Resolving Issues In Business Income Insurance Resulting From Government Mandated Shutdowns During Declared Public States of Emergency

A Senior Honors Thesis

Presented in Partial Fulfillment of the Requirements for Graduation
with Honors Research Distinction in the Fisher College of Business at
The Ohio State University

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2023

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Acknowledgments

I would like to thank my parents, Tim and Laurie, and my brother Joel, for their continued support throughout my undergraduate education and preparation for law school.

I also give a very warm message of thanks to Dr. John Blackburn, J.D., for his advisory oversight of this research project.

Abstract

The COVID-19 Pandemic brought forth an unprecedented time in American history. As the pandemic first rolled through the country businesses were required, by government order, to shut down. As a result, these businesses lost large amounts of revenue and turned to their commercial insurance policies to fill the gap. However, the insurance industry had planned well for such situations and denied coverage on a large majority of claims. This research analyzes the reasons why insurance companies specifically wrote coverage exclusions for pandemic related events among other potentially catastrophic loss categories. Particular attention is paid to the seven principles of insurance, which guide the solvency of different insurance policy coverages.

Following the denial of coverage by insurers many business owners took the decisions to the court system. This research analyzes the legal arguments and court decisions made during the appeal of businesses to the courts for coverage denials. Analysis of existing insurance law in the state of Ohio and the decisions made by the courts in these cases allows for better understanding of insurance contracts and actions that can be taken in the future. Despite business owners' best efforts, the courts continued to turn down these legal challenges, and businesses were left empty handed.

There were many different actions taken by different entities to help remedy these issues. The Insurance Services Office (ISO), the leading organization governing commercial insurance, offered a new line of endorsements, but these were

minimal in scope and ultimately did not provide much in the ways of recovery for business owners. Several states and the federal government proposed various forms of legislation for supporting businesses, but few of these bills made it into codified law. Of the few that made it through, they were entirely retroactive, and so their actual functionality was very limited.

By researching these proposals as well as existing government-backed insurance programs, this research creates a new policy proposal to proactively manage events that take place during declared public states of emergency in the state of Ohio. This research will provide methods for solving business interruption issues for pandemics and other similar potentially catastrophic events. This research extends the coverage proposal to include shutdowns required by declared states of emergency in the state of Ohio.

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Introduction

Insurance Background. Commercial insurance is a large subcategory of the insurance industry in the United States, as well as around the world, that aims at providing insurance coverage for businesses. In the United States there are two common types of commercial insurance, the *Business Owners Policy* (BOP) and the *Building and Personal Property Coverage Form* (BPP). Within each of these is a subset of commercial insurance called "Business Interruption Insurance." The National Association of Insurance Commissioners defines this as insurance that "covers lost net income due to the closure of the business while repairs are underway. Exclusions from coverage include losses unrelated to property damage, such as lost revenues due to viral outbreaks or pandemics."[1] One of the most common forms insurers use for this type of insurance is the Insurance Services Office (ISO) standard form for "Business Income (and Extra Expense) Coverage Form,"[2] which will be the form used throughout this research.

Essential to this coverage is the concept that coverage will be provided when operations are interrupted by damage to property resulting from a covered peril.[3] There are also a series of coverage extensions which define further whether a loss is covered by the policy.

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[1] "Business Interruption/Businessowner's Policies (BOP)." National Association of Insurance Commissioners.
[2] "CP 00 30 04 02 - Business Income (and Extra Expense) Coverage Form." Property Insurance Coverage Law.
[3] The Institute's Handbook of Insurance Policies. 12. Vol. 12. American Institute for Chartered Property Casualty Underwriters, 137

The policy has a few important concepts and definitions to be discussed first. “Business income” is the “net profit or loss that would have been earned had the loss not occurred, and continuing normal operating expenses incurred, including payroll.”[4] The insurance policy will pay for the “actual loss of business income sustained due to suspension of ‘operations’ during the ‘period of restoration.’ Within the policy “operations” are defined as “business activities occurring at the described premises.”[5] Further, the “period of restoration” is defined as “the period of time that begins 72 hours after the time of direct physical loss or damage for Business Income Coverage; caused by or resulting from any Covered Cause of Loss at the described premises. This period ends on the earlier date of reasonable repair, rebuilding, or replacement with reasonable speed and similar quality; or the date when business is resumed at a new permanent location.”[6] The result of this portion of the policy is that the policy will cover a cessation in operations, caused by a covered cause of loss, during the period when reasonable actions to restore business functionality will be taken.

The “Covered Causes of Loss” for a specific business income policy cannot be defined because a businessowner has the option of selecting from a few different cause of loss forms. There is a “broad form,” which lists the covered perils from which the insured must prove a certain claim is covered. A direct shutdown resulting from disease is not listed in this policy. The form also goes the extra

[4] Ibid, 137
[5] Ibid, 145
[6] Ibid, 145

distance to specifically exclude coverage for any "ordinance or law" that has been "enforced even if the property has not been damaged."[7] The "special form" is an "all risks" policy that provides coverage for covered causes of direct physical loss, except for those specifically excluded. The aforementioned "ordinance or law" exclusion is also used in this form, alongside "governmental action," which is specifically excluded.

The policy continues that the "'suspension' must be caused by direct physical loss of or damage to property at premises which are described in the Declarations and for which a … limit of insurance applies."[8] The policy also includes a series of "additional coverages" for which insureds are covered. The first is the "Civil Authority" coverage, which provides protection in the case in which business income is lost as a result of "action of civil authority that prohibits access to the described premises, provided that both of the following apply: access to the area surrounding the damaged property is prohibited as a result of the damage, and that the action of civil authority is taken in response to dangerous physical conditions resulting from the damage."[9]

Principles of Insurance. An important factor to examine when discussing insurance coverages are the principles of insurance. These principles generally define what an insurer can cover on economic grounds. These come with the characteristics of an inherently insurable risk, as outlined by Rejda, McNamara,

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[7] Ibid, 111
[8] Ibid, 137
[9] Ibid, 139

and Rabel in their text.[10] First, an insurable risk must have a large number of exposure units. COVID-19 fits this criteria because there is a great number of businesses which the loss could be spread. There are millions of businesses throughout the US, around 32 million total, using data from 2014 which has only grown.[11] Providing coverage for COVID-19 losses, however, to all of them would likely bankrupt the insurance system and put insurers in a negative financial position. This would also negatively impact those who are insured because they would not be able to receive coverage for other covered causes of loss.

The second principle is that the loss must be accidental and unintentional. COVID-19 fits this category because the spread of COVID-19 and the resulting shutdowns were not maliciously intended. The shutdown of business operations was conducted for the health and safety of the people. The third principle is that the loss must be determinable and measurable. Business income losses are relatively easy to calculate. In fact, the policies include formulas and methodologies for calculating the amount of insurance to purchase for a business income policy, as well as payouts. However, losses that occur at a scale as large as that of COVID-19 become increasingly difficult to calculate.

Further, the chance of loss must be calculable. A typical insurance policy will use a rate of occurrence that can be applied to determine the frequency, and total amount, of losses for a given coverage area. These statistical methods can be very

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[10] Rejda, McNamara & Rabel, Principles of Risk Management and Insurance, 14th Edition, Pearson
[11] Hodge, Scott. "The U.S. Has More Individually Owned Businesses than Corporations." Tax Foundation, January 13, 2014.

accurate in predicting such losses, and as a result they have been the financial basis for the industry for many years. COVID-19 presented a new challenge because there was no existing data for insurance companies to use regarding shutdowns during a pandemic. Without complete data the COVID-19 peril could not be planned for by the insurance industry. Covering a peril without statistical data is an unsafe business practice that could bankrupt an insurance company. The next principle is that the loss is not catastrophic. COVID-19 violates this because so many policyholders were impacted in a multitude of industries around the world. The exact number of losses, and the monetary value, is still not known. Losses from the COVID-19 pandemic were mostly not diversifiable because losses impacted nearly every business sector.

The final principle is that the premium insureds pay must be economically feasible. A feasible premium to cover a COVID-19 business interruption insurance plan would likely not be possible, businesses combined lost an estimated $606 billion a month in income.[12] This was also not known until after the fact, so it could not be readily planned for either. In the hypothetical case percent of businesses filed claims in a given month during this period, it would be more than major insurance carriers paid in an entire year.[13] The largest property and casualty insurer in the United States, State Farm, paid less than $50 billion in all claims

[12] "Responding to the COVID-19 and Pandemic Protection Gap in Insurance." OECD, March 16, 2021.
[13] Ibid

combined in 2021.[14] Chubb insurance, the world's largest commercial insurer by market share, only paid $10.015 billion in commercial insurance claims in North America in 2021.[15] An economically feasible premium would seem impossible for such claims.

COVID-19 Background. COVID-19 was a worldwide pandemic with its first case being identified in December of 2019.[16] According to Merriam-Webster, a pandemic is defined as "an outbreak of a disease that occurs over a wide geographic area (such as multiple countries or continents) and typically affects a significant proportion of the population."[17] COVID-19 meets the definition of a pandemic for a variety of reasons. First, the geographic concentration of the disease became world-wide, as nearly every country reported positive cases and resulting deaths.[18] This specific variation of the disease family *Coronaviridae*[19] originated as a public health concern in China and quickly spread throughout the world. The disease also affected significant portions of the population, as in 2020 alone 10% of all residents' deaths in the United States cited COVID-19 as an underlying cause, the third leading cause of death in the country.[20] As a total of all cases, to date, Johns

[14] State Farm. "Good Neighbor." State Farm® announces 2021 financial results. State Farm, February 25, 2022.
[15] "Chubb, Ltd. 2021 Financial Report" Chubb Ltd.
[16] "CDC Museum Covid-19 Timeline." Centers for Disease Control and Prevention, January 2020.
[17] Merriam-Webster.com Dictionary, s.v. "pandemic,"
[18] Pettersson, Henrik, Byron Manley, and Sergio Hernandez. "Tracking Covid-19's Global Spread." CNN. Cable News Network.
[19] Payne, Susan. "Family Coronaviridae." Viruses. U.S. National Library of Medicine, 2017.
[20] Murphy, Sherry L, Kenneth D Kochanek, Jiaquan Xu, and Elizabeth Arias. "Mortality in the United States, 2020" Centers for Disease Control and Prevention.

Hopkins reports over 600 Million, with many more unreported.[21] The rate at which COVID-19 spread and caused so many deaths, and continued to do so into portions of 2021, meets the criteria of effecting a large portion of the population. Having defined COVID-19 as a pandemic, governments and other entities alike took action to address the public health crisis.

COVID-19 first arrived in the United States in January of 2020 along the west coast.[22] Life continued as normal for nearly all the country for the next few months until government mandated shutdowns began in March. Ohio Governor Mike DeWine soon became one of the first movers in COVID-19 protocols, ordering the shutdown of all schools in the state on March 12, 2020.[23] Similar actions were taken when the Arnold Classic, a major revenue driver for the state and city of Columbus, was cancelled.[24] The same day students at The Ohio State University were notified by then President Drake that the school would be moving to online instructions for the indefinite future.[25] This initial closure was intended to be kept for a three week period, but it quickly became apparent that the shutdown would continue for much longer. A few days later DeWine then announced the shutdown of all Ohio bars and restaurants, for public attendance, on March 15.[26] Again, these

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[21] "Covid-19 Map." Johns Hopkins Coronavirus Resource Center.
[22] "CDC Museum Covid-19 Timeline." Centers for Disease Control and Prevention.
[23] Camera, Lauren. "Ohio Gov. Mike DeWine Orders All K-12 Schools Closed." U.S. News and World Report, March 12, 2020.
[24] Lanier, Shawn. "Arnold Sports Festival Cancels Convention Due to Coronavirus, Will Allow Athletes to Compete." NBC4 WCMH-TV, March 5, 2020.
[25] Drake, Michael V. Coronavirus (COVID-19) Updates, email on file with author, March 12, 2020.
[26] "Governor DeWine Orders Ohio Bars & Restaurants to Close." Governor DeWine orders Ohio Bars & restaurants to close, March 15, 2020.

shutdowns were expected to be short-term in nature, and these beliefs were echoed by President Trump, who hoped to have the country reopened by Easter, which fell on April 12, 2020.[27]

In the United States COVID-19 restrictions were left mostly to the states, following a brief back-and-forth with then President Donald Trump.[28] As a matter of law the Supreme Court and Congress had little to say regarding COVID-19 as it first spread in the United States. The Court changed protocols regarding COVID-19 safety during oral arguments,[29] but did not make any definitive decisions on COVID-19 related shutdowns until late 2020. One of the initial cases struck down a New York state shutdown order, resulting in religious groups being allowed to hold services despite the pandemic.[30] At this point with little, and conflicting, federal guidance and decisions being left to the states, COVID-19 soon became a divisive issue around the country, however the insurance industry would remain firm in denying coverage and receiving backing from the courts.

Despite optimistic projections from the onset, COVID-19 only got worse, and restrictions were increasingly imposed throughout the country.[31] People soon began to accept the fact that COVID-19 was not a short-term situation, and that there was

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[27] Liptak, Kevin, Maegan Vazquez, Nick Valencia, and Jim Acosta. "Trump Says He Wants the Country 'Opened up and Just Raring to Go by Easter,' despite Health Experts' Warnings | CNN Politics." CNN. Cable News Network, March 25, 2020.
[28] Orr, Gabby, Jeremy White, and Nancy Cook. "Trump Tosses Coronavirus Shutdowns Back to the States." POLITICO, April 16, 2020.
[29] "COVID-19 Announcements." Covid-19 announcements, March 19, 2020.
[30] Liptak, Adam. "Splitting 5 to 4, Supreme Court Backs Religious Challenge to Cuomo's Virus Shutdown Order." The New York Times, November 26, 2020.
[31] "State-by-State Covid-19 Guidance: Resources for Covid-19 Restrictions and Rules by State." Resources for COVID-19 Restrictions and Rules by State | Husch Blackwell.

no clear end in sight. State and locally mandated business shutdowns were extended beyond their original deadlines, eventually lasting well into 2021. At this point businesses were going months without any source of income, and as a result claims for business income insurance only continued. In total during 2020, over 400,000 business closed as a whole, twice the normal amount per year.[32]

Denial of Business Interruption Coverage. Despite all the claims filed by businesses, insurers regularly denied coverage because the claims made did not meet the definition of covered losses described in the language of the business income policies. When these insuring contracts and agreements were originally made, the insurers paid close attention to the specific language and were careful to leave out any points of ambiguity. More specifically, they worked to exclude pandemics outright from coverage, given that they are potentially financially catastrophic for insurers. The main point of denial was that COVID-19 was not a "direct physical loss" to the business building or property that resulted in their shutdown. This qualifier is explicitly stated at the outset of the policy, and so its failure to be met by the consequences of COVID-19 shut-downs led to many policy claims being denied.

Other points of issue in this area were Civil Authority shutdowns, which also did not meet the scrutiny of insurers in these cases because they, too, are wrapped in a physical loss clause for their coverage to be triggered. Another method used by

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[32] Press, Wilfredo Lee/Associated. "Covid-19's Toll on U.S. Business? 200,000 Extra Closures in Pandemic's First Year." The Wall Street Journal. Dow Jones & Company, April 16, 2021.

business owners, and much less common, was the contingent business shutdown provision. Under this provision, a shutdown of an insured business resulting from reliance on another business are also covered. This claim held merit during COVID-19 because of the plethora of supply chain issues that resulted from the widespread business shutdowns.[33] Still, many businesses could not prove reliance on another for operations, and so these claims fell through.

To further complicate issues, many state insurance commissions did not back the policyholders during the initial wave of claims being made. After extensive review, it is readily apparent that many of these commissions simply released bulletins outlining the provisions in the policies, and how they likely did not apply to the claims made on the basis of COVID-19. In Idaho, for example, the bulletin discussed the coverage provisions and how they almost entirely excluded COVID-19 related overage.[34] These policies also discussed the duty of insurers when reviewing the claims and working in good faith throughout the claims review process.

Considerations. So how could a situation like this be insured against in the future? Private insurance would be unlikely to be able to handle such situations. The great size of the financial losses resulting from claims would prove difficult, if not impossible, for private insurers to cover. Government intervention is therefore likely necessary to cover such losses. It is also important to keep in mind that the private insurance industry is a business, not a welfare program. Private insurance

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[33] Harapko, Sean. "How Covid-19 Impacted Supply Chains and What Comes Next." EY. EY, January 6, 2023.
[34] "Bulletin No. 20-08 - Department of Insurance." Idaho Department of Insurance.

exists as a function of the financial losses the industry can bear through extensive financial planning. The inherent financial considerations of the insurance industry must be kept in mind when writing laws and regulations relating to the insurance industry. There would likely more damage to the economy and the people insurance serves if insurers are forced to cover these losses alone and without warning. Insurance contracts specifically write out these issues to maintain financial solvency.

Methodology

The objective of this research is to provide a proactive public policy proposal in response to issues that arose during the COVID-19 pandemic. Specifically, the research will work to resolve issues resulting from the extensive denial of claims by insurers resulting from government mandated business shutdowns during this period not being an included or covered event. The proactive nature of the proposal establishes a program prior to catastrophic events happening. The existence of such a program prior to the event occurring will allow for more timely and efficient administration of the program.

An extensive review of judicial records and court decisions were used in determining the rationale for court-backed denials of coverage. These judicial decisions provide context for how the court system will interpret disputes involving insurance contracts. The review also provides background for existing insurance law in the state of Ohio. Following the judicial component, an extensive review of legislative proposals was undertaken. These legislative actions include both existing programs and proposed programs relevant to the COVID-19 crisis. The culmination of the review was an extensive set of information used to establish the necessity of the proposal and the language used in it.

Judicial Methodology. Cases relating directly to COVID-19 business interruption claims in the state of Ohio were reviewed. A variety of claims were filed, and the court system's method of resolution included ending the case during the pleadings as well as sending a few cases to trial. The overwhelming majority of these cases provided no resolution method for businesses, necessitating the need for further review of the legislation used to remedy the issue.

Legislative Methodology. Legislation dating back to the Great Depression and New Deal Era, as well as relevant government backstop insurance programs, those using extensive government funding for insuring purposes, were reviewed and analyzed. The analysis process will identify essential principles of the reviewed legislation and inform the policy proposal this research makes. The specific programs analyzed include the Federal Deposit Insurance Corporation, the Federal Crop Insurance Corporation, the National Flood Insurance Program, and the Terrorism Risk Insurance Act. These programs created in the past will also help to guide the legality of the proposed legislation.

Throughout the United States a variety of proposals were created both at the state and at the federal government level specific to resolving the COVID-19 insurance crisis. Using the compendium of insurance policies compiled by the Verisk Institute,[35] state legislative proposals directly relating to business interruption insurance during the COVID-19 pandemic were reviewed. The policy proposals varied in scope and nature and will provide a basis for the proposal this research will make.

Economic Methodology. The economic analysis was conducted by looking at insurance industry financial information aggregated from 2019 through 2022. The data came from private company financial statements as well as through data

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[35] "Covid-19 Legislative and Regulatory Activities." Verisk.

reports published by major insurance commissions such as the National Association of Insurance Commissioners[36] and the Insurance Information Institute.[37] The focus of the economic analysis is to gain a full understanding of funding methods used in the commercial insurance industry. These financial data are important because they support the business operations of individual companies and the industry.

The economic analysis will also examine the relationship of the private insuring industry to the losses sustained during COVID-19. This analysis will help determine the necessity and scale of government intervention in the policy proposal. If intervention is required, analysis can also provide details as to the level of involvement the government would need to take. The specifics of the government's ability to finance the proposal are not analyzed, however government financing methods will be accounted for through the legislation review and considered in the final policy proposal.

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[36] "The National Association of Insurance Commissioners." National Association of Insurance Commissioners.
[37] "Insurance Information Institute." Insurance Information Institute.

Literature Review

The University of Pennsylvania COVID-19 Insurance Litigation Model. The University of Pennsylvania's (Penn) model[38] focused on the aggregate data of related cases and separated the court decisions by state and federal jurisdictions. The model makes an important distinction between policies with an explicit 'virus exclusion' against those that did not. Still, this difference in policy language reflected very little difference in the rate at which decisions were rendered in favor of the policyholder.

A general trend is apparent through this judicial review model that echoes the previously stated issues introduced which this research is intended to resolve. Regardless of the direction or approach taken by the businesses against the insurance companies, businesses were almost always denied in their attempts of seeking coverage under the related business interruption insurance.[39] Except for a few cases still outstanding, only California, Louisiana, Vermont, and Pennsylvania have issued rulings that a specific case has met the requirements to potentially be provided coverage.[40]

The nature of the denials of coverage are, as noted, overwhelmingly in favor of the insurers. Even more so, most of the cases brought to court are dismissed before trial. In the state courts *full dismissals with prejudice* resulted in nearly

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[38] "Covid Coverage Litigation Tracker." University of Pennsylvania.
[39] See Figure A in the Appendix
[40] Ibid

seventy percent of cases, totaling 160 out of 230 cases.[41] This distinction is important because a claim dismissed "with prejudice" are not eligible to be refiled by the plaintiff in the same court.[42]

Partial dismissals come to make up a very small portion of the overall cases tracked at the state level, accounting for twelve of the 230 cases.[43] This distinction remains important as well because the denial of the claim is based only on some of the facts of the case. In essence, the claim can continue forward with the resubmission of certain aspects of the claim as detailed in the dismissal motion reply. Forty-six cases still saw potential for the full case to move forward, as the motions to dismiss in these cases were denied. As little advance the state courts gave to these insurance claims in the states, the federal courts were ever more unforgiving. Bringing in a much larger number of cases, totaling 707, over ninety-four percent were dismissed in full.[44]

According to the university model, and as of the publication date, only three cases made it to trial, of which two found in favor of the insurer and one in favor of the policyholder. In *Baylor College of Medicine v. XL Insurance of America, Inc., et al.*, the state district court heard the case in Harris County, Texas.[45] The school had paid all premiums as necessary, and the court paid particular attention to the language of the policy. The court noted that payment would be made for "limitations

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[41] Ibid
[42] "Prejudice." Legal Information Institute.
[43] "Covid Coverage Litigation Tracker." University of Pennsylvania.
[44] Ibid
[45] Baylor College of Medicine v. XL Insurance America Inc., et al. (Texas 2022)

of ingress and egress," and "all risks unless expressly excluded."[46] As a part of this the decision notes that virus coverage was not specifically excluded, and that the policy may be interpreted to "occur under a variety of circumstances."[47] This specific interpretation of the policy, as the court notes, would allow for the inclusion of "covered causes of loss threatens or renders property unusable or unsuitable for its intended purpose."[48]

The court ultimately found that COVID-19 and the physical presence of the disease did cause physical loss, damage, and destruction to the property. Further, the Baylor College of Medicine will continue to endure this direct physical loss through limits on ingress and egress. These damages resulted from the virus's physical presence and the state orders forcing closure and limiting business operations.[49] This case in important for its new interpretation of COVID-19 as a covered peril, and the potential for this ruling to influence other judges around the country.

There were also fourteen instances in which motion for summary judgement was, and only in part, granted to the policyholder. Motion for summary judgement being granted to the plaintiff who brings the case shows the court found merit in their case based on the facts of the case and law applicable to the case. In such cases

[46] Ibid
[47] Ibid
[48] Ibid
[49] Ibid

the court interpreted some portion of the insuring contract in favor of the policyholder.

Existing Insurance Law in the State of Ohio. During analysis of the cases heard during the COVID-19 pandemic, the United State 6th Circuit Court of Appeals noted three important cases governing insurance law in the state of Ohio, *Alexander v. Buckeye Pipe Line* (1978)[50], *Lager v. Miller-Gonzalez* (2008)[51], and *Laboy v. Grange Indem. Ins. Co.* (2015).[52] *Alexander v Buckeye Pipe Line* states that when contractual language is clear the court is to look at the language of the contract itself to determine the intent of the parties to the contract. Outside influences in such cases are not to be included in analysis. *Lager v Gonzalez* definitively states that insurance policies are contracts and that disputes between the insurer and insureds are to be settled as questions of law. In *Laboy v. Grange*, the court settled that the terms of the contract are to be interpreted using their ordinary meaning. This will also generally mean that ambiguity in insurance contracts will give favor to the insureds given the much greater influence insurance companies have in negotiating these agreements.

Motions for Summary Judgement Granted in favor of Insurers. The majority of claims filed by insureds seeking coverage were denied. The result of this analysis is a determination of patterns and concepts present in the decisions that provide a

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[50] *Alexander v. Buckeye Pipe Line Co.*, 53 Ohio St. 2d 241, 374 N.E.2d 146 (Ohio 1978)
[51] *Lager v. Miller-Gonzalez*, 120 Ohio St. 3d 47, 2008 Ohio 4838, 896 N.E.2d 666 (Ohio 2008)
[52] *Laboy v. Grange Indem. Ins. Co.*, 2014 Ohio 1516 (Ohio Ct. App. 2014)

basis for why the claim denial was upheld. Cases that resulted in this decision in the state of Ohio were analyzed.

An important case that would come to be cited by courts throughout the insurance litigation fallout from COVID-19 was *Santo's Italian Café LLC. V. Acuity Ins. Co.,*[53] heard before the United States Court of Appeals 6th Circuit in September 2021. Santo's filed suit against their insurer, Acuity, because they were denied coverage for losses incurred during the pandemic shutdowns ordered during the state of emergency declared by Ohio Governor Mike DeWine in 2020. The policy language specifically states coverage will be provided for "direct physical loss of or damage to covered property." Under the "additional coverages" section of the policy it is outlined that coverage will also be provided for lost income "due to the necessary suspension of operations resulting from direct physical loss or damage.[54]

This language uses one of the important qualifiers used in many of these types of cases, that being direct physical loss or damage. The court here finds that the shutdown order required a cessation in business operations and the business lost income as a result. However, the question became does the shutdown order itself constitute direct physical loss or damage to the property? The federal district court found that the policy did not cover "lost income attributable to the pandemic and any shut-down orders," when using the "common and ordinary" meaning of the language as prescribed by *Laboy.* This decision creates an important precedent that

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[53] *Santo's Italian Café LLC v. Acuity Ins. Co.*, 508 F. Supp. 3d 186 (Ohio 2020)
[54] *Ibid*

can be taken by other courts, that being a government mandated pandemic related shutdown and the ensuing business income losses are not covered by commercial insurance policies using the physical loss or damage language.

In *Nail Nook Inc. v. Hiscox Insurance Company, Inc. et al,*[55] the plaintiffs, a nail salon, sought coverage from their insurer, the defendant, for income lost due to the shutdowns ordered during the state of emergency declared by Governor Mike DeWine in 2020. The plaintiffs alleged in its complaint that its physical property was damaged by COVID-19, and so they were to receive coverage as written in the policy. The defendant Hiscox denied this claim, on the basis that the policy contained a "virus or bacteria" exclusion.

Arguing the language of the exclusion was ambiguous, *Nail Nook* brought their claim to court. The trial court found that "[T]he clear and unambiguous virus exclusion contained in the insurance policy issued by Hiscox to Nail Nook specifically excluded coverage for any loss or damage caused directly or indirectly by a virus, such as the coronavirus (SARS-CoV-2)." Nail Nook then appealed the case.

The appellate court affirmed the finding of the trial court on multiple grounds. The appeals court first focused on the policy language regarding physical loss and damage to property. As stated in the policy under scrutiny in this case, coverage is only provided for business interruption when "direct physical loss of or damage to covered property caused a suspension of business operations." The court found that no physical loss or damage took place, and further noted that Nail Nook

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[55] *Nail Nook, Inc. v. Hiscox Ins. Co., Inc.,* 2021-Ohio-4211.

never alleged such damage had happened. Thus, a second reason for denying coverage was now to be enforced by the courts, COVID-19 itself did not cause physical loss or damage to covered property. Even if it did, it would likely be excluded outright by the language of the policy.

In *Sanzo Enterprises, LLC v. Erie Indemnity Company* (2020)[56] the court heard a dispute concerning an "all risks" policy held by Sanzo. Sanzo, knowing about the previous decisions, went a different route to try and prove physical damage took place to their business, and therefore should have their losses covered. According to the plaintiff, the damages in this case are physical because "employees and customers were unable to be physically present on the property," and there was a "physical depravation" imposed on *Sanzo*.[57] The result is that the shutdowns caused the value of the business property to be reduced or eliminated. The trial court found that these arguments were moot given no loss of physical access to the store was created. Instead, it was the conduct of business that was prevented. Moreover, no "material or tangible harm" resulted from these orders either.[58]

In addition to the physical loss be examined, the trial court also considered the civil authority portion of the insuring agreement. Here, as was previously found, the court wrote that a "tangible harm" to the property needed to have occurred for coverage to be required. The court also details that the orders of the civil authority were issued not because of any physical issues with the business property or

[56] *Sanzo Ents., L.L.C. v. Erie Ins. Exchange*, 2021-Ohio-4268.
[57] Ibid
[58] Ibid

location which prevented access. Instead, it was an outside factor that still did not cause any physical loss or damage. The appeals court affirmed the trial court's decision.

The final major decision of this type came from the Ohio State Supreme Court in *Neuro-Communication Services, INC. v. Cincinnati Insurance Co. et al* (2022).[59] Similar to the previously analyzed cases, business operations of *Neuro-Communications* were forced to cease because of the pandemic shutdowns issued by Governor Mike DeWine in 2020. The plaintiff held an "all risks" commercial insurance policy and filed suit after being denied coverage for the lost income incurred during the relevant shutdowns.

The Ohio Supreme Court first looked at the term "physical" in determining the issues at hand. *Neuro-Communications* argued that physical loss has an objective existence, and the term can mean deprivation or no longer having something.[60] This legal strategy further attempted to expand the physical loss or damage standard as had been set by previous cases which favored the insurer. The court ultimately sided with the insurer on this issue stating that the policy clearly defined differences between losses to property that are physical and those that are nonphysical.[61] Given that the court found this distinction to exist the further denial of coverage is justified.

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[59] *Neuro-Commc'n Servs. v. Cincinnati Ins. Co.*, 2021 Ohio 2208 (Ohio 2021)
[60] Ibid
[61] Ibid

Neuro-Communications also referred to new policies issued by the Insurer that are more explicit in their exclusion of viruses from coverage. Their argument was that since the insurer went out of their way to exclude such losses that it can be inferred they did not adequately exclude them from existing policies, so the losses should be covered. The court did not rule on what it called "ambiguous" language because it is a consideration not allowed by law to be examined because other policies are not part of the contract in dispute. The conclusion reached by the court is that, in also being consistent with rulings across all jurisdictions, the policy did not cover business income losses attributable to COVID-19.

The findings of the judicial branch in these cases across the state of Ohio do not construe interpretation of insurance policy language to include coverage for COVID-19 government mandated shutdowns. The insurance companies appear to have been proactive and particular in their policy language to prevent payouts for coverage from being offered in such cases. Having the backing of the courts provided a major advantage for insurance companies as they navigated the uncertainty all businesses faced during the pandemic shutdowns. This judicial review and the major concepts underscoring the decisions of the judiciary will serve as a basis for the policy proposal this research creates.

Legislation Review. Catastrophic insurance losses are not a novel subject of the American political system. Insurance has evolved over time as a fundamental financial obligation, as well as a safety net, for both citizens and businesses. The aforementioned principles of insurance provide informal guidelines for insurers to follow when issuing policies, but a natural aspect of life are the catastrophic events that cannot be insured in an economically sensible way. It is in the context of such situations that the government will often act and provide remedies in which private insurance companies would otherwise be unwilling or unable to support.

The policies proposed during the COVID-19 Pandemic were not drastic policy innovations in and of themselves; many of them found their basis in precedent established by prior legislation. To understand the most essential aspects of such policy proposals, this research has investigated other legislation that provides similar state-sponsored insuring measures to those programs introduced during COVID-19.

Origins of Government Insurance Programs. Throughout the history of the United States, government backed insurance has been a common method of insuring against risk. The first government-backed insurance programs were created by legislation passed during the Great Depression and World War II era under the Franklin D. Roosevelt Administration. These legislative actions were responses to the social conditions of the time and the many issues plaguing the working population. Perhaps the most well-known is the Social Security Act of 1935 which provided government backed and regulated unemployment insurance and retirement income. The unemployment insurance was a system operated jointly by the state and federal government.[62] Later amendments would provide coverage for "OASDI"- Old Age, Survivorship, and Disability Income.

[62] 42 U.S. Code § 501

Federal Deposit Insurance Corporation. Also created as a part of the New Deal and Great Depression assistance programs, the Federal Deposit Insurance Corporation (FDIC) was created to provide a government backstop for private holdings in federally regulated banks. A major rationale for the creation of the FDIC was also to re-instill consumer confidence in the banking system and to help deter bank-runs that resulted from the 1929 financial crisis. The FDIC was created as a function of the passage of the Banking Act of 1933 (Glass-Steagall Act). The FDIC is granted the authority of managing and liquidating banks closed under the authority of the Comptroller of the Currency in addition to ensuring the safety of deposits of covered banks.[63]

The FDIC operates as a self-funded corporation using premiums paid by member banks to fund operations and insure payments. Premiums paid by the member banks are determined by the respective risk relative to other members of the FDIC and are given individual ratings. If a bank were to fail, the premiums paid into the FDIC cover a deposit or account amount specified by the FDIC, which has moved from $2,500 at the inception of the Banking Act of 1933 to modern day reforms protecting $250,000 in deposits.[64] It is also important to note that only "non-risky" deposits and investments are protected by the FDIC. Checking

[63] Banking Act of 1933 (Glass-Steagall Act), Law 73-66

[64] Ibid

accounts, savings accounts, and time deposits form the most commonly held types of insured deposits.

Federal Crop Insurance Corporation. Created in 1938, the Federal Crop Insurance Corporation (FCIC) was one of the first government insurance backstops for commodities, acting as a largely experimental program.[65] Over time the program grew in scope and became a much larger and greatly depended on government program for farmers. The program operates as a government subsidy for coverage provided by insurers to farmers under contracts that meet FCIC standards.[66]

Extensive reform was undertaken through the Federal Crop Insurance Reform Act of 1994. The 1994 Act created an extensive series of new requirements and technicalities for the program, and of specific interest to this research is the created "Additional Coverages" section devoted to "providing a level of coverage greater than the level available under catastrophic risk protection."[67] The revisions to the program allow for the FCIC to make payments to insureds that would not be typically made if conditions require the "producer unable, because of drought, flood, or other natural disaster (as determined by the Secretary), to plant other crops for harvest on the acreage for the crop year."[68] The program does have eligibility requirements, as well as provisions that require fees be paid by both those seeking

[65] "History of the Crop Insurance Program." United States Department of Agriculture Risk Management Agency.
[66] Ibid
[67] Federal Crop Insurance Act of 1994 Section 102
[68] Ibid

insurance as well as by the insurance providers.[69] Of specific note is that insurers are not required to share in the losses of the industry at all. The extent of liability for insurance carriers appears limited to their annual obligation to enroll in the program, the remaining "catastrophic" amount of the payment will be made by the FCIC.

National Flood Insurance Program. With the advent of greater government assistance programs came the National Flood Insurance Program (NFIP), which was created, in part, to "sharing the risk of flood losses… which can complement and encourage preventive and protective measures.[70]" The legislation writes that "large-scale" participation by the federal government alongside the administrative works of private industry can create an operable and effective program.

The flood insurance program is administered through the Federal Emergency Management Agency for losses to real and personal property resulting from a flood within the United States. The program also makes explicit reference to the rather narrow eligibility requirements to qualify for the program and makes clear its directives. In general, those properties eligible for coverage must be in an area that is continually subject to flood risk and have been impacted by flooding in the past.

The financing method of NFIP is through shared losses among insurers and other risk management methods. Specifically, financial limits are imposed on the payment amounts afforded to various classes of those who are covered under the

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[69] Ibid

[70] United State Code Title 42—The Public Health and Welfare Chapter 50—National Flood Insurance

policy. A single-family dwelling is limited to $35,000 in coverage, and multi-family units are increased to $100,000, as well as $10,000 in coverage for personal items. On the business side, $100,000 of coverage is provided per occupant business in addition to $100,000 as a base amount.

The NFIP is funded through aggregate funding methods further outlined in the act. First, the Director of the NFIP has limits on the monetary amounts they can make as payments and monetary obligations. Without explicit consent of the president, the program may not exceed $500 Million, and is capped outright at $1 Billion. The payments are made from a Treasury fund created by the Act which is funded from payments such as premiums and other government methods. The payment of claims is not prescribed in the statute and is to be disseminated by regulation and discretion of the Director.

Terrorism Risk Insurance Act. Most relevant to this research is the Terrorism Risk Insurance Act (TRIA), passed in 2002 because of the infamous September 11, 2001, Terrorist Attacks (9/11 Attacks). Utilizing concepts from legislation previously discussed in the legislation review, as well as the relatively recent nature of the Act itself, TRIA can provide an essential informative basis for the conduct of government backstop insuring methods used today.

TRIA was created, in part, because Congress found necessity in "the ability of businesses and individuals to obtain property and casualty insurance at reasonable and predictable prices, in order to spread the risk of both routine and catastrophic loss, is critical to economic growth.[71]" Congress explicitly states in the TRIA language their concern with economic stability following catastrophic events. The same focus re-emerged during the COVID-19 pandemic. The legislation also attempts to set a precedent by establishing the importance of necessary procedures for accurate statistical and financial information moving forward after a catastrophic event occurs. Finally, the legislation directly addresses the necessity of government assistance in paying for the large losses incurred from such events.

The coverage triggers are important aspects of this policy because they govern when large-scale losses may be shared jointly and with government assistance. The determination of a relevant act must be certified by the Secretary of the Treasury, Homeland Security, and U.S Attorney General. The losses must also be in excess of certain amounts specified in the policy language.

Any insurer that is defined in the program is required to participate in it and abide by the necessary regulations. Involvement in the program requires a premium payment from insureds who want to be enrolled in the program, which also helps to offset the potentially large dollar amount of claims to be paid. Claims are paid under the program when an insured files a claim with their private insurer, which in turn files the claim with the government seeking the federal share of the loss payment. Once the insurance industry pays an amount of the loss specified by the legislation, the government's obligation to begin making payments then becomes active. Insurers can also recover losses once the threshold is made through a

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[71] Terrorism Risk Insurance Act, Public Law 107–297—Nov. 26, 2002

surcharge, not to exceed 3%, to policyholder premiums. The government is responsible for paying 90% of the amount of losses exceeding the deductible amount of relevant policies during a policy period. At the conclusion of a policy period the losses paid will be shared on a pro-rata basis among eligible insurers.

COVID-19 Specific Policy Proposals. Before building a proactive proposal to respond to similar issues in the future, an intense examination of the legislative actions that took place during the COVID-19 pandemic is necessary. From these legislative proposals many different concepts for resolving the crisis can be examined, and the positive and negatives of various actions can be considered when creating a new proposal. The legislation proposed during this time is diverse and offered multiple methods for resolving the crisis as it was happening.

The legislation review revealed a few common types of proposals that can be grouped accordingly.[72] The most common was a policy that involved insurers providing coverage for specified claims related to COVID-19. This coverage method was entirely retroactive, being that the new programs were created after the pandemic crisis had taken place. Many states also required insurers to participate in the program. Other methods include financial assistance to insurers to cover cases related to COVID-19, with varying degrees of voluntary and required actions on the part of the insurers. This research will now critically examine each of the legislative proposals from different state and federal jurisdictions, grouped into the aforementioned categories.

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[72] See Figure B of the Appendix

California. In California there was a proposed COVID-19 related legislative action through the proposed Assembly Bill 743.[73] Here, the bill created "specified rebuttable presumptions affecting the burden of proof in a case in which the insured alleges that business interruption was due to COVID-19."[74] The bill relies upon the use of a "rebuttable presumption," the concept that a particular rule of law that may be inferred from the existence of a given set of facts and that is conclusive absent contrary evidence.[75] The burden of denying a claim now falls heavily on the insurer, and this bill makes the denial of coverage based on COVID-19 essentially impossible.

Under this proposal any area where COVID-19 could have reasonably been or moved onto and off of the property by a third party are much harder to deny. The coverage under a policy is to be applied if COVID-19 was in a geographic area in which civil authority shutdowns applied. Specific language also provides that COVID-19 cannot be construed to be a "pollutant or contaminant" as would otherwise be excluded in a policy. In essence, this policy creates a new requirement for insurers to pay COVID-19 related claims. This proposed legislation would take effect in the case the governor of the state declared a state of emergency.

Illinois. Introduced as House Bill 3166,[76] there was a similar proposal to that of California taken in Illinois. The proposal amended the existing Illinois insurance

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[73] California AB 743
[74] Ibid
[75] "Rebuttable Presumption." Legal Information Institute.
[76] Illinois HB 3166

code to allow inclusion for coverage of loss, use, and occupancy of a business resulting from a public health emergency or disaster. Although the actual text of the bill is relatively short, there is a lot of detail included which greatly expands the power of the insured to demand coverage. This also creates ambiguous language for the courts to interpret, as subject to the language determined by the executive and legislative branch concerning a pandemic. This program also has a proactive element, as it does not explicitly mention COVID-19 and had no definitive end date.

Legislation from Illinois in Senate Bill 2135, and more specifically Article 25, is one of the few reviewed actions that was signed into law. The bill passed both houses and was signed by Governor J.B. Pritzker into law. Attached as a part of the "Government Emergency Administration Act," which was passed "to provide government with the tools that it needs to continue to serve the People of the State of Illinois and to better respond to the statewide public health emergency caused by the outbreak of COVID-19."[77]

The article covering COVID-19 and its relation to insurance creates a task force to study business interruption policies. More specifically, the task force was created to study the impact of COVID-19 on businesses and the need for changes to business interruption policies. The bill was to run from the inception of the insurance policy through the end of 2021, by which time it was assumed COVID-19 would have greatly lessened in its impact on the closure of businesses. Although not a substantive change to the insurance code of Illinois as proposed elsewhere, the

[77] Illinois SB 2135

creation of a task force allows for the possibility of establishing proactive measures for pandemic related issues in the future.

Louisiana. In Louisiana Senate Bill 477 used an approach which focused on creating a more encompassing business interruption policy.[78] The text provides that any policy insuring against loss or damage to property that includes the loss of use and occupancy to be construed to include coverage for business interruption due to the threat of COVID-19.[79] This bill specifically defines that it provides coverage retroactively to March 11, 2020, and is applied to those losses incurred during the statewide declaration of a public health emergency.

Also a part of the proposed legislation was a requirement that insurers issue a list of coverage exclusions for all policies issued during 2021 and thereafter. This method creates more transparency for business owners as to what is covered (or not) and will likely be used to avoid future litigation expenses as the insured will better understand their situation, and a court of law can move more swiftly. This agreement must then be signed by both parties and becomes part of the insurance contract.

Maine. In Maine the legislative proposal explored prohibitions on certain actions the insurers could undertake as it pertained to COVID-19. LD 694.[80] concerned every insurer "authorized to do business in the state with a policy

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[78] Louisiana SB 477
[79] Ibid
[80] Main LD 694

insuring against property damage."[81] In essence, any commercial property insurer would have been subject to increased policy coverages. Here, the aforementioned insurers were not allowed to "prevent coverage from interruption or loss of occupancy as a result of an officially declared pandemic, exclude coverage for loss of occupancy/interruption to operations resulting from COVID-19, or deny any claim for coverage as a result of COVID-19."[82] The open ended language of the proposal ultimately makes the burden of proof fall on the insurer, as "COVID-19" is not defined specifically. For example, "COVID-19" could be its physical presence on the property, the effect of a government-mandated "COVID-19" shutdown, among many others.

Michigan. In Michigan legislation was introduced that would have required any insurer providing coverage for business interruption to also include coverage for COVID-19.[83] More specifically, it must indemnify the insured, subject to the limits under the policy, for any loss of business or business interruption for the duration of the declaration of state of emergency."[84]

New Jersey. The legislature made a wide range of proposals that varied in scope, including Bill A1629[85] and Bill S318.[86] Among these were proposals that allowing insurers to attach riders allowing for COVID-19 coverage to be purchased,

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[81] Ibid
[82] Ibid
[83] Michigan HB 5739
[84] Ibid
[85] New Jersey Bill A1629
[86] New Jersey Bill S318

as well as a duty of the insurer to disclose whether COVID-19 was covered under the policy. Legislation also established a commission to study losses and compile them for statistical use.

Assemblyman Gregory P. McGuckin introduced a proposal for the "just compensation to businesses for losses due to the emergency closures." Bill A1629 would have created a program allowing for businesses forced to shut down an option to seek compensation from the state. The bill states that the affected business "may by action compel" the state to pay just compensation. This program is very different from all the others proposed as it rests responsibility for payment solely on the state.

One of the largest COVID-19 insuring proposals came from New Jersey Assemblywoman Angela V. McKnight. The proposal created a COVID-19 reinsurance program to offset losses of individual insurers paying for claims that would otherwise not be covered. The program would not be enacted unless a $75 Million threshold was met and provided for a maximum aggregate of $500 Million. This program is based on the requirement that insurers licensed in the state must provide a rider allowing insurers to purchase COVID-19 coverage. Losses would be paid on a pro-rata by both the insurance commission and eligible insurers in the program. The bill was sent to committee and was not reviewed any further, resulting in the end of the bill entirely.

New York. New York entertained a series of legislative proposals, all aligned with different methods of resolving the COVID-19 business crisis. The first is

AO1937, which required certain perils to be covered under business interruption insurance during COVID-19. Among the language is the stipulation that policies shall be construed to include, among covered perils, that for business interruption during a declared state of emergency due to COVID-19.[87] Another similar proposal, A10327, requires certain perils to be covered under business interruption policies issued to certain human services and community health providers due to COVID-19.[88] The final major action not introduced into law was A11147, which, similar to earlier proposals, involves a study and report on the issues created by COVID-19. Here, the department of financial services was to study and report on the adequacy and affordability of bodily injury coverage for pandemics, viruses, and more.

The bill enacted is S8178, which requires certain COVID-19 related perils to be covered under business interruption policies. Important to this distinction is that it only applies to those policy holders which employ less than 100 people, creating an emphasis on protecting small business less likely to be able to protect themselves financially during this time.

Ohio. Another proposal that saw a retroactive change to the specified requirements of business income losses came in Ohio's H.B. 589. Within the specific language of the bill, every policy of insurance against loss or damage to property, including loss of occupancy, in the state must include coverage for viruses during

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[87] New York Assembly Bill A1937
[88] New York Assembly Bill A10327

the state of emergency declared by the governor.[89] The policy applies to all businesses covered in the state employing less than 100 "eligible" employees.

An essential aspect of this policy is the reimbursement provision the policy creates. As outlined in Division E of Section 1, any insurer that indemnifies an insured who has filed a claim pursuant to the act may apply to the Superintendent of Insurance for relief and reimbursement."[90] Here, there is important distinction from that of other forms of legislation, that being the protectionary methods taken for the insurers. Instead of the insurance companies being forced to retroactively pay for losses they explicitly wrote out of their coverage plans, forms of repayment by the state became available.

The losses of business interruption insurance, however, were not solely to be backed by the state. Once payments are complete, all insurers engaged in specified areas of business will be charged a relative amount based on their risks within the state for the given period.[91] Although the state promises to provide relief soon after a claim is made, the insurers ultimately bear the price of the claims as they share in a proportion of all business losses resulting from the pandemic.

United States Congress. Many different proposals emerged during the pandemic, and with all proposals throughout the country, there was intense partisan debate concerning the actions to be taken. The consensus, however, was that some form of relief needed to be offered on non-partisan lines. During the final

[89] Ohio HB 589
[90] Ibid
[91] Ibid

year of the Trump Administration in 2020, then President Trump authorized the creation of a COVID-19 task force under the direction of then Secretary of Health and Human Services, Alex Azar.

A Democrat controlled House and Republican Controlled Senate, during the Trump Administration, passed a series of spending packages as well as the CARES Act.[92] In addition, the Paycheck Program and Healthcare Enhancement Act[93] and Consolidated Appropriations Act[94] was passed later in the year, offering expanded social and stimulus programs in the United States.. With Democrats controlling both houses, one of President Biden's first initiatives was passage of the American Rescue Plan in 2021.

The main bill directly tied to COVID-19, Introduced as H.R. 7394, came in the form of a proposal in June of 2020 from Representative Mike Thompson, a Democrat from California's 5th District. The proposal outlines financial assistance from the treasury department to insurers paying COVID-19 expenses. This proposal is also unique because insurer participation is voluntary, as opposed to most other programs. With the intention to keep business in operation, coverage is to be provided for claims made "during a civil authority shutdown as a result of COVID-19, in which the insurance policy expressly excludes coverage for a virus."[95]

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[92] CARES Act, Public Law 116–136—Mar. 27, 2020
[93] Paycheck Program and Healthcare Enhancement Act, United States Congress HR 266, Public Law 116-139
[94] Consolidated Appropriations Act, United States Congress HR 2617, Public Law 117-328
[95] United States Congress HR 7394

Introduced in April of 2020, the Never Again Small Business Protection Act of 2020 was brought forth by Representative Brian Fitzpatrick, a Republican from Pennsylvania's 1st District. Instead of creating a retroactive program relating directly to COVID-19, this legislation proposed a new proactive program at the federal level. This bill would have required insurers offering business interruption coverage to provide additional coverage for those losses resulting from government ordered closure from a national emergency.[96] This bill also has an interesting stipulation that this bill would not apply to any business revoking health care coverage to its employees because of the emergency.[97]

Most important to this bill is that although a new coverage requirement would now exist, it would only go into effect contingent on Treasury Department backing of a federal backstop for such losses.[98] Acknowledging the multitudes of inherent risks and the catastrophic nature of such a program, the idea that insurers may not be entirely able to handle the losses by themselves is incorporated into the bill. This brings forth further questions regarding the solvency of such a program.

A bill titled the Pandemic Risk Insurance Act of 2020 came in May of 2020 from Representative Carolyn Maloney, Democrat from New York. This proposal's intent was to create a reinsurance program within the Treasury department, but in a different form than much of the legislation reviewed up to this point, and with a proactive intention.

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[96] Never Again Small Business Protection Act, United States Congress HR 6497
[97] Ibid
[98] Ibid

The program was created to be "generally available to insurers if they incur losses as a result of coverage related to pandemics and outbreaks of disease."[99] In order to be eligible for the reinsurance program, the bill specifies that insurers would be required to offer coverage for public health emergencies related to the pandemic declared on or after January of 2021. The Treasury's reinsuring agency would be triggered if losses from the public emergency exceeded $250 Million, and suggests a series of provisions, such as financial requirements from insurers, to be involved in the program.

Economic Analysis. The entire insurance industry exists as a function of private financing through insurance premiums. Insurance is intended to provide safety for risk in a variety of different ways. As with all business, the economic implications of the insurance industry stand as some of the most important factors in determining the nature of the industry. As covered previously in the principles of insurance, financing the insurance industry relies on calculated statistical data to determine, within a range, the expected monetary losses for a given peril. These data serve as one of the primary factors in determining the solvency of insuring a specific peril, region, or other such factor and aids in setting the premiums to be paid by insureds. This literature review will analyze financial data from the largest firms in the commercial insurance industry to determine the feasibility of privately insuring business income losses resulting from COVID-19.

[99] United States Congress HR 7011

Within the commercial insurance sector in the United States the Insurance Information Institute (I.I.I.) reports that nearly $360 billion in premiums were written in 2021.[100] Chubb Ltd., Travelers Co. Inc., and Liberty Mutual were among the largest writers of insurance premiums in the commercial lines industry. Over time commercial insurance losses in the United States have increased from $137.9 billion in 2017 to $184.9 billion in 2021.[101] These figures represent the amount to be paid for claims filed by policyholders for losses in the given year. This data includes all losses paid by the commercial insurers and are not tied to a specific cause of loss. Commercial insurance losses cover a variety of different causes of loss ranging from damages to business buildings, personal business property, shutdowns, and many others. The data regarding claims paid specifically for shutdown related losses are not available as only aggregate data of losses are made available.

Analysis of individual insurers can provide insight into the necessary profit margins needed to continue running a company and its insurance lines in the commercial insurance industry. This research analyzes Chubb Ltd., the largest commercial insurer by premiums written, and its financial statements for 2021. The company wrote a total of $46.78 billion in premiums and amassed a net income of $8.5 billion. In North America, Chubb Ltd. wrote $16.4 billion in commercial property and casualty premiums and received policyholder payment for $15.461 billion of those written. The company valued their losses from claim payment at

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[100] "Facts + Statistics: Commercial Lines." Insurance Information Institute.
[101] Ibid

$10.015 billion, totaling a net income for the North American Commercial business segment of $4.36 billion. This creates a loss and expense ratio totaling 64.8% of all premiums written in the segment. This ratio details the percentage of premiums paid that are converted into loss payments, and the lower the ratio, the greater the insuring net income. The overall result is nearly $5 billion in premiums that were not used to cover insuring losses. Other figures of note are the $1.052 billion in administrative expenses and just over $2 billion in policy acquisitions costs.[102]

It is also important to look at state-by-state figures of commercial insurance losses and payments before finalizing the analysis. The most recent data at the time of publishing is from 2019. Within the state of Ohio commercial losses incurred totaled over $4.2 Billion.[103, 104] Before continuing with analysis it is important that this research notes a discrepancy in the data. The aggregate commercial losses by state reported by the I.I.I. totaled $178.6 Billion in 2019. However, this number varies from the United States aggregated total detailed in another portion of the I.I.I.'s literature, which valued United States commercial insurance incurred losses at $155 Billion.[105] This discrepancy is likely to be the result of differences in footnotes the I.I.I. reports, which involves differences in reinsurance transactions, which are beyond the scope of this research.

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[102] "Chubb, Ltd. 2021 Financial Report." Chubb, Ltd.
[103] "Incurred Losses by State." Insurance Information Institute, 2021.
[104] See Figure C of the Appendix
[105] See Figure D of the Appendix

When analyzing business income losses during COVID-19 it becomes readily apparent the insurance industry cannot bear the totality of losses independently. According to findings of the National Association of Insurance Commissioners, business interruption losses attributable to COVID-19 may extend north of $300 Billion per month just in the small business sector. Another estimate from the Organisation for Economic Co-Operation and Development places the aggregate losses at over during this same monthly period at over $600 Billion.[106] To date these findings remain the two main sources for determining business loss amounts.

[106] "Responding to the COVID-19 and Pandemic Protection Gap in Insurance." OECD, March 16, 2021.

Results

Research into the effects of the COVID-19 pandemic shutdowns on businesses shows many different areas that need to be addressed. The perspective of the insurers shows a relatively successful deflection of responsibility for business losses incurred during the shutdowns. Judicial decision review shows a continual backing of the insurance industry through the industry's proactive planning and policy writing for such catastrophic events. The review of legislative proposals shows that government generally did not have policies in place at the onset of COVID to protect businesses from government mandated shutdowns. Analysis of the financial structure of the insurance industry also showed an inability for the private insurance industry to carry catastrophic losses alone, necessitating further government involvement serving as a backstop in an insuring program.

Analysis of judicial decisions reveals that court decisions favored insurance companies and honored the language of insuring contracts. The courts showed little inclination to interpret insurance contracts to cover business income losses due to pandemic related government mandated shutdowns. Insurance companies were careful to provide protections from potentially catastrophic events such as COVID-19, and the courts sided with them. Additionally, the courts avoided the creation of new law to extend the rights of the insureds even during times of public emergency. The result of the judicial analysis is a strong support of literal reading of the insurance contracts and not extending the provisions therein.

Regarding procedure, government has generally agreed that administration of insurance programs is best left to private industry. Each year millions of people and businesses conduct their insurance transactions through private insurers, and offering these government-backed programs alongside existing insurance plans on the market is beneficial in making consumers aware of the program and in administering the program. Private insurance companies by their nature specialize in the administration of insurance activities and are likely to have greater expertise and efficiency of methods has been long recognized.

The legality of such programs has been supported by the long-standing existence of such programs and their ability to pass the scrutiny of the federal court system. Some of the analyzed programs will be reaching an age of 100 years over the next decade, and others will be approaching over fifty years as active government programs. This research did not explicitly analyze court cases involving the existing programs, however their continued operation in the present day supports the legality of their existence.

The government-backed insurance programs reported by this research, and the modern-day methods proposed to deal specifically with the COVID-19 crisis, provided a basis to expand these ideas more generally to states of emergency with potentially catastrophic effects. The reviewed legislative proposals revealed an intention to protect businesses, especially small businesses, which can benefit the economy and individual well-being.[107]

[107] See Figure E of the Appendix

Through the review of current government-backed insurance programs a determination can be reached that a private-public partnership is ideal for the response to COIVD-19 for several reasons. First, the existing programs, such as the FDIC, NFIP, and TRIA, create a precedent both for the administration, funding, and legality of government-backed insuring methods for events catastrophic in nature.

The economic analysis allows for a conclusion to be drawn that while insurers do make heavy profits for shareholders, they are nowhere near equipped for even a fraction of the demand posed by losses presented by COVID-19. If any reasonable programs are to exist protecting businesses from similar catastrophic losses such as COVID-19, a different financial arrangement needs to be made to support all interested parties. The form of restructuring necessary would likely require government intervention, as this research proposes.

The insuring method this research will propose exists at the state level, and specifically for the State of Ohio. The proposal will be financed through three primary methods: 1) premium payments from policyholders wishing to opt in to public emergency coverage, 2) a pro-rata share of insurer losses, and 3) government subsidy of insurance loss payments. The first $100,000,000 of losses will be funded by private insurers through the opt-in premiums, the price of which is set by the state insurance commissioner. At the end of the year the first $100,000,000 of losses will be reimbursed to the insurers on a pro-rata basis using funds from the premiums paid. The commissioner will also take 10% of the premium amount for administrative purposes. Above this amount the government and private industry will share jointly in the losses. The government will pay for 90% of losses above the threshold and the remaining 10% will be self-funded by enrolled insurers on a pro-rata basis.[108] Payments will be made to insureds using established formulas present in the commercial insuring contract.[109]

Government intervention methods may take many different forms, of which this research believes a private-public partnership is most effective. Mandatory enrollment of private commercial insurance providers in the plan is a necessary attribute to ensure a large enough portion of the insurance industry is involved and the plan is made available to policyholders. Mandatory enrollment also creates financing methods that can be utilized in the event the program needs to be used. The result is a program which is economically feasible, but most importantly is proactive and contains guidelines for the administration of the program in the event it must be utilized.

A final important aspect of the program is the ability of the commissioner to take regulatory actions not otherwise prescribed in the policy. Regulations including, but not limited to, establishment of fund reserves, premium payments relative to insurer share in the program, business qualification requirements, and proposed changes to the threshold value, can be established by the commissioner.

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[108] See Figure F of the Appendix
[109] See Figure G of the Appendix

Catastrophic Business Interruption Insurance Act of 2023

A Bill to require insurance payments be made by commercial insurers licensed in the state of Ohio for events reasonably expected to be subject to the conditions created by a state of emergency declared in the state.

Definitions:

Claim: A formal request for the payment of losses by a policyholder for losses incurred which may be covered by a commercial insurance policy.

Insurance Commissioner: The Commissioner of the Department of Insurance of the State of Ohio as appointed by the Governor of the State of Ohio.

Insurer: Any business, licensed to conduct business in the State of Ohio, offering commercial lines of coverage.

Policyholder: An individual or business who pays a premium and has entered into an insuring contract with a licensed insurer in the state of Ohio.

Program: The Catastrophic Business Interruption Program, as detailed throughout this Act.

Pro-Rata: A financing method which distributes payments as a function of the relative losses carried by each insurer.

Section 1: Establishment of the Catastrophic Business Interruption Program.

(1.) The legislature of the State of Ohio finds it necessary to create a program that provides government assistance to private insurers for losses the industry would not be able to cover on its own.

(2.) The Catastrophic Business Interruption Program is hereby established and referred to as "the program" throughout this Act.

(3.) This Act is to be carried out by the Ohio Insurance Commissioner as detailed in Section 5 of this Act.

(4.) This program applies to all commercial insurers licensed in the state of Ohio to conduct business pursuant to Section 3901.33 of the Ohio Revised Code

(5.) This program applies regardless of any provisions outlined in an insuring agreement contrary to, or written in contradiction of, this Act, unless specifically excluded by the language of this Act.

Section 2: Specifications of Requirements for Coverage to be Provided.

(1.) A claim filed by a Catastrophic Business Insurance Program Policyholder must be paid by either the private insurer or state insurance commission, relative to the aggregate loss payments made in regard to the $100,000,000 threshold, if:

a. The claim is filed for a cessation of business operations that:

i. Took place during a declared public state of emergency.

ii. Resulted directly from the declared public state of emergency.

iii. Is not excluded by this Act.

b. The business filing the claim had physical operations located within the state of Ohio for 30 days prior to the forced cessation of operations.

c. The physical operations of the business are unable to continue or resume as a result of the state of emergency or residual provisions therein.

d. The cessation of operations has been in effect for a period of at least 5 normal business operation days.

Section 3: Financial Threshold Directives

(1.) The Administration of the program is to be funded entirely by annual premiums paid by policyholders enrolled in the program.

(2.) All claims must be paid according to the business interruption income loss payment formulas specified in the policy.

(3.) Losses to be paid under the provisions of this Act, for the same state of emergency, during a single year, by premiums paid to the program without any government assistance shall not exceed $100,000,000.

a. Losses not in excess of $100,000,000 for which this Act applies shall be paid entirely by the enrolled private insurers.

b. The premiums paid for enrollment in the program are to be used for funding the administration and payment of losses subject to this Act.

(4.) Losses paid under the provisions of this Act, for the same state of emergency, during a single year, in excess of $100,000,000 are to be funded by the Government of the State of Ohio up to 90%

a. The remaining 10% are to be paid by insurers on a pro-rata basis as determined by the Commissioner.

(5.) Losses in excess of $100,000,000 are to be paid in full by the Treasurer at the time of claim payment.

a. The treasurer will be reimbursed at the end of the year upon the Insurance Commissioners collection of pro-rata payments from insurers.

Section 4: Obligations of Insurers

(1.) All insurers to which this Act applies must offer a *Catastrophic Business Interruption Program* line as a part of their commercial insurance policy.

(2.) An additional monthly premium for enrollment in this program must be charged to the policyholder:

a. The amount of the premium to be paid is specified by the Insurance Commissioner for each year.

b. The insurance carrier must report each enrollment to the insurance commissioner within 7 business days of policyholder enrollment.

c. 10% of the annual premium amount is to be paid to the Insurance Commissioner for the purpose of funding this program.

(3.) A claim filed during a public state of emergency declared by the Governor of Ohio, by a policyholder enrolled in the program resulting from a shutdown directly related to the public state of emergency must be paid subject to the annual guidance policies issued by the Commissioner:

a. So long as the Commissioner has not notified insurers the state program threshold described in Section 3.2 has been met.

b. The claim and payment amount must be reported to the Insurance Commissioner within 5 business days.

(4.) A claim filed during a public state of emergency declared by the Governor of Ohio, by a policyholder enrolled in the program resulting from a shutdown directly related to the public state of emergency, after the Insurance Commissioner has notified insurers the program threshold has been met shall be immediately forwarded to the Commissioner's office for payment.

(5.) Any disputes as to whether or not a claim must be covered pursuant to Section 2.1 of this Act are to be brought to the Insurance Commissioner for a final determination.

(6.) Claims that would already be covered under the existing insurance contract are to be paid as usual.

Section 5: Duties of the Insurance Commissioner

(1.) Set the annual premium amount to be charged for enrollees in the program.

(2.) Aggregate and hold all relevant data and financial information relating to the conduct of this Act.

(3.) Collect 10% of annual premiums paid for enrollment in this program.

(4.) Make final determinations relating to the dispute of the coverage of a claim under this program.

(5.) Notify the State Treasurer and Insurers enrolled in the program when the $100,000,000 minimum threshold has been met.

(6.) Determine pro-rata share size and collect payments from insurers totaling 10% of losses subject to this Act in excess of $100,000,000 and reimburse the State Treasurer this amount.

(7.) Petition the state legislature, if necessary, for a change in the value of the threshold.

(8.)Petition the state legislature, if necessary, for a change in the value of premiums collected for program administration

(9.) Make other necessary regulations that do not conflict with the provisions set forth in this Act.

Section 6: Duties of the Governor of the State of Ohio

(1.) Notify the State Insurance Commissioner of all states of emergency in which this Act may reasonably apply.

Section 7: Exclusions from this Legislation

(1.) Any events that may fall under the description of a declared public state of emergency that are already covered or otherwise addressed by Federal statue, regulation, or other authority are to be explicitly excluded from coverage under this legislation.

Conclusion

This research concludes that there is sufficient reason and support to create a government-backed program to insure against business income losses resulting from mandated government shutdowns during declared public states of emergency. The inability for individual businesses to recover profits lost from events completely outside of their control, and not as a result of the natural ebbs and flows of economic activity, necessitate such a program.

The insurance industry was well-prepared and explicitly wrote potentially catastrophic events out of commercial coverage forms. The precise language of the insuring agreements allowed for an initial denial of claims and further support from the court system in these decisions. The courts did not develop any new contractual interpretations and relied on existing insurance law for interpretation of insurance contracts. The ultimate result of this process was the denial of coverage outright and no method of recovering losses.

The proposal and purpose of this research is also strongly supported by both existing government backstop insuring programs and policy proposals created to respond to the COVID-19 business income issues. Government programs have existed for nearly a century providing additional funding necessary to cover losses incurred from catastrophic events. These events vary widely in scope from economic downturns, natural disasters, and even intentional human actions.

New policy proposals further support the need for coverage programs during public emergencies as well as the creation of proactive programming so that responses to such issues can be planned for and implemented effectively.

Final conclusions drawn by this research utilize and combine many different factors that were analyzed and determined to be of importance to the pertinent issues. The resulting program uses a combination of private and public funding, in concert with increases in insurance industry requirements and regulations. Funding methods rely heavily on the insurance industry until a threshold is met, by which the government bears most losses, and the remainder is spread proportionally among involved insurers.

The new policy proposal is intended to create a more sustainable business environment that limits exposure to purely external risks. This program is likely to help small businesses, who were specifically impacted negatively during the COVID-19 pandemic. The result of this research is a program which intends to positively impact the businesses and promote the financial capabilities and success of individuals in the United States.

Appendix

Figure A- Breakdown of COVID-19 related litigation court decisions

	Full Case Dismissal	Partial Case Dismissal	Case allowed to proceed
Federal	94%	2%	4%
State	75%	5%	20%
% of Total Heard	89%	3%	8%
Total Heard	842	29	71
Data aggregated from the University of Pennsylvania COVID-19 Insurance Litigation Tracker.			

Figure B- Legislative Proposals by Type

Resolution Method	Legislative Bodies Proposed
COVID-19 Related perils coverage with no state provided financial assistance	CA, IL, LA, ME, MI, NY
COVID-19 Related perils coverage with state provided financial assistance	NJ, OH, Fed
Task force/Commission study	IL, NY, Fed
Data aggregated from the Insurance Services Office Compendium of COVID-19 related Insurance Legislation.	

Figure C- Incurred Losses by State, Commercial Insurance, 2019, Insurance Information Institute

Incurred Losses By State, Commercial Insurance, 2019 (1)

($000)

State	Incurred losses	State	Incurred losses
Alabama	$1,793,587	Montana	$919,776
Alaska	356,189	Nebraska	1,708,365
Arizona	2,327,020	Nevada	1,672,253
Arkansas	1,600,472	New Hampshire	468,357
California	21,356,376	New Jersey	6,785,945
Colorado	3,103,153	New Mexico	889,278
Connecticut	2,220,881	New York	15,514,275
Delaware	688,956	North Carolina	3,702,391
D.C.	378,394	North Dakota	1,273,448
Florida	14,534,813	Ohio	4,238,179
Georgia	5,610,805	Oklahoma	1,893,782
Hawaii	584,652	Oregon	1,868,227
Idaho	850,249	Pennsylvania	7,314,696
Illinois	8,527,029	Rhode Island	525,819
Indiana	2,861,556	South Carolina	2,250,933
Iowa	1,879,763	South Dakota	1,591,974
Kansas	1,784,301	Tennessee	2,336,953
Kentucky	1,875,461	Texas	17,492,038
Louisiana	2,971,976	Utah	1,123,346
Maine	566,361	Vermont	328,064
Maryland	2,789,339	Virginia	2,822,991
Massachusetts	3,638,401	Washington	2,946,766
Michigan	3,848,514	West Virginia	644,046
Minnesota	3,862,174	Wisconsin	3,185,911
Mississippi	1,262,239	Wyoming	351,323
Missouri	3,507,667	**United States**	**$178,629,467**

(1) Losses occurring within a fixed period whether or not adjusted or paid during the same period, on a direct basis before reinsurance.

Source: NAIC data, sourced from S&P Global Market Intelligence, Insurance Information Institute.

Figure D- Incurred Losses for Commercial Insurance, 2017-2021, Insurance Information Institute

Incurred Losses For Commercial Insurance, 2017-2021 (1)

($000)

Year	Incurred losses
2017	$137,939,624
2018	148,768,919
2019	155,085,961
2020	172,088,377
2021	184,908,130

(1) Losses occurring within a fixed period, whether or not adjusted or paid during the same period, after reinsurance transactions.

Source: NAIC data, sourced from S&P Global Market Intelligence, Insurance Information Institute.

Figure E- Policyholder claim flowchart:

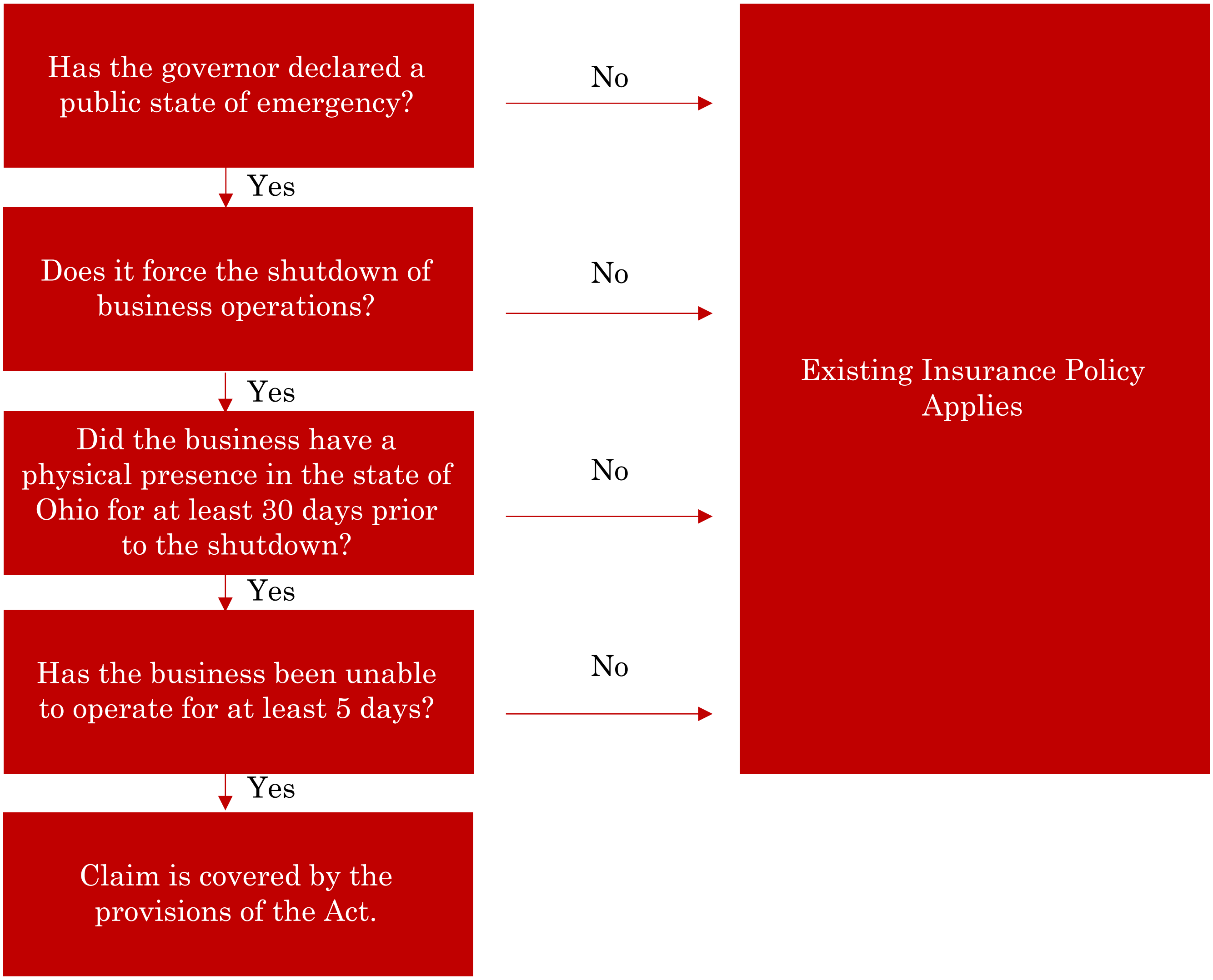

Figure F- Claim payment flowchart:

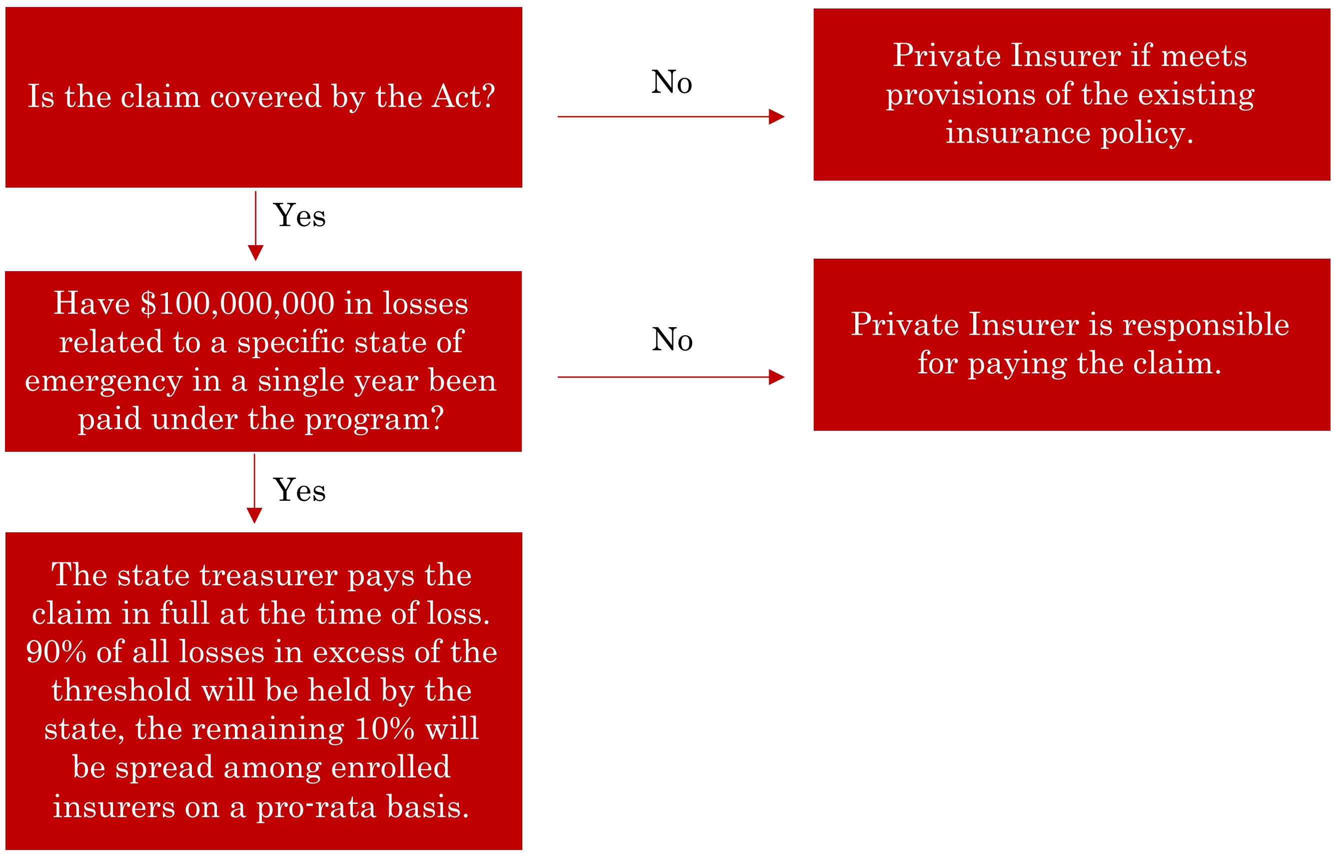

Figure G- Travelers Insurance Co. Business Income Worksheet

TRAVELERS

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Business Income: Manufacturers

Most Recent 12 Month Period Ending: (mm/dd/yyyy)		Income and Expenses	Estimated 12 Month Policy Period Beginning: (mm/dd/yyyy)
0/0/2000			0/0/2000
$ -	A.	**Gross Sales**	
$ -	B.	**Less:** Finished Stock Inventory (at selling price) at beginning of 12 month period	$ -
$ -	C.	**Add:** Finished Stock Inventory (at selling price) at end of 12 month period	$ -
$ -	D.	**Equals:** Gross Sales Value of Production	$ -
$ -	E.	**Less:** Prepaid Freight - Outgoing	$ -
$ -		**Less:** Discounts, Returns & Allowances	$ -
$ -		**Less:** Bad Debts & Collection Expenses	$ -
$ -	F.	**Equals: Net Sales Value of Production**	**$ -**
		Add: Other Earnings from your business operations (not royalties or investment income):	
$ -	G.	*Commissions or Rents*	$ -
$ -		*Cash Discounts Received*	$ -
$ -		*Other* ___________________________	$ -
$ -	H.	**EQUALS: TOTAL REVENUES**	**$ -**
$ -	I.	Click button to Go to Cost of Goods Sold worksheet to calculate **Less:** Total Cost of Goods Sold	**$ -**
$ -	J.	**Less:** Cost of services you purchase from outsiders to separately resell that DO NOT continue under contract. Costs that continue are NOT deducted.	$ -
$ -	K.	**Less:** Power, heat and refrigeration expenses that do not continue under contract. Expenses that continue are NOT deducted.	$ -
$ -	L.	**Less:** All "Ordinary Payroll" Expenses if they are to be excluded or limited. Payroll Limitation worksheet item PL5 Click to go to Payroll Limitation worksheet	$ -
$ -	M.	**Business Income Exposure for 12 Mos. (H-I-J-K-L)**	**$ -**

N. Period of Restoration (POR): Adjust for maximum time to rebuild, repair or replace property damaged by serious loss at an existing location or to move to a new permanent location 1

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