost-profit damages.

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https://riskandinsurance.com/3-ways-insurance-companies-can-navigate-the-surge-of-covid-19-business-interruption-claims/ (suggesting that insurers should monitor legislative responses that would make insurers cover business interruption claims).

320. *See, e.g.*, Pac. Coast Eng'g Co. v. St. Paul Fire & Marine Ins. Co., 88 Cal. Rptr. 122, 124 (Cal. App. Ct. 1970) (reaffirming that the purpose of business interruption insurance is to indemnify an insured whose property causes lost profits).

321. *See* Bruno et al., *supra* note 15 (documenting that courts have penned legion of decisions regarding the relationship between a physical property loss and a virus or bacteria).

322. *See, e.g.*, Complaint ¶ 62, Sandy Point Dental PC v. The Cincinnati Indem. Co., No. 1:20-cv-02160, 2020 WL 1684205 (N.D. Ill., Apr. 6, 2020) (providing that Society Insurance allegedly acted in bad faith under Illinois statute by refusing to indemnify after the submission of a coronavirus business interruption claim and before conducting reasonable investigations).

323. *See* Marianne Bonner, *Property Coverage for Riots, Vandalism, and Civil Commotion*, THE BALANCE SMALL BUSINESS, https://www.thebalancesmb.com/property-coverage-for-riots-462690 (Nov. 8, 2018); Reed Smith Client Alerts, *Insurance coverage for damage due to riots, civil commotion, and vandalism*, REED SMITH (June 18, 2020), https://www.reedsmith.com/en/perspectives/2020/06/insurance-coverage-for-damage-due-to-riots-civil-commotion-and-vandalism#:~:text=Most%20commercial%20property%20insurance%20policies,are%20covered%20unless%20specifically%20excluded; *see also Riots & Car Insurance— Are Policyholders Covered If Their Cars Are Destroyed*?, ACCESSWIRE (June 1, 2020, 12:10 PM), https://www.accesswire.com/592211/Riots-Car-Insurance—Are-Policyholders-Covered-If-Their-Cars-Are-Destroyed ("Businesses across the country suffered destruction over the weekend as protesters unleashed their anger over the death of George Floyd on commercial enterprises— from the offices of major multinational corporations to local, family-owned small shops. . . . Many may wonder who pays for the damage caused by rioting and civil unrest. . . . On a 'standard' personal auto policy,

On the other hand, there is less-encouraging news for businessowners who alleged that government coronavirus orders and looting were the concurrent causes of the owners' loss profits. Put simply, business entities are extremely less likely to prevail if their insurance contracts contain an anti-concurrent causation exclusion. Even more notably, if insureds' business operations are located or incorporated beyond the "*top-13, pro-business climate"* or *"bottom-13 business friendly"* states, both federal and state courts are substantially more likely to decide duty-to-indemnify disputes in favor of insurers.

Again, courts frequently stress that the "relevant facts" surrounding a controversy are more important than the application of settled legal doctrines. Nevertheless, the statistically significant findings discussed above, strongly suggest: Some "relevant" facts or factors are *more important,* probative, dispositive or persuasive than others in courts of equity and law. Unquestionably, a state's "objective" *business-climate ranking* is an exceptional factor that courts weigh—perhaps *wittingly* and *unwittingly* when deciding business disputes.

Thus, the single message is simple: Arguably, thrice-harmed businessowners can increase their likelihood of winning duty-to-indemnify lawsuits in state supreme courts. But, to achieve that goal, insured small businesses must 1) respect the various legal barriers discussed in this presentation, 2) discover and understand their states' "business climate rankings," and 3) weigh carefully their states' "business climate rankings" as well as other "relevant factors" outlined in this article—before filing a business-interruption suit in this "age of the coronavirus pandemic."

the vehicle's comprehensive coverage covers damage caused by riot and civil unrest, just is it does for vandalism or theft.").