

# No End in Sight: Business Interruption Insurance Claims in New York After the Second COVID-19 Surge

Julian Plaza

I. INTRODUCTION .....	818
II. BACKGROUND.....	818
A. <i>The Current State of the COVID-19 Crisis</i> .....	819
B. <i>BI Insurance: Presence and Function in New York</i> .....	821
1. <i>Elements of a BI Claim</i> .....	822
2. <i>How BI Claims Function in New York</i> .....	824
III. ANALYSIS.....	827
A. <i>Force Majeure, COVID-19, and New York Law</i> .....	827
B. <i>Civil Authority, COVID-19, and New York Law</i> .....	828
C. <i>Ingress/Egress, COVID-19, and New York Law</i> .....	830
D. <i>Extra Expense Clauses, COVID-19, and New York Law</i> .....	832
E. <i>General BI, COVID-19, and New York Law</i> .....	833
IV. RECOMMENDATIONS.....	834
A. <i>Policyholder Recommendations</i> .....	834
1. <i>Civil Authority</i> .....	835
2. <i>Ingress/Egress</i> .....	836
3. <i>Extra Expense</i> .....	837
4. <i>General BI</i> .....	838
B. <i>Insurer Recommendations</i> .....	838
1. <i>Direct Loss or Physical Damage</i> .....	839
2. <i>Virus and Bacterial Exclusions</i> .....	839
3. <i>Lobby State and Federal Government</i> .....	840
V. CONCLUSION .....	841

## I. INTRODUCTION

The novel and cascading effects of the COVID-19 pandemic have left businesses and insurers alike wondering how losses that have been estimated to be nine times greater than those associated with the 9/11 terrorist attacks will be accounted for.<sup>1</sup> This Note intends to examine the effect of the COVID-19 pandemic on business interruption (BI) insurance coverage within the context of New York State law. The scope of the inquiry is limited to the context of New York state law, first, because a Judicial Panel on Multidistrict Litigation has already indicated there will be no centralization of the 263 actions that have named more than 100 insurers so far.<sup>2</sup> Furthermore, the U.S. District Court for the Southern District of New York was one of the first to rule against coverage for business losses related to the COVID-19 pandemic,<sup>3</sup> while the U.S. District Court for the Western District of Missouri cited to an earlier decision made by the Southern District of New York for persuasive authority in a decision to uphold coverage.<sup>4</sup> As a result, New York is an apt focal point. While this Note began with the optimism that the worst effects of the COVID-19 crisis would subside before this Note's publication, the Delta and Omicron variants have proven such optimism ill-founded.<sup>5</sup>

Intuitively, an unpredictable human catastrophe that is global in scope, like the COVID-19 pandemic, would seem to activate coverage under some form of an insurance policy. On the contrary, the thesis here argues that New York's strict construction of insurance policy clauses renders them particularly ineffective for enforcing BI coverage for pandemic-related losses. As a result, this Note supports the use of a co/reinsurance policy that protects insurers and insured businesses alike. Part I of this Note supports this thesis by contextualizing the scope and depth of the pandemic's impacts in New York before explaining the process and case law surrounding BI claims and examining what establishes a prima facie case. Part II addresses the function and role of the various alternative clauses in New York. Part III analyzes the relationship between these clauses, the New York legal environment, and the ongoing realities of the COVID-19 pandemic. Part IV offers opportunities for insurance companies and policyholders based on clauses that may be present in existing policies and a recommendation on the basis of these revealed relationships: a co/reinsurance policy to aid both insurers and insured businesses.

## II. BACKGROUND

This Part begins with an overview of the COVID-19 pandemic's effects on New York.

---

1. Jeff Feeley & Katherine Chiglinsky, *Litigation Builds Against Insurers over Coronavirus Business Interruption*, INS. J. (Apr. 8, 2020), <https://www.insurancejournal.com/news/national/2020/04/08/563723.htm> [<https://perma.cc/EN6G-26UP>].

2. *In re COVID-19 Bus. Interruption Prot. Ins. Litig.*, 482 F. Supp. 3d 1360, 1360 (J.P.M.L. 2020).

3. See Transcript of Order to Show Cause Teleconference at 15, *Soc. Life Mag., Inc. v. Sentinel Ins. Co. Ltd.*, Case No. 20-cv-3311, DE 24-1 (S.D.N.Y. 2020) [hereinafter *Social Life*] (denying the injunction citing New York's stringent construction of insurance policies).

4. See *Studio 417, Inc., v. Cincinnati Ins. Co.*, 478 F. Supp. 3d 794, 802 (W.D. Mo. 2020) (distinguishing the holding in *Social Life* to show that COVID-19 viral particles attached to and damaged Studio 417 property).

5. Brian Sozzi, *Delta Variant: Fast-spreading COVID-19 Starts to Hit Corporate America*, YAHOO! FIN. (Aug. 13, 2021, 7:31 AM), <https://finance.yahoo.com/news/fast-spreading-covid-19-delta-variant-is-starting-to-hit-corporate-america-123154263.html> [<https://perma.cc/Y9JU-MZVT>].

It also contains a review of insurance law as it relates to this Note's specific focus. This Part closes with a review of state and federal legislation drafted in response to COVID-19 that would be likely to affect the process, substance, or enforceability of BI claims.

#### A. *The Current State of the COVID-19 Crisis*

At the time of writing, the impacts and effects of COVID-19 are ongoing.<sup>6</sup> However, the pandemic's effects on New York, particularly New York City (NYC), cannot be overstated.<sup>7</sup> While the impacts of COVID-19 are diffuse and variable, almost every effect arising from this pandemic implicates the insurance industry in one way or another, and early estimates indicate insurance claims will total in the billions of dollars.<sup>8</sup> In an effort

---

6. Bruce Y. Lee, *What The COVID-19 Coronavirus Delta Variant is Doing to Fall Plans*, FORBES (Aug. 14, 2021, 12:18 PM), <https://www.forbes.com/sites/brucelee/2021/08/14/what-the-covid-19-coronavirus-delta-variant-is-doing-to-fall-plans/?sh=3793e1db6aa9> [https://perma.cc/6F5M-VZ82].

7. See Michael Rothfeld, Somini Sengupta, Joseph Goldstein & Brian M. Rosenthal, *13 Deaths in a Day: An 'Apocalyptic' Coronavirus Surge at an N.Y.C. Hospital*, N.Y. TIMES (Apr. 14, 2020), <https://www.nytimes.com/2020/03/25/nyregion/nyc-coronavirus-hospitals.html> [https://perma.cc/Q7H8-KZWK] (describing the scenario at Elmhurst Hospital Center and the health crisis in NYC as "apocalyptic"); see also Jack Cordes & Marcia C. Castro, *Spatial Analysis of COVID-19 Clusters and Contextual Factors in New York City*, 34 SPATIAL & SPATIO-TEMPORAL EPIDEMIOLOGY 1, 1 (2020) (discussing the spread and concentration of COVID-19 across New York and showing increases in COVID-19 positivity of 1000% in some clusters); Ethan Covey, *Tracking Excess Deaths May Reveal True Scope of COVID-19 in NYC*, INFECTIOUS DISEASE SPECIAL EDUC. (May 28, 2020), <https://www.idse.net/Covid19/Article/05-20/Tracking-Excess-Deaths-May-Reveal-True-Scope-of-COVID19-in-NYC/58553> [https://perma.cc/FU8F-HRWF] (indicating that of the 24,000 excess deaths reported between March and May 2020 than in a typical year, 13,831 were directly attributable to COVID-19 and 5,408 were COVID-19-associated); BOS. CONSULTING GRP., *NY COVID-19 PRELIMINARY ECONOMIC ASSESSMENT 5* (2020), <https://www.budget.ny.gov/pubs/archive/fy21/ny-covid19-economic-impact-prelim.pdf> [https://perma.cc/3XNE-M7SX] (estimating a \$13.3 billion revenue shortfall in New York and indicating the state accounted for over one-third of all COVID-19 deaths in America); Scott R. Baker, Nicholas Bloom, Steven J. Davis, Kyle J. Kost, Marco C. Sammon & Tasaneeya Viratyosin, *The Unprecedented Stock Market Impact of COVID-19* 3 (Nat'l Bureau of Econ. Rsch., Working Paper No. 26945, 2020), <https://www.nber.org/papers/w26945.pdf> [https://perma.cc/8YVG-DZ9T] (arguing that "no previous infectious disease episode led to daily stock market swings that even remotely resemble the response in 2020 to COVID-19 developments."); Alexander W. Bartik, Marianne Bertrand, Zoe Cullen, Edward L. Glaeser, Michael Luca & Christopher Stanton, *The Impact of COVID-19 on Small Business Outcomes and Expectations*, 117 PROC. NAT'L ACAD. OF SCI. 17656 (2020) (surveying 5,800 small businesses on the effects of closures, reduced staffing, and CARES Act); Thomas A. Moore & Matthew Gaier, *Toll on Statutes of Limitations During the COVID-19 Emergency*, N.Y.L.J. (June 1, 2020, 12:30 PM), <https://www.law.com/newyorklawjournal/2020/06/01/toll-on-statutes-of-limitations-during-the-covid-19-emergency/> [https://perma.cc/WLH4-B8DP] (detailing the cascading effect and scope of toll orders issued by the governor in response to the pandemic); Christopher M. Weible, Daniel Nohrstedt, Paul Cairney, David P. Carter, Desera A. Crow, Anna P. Dunovà, Tanya Heikkila & Karin Ingold, *COVID-19 and the Policy Sciences: Initial Reactions and Perspectives*, 53 POL'Y SCI. 225 (2020) (acknowledging the ongoing policy challenge that COVID-19 poses).

8. See Matthew Gavidia & Dan Mendelson, *How Will the COVID-19 Pandemic Affect the Health Insurance Industry?*, AM. J. MANAGED CARE (June 16, 2020), <https://www.ajmc.com/view/how-will-the-covid19-pandemic-affect-the-health-insurance-industry> [https://perma.cc/YSM6-34EV] (discussing the broad effects of the pandemic on both public and private health insurance infrastructures); Jennifer A. Kingson, *Insurance Companies Battle Their Clients Over the Coronavirus*, AXIOS (July 23, 2020), <https://www.axios.com/insurance-companies-vs-business-coronavirus-946b8cd3-ac29-401f-b548-98ef7dcaa0c1.html> [https://perma.cc/9HHC-LS74] (estimating the insurance payout in the US to be between \$40 and \$80 billion); Feeley & Chiglinsky, *supra* note 1, (providing a more alarming estimate of \$431 billion in business continuity losses a month for companies with 100 or more employees).

to shore up costs for businesses and the resulting employment impacts of the pandemic, the United States Federal Government (USFG) passed the \$2.2 trillion Coronavirus Aid, Relief, and Economic Security Act (CARES Act).<sup>9</sup> While the CARES Act did not explicitly target the insurance industry for relief, additional pieces of legislation were introduced that could have impacted the industry early on.<sup>10</sup>

At the state level, Governor Cuomo officially declared a Disaster Emergency in New York on March 7, 2020.<sup>11</sup> As of December 2020, there have been 87 continuations and amendments to the declared Disaster Emergency.<sup>12</sup> Of the various measures Governor Cuomo enacted, the most significant for the present study are the non-essential business closure and stay-at-home orders, which ordered many business closures and obliged the population to avoid leaving their homes.<sup>13</sup> By September 2020, New York had already seen 6,000 businesses close and a 40% increase in bankruptcy filings.<sup>14</sup> In May 2020, Governor Cuomo announced a phased reopening scheme, New York Forward, in which restrictions were linked to local infection rates.<sup>15</sup>

As New York and the rest of the country began to emerge from what has been the worst of the pandemic so far, hundreds of businesses looked to their insurance policies to mitigate their losses, many insurance companies rejected their claims, and litigation ensued.<sup>16</sup> New York courts construe insurance coverage for business losses stringently,

9. Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116–36, 134 Stat. 281 (2020); Susan Cornwell & Andy Sullivan, *Some Details of the \$2 Trillion U.S. Senate Coronavirus Rescue Bill*, INS. J. (Mar. 25, 2020), <https://www.insurancejournal.com/news/national/2020/03/25/562355.htm> [<https://perma.cc/K42Q-5U7E>] (highlighting target areas of the CARES Act).

10. Health and Economic Recovery Omnibus Emergency Solutions Act (HEROES Act), H.R. 6800, 116th Cong. (2020) (House Democratic developed bill, which at the time of writing has passed the House of Representatives, contains measures to protect health insurance options for both employee-provided and publicly provided programs); Health, Economic Assistance, Liability Protection and Schools Act (HEALS Act) is made up of eight bills: American Workers, Families, And Employers Assistance Act, S.4318, 116th Cong. (2020); Safeguarding America’s Frontline Employees to Offer Work Opportunities to Kickstart the Economy Act, S. 4317, 116th Cong. (2020); Continuing Small Business Recovery and Paycheck Protection Program Act, S.4321, 116th Cong. (2020); Coronavirus Response Additional Supplemental Appropriations Act, S.4320, 116th Cong. (2020); Time to Rescue United States Trusts Act, S.2733, 116th Cong. (2020); Safely Back to School and Back to Work Act, S.4322, 116th Cong. (2020); Restoring Critical Supply Chains and Intellectual Property Act, S.4324, 116th Cong. (2020); and Supporting America’s Restaurant Workers Act, S.4319, 116th Cong. (2020). The HEALS Act is the Senate Republican-developed bill, and many provisions directly implicate the insurance industry more broadly.

11. 9 N.Y.C.R.R. § 8.202 (2020).

12. 9 N.Y.C.R.R. § 8.202.87 (2020).

13. See 9 N.Y.C.R.R. § 8.202.6–8 (2020) (mandating various non-essential business closures).

14. Josh Saul & Henry Goldman, *New York Region Sees 40% Bankruptcy Surge, Braces for More*, BLOOMBERG (Sept. 29, 2020, 6:00 AM), <https://www.bloomberg.com/news/features/2020-09-29/new-york-city-bankruptcies-2020-pivotal-point-for-business-as-covid-cases-rise> [<https://perma.cc/B6ME-WPW8>].

15. ANDREW CUOMO, N.Y. FORWARD: A GUIDE TO REOPENING NEW YORK & BUILDING BACK BETTER (2020), <https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/NYForwardReopeningGuide.pdf> [<https://perma.cc/NC2W-H3YW>]; Michael Gold & Matt Stevens, *What Restrictions on Reopening Remain in New York?*, N.Y. TIMES (May. 1, 2021), <https://www.nytimes.com/article/new-york-phase-reopening.html> [<https://perma.cc/E5LT-L2NT>].

16. *COVID-19 Business Litigation*, *supra* note 2; Mary Williams Walsh, *Businesses Thought They Were Covered for the Pandemic. Insurers Say No*, N.Y. TIMES (Aug. 5, 2020), <https://www.nytimes.com/2020/08/05/business/business-interruption-insurance-pandemic.html> [<https://perma.cc/QJ3J-9W4B>].

and the U.S. District Court for the Southern District of New York has already rejected a business policyholder's request for an injunction, pending the lawsuit result, that would require the insurer to pay most of the amount claimed.<sup>17</sup> While the suits are just beginning, the insurance industry will likely see changes of the scale it has not seen since the 9/11 terrorist attacks.<sup>18</sup> Estimates put the total national cost of 9/11 between \$50 and \$100 billion.<sup>19</sup> By contrast, the COVID-19 pandemic is estimated to cost the nation tens of trillions of dollars.<sup>20</sup> To understand where the legal environment is headed, it is first necessary to understand the current legal environment surrounding BI insurance in New York.

### B. BI Insurance: Presence and Function in New York

BI is first-party insurance, which means that it covers the direct losses of the party named in the policy.<sup>21</sup> BI "indemnifies the policyholder for lost income which results when the policyholder's operations are interrupted, usually as a result of property damage."<sup>22</sup> Typically, BI is not a separate insurance policy, but rather BI is a supplemental endorsement to a policyholder's property insurance.<sup>23</sup> Unlike standard general liability insurance policies, BI supplements do not have standardized language and often contain language that is unique to the specific insurer and industry.<sup>24</sup> As a part of commercial property insurance, BI is offered either as an all-risk policy or a named-perils policy.<sup>25</sup> Under an all-risk policy, the policyholder may recover for all losses resulting from any cause barring their express exclusion in the policy.<sup>26</sup> Alternatively, a named-peril policy only covers a policyholder's losses for specific causes of loss expressly named in the policy.<sup>27</sup> Although BI contains the word "interruption," more often than not, the

---

17. See *Social Life*, *supra* note 3 (denying the injunction, citing New York's stringent construction of insurance policies).

18. See Zachary Warmbrodt, *Insurers Scramble to Avoid 9/11-style Coronavirus Backlash*, POLITICO (Mar. 26, 2020, 4:30 AM), <https://www.politico.com/news/2020/03/26/insurers-avoid-9-11-style-coronavirus-backlash-149462> [<https://perma.cc/YA9L-AU7V>] (noting the pressure the pandemic has put on insurers for innovating solutions is similar to that following the 9/11 attacks); HIGHLIGHT BETA, INNOVATION OPPORTUNITIES IN INSURANCE: CRISIS MANIFESTO: HOW INSURANCE WILL CHANGE POST-COVID (2020), <https://go.highlinebeta.com/hubfs/HB-Insurance-Report.pdf> [<https://perma.cc/V32R-XZM6>] (arguing that COVID-19 will force insurers to accelerate digital transformation, short time horizons, opportunities for cyber insurance, and projects the industry to grow by \$9 billion by the end of 2020).

19. Adam Z. Rose & S. Brock Blomberg, *Total Economic Consequences of Terrorist Attacks: Insights from 9/11*, 16 PEACE ECON., PEACE SCI. & PUB. POL'Y 1, 4 (2010).

20. David M. Cutler & Lawrence H. Summers, *The COVID-19 Pandemic and the \$16 Trillion Virus*, 324 J. AM. MED. ASS'N 1495, 1495 (2020).

21. *First-Party Insurance*, INT'L RISK MGMT. INST., <https://www.irmi.com/term/insurance-definitions/first-party-insurance> [<https://perma.cc/WPL5-4KLZ>].

22. Randy Paar, *The Elements of a Business Interruption Claim*, in MAXIMIZING INSURANCE RECOVERY FOR BUSINESS INTERRUPTION CLAIMS 7, 9–10 (2002); *Zurich Am. Ins. Co. v. ABM Indus.*, 397 F.3d 158, 168 (2d Cir. 2005) (noting the insured interest is the insured's "future stream of income").

23. Paar, *supra* note 22, at 10.

24. *Id.* at 11.

25. *Parks Real Est. Purchasing Grp. v. St. Paul Fire & Marine Ins. Co.*, 472 F.3d 33, 41 (2d Cir. 2006) (applying N.Y. law).

26. *Ingersoll Milling Mach. Co. v. M/V Bodena*, 829 F.2d 293, 307 (2d Cir. 1987).

27. *Parks Grp.*, 472 F.3d at 41.

interruption must precipitate from actual property damage or loss.<sup>28</sup>

### 1. Elements of a BI Claim

BI claims are typically comprised of five elements: (1) a covered peril, (2) the covered peril results in a loss of covered property, (3) the loss results in an interruption of the policyholder's business operations, (4) the interruption results in a covered loss, and (5) the interruption occurs during the period of restoration.<sup>29</sup> Beyond proving the presence of all five elements, a successful claim will also prove a causal connection between the elements.<sup>30</sup>

The first element functions differently depending on whether the policy is an all-risk policy or a named peril policy, as the former operates via named exclusions and the latter via inclusions.<sup>31</sup> Since all-risk policies are assumed to cover all risks, the burden falls on the insured to prove a loss occurred, but the burden then shifts to the insurer to prove that cause of loss is excluded by the policy.<sup>32</sup> The burden shifts in named peril policies, however, where the policyholder will have the burden to prove that the cause of loss arose from one of the enumerated perils in the policy.<sup>33</sup> When constructing the language of an included or excluded cause of loss, "New York follows the maxim of *contra preferentem* in insurance cases: where the plain language of a policy permits more than one reasonable reading, a court must adopt the reading upholding coverage."<sup>34</sup> Essentially, *contra preferentem* allows courts to interpret insurance policies as providing coverage where the policy language is indeterminate.

The second element, loss of covered property, refers to physical losses of, or damage to, commercial or personal property within or touching commercial real estate listed in the policy.<sup>35</sup> This element typically addresses what commercial or personal "property" is covered by the terms of the policy, as property is increasingly digital or otherwise intangible by its nature.<sup>36</sup> Barring indeterminate language or language to the contrary, New

---

28. Paar, *supra* note 22, at 12 (noting the elements of a BI claim include the loss of "covered property" and a resulting interruption of business); Roundabout Theater Co. v. Cont'l Cas. Co., 751 N.Y.S.2d 4, 7-8 (N.Y. App. Div. 2002) (citing *Howard Stores Corp. v. Foremost Ins. Co.*, 441 N.Y.S.2d 674 (1981)) (concluding that based on the language of the insurance agreement in the case, coverage could only attach to business locations where business was interrupted as a result of physical damage to the business' property).

29. Paar, *supra* note 22, at 12-13.

30. *Id.* at 13.

31. See John N. Love & Micah J. M. Knapp, *Insuring Against Many, but Not All Risks: An Overview of the All Risk Policy*, 43 BRIEF 13, 13-14 (2014) (comparing and contrasting the differences between named peril policies and all-risk policies, including a party's burden of proof).

32. *Id.*; see *Consol. Edison Co. of N.Y. v. Allstate Ins. Co.*, 774 N.E.2d 687, 690-93 (N.Y. 2002) (parsing the division of burdens between the insured and the insurer in insurance coverage dispute).

33. *Edison Co.*, 774 N.E.2d at 690.

34. *VAM Check Cashing Corp. v. Fed. Ins. Co.*, 699 F.3d 727, 732 (2d Cir. 2012) (applying N.Y. law).

35. Paar, *supra* note 22, at 18.

36. See Madeleine Brown, *Intellectual Property: The Shift from Tangible to Intangible*, INS. J. (Aug. 24, 2020), <https://www.insurancejournal.com/magazines/mag-features/2020/08/24/579885.htm> [<https://perma.cc/7UT6-WT42>] (discussing the growing business demand for coverage of intangible assets brought about by COVID-19); *The Business of Insuring Intangible Risks Is Still in Its Infancy*, ECONOMIST (Aug. 25, 2018), <https://www.economist.com/finance-and-economics/2018/08/23/the-business-of-insuring-intangible-risks-is-still-in-its-infancy> [<https://perma.cc/P3QA-AH2J>] (discussing the tricky business of insuring intangible property); Andrea S. Warren, *Carrier Considerations: Business Interruption Coverage for COVID-19 Losses*,

York typically requires physical property damage.<sup>37</sup> This element will be of particular importance, as many all-risk policies explicitly exclude viral or bacterial causes of loss, many named peril policies do not name pandemics, and in any event, physical damage may be difficult if not impossible to prove for COVID-19-related business losses.<sup>38</sup>

While causal links between each element are a requirement, the third element most expressly requires causal analysis to prove the cause of the covered property loss results in an interruption of business.<sup>39</sup> Beyond the issue of proving the causal relationship between the damaged and/or lost property and interruption of business, policyholders will frequently be required to prove that the level of interruption experienced rises to the level described by the policy's language.<sup>40</sup> As a result, BI can come off as a misnomer because business is typically required to cease, suspend, or shut down entirely as opposed to merely facing an interruption for coverage activation.<sup>41</sup> Despite the fact that many policyholders will not be in a position to continue business operations following an interruption, they nonetheless have a duty to mitigate their damages.<sup>42</sup> Similarly, insurers have a duty to investigate claims in good faith and pay covered claims in a timely manner.<sup>43</sup> Should either party fail to uphold these duties, the insured risks losing certain coverage payouts, and the insurer risks further damages liability.<sup>44</sup>

Just like the cause of loss must be covered, the fourth element of a BI claim is proof that the loss claimed is one covered in the policy.<sup>45</sup> If the loss is covered, BI claims require two levels of proof in this respect. First, the policyholder must show that “but for the suspension of its business, it would have earned income.”<sup>46</sup> Second, the policyholder must

---

NAT'L L. REV. (Apr. 8, 2020), <https://www.natlawreview.com/article/carrier-considerations-business-interruption-coverage-covid-19-losses> [<https://perma.cc/7NGR-MADY>] (drawing a distinction between “prophylactic measures” and “physical losses”).

37. See *Roundabout*, 751 N.Y.S.2d at 6–7 (holding that plaintiff's insurance claim did not qualify for coverage under business interruption insurance because the interruption did not arise from physical property damage); *Newman Myers Kreines Gross Harris, P.C. v. Great N. Ins. Co.*, 17 F. Supp. 3d 323, 330–33 (S.D.N.Y. 2014) (affirming *Roundabout* and holding that a power outage that caused no demonstrable physical damage did not qualify for coverage under business interruption insurance); *Yar-Lo, Inc. v. Travelers Indem. Co.*, 14 N.Y.S.3d 577, 578 (N.Y. App. Div. 2015) (holding that the business was not forced to close as a result of a sewage flood and was not entitled to business interruption coverage); *United Air Lines, Inc. v. Ins. Co. of State of Pa.*, 439 F.3d 128, 129 (2d Cir. 2006) (holding that United's “civil authority” clause required lack of access due to physical damage to an adjacent property).

38. Christopher C. French, *COVID-19 Business Interruption Insurance Losses: The Cases for and Against Coverage*, 27 CONN. INS. L.J. 1, 16–17 (2020).

39. See *Yar-Lo*, 14 N.Y.S.3d at 578 (finding that the physical damage resulting from a sewage leak was not the cause of business interruption).

40. Paar, *supra* note 22 at 24; See, e.g., 54th St. Ltd. Partners, L.P. v. Fid. & Guar. Ins. Co., 763 N.Y.S.2d 243, 244 (N.Y. App. Div. 2003) (finding that a traffic diversion did not force a restaurant to “suspend” its business as required by the policy).

41. Paar, *supra* note 22, at 24.

42. *Binghamton Precast & Supply Corp. v. Liberty Mut. Fire Ins. Co.*, 122 N.Y.S.3d 734, 738 (N.Y. App. Div. 2020).

43. *Bi-Econ. Mkt., Inc. v. Harleysville Ins. Co. of N.Y.*, 886 N.E.2d 127, 132 (N.Y. 2008).

44. See *Binghamton*, 122 N.Y.S.3d at 738 (finding that Binghamton did not mitigate its damages by refusing to run weekend shifts to make up for production shortfalls resulting from a broken-down concrete mixer); *Bi-Econ*, 886 N.E.2d at 132 (finding that Harleysville failed to investigate Bi-Economy Market's claim in good faith and cover their losses in a timely fashion which justified further consequential damages).

45. Paar, *supra* note 22, at 13.

46. *Id.* at 26.

show that the lost income would have been profit, which often requires consultation with accountants.<sup>47</sup> Relating to the insured's duty to mitigate damages, it is not uncommon for BI policies to include an "extra expense" provision to cover additional costs associated with renting an alternative retail space or paying overtime, for example.<sup>48</sup> "Extra expense" provisions have a direct impact on the scope of losses covered.<sup>49</sup>

The last element of a BI claim introduces time into the equation—the period between the date of loss and the date the operations return to business as usual is typically the only timeframe from which losses are covered.<sup>50</sup> The fifth element is linked to the third element insofar as the clock for calculating loss begins when there is a necessary suspension of business operations.<sup>51</sup> Two issues arise with regard to the last element. First, the destroyed property is often not only rebuilt but modernized or otherwise upgraded, and there will be disputes as to whether time spent beyond rebuilding will be covered. Second, sometimes losses that the policy would cover occur after the restoration period.<sup>52</sup>

## 2. How BI Claims Function in New York

When policyholders' claims are rejected and they sue their insurers for breach of contract, they start by pointing to the provision in their policy that names the peril that has precipitated their loss.<sup>53</sup> The clauses and provisions under which the policyholder is claiming breach are constructed in their plain meaning in New York.<sup>54</sup> It is worth reiterating the fact that New York follows *contra proferentem* when constructing the meaning of an insurance policy. Therefore, should the provision at issue allow for more than one reasonable plain meaning construction, the ambiguity is to cut in favor of the insured.<sup>55</sup> For the purposes of the provisions at issue in this Note, a brief review of New York's treatment of *force majeure* events, civil authority clauses, ingress/egress clauses, extra expense clauses, and BI general provisions in case law follows.

As insurance is a subset of contract law, it is worth discussing *force majeure* events. "Generally, a force majeure event is an event beyond the control of the parties that prevents

---

47. See *N.Y. Career Inst. v. Hanover Ins. Co.*, 791 N.Y.S.2d 338, 339–43 (N.Y. Sup. Ct. 2005) (detailing contested accounting and putting its judgment in abeyance pending the determination of an appraisal panel for calculating the amount of loss covered by the insured's coinsurance provision).

48. Paar, *supra* note 22 at 26–27.

49. *Career Inst.*, 791 N.Y.S.2d at 343 (discussing the interplay of an "extra expense" provision and coverage exclusions).

50. Paar, *supra* note 22, at 27.

51. *Broad St., L.L.C. v. Gulf Ins. Co.*, 832 N.Y.S.2d 1, 6 (N.Y. App. Div. 2006).

52. Paar, *supra* note 22, at 28; See *Roundabout Theater Co. v. Cont'l Cas. Co.*, 751 N.Y.S.2d 4, 7–8 (N.Y. App. Div. 2002) (rejecting the plaintiff's argument that the Restoration Period lasted until damage outside of its theater and prevented entry was repaired); See *Broad St., L.L.C.*, 832 N.Y.S.2d at 6 (discussing the Restoration Period extending only to the resumption of operations not to completed cleaning and HVAC filtration replacement); See *Duane Reade, Inc. v. St. Paul Fire & Marine Ins. Co.*, 411 F.3d 384, 395–97 (2d Cir. 2005) (holding that the Restoration Period at issue in the case only extended until Duane Reade could continue its operations, not when it could resume operations at the same location).

53. See *supra* note 31 and accompanying remarks.

54. See *Roundabout*, 751 N.Y.S.2d at 8 (explaining that the plain meaning of "direct" and "physical" in the provision at issue narrowed the scope of coverage to exclude off-site property damage as a covered peril in the BI policy).

55. *VAM Check Cashing Corp. v. Fed. Ins. Co.*, 699 F.3d 727, 732 (2d Cir. 2012).



performance under a contract and may excuse nonperformance.”<sup>56</sup> In the American insurance context, policies typically define and list events that are not covered by the policy.<sup>57</sup> These policies also tend to include a catch-all clause.<sup>58</sup> It is common for natural disasters (hurricanes, floods, earthquakes, etc.) and large-scale social phenomena to be labeled as *force majeure* events.<sup>59</sup> *Force majeure* events bleed into insurance considerations because, under New York law, they can generate additional business losses as a result of the COVID-19 pandemic’s potential for causing a party to breach its contracts.<sup>60</sup> In New York, the general rule for *force majeure* clauses is that a party’s nonperformance will be excused when the clause specifically enumerates the particular event that prevents performance.<sup>61</sup> Further, where a *force majeure* clause contains a broad catch-all clause, it should not be constructed as having an expansive meaning.<sup>62</sup> Given the unlikelihood that many contract drafters are clairvoyant, it is easy to see how New York’s strict treatment of *force majeure* clauses will leave many contracts breached with no way to avoid breach of contract liability. *Force majeure* clauses provide an appropriate referent for BI provisions because they similarly name or exclude events for coverage. However, where a *force majeure* triggering event excuses nonperformance, the same event or the damage from it might activate a BI provision causing the inverse—the event would trigger performance on behalf of the insurer.

Civil authority clauses in a BI insurance policy refer “to the situation when a civil authority prohibits access to the insured’s premises resulting in a total loss of business income.”<sup>63</sup> The critical point to keep in mind when analyzing potential coverage is that absent language to the contrary in a policy, BI claims that result from civil authority clauses require a total loss of business—merely impeding access has proven insufficient.<sup>64</sup> As a result, claimants invoking the civil authority clauses in New York should be wary of the third element in a BI claim and ensure the loss is properly covered within the language of the policy.

Ingress/egress clauses are similar to civil authority clauses in that they provide

---

56. *Beardslee v. Inflection Energy, L.L.C.*, 31 N.E.3d 80, 82 (N.Y. 2015); *see generally* Robert T. Miller, *Pandemic Risk and the Interpretation of Exceptions in MAE Clauses*, 46 J. CORP. L. 681 (2021).

57. P.J.M. Declercq, *Modern Analysis of the Legal Effects of Force Majeure in Situations of Commercial Impracticability*, 15 J.L. & COM. 213, 214 (1995).

58. *Id.*

59. Joni R. Paulus & Dirk J. Meeuwig, *Force Majeure—Beyond Boilerplate*, 37 ALBERTA L. REV. 301, 308 (1999).

60. *See* Stephen P. Younger, Muhammad Faridi & Timothy Smith, *COVID-19’s Impact on Commercial Transactions and Disputes*, N.Y. STATE BAR ASS’N (Mar. 23, 2020), <https://nysba.org/covid-19s-impact-on-commercial-transactions-and-disputes/> [<https://perma.cc/65BV-CQA9>] (discussing contract law issues that emerged from COVID-19 including force majeure, impossibility, and frustration of purpose); James Chou & Alex Corey, *Pay Me What I Would Have Earned: The Impact of COVID-19 Shutdown on the Legal Measurement of Future Lost Profits*, JD SUPRA (Jul. 29, 2020), <https://www.jdsupra.com/legalnews/pay-me-what-i-would-have-earned-the-19804/> [<https://perma.cc/TY4H-RCYD>] (discussing loss of future profits related to breach of contract claims).

61. *See Kel Kim Corp. v. Cent. Mkts., Inc.*, 519 N.E.2d 295, 296 (N.Y. 1987) (seminal case finding that excuse of nonperformance was only warranted where the event was specifically contemplated by the writing).

62. *Id.* at 296–97.

63. *N.Y. Career Inst. v. Hanover Ins. Co.*, 791 N.Y.S.2d 338, 342 (N.Y. Sup. Ct. 2005).

64. *See 54th St. Ltd. Partners, L.P. v. Fid. & Guar. Ins. Co.*, 763 N.Y.S.2d 243, 243–44 (N.Y. App. Div. 2003).

coverage for lack of access to a business because of damage to third-party property but differ insofar as the access issue need not be caused by a civil authority.<sup>65</sup> In this way, ingress/egress clauses provide for a greater scope of covered losses under the fourth element of a BI claim. Solely based on dicta from *Roundabout*, it appears that New York has a preference for construing ingress/egress clauses strictly as they relate to the fifth element of BI claims.<sup>66</sup> Namely, the court cites a decision from the U.S. District Court for the Eastern District of North Carolina, where the court held an ingress/egress provision in the policy only covered losses sustained from real and personal property, thus, preventing the regular operation of business.<sup>67</sup>

Extra expense clauses were used as an example earlier, but they generally cover business losses that accrue as a result of adapting business operations to mitigate losses.<sup>68</sup> Despite the broadness of the clause title, extra expense clauses only cover necessary expenses that a business assumes during the restoration period.<sup>69</sup> Thus, it is useful to remember that when extra expense clauses are at issue, coverage will be limited both by necessity and by the timeframe within which the expenses accumulate.

Lastly, general provisions within BI are meant to catch the typical elements of a BI claim. Namely, these elements include the covered or excluded perils listed in a BI policy, the resulting physical property damage or loss, the business interruption that results, the covered losses, and the period of restoration.<sup>70</sup> Within general provisions, it is advisable to keep in mind the various idiosyncrasies present in New York's common law pertaining to BI claims. First, covered perils and losses are constructed strictly in their plain language, and burden shifts depending on whether the policy is an all-risk policy or a named peril policy.<sup>71</sup> Second, ambiguous policy language is constructed in favor of the insured.<sup>72</sup> Finally, unless express language is in the policy, the period of restoration, when business losses are covered, extends from the date of property loss necessitating a complete suspension of business to the date when the business can operate again.<sup>73</sup>

---

65. See Albert Risk Management Consultants, *The Next Level of Business Income Coverage*, INT'L RISK MGMT. INST. (Nov. 2011), <https://www.irmi.com/articles/expert-commentary/the-next-level-of-business-income-coverage> [<https://perma.cc/S7QE-W5S4>] (contrasting the difference between civil authority and ingress/egress clauses).

66. *Roundabout Theater Co. v. Cont'l Cas. Co.*, 751 N.Y.S.2d 4, 9 (N.Y. App. Div. 2002).

67. The court in *Roundabout* looked to *Fountain Powerboat Indus. v. Reliance Ins. Co.*, 119 F. Supp. 2d 552 (E.D.N.C. 2000) for persuasive authority. *Id.* at 8.

68. William N. Erickson & Alexander G. Henlin, *Understanding Extra Expense*, 45 TORT, TRIAL & INS. PRAC. L.J. 1, 3 (2009).

69. *Id.*

70. See generally *Roundabout*, 751 N.Y.S.2d.

71. *Consol. Edison Co. of N.Y. v. Allstate Ins. Co.*, 774 N.E.2d 687, 690–93 (N.Y. 2002).

72. *VAM Check Cashing Corp. v. Fed. Ins. Co.*, 699 F.3d 727, 729 (2d Cir. 2012) (internal citations omitted).

73. See *Roundabout*, 751 N.Y.S.2d at 7–8 (rejecting the plaintiff's argument that the Restoration Period lasted until damage outside of its theater and prevented entry was repaired); *Broad St., L.L.C. v. Gulf Ins. Co.*, 832 N.Y.S.2d 1, 7 (N.Y. App. Div. 2006) (discussing the Restoration Period extending only to the resumption of operations, not to completed cleaning and HVAC filtration replacement); *Duane Reade*, 411 F.3d at 396–97 (holding that the Restoration Period at issue in the case only extended until Duane Reade could continue its operations, not when it could resume operations at the same location).

## III. ANALYSIS

What follows is an analysis of the utility of the various clauses for providing coverage in light of the nuances uncovered in the State of New York's common law. For simplicity, this Part follows the same order as above, discussing claims utilizing *force majeure*, civil authority, ingress/egress and extra expense clauses, and finishing with general claims made under BI insurance.

A. *Force Majeure, COVID-19, and New York Law*

As discussed above, New York courts strictly construe the language of an insurance policy.<sup>74</sup> Indeed, the sentiment is at the heart of New York's contract enforcement jurisprudence.<sup>75</sup> Only where public policy outweighs both the enforcement of the contract and the value of encouraging individuals to contract on mutually agreeable terms will any contract be construed contrary to the language of the writing.<sup>76</sup> As a result, New York courts are unlikely to enforce *force majeure*. While it is doubtful that many policies lacked "pandemic" language in their *force majeure* clauses, it is equally doubtful that these clauses will be deemed to have contemplated the specificity of the COVID-19 pandemic because courts "will generally only excuse a party's nonperformance if the event that caused the party's nonperformance is specifically identified."<sup>77</sup> Even when the policy includes a catch-all phrase in the clause, an exacting standard remains, and coverage will only be afforded to "things of the same kind or nature as the particular matters mentioned."<sup>78</sup> Owing to its standard of strict specificity when interpreting contracts, New York policyholders will have difficulty meeting the first element of a BI claim. Establishing that COVID-19 is a "covered peril" will be a difficult task.<sup>79</sup>

For all-risk policies, it is up to the insurer to prove the policy excluded the loss-causing event.<sup>80</sup> On this type of policy, *Roundabout* is an instructive case as an all-risk BI policy was at issue.<sup>81</sup> In *Roundabout*, the theater sought coverage under their BI policy after a construction accident caused the closure of several surrounding streets, prompting the theater to cancel several performances.<sup>82</sup>

The appellee insurer relied on the language found in its "Civil Commotion Exclusion" that disclaimed coverage for direct and indirect loss occasioned by "popular rising, riots, martial law of (sic) the acts of any lawfully constituted authority."<sup>83</sup> In addition, the insurer

---

74. See *Kel Kim Corp. v. Cent. Mkts., Inc.*, 519 N.E.2d at 296.

75. See *159 MP Corp. v. Redbridge Bedford, L.L.C.*, 128 N.E.3d 128, 132 (N.Y. 2019) (emphasizing that "our courts have long deemed the enforcement of commercial contracts according to the terms adopted by the parties to be a pillar of the common law.").

76. *N. Eng. Mut. Life Ins. Co. v. Caruso*, 535 N.E.2d 270, 273–74 (N.Y. 1989).

77. *In re Cablevision Consumer Litig.*, 864 F. Supp. 2d 258, 264 (E.D.N.Y. 2012).

78. *Kel Kim*, 519 N.E.2d at 296–97.

79. See *Paar*, *supra* note 22, at 13–17 (discussing the requirements of the "covered peril" element of a BI claim).

80. *Id.*

81. See *Roundabout Theater Co. v. Cont'l Cas. Co.*, 751 N.Y.S.2d 4, 7–9 (N.Y. App. Div. 2002) (indicating that part of the controversy was generated by an alleged misconception of what "all-risk" meant in the agreement).

82. *Id.* at 5.

83. *Id.*

argued that the stated cause did not result in a direct loss.<sup>84</sup> Ultimately, the court ruled in favor of the insurer because the road closures did not result in direct physical damage to the property.<sup>85</sup> Thus, the covered perils are intimately linked to the covered losses, and both elements adhere to this strict construction. Policyholders would be wise to ensure that they link their coverage claims to the specific perils and losses or renegotiate terms such that their coverage meets their needs.<sup>86</sup>

For named peril policies, *Roundabout* is also useful insofar as the policy at issue in the case was an all-risk policy with named-peril exceptions to coverage.<sup>87</sup> For an example of a case where the specificity of a policy was utilized to the benefit of the insured, one can turn to *Fountain*.<sup>88</sup> There, the court explicitly linked enforceable coverage to the specific lack of a direct physical damage requirement or any unambiguous language that one might be interpreted to affirm such a requirement.<sup>89</sup>

Contrasting the two cases, it is imperative to acknowledge that different terms of the agreement determined the different outcomes in each.<sup>90</sup> In *Fountain*, there was no direct physical damage requirement, whereas, in *Roundabout*, there was.<sup>91</sup> This highlights the need for insurers and policyholders to both fully contemplate future risks and coverage and draft in clear language that leaves both parties with a firm idea about their obligations should a future risk come to fruition. Keeping in mind the rigorous standard of interpretation in New York, it should come as no surprise that enforcement of *force majeure* clauses and excusing nonperformance is exceedingly rare.<sup>92</sup>

#### B. Civil Authority, COVID-19, and New York Law

Contemplating the executive orders that Governor Cuomo issued requiring the closure of non-essential businesses, civil authority coverage appears a prodigious avenue for businesses seeking BI coverage.<sup>93</sup> One of the many insurance suits following the 9/11 terrorist attacks provides a blueprint for a successful BI claim that leverages the civil

84. *Id.*

85. See *Roundabout*, 751 N.Y.S.2d at 9–10 (showing that the all-risk policy only covered BI risks directly resulting from property loss or damage).

86. See generally Andrew A. Schwartz, *Contracts and COVID-19*, 73 STAN. L. REV. ONLINE 48 (2020).

87. See *Roundabout*, 751 N.Y.S.2d at 9–10 (describing the unique features and what they mean for coverage in the case).

88. See generally *Fountain Powerboat Indust. v. Reliance Ins. Co.*, 119 F. Supp. 2d 552 (E.D.N.C. 2000).

89. *Id.* at 556–58.

90. See *id.*; *Roundabout*, 751 N.Y.S.2d at 9–10.

91. *Id.*

92. See THOMSON REUTERS & NEW YORK COUNTY LAWYERS ASSOCIATION, COMMERCIAL LITIGATION IN NEW YORK STATE COURTS § 114:36 (Robert L. Haig ed., 2019) (indicating that reliance on *force majeure* clauses rarely results in a successful outcome); Harold Alexander Lewis, Comment, *Allocating Risk in Take-or-Pay Contracts: Are Force Majeure and Commercial Impracticability the Same Defense?*, 42 SW. L.J. 1047, 1061–69 (1989) (noting the narrow and particular construction of *force majeure* clauses and courts' typical rejection of excusing performance).

93. See Thomas P. Kurland, Dakotah Burns & Stephen P. Younger, *COVID-19 Business Interruption Coverage – Chief Roadblocks and Potential Paths to Coverage for Commercial Losses in New York*, 23 MEALEY'S EMERGING INS. DISP. 1, 3–4 (July 16, 2020) (claiming that civil authority coverage could be “a natural fit” for recouping business losses in New York); see also 9 N.Y.C.R.R. § 8.202 (2020), *supra* notes 117–39 (series of executive orders issuing civil authority closures of businesses and other activities).

authority clause.<sup>94</sup> In the case, the insured, an investment advisory firm, sought coverage for losses and extra expenses resulting from lack of access to their offices after the 9/11 attacks occurred nearby.<sup>95</sup> The policy language of the civil authority coverage at issue stated that the insurer “will pay for the actual business income loss . . . and extra expense you incur due to the actual or potential impairment of your operations, when a civil authority prohibits access to your premises . . . .”<sup>96</sup> This policy language provides a unique outcome for the insured insofar as direct physical damage is not required for coverage. However, given the relatively open language of this civil authority clause, it should come as no surprise that policies with such broad language are frequently pared down with broad coverage exemptions and exclusions.<sup>97</sup> In New York, there have been occasions where a policyholder has had coverage enforced amidst such broad policy exclusions.<sup>98</sup>

For civil authority coverage, the third and fourth elements of a BI claim become pivotal.<sup>99</sup> Namely, proving that the covered peril resulted in an interruption of business and that the interruption resulted in a covered loss will typically be determinative in such suits.<sup>100</sup> For example, the courts in *Roundabout* and *Social Life* ruled against coverage application because, in both instances, the predominant cause or peril did not result in a covered loss.<sup>101</sup> Similarly, but holding for the insured, courts have found the predominant cause resulted in an interruption where physical damage occurred from a source not identified by the insurer or where simple inaccessibility constituted coverage in *Parks Grp.* and *Abner, Herrman & Brock, Inc.*<sup>102</sup>

The other element that *Abner, Herrman & Brock, Inc.* made clear was the last one:

94. See Kurland et al., *supra* note 93, at 3; *Abner, Herrman & Brock, Inc. v. Great N. Ins. Co.*, 308 F. Supp. 2d 331 (S.D.N.Y. 2004) (holding that the insurer was obligated to cover losses when the policyholder’s property was inaccessible).

95. *Abner, Herrman & Brock*, 308 F. Supp. 2d at 333–34.

96. *Id.* at 334.

97. See Michael J. Redenburg, Esq., PC v. Midvale Indem. Co., 515 F. Supp. 3d 95 (S.D.N.Y. 2021) (deciding civil authority coverage involving a virus exclusion clause and an adjacent property coverage clause); Frederic Theodore Le Clercq & Francis J. Barry Jr., *Business Interruption Claims and COVID-19: Is it “Reasonable” to Expect Any Coverage After This Disaster?*, LA. BAR J., June/July 2020, at 12, 13–14 (pointing out the existence of 2006 ISO Form CP 01 40 07 06 “Exclusion for Loss Due to Virus or Bacteria” in many policies since 2006).

98. See *Parks Real Est. Purchasing Grp. v. St. Paul Fire & Marine Ins. Co.*, 472 F.3d 33, 43 (2d Cir. 2006) (representing a case where such an outcome followed broad policy language).

99. See Paar, *supra* note 22, at 20 (discussing whether an interruption in business meets the level of interruption required by the policy, i.e., “loss of use” vs. “direct physical damage”).

100. See *Parks Grp.*, 472 F.3d at 48 (reasoning that “[i]n a case where a covered and excluded peril combine to cause a covered loss, courts typically apply the efficient proximate cause rule—meaning, that the insured is entitled to coverage only if the covered peril is the ‘predominant cause of the loss or damage.’”); see also *Social Life*, *supra* note 3 (denying an injunction request from the insured because the loss claimed resulted from Gov. Cuomo’s stay-at-home order, not direct physical damage to the property).

101. See *Roundabout Theater Co. v. Cont’l Cas. Co.*, 751 N.Y.S.2d 4, 9–10 (N.Y. App. Div. 2002) (holding that the policy did not provide coverage absent a showing of physical damage to the theatre); *Social Life*, Case No. 20-cv-3311, DE 24-1 (denying an injunction request from the insured because the loss claimed resulted from Gov. Cuomo’s stay-at-home order, not direct physical damage to the property).

102. See *Parks Grp.*, 472 F.3d at 49 (finding that the building collapse was not the predominant cause and contamination was not the damage, but that the particulate cloud from the collapse was the cause of property damage and caused damage directly, not via contamination); *Abner, Herrman & Brock, Inc. v. Great N. Ins. Co.*, 308 F. Supp. 2d 331, 336–37 (S.D.N.Y. 2004) (finding that the unambiguous language of the policy covered losses resulting from inaccessibility).

the period of restoration.<sup>103</sup> In that case, the policyholder sought coverage for business losses from September 11, 2001, through September 17, 2001, and half coverage for traffic prohibitions impeding normal operations from September 17, 2001, through October 12, 2001.<sup>104</sup> However, the court held that the insured was only entitled to four days of coverage under the terms of its civil authority coverage because those four days were the only days where civil authorities barred the use of the insured's offices.<sup>105</sup> While not implicating a civil authority clause directly, the court in *Broad St., LLC v. Gulf Insurance Co.* reached a similar conclusion.<sup>106</sup> With regard to civil authority coverage, the language of the policy will be controlling, as with all coverage determinations.<sup>107</sup> As a result, the scope of civil authority coverage will typically fall along what will activate the coverage (direct physical loss, loss of use, loss of access, etc.) and how long losses will be covered.<sup>108</sup> As businesses and insurers examine the policy language at issue in forthcoming COVID-19 suits, they should be asking themselves what is required of a civil authority closure in order to activate coverage? Is direct physical damage required? How long will losses resulting from inaccessibility be covered?

### C. Ingress/Egress, COVID-19, and New York Law

Since the ingress/egress coverage extends to losses resulting from inaccessibility that is not unique to civil authority closures, this form of insurance seems as good of a fit for the COVID-19 pandemic as civil authority provisions. In *Zurich Am. Ins. Co. v. ABM Industries, Inc.*, the court dealt with an ingress/egress clause in another 9/11-related insurance dispute.<sup>109</sup> The insured was hired by the World Trade Center for lighting, engineering, and janitorial services to public spaces and 97% of the World Trade Center's tenants.<sup>110</sup> After the World Trade Center was destroyed, ABM sought to utilize as much

---

103. See Paar *supra* note 22, at 27 (discussing the problems of establishing causation and losses occurring after the restoration period); *Abner, Herrman & Brock*, 308 F. Supp. 2d at 336–37 (discussing coverage only applying when the offices were completely physically inaccessible as opposed to when they were merely more difficult to access).

104. See *Abner, Herrman & Brock*, 308 F. Supp. 2d at 335 (showing the insured seeking 7 days of full coverage due to inaccessibility and 25 days of half coverage “due to the restraints the vehicular traffic prohibitions put on its normal operating procedures.”).

105. *Id.* at 336.

106. See *Broad St., L.L.C. v. Gulf Ins. Co.*, 832 N.Y.S.2d 1, 4–6 (N.Y. App. Div. 2006) (indicating that “necessary suspension” means total cessation of business and any losses occurring outside of the necessary suspension are not covered by the policy).

107. *Id.* at 4–5; *Abner, Herrman & Brock*, 308 F. Supp. 2d at 335; *Roundabout Theater Co. v. Cont'l Cas. Co.*, 751 N.Y.S.2d 4, 7 (N.Y. App. Div. 2002); *Parks Real Est. Purchasing Grp. v. St. Paul Fire & Marine Ins. Co.*, 472 F.3d 33, 42–44 (2d Cir. 2006); *Zurich Am. Ins. Co. v. ABM Indus.*, 397 F.3d 158, 164–65 (2d Cir. 2005); *Consol. Edison Co. of N.Y. v. Allstate Ins. Co.*, 774 N.E.2d 687, 694 (N.Y. 2002); *Yar-Lo, Inc. v. Travelers Indem. Co.*, 14 N.Y.S.3d 577, 578 (N.Y. App. Div. 2015); *Career Inst.*, 791 N.Y.S.2d at 342; *54th St. Ltd. Partners, L.P. v. Fid. & Guar. Ins. Co.*, 763 N.Y.S.2d 243, 243 (N.Y. App. Div. 2003).

108. See Paar, *supra* note 22, at 15.

109. See *Zurich*, 397 F.3d at 168–71 (discussing the application of a contingent business interruption policy that included ingress/egress provisions); *Zurich Am. Ins. Co. v. ABM Indus., Inc.*, 265 F. Supp. 2d 302, 305 (S.D.N.Y. 2003) (listing the provisions that make up the contingent business interruption insurance in the policy at issue).

110. *Zurich*, 265 F. Supp. 2d at 304.

of its insurance to recoup what amounted to a complete loss of business.<sup>111</sup> The contingent business insurance provision at issue read:

[D]ue to the necessary interruption of business as the result of direct physical loss or damage of the type insured against to properties not operated by the Insured which wholly or partially prevents any direct supplier of goods and/or services to the Insured from rendering their goods and/or services, or property that wholly or partially prevents any direct receiver of goods and/or services from the Insured from accepting the Insured's goods and/or services.<sup>112</sup>

The ingress/egress provision functioning here concerns the prevention of access to suppliers and receivers of goods and/or services.<sup>113</sup>

Here, the contingent business interruption provision also requires a direct physical damage prerequisite, except the direct physical damage required to activate coverage is the damage of third-party property that prevents access.<sup>114</sup> Relating the facts of the case to the terms of the agreement, the court explains coverage broke down because “the case . . . involve[d] . . . circumstances where the insured’s customers occupied a building that the insured itself operated, thus rendering the [contingent business interruption] provision inapplicable.”<sup>115</sup> The court held that ABM operated the World Trade Center, which renders the “properties not operated by the Insured” language of the clause problematic.<sup>116</sup> The court concluded that ABM operated the World Trade Center, despite the existence of other service providers operating in the building, by following the Supreme Court’s construction of the meaning of “operated” in *Coughran*.<sup>117</sup> There, the Court held “operated” meant that “[o]ne may operate singly with his own hands, or jointly with another, or through one or more agents.”<sup>118</sup>

From *Zurich*, it becomes clear that ingress/egress provisions will find difficulties with the second and fourth elements of a BI claim. The second element was where ABM ultimately lost because it could not prove that the adjacent properties that had impeded the access of suppliers and receivers were exclusively operated by the adjacent business owners.<sup>119</sup>

Additionally, the fourth element of covered loss will present significant issues. Although not at issue in *Zurich*, basic deductive logic indicates that ABM would have had difficulty “establish[ing] that, but for the suspension of its operations, it would have earned income.”<sup>120</sup> ABM had operations outside of the World Trade Center, but in light of the scope of the claim, it is unlikely that ABM would have earned income from the World Trade Center or its tenants that were ABM’s clients. As is hopefully evident at this point, ingress/egress clauses may provide for more flexibility than civil authority provisions, but

---

111. *Id.* at 305.

112. *Zurich*, 397 F.3d at 162.

113. *Id.*

114. *Id.* at 168–69.

115. *Id.* at 170.

116. *Id.* at 169.

117. *Zurich*, 397 F.3d at 169.

118. *State Farm Mut. Auto. Ins. Co. v. Coughran*, 303 U.S. 485, 491 (1938).

119. *Zurich*, 397 F.3d at 169.

120. *Paar*, *supra* note 22, at 26.

the case law shows that the former is subject to some of the same coverage pitfalls and intricacies as the latter.<sup>121</sup> For the purposes of ingress/egress claims, the principal difficulty lies with policyholders that have ingress/egress provisions that require proof of direct physical loss because the COVID-19 pandemic has not resulted in much property damage.<sup>122</sup>

*D. Extra Expense Clauses, COVID-19, and New York Law*

Extra expense provisions seem like a natural fit for many of the businesses that have had to expend resources to fill positions and make adjustments to changing COVID-19 health regulations.<sup>123</sup> An extra expense clause figured prominently in *Broad St., LLC v. Gulf Insurance Co.*<sup>124</sup> There, the landlord plaintiff sought to recoup losses associated with the 9/11 attacks and requested losses that accrued past September 18, 2001, the date which Gulf determined to be the last day that a civil authority measure prevented access to the plaintiff's property.<sup>125</sup> The plaintiff sought to rely on the language in the extra expense provision because it extended coverage to “[e]xtra expense loss to the extent that you can return ‘operations’ to normal and discontinue such Extra Expenses.”<sup>126</sup> Read in isolation, this language seems to indicate that the insured will be covered up until it no longer needs to engage in additional expenditure resulting from the lack of access and/or physical damage to the property. However, the clause that precedes it indicates that extra expenses are to be excluded from business income loss and that the coverage will only extend to the point where business operations can resume “in whole or in part.”<sup>127</sup> What *Broad St.* elucidates is the profound importance that the last element of a BI claim will have on extra expense coverage. The identification of a period of restoration will demarcate in time the expenses covered, which can be extended when an extended business interruption period is available for purchase.<sup>128</sup> As a result, businesses and insurers alike should be clear in drafting what constitutes “operations” and what factors will be used for determining their resumption.

The other element that causes issues regarding extra expense clauses is the second

---

121. See Scott G. Johnson, *Ten Years After 9/11: Property Insurance Lessons Learned*, 46 TORT, TRIAL & INS. PRAC. L.J. 685, 706–08 (2011) (discussing the shared emphasis on time and place regarding civil authority and ingress/egress clauses).

122. See Kurland et al., *supra* note 93, at 1–2 (pointing out that “in some policies, the definition of ‘physical loss or damage’ may be narrow enough to preclude coverage for any ‘loss or damage’ other than actual, physical alteration to the subject property.”); John D. Dempsey & Lee M. Epstein, *Re-Examining Business Interruption Insurance*, 49 RISK MGMT. 40, 42–43 (2002) (noting the “paucity of case authority” on ingress/egress provisions and that in *Fountain Powerboat*, no physical loss was required to activate coverage).

123. See Cheryl Carleton, *Replacing Workers After COVID-19 is Going to Come With a High Cost for Everyone*, FAST CO. (Apr. 23, 2020), <https://www.fastcompany.com/90494319/replacing-workers-after-covid-19-is-going-to-come-with-a-high-cost> [<https://perma.cc/ZR2J-NPFB>] (discussing the financial, social capital, and productivity costs associated with rehiring post-COVID-19).

124. See *Broad St., L.L.C. v. Gulf Ins. Co.*, 832 N.Y.S.2d 1, 133 (N.Y. App. Div. 2006) (discussing the insured's reliance on language in the extra expense clause for determining the recovery period).

125. *Id.* at 129–35.

126. *Id.* at 133.

127. *Id.*

128. See Paar, *supra* note 22, at 26–29 (discussing the problem of losses occurring after the period of restoration).



element: establishing the loss of a covered property.<sup>129</sup> The second element was at issue in *Newman*.<sup>130</sup> Newman sought to recoup business interruption losses under its extra expense provision resulting from a power outage that lasted for six days.<sup>131</sup> However, the clause was activated by direct physical loss or damage.<sup>132</sup> Citing *Roundabout*, the court held that loss of power did not result in “some form of actual, physical damage to the insured’s premises.”<sup>133</sup> As with the other clauses, when direct physical damage is the condition precedent for activating coverage, parties in New York will be held to strict constructions barring the existence of broader language.<sup>134</sup> Regardless, attention must be paid to the language constituting what “damage” and “loss” mean to the parties and to what extent coverage will be afforded, especially in the context of the COVID-19 pandemic where actual, physical damage to business’ property was exceedingly rare.<sup>135</sup>

#### E. General BI, COVID-19, and New York Law

As can be seen by the various add-on clauses and coverage extensions, BI claims cover a host of risks that occasion interruptions as well as the cascading effects that some interruptions can cause. This last section is devoted to more general BI claims. The typical general BI claim follows the elements: a named peril causes physical damage to property that forces the business to suspend its operations, resulting in a loss.<sup>136</sup>

For general BI claims, one outlier case is worth examining as the high-water mark for expansive interpretations of physical damage: *Willets Point Contracting Corp. v. Hartford Insurance Grp.*<sup>137</sup> This case involved a business owner who sued a contractor for preventing access to the business during construction which led the contractor to seek a court order declaring that the contractor’s insurer had a duty to defend it in the action.<sup>138</sup> While the court rejected the duty to defend claims, it did note in dicta that the policy’s definition of property damage was so broad that it could include “coverage for loss of use.”<sup>139</sup> This may be of use to some policyholders that have more broadly worded policies. However, as the previous case law indicates, New York’s plain language reading more often than not results in a showing of actual physical damage to the property.<sup>140</sup>

---

129. *Id.* at 18–23.

130. *See Newman Myers Kreines Gross Harris, P.C. v. Great N. Ins. Co.*, 17 F. Supp. 3d 323, 328 (S.D.N.Y. 2014) (discussing whether Newman’s could recoup BI losses following Hurricane Sandy closing its office locations).

131. *Id.*

132. *Id.*

133. *Id.* at 331.

134. *See Willets Point Contracting Corp. v. Hartford Ins. Grp.*, 423 N.E.2d 42, 42 (N.Y. 1981) (recognizing that the definition of “damage” or “loss” in a policy may be broad enough to include loss of use of property “without physical damage thereto”).

135. *See John DiMugno, The Implications of COVID-19 for the Insurance Industry and its Customers*, 32 CAL. INS. L. & REGUL. REP. 1 (2020) (discussing the mixed approaches circuits have taken in approaching physical damage requirements and outlier cases affirming damage involving asbestos, *E. coli* bacteria, etc.).

136. *See Paar, supra* note 22, at 12.

137. *Willets Corp.*, 423 N.E.2d; *see also Kurland et al., supra* note 93, at 2–3 (describing the various ways the holding could be used to expand the construction of physical damage or loss in BI policies).

138. *Willets Corp.*, 423 N.E.2d at 42.

139. *Id.*

140. *See, e.g., Roundabout Theater Co. v. Cont’l Cas. Co.*, 751 N.Y.S.2d 4, 9–10 (N.Y. App. Div. 2002) (denying coverage because there was no physical property damage).

One case that seems more helpful on this question is *Parks Gr.* because the physical damage that was held to qualify for coverage was the damage caused directly from a plume of contaminated and corrosive gas that struck the insured's property.<sup>141</sup> For policyholders whose business relies on clean or sterile environments, this holding may help overcome the direct physical damage hurdle because the business is damaged by COVID-19 particles on the surfaces of its property.<sup>142</sup> Similarly, in many all-risk policies, pollutant and contaminant exclusions rarely include communicable diseases and might be leveraged to make arguments similar to those found in *Parks Grp.*<sup>143</sup> In both cases where coverage is precluded and enforced, policyholders and insurers can learn from the victories and losses of previous parties. In considering some of the specific clauses in BI claims, how they relate to the current body of case law, and what nuances the COVID-19 pandemic introduces to BI claims, the stage is set to explore recommendations for policyholders and insurers alike.

#### IV. RECOMMENDATIONS

Hopefully, the exploration and analysis of New York case law have revealed that the language of a given policy is where any recommendation for policyholders and insurers should begin. Already, COVID-19 claims are being adjudicated under the state's strict plain-language construction of insurance contracts.<sup>144</sup> It is also necessary to realize that the legislative responses to COVID-19-related losses are by no means finished, and these measures may play a significant role in future legal action following BI claims.<sup>145</sup> With these overarching reflections in mind, this Note considers recommendations for policyholders before turning to recommendations for insurers.

##### A. Policyholder Recommendations

To begin, policyholders should be aware that the insurance industry has already declared that it will fight COVID-19 BI claims "tooth and nail."<sup>146</sup> This mentality makes sense, given that the scale of loss described vastly exceeds the gross capital surplus held by insurers needed to cover new claims.<sup>147</sup> It should not be a cause for despair because

---

141. See *Parks Real Est. Purchasing Grp. v. St. Paul Fire & Marine Ins. Co.*, 472 F.3d 33, 36 (2d Cir. 2006) (finding that the building collapse was not the predominant cause and contamination was not the damage, but that the particulate cloud from the collapse was the cause of property damage and caused damage directly not via contamination).

142. See DiMugno, *supra* note 135 (discussing exclusion ambiguity and the propensity for coverage of contaminants and communicable diseases).

143. See *Cont'l Cas. Co. v. Rapid-Am. Corp.*, 609 N.E.2d 506 (N.Y. 1993) (holding that the policy's pollution exclusion did not apply to asbestos exposure); *Koegler v. Liberty Mut. Ins. Co.*, 623 F. Supp. 2d 481 (S.D.N.Y. 2009) (holding that a communicable disease exclusion precluded coverage for the transmission of the human papilloma and herpes virus).

144. See, e.g., *Social Life, Inc. v. Sentinel Ins. Co. Ltd.*, No. 20-cv-3311, 2020 WL 2530721 (S.D.N.Y. 2020).

145. See *Pandemic Risk Insurance Act of 2020*, H.R. 7011, 116th Cong. (2020) (addressing federal action that will impact the outlook of insurance coverage for businesses); S.B. S8211A, 203rd Leg., 2020 Sess. (N.Y. 2020) (requiring certain "perils" be covered under business interruption insurance during the COVID-19 pandemic).

146. See French, *supra* note 38, at 1.

147. *BOS. CONSULTING GRP.*, *supra* note 7, at 27–29 (noting the headwinds faced by insurers due to COVID-

there will be certain policy language that will allow coverage.<sup>148</sup>

The most clear-cut example would be businesses that have obtained pandemic insurance, despite industry claims that pandemics are uninsurable.<sup>149</sup> However, businesses with pandemic coverage are the exception, not the norm.<sup>150</sup> As a result, recommendations will be focused on the previously described: civil authority clauses, ingress/egress clauses, extra expense clauses, and general claims made under BI insurance.

### 1. Civil Authority

Some civil authority clauses specifically include contamination clauses.<sup>151</sup> However, recall that civil authority clauses are only activated when a civil authority prohibits access to the insured property.<sup>152</sup> As a result, business owners who opted to close shop to protect themselves and employees will not be able to claim coverage. However, in the case of New York, business closures that resulted from Governor Cuomo's executive orders were compulsory and related to the government's observation that COVID-19 infected surfaces and persons presented dangerous conditions sufficient to warrant full closure.<sup>153</sup> By the summer of 2020, Partnership for New York City estimated that one-third of the estimated 230,000 small businesses operating in New York City will close for good.<sup>154</sup> At present, there exists no clearinghouse data on whether these businesses closed as a result of a

19); *see also* Suzanne Barlyn, *U.S. Insurers Want Taxpayers to Back Pandemic Coverage for Businesses*, REUTERS (Apr. 29, 2020, 6:21 AM), <https://www.reuters.com/article/us-health-coronavirus-insurance-pandemic/u-s-insurers-want-taxpayers-to-back-pandemic-coverage-for-businesses-idUSKCN22B1J8> [<https://perma.cc/XF94-Q3L5>] (quoting the chief economist for the Insurance Information Institute, Steven Weisbart: "The industry doesn't have as much money available for new claims as people would tend to think" and "[i]f we ever had a bad hurricane season or bad anything else, we wouldn't have enough money").

148. French, *supra* note 38, at 20–25; *see* Kurland et al., *supra* note 93, at 1–4 (stressing the importance of the terms and language that come to define the scope of policy coverage).

149. *See* Eileen Gilligan, *APCIA Releases New Business Interruption Analysis*, AM. PROP. CAS. INS. ASS'N (Apr. 6, 2020), <https://www.apci.org/pciwebsite/cms/content/viewpage?sitePageId=60052> (quoting the President and CEO of American Property Casualty Insurance Association that "[p]andemic outbreaks are uninsured because they are uninsurable"); Russ Banham, *This Insurance Would Have Helped in Coronavirus Crisis but Nobody Bought it*, INS. J. (Apr. 3, 2020), <https://www.insurancejournal.com/news/national/2020/04/03/563224.htm> [<https://perma.cc/72W8-ZJZP>] (discussing PathogenRX, an insurance product specifically offered for pandemics).

150. *Id.*; *see Wimbledon Shows how Pandemic Insurance Could Become Vital for Sports, Other Events*, INS. J. (Apr. 13, 2020), <https://www.insurancejournal.com/news/international/2020/04/13/564598.htm> [<https://perma.cc/KK5J-CCAF>] [hereinafter *Wimbledon*] (discussing Wimbledon's acquisition of insurance following the SARS outbreak in 2003).

151. *See* French, *supra* note 38, at 20 (discussing insurance policies with business interruption coverage for losses resulting from contamination); Douglas Berry & John V. Garaffa, *COVID-19—When Civil Authorities Take Over, Are You Covered?*, INT'L RISK MGMT. INST. (Mar. 2020), <https://www.irmi.com/articles/expert-commentary/when-civil-authorities-take-over-are-you-covered> [<https://perma.cc/Q8ZG-WFBH>] (discussing policy language for civil authority clauses that would and would not provide coverage); *Motorists Mut. Ins. Co. v. Hardinger*, 131 F. App'x. 823, 823–27 (3d Cir. 2005) (stating that *E. coli* may have rendered the property at issue uninhabitable).

152. Kurland et al., *supra* note 93, at 3.

153. *See* 9 N.Y.C.R.R. § 8.202 (2020), *supra* notes 11–13 (discussing a series of executive orders issuing civil authority closures of businesses and other activities).

154. P'SHIP FOR N.Y.C., A CALL FOR ACTION AND COLLABORATION 4 (2020), <https://pfny.org/wp-content/uploads/2020/07/actionandcollaboration.pdf> [<https://perma.cc/UR3M-XJLP>].

compulsory state order or the cascading effects COVID-19 has had on business operations.<sup>155</sup> Policies with this kind of specific contamination coverage relating to civil authority closures will most likely find favorable judicial decisions by relying on the Third Circuit's decision in *Hardinger*, where the court upheld coverage after pre-existing *E. coli* bacteria rendered the insured property uninhabitable.<sup>156</sup> Similarly, civil authority clauses that do not require damage but only loss of use will be better situated to compel coverage for their business losses.<sup>157</sup> As a result of the many nuances, policyholders should remember that New York follows *contra preferentem*, and ambiguities will be constructed in favor of the policyholder.<sup>158</sup> Policies that require physical damage related to the civil authority closure will face more difficulties because *Roundabout* will control and require direct physical damage that may not exist in actuality.<sup>159</sup> It is also important for policyholders to recall that losses will only be available when the civil authority prohibits access entirely to the business.<sup>160</sup> Reduced occupancy that resulted from social distancing requirements does not bring those losses within the ambit of a civil authority clause.<sup>161</sup>

## 2. Ingress/Egress

Unlike civil authority clauses, ingress/egress clauses more frequently require a showing of direct physical damage to third-party property caused by a covered peril.<sup>162</sup> As observed earlier, this damage requirement will be the principal difficulty because COVID-19 has not caused much property damage.<sup>163</sup> This difficulty alone will make ingress/egress clauses difficult and unattractive for most policyholders. Unlike civil authority closures that prohibit access because of contamination, few ingress/egress clauses will permit coverage in like circumstances because ingress/egress clauses relate to third-party property.<sup>164</sup> Thus, policyholders are better suited to negotiate coverage under other clauses.

---

155. Matthew Haag, *One-Third of New York's Small Businesses May Be Gone Forever*, N.Y. TIMES (Aug. 3, 2020), <https://www.nytimes.com/2020/08/03/nyregion/nyc-small-businesses-closing-coronavirus.html> [https://perma.cc/6B8Z-K5Z9].

156. *Hardinger*, 131 F. App'x. at 823.

157. See Paar, *supra* note 22, at 12 (discussing whether an interruption in business meets the level of interruption required by the policy, i.e., "loss of use" vs. "direct physical damage").

158. See VAM Check Cashing Corp. v. Fed. Ins. Co., 699 F.3d 727, 732 (2d Cir. 2012) (stating that "New York follows the maxim of *contra proferentem* in insurance cases").

159. See Roundabout Theater Co. v. Cont'l Cas. Co., 751 N.Y.S.2d 4, 7–8 (N.Y. App. Div. 2002) (explaining that the plain meaning of "direct" and "physical" in the provision at issue narrowed the scope of coverage to exclude off-site property damage as a covered peril in the BI policy).

160. See Abner, Herrman & Brock, Inc. v. Great N. Ins. Co., 308 F. Supp. 2d 331, 336–37 (S.D.N.Y. 2004) (discussing coverage only applying when the offices were completely physically inaccessible as opposed to when they were merely more difficult to access).

161. *Id.*

162. See Zurich Am. Ins. Co. v. ABM Indus., 397 F.3d 158, 162 (2d Cir. 2005) (explaining two policy provisions, wherein the first provision insured losses from damage or destruction of property, and the second provision insured losses from civil authority if "in connection with or following a peril insured against").

163. See Carleton, *supra* note 122 (discussing the financial, social capital, and productivity costs associated with re-hiring post-COVID-19).

164. See Kurland et al., *supra* note 93, at 1–2 ("[I]n some policies, the definition of 'physical loss or damage' may be narrow enough to preclude coverage for any 'loss or damage' other than actual, physical alteration to the subject property.").

### 3. Extra Expense

Following the *Broad St., LLC* decision, it may seem like extra expense clauses will be as unhelpful to policyholders as ingress/egress clauses.<sup>165</sup> Recall that in *Broad St., LLC*, extra expenses were available only to the point where business operations could resume “in whole or in part.”<sup>166</sup> However, depending on the kind of business a policyholder is seeking loss coverage for, expenses accrued from personal protective equipment for employees or altering the business’s layout to comply with health standards may have been quite high.<sup>167</sup> Alternatively, some businesses’ expenses may have been dramatically reduced because of fewer employees, a decrease in utilities use, etc. Depending on the language of the clause, the policyholder may be obligated to pay for health and safety technologies and measures.<sup>168</sup> The common language in extra expense clauses requires the expenses to be “non-ordinary;” this bodes well for most employers, as few businesses, pre-COVID-19, bought room occupancy monitors or UV light sanitizing stations.<sup>169</sup> Policyholders with extra expense coverage will be better positioned to recoup “back to the office” expenses, like additional cleaning supplies, retrofitting air filtration, and hand sanitizer or masks.<sup>170</sup> Unfortunately, as was the case in *Broad St., LLC*, extra expense clauses may explicitly exclude an increase in expenses during the period of restoration resulting from compliance with an ordinance or law that “[r]equires any insured or others to test for, monitor, clean up, remove, contain, treat, detoxify or neutralize, or in any way respond to, or address the effects of pollutants.”<sup>171</sup> An exclusion such as this one would most likely be fatal to a policyholder’s claim seeking extra expense coverage within the context of the COVID-19 pandemic because almost every additional expense will fall under this exclusion. As a result, policyholders should be wary of accepting insurance policies with extra expense clauses that exclude compliance-related expenses.

Other exclusion clauses, however, will not be as difficult to overcome. Other common exclusions include pollution and virus/bacterial exclusions.<sup>172</sup> On its face, it seems like

165. *Broad St., L.L.C. v. Gulf Ins. Co.*, 832 N.Y.S.2d 1, 6 (N.Y. App. Div. 2006).

166. *Id.*

167. See generally O.S.H.A., U.S. DEP’T OF LABOR, PUB. NO. 3990-03, GUIDANCE ON PREPARING WORKPLACES FOR COVID-19, 15 (2020) (requiring personal protective equipment when needed and recommending controls for employers to put into place for reducing COVID-19 transmission in the workplace). For an idea of the various measures that increased expenses for businesses see the checklist in C.D.C., U.S. DEP’T OF HEALTH & HUM. SERV., RESUMING BUSINESS TOOLKIT: CORONAVIRUS DISEASE 2019 (COVID-19) (2020), <https://www.cdc.gov/coronavirus/2019-ncov/downloads/community/Resuming-Business-Toolkit.pdf> [<https://perma.cc/MX3P-F4XT>].

168. See Pillsbury’s Insurance Recovery Law Team, *Insurance Coverage for COVID-19 “Back to Office” Expenses*, POLICYHOLDER PULSE (Aug. 5, 2020), <https://www.policyholderpulse.com/insurance-coverage-covid-19-office-expenses/> [<https://perma.cc/AS6A-2Y3U>] (discussing policies that may require businesses to invest in COVID-19 preventative measures and technologies).

169. *Id.*

170. See Julie Weed, *Air Filters and Outdoor Spaces: Office Costs Rise as Workers Return*, N.Y. TIMES (Dec. 28, 2021), <https://www.nytimes.com/2021/12/28/business/offices-coronavirus.html> [<https://perma.cc/V8GH-7R92>] (providing examples of costs associated with returning the post-pandemic return to office space).

171. *Broad St., L.L.C. v. Gulf Ins. Co.*, 832 N.Y.S.2d 1, 7 (N.Y. App. Div. 2006).

172. See *Motorists Mut. Ins. Co. v. Hardinger*, 131 F. App’x. 823, 826–27 (3d Cir. 2005) (pointing out that the presence of *E. coli* could generate a loss by rendering a property uninhabitable); *Stoney Run Co. v. Prudential-LMI Com. Ins. Co.*, 47 F.3d 34, 38–39 (2d Cir. 1995) (deciding that carbon monoxide fatalities were not excluded

COVID-19 would be patently excluded by a viral/bacterial exclusion, but New York's strict construction doctrine could cut in the policyholder's favor. A policyholder would argue that the novelty of COVID-19 could not have been contemplated by the insurance contract because nothing truly like it had ever before existed. If coronavirus is not expressly excluded, then the strict construction of insurance policies would tend to favor the insured. Ironically, the argument is very similar to what the insurance industry argues for why pandemics are uninsurable.<sup>173</sup> Nevertheless, Wimbledon's pandemic insurance policy garnered them an alleged \$142 million insurance payout when the tournament was canceled because of COVID-19 just this year.<sup>174</sup> Going forward, it would be in policyholders' best interest to avoid insurance policies with language that explicitly excludes viral and bacterial risks that are likely to be confronted by the business.

#### 4. General BI

General BI claims concerning losses because of COVID-19 may not be broadly excluded on the grounds that pandemics are uninsurable because the very presence of virus exclusions indicates that "coverage for business interruption losses caused by viruses is provided by policies that do not contain the exclusion."<sup>175</sup> Following the logic of the court *Broad St., LLC*, even if the property does not suffer physical damage, this would not automatically remove it from coverage consideration. If, for example, the danger of contagion leaves a business too dangerous to use (as the *E. coli* did in *Broad St., LLC*), then BI coverage would be applicable unless otherwise expressly excluded.<sup>176</sup> Indeed, Mayor Bill de Blasio's own executive order explicitly justified stay-at-home orders "because the virus is causing property loss and damage . . ."<sup>177</sup> As has been stressed throughout this Note, all of these determinations will come down to the language in the insurance policy much like the divergent outcomes in *Willets Point Contracting Corp.* and *Roundabout*.<sup>178</sup> Again, policyholders should view specific bacterial and viral exclusions critically and ensure that any exclusion does not present an excessive risk to the business.

#### B. Insurer Recommendations

From the insurer's perspective, it is simpler to base recommendations on trends that are independent from the various clauses and hone in on recommendations that lie outside

---

by a pollution exclusion clause because the exclusion only pertained to industrial pollution).

173. See French, *supra* note 38, at 28 (explaining that the insurance industry contends that "pandemic outbreaks are uninsured because they are uninsurable").

174. See *Wimbledon*, *supra* note 150 (discussing Wimbledon's acquisition of insurance following the SARS outbreak in 2003).

175. See French, *supra* note 38, at 25.

176. *Id.* at 21.

177. Bill de Blasio, N.Y.C. Mayor, Emergency Exec. Order No. 101, 1 (Mar. 17, 2020), <https://www1.nyc.gov/assets/home/downloads/pdf/executive-orders/2020/eo-101.pdf> [<https://perma.cc/42F9-URFS>].

178. See *Roundabout Theater Co. v. Cont'l Cas. Co.*, 751 N.Y.S.2d 4, 8 (N.Y. App. Div. 2002) (explaining that the plain meaning of "direct" and "physical" in the provision at issue narrowed the scope of coverage to exclude off-site property damage as a covered peril in the BI policy); *Willets Corp.*, 423 N.E.2d at 42 (recognizing that the definition of "damage" or "loss" in a policy may be broad enough to include loss of use of property "without physical damage thereto").

of the four corners of the insurance contract.<sup>179</sup> This subsection will proceed with (i) a recommendation to emphasize COVID-19 losses as outside of the “direct physical damage” envisaged by BI policies; (ii) widespread use and defense of virus exclusions clauses; (iii) pressing pandemics as uninsurable as an industry-wide practice; and (iv) lobbying federal and state governments to develop pandemic trust funds and government-backed insurance.

### 1. Direct Loss or Physical Damage

The insurance industry is at an advantage in BI claim suits because of the longstanding effects that *Roundabout* has had on New York’s jurisprudence.<sup>180</sup> The losses that policyholders are experiencing are not the result of damage caused by COVID-19, they are losses that are firmly the result of civil authority orders from state and local governments.<sup>181</sup> In *United Air Lines, Inc.*, even the civil authority clause required a showing of damage to adjacent property that prevented United Airlines from accessing their property.<sup>182</sup> By emphasizing the requirement of tangible alteration to or loss of property that prevented the policyholder from engaging in business, insurers will be able to significantly limit successful legal challenges to unfulfilled claims.<sup>183</sup> In fact, Kurland notes that “no New York court has extended business interruption coverage to circumstances where a property owner suffered only loss of use of the subject property.”<sup>184</sup>

### 2. Virus and Bacterial Exclusions

After the SARS epidemic, virus exclusion clauses specifically contemplated excluding coronavirus variations.<sup>185</sup> Since BI policies are premised on the actual destruction or loss of property, viruses’ actual damage is determinable only by considering the kind of property alleged. While the insurance industry is the largest industry on Earth,<sup>186</sup> its capital resources are insufficient for responding to an economic and human health crisis of the magnitude of COVID-19.<sup>187</sup> One estimate puts the timeframe at 150 years for property and casualty insurers to collect the several trillion-dollar loss brought

---

179. See, e.g., Barlyn, *supra* note 147 (indicating that the insurance industry has support from the U.S. Chamber of Commerce and is joining their call for government-sponsored pandemic insurance).

180. See Gavin Souter, *Publisher Appeals COVID-19 Ruling Denying Coverage*, BUS. INS. (May 19, 2020), <https://www.businessinsurance.com/article/20200519/NEWS06/912334634/Publisher-appeals-COVID-19-ruling-denying-coverage-coronavirus#> [<https://perma.cc/56GV-FZBN>] (discussing the *Soc. Life Mag.* case and the judge having “grilled” the policyholder over the physical damage element of the claim).

181. See Warren, *supra* note 36 (discussing how economic losses are not physical losses or damage to property); *Newman*, 17 F. Supp. 3d at 330–32 (affirming *Roundabout* and holding that a power outage did not constitute a direct physical loss or damage); *United Air Lines, Inc. v. Ins. Co. of State of Pa.*, 439 F.3d 128, 131 (2d Cir. 2006) (pointing out that United’s Civil Authority clause requires physical damage to an adjacent property to activate coverage).

182. *United*, 439 F.3d at 131.

183. Barlyn, *supra* note 147; French, *supra* note 38, at 16; Kurland et al., *supra* note 93, at 2.

184. Kurland et al., *supra* note 93, at 2.

185. *Id.*

186. LUIS LOBO-GUERRERO, *INSURING SECURITY: BIOPOLITICS, SECURITY, AND RISK 1* (2011).

187. See Barlyn, *supra* note 147 (discussing the insurance industry being forced to choose between covering COVID-19 claims now and potential future claims arising from natural disasters in the near future).

about by COVID-19.<sup>188</sup> As a result, the industry is incapable of covering all the losses. COVID-19 has shown the world what insurers have been saying for a long time about pandemics, they involve too many correlated risks.<sup>189</sup> Correlated risks are particularly problematic for actuarial analysis because they result in almost simultaneous losses in the same geographic area. When a pandemic is concerned, that geographic area is global.<sup>190</sup> Ultimately, there is no way to accurately charge a premium for coverage for pandemics.<sup>191</sup> The only entities on the planet that come close to having the capacity to cover this kind of loss are national governments.

### 3. Lobby State and Federal Government

Insurers have good reason to request that pandemic policies be backed by the federal government, just like they did with commercial terrorism insurance following the 9/11 attacks.<sup>192</sup> Rep. Carolyn Maloney (D-NY) and William Clay (D-MO) have already introduced the Pandemic Risk Insurance Act to do exactly that.<sup>193</sup> Leaving the insurance industry to take on so much loss would be unrealistic and bad public policy.<sup>194</sup> It would be unrealistic because the American Property Casualty Insurance Association estimates that losses among businesses employing 100 employees or fewer stand between \$255 billion to \$431 billion per month.<sup>195</sup> The entire American industry of property and casualty insurers' estimated surplus capital is just \$800 billion.<sup>196</sup> As a result, leaving the insurance industry to attempt to cover such losses would bankrupt the industry and still not cover all the losses. "[I]t would be bad public policy to allow the insurance industry to become bankrupt, especially by forcing insurers to pay claims they contend are not covered by their policies."<sup>197</sup> Just as 9/11 forced the industry and government to collaborate to generate viable solutions for addressing the losses then, conciliation between government and insurance companies will be a prerequisite for a solution now. The insurance industry serves a unique economic function by ensuring that the accidents and unintended losses persons and businesses suffer do not crush them.<sup>198</sup>

---

188. L.S. Howard, *It Would Take P/C Insurers 150 Years to Pay COVID-19 Business Interruption Losses*, INS. J. (Oct. 30, 2020), <https://www.insurancejournal.com/news/international/2020/10/30/588883.htm> [<https://perma.cc/CM8H-3CE3>].

189. See Vèronique Bruggeman, Michael Faure & Tobias Heldt, *Insurance Against Catastrophe: Government Simulation of Insurance Markets for Catastrophic Events*, 23 DUKE ENV'T L. & POL'Y F. 185, 187 (2012).

190. *Id.*

191. See French, *supra* note 38, at 18 (discussing how pandemic losses are uninsurable correlated losses that are too unpredictable to insure against).

192. Barlyn, *supra* note 147.

193. Pandemic Risk Insurance Act of 2020, *supra* note 145.

194. French, *supra* note 38, at 19.

195. Gilligan, *supra* note 149.

196. Barlyn, *supra* note 147; French, *supra* note 38, at 19.

197. French, *supra* note 38, at 19.

198. *Insurance 101*, INS. INFO. INST., <https://www.iii.org/article/insurance-101> [HTTPS://PERMA.CC/D62V-3L3V].



## V. CONCLUSION

As BI cases continue to pour into dockets across the country, the prognosis for New York is likely to mirror the rest of America, where real-time aggregate figures from the University of Pennsylvania's Carey Law School COVID Coverage Litigation Tracker (CCLT) reveal that in 83 of 105 cases insurers have prevailed when cases were decided by summary judgment or dismissal motion.<sup>199</sup> However, the CCLT also shows that in cases involving all-risk policies that lacked a virus and bacteria exclusion clause, businesses prevailed in 12 of the 35 cases where such a policy was present.<sup>200</sup> This data reiterates that absent direct physical property damage, coverage will be highly dependent on the language in the policy agreement. The data accumulated also suggests that the greater likelihood of success envisioned for civil authority and extra expense clauses is backed by the data and accounts for roughly 58% of the type of coverage sought in all claims.<sup>201</sup>

New York's stringent construction of agreements is likely to favor insurers unless Congress or the New York State Legislature enact laws that would bend the direct physical property damage requirement of the *Roundabout* precedent.<sup>202</sup> Absent legislative action, the 15% voluntary termination rate of BI cases would make mass vaccination too late to resuscitate many policy-holder businesses set for another wave of bankruptcies.<sup>203</sup> Alternatively, insurers will continue to benefit from the *Roundabout* precedent and maintain their current success rate in courts, which is closing in on 80%.<sup>204</sup> As a new U.S. Presidential Administration commences and the onset of the Delta variant looks poised to generate another series of lockdowns, the total depth and scope of economic damage America sustained from the COVID-19 pandemic remains unknown.<sup>205</sup> One thing that does remain evident is that many businesses relying on their BI insurance for moments just like this will find it difficult, if not impossible, to receive the coverage they may require to survive.

---

199. *Latest Developments*, COVID COVERAGE LITIG. TRACKER, <https://cclt.law.upenn.edu> [<https://perma.cc/5YY5-Q6TR>].

200. *Id.*

201. *Id.*

202. Pandemic Risk Insurance Act, *supra* note 145.

203. See Tom Baker, *More Than 15% of BI Cases Have Been Terminated Already, Mostly Voluntarily*, COVID COVERAGE LITIG. TRACKER (Dec. 2, 2020), <https://cclt.law.upenn.edu/2020/12/02/more-than-15-of-bi-cases-have-been-terminated-already-mostly-voluntarily/> [<https://perma.cc/Z3CW-T2BG>] (stating that 15% of BI cases are voluntarily terminated); Martin W. Aron & Karl Weisheit, *The Impact of COVID-19 on Employment Claims and Litigation*, PROPERTYCASUALTY360 (Jan. 5, 2021, 12:00 AM), <https://www.propertycasualty360.com/2021/01/05/the-impact-of-covid-19-on-employment-claims-and-litigation/> [<https://perma.cc/US6H-NWK8>] (discussing the employment roots for another wave of bankruptcies).

204. COVID COVERAGE LITIG. TRACKER, *supra* note 203.

205. See Ewen Callaway, *Delta Coronavirus Variant: Scientists Brace for Impact*, NATURE (June 22, 2021), <https://www.nature.com/articles/d41586-021-01696-3> [<https://perma.cc/HN7W-F4MQ>] (highlighting the increased transmissibility of the Delta variant, lack of vaccine protection against the Delta variant, and lack of a coherent contact tracing policy in the U.S. as particularly problematic for American resilience against the Delta variant of COVID-19).