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COVID-19 and Business Interruption Insurance: The Constitutionality of Legislatively Mandated Coverage

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COVID-19 AND BUSINESS INTERRUPTION INSURANCE: THE CONSTITUTIONALITY OF LEGISLATIVELY MANDATED COVERAGE

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I. INTRODUCTION

On March 6, 2020, the South Carolina Department of Health and Environmental Control (DHEC) announced it was investigating two potential cases of the novel coronavirus (COVID-19).[1] Both individuals tested

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1. *DHEC Investigating Two Possible Cases of 2019 Novel Coronavirus in South Carolina*, DHEC, https://scdhec.gov/news-releases/dhec-investigating-two-possible-cases-2019-

"presumptive positive," giving South Carolina its first cases of COVID-19.[2] Less than two weeks later, South Carolina experienced its first COVID-19 related death.[3] Since then, South Carolina has had nearly 400,000 probable or confirmed COVID-19 cases and over 5,000 COVID-19 related deaths.[4] In March of 2020, South Carolina Governor Henry McMaster responded to the pandemic's increasing threat by signing numerous executive orders that closed public schools and restaurants and implemented various "stay-at-home" measures.[5] Less than a month later, Governor McMaster tightened restrictions further, closing "nonessential" businesses and restricting travel only to work commutes and trips for "essential services."[6] Since May of 2020, Governor McMaster has steadily abrogated many of these restrictions and regulations,[7] but the drastic effects of the stay-at-home orders and COVID-19 pandemic continue to harm South Carolina's economy.[8]

The pandemic's economic losses have yet to be precisely calculated; however, there are some indications of the types of losses that South Carolina will face. For example, a release from April 2021 reported that the state revenue for March 2020 was down $273 million, or 47.1%, compared to March 2019.[9] Another way to conceptualize these losses is by looking at South Carolina's gross domestic product (GDP). In 2020, South Carolina's current-dollar GDP (essentially GDP not accounting for inflation) fell from

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novel-coronavirus-south-carolina [https://perma.cc/X9SM-SZUH]; Noah Feit et al., *First Potential Coronavirus Cases Under Investigation in South Carolina*, THE STATE (Mar. 6, 2020), https://www.thestate.com/news/state/south-carolina/article240838221.html [https://perma.cc/2CRB-7VT2].

2. Patrick Phillips & Ray Rivera, *First Possible S.C. Novel Coronavirus Cases Detected in Charleston, Kershaw Counties*, LIVE 5 NEWS (Mar. 7, 2020), https://www.live5news.com/2020/03/07/first-possible-novel-coronavirus-cases-detected-charleston-kershaw-counties/ [https://perma.cc/P47E-RYXU].

3. *State of South Carolina Reports First COVID-19 Related Death*, DHEC (Mar. 16, 2020), https://scdhec.gov/news-releases/state-south-carolina-reports-first-covid-19-related-death [https://perma.cc/QKD8-LQF7].

4. *SC Testing Data & Projections (COVID-19)*, DHEC (Jan. 17, 2021), https://scdhec.gov/infectious-diseases/viruses/coronavirus-disease-2019-covid-19/sc-testing-data-projections-covid-19 [https://perma.cc/T29T-CC44].

5. S.C. Exec. Order No. 2020-09 (Mar. 15, 2020); S.C. Exec. Order No. 2020-10 (Mar. 17, 2020); S.C. Exec. Order No. 2020-11 (Mar. 19, 2020).

6. S.C. Exec. Order No. 2020-17 (Mar. 31, 2020); S.C. Exec. Order No. 2020-18 (Apr. 3, 2020); S.C. Exec. Order No. 2020-21 (Apr. 6, 2020).

7. S.C. Exec. Order No. 2020-31 (May 3, 2020); S.C. Exec. Order No. 2020-63 (Oct. 2, 2020).

8. *See* Jason Raven, *SC Budget Forecasters Expect State Revenue Losses to Grow Because of COVID-19*, WIS NEWS 10 (May 8, 2020), https://www.wistv.com/2020/05/08/south-carolina-budget-forecasters-expect-state-revenue-losses-grow-because-covid-/ [https://perma.cc/ZZ6Z-6CND].

9. S.C. BD. OF ECON. ADVISORS, GENERAL FUND REVENUE RELEASE: MARCH FISCAL YEAR 2020–21, at 1 (2021).

$247 billion in quarter one to $224 billion in quarter two, roughly a 9% decrease.[10] According to the U.S. Bureau of Economic Analysis, this annualizes to a 32.6% reduction in GDP.[11]

The financial toll on specific industries is also informative. For example, despite continued operations, golf courses in the Myrtle Beach area collectively lost nearly $21 million in the spring of 2020.[12] This figure does not account for the peripheral losses that golf clubs experienced, like lost sales of merchandise and food.[13] Restaurants have also been hit particularly hard because they were one of the first businesses Governor McMaster restricted.[14] Even as restaurants reopen, many operate at limited capacity and are incurring additional costs for proper sanitization and disposable equipment.[15] Some restauranteurs have estimated a 25%–50% reduction in normal business levels while spending tens of thousands of dollars above standard operating costs to comply with new safety standards.[16] Clearly, South Carolina's economic losses are substantial. Many business owners have looked to federal programs, like the Paycheck Protection Program, to recoup those losses,[17] and others have looked to the federal government to supply stimulus funds, particularly through the Coronavirus Aid, Relief, and Economic Security (CARES) Act.[18]

There is, however, another potential avenue to recoup losses: business interruption (BI) insurance policies. BI insurance policies are intended to help businesses cover losses, especially from closures outside of their control.[19] If, for example, a business office burned down, business owners would need a fire policy to cover fire damage and property losses, but if the business had a

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10. *See* BUREAU OF ECON. ANALYSIS, U.S. DEP'T OF COM., GROSS DOMESTIC PRODUCT BY STATE, 2ND QUARTER 2020, at 7 tbl.3 (2020).

11. *Id.* at 4 tbl.1.

12. *Id.*

13. Alan Blondin, *How Myrtle Beach Area Golf Courses Have Lost $21M This Spring Despite Remaining Open*, MYRTLE BEACH ONLINE (Apr. 30, 2020), https://www.myrtlebeachonline.com/sports/golf/article242387151.html [https://perma.cc/5ETA-6QB9].

14. S.C. Exec. Order No. 2020-10 (Mar. 17, 2020).

15. David Clarey & Avery G. Wilks, *Facing Serious COVID-19 Costs, End of Federal Loans, SC Restaurants Still Struggling*, POST & COURIER: FREE TIMES (June 25, 2020), https://www.postandcourier.com/free-times/news/covid19/facing-serious-covid-19-costs-end-of-federal-loans-sc-restaurants-still-struggling/article_b0b63270-b667-11ea-a3d1-273b989fdb88.html [https://perma.cc/43NG-XFET].

16. *Id.*

17. *See PPP Loan Recipient List by State—South Carolina*, FEDERALPAY.ORG, https://www.federalpay.org/paycheck-protection-program/sc [https://perma.cc/4SRV-5KYJ].

18. *See* Clarey & Wilks, *supra* note 15.

19. *See* S.C. DEP'T OF INS., BUSINESS INTERRUPTION INSURANCE COVERAGE AND THE CORONAVIRUS (COVID-19) 1 (2020).

BI policy, it could claim lost income in the interim.[20] Such policies allow businesses to continue operations through catastrophic events and, potentially, keep employees on payroll in the meantime.[21]

While insurance companies have varying language in their BI policies, many provisions and types of coverage are consistent throughout the industry.[22] First, most BI policies require there be "physical loss or damage" to the premises.[23] The fire example above would clearly satisfy this requirement because the building burned down. Losses due to a ruined reputation, on the other hand, would not satisfy this requirement. In addition to the standard BI policy, some insurance companies offer complementary coverage plans.[24] Two of the most common types of complementary coverage are "extra expense coverage" and "civil authority coverage."[25] As the name would suggest, extra expense coverage is intended to cover expenses the business incurs to continue operations while the physical location is being repaired.[26] Civil authority coverage is designed to cover losses resulting from government orders that prohibit business operations.[27] Because these types of losses are explicitly covered by complementary coverage, this implies the standard BI policy does not cover them.

Second, certain exclusions commonly appear in BI policies. Most notably, many BI policies explicitly exclude coverage for losses incurred as a result of viruses, pathogens, or other infectious diseases.[28] Assuming these provisions are valid and apply based on the usual and customary meaning of the terms, a company could not make a valid BI claim for temporary closure resulting from an outbreak of influenza.

Confronted with severe economic downturn and business decline during the COVID-19 pandemic, every level of government has turned their attention

20. Julia Kagan, *Business Interruption Insurance*, INVESTOPEDIA (July 9, 2020), https://www.investopedia.com/terms/b/business-interruption-insurance.asp [https://perma.cc/4MMM-CPQG].

21. *See* S.C. DEP'T OF INS., *supra* note 19, at 1.

22. *See Getting (Back To) Business Interruption Insurance*, UNITED POLICYHOLDERS, https://www.uphelp.org/pubs/getting-back-business-interruption-insurance [https://perma.cc/5CAS-434F].

23. *Id.*

24. S.C. DEP'T OF INS., *supra* note 19, at 1.

25. *See id.*

26. *Id.*

27. *Id.*

28. Frederic Theodore Le Clercq & Francis J. Barry Jr., *Business Interruption Claims and COVID-19: Is It "Reasonable" to Expect Any Coverage After This Disaster?*, LA. BAR J., June–July 2020, at 12, 13.

toward remedial measures.[29] In South Carolina, three state senators have proposed Senate Bill 1188 (S.1188), which would mandate COVID-19 related coverage for all BI policies in South Carolina, even where the policy explicitly excludes virus coverage.[30] South Carolina is not alone in this regard; other states, such as New Jersey, Ohio, New York, and Louisiana, have proposed similar bills.[31] While well-intentioned, S.1188 is an unconstitutional attempt to remedy the problem faced by businesses hoping to recoup losses caused by COVID-19. This Note argues an entirely new legislative solution is South Carolina's best path forward. Part II addresses the broad concerns underlying BI policies in the context of COVID-19. Part III briefly discusses what a judicial approach would look like and why that approach is inadequate. Finally, Part IV analyzes the advantages and disadvantages of various legislative approaches and proposes a new solution for South Carolina.

II. BACKGROUND

The implications of, and potential solution to, business interruption threaten a devastating blow to South Carolina's businesses and insurers. Over the past year, South Carolina's GDP has decreased by more than $20 billion, and many establishments are fighting to stay open.[32] On the one hand, without some subsidy for losses resulting from COVID-19, many businesses will continue to struggle or will close down altogether.[33] For example, Yesterdays Restaurant—a Columbia staple that operated for nearly fifty years—closed permanently in April of 2020 after financial losses due to COVID-19.[34] Governor McMaster's orders allowed restaurants to remain open for carryout

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29. *See, e.g.*, Bristow Marchant, *Columbia Rolls Out a $6 Million Plan to Combat Coronavirus Economic Fallout*, THE STATE (Mar. 20, 2020), https://www.thestate.com/news/news/coronavirus/article241366381.html [https://perma.cc/95ML-DWG6] (discussing local efforts).

30. S.B. 1188, 2019–2020 Gen. Assemb., 123rd Sess. (S.C. 2020).

31. Gerald P. Konker et al., *COVID-19 Business Interruption Losses: The Potential Keys to Unlocking Insurance Recovery*, MORGAN LEWIS (Apr. 21, 2020), https://www.morganlewis.com/pubs/covid-19-business-interruption-losses-the-potential-keys-to-unlocking-insurance-recovery-cv19-lf [https://perma.cc/ENB6-FP8Q].

32. *See* BUREAU OF ECON. ANALYSIS, *supra* note 10, at 7 tbl.3.

33. *See* Annette Montgomery, *"More Than Half of Small Businesses Worried About Closing" S.C. Official Said*, WPDE (Oct. 16, 2020), https://wpde.com/news/local/more-than-half-of-small-businesses-worried-about-closing-sc-official-said [https://perma.cc/X2GT-K988].

34. David Clarey, *COVID-19 Hastened the End for Columbia's Yesterdays. How Are Other Restaurants Holding Up?*, POST & COURIER: FREE TIMES (Apr. 29, 2020), https://www.postandcourier.com/free-times/news/covid19/covid-19-hastened-the-end-for-columbia-s-yesterdays-how-are-other-restaurants-holding-up/article_4b15b4b4-87fe-11ea-bc85-2ff1a5c2686b.html [https://perma.cc/6JHS-ZPYD].

and delivery, but this was still insufficient to fund Yesterdays' operation.[35] It is not a stretch to assume businesses throughout the state, particularly those deemed nonessential that were ordered to fully close their doors for some time, have experienced similar financial struggles,. In fact, according to the South Carolina Chamber of Commerce's President and Chief Executive Officer, over half of America's small business owners are worried about having to close permanently.[36] That number will continue to climb without financial support.

On the other hand, asking the insurance industry to subsidize some $20 billion in losses (or a substantial portion thereof) is simply not feasible when the industry did not underwrite such a risk. While this Note focuses on insurance companies operating in South Carolina, it may nonetheless be informative to expand to the national level. After all, many insurers operating in South Carolina—particularly the largest players—operate outside of the state as well; COVID-19 is not a problem unique to South Carolina nor is South Carolina unique in its proposed response.[37]

At the national level, one estimate projects that the insurance industry, if made to pay BI claims *only* for small businesses with fewer than 100 employees, would need to pay between $52 billion and $223 billion *monthly*.[38] The American Property Casualty Insurance Association (APCIA) estimates that range to be $255 to $431 billion per month.[39] For reference, property-casualty insurers recorded a national $27 billion profit in the first half of 2020.[40] Forcing the industry to cover these losses would devastate insurers. Even for those critical of insurance companies, bankrupting the industry as a whole is still a net negative. In the case of a bankrupt insurer, the state would undertake the insurer's active policies and begin to pay out on claims.[41] This would decrease the state's annual net profits, and if the problem were to grow large enough, taxpayers could end up footing the bill. If APCIA's estimate is

35. *Id.*

36. Montgomery, *supra* note 33.

37. *See infra* Part IV.

38. David Yaffe-Bellany, *U.S. Businesses Are Fighting Insurers in the Biggest Legal Battle of the Pandemic*, BLOOMBERG (Nov. 2, 2020), https://www.bloomberg.com/news/features/2020-11-02/should-insurers-have-to-compensate-businesses-for-coronavirus-lockdowns [https://perma.cc/7NSW-AJKR].

39. Press Release, Am. Prop. Cas. Ins. Ass'n, APCIA Releases New Business Interruption Analysis (Apr. 6, 2020) (on file with the *South Carolina Law Review*).

40. BRIAN BRIGGS & ERIKA COSEY, NAT'L ASS'N OF INS. COMM'RS, U.S. PROPERTY & CASUALTY AND TITLE INSURANCE INDUSTRIES – 2020 FIRST HALF RESULTS 1 (2020).

41. Dana Anspach, *What Happens If Your Insurance Company Files Bankruptcy?*, THE BALANCE (Nov. 2, 2020), https://www.thebalance.com/what-happens-if-your-insurance-company-files-bankruptcy-2388607 [https://perma.cc/8SK6-VRS5].

correct, states could collectively end up inheriting over $250 billion in liability.[42]

Further, even if this crisis does not bankrupt insurance companies, some of the proposed solutions could invoke fear that companies will be forced to cover future contingencies regardless of what their policies say. Should S.1188 become law and withstand potential constitutional challenges, insurance companies would be left to conclude that, at the whim of state legislatures, they could be forced to cover widespread losses where public policy overrides existing contractual agreements. Under this framework, insurance companies and their actuaries would likely incorporate potential costs into their bottom line, thus increasing insurance premiums to prepare for large-scale payouts. Although hiked premiums increase profit margins, they would not result in company or job growth because insurers would be constantly occupied with having enough cash on hand to pay a substantial lump sum in case of emergency. They would have to increase premiums even further to compensate for the *massive* cost of unpredictable losses. Moreover, if the South Carolina Department of Insurance (Department) broadly assessed the state's insurance industry to fund certain reimbursements, these increased premiums would affect policies wholly unrelated to property-casualty losses.

III. A JUDICIAL APPROACH

A. Principles of Insurance Contract Interpretation in South Carolina

In South Carolina, insurance contracts "are subject to the general rules of contract construction."[43] Contracts that are "unambiguous, clear and explicit" are interpreted according to the "plain, ordinary and popular sense" of the unambiguous language.[44] To determine whether a contract is ambiguous, courts look to whether the contract "is capable of more than one meaning when viewed objectively by a reasonably intelligent person who has examined the context of the entire integrated agreement and who is cognizant of the customs, practices, usages and terminology as generally understood in the particular trade or business."[45]

42. *See* Press Release, Am. Prop. Cas. Ins. Ass'n, *supra* note 39.

43. B.L.G. Enters., Inc. v. First Fin. Ins. Co., 334 S.C. 529, 535, 514 S.E.2d 327, 330 (1999) (citing Diamond State Ins. Co. v. Homestead Indus., Inc., 318 S.C. 231, 456 S.E.2d 912 (1995)).

44. C.A.N. Enters., Inc. v. S.C. Health & Hum. Servs. Fin. Comm'n, 296 S.C. 373, 377, 373 S.E.2d 584, 586 (1988) (citing Warner v. Weader, 280 S.C. 81, 83, 311 S.E.2d 78, 79 (1983)).

45. Hawkins v. Greenwood Dev. Corp., 328 S.C. 585, 592, 493 S.E.2d 875, 878 (Ct. App. 1997).

Regarding insurers, their duty is "defined by the terms of the policy and cannot be enlarged by judicial construction."[46] Policies are generally interpreted in favor of coverage by requiring insurers to establish the applicability of an exclusion; however, courts cannot "torture the meaning of policy language" to find coverage contrary to the intent of the parties.[47] Rather, the burden of proving that a claim should be covered under the policy falls on the claimant.[48]

1. *Arguments for and Against Coverage*

The arguments supporting and opposing BI coverage would undoubtedly change depending on the terms of the policy at issue.[49] Arguments regarding a policy that lacks a virus exclusion but includes civil authority coverage will vary wildly from arguments regarding a policy that lacks civil authority coverage but includes a virus exclusion. In most cases, insurers are likely to argue that the losses businesses have experienced are not the result of physical damage, that most policies have explicit virus exclusions, and that forced coverage is poor public policy.[50] In contrast, policy holders will likely argue that losses were caused by either contamination (for some policies) or physical damage; that virus exclusions, civil authority exclusions, or both are inapplicable; and that public policy favors coverage.[51]

Insurers will likely emphasize that the losses sustained by most businesses did not directly result from COVID-19 but rather resulted from civil orders, which did not cause property damage.[52] Further, insurers will likely contend that virus pathogens also do not create property damage, at least not in the way contemplated by a physical damage or loss provision.[53] Insurers are also likely to rely on the exclusions contained in many BI policies.[54] If

46. Kelaher, Connell & Conner, P.C. v. Auto-Owners Ins. Co., 440 F. Supp. 3d 520, 526 (D.S.C. 2020) (quoting S.C. Ins. Co. v. White, 301 S.C. 133, 137, 390 S.E.2d 471, 474 (Ct. App. 1990)).

47. *Id.* at 528.

48. Pa. Nat'l Mut. Cas. Ins. Co. v. Lewis, 105 F. Supp. 3d 573, 583 (D.S.C. 2015) (quoting S.C. Farm Bureau Mut. Ins. Co. v. Wilson, 344 S.C. 525, 530, 544 S.E.2d 848, 850 (Ct. App. 2001)).

49. For a more comprehensive discussion of the likely arguments for and against coverage, albeit on a national scale, see generally Christopher C. French, *COVID-19 Business Interruption Insurance Losses: The Cases for and Against Coverage*, 27 CONN. INS. L.J. 1 (2020).

50. *See id.* at 16–20.

51. *Id.* at 20–21.

52. *Id.* at 16.

53. *See id.*

54. *Id.* at 17.

courts choose to enforce these exclusions, insurers "win" the battle.[55] Lastly, as discussed in Part II, insurers have a valid argument that the financial havoc that would be wreaked by forced coverage is incredibly poor public policy and would result in the industry's general failure.[56]

Policy holders, on the other hand, are more likely to shape their arguments according to the terms of their policies.[57] Some policies include coverage for "contamination" as well as physical damage.[58] In those cases, policy holders may argue the virus contaminated their property and resulted in government closures.[59] Those whose policies are limited to physical damage will likely argue that the pathogen—the physical virus itself—being on the property and resulting in a civil order satisfies the physical damage requirement.[60] More importantly, policy holders may try to negate potentially applicable exclusions—like the virus exclusion—by arguing, among other things, that the exclusion is unreasonable and does not fall within their reasonable expectations of the policy's coverage.[61] This line of thinking was most prominently established in *C & J Fertilizer, Inc. v. Allied Mutual Insurance Co.*, a case that the South Carolina Supreme Court has endorsed at some level.

Although it is unclear whether the court would be willing to explicitly apply *C & J Fertilizer*'s principles,[62] the case is a landmark decision about a policy that required exterior damage for burglary coverage.[63] In *C & J Fertilizer*, the court held that such a requirement was unreasonable and did not conform to the policy holder's reasonable expectations.[64] For this reason, the court struck down the exclusion and mandated coverage.[65] Some have pointed out that applying *C & J Fertilizer*'s reasonable expectations test would excuse policy holders from reading their policies, given that reasonable expectations would come into play if only they were wholly ignorant as to the

55. *See id.*
56. *Id.* at 19–20.
57. *See id.* at 20–29.
58. *Id.* at 20.
59. *Id.*
60. *See id.* at 21.
61. *Id.* at 26–29.
62. *See* S.C. Farm Bureau Mut. Ins. Co. v. Kennedy, 398 S.C. 604, 617, 730 S.E.2d 862, 868 (2012).
63. C & J Fertilizer, Inc. v. Allied Mut. Ins. Co., 227 N.W.2d 169, 171 (Iowa 1975).
64. *Id.* at 177.
65. *Id.* at 177, 182.

terms.[66] Plaintiffs' attorneys have already begun implanting the reasonable expectations test in trial preparation.[67]

Lastly, policy holders will likely argue that denying coverage would be detrimental to the local and national economy as businesses continue to struggle with financial fallout from the pandemic and related government orders.[68]

2. *Most Likely Court Decisions*

Once again, any outcome depends on the facts of a specific case and the terms of the policy at issue. Most BI policies include a virus exclusion and either are silent on civil authority coverage or explicitly exclude it.[69] In this scenario, South Carolina courts must deny coverage. The only potential ambiguity in these policies lies in the meaning of "physical damage."[70] Even if courts were to find this term ambiguous and apply *contra proferentem*[71] to hold that "physical damage" includes the virus's presence on property, courts cannot "torture" the plain meaning of the virus exclusion solely to justify coverage.[72]

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66. W. David Slawson, *Contractual Discretionary Power: A Law to Prevent Deceptive Contracting by Standard Form*, 2006 MICH. ST. L. REV. 853, 862–63.

67. *See* Yaffe-Bellany, *supra* note 38 ("On their face, the exclusions appear to rule out insurance payments for businesses that close because of a pandemic. But in a lawsuit filed in California, Ellison is arguing that such exclusions should be unenforceable."); Bethan Moorcraft, *A Plaintiff Attorney's View on COVID-19 Business Interruption Claims*, INS. BUS. AM. (June 5, 2020), https://www.insurancebusinessmag.com/us/news/breaking-news/a-plaintiff-attorneys-view-on-covid19-business-interruption-claims-224422.aspx [https://perma.cc/UFK9-DVEQ] ("'I'm not denying the fact that the insurance companies have an exclusion for viruses in their policies. Whether it's enforceable is a completely different question. As of right now, there hasn't been a binding decision from any court in the country that would say that provision in the insurance contract is enforceable,' Zinkovetsky added. 'I ask every single one of my clients the same thing: were they aware of this exclusion? And not a single person has yet told me that they were. Many people thought that when they bought a business income interruption policy, it would do exactly as the name implies. They would get insurance that would pay out if their business was interrupted.'").

68. *See* French, *supra* note 49, at 31–34.

69. Yaffe-Bellany, *supra* note 38 ("John Ellison, an insurance litigator who represents policyholders, estimates that from half to two-thirds of business-interruption policies contain 'virus exclusions . . . .'").

70. *Id.* ("For years, insurance companies and policyholders have debated the meaning of the phrases 'physical loss' and 'physical damage,' the standard formulations governing which types of harm are covered.").

71. This phrase refers to the principle that ambiguities in contracts must be construed against the drafter.

72. Pa. Nat'l Mut. Cas. Ins. Co. v. Lewis, 105 F. Supp. 3d 573, 583 (D.S.C. 2015) (quoting S.C. Farm Bureau Mut. Ins. Co. v. Wilson, 344 S.C. 525, 530, 544 S.E.2d 848, 850 (Ct. App. 2001)).

The *C & J Fertilizer* argument similarly fails because the nexus between BI and viruses is much closer than burglaries and exterior property damage. Moreover, most insurance companies now require agents to walk policy holders through each provision of their policy, typically in a recorded session.[73] If a company utilizes this practice, policy holders cannot claim they were unaware of the virus exclusion, further undermining the *C & J Fertilizer* argument. Considering the stakes are so high in policy arguments that either side risks bankruptcy in the case of judicial loss, their risks negate one another. At the very least, these arguments cannot be said to weigh so heavily in favor of policy holders that they override otherwise well-established rules of contract interpretation.

B. Why the Judiciary Should Not Serve as the Primary Solution

If the South Carolina General Assembly leaves this economic crisis to the courts, South Carolinians—particularly business owners—will be worse off. Leaving an issue of this manner and magnitude to the courts creates financial uncertainty in an already uncertain market; opens the door to inequitable rulings based on location, access to lawyers, and luck; and makes the issue cost prohibitive for business owners who have previously experienced substantial financial losses.

First, allowing courts to decide whether BI policies cover COVID-19 losses would create uncertainty in the market until resolution of pending litigation.[74] Investors, partner companies, and even some consumers may be wary of engaging with business owners who, eventually, may not have the assets necessary to remain afloat. Litigation, particularly after delays, continuances, and appeals, is a lengthy and time-consuming process.[75] This prolonged process would be compounded by a flood of claims arising from COVID-19's collateral effects.[76] The resulting increased volume of litigation would slow the judicial process, creating an even longer period of market

73. *See* Tim Ryles, *Insurer's Duty at the Outset of a Personal Lines Claim*, INT'L RISK MGMT. INST., INC. (Sept. 2008), https://www.irmi.com/articles/expert-commentary/insurers-duty-at-the-outset-of-a-personal-lines-claim [https://perma.cc/3HH5-G7BF] ("The basis for the 'sit down conference' during which an adjuster educates the insured about the claim and policy rights at the initial stages of a claim arises from (1) the distinguishing features of the insurance contract, (2) common law principles, and (3) regulatory standards.").

74. *See COVID-19 Insurance Coverage – The Uncertainty Continues*, JD SUPRA (Feb. 2, 2021), https://www.jdsupra.com/legalnews/covid-19-insurance-coverage-the-4415425/ [https://perma.cc/V4MA-SU5V].

75. Joseph G. Bisceglia, *ADR & the Image of Lawyers*, 96 ILL. B.J. 8, 8 (2008).

76. *See, e.g.*, *Employment Litigation Tracker Details Rise in COVID-19 Lawsuits*, LEXISNEXIS (Dec. 17, 2020), https://www.lexisnexis.com/community/lexis-legal-advantage/b/trends/posts/employment-litigation-tracker-details-rise-in-covid-19-lawsuits [https://perma.cc/KYW9-2P24].

uncertainty for business owners and investors. This uncertainty would be detrimental to market stability.

Second, a decision made in pending litigation might not be entirely determined on the facts and relevant law but rather on extraneous factors, like legal access and geography. For example, an Allendale County business may receive judicially mandated coverage while a Richland County business may be denied coverage under an identical fact scenario. While judges are supposed to be impartial arbiters of the law, personal views inevitably influence their decision-making.[77] As a result, the outcomes in a given case may vary based on the assigned judge. Because certain counties have a reputation for being more or less insurance friendly,[78] plaintiffs could be encouraged to forum shop. At the end of the day, having such a widespread issue resolved by entirely independent arbiters who may not apply the same reasoning to identical facts is a recipe for inequity that should be avoided.

Finally, litigation is notoriously expensive and time-consuming.[79] Money and time are two resources that business owners lack in the aftermath of COVID-19.[80] Although many plaintiffs' attorneys will represent BI appeals on a contingency basis, policy holders will still have to dedicate more of their time and energy to litigating the case, producing documents, appearing for depositions, and completing other procedural requirements. With the majority of small business owners concerned about their company's longevity, they simply do not have the time or resources to manage complex corporate litigation while struggling to keep their business afloat.[81] Requiring potential litigants to invest substantial amounts of time and money that could otherwise be directed to resurrecting their business operations would, for all intents and purposes, altogether prevent resolution. To provide the most efficient solution to the widest array of affected entities, the legislature must step in.

IV. LEGISLATIVE SOLUTIONS AND THE CONTRACTS CLAUSE

A. *Overview of Senate Bill 1188*

In response to COVID-19, senators in the South Carolina General Assembly proposed S.1188, which reads, in pertinent part:

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77. *See, e.g.*, Louis E. Newman, *Beneath the Robe: The Role of Personal Values in Judicial Ethics*, 12 J.L. & RELIGION 507, 514 (1995–1996).

78. *See, e.g.*, U.S. L. NETWORK, INC., STATE JUDICIAL PROFILES BY COUNTY 2019–2020, at 12 (2019).

79. Bisceglia, *supra* note 75, at 8.

80. *See* Montgomery, *supra* note 33.

81. *See id.*

> Notwithstanding any provision of law to the contrary, every policy of insurance in force in this State insuring against loss or damage to property, notwithstanding the terms of the policy and including any endorsement thereto or exclusions to coverage included therewith, that includes a loss of use and occupancy, or business interruption, shall be construed to include, among the covered perils under the policy, coverage for loss of use and occupancy, or business interruption, directly or indirectly resulting from the global pandemic known as COVID-19, including all mutated forms of the COVID-19 virus. Moreover, no insurer in this State may deny a claim for a loss of use and occupancy, or business interruption, with respect to COVID-19, including, but not limited to, attempted insurer denials on account of:
>
> (1) COVID-19 being a virus, even if the relevant insurance policy excludes losses resulting from viruses;
> (2) there being no physical damage to the property of the insured or to any other relevant property; or
> (3) orders issued by any civil authority, or acts or decisions of a governmental entity.[82]

S.1188 allows affected insurance companies to apply for reimbursement from the Department.[83] However, it leaves the Department with a great deal of discretion, entrusting it to determine eligibility, application, and distribution.[84] Furthermore, it appears S.1188 would have the Department fund these reimbursements through an assessment of all licensed insurers in the state, including those who do not insure property-casualty losses at all, thus spreading business losses across the industry as a whole.[85]

2. *Constitutionality*

Article I, Section 10 of the Constitution includes some of the strongest limitations on state legislative power.[86] Included among it, the Contracts Clause reads: "No State shall . . . pass any . . . [l]aw impairing the [o]bligation of [c]ontracts . . . ."[87] The Supreme Court applies a two-part test to assess whether a state law violates the Contracts Clause.[88] First, the Court asks

82. S.B. 1188, 2019–2020 Gen. Assemb., 123rd Sess. (S.C. 2020).
83. *Id.*
84. *See id.*
85. *See id.*
86. *See* U.S. CONST. art. I, § 10.
87. *Id.* at cl. 1.
88. Sveen v. Melin, 138 S. Ct. 1815, 1821 (2018).

whether the state law substantially impairs a contractual obligation.[89] If the Court so finds, it then asks "whether the state law is drawn in an 'appropriate' and 'reasonable' way to advance 'a significant and legitimate public purpose.'"[90] When reviewing the constitutionality of state laws, the Court generally defers to state legislatures.[91] However, a law that fundamentally changes "the rights and responsibilities of contracting parties must be upon reasonable conditions and of a character appropriate to the public purpose justifying its adoption."[92]

The Court began developing this test in *Home Building & Loan Association v. Blaisdell*.[93] In *Blaisdell*, Minnesota implemented a mortgage moratorium in response to the Great Depression.[94] The statute was aimed at preventing a wave of foreclosures across the state as the economy worsened.[95] The challenged provisions allowed homeowners to petition local courts for a redemption period extension, during which, if granted, the homeowner would contribute "all or a reasonable part of" the income derived from the property or its fair rental value to taxes, interest, and mortgage indebtedness, among other things.[96] At the time, interest would still accrue on the mortgage value and the homeowner would not be relieved of any long-term obligation.[97] The legislature also set a definite end date: roughly two years after the statute was enacted or earlier if the emergency were to resolve itself.[98]

The Court upheld the mortgage moratorium despite its effects on contracts, noting five key factors.[99] First, the statute acknowledged an emergency situation that required intervention.[100] Second, the statute "was not for the mere advantage of particular individuals but for the protection of a basic interest of society."[101] Third, the moratorium was an appropriately tailored measure.[102] Fourth, the conditions imposed on the mortgagees were reasonable because (1) the homeowners were still required to make full

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89. *Id.* at 1821–22 (quoting Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 244 (1978)).

90. *Id.* at 1822 (quoting Energy Rsrvs. Grp., Inc. v. Kan. Power & Light Co., 459 U.S. 400, 411–12 (1983)).

91. U.S. Tr. Co. of N.Y. v. New Jersey, 431 U.S. 1, 46 (1977) (Brennan, J., dissenting).

92. *Id.* at 22 (majority opinion) (citing Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 445 (1934)).

93. *Blaisdell*, 290 U.S. at 444–48.

94. *Id.* at 415–16.

95. *Id.* at 446.

96. *Id.* at 416–17.

97. *Id.* at 425.

98. *Id.* at 416.

99. *See id.* at 444–48.

100. *Id.* at 444.

101. *Id.* at 445.

102. *See id.*

payments at a later date, (2) the homeowners were required to make certain adjusted payments during the redemption period, and (3) interest still accrued on the loan.[103] Finally, the statute's application was temporally limited to the emergency it purportedly responded to.[104]

In *W.B. Worthen Co. v. Thomas*, however, the Court used the Contracts Clause to invalidate a law that prohibited courts from attaching liens to certain insurance proceeds on behalf of creditors.[105] In *Thomas*, a marital business partnership defaulted on a loan, eventually resulting in a judgement against the partnership for the amount due.[106] Shortly thereafter, the husband passed away, leaving his wife as the beneficiary of a life insurance policy.[107] The creditors acquired a writ of garnishment on the life insurance policy, and nearly a week later, the legislature retroactively enacted a law that prevented liens, writs, and other instruments from attaching to various insurance proceeds.[108] The creditors challenged this law as being violative of the Contracts Clause, and the Court agreed.[109] Reaching this conclusion, the Court focused primarily on the fact that, while the state claimed the law was an emergency response measure, it did not reflect a limitation in time or applicability.[110] The Court also did not believe the measures were reasonable under the circumstances, highlighting that the law imposed no limitations, financially or otherwise.[111] In other words, the Court was concerned that debtors could shield certain assets from judgements by investing those assets in life insurance policies.[112]

More recently, in *Sveen v. Melin*, the Court refuted a Contracts Clause challenge against a law that, upon divorce, automatically removed ex-spouses as beneficiaries on certain insurance documents.[113] If divorcees did not want to remove their ex-spouse as beneficiary, they could maintain the insurance contract with an expression of this intent.[114] The Court decided the provision was not a substantial impairment and was, therefore, valid for three main reasons.[115] First, the statute was aimed at reflecting the intent of the parties.[116] In other words, the Court believed that most divorcees no longer want their

103. *Id.* at 445–47.
104. *Id.* at 447.
105. W.B. Worthen Co. v. Thomas, 292 U.S. 426, 434 (1934).
106. *Id.* at 429.
107. *Id.*
108. *Id.* at 429–430.
109. *Id.* at 430, 434.
110. *Id.* at 432, 434.
111. *Id.* at 431.
112. *Id.*
113. Sveen v. Melin, 138 S. Ct. 1815, 1818 (2018).
114. *Id.* at 1820–21.
115. *Id.* at 1822.
116. *Id.*

ex-spouse listed as beneficiary.[117] Second, the statute simply automated an action that the divorce court could take anyway.[118] The statute did not grant a new power to the divorce court but merely created a presumption.[119] Third, the parties' ability to undo this presumption undermined the extent to which the statute impaired any contractual obligation.[120]

Justice Gorsuch, the lone dissenter, wrote separately to discuss his general views on the jurisprudence of the Contracts Clause.[121] Justice Gorsuch argued that the Court's two-part test is not a valid reading of the Contracts Clause.[122] He pointed out that the language of the clause prohibits states from making *any* law impairing the obligation of contracts.[123] Justice Gorsuch argued that the Court is wrong to take a nuanced approach to such a strict statement.[124] He further asserted that the Framers' discussions when drafting the Contracts Clause evidence their intent for the provision to be read strictly and literally.[125] In Justice Gorsuch's view, any law that impacts existing contracts is unconstitutional under the Contracts Clause.[126]

Although a close call, S.1188 violates the Contracts Clause. In addressing the threshold question of whether the law substantially impairs a contractual obligation,[127] it is abundantly clear that S.1188 does. The Bill would fundamentally alter the protections offered by many active contracts by, in many cases, explicitly voiding virus or civil authority exclusions.[128] Most of the time, the Bill would nullify the foundational requirements of a BI policy: physical damage, loss, or both.[129] Notably, S.1188 is materially distinct from the statute at issue in *Sveen* because it does not realize the collective intent of the parties. In fact, S.1188 actively undermines the intent of insurance companies that require physical damage and, in some instances, exclude virus coverage.

As to whether S.1188 "is drawn in an 'appropriate' and 'reasonable' way to advance 'a significant and legitimate public purpose,'" with an eye toward

117. *See id.*

118. *Id.*

119. *See id.*

120. *Id.* at 1823.

121. *See id.* at 1826–31 (Gorsuch, J., dissenting).

122. *See id.* at 1826–27.

123. *Id.* at 1826.

124. *Id.* at 1826–1827.

125. *See id.* at 1827 (citing Sturges v. Crowninshield, 17 U.S. 122, 206 (1819)).

126. *See id.* ("After all, the Constitution does not speak of 'substantial' impairments—it bars 'any' impairment.").

127. *Id.* at 1821–22 (majority opinion) (quoting Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 244 (1978)).

128. *See* S.B. 1188, 2019–2020 Gen. Assemb., 123rd Sess. (S.C. 2020).

129. *See id.*

the five factors established in *Blaisdell*,[130] keeping businesses open and attempting to boost the state's economy is clearly a "significant and legitimate public purpose." On the contrary, the measures implemented by S.1188 are neither appropriate nor reasonable and, thus, fail to meet this standard.

The first *Blaisdell* factor—state of emergency[131]—weighs in favor of validity due to the ongoing COVID-19 pandemic, which, by its very nature, is an emergency. The second factor—that the law was aimed at a broad societal interest and not at a particular group[132]—is less clear. While insurance companies may argue that S.1188 only benefits policy-holding business owners, the Bill's overall aim is to promote the local economy generally. Therefore, the second factor likely weighs in favor of validity. The third factor—that the law was appropriately tailored to the emergency, particularly that the impairment of the contract could only come as a result of the emergency[133]—also weighs in favor of validity because the Bill clearly limits enforcement to COVID-19 related losses.

The fourth factor—that the imposed conditions were reasonable[134]—opposes validity. Whereas the mortgagee in *Blaisdell* still collected some form of payment and only had to accommodate a court-approved extended redemption period, South Carolina insurance companies would be forced to fully pay out every single BI policy in the state. This payment is materially distinct from the moratorium in *Blaisdell* because it has no financial limitations, no judicial oversight, no potential to eventually recoup losses, and no meaningful reimbursement.[135] In this way, the provisions of S.1188 are similar to the invalidated provisions from *Thomas*, which similarly lacked any financial limitation and circumvented judicial oversight.

The final factor—that the law is temporally limited to the emergency to which it responds[136]—also opposes validity. While S.1188 confines itself to losses resulting from the COVID-19 pandemic, that pandemic is still ongoing; without a clear end in sight, there is no meaningful time limitation on coverage. This is unlike the statute at issue in *Blaisdell*, where the legislature limited the redemption extensions to either the end of the Great Depression or mid-1935, whichever came first. S.1188 has no similar language. If America fails to control COVID-19, insurers could be liable for losses well beyond 2021.

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130. *Sveen*, 138 S. Ct. at 1817 (quoting Energy Rsrvs. Grp., Inc. v. Kan. Power & Light Co., 459 U.S. 400, 411–12 (1983)).

131. Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 444 (1934).

132. *Id.* at 445.

133. *Id.*

134. *Id.* at 446.

135. *See* S.B. 1188, 2019–2020 Gen. Assemb., 123rd Sess. (S.C. 2020).

136. *Blaisdell*, 290 U.S. at 447.

Although three factors weigh in favor of validity, the other two factors are at the crux of the Supreme Court's test and, therefore, should weigh more heavily in the analysis. Because the test asks if the law is appropriate and *reasonable*, the fact that S.1188 is arguably unreasonable significantly diminishes its chances of constitutional validity.

Further, if Justice Gorsuch convinces at least four of his colleagues that the Contracts Clause should be interpreted more strictly, then the Court would clearly hold that S.1188 is unconstitutional. While convincing so many Justices to abandon precedent may be unlikely, *Sveen* was decided before the confirmation of Justices Kavanaugh and Barrett. While I know of no occasion where either Justice has addressed the Contracts Clause, Justices Gorsuch and Kavanaugh clerked for Justice Kennedy during the same term, and Justice Barrett clerked for Justice Scalia, the preeminent originalist.[137] Neither of these facts guarantee the Justices' interpretations one way or another, but they do increase the likelihood that Justice Gorsuch's point of view could command more of the Court's attention in the future.

3. *Policy Implications*

Notwithstanding any potential ruling on the constitutionality of S.1188, the Bill would have a catastrophic impact on both the insurance industry and policy holders, including those outside of the property-casualty sector.[138] This impact would even further undermine South Carolina's financial revenue and increase expenditures.[139] As discussed in Part II, mandating coverage for BI losses would almost certainly bankrupt the insurance industry and result in the state inheriting substantial liability.[140] Even if insurance companies survived this imposition of liability, they would likely increase premiums to recoup losses and further establish financial security in an uncertain underwriting environment.

If S.1188 becomes law and the Department funds reimbursements through assessments, the insurance industry as a whole, including insurers who do not operate in the property-casualty field, would be forced to subsidize

137. Richard Wolf, *Basketball, Popeyes, 2 Live Crew: The Year Neil Gorsuch and Brett Kavanaugh Clerked for Anthony Kennedy*, USA TODAY (Aug. 30, 2018), https://www.usatoday.com/story/news/politics/2018/08/30/brett-kavanaugh-neil-gorsuch-learned-supreme-court-ropes-together/1050836002/ [https://perma.cc/9Z6H-RUS9]; Amy Howe, *Potential Nominee Profile: Amy Coney Barrett*, SCOTUSBLOG (July 4, 2018), https://www.scotusblog.com/2018/07/potential-nominee-profile-amy-coney-barrett/ [https://perma.cc/24RM-NAED].

138. *Accord* Press Release, Am. Prop. Cas. Ins. Ass'n, *supra* note 39; *see* S.C. S.B. 1188.

139. *Cf.* Anspach, *supra* note 41 (explaining the process of rehabilitation, where state insurance guaranty associations will continue coverage for insurance companies that declare bankruptcy).

140. *See supra* Part II.

the economic losses of an unforeseeable pandemic. It is eminently unfair to force insurers outside of the property-casualty realm to subsidize a market they do not participate in. If the legislature's goal is to spread the burden of financial losses across a wide array of entities so as to minimize the impact on any given entity, why not assess every licensed business in the state? That solution spreads the financial impact across a wider array of entities, and there is arguably as meaningful of a connection between property-casualty insurers and licensed businesses as there is between property-casualty and other insurers.

Because S.1188 is likely to result in a combination of higher premiums, bankruptcy in the insurance industry, and substantial state liability, it fails to meaningfully resolve South Carolina's financial crisis.

B. Other Legislative Proposals

Considering the issues S.1188 presents, other proposed legislation may inspire a more tenable solution. Legislative proposals addressing BI coverage have been advanced in New Jersey, Massachusetts, Ohio, New York, Louisiana, and Pennsylvania.[141] Many of these proposals share similarities with S.1188, but many also have key differences.[142] Discussions of their constitutional merits would be largely repetitive and have, therefore, been omitted. Moreover, since their proposals, some of these bills have been withdrawn, amended, or otherwise made null.[143]

The Act proposed in New Jersey is substantially comparable to S.1188.[144] Two key differences are that it is limited to business with fewer than 100 full-time employees and that the assessment to fund reimbursements cannot come from life or health insurance companies.[145] The Act does not explicitly override virus exclusions, but its accompanying comments indicate that may be its intent.[146] While the additional limitations help reign in some of the policy concerns arising from S.1188, most of these concerns remain—namely that insurance companies cannot afford to cover such losses.[147] Additionally, the ambiguity regarding virus exclusions would create an environment ripe

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141. Assemb. Res. 3844, 219th Leg., Reg. Sess. (N.J. 2020); S.B. 2655, 191st Gen. Ct., Reg. Sess. (Mass. 2020); H.B. 589, 133rd Gen. Assemb., Reg. Sess. (Ohio 2020); S.B. 8211–A, 2019–2020 Leg. Sess. (N.Y. 2020); S.B. 477, 2020 Reg. Sess. (La. 2020); S.B. 1127, 2020 Gen. Assemb., Sess. of 2020 (Pa. 2020).

142. *See infra* Part IV.

143. *E.g.*, *Bill S.2655*, THE 192ND GEN. CT. OF THE COMMONWEALTH OF MASS. (Nov. 24, 2020), https://malegislature.gov/Bills/191/S2655 [https://perma.cc/4C53-2HYF].

144. *Compare* N.J. Assemb. Res. 3844, *with* S.B. 1188, 2019–2020 Gen. Assemb., 123rd Sess. (S.C. 2020).

145. N.J. Assemb. Res. 3844.

146. *See id.*

147. *See id.*

for widespread litigation, which is exactly what the legislature wants to avoid.[148]

Similarly, the Massachusetts Act sets the upper limit at 150, rather than 100, employees.[149] The Act also explicitly limits the Division of Insurance's assessments to only those companies that sell BI insurance.[150] The practical benefit of assessing the very entities being reimbursed is unclear, but otherwise, any concerns about this Act mirror those from S.1188 and the New Jersey Act.

The Ohio Bill shares many of the features already discussed.[151] It is limited to businesses with fewer than 100 eligible employees; it allows an assessment against in-state licensed insurers; and, like the New Jersey Act, it does not explicitly override virus exclusions.[152]

The Act proposed in New York is more expansive than others.[153] It covers not only BI policies but also adjacent losses, including "insuring against an insured's business income loss resulting from loss, damage, or destruction of property *owned by others*, including direct suppliers of goods or services to the insured and/or direct receivers of goods or services manufactured or provided by the insured . . . ."[154] It further establishes that these and all other affected policies, if set to expire during the period of emergency, are subject to automatic renewal.[155] Additionally, the Act explicitly states that virus exclusions are null and void, and it limits claims to businesses with fewer than 250 employees.[156] Lastly, the assessment appears to affect all authorized insurers in the state, regardless of the specific policies they sell.[157]

State legislators in Louisiana have amended their initial proposal to the point of effectively withdrawing it due to concerns about litigation and the financial impact on the insurance industry.[158] Before the amendments, the

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148. *See id.*

149. *Compare* S.B. 2655, 191st Gen. Ct., Reg. Sess. (Mass. 2020), *with* N.J. Assemb. Res. 3844.

150. Mass. S.B. 2655.

151. *See* H.B. 589, 133rd Gen. Assemb., Reg. Sess. (Ohio 2020).

152. *Id.*

153. *Compare* S.B. 8211-A, 2019–2020 Leg. Sess. (N.Y. 2020), *with* N.J. Assemb. Res. 3844, *and* Mass. S.B. 2655, *and* Ohio H.B. 589.

154. N.Y. S.B. 8211-A (emphasis added).

155. *Id.*

156. *Id.*

157. *See id.*

158. Claire Wilkinson, *La. Lawmakers Scrap Business Interruption Bill*, BUS. INS. (May 13, 2020), https://www.businessinsurance.com/article/20200513/NEWS06/912334550/Louisiana-lawmakers-scrap-bill-to-make-interruption-coverage-retroactive-COVID-1 [https://perma.cc/WF9W-6VP4]; Melinda Deslatte, *Bid to Force Interruption Insurance to Cover Virus Pulled from Louisiana Bill*, INS. J. (May 14, 2020), https://www.insurancejournal.com/news/southcentral/2020/05/14/568631.htm [https://perma.cc/SQ5R-MJ27].

Louisiana Bill mandated coverage for losses due to COVID-19.[159] Like S.1188, it did not limit the number of employees an eligible business could have.[160] As amended, the Bill simply requires that, as of January 1, 2021, all BI policies sold in the state include "a notice of all exclusions on a form prescribed by the commissioner of insurance."[161] Presumably, this ensures future policy holders are statutorily notified as to whether their policy has a provision similar to a virus exclusion.

Finally and most distinct is the Pennsylvania Bill.[162] This Bill broadly defines "physical loss" to include nearly all businesses.[163] So long as a business owner can show that COVID-19 was present at the insured location—likely through an infected individual having been on the premises or from at least one confirmed case in the relevant municipality—physical loss has occurred.[164] This Bill also establishes coverage for losses resulting from civil authority; however, both of these statutory provisions can be overridden by unambiguous exclusions for virus or civil authority coverage.[165] The Bill does not mandate coverage, override existing provisions of current policies, limit its application to businesses of a given size, or implement a reimbursement system.[166]

V. A NEW PROPOSAL FOR SOUTH CAROLINA

To resolve the problem that many businesses and insurance companies are facing, the legislature must balance the competing interests of insurers and policy holders and consider the financial impact on South Carolina's bottom line. Furthermore, a resolution must be deferential to constitutional prohibitions and evenly spread costs among the parties most equipped and involved. This Part proposes incentivized voluntary coverage (IVC), a type of coverage that protects the most vulnerable business owners, that does not

159. Wilkinson, *supra* note 158.

160. Paul S. White & Siobhán A. Breen, *Update: Louisiana Joins States Proposing Legislation to Require Insurers to Cover COVID-19*, NAT'L L. REV. (Apr. 8, 2020), https://www.natlawreview.com/article/update-louisiana-joins-states-proposing-legislation-to-require-insurers-to-cover [https://perma.cc/Z2J9-AXET].

161. S.B. 477, 2020 Reg. Sess. (La. 2020).

162. *Compare* S.B. 1127, 2020 Gen. Assemb., Sess. of 2020 (Pa. 2020), *with* Assemb. Res. 3844, 219th Leg., Reg. Sess. (N.J. 2020), *and* S.B. 2655, 191st Gen. Ct., Reg. Sess. (Mass. 2020), *and* H.B. 589, 133rd Gen. Assemb., Reg. Sess. (Ohio 2020), *and* S.B. 8211-A, 2019–2020 Leg. Sess. (N.Y. 2020), *and* La. S.B. 477, *and* S.B. 1188, 2019–2020 Gen. Assemb., 123rd Sess. (S.C. 2020).

163. Pa. S.B. 1127.

164. *Id.*

165. *Id.*

166. *See id.*

bankrupt the insurance industry, and that still allows business owners to maintain a competitive advantage in a free market.

Similar to the Pennsylvania Bill, IVC would first statutorily define "physical loss or damage" as including either the presence of a COVID-19 positive individual on the insured premises or the presence of other evidence suggesting the virus's existence on the premises. This definition would not extend to a business solely because its municipality has at least one confirmed case. While this definition places a high evidentiary burden on business owners, it still expands their coverage beyond the most natural reading of "physical damage or loss." IVC would also limit coverage to businesses of 100 employees or less, ensuring that the most vulnerable businesses are afforded the most protection. Second, IVC would not override exclusions for virus or civil authority coverage. Rather, it would explicitly state that, absent a showing of fraud or other inducement, such provisions are facially and presumptively valid.

Some BI policies would still leave many business owners without financial aid. For those policies, IVC would provide two potential avenues for aid. The first would be a tax credit (with an upper limit) for insurers who voluntarily choose to cover policies either without evidence of physical damage or loss or despite a relevant exclusion. This would encourage insurers to continue building their reputation in the community. While a tax credit effectively subsidizes these payouts, it would allow the state to capitalize in the interim, even further improving the state's overall cash flow. Although the tax credit would undeniably decrease revenues for the state, it would still minimize the financial impact on insurers and limit the state's liability. IVC would also guarantee that insurers who volunteer to cover otherwise deniable losses do not set a precedent that could be used against them in future litigation.

The second avenue for relief would be available to business owners who have a BI policy and either do not want to deal with their insurer or have already been denied by the insurer (e.g., because the policy has a virus exclusion). IVC would allow these businesses to apply for an interest-free loan from the state. The assets funding these loans would come primarily through funds that the Department collects from policy and premium taxes. Because this fund is normally reserved for paying claims against bankrupt insurance companies, the Department would likely need to double-check its audits to ensure South Carolina insurers are not already on the verge of bankruptcy. Businesses who take out these loans would only need to show they had a BI policy in effect at some point during the state of emergency. Receiving one of these loans would disqualify that business from making a claim with their insurer for the same loss.

A. Advantages and Disadvantages

IVC clarifies BI policies and their exclusions, thus limiting the court's burden. It provides a streamlined way for businesses to receive financial aid, and it incentivizes insurers to contribute resources to the market and spread the cost of harm. IVC also maintains competitive advantages that would otherwise exist in a free market. Business owners who negotiated virus or civil authority coverage would be entitled to coverage from their insurer. Business owners who obtained a BI policy yet did not negotiate for these types of coverage would be entitled to a loan from the state. Business owners without a BI policy would not be entitled to any specialized or particular aid but could pursue loans in the private market. This hierarchy establishes competitive advantages based on a business owner's level of preparation for the given environment. While it sounds harsh to impose such a hierarchy for an unprecedented event like the COVID-19 pandemic, this hierarchy helps preserve some semblance of the free-market ideals that have traditionally strengthened the American economy.

Notably, the crux of balancing competing interests requires spreading financial liability such that no single entity is overburdened beyond its means. IVC only achieves that balance if private sector entities voluntarily pay out claims they are not legally required to pay. This is, admittedly, unlikely. However, tax benefits could encourage insurance companies to view this as an opportunity to boost their public image at little or no cost to them. Additionally, more insurance companies have recently adjusted their goals to reflect their obligations and duties beyond those owed to shareholders.[167] If South Carolina insurers adopt this view, they may be more than willing to pay out on these claims. The other downside to IVC is that it disadvantages businesses for failing to foresee an unforeseeable pandemic. Nonetheless, as discussed above, the alternative would be to deprive prepared entities of any advantage they might have gained through planning and investing for this eventuality.

VI. CONCLUSION

South Carolina's response to the financial havoc wreaked by COVID-19 should focus on sustaining the local economy and fairly spreading financial liability across relevant parties based on ability and previously negotiated liability. Leaving this problem to the judiciary is simply not a viable option.

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167. *See* David Benoit, *Move Over, Shareholders: Top CEOs Say Companies Have Obligations to Society*, WALL ST. J. (Aug. 19, 2019), https://www.wsj.com/articles/business-roundtable-steps-back-from-milton-friedman-theory-11566205200 [https://perma.cc/83UA-P2QA].

S.1188 not only fails to accomplish the goals set out above, but it also fails to pass constitutional muster; the provisions imposed by the Bill are not reasonable impairments on the obligations of contracts, and as a result, they run afoul of the Contracts Clause. Even if the Bill were constitutionally valid, it would bankrupt insurance companies; impose substantial financial liability on the state; and, at the very least, result in large premium hikes from insurance companies, thus inhibiting access to insurance across the state. For these reasons, the South Carolina General Assembly should instead enact a law that broadens the definition of "physical loss or damage" under a BI policy, declares certain exclusions presumptively valid, incentivizes the spread of financial liability, and maintains certain competitive advantages based on planning and investment.