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**REDESIGNING WIDESPREAD INSURANCE
COVERAGE DISPUTES: A CASE STUDY OF THE
BRITISH AND AMERICAN APPROACHES TO
PANDEMIC BUSINESS INTERRUPTION
COVERAGE**

*Daniel Schwarcz**

On March 11, 2020, the World Health Organization declared COVID-19 a pandemic. In the subsequent two years, U.S. businesses filed well over 2,000 lawsuits in state and federal courts seeking Business Interruption (BI) insurance coverage for closures associated with the pandemic. Notwithstanding this “nationwide flood of insurance-related litigation,” clear answers regarding insurers’ coverage obligations remain elusive two years into the pandemic; although courts have dismissed a significant majority of these lawsuits, policyholders have scored a meaningful number of victories in federal, and especially state, courts. This chaotic and costly process for resolving pandemic-related BI coverage disputes contrasts sharply with the experience of the United Kingdom. Within eight months of the pandemic’s onset, the legal obligations of British BI insurers had been definitively resolved through a novel “test case scheme” led by the country’s primary market conduct regulator for financial firms, the Financial Conduct Authority (FCA). Focusing on these divergent experiences, this Article suggests that the United States can substantially improve its process for resolving future widespread insurance coverage disputes by adopting a limited reform that is inspired by the British test case scheme. In particular, this Article proposes that states should consider empowering their insurance department and attorney general to request that federal courts adjudicating cases raising novel coverage questions implicated in emerging and widespread coverage disputes certify those questions to the state’s su-

* Schwarcz@umn.edu. The title of this Article is intended to parallel Daniel Schwarcz, *Redesigning Consumer Dispute Resolution: A Case Study of the British and American Approaches to Insurance Claims Conflict*, 83 TULANE L. REV. 735 (2009), which, like this Article, examined the U.S. and U.K. approaches to resolving insurance disputes. Whereas that article focused on individual consumer-oriented coverage disputes, this Article focuses on the resolution of widespread coverage disputes that often implicate large and small businesses alike. For helpful guidance and suggestions, I owe substantial thanks to Tom Baker, James Davey, Nora Freeman Engstrom, Brian Fitzpatrick, Christopher French, Erik Knutsen, Jeffrey Stempel, and Adam Zimmerman. Josh Hamel provided excellent research assistance.

preme court. It concludes by suggesting that affirmative efforts by states to encourage federal courts to certify key questions of state law could help to promote the fair and efficient resolution of widespread disputes even outside of the insurance domain.

INTRODUCTION

Starting in March 2020, COVID-19 fundamentally transformed life in the United States. For innumerable businesses across the country, these changes produced massive losses as potential customers stayed home rather than venturing out for their food, entertainment, work, or education.¹ Faced with these shocks to their revenue and income, many businesses looked to their Business Interruption (BI) insurers for compensation.² Insurers uniformly rebuffed these coverage claims, causing thousands of disappointed policyholders to resort to coverage litigation; many of these cases are ongoing as of April 2022.³

Although the details of these insurance coverage cases vary, they generally turn on a subset of common legal issues. The most significant of these is whether policyholders' pandemic-induced shutdowns, operating modifications, or additional expenses were caused by "direct physical loss of or damage to" property.⁴ The centrality of this issue stems from the fact that virtually all BI policies in the United States include this phrase—or a close variant⁵—in their grant of coverage, both for ordinary BI coverage and for related coverages such as Civil Authority and Contingent BI coverage.⁶ According to insurers, this requirement is simply not met when it comes to pandemic-related business interruption losses, which stem not from any physical altera-

1. Diana Farrell et al., *Small Business Financial Outcomes during the Onset of COVID-19*, JPMORGAN & CHASE CO. (June 2020), www.jpmorganchase.com/institute/research/small-business/small-business-financial-outcomes-during-the-onset-of-covid-19.

2. See generally Christopher C. French, *COVID-19 Business Interruption Insurance Losses: The Cases for And Against Coverage*, 27 CONN. INS. L. J. 1 (2020–2021); Erik S. Knutsen & Jeffrey W. Stempel, *Infected Judgment: Problematic Rush to Conventional Wisdom and Insurance Coverage Denial in a Pandemic*, 27 CONN. INS. L. J. 185, 198 (2020–2021).

3. See Knutsen & Stempel, *supra* note 2, at 190.

4. See *id.* at 231.

5. Some policies cover "direct physical loss or damage to" property rather than "direct physical loss of or damage to" property. Compare *Frontier Dev., LLC v. Endurance Am. Specialty Ins. Co.*, No. 1:21-cv-20611-GAYLES, 2021 WL 4127395, at *1 (S.D. Fla. Sept. 8, 2021) (policy uses former language), with *Univ. of Saint Thomas v. Am. Home Assurance Co.*, No. CV H-20-2809, 2021 WL 3129330, at *2 (S.D. Tex. July 23, 2021) (policy uses latter language). At least some courts have suggested that this variation in policy language is legally significant. See, e.g., *Seifert v. IMT Ins. Co.*, 542 F. Supp. 3d 874, 878 (D. Minn. 2021).

6. See Larry P. Schiffer, *Does the Novel Coronavirus Cause Direct Physical Loss of or Damage to Property?*, NAT'L L. REV. (Apr. 23, 2020), <https://www.natlawreview.com/article/does-novel-coronavirus-cause-direct-physical-loss-or-damage-to-property>.

tion of or damage to property, but from efforts to mitigate person-to-person transmission of COVID-19.⁷

In addition to this “direct physical loss of or damage to” issue, litigation of pandemic-related BI coverage in the United States raises a host of other common issues. For instance, many cases also implicate exclusions for losses caused by a virus, which were a common, but not universal, feature of BI policies prior to the pandemic.⁸ Similarly, a central issue in the many cases alleging that an insured’s property was contaminated with COVID-19 is the causal connection between any such contamination and the suspension of the insured’s business operations.⁹

These legal issues have spawned a massive amount of litigation and uncertainty in the United States. According to the COVID Coverage Litigation Tracker maintained by the University of Pennsylvania Law School, over 2,000 lawsuits have been filed regarding BI coverage in connection with the pandemic as of April 2022.¹⁰ To date, these cases have resulted in well over 500 judicial opinions, with that number sure to swell significantly in the months and years to come.¹¹ Notwithstanding these massive expenditures in legal and judicial resources, clear answers about BI insurers’ coverage obligations remain elusive; although a significant majority of federal cases have been dismissed with prejudice, more than 20% of all state court decisions on insurers’ motions to dismiss have denied them as of the two-year anniversary of the Pandemic.¹² And ultimately it is state courts rather than federal courts that will have the final word on these disputes, given that insur-

7. See *Keeping Promises Made to Main Street, Ensuring Fairness for All Customers.*, INS. INFO. INST., <https://fairinsure.org/> (last visited Mar. 24, 2022).

8. See John Buchanan & Suzan Charlton, *Virus and Pollution Exclusions in Coronavirus-Related Business Interruption Claims*, A.B.A. (Aug. 27, 2020), <https://www.americanbar.org/groups/litigation/committees/insurance-coverage/articles/2020/virus-pollution-exclusions-coronavirus/> (“Some—but far from all—commercial property insurance policies contain exclusions for losses caused by viruses.”).

9. See Alison Frankel, *Plaintiffs Pushing for COVID-19 Insurance MDL: Don’t Believe Industry’s Hype*, REUTERS (June 16, 2020, 3:34 PM), <https://www.reuters.com/article/us-otc-insurance-idUSKBN23N39P>.

10. *Covid Coverage Litigation Tracker*, INS. LAW CTR., <https://cclt.law.upenn.edu/> (last visited Apr. 1, 2022).

11. See *Key COVID-19 Insurance Coverage Cases Tracker (US): 2020 and 2021*, THOMSON REUTERS (last visited Mar. 24, 2022), [https://uk.practicallaw.thomsonreuters.com/w-024-9391?contextData=\(sc.Default\)&transitionType=Default&firstPage=true](https://uk.practicallaw.thomsonreuters.com/w-024-9391?contextData=(sc.Default)&transitionType=Default&firstPage=true) (last visited Mar. 24, 2022) (summarizing well over one hundred written judicial opinions involving pandemic BI insurance coverage).

12. *Covid Coverage Litigation Tracker*, *supra* note 10.

ers' coverage obligations are a matter of state rather than federal law.¹³

Perhaps not surprisingly given this costly and uncertain process for resolving pandemic-related BI claims, various efforts to promote more efficient resolution of these disputes in the United States have been pursued. However, these efforts have largely proven unsuccessful. For instance, in August 2020, the U.S. Judicial Panel on Multidistrict Litigation (MDL) rejected an effort to consolidate a broad range of federal BI coverage disputes, emphasizing potentially relevant variations in policy language, applicable law, and factual circumstances.¹⁴ Although the MDL panel subsequently consolidated federal proceedings in cases involving two relatively small regional insurers, Society¹⁵ and Erie,¹⁶ most federal coverage disputes have continued to proceed individually.¹⁷ Efforts to establish MDLs or similar consolidated proceedings in individual state court systems have also proven unsuccessful.¹⁸ And while hundreds of the suits filed to date are styled as class actions, no court has, as of yet, authorized a class in any of these cases.¹⁹ In the legislative arena, various proposals to clarify insurers' coverage obligations through legislation with retroactive effect have also fallen short.²⁰

The United States' chaotic and costly resolution of pandemic-related BI coverage disputes contrasts sharply with the experience of the United Kingdom, a country whose legal system, insurance industry, and economy share many similarities with the United States.²¹

13. See KENNETH ABRAHAM & DANIEL SCHWARCZ, *INSURANCE LAW AND REGULATION* 10–11 (7th ed. 2020).

14. See *In re COVID-19 Bus. Interruption Prot. Ins. Litig.*, 482 F. Supp. 3d 1360, 1362–63 (J.P.M.L. 2020).

15. *In re Soc'y Ins. Co. COVID-19 Bus. Interruption Prot. Ins. Litig.*, 521 F. Supp. 3d 729 (N.D. Ill. 2021).

16. *In re Erie COVID-19 Bus. Interruption Prot. Ins. Litig.*, 509 F. Supp. 3d 1370 (J.P.M.L. 2020).

17. See Alison Frankel, *Imagining the COVID Insurance MDL that Wasn't*, REUTERS (Mar. 3, 2021, 4:00 PM), <https://www.reuters.com/article/legal-us-otc-insurance-idUSKCN2AV2T4>.

18. See *infra* Part I.B. For an overview of state analogues to MDLs, see Zachary Clopton & D. Theodore Rave, *Opioid Cases and State MDLs*, 70 DEPAUL L. REV. 245, 245 (2020).

19. See Anne Merminod & Nigah Awj, *COVID-19 Class Action Forecasts*, A.B.A. (2020), https://www.americanbar.org/groups/tort_trial_insurance_practice/publications/committee-newsletters/covid-19_class_actions_forecast/.

20. See Andrew G. Simpson, *Some States Still Weigh Mandating Business Interruption Coverage*, INS. J. (Apr. 5, 2021), <https://www.insurancejournal.com/news/national/2021/03/16/605442.htm>.

21. Compare Tom Baker, Univ. Pa., Presentation on U.S. COVID-19 Insurance Litigation and the Future of Business Income Protection (Mar. 25, 2021), with James Davey, Professor of Ins. & Commercial Law, Univ. Southampton, Presentation on The Impact of the FCA Test Case in the UK and Beyond (Mar. 25, 2021).

Within weeks of the pandemic causing widespread disruptions for British businesses, the country's primary market conduct regulator for financial firms, the Financial Conduct Authority (FCA), announced that it would bring a "test case" to clarify the application of various BI insurance policies to pandemic-related losses.²² Approximately six months later, in January 2021, the country's high court definitively resolved this test case, answering numerous coverage questions based on a representative sample of dozens of policy terms.²³ Not only was the judgment legally binding on the eight insurers that agreed to be parties to the test case, but it also provided "authoritative guidance for the interpretation of similar policy wordings and claims."²⁴ For that reason, the FCA subsequently issued various directives designed to ensure efficient claims payments by insurers, including a policy checker, FAQs, Final Guidance, coverage calculator for policyholders, and a "Dear CEO letter" that outlined the agency's expectations for how insurers must handle claims in light of the test case.²⁵ Since about March 2021, the coverage obligations of most U.K. insurers in most circumstances have thus been quite clear, meaning that virtually all British policyholders with legitimate pandemic-related BI claims have been paid by their insurers as of April 2022.²⁶

To be sure, there are several crucial distinctions between the British and American pandemic BI coverage litigation. The most important is that the FCA test case intentionally bypassed the issue that is at the forefront of coverage litigation in the United States, as the FCA determined at the outset that policies providing only "basic cover" for business interruption "as a consequence of property damage" were unlikely to be "oblig[ed] to pay out in relation to the COVID-19 pandemic."²⁷ For that reason, the FCA framed its test case to focus only on coverage issues involving policies that provided coverage for business interruption flowing from causes other than property damage, such as the presence of disease or denial of access to property.²⁸ Un-

22. See *FCA Statement - Insuring SMEs: Business Interruption*, FIN. CONDUCT AUTH. (May 1, 2020), <https://www.fca.org.uk/news/statements/insuring-smes-business-interruption>.

23. *Fin. Conduct Auth. v. Arch Ins. (UK) Ltd.* [2021] UKSC 1, [1]–[4] (appeal taken from Eng.).

24. *Business Interruption Insurance*, FIN. CONDUCT AUTH. (July 26, 2021), <https://www.fca.org.uk/firms/business-interruption-insurance>.

25. See *id.*

26. See *id.*

27. Letter from Christopher Woolard, Interim Chief Exec., Fin. Conduct Auth., to CEOs 1 (Apr. 15, 2020), <https://www.fca.org.uk/publication/correspondence/dear-ceo-insuring-sme-business-interruption-coronavirus.pdf> [hereinafter FCA Dear CEO Letter].

28. The FCA referred to these policies as a "relevant non-damage business interruption policy." See FIN. CONDUCT AUTH., *BUSINESS INTERRUPTION INSURANCE TEST CASE: FINALISED*

like in the United States, where policies providing this type of coverage are rare, a significant number of British insurers had issued BI policies providing such extended coverage.²⁹

Despite this important difference, the contrasting experiences of the United States and the United Kingdom in addressing pandemic-related BI disputes raises an important question: Can the United States improve its process for resolving future widespread coverage disputes by adopting elements of the British approach?³⁰ After all, the insurance coverage questions raised by the pandemic are hardly the first example of widespread coverage disputes in the United States being inefficiently resolved through hundreds of lawsuits that generate mass uncertainty and span years, if not decades.³¹ And absent broad-ranging reforms, they will certainly not be the last.³² If, as appears to be the case, the United Kingdom has developed and implemented a system for resolving such widespread coverage disputes fairly and efficiently, then it stands to reason that the United States could potentially benefit from importing adapted versions of these reforms.

This Article explores that possibility, ultimately suggesting that states should consider empowering their insurance regulators and attorneys general to request that federal courts adjudicating cases raising novel coverage questions implicated in emerging and widespread coverage disputes certify those questions to the state's supreme court. Unlike the United Kingdom's test case scheme, this proposal would

GUIDANCE FOR FIRMS 9 (2020), <https://www.fca.org.U.K./publication/finalised-guidance/finalised-guidance-bi-test-case.pdf>. See also Paul J. Covalleski, *U.K. High Court Extends Reach of Business Interruption Coverage for Policy Holders – What Do U.S. Insurers Need to Know?*, NAT'L L. REV. (Jan. 26, 2021), <https://www.natlawreview.com/article/covid-19-fca-business-interruption-test-case-unresolved-issue-and-wider-implications>.

29. See Aaron Lapniewski et al., *FCA Test Case Impact on U.S. Insurers*, JD SUPRA (Oct. 20, 2020), <https://www.jdsupra.com/legalnews/fca-test-case-impact-on-u-s-insurers-79153/>.

30. This is an issue I have previously explored in the context of resolving run-of-the-mill consumer-oriented coverage disputes. See Daniel Schwarcz, *Redesigning Consumer Dispute Resolution: A Case Study of the British and American Approaches to Insurance Claims Conflict*, 83 TULANE L. REV. 735, 738–40 (2009) [hereinafter Schwarcz, *Redesigning Consumer Dispute Resolution*]. Adam Zimmerman has also explored how administrative agencies in non-U.S. settings use aggregate procedures to resolve common claims, including through “test case” schemes. See generally Michael Sant’Ambrogio & Adam S. Zimmerman, *Collective Adjudication and Administrative Justice*, (Loy. Law Sch. L.A., Working Paper No. 2020-04, 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3489399.

31. Another obvious example was the question whether and when pollution-remediation costs associated with the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) were covered by CGL policies issued in the 1970s and 1980s. See Kenneth S. Abraham, *The Rise and Fall of Commercial Liability Insurance*, 87 VA. L. REV. 85, 86, 90 (2001).

32. See generally Kenneth S. Abraham & Daniel Schwarcz, *Courting Disaster: The Underappreciated Risk of a Cyber Insurance Catastrophe*, 27 CONN. INS. L. J. 407 (2021) [hereinafter Abraham & Schwarcz, *Courting Disaster*].

focus public state actors outside of the judiciary solely on identifying a set of pending coverage disputes wherein the exercise of federal courts' long-standing certification authority would be most likely to help resolve widespread coverage disputes. Not only could this proposal plausibly help to limit the uncertainty and costs produced by litigation like the pandemic BI coverage cases, but it could also affirm the primacy of state rather than federal courts in deciding highly consequential and contested questions of state insurance law.

The Article proceeds as follows. Part I begins by describing the United Kingdom's Financial Markets Test Case Scheme and its success in facilitating the resolution of pandemic-related BI coverage disputes.³³ It contrasts this success with the relatively chaotic process for resolving widespread coverage disputes in the United States, which has been on full display in the context of COVID-19-related BI insurance. Part II then argues that the efficiency and clarity offered by the British scheme for resolving widespread coverage disputes could substantially benefit U.S. insurance markets, but that key differences between the two countries' legal and regulatory schemes complicate any effort to import wholesale a test case scheme into the United States.³⁴ Building on these insights, Part III advances the Article's proposal: that states direct their insurance departments and attorneys general to play a key role in requesting federal courts to certify to state supreme courts important legal issues implicated in a discrete set of existing coverage disputes.³⁵ Finally, the conclusion raises the possibility that the Article's regulatory certification proposal could prove useful outside of the insurance arena in helping to promote the efficient resolution of widespread disputes in a way that respects the primacy of state courts in resolving matters of state law.

I. CONTRASTING THE UNITED KINGDOM'S FINANCIAL MARKETS TEST CASE SCHEME WITH PANDEMIC INSURANCE LITIGATION IN THE UNITED STATES

In the United Kingdom, insurers' coverage obligations for pandemic-induced interruptions of their policyholders' businesses have largely been settled law since January 2021, a mere ten months after the pandemic first ravaged the country and much of the rest of the world. The story could not be more different in the United States, where the coverage obligations of insurers for pandemic-induced

33. See *infra* Part I.

34. See *infra* Part II.

35. See *infra* Part III.

losses remain largely unsettled as of the pandemic's two-year anniversary. This Part describes these competing trajectories in detail, laying the groundwork for assessing whether the United States might borrow from developments in the United Kingdom to improve its processes for resolving widespread coverage disputes. Section A begins by describing the resolution of pandemic BI disputes under the United Kingdom's unique Financial Markets Test Case Scheme.³⁶ Section B then canvasses the massively inefficient and indeterminate state of pandemic BI litigation in the United States.³⁷

A. *The Resolution of Pandemic-Related Insurance Disputes in the United Kingdom*

The COVID-19 pandemic first dramatically impacted the United Kingdom in March 2020, at around the same time that it initially prompted widespread shutdowns in the United States.³⁸ Within weeks of the pandemic's arrival in the United Kingdom, the FCA—the primary market conduct regulator of financial services firms, including insurers, in the United Kingdom³⁹—released a “Dear CEO” letter that clarified the regulator's initial assessment of insurers' coverage obligations with respect to BI policies.⁴⁰ The April 15, 2020, letter first conveyed the FCA's conclusion that it had “no reasonable grounds to intervene” in coverage denials by insurers that had issued “basic cover, [which] do not cover pandemics.”⁴¹ Such policies, the FCA clarified two weeks later, “focused on property damage” and only cover business interruption “as a consequence of property damage.”⁴²

By contrast, the FCA's April 2020 letter also suggested that the pandemic raised numerous legitimate and complicated issues regarding the coverage obligations of British insurers that had issued BI policies triggered by causes other than property damage.⁴³ Such

36. See *infra* Part I.A.

37. See *infra* Part I.B.

38. *Coronavirus and the Impact on Output in the UK Economy: April 2020*, OFFICE NAT'L STATISTICS (June 12, 2020), <https://www.ons.gov.uk/economy/grossdomesticproductgdp/articles/coronavirusandtheimpactonoutputintheukeconomy/april2020>.

39. See *About the FCA*, FIN. CONDUCT AUTH. (Nov. 22, 2021), <https://www.fca.org.uk/about/the-fca>.

40. See generally FCA Dear CEO Letter, *supra* note 27.

41. *Id.* at 1.

42. See FCA Statement - Insuring SMEs: Business Interruption, *supra* note 22.

43. See FCA Dear CEO Letter, *supra* note 27, at 2 (noting that “there are policies where it is clear that the firm has an obligation to pay out on a policy,” as well as various policies where “payment . . . may be disputed”). In order to help the FCA understand these issues and their impact on both regulated insurers and their small business policyholders, the letter announced the creation of a “new small business unit” within the agency. See *id.*

potentially covered causes of business interruptions included infectious diseases, denial of access to property, and government-ordered closures or restrictions.⁴⁴ On May 1, 2020, the FCA announced that it would work to “obtain a court declaration to resolve contractual uncertainty” regarding the coverage obligations of insurers that issued such policies.⁴⁵ Although the precise language of these policies varied significantly across insurers, this action, the FCA announced, would help limit the risk of “ongoing uncertainty for a lengthy period” for both insurers and policyholders.⁴⁶

The procedural mechanism that the FCA used to accomplish this involved a Financial Markets Test Case Scheme that the British courts first adopted on a pilot basis in 2015.⁴⁷ The test case scheme was developed as part of larger procedural reforms designed to help ensure that complex financial disputes could be placed on a specialized “Financial List” so that they could be assigned to judges with particularized experience in this domain.⁴⁸ Financial market test cases are available for claims within the broader Financial List “which rais[e] issues of general importance in relation to which immediately relevant authoritative English law guidance is needed.”⁴⁹ For such cases, the rules authorize a suit between persons with “opposing interests” who mutually agree to participate in the proceedings so as to resolve the unsettled question of law; there is thus no “need for a present cause of action between the parties to the proceedings.”⁵⁰ Opposing parties in a test case, the rules specify, must also “seek to agree” to a common set of facts for purposes of the case.⁵¹ Although the rules contemplate that these test case litigants will generally consist of people who are or were “actively in business in the relevant market,” they also specify

44. See *FCA Statement - Insuring SMEs: Business Interruption*, *supra* note 22.

45. *Id.*

46. See *id.*

47. The Financial Markets Test Case Scheme was first adopted on a pilot basis in PRACTICE DIRECTION 51M-FINANCIAL MARKETS TEST CASE SCHEME ¶¶ 2.2.–.3 (2015). This pilot scheme was subsequently revoked and replaced with a permanent adoption of the Financial Markets Test Case Scheme in PRACTICE DIRECTION 63AA-FINANCIAL LIST ¶¶ 6.3–.4 (2020).

48. The Financial Markets Test Case Scheme was initially only adopted on a pilot basis. See *New Financial List, Financial Market Test Case Pilot Scheme and Shorter and Flexible Trial Pilot Schemes*, ALLEN & OVERY (Sept. 22, 2015), <https://www.allenoverly.com/en-gb/global/news-and-insights/publications/new-financial-list-financial-market-test-case-pilot-scheme-and-shorter-and-flexible-trial-pilot-sche>. The scheme was thereafter extended for three years in 2017. See *Financial Markets Test Case Pilot Scheme to Be Extended for Three Years and Expanded*, HERBERT, SMITH, & FREEHILLS (June 21, 2017), <https://hsfnotes.com/litigation/2017/06/21/financial-markets-test-case-pilot-scheme-to-be-extended-for-three-years-and-expanded/>.

49. See PRACTICE DIRECTION 63AA-FINANCIAL LIST, *supra* note 47, ¶ 6.1.

50. See *id.* ¶¶ 6.2–.3.

51. See *id.* ¶ 6.5(b).

that “in appropriate cases,” other actors may be parties to a test case, including regulatory bodies.⁵²

The FCA’s test case for BI cover of pandemic-related losses was the first case to operate under this Financial Markets Test Case Scheme.⁵³ Throughout May 2020, the FCA set the stage for invoking this unprecedented procedure by hiring a well-regarded London law firm⁵⁴ and a high-profile barrister to assist with its efforts.⁵⁵ During this time period, the FCA also broadly solicited feedback from policyholders and insurers.⁵⁶ Then, on June 1, 2020, the FCA published several proposals for framing the test case.⁵⁷ These included a representative set of policy wordings to be tested in the case, a set of several different fact patterns involving the effect of the pandemic on impacted policyholders, and various different statements of the issues and questions that the FCA would ask the court to resolve in the test case.⁵⁸

Approximately one week later, on June 9, 2020, the FCA formally filed its test case with the “High Court,” the equivalent of a U.S. federal district court.⁵⁹ The test case named as defendants eight insurers that had agreed to participate in the proceedings as “opposing interests” to the FCA, while making clear that the FCA would argue in the proceedings that “subject to proof of loss and individual policy points such as sub-limits,” the policies it identified in connection with the test case “do respond to the events of COVID-19 and the Governmental action responding to it in the first half of 2020.”⁶⁰ At the same time, the FCA published revised versions of the sample policy language to be tested in the case as well as its proposed facts and list of issues and questions for the court to resolve.⁶¹ These revisions were informed by

52. *See id.* ¶¶ 6.3, 6.5(a).

53. *See* Neill Blundell et al., *Financial Services and Markets Dispute Resolution Quarterly Update: October 2020*, MACFARLANES (Oct. 8, 2020), <https://www.macfarlanes.com/what-we-think/in-depth/2020/financial-services-and-markets-dispute-resolution-quarterly-update-october-2020/#Financial>.

54. Herbert Smith Freehills is widely regarded as one of the leading law firms in London.

55. The lead barrister for the test case was Colin Edelman, who is widely regarded as the best insurance barrister in the United Kingdom. *See Colin Edelman QC*, DEVEREUX, <https://devereuxchambers.co.uk/barristers/pdf/colin-edelman> (last visited Mar. 24, 2022).

56. *See Business Interruption Insurance*, *supra* note 24.

57. Press Release, Fin. Conduct Auth., Update on FCA Test Case of the Validity of Business Interruption Claims (June 1, 2020), <https://www.fca.org.uk/news/press-releases/update-fca-test-case-validity-business-interruption-claims>.

58. *See id.*

59. *See* Claim Form, Fin. Conduct Auth. v. Arch, No. FL-2020-000018 (EWHC (QB) June 9, 2020).

60. *See id.*

61. *See generally* HERBERT, SMITH FREEHILLS, FIN. CONDUCT AUTH., BUSINESS INTERRUPTION INSURANCE TEST CASE Representative Sample Of Policy Wordings (2020), <https://>

over 270 written submissions and forty-five consultations from policyholders and other stakeholders in the preceding weeks.⁶²

In short order, the court approved the FCA's proposed treatment of the case under the Financial Markets Test Case Scheme and established an expedited schedule for hearing the case.⁶³ Given the case's scale, two judges were assigned to jointly handle it, as authorized by the rules establishing the Financial List for complex financial disputes.⁶⁴ Over the next several weeks, the test case proceeded at an expedited pace, with extensive pre-trial briefing on a range of substantive issues.

During this pre-trial process, the FCA posted frequent updates about the proceedings on its website.⁶⁵ These included the final set of approved facts to which the parties had agreed for purposes of the test case, a final set of twenty-one policy wordings to be considered in the case, as well as the various pre-trial arguments of the defendants and the FCA.⁶⁶ Throughout this time period, the FCA and its legal team continued to meet with policyholders and other stakeholders to consider feedback on how to best frame their arguments so as to advance policyholders' interests.⁶⁷ Meanwhile, the court allowed two outside groups acting on behalf of a subset of policyholders to intervene and present their own arguments, in addition to those presented by the FCA.⁶⁸

These pre-trial proceedings culminated with an eight-day online trial starting on July 20, 2020.⁶⁹ The two judges assigned to the case subsequently published their decision, which spanned over 150 pages, in mid-September 2020.⁷⁰ The decision organized the relevant policies under consideration into three broad categories, depending on the covered cause of the business interruption: (i) "disease" wordings that provided coverage when a business interruption was caused by a dis-

www.fca.org.uk/publication/corporate/bi-insurance-test-case-representative-sample-of-policy-wordings-9-june.pdf.

62. *Business Interruption Insurance*, *supra* note 24.

63. See Court Order ¶¶ 1–5, 10, 14–15, 20–21, 24, *Fin. Conduct Auth. v. Arch Ins. (UK) Ltd.*, No. FL-2020-000018 (2020).

64. PRACTICE DIRECTION 63AA–FINANCIAL LIST, *supra* note 47, ¶ 6.5(d).

65. *Business Interruption Insurance*, *supra* note 24.

66. See *id.*

67. *Id.*

68. See *Judgment Handed Down in FCA's COVID-19 Business Interruption Insurance Test Case*, HERBERT, SMITH & FREEHOLDS (Sept. 15, 2020), <https://hsfnotes.com/insurance/2020/09/15/judgment-handed-down-in-fcas-covid-19-business-interruption-insurance-test-case/>.

69. See *Business Interruption Insurance*, *supra* note 24.

70. See generally *Fin. Conduct Auth. v. Arch Ins. (UK) Ltd.* [2020] EWHC 2448 (Comm) (Eng.).

ease; (ii) “prevention of access/public authority” wordings, which covered business interruption caused by restricted access to premises due to public orders; and (iii) “hybrid” wordings which covered business interruption caused by publicly-imposed restrictions related to a disease.⁷¹

With respect to policies containing disease and hybrid wordings, the High Court opinion largely found in favor of coverage, with several caveats. For instance, the opinion rejected most insurers’ arguments that their policies only covered losses directly attributable to local occurrences of a disease that were independent of the broader pandemic.⁷² The court did, however, reach a slightly different conclusion for two specific policy wordings, which it interpreted to only provide coverage if policyholders could demonstrate that COVID-19 outbreaks within the policyholders’ local proximity had caused their business interruption.⁷³ Additionally, for several hybrid policies, the court held that the relevant language conditioned coverage on government shutdown orders that were issued pursuant to statutory authority, a requirement that the court found was not met by various advisories issued by U.K. authorities in March 2020.⁷⁴

The High Court opinion interpreted the second category of prevention of access/public authority wordings more restrictively than the other two sets of policies, with the coverage questions in these cases turning heavily on both the specific language at issue and the insured’s particular circumstances.⁷⁵ The court held that many such policies required government orders that completely restricted physical access to the insured premises for purposes of the insured’s preexisting business; that condition might be met, for instance, for restaurants that were forced to convert entirely sit-in dining to take-out, but might not be met for restaurants that maintained a significant take-out business prior to the pandemic.⁷⁶ As with the hybrid policies, the court also found that coverage required government closures ordered pursuant to statutory authority.⁷⁷

The High Court opinion also addressed various important issues that crosscut the three categories of policies. For instance, it rejected insurers’ proposed interpretation of the “trends” clauses in their poli-

71. *Id.* at [8].

72. *Id.* at [102], [107].

73. *Id.* at [407], [436]–[37].

74. *Id.* at [266]–[67], [294].

75. *Id.* at [306]–[502].

76. See *Judgment Handed Down in FCA’s COVID-19 Business Interruption Insurance Test Case*, *supra* note 68.

77. *Fin. Conduct Auth. v. Arch Ins. (UK) Ltd.* [2020] EWHC 2448 (Comm), [121]–[22] (Eng.).

cies to mean that insureds could only collect the amount they would have made had the pandemic occurred but not resulted in any localized infections.⁷⁸ Such trends clauses, the court emphasized, require taking into account business trends that would have occurred in the absence of an insured peril when calculating covered loss; in all instances, the insured peril included either the occurrence of an emergency or the presence of a communicable disease.⁷⁹ The court also rejected a similar argument based on the Supreme Court precedent, *Orient Express*, which had held that there was no BI coverage for a New Orleans hotel that was severely damaged in Hurricane Katrina because the hotel would have experienced a complete cessation of its business even if it was undamaged by the hurricane due to the physical damage that Katrina caused to neighboring property.⁸⁰ While opining that *Orient Express* was likely wrongly decided, the High Court (which did not have authority to overturn the Supreme Court precedent) distinguished it on the grounds that the insured peril in that case was distinct from the “composite or compound perils” in the policies that the court was interpreting.⁸¹

About a month after the High Court published its opinion, the Supreme Court granted motions by both the FCA and most of the defendant-insurers to hear a “leapfrog” appeal of the case that bypassed the intermediate appeals stage.⁸² After hearing the appeal in mid-November 2020, the Supreme Court issued its own one-hundred-plus page opinion on the case on January 15, 2021.⁸³ With the issuance of its opinion, the Supreme Court brought the test case to a final resolution within about seven months of its filing and within ten months of the United Kingdom being first struck by the COVID-19 pandemic.⁸⁴

The Supreme Court opinion largely affirmed the trial court’s conclusions while rejecting only isolated portions of the analysis in ways that ultimately expanded the availability of coverage for policyholders. For instance, the Supreme Court rejected the High Court’s conclusion that only closures ordered pursuant to statutory authority could produce coverage under various prevention of access/public authority and hybrid wordings, such as “closure or restrictions placed,”

78. *Id.*

79. *Id.*

80. *Orient-Express Hotels Ltd. v. Assicurazioni Generali S.p.A* [2010] EWHC 1186 (Comm), [18], [57], [60] (Eng.).

81. *Fin. Conduct Auth.*, [2020] EWHC 2448 (Comm), [529].

82. See *Business Interruption Insurance*, *supra* note 24.

83. See generally *Fin. Conduct Auth. v. Arch Ins. (UK) Ltd.* [2021] UKSC 1 (appeal taken from Eng.).

84. *Id.* at [43].

“enforced closure,” and “imposed” denial of access.⁸⁵ While acknowledging that these wordings required a mandatory rather than advisory public closure order, the Supreme Court held that this condition could be met by instructions from a public authority that, in context, would reasonably be understood as mandatory.⁸⁶ Although the High Court declined to rule on whether individual specific government announcements qualified under this test, it strongly suggested that certain specific public instructions, including orders from the Prime Minister in March 2020 for schools and certain businesses to close, were sufficient to produce coverage under this test.⁸⁷

Similarly, the Supreme Court interpreted the prevention of access/public authority wordings more broadly than had the High Court, rejecting the lower court’s holding that coverage under these policies required a complete closure of the business’s premises relative to pre-existing business operations.⁸⁸ Instead, the Supreme Court credited the FCA’s argument that phrases like “inability to use,” “prevention of access,” and “interruption” could all be met even if the insured only lost access to part of its premises as a result of a shutdown order.⁸⁹ In such cases, the Supreme Court reasoned, the insured would be completely unable to profit from the specific part of the impacted premises, even if other portions of the premises might be accessible or capable of use.⁹⁰

Several other portions of the Supreme Court opinion further benefited policyholders. For instance, the Supreme Court interpreted the trends clauses in the underlying policies even more generously for policyholders than had the High Court, clarifying that any changes to an insured’s business that were linked to the pandemic could not be used to reduce recovery, as trends clauses were only meant to reduce recovery for losses wholly outside of the insured peril.⁹¹ Additionally, the Supreme Court flatly overruled its *Orient Express* precedent, reasoning that a loss may be covered if an insured peril was a significant proximate cause of the loss, even if the loss would have occurred in the absence of the insured peril.⁹² Because the property damage to the insured hotel in *Orient Express* was a substantial proximate cause of

85. *Id.* at [116]–[24].

86. *Id.*

87. *Id.* at [120].

88. *Id.* at [136]–[37], [150]–[56].

89. *Fin. Conduct Auth. v. Arch Ins. (UK) Ltd.* [2021] UKSC 1, [136]–[37], [150]–[58] (appeal taken from Eng.).

90. *Id.* at [140].

91. *Id.* at [264]–[68].

92. *Id.* at [308]–[09].

the business's interruption, and the damage to the surrounding property (which was not itself an insured peril) arose out of the same underlying cause (Hurricane Katrina), the loss should have been covered even though the hotel's business operations would also have been completely interrupted from the surrounding property damage alone.⁹³

The FCA estimated that the test case ultimately helped to clarify insurers' coverage obligations for "some 700 types of policies held by 370,000 policyholders across [sixty] different insurers."⁹⁴ But it did not resolve individual policyholders' claims.⁹⁵ The FCA thus took on a leading role in facilitating the process of translating the opinion's holdings into the timely and accurate payment of individual policyholders' claims.⁹⁶ For instance, the FCA promptly released various directives to insurers regarding their payment obligations, including a "Dear CEO letter" that outlined the regulator's expectations for how insurers must handle any outstanding claims impacted by the test case.⁹⁷ It also developed a tool to help policyholders identify, based on their specific policy, the key implications of the test case.⁹⁸ In cases where legitimate differences remained between insurers and policyholders regarding the appropriate settlement of a claim, insureds could have those disputes authoritatively resolved by the Financial Ombudsman Service (FOS), a government entity designed to efficiently resolve relatively small individual coverage disputes.⁹⁹ As of May 2021, British BI insurers had paid out roughly one billion dollars to policyholders for pandemic-induced shutdowns.¹⁰⁰

Meanwhile, the FCA's initial assessment that there is no coverage for pandemic-induced shutdowns under standard BI policies, which only cover business interruption "as a consequence of property dam-

93. *Id.* at [309].

94. *See Judgment Handed Down in FCA's COVID-19 Business Interruption Insurance Test Case, supra* at note 68.

95. *Id.*

96. *See Business Interruption Insurance – Policy Checker*, FIN. CONDUCT AUTH. (Jan. 29, 2021), <https://www.fca.org.uk/firms/business-interruption-insurance/policy-checker>.

97. *See generally* Letter from Sheldon Mills, Exec. Dir., Fin. Conduct Auth., to CEOs (Jan. 22, 2021), <https://www.fca.org.uk/publication/correspondence/dear-ceo-letter-business-interruption-insurance-january-2021.pdf>.

98. *See generally id.* It has also produced various FAQ documents as well as a coverage calculator to help them estimate the amount that they should be able to recover from their insurers. *See Business Interruption Insurance Covid-19 Calculator*, FIN. CONDUCT AUTH. (Apr. 8, 2021), <https://covidcalculator.fca.org.uk/>; *see Business Interruption Insurance, supra* note 24.

99. *See generally* Schwarcz, *Redesigning Consumer Dispute Resolution, supra* note 30.

100. Carolyn Cohn, *UK Insurers Pay 700 Mln Pounds So Far in Business Interruption Claims*, REUTERS (May 12, 2021, 11:53 AM), <https://www.reuters.com/world/uk/uk-insurers-pay-700-mln-pounds-so-far-business-interruption-claims-2021-05-12/>.

age,” has largely been accepted with minimal challenge in the United Kingdom.¹⁰¹ For instance, one of the few (if only) British cases challenging this conclusion was summarily dismissed by a court in a lengthy opinion, even though the case involved a plausible allegation of property damage arising out of the deterioration of the restaurant-policyholder’s stock of food supplies when shutdowns were first implemented.¹⁰² The opinion specifically cited the FCA’s statements regarding the lack of cover under standard policies for pandemic-related losses, emphasized that the underlying policy required “physical rather than economic loss” in order for coverage to attach, and concluded that this requirement was not met by the “mere temporary loss of use” of property or by the gradual deterioration of business supplies through natural means.¹⁰³

B. The (Lack of) Resolution of Pandemic-Related Insurance Disputes in the United States

Within weeks of the pandemic hitting the United States in March 2020, impacted businesses began filing claims under their BI policies. Almost as quickly, insurers across the country started rejecting these claims in their entirety. As described in the Introduction, a central explanation for these coverage denials was that, according to insurers, policyholders’ losses were not caused by “direct physical loss of or damage” to any property.¹⁰⁴ Unlike in the United Kingdom, where this requirement was often eliminated through coverage extensions, BI policies issued in the United States almost universally¹⁰⁵ conditioned coverage on a policyholder’s business interruption being caused by “direct physical loss of or damage to” either covered property (in the case of traditional BI coverage) or some other property

101. See *FCA Statement - Insuring SMEs: Business Interruption*, *supra* note 22.

102. *TKC London Ltd. v. Allianz Ins. PLC* [2020] EWHC 2710 (Comm), [119]–[31] (Eng.).

103. *Id.* at [118], [128].

104. See *supra* Introduction.

105. As noted above, some policies omitted the word “of” after “physical loss,” a distinction that some courts have found relevant. See *supra* note 5. The similar language contained in different insurance policies stems in large part from the unique prominence that the Insurance Services Office (ISO) enjoys in coordinating coverage terms in the United States. See generally Daniel Schwarcz, *Reevaluating Standardized Insurance Policies*, 78 U. CHI. L. REV. 1263 (2011). Historically, insurers in many property/casualty lines of business have uniformly adopted ISO-drafted policies with little or no modification. *Id.* Although many insurers have increasingly departed from these standardized ISO policy forms in recent decades, they have typically retained the core structural elements of these policies when doing so. *Id.* This approach has helped individual insurers incrementally adjust their coverage obligations while reducing the risk that doing so will produce substantial unexpected consequences. *Id.*

(in the case of extensions of BI coverage, like Civil Authority or Contingent BI coverage).¹⁰⁶

Insurers' refusals to cover pandemic-related BI claims were, in many cases, substantially buttressed by coverage exclusions for losses caused by a virus or bacteria. The Insurance Services Office (ISO) had developed a standardized exclusion to this effect in 2006 in the wake of the SARS outbreak.¹⁰⁷ At that time, many insurers were concerned about the possibility of coverage resulting from a pandemic, which could result in highly correlated losses across policyholders.¹⁰⁸ Insuring potentially correlated losses is much more difficult than covering independent risks because they can result in very large aggregate claims during a short time period.¹⁰⁹ Such massive claims demands can jeopardize insurers' solvency, particularly because insurers face various practical, regulatory, and tax restrictions in attempting to establish long-term reserves to pay for uncommon but potentially catastrophic claims.¹¹⁰ However, at least in part because the ISO virus exclusion was designed as an amendatory endorsement to commercial property policies, some insurers neglected to include it in the policies they issued to insureds and others incorporated varying versions of the exclusion into their own policies.¹¹¹

Although the central issues surrounding BI coverage in the United States were thus much more consistent across insurers and policyholders than in the United Kingdom, the process by which those disputes have been and are being resolved has been dramatically more cha-

106. See French, *supra* note 2, at 7–8. The relevant property that had to meet this condition varied by coverage type: for conventional business interruption, “physical loss or damage” to the insured’s property was required, whereas civil authority coverage focused on neighboring property, and contingent business interruption coverage looked to the property of suppliers or customers. *Id.*

107. See INS. SERVS. OFFICE, EXCLUSION OF LOSS DUE TO VIRUS OR BACTERIA, CP 01 40 07 06, A–B (2006), <https://bcms-files.s3.amazonaws.com/4NayvxOEvy-950/docs/CP0140.pdf>.

108. See LARRY PODOSHEN, NEW ENDORSEMENTS FILED TO ADDRESS EXCLUSION OF LOSS DUE TO VIRUS OR BACTERIA 2 (2006), <https://www.propertyinsurancecoveragelaw.com/wp-includes/ms-files.php?file=2020/03/ISO-Circular-LI-CF-2006-175-Virus.pdf>. Podoshen explained the virus exclusion in 2006 by noting:

While property policies have not been a source of recovery for losses involving contamination by disease-causing agents, the specter of pandemic or hitherto unorthodox transmission of infectious material raises the concern that insurers employing such policies may face claims in which there are efforts to expand coverage and to create sources of recovery for such losses, contrary to policy intent.

Id. at 2.

109. Abraham & Schwarcz, *Courting Disaster*, *supra* note 32, at 414.

110. See *id.* at 415.

111. *Covid Coverage Litigation Tracker*, *supra* note 10.

otic.¹¹² Tracking this chaos accurately is only possible due to the efforts of Professor Tom Baker, who developed a Covid Coverage Litigation Tracker that reports a range of data in real time regarding these suits.¹¹³ According to the tracker, in the first two years of the pandemic, over 2,000 lawsuits seeking BI coverage for pandemic-induced BI losses have been filed in federal and state courts.¹¹⁴ The rate of lawsuit filings peaked in May and June of 2020, with nearly eighty cases being filed on a weekly basis during this time period.¹¹⁵ But even as of April 2022, it was common for numerous new coverage suits to be filed each week.¹¹⁶ Moreover, approximately 20% of all suits have been filed as putative class actions as of the two-year anniversary of the pandemic; to date, however, no court has authorized any of these suits as class actions.¹¹⁷

Consistent with the relatively uniform terms of BI policies in the United States, the substantive issues raised by these myriad suits vary along only a limited number of dimensions. In addition to traditional BI coverage, many suits also seek Civil Authority coverage, which is available when an action of a public entity prohibits access to insured property.¹¹⁸ Suits often seek payment not only for loss of business income, but also for extra expenses caused by the pandemic, such as the erection of physical barriers or the development of online ordering platforms.¹¹⁹ In addition to the “direct physical loss of or damage to” issue—which is nearly universally raised in existing suits—roughly two-thirds of filed cases involve issues relating to virus exclusions.¹²⁰ The precise language of these exclusions varies in potentially important ways across cases. For instance, some virus exclusions contain an explicit anti-concurrent causation clause, which excludes coverage

112. One judge described the litigation as producing “a nationwide flood of insurance-related litigation.” *Blue Springs Dental Care, LLC v. Owners Ins. Co.*, 488 F. Supp. 3d 867, 869 (W.D. Mo. 2020).

113. *See Covid Coverage Litigation Tracker*, *supra* note 10.

114. *See id.*

115. *See id.*

116. *See id.*

117. *See id.*

118. *See id.*

119. *See id.*

120. *See id.* According to a survey conducted by the Washington Insurance Commissioner, the vast majority of sampled policies included virus exclusions of some type. *See Kreidler Finds Most Business Insurance Policies in State Exclude Pandemic, Virus Coverage*, WASH. STATE OFFICE OF THE INS. COMM’R (Apr. 17, 2020), <https://www.insurance.wa.gov/news/kreidler-finds-most-business-insurance-policies-state-exclude-pandemic-virus-coverage>.

when a virus contributes in any way to a loss.¹²¹ Others are less clear about coverage when a virus contributes only indirectly to a policyholder's business interruption.¹²² In about 10% of cases, an additional issue is potentially raised by the presence of policy language granting specific coverage for communicable diseases.¹²³

While judicial rulings on the merits of these suits have generally favored insurers at the federal level, policyholders have enjoyed relative success in the smaller set of state court decisions that have been issued as of April 2022. As of that date, nearly 800 decisions have been issued on the merits of insurers' motions to dismiss in pandemic BI cases.¹²⁴ A substantial majority of these rulings have favored insurers; 633 of them, or about 80%, have fully dismissed plaintiffs' suits with prejudice, whereas only 68 rulings, amounting to about 9% of total decisions, have rejected insurers' motions to dismiss in full.¹²⁵ The remaining 11% of cases involve partial dismissals or dismissals without prejudice, which are harder to interpret.¹²⁶ These trends, however, are largely driven by federal court decisions, which have produced approximately 86% of decisions on the merits as of April 2022.¹²⁷ Focusing only on state court decisions issued as of April 2022, about 22% of those decisions have denied insurers' motions to dismiss.¹²⁸

Not surprisingly, the primary substantive issue on which a significant majority of court decisions turn has been whether a policyholder's business interruption was caused by "direct physical loss of or damage to" property. Most judicial decisions granting insurers' motions to dismiss have reasoned that the phrase "direct physical loss of or damage to" requires some "visible, tangible 'physical alteration' to property," and that coronavirus is simply incapable of producing this result.¹²⁹ The courts that have resisted this logic have generally done

121. See *Covid Coverage Litigation Tracker*, *supra* note 10. See generally Erik Knutson, *Confusion About Causation in Insurance: Solutions for Catastrophic Losses*, 61 ALA. L. REV. 957 (2010).

122. See *Covid Coverage Litigation Tracker*, *supra* note 10. Policies also vary regarding the prominence of exclusionary language related to a virus, with a significant number of cases involving exclusionary language that is not specifically denominated as a virus exclusion, but that was instead contained within a pollution or contamination exclusion. *Id.*

123. See *id.*

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.*

129. See Jeff Sistrunk, *1 Year In, Policyholders See Hope in Virus Coverage Battles*, LAW360 (Mar. 8, 2021, 5:06 PM), <https://www.law360.com/articles/1358935/1-year-in-policyholders-see-hope-in-virus-coverage-battles>.

so on several grounds. First, some courts have concluded that complaints including specific allegations that the coronavirus was physically present on property prior to a shutdown should be allowed to proceed to discovery, as the presence of the virus on property could conceivably amount to “direct physical loss of or damage to” insured property.¹³⁰ Other more expansive decisions have emphasized the disjunctive “or” in “direct physical loss of or damage to,” reasoning that “direct physical loss” must necessarily involve scenarios where there is no “direct physical damage” to property.¹³¹ For this reason, a business’s inability to use otherwise undamaged property due to a shutdown order or the risk of virus transmission might well constitute “direct physical loss.”¹³²

Because the meaning of insurance policy language is a matter of state law, it is possible that state court decisions allowing pandemic BI suits to proceed to discovery are more reflective of the ultimate resolution of these claims than pro-insurer outcomes at the federal level. As with all substantive state law matters that are litigated in federal court, federal decisions on the merits of pandemic BI claims have ostensibly been based on those courts’ “*Erie* guesses” about how the underlying disputes would be resolved under the relevant state’s law.¹³³ But the significant differences in aggregate outcomes across state and federal courts suggest that it is possible that these *Erie* guesses have been inaccurate. This would hardly be unprecedented. For instance, in the widespread and prolonged litigation regarding Commercial General Liability (CGL) insurers’ coverage obligations under Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), federal caselaw initially favored insurers on questions like whether CERCLA liability constitutes “damages because of . . . property damage” or on the meaning of the “sudden and accidental” pollution exclusion.¹³⁴ In subsequent years, however, state

130. See, e.g., *Studio 417, Inc. v. Cin. Ins. Co.*, 478 F. Supp. 3d 794, 800–05, n.6 (W.D. Mo. 2020).

131. See, e.g., *In re Soc’y Ins. Co. Covid-19 Bus. Interruption Prot. Ins. Litig.*, F. Supp. 3d 729, 738–39 (N.D. Ill. 2021).

132. *Id.* at 739.

133. See, e.g., *Brunswick Panini’s, LLC v. Zurich Am. Ins. Co.*, 520 F. Supp. 3d 965, 973 (N.D. Ohio 2021); *Terry Black’s Barbecue, LLC v. State Auto. Mut. Ins. Co.*, 514 F. Supp. 3d 896, 902 (W.D. Tex. 2021); *Wilson v. Hartford Cas. Co.*, 492 F. Supp. 3d 417, 426 (E.D. Pa. 2020). See generally John L. Watkins, *Erie Denied: How Federal Courts Decide Insurance Coverage Cases Differently and What to Do About It*, 21 *CONN. INS. L.J.* 455, 456 (2014–2015).

134. *A.Y. McDonald Indus., Inc. v. Ins. Co. of N. Am.*, 475 N.W.2d 607, 611 (Iowa 1991); see also *Enbridge Energy Co. v. Dane Cty.*, 929 N.W.2d 572, 575 (Wis. 2019).

courts increasingly reached more pro-policyholder determinations on these issues.¹³⁵

Despite the sheer number of BI coverage cases that have been filed in the United States since the pandemic's onset, most efforts to consolidate or otherwise promote the efficient resolution of these cases have foundered. One important example of this trend is a holding by the Judicial Panel on Multidistrict Litigation rejecting two different motions by plaintiffs to consolidate pandemic-related BI actions across multiple different insurers in a federal MDL.¹³⁶ In rejecting these motions, the panel emphasized that MDLs are primarily intended to promote efficiencies in discovery and pre-trial fact-finding rather than to provide a definitive resolution of legal questions.¹³⁷ This goal, the panel held, would not be promoted by an industry-wide consolidation of federal pandemic BI claims because there was "little potential for common discovery across the litigation" given that different insurers had issued different policies with different language in different states.¹³⁸ The panel concluded these variations in policy language and state insurance law, in particular, could ultimately prove highly consequential to the proper resolution of individual disputes.¹³⁹

In addition to emphasizing that pandemic BI disputes raised varying legal issues and only a limited set of common factual questions, the panel stressed the immense practical difficulties that would accompany managing a federal MDL covering all pandemic BI coverage.¹⁴⁰ Overseeing such a mega-MDL would require establishing "a pretrial structure to manage the hundreds of plaintiffs—many with disparate views of the litigation—and more than one hundred insurers," the court stressed.¹⁴¹ It would also require a procedure for segmenting hundreds of policies into groupings of policies with sufficiently similar language.¹⁴² Although theoretically possible, any such undertaking would take a significant amount of time, which would undermine the

135. Watkins, *supra* note 133, at 464; ABRAHAM & SCHWARCZ, *supra* note 13, at 490.

136. *In re COVID-19 Bus. Interruption Prot. Ins. Litig.*, 482 F. Supp. 3d 1360, 1364 (J.P.M.L. 2020).

137. Consistent with this goal, actions that are transferred in connection with an MDL are generally remanded to their original districts if they have not been resolved after centralized pretrial proceedings.

138. *In re COVID-19*, 482 F. Supp. 3d at 1362.

139. *Id.* at 1362–64.

140. *Id.* at 1363.

141. *Id.*

142. *Id.*

quick resolution of these claims, yielding prolonged uncertainties for policyholders and insurers alike.¹⁴³

Federal courts have also largely refused to certify legal questions related to pandemic BI coverage disputes to state supreme courts. The law of virtually every state allows federal courts to certify unsettled questions of state law to that state's supreme court, where they can be definitively resolved in a way that binds future courts.¹⁴⁴ By contrast, neither federal courts nor inferior state courts can issue rulings that definitively resolve contested questions of state law in connection with future cases.¹⁴⁵ As of April 2022, only a single federal court in Ohio has certified to a supreme court legal questions related to pandemic BI coverage disputes.¹⁴⁶ By contrast, numerous federal courts have rejected plaintiffs' requests to certify underlying legal issues to the relevant state supreme court.¹⁴⁷ These courts have generally reasoned, or

143. Despite its refusal to consolidate pandemic BI litigation across different insurers, the MDL panel did subsequently authorize two consolidated MDLs with respect to individual, regional insurers, Society and Erie. See *In re Soc'y Ins. Co. COVID-19 Bus. Interruption Prot. Ins. Litig.*, 492 F. Supp. 3d 1359, 1362 (J.P.M.L. 2020); *In re Erie COVID-19 Bus. Interruption Prot. Ins. Litig.*, 509 F. Supp. 3d 1370, 1374–75 (J.P.M.L. 2020). Such insurer-specific MDLs were sensible, according to the panel, not only because the underlying policies in these cases were issued by a single insurer, but also because these policies contained identical or nearly identical language. See generally *supra*. Just as importantly, both of the two insurers only operated across a limited geographic scope, meaning that coverage disputes only implicated the insurance laws of a limited number of states. See generally *supra*. These considerations enhanced the prospect of common discovery and pre-trial motions while limiting many of the managerial difficulties that would accompany an MDL involving multiple insurers or even individual insurers that operated on a national scale. See generally *supra*. Consistent with this logic, the MDL panel refused to authorize MDLs for insurers that had issued policies across broad swaths of the United States, including The Hartford, Travelers, Cincinnati Insurance Company, and Lloyd's of London underwriters. *In re Travelers COVID-19 Bus. Interruption Prot. Ins. Litig.*, 492 F. Supp. 3d 1341, 1343 (J.P.M.L. 2020); *In re Cin. Ins. Co. COVID-19 Bus. Interruption Prot. Ins. Litig.*, 492 F. Supp. 3d 1347, 1349 (J.P.M.L. 2020); *In re Certain Underwriters at Lloyd's, London, COVID-19 Bus. Interruption Prot. Ins. Litig.*, 492 F. Supp. 3d 1355, 1357 (J.P.M.L. 2020).

144. Rebecca A. Cochran, *Federal Court Certification of Questions of State Law to State Courts: A Theoretical and Empirical Study*, 29 J. LEGIS. 157, 159 (2003) (cataloguing sources of then-existing state certification procedures).

145. Abbe R. Gluck, *Intersystemic Statutory Interpretation: Methodology As "Law" and the Erie Doctrine*, 120 YALE L.J. 1898, 1922 (2011).

146. *Neuro-Comm'n Servs. v. Cin. Ins. Co.*, No. 4:20-CV-1275, 2021 WL 274318, at *1 (N.D. Ohio Jan. 19, 2021). The Northern District of Ohio certified the following question to the Ohio Supreme Court:

Does the general presence in the community, or on surfaces at a premises, of the novel coronavirus known as SARS-CoV-2, constitute direct physical loss or damage to property; or does the presence on a premises of a person infected with COVID-19 constitute direct physical loss or damage to property at that premises?

Id.

147. See, e.g., *Bel Air Auto Auction, Inc. v. Great N. Ins. Co.*, 534 F. Supp 3d 492, 502–03 (D. Md. 2021); *Henry's La. Grill v. Allied Ins. Co. of Am.*, 495 F. Supp. 3d 1289, 1297 (N.D. Ga. 2020); *Hillcrest Optical, Inc. v. Cont'l Cas. Co.*, 497 F. Supp. 3d 1203, 1208 (S.D. Ala. 2020); *Real*

implicitly suggested, that basic principles of state insurance law require enforcing the plain meaning of insurance policy terms, and that this principle is sufficient to permit resolution of the underlying disputes.¹⁴⁸ The Ohio federal court that did certify the direct-physical-loss issue to the Supreme Court of Ohio not only framed the relevant legal issue much more specifically, but also emphasized that “dozens, if not hundreds of cases implicating the question certified here are currently making their way through both the state and federal courts in Ohio.”¹⁴⁹ Certifying resolution of this question would consequently “allow the Supreme Court of Ohio to decide these questions and bring uniformity to the application of state law to these policies.”¹⁵⁰ As of April 2022, however, the Supreme Court of Ohio has not answered this certified question.

Efforts to efficiently resolve the flood of insurance coverage disputes that are being litigated in state rather than federal courts have also proven unsuccessful. For instance, the Supreme Court of Pennsylvania summarily rejected an application by plaintiffs in a BI coverage case to exercise its unique King’s Bench Power¹⁵¹ to consolidate and decide, on an expedited basis, pandemic BI coverage litigation in the Pennsylvania state court system.¹⁵² To date, research has not uncovered any other efforts by plaintiffs or insurers to invoke the various state analogues to federal MDLs that exist in many states.¹⁵³

Meanwhile, sixteen state legislatures have seriously considered bills that would attempt to resolve pandemic BI coverage disputes, often by requiring insurers to provide coverage for these losses irrespective of the terms of their insurance policies.¹⁵⁴ None of these bills have

Hosp., LLC v. Travelers Cas. Ins. Co. of Am., 499 F. Supp. 3d 288, 293–94 n.6 (S.D. Miss. 2020); Drama Camp Prods., Inc. v. Mt. Hawley Ins. Co., No. 1:20-CV-266-JB-MU, 2020 WL 8018579, at *4 (S.D. Ala. Dec. 30, 2020).

148. See, e.g., *Bel Air Auto Auction, Inc.*, 534 F. Supp 3d at 504; *Hillcrest Optical, Inc.*, 497 F. Supp. 3d at 1208.

149. *Neuro-Comm’n Servs. v. Cin. Ins. Co.*, No. 4:20-CV-1275, 2021 WL 274318, at *2 (N.D. Ohio Jan. 19, 2021), *cert. granted*, 166 N.E.3d 29 (Ohio 2021).

150. *Neuro-Comm’n Servs.*, 2021 WL 274318, at *3.

151. Under its King’s Bench Power, the Pennsylvania Supreme Court may consider an issue of “immediate public importance,” even if there is no pending case on the matter in a lower court. *Joseph Tambellini, Inc. v. Erie Ins. Exch.*, 234 A.3d 390 (Pa. 2020); *Pennsylvania Supreme Court*, USLEGAL, <https://system.uslegal.com/state-supreme-courts/pennsylvania-supreme-court/#:~:text=The%20Supreme%20Court%20also%20can%20take%20up%20any,to%20serve%20for%20a%20term%20of%20ten%20year> (last visited Mar. 25, 2022).

152. See generally *Trial Order, Joseph Tambellini, Inc. v. Erie Ins. Exch.*, No. GD 20-005137, 2020 WL 7685913 (Pa. D.&C. Nov. 19, 2020).

153. See generally *Clopton & Rave*, *supra* note 18.

154. See *Simpson*, *supra* note 20. The precise language in these bills has varied. Many have required insurers to retroactively pay claims for pandemic-linked BI losses, irrespective of a “physical damage” requirement or (in some cases) virus exclusions. *Id.* Some bills would allow

passed,¹⁵⁵ however, and most informed observers do not expect that they will succeed in the future.¹⁵⁶ Moreover, there is a significant likelihood that any such bill that were enacted into state law would ultimately be struck down as a violation of the U.S. Constitution's Contracts Clause, which prohibits any state from passing "any . . . Law impairing the Obligations of Contracts."¹⁵⁷

Since the pandemic's onset, state insurance regulators and the National Association of Insurance Commissioners (NAIC) – the national association through which state regulators coordinate many of their efforts – have largely avoided addressing the merits of BI coverage suits. Instead, state insurance regulators have framed these disputes as legal rather than regulatory matters. In a few cases, however, state insurance commissioners have expressed skepticism about policyholders' claims, emphasizing, for instance, that "[s]tandard business interruption policies are not designed to provide coverage for viruses, diseases, or pandemic-related losses because of the magnitude of the potential losses."¹⁵⁸ Additionally, state insurance regulators and the NAIC have taken strong public stands against any legislation that would retroactively require insurers to pay pandemic-related BI claims irrespective of the terms of their policies, warning that such a measure could "create substantial solvency risks for the sector, significantly undermine the ability of insurers to pay other types of claims, and potentially exacerbate the negative financial and economic impacts the country is currently experiencing."¹⁵⁹

BI insurers who pay out claims to seek reimbursement from special funds that would be funded by all p/c insurers licensed to do business in state. *Id.* And some bills only apply to insureds with employees below specified thresholds. *Id.*

155. *See id.*

156. *See, e.g.,* Mark Hollmer, *S&P Expects States to Lose Bids to Mandate Coronavirus Business Interruption Coverage*, *Ins. J.* (May 4, 2020), <https://www.insurancejournal.com/news/national/2020/05/04/566978.htm>.

157. *See* U.S. CONST. art. 1, § 10. There is a three-part test for violations of this clause: (1) "Whether the state law has, in fact, operated as a substantial impairment of a contractual relationship"; (2) Is law supported by a significant and legitimate public purpose; and (3) Is the adjustment of "the rights and responsibilities of contracting parties . . . [based] upon reasonable conditions and . . . of a character appropriate to the public purpose justifying [the legislation's] adoption." *See* *Energy Reserves Grp, Inc. v. Kan. Power & Light Co.*, 459 U.S. 400, 411–12 (1983). But past decisions have invalidated state efforts to retroactively change terms of insurance policies due to the extent of insureds' reliance interest. *See, e.g.,* *Hand v. Phila. Ins. Co.*, 973 A.2d 973, 984 (N.J. Super. App. Div. 2009).

158. *See* Jim Sams, *Some Insurance Regulators Skeptical about Business Interruption Claims*, *Ins. J.* (Apr. 27, 2020) (quoting letter from the North Carolina Insurance Commissioner).

159. *See* *NAIC Statement on Congressional Action Relating to COVID-19*, NAT'L ASS'N OF INS. COMM'RS (Mar. 25, 2020), https://content.naic.org/article/statement_naic_statement_congressional_action_relating_covid19.htm.

II. ADAPTING THE UNITED KINGDOM'S TEST CASE SCHEME FOR THE UNITED STATES

As Part I suggests, the United States and United Kingdom have had dramatically divergent experiences managing pandemic-related BI coverage disputes.¹⁶⁰ Various differences between the two countries' legal systems other than the test case scheme emphasized in Part I help to explain this result. Perhaps most importantly, the national scope of British insurance law surely facilitated a consolidated and streamlined resolution of pandemic BI suits in that country.¹⁶¹ So too did the country's "loser-pays" rule for attorneys' fees, which likely deterred lawsuits seeking coverage under standard BI policies that conditioned coverage on property damage.¹⁶² The broad availability of extended coverage for business interruptions caused by diseases or government shutdowns in the United Kingdom may also have helped to quickly resolve pandemic BI claims by suggesting that ordinary BI policies were not meant to cover pandemic-induced shutdowns.¹⁶³ Additionally, insurance law in the United Kingdom tends to be somewhat more literalist and contractarian than in the United States.¹⁶⁴

But in addition to all of these factors, Part I suggests that the British test case scheme played a significant role in helping the United Kingdom to avoid the uncertainty, cost, and inefficiencies that have characterized pandemic BI coverage litigation in the United States.¹⁶⁵ The British test case scheme quickly and definitively resolved a subset of coverage disputes involving varying insurance policy formulations and policyholder circumstances. Even more importantly, it provided definitive guidance to insurers on virtually all other contested pandemic-related coverage issues. Armed with this guidance, the FCA provided tailored instructions to insurers about the appropriate treatment of pandemic-related BI claims.¹⁶⁶

160. See *supra* Part I.

161. See *infra* Part II.B.

162. A loser-pays rule can help deter lawsuits that have a relatively low-likelihood of success. See Theodore Eisenberg et al., *Attorneys' Fees in a Loser-Pays System*, 162 U. PA. L. REV. 1619, 1633 (2014).

163. See generally FCA Dear CEO Letter, *supra* note 27. The purchase of extended cover by a small but meaningful number of businesses also allowed for British coverage disputes to be resolved in a way that simultaneously delivered significant insurance proceeds while avoiding creating solvency risks for insurers.

164. See generally Erik Knutsen, *Patchwork Contextualism in the Anglo-Canadian Law of Insurance Policy Interpretation: Implications for the Principles of the Law of Liability Insurance*, 68 RUTGERS U. L. REV. 415 (2015).

165. See *supra* Part I.

166. See *supra* Part I.A. See Cohn, *supra* note 100 ("Where we see any laggards we are taking supervisory action," FCA CEO Nikhil Rathi told a hearing in parliament.).

Prompted by the test case scheme's success in the United Kingdom, this Part considers whether reforms inspired by that scheme could benefit U.S. insurance law and regulation.¹⁶⁷ It first describes the potential benefits of a mechanism for more quickly and definitively resolving widespread coverage disputes in the United States, like the pandemic BI coverage cases. While acknowledging the advantages of deliberate decision-making that reflects wide-ranging arguments and expertise, Section A argues that the time and resources that have been devoted to the resolution of widespread coverage disputes in the United States are clearly excessive.¹⁶⁸ As illustrated by the pandemic BI cases, most such disputes are driven principally by a manageable subset of relatively ordinary legal, rather than factual, questions. Meanwhile, the costs to both policyholders and insurers of prolonged uncertainty about the ultimate resolution of widespread coverage disputes are significant. Unfortunately, Section B suggests that simply transplanting the United Kingdom's test case scheme into the United States is hardly a viable option given the differences between the two country's legal and regulatory systems.¹⁶⁹ Section B nonetheless helps frame the proposal developed in Part III by offering some preliminary thoughts on which elements of the British scheme could be adapted to the American setting in light of these differences.¹⁷⁰

A. *Speed vs. Deliberation in Resolving Widespread Coverage Disputes*

Legal disputes are not always best resolved quickly, definitively, and en masse. To the contrary, there are a broad array of settings in which slow, deliberate, and individualized processes best serve the interests of justice, and even efficiency.¹⁷¹ Even in disputes raising nearly identical legal questions, individualized dispute resolution can harness the varying perspectives of numerous different judges, ultimately helping to produce more accurate adjudication of legal claims and defenses.¹⁷² These and similar considerations help to explain why

167. See *infra* Part II.

168. See *infra* Part II.A.

169. See *infra* Part II.B.

170. See *infra* Part II.B.

171. See, e.g., Elizabeth Chamblee Burch, *Procedural Justice in Nonclass Aggregation*, 44 WAKE FOREST L. REV. 1, 45 (2009); Abbe R. Gluck, *Unorthodox Civil Procedure: Modern Multidistrict Litigation's Place in the Textbook Understandings of Procedure*, 165 U. PA. L. REV. 1669, 1669 (2017); Martin H. Redish & Julie M. Karaba, *One Size Doesn't Fit All: Multidistrict Litigation, Due Process, and the Dangers of Procedural Collectivism*, 95 B.U.L. REV. 109, 149 (2015).

172. See Brian T. Fitzpatrick, *Many Minds, Many MDL Judges*, 84 LAW & CONTEMP. PROBS. 107, 107–11 (2021).

the U.S. Supreme Court frequently refuses to accept petitions for Certiorari on issues that have not had an opportunity to “percolate” in the circuit courts.¹⁷³ Similarly, familiar rules of civil procedure allow only certain cases to be consolidated through mechanisms like class actions or MDLs.¹⁷⁴

America’s system for resolving pandemic BI coverage cases can plausibly be defended on these grounds. The massive number of pandemic BI coverage lawsuits in the United States has allowed countless lawyers, judges, policymakers, and academics to weigh in on virtually every relevant aspect of this litigation over the first two years of the pandemic.¹⁷⁵ During this time period, plaintiffs’ lawyers have fine-tuned increasingly clever and nuanced arguments about why coverage should be available, while insurers have developed their own increasingly sophisticated counter-arguments.¹⁷⁶ Hundreds of judges have evaluated these arguments to reach tentative assessments of their merits, based on the specific policy language at issue and the particular circumstances of individual plaintiffs.¹⁷⁷ Others, like legal academics and journalists, have also waded into the fray.¹⁷⁸ Meanwhile, various public programs have mitigated or even entirely offset potentially insured losses,¹⁷⁹ and scientists have come to better understand numerous potentially relevant facts regarding the transmission of COVID-19.¹⁸⁰

173. See Margaret Meriwether Cordray & Richard Cordray, *The Philosophy of Certiorari: Jurisprudential Considerations in Supreme Court Case Selection*, 82 WASH. U. L.Q. 389, 437–41 (2004).

174. See Alexandra D. Lahav, *The Continuum of Aggregation*, 53 GA. L. REV. 1393, 1394–1401 (2019).

175. See *supra* Part I.B.

176. See *id.* Consider, for instance, one recent district court decision that adopted a novel line of textual analysis. See *Seifert v. IMT Ins. Co.*, 542 F. Supp. 3d 874, 879, 880–81 (D. Minn. 2021) (emphasizing distinction between “direct physical loss to” and “direct physical loss of” property and refusing to grant the insurer’s motion to dismiss because the latter phrasing could include the inability to use property due to a shutdown order). Similarly, in recent months, some plaintiffs have argued that the physical barriers that they needed to erect to reduce the risk of transmission can themselves constitute “direct physical loss.” *Id.* at 880.

177. See *supra* Part I.B.

178. See generally Knutsen & Stempel, *supra* note 2; French, *supra* note 2; see Dennis J. Wall et al., *Recent Developments in Business Litigation*, 56 TORT TRIAL & INS. PRAC. L. J. 279, 295, 302 (2021).

179. See, e.g., Coronavirus Aid, Relief, and Economic Security (CARES) Act, Pub. L. No. 116-136, § 1600, 134 Stat. 281, 544 (providing numerous benefits to small businesses impacted by the pandemic, including cash grants and low-interest, forgivable loans).

180. . See generally Ceconi et al., *Ten Things We Learned About COVID-19*, 46 INTENSIVE CARE MED. 1590 (2020); Johanna Younghans, *12 Things Science Taught Us About COVID-19 This Past Year*, U. MICH. HEALTHLAB (Dec. 23, 2020, 3:12 PM), <https://labblog.uofmhealth.org/rounds/12-things-science-taught-us-about-covid-19-past-year>.

Ultimately, however, it is virtually certain that a more streamlined and definitive resolution of pandemic-related BI coverage disputes in the United States could have benefitted insurers and policyholders alike. First, and most importantly, this is because the uncertainty that has driven the widespread litigation of BI pandemic claims in the United States is fundamentally legal rather than factual. As discussed in Part I, the key questions in this litigation focus entirely on the meaning of specific insurance policy terms, like “direct physical loss of or damage to,” in the context of pandemic-induced shutdowns.¹⁸¹ In virtually every state, such disputes are questions of law to be resolved by judges.¹⁸² Of course, certain answers to these legal questions will raise a variety of factual issues in individualized cases, such as whether the coronavirus was present at a business when it was forced to shut down or how a particular business’s costs and revenues were impacted by partial shutdowns. But in most cases, clarity about the legal obligations of insurers would allow such factual questions to be resolved through ordinary claims-management processes without the need for litigation, as the British experience illustrates.¹⁸³

When it comes to the resolution of purely legal issues like those that are at the heart of the pandemic BI coverage litigation, the benefits of delay and gathering alternative perspectives only go so far. To be sure, writing a comprehensive and accurate analysis of legal issues can take months and be substantially aided by prior legal analyses. Moreover, allowing such questions to be resolved by only a small number of judges is likely to increase the risk of errors.¹⁸⁴ But accurate and compelling legal analysis virtually never takes years to draft or requires the input of hundreds of judges, academics, and lawyers. To illustrate, even the thorniest legal questions argued before the Supreme Court almost always result in judicial opinions in a matter of months that are informed by, at the outer limit, several dozen competing briefs and directly relevant precedents.¹⁸⁵

Moreover, while the legal issues raised by pandemic BI coverage disputes involve some complexity, they are hardly uniquely difficult or complex. To the contrary, the overarching principles regarding how

181. *See supra* Part I.B.

182. RESTATEMENT OF LIAB. INS. § 2 (AM. LAW INST. 2018) (“Insurance policy interpretation is a question of law.”).

183. *See supra* Part I.A (noting that insurers have paid claims for pandemic-induced business interruptions without controversy once the legal questions regarding the meaning of relevant policy terms were clarified by the Supreme Court and associated FCA guidance).

184. *See Fitzpatrick, supra* note 172, at 108–15.

185. Ruth Bader Ginsburg, *Workways of the Supreme Court*, 25 T. JEFFERSON L. REV. 517, 525–26 (2003).

courts should interpret insurance policy language are both well-established and regularly deployed by courts.¹⁸⁶ In most jurisdictions, these principles require courts to carefully read the relevant insurance policy language and to consider whether that language has a single plain meaning as applied to the facts of the underlying dispute.¹⁸⁷ To be sure, the details regarding how these interpretive principles are deployed vary across different states in many of their particulars.¹⁸⁸ But these variations are not so significant that they preclude judges in one state from learning from, and building upon, the insights of other state courts that have confronted the same legal issues.

Although the language of different plaintiffs' insurance policies and the particular circumstances of the underlying disputes can vary, these permutations are relatively limited in the context of widespread coverage disputes like pandemic-induced BI claims. The U.K. test case illustrates this point well: the U.K. Supreme Court was able to provide "definitive guidance" on virtually all insurance coverage disputes in that country by bucketing variations in insurance policy language and factual scenarios into a limited set of categories sharing essential features.¹⁸⁹ Any such effort would almost certainly be even easier in the U.S. setting, where insurance policy language is typically more standardized than in the United Kingdom.¹⁹⁰

The second key reason that streamlining the resolution of widespread coverage disputes, like the pandemic-related BI coverage liti-

186. Indeed, this very fact is emphasized by many of the federal courts that have refused to certify questions relating to pandemic BI coverage disputes to state supreme courts. *See, e.g.*, *Bel Air Auto Auction, Inc. v. Great N. Ins. Co.*, 534 F. Supp. 3d 492, 502–04 (D. Md. 2021) (describing the interpretation of "direct physical loss or damage" in the context of pandemic BI claims as involving the "straightforward application").

187. *See* RESTATEMENT OF LIAB. INS. §§ 3–4. Continuing a long tradition, academics in recent years – including myself – have pushed for an approach to insurance policy interpretation that is less tied to the plain language of insurance policies. *See, e.g.*, Jeffrey W. Stempel & Erik S. Knutsen, *Rejecting Word Worship: An Integrative Approach to Judicial Construction of Insurance Policies*, 90 U. CIN. L. REV. 561 (2021); Christopher C. French, *Understanding Insurance Policies as Noncontracts: An Alternative Approach to Drafting and Construing These Unique Financial Instruments*, 89 TEMP. L. REV. 535 (2017); Daniel Schwarcz, *A Products Liability Theory for the Judicial Regulation of Insurance Policies*, 48 WM. & MARY L. REV. 1389 (2007). But this approach has not been widely adopted by courts.

188. *See* RESTATEMENT OF LIAB. INS. § 3 cmt. a ("Under the plain-meaning approach, which is typically followed in insurance law, courts interpret an insurance policy term on the basis of its plain meaning, if it has one" without considering "circumstances surrounding the drafting, negotiation, and performance of the insurance policy."); *Id.* § 3 cmt. c (noting that some courts do consider customer, practice, and usage when interpreting insurance policy terms, but this "does not, however, open the door to extrinsic evidence of the parties' specific or subjective intent or understanding regarding the insurance policy, such as drafting history, course of dealing, or precontractual negotiations").

189. *See supra* Part I.A.

190. *See supra* Part I.B.

gation, would benefit insurance markets is that the prolonged uncertainty produced by such contestations harm policyholders and insurers alike. For policyholders, lack of clarity about the availability of BI coverage can inject uncertainty into a broad range of decisions relating to overcoming a potentially insured loss, from when to start re-hiring, to how much to invest in alternative business models, to whether to shutter operations permanently.¹⁹¹ Such uncertainty can also impose a variety of meaningful non-financial strains on policyholders, requiring them to invest significant amounts of time and emotional energy when both are likely to be scarce due to their underlying loss.¹⁹²

The costs of uncertainty regarding widespread coverage disputes are also significant for insurers. Unlike aggrieved policyholders, who can at least sometimes hire attorneys on a contingency fee basis, insurers facing such widespread coverage lawsuits must spend massive sums to defend themselves in court.¹⁹³ They also may feel compelled to devote extensive resources to managing these disputes in legislative arenas and in the press.¹⁹⁴ Meanwhile, the mere potential of liability can wreak havoc on insurance markets, producing significant uncertainty regarding insurers' financial strength¹⁹⁵ and market value.¹⁹⁶ This uncertainty can also impact the cost and availability of coverage in the future as insurers brace for the possibility of adverse court outcomes by increasing premiums and deductibles.¹⁹⁷

191. See, e.g., Mary Williams Walsh, *Businesses Thought They Were Covered for the Pandemic. Insurers Say No.*, N.Y. TIMES (Aug. 5, 2020), <https://www.nytimes.com/2020/08/05/business/business-interruption-insurance-pandemic.html>; Leslie Scism, *Companies Hit by Covid-19 Want Insurance Payouts. Insurers Say No*, WALL ST. J. (June 30, 2020, 10:24 am), <https://www.wsj.com/articles/companies-hit-by-covid-19-want-insurance-payouts-insurers-say-no-11593527047>.

192. See Schwarcz, *Redesigning Consumer Dispute Resolution*, *supra* note 30, at 747–48.

193. Unlike plaintiffs' attorneys, the numerous attorneys who defend insurers against BI coverage claims are not paid on a contingency fee basis. See Dennis E. Curtis & Judith Resnik, *Contingency Fees in Mass Torts: Access, Risk, and the Provision of Legal Services When Layers of Lawyers Work for Individuals and Collectives of Clients*, 47 DEPAUL L. REV. 425, 426 (1998).

194. See Knutsen & Stempel, *supra* note 2, at 240.

195. See *US P/C Insurer Coronavirus Business Interruption Uncertainty Lingers*, FITCH WIRE (Mar. 9, 2021, 9:35 AM), <https://www.fitchratings.com/research/insurance/us-p-c-insurer-coronavirus-business-interruption-uncertainty-lingers-09-03-2021>.

196. See Julie Steinberg, *Coronavirus Claims Hurt Shares of European Insurers*, WALL ST. J. (Aug. 17, 2020, 5:30 AM), <https://www.wsj.com/articles/coronavirus-claims-hurt-shares-of-european-insurers-11597656600>.

197. See Karen Epper Hoffman, *A Question of Coverage: Business Interruption Claims*, CORP. FIN. EXEC. LEADERSHIP (July 21, 2021), <https://www.cfo.com/risk-management/2021/07/a-question-of-coverage-business-interruption-claims/> (paraphrasing Mike Rouse, a practice leader for insurance broker Marsh LLC as noting that uncertainty about pandemic BI claims is impacting available coverage as well as pricing of BI policies).

B. Practical Considerations in Adapting the British Test Case Scheme for the United States

Section A suggests that U.S. insurance markets would have been well served by prompter and more definitive resolution of pandemic-related BI coverage disputes.¹⁹⁸ Of course, the United Kingdom's Financial Markets Test Case Scheme produced precisely these results. But any effort to import wholesale the British scheme into the United States faces at least two fundamental challenges: (i) the state-based nature of U.S. insurance law, and (ii) the unique state and sector specific nature of U.S. insurance regulation.

1. Accounting for State-Based Insurance Law

The most obvious barrier to transplanting the United Kingdom's Financial Markets Test Case Scheme into the United States is that insurance law in the United States is a matter of state rather than federal law.¹⁹⁹ To be sure, federal law can preempt varying state insurance laws when it is explicitly intended to accomplish this goal.²⁰⁰ But the politics and history of U.S. insurance law and regulation make any uniform federal approach to widespread insurance coverage disputes largely infeasible as a practical or political matter, at least at present. This is particularly true given that the appropriate resolution of insurance coverage disputes is generally understood to be a matter of contract law, which (like insurance law more generally) has historically been set by state rather than federal law.²⁰¹

Indeed, as suggested at various points in Part I, the state-based nature of U.S. insurance law helps to explain why so many efforts to consolidate and rationalize pandemic-related BI coverage litigation in the United States have failed.²⁰² Although most states do adhere to a common set of basic principles of insurance law – including the plain language rule and *contra proferentem* – the details regarding how these broad principles are implemented and how much room they leave for extrinsic evidence and policyholder expectations do indeed vary across different states.²⁰³ And with respect to more specific questions of insurance law, states often have differing precedents on key issues, like the proper interpretation of “physical loss of or damage to” property or the treatment of losses that are caused by both cov-

198. See *supra* Part II.A.

199. See ABRAHAM & SCHWARCZ, *supra* note 13, at 10–11.

200. See *id.* at 111–15.

201. See RESTATEMENT OF LIAB. INS. § 2.

202. See *supra* Part I.

203. See RESTATEMENT OF LIAB. INS. §§ 2–3

ered and uncovered perils.²⁰⁴ These variations in state law were one important motivating factor in the MDL panel's unwillingness to consolidate pandemic BI coverage disputes across different insurers or even across individual insurers that operated nationally.²⁰⁵ Varying state insurance law precedents also help to explain why policyholders and their lawyers have continued filing suits even when similar claims have not been met with success in other states; failure in one state does not necessarily mean that similar results will be obtained in other states, even for nearly identical cases.

Of course, the state-based nature of U.S. insurance law would not prevent any individual state from adopting a procedure inspired by the United Kingdom's test case scheme. Such a state-based regime might not only help to efficiently and definitively resolve widespread coverage disputes within that state's court system, but could also plausibly limit the risk that federal courts would make incorrect *Erie* guesses about the proper application of state insurance law.²⁰⁶ As indicated in Part I, the divergent results reached by federal and state courts adjudicating pandemic-BI coverage cases may reflect such errant *Erie* guesses.²⁰⁷ Incorrect *Erie* guesses by federal courts applying state insurance law have occurred with regularity in the past.²⁰⁸ By quickly supplying definitive precedent on the proper application of common insurance policy terms to widespread coverage claims, a state-based scheme inspired by the United Kingdom's test case system might eliminate the need for federal courts to make any guesses at all about state insurance law.²⁰⁹ This, in turn, would help to limit both the

204. See ABRAHAM & SCHWARCZ, *supra* note 13, 231–39, 256–74.

205. See *supra* Part I.B.

206. This risk is deeply related to the hollowing out of the state common law regarding contracts created through browserwrap, clickwrap, and shrinkwrap processes, which Samuel Issacharoff and Florencia Marotta-Wurgler have identified. See generally Samuel Issacharoff & Florencia Marotta-Wurgler, *The Hollowed Out Common Law*, 67 UCLA L. REV. 600, 607–08 (2020). In particular, they note that federal courts have prevented the definitive resolution by state Supreme Courts of the law in these areas, in large part because so many disputes involving electronic contracting end up getting resolved through aggregate litigation in federal courts. *Id.* In emerging widespread coverage disputes, a related phenomenon of federal-influence over state law occurs, but through a different mechanism: insurers selectively choose relatively favorable cases to litigate early in federal forums, so as to increase the chances that this federal precedent will influence the ultimate outcome of disputes in state courts as well.

207. See *supra* Part I.B.

208. See *id.* See generally Watkins, *supra* note 133, at 456 (noting that “supreme courts from different states often reach diametrically different conclusions in deciding important coverage issues based on identical insurance policy language”).

209. Citing the lack of such state precedent that is directly on point, a number of federal courts have abstained from ruling on these disputes. See *Dianoia's Eatery, LLC v. Motorists Mut. Ins. Co.*, No. 20-787, 2020 WL 5051459, at *3 (W.D. Pa. Aug. 27, 2020) (declining to exercise jurisdiction over a BI pandemic coverage dispute because the “[c]omplaint raises novel in-

legal uncertainty that results from errant federal *Erie* guesses as well as the attractiveness of forum shopping for litigants in coverage cases.²¹⁰

Just as importantly, a state-based scheme inspired by the United Kingdom's test case procedure could help states wrest back control over their insurance law from federal courts.²¹¹ As is evidenced by the current BI pandemic litigation, the existing system results in federal courts resolving many early cases in widespread coverage disputes²¹² as insurers strategically remove relatively weak state cases to federal court and promptly seek rulings on dispositive motions to dismiss.²¹³ These early federal decisions can have an outsized influence on the trajectory of widespread coverage disputes, in part because federal judges have the time and resources to write more thorough judicial opinions than state judges.²¹⁴ By short-circuiting this process, a state-based procedure modeled on the United Kingdom's test case scheme could allow that state's court system to establish the appropriate interpretation of common policy terms implicated by widespread coverage litigation at the outset of those disputes, before federal courts have an opportunity to tip the scales in favor of their preferred interpretation of contested policy language.²¹⁵

surance coverage issues under Pennsylvania law . . . which are best reserved for the state court to resolve in the first instance”).

210. See Watkins, *supra* note 133, at 456–57. See also Christopher C. French, *Forum Shopping COVID-19 Business Interruption Insurance Claims*, 2020 U. ILL. L. REV. 187, 201.

211. See Bradford R. Clark, *Ascertaining the Laws of the Several States: Positivism and Judicial Federalism After Erie*, 145 U. PA. L. REV. 1459, 1508 (1997); see also Issacharoff & Marotta-Wurgler, *supra* note 206, at 607–08; Diego A. Zambrano, *Federal Expansion and the Decay of State Courts*, 86 U. CHI. L. REV. 2101, 2106–07, 2133–34 (2019) (describing how federal courts have come to wrest control from state courts); Samuel Issacharoff & Catherine M. Sharkey, *Backdoor Federalization*, 53 UCLA L. REV. 1353, 1423 (2006).

212. See *supra* Part I.

213. See Andy Lundberg, *Covid Business Interruption Insurance: What Do the Numbers Tell Us?*, BURFORD Q., <https://www.burfordcapital.com/insights/insights-container/burford-quarterly-2021-03-covid-insurance/> (last visited Mar. 25, 2022) (noting the fact that many cases filed in state court have been removed by insurers to federal court); see Watkins, *supra* note 133, at 469 (“When an insurance company is sued in state court, it has a strong tendency to invoke removal jurisdiction to move the case to federal court, if possible.”).

214. Early in the pandemic, a substantial majority of the written judicial opinions on pandemic BI coverage were penned by federal trial court judges. Such early opinions can end up having an outsized impact on the evolution of insurance law precedent. See generally Christopher C. French, *The Butterfly Effect in Interpreting Insurance Policies*, 82 LAW & CONTEMP. PROBS. 47 (2019).

215. Cf. Issacharoff & Marotta-Wurgler, *supra* note 206, at 607–08 (noting the excessive influence that federal courts have had in the development of the state common law governing electronic contract terms).

2. Accounting for the U.S. Insurance Regulatory Structure

A second major obstacle to transplanting the United Kingdom's Financial Markets Test Case Scheme into the United States is that state insurance regulators are less well positioned than the FCA to play a major role in litigating coverage questions. Recall that the FCA is the primary market conduct regulator of all financial firms operating in the United Kingdom, including banks, insurers, and securities firms.²¹⁶ Under the United Kingdom's twin peaks regulatory model, however, the FCA does not regulate the solvency of insurers, a task that is instead entrusted to the United Kingdom's Prudential Regulatory Authority (PRA), which is part of the Bank of England.²¹⁷

By contrast, insurers in the United States are regulated in each state in which they operate by a state agency that is typically devoted entirely or predominantly to insurance regulation.²¹⁸ Such agencies regulate virtually all elements of insurers' operations, including both their market conduct and their solvency.²¹⁹ They often face significant resource limitations, which can be exacerbated by state budget shortfalls.²²⁰ They are also frequently accused of being captured by the insurance industry, a charge whose accuracy, of course, varies across jurisdictions and time periods.²²¹

These fundamental differences in American and British insurance regulatory architecture substantially complicate any proposal to entrust state insurance regulators with a role comparable to that which the FCA played in the pandemic BI test case litigation. First, state insurance regulators' primary mandate to safeguard insurer solvency could conflict with their interest in zealously representing policyholder interests in any litigation of widespread coverage disputes.²²² That, of

216. Dan Awrey, William Blair, & David Kershaw, *Between Law and Markets: Is There A Role for Culture and Ethics in Financial Regulation?*, 38 DEL. J. CORP. L. 191, 196 (2013).

217. See Hilary J. Allen, *Putting the "Financial Stability" in Financial Stability Oversight Council*, 76 OHIO ST. L.J. 1087, 1140 (2015).

218. See Elizabeth F. Brown, *E Pluribus Unum - Out of Many, One: Why the United States Needs a Single Financial Services Agency*, U. MIAMI BUS. L. REV., 2005, at 1, 67. Some states do entrust insurance regulation to agencies with broader jurisdiction, which may include banking, securities, or commerce more generally. See *id.* at 17.

219. See ABRAHAM & SCHWARCZ, *supra* note 13, 115–16.

220. See BIPARTISAN POLICY CTR., *IMPROVING U.S. INSURANCE REGULATION* 26, 28 (2017), <http://bipartisanpolicy.org/wpcontent/uploads/2017/04/Improving-U.S.-Insurance-Regulation.pdf>.

221. See generally Daniel Schwarcz, *Preventing Capture Through Consumer Empowerment Programs: Some Evidence from Insurance*, in *PREVENTING CAPTURE: SPECIAL INTEREST INFLUENCE AND HOW TO LIMIT IT* (Daniel Carpenter & David A. Moss eds., 2013) [hereinafter Schwarcz, *Preventing Capture*]; French, *supra* note 187, at 551–52.

222. This point has been prominent in the debate about banking regulatory structure. See Oren Bar-Gill & Elizabeth Warren, *Making Credit Safer*, 157 U. PA. L. REV. 1, 93 (2008); Adam

course, is because pro-policyholder results in such litigation could plausibly impact insurers' financial health.²²³ This possibility has no doubt played a role in prompting some state insurance regulators to publicly opine that the ongoing pandemic BI lawsuits against insurers are without merit.²²⁴

Second, there is a substantial risk that industry influence could undermine state insurance regulators' capacity to advocate for policyholders in test case litigation.²²⁵ Even apart from the risk of conventional industry capture, political considerations could unduly influence state insurance regulators who were called upon to play such an advocacy role in widespread coverage litigation.²²⁶ This point is well illustrated by the small set of cases in which state insurance regulators have actively embroiled themselves in coverage disputes.²²⁷ For instance, in 2015 the Oklahoma Insurance Commissioner directed earthquake insurers operating in the state to pay claims by rejecting their determination that recent earthquakes were a result of fracking activity, which the underlying policies explicitly excluded.²²⁸ Inaccurately dubbing the link between fracking and earthquakes "unsettled science," the insurance commissioner threatened insurers that refused to pay with market conduct examinations and enforcement actions.²²⁹

Third, unlike the FCA, state insurance regulators would almost certainly not have the resources or expertise necessary to coordinate and litigate a test case involving a widespread coverage dispute like the BI pandemic claims. Most state insurance regulators only employ a lim-

J. Levitin, *The Consumer Financial Protection Bureau: An Introduction*, 32 REV. BANKING & FIN. L. 321, 331 (2013).

223. See generally Robert W. Klein & Harold Weston, *Government Insurance for Business Interruption Losses from Pandemics: An Evaluation of Its Feasibility and Possible Frameworks*, 23 RISK MGMT. & INS. REV. 401 (2020).

224. See *supra* Part I.B.

225. See generally Schwarcz, *Preventing Capture*, *supra* note 221.

226. See Martin F. Grace & Richard D. Phillips, *Regulator Performance, Regulatory Environment and Outcomes: An Examination of Insurance Regulator Career Incentives on State Insurance Markets*, 32 J. BANKING & FIN. 116, 119 (2008).

227. Politics also likely played an important role in several northeastern insurance commissioners publicly announcing that policy terms imposing deductibles for hurricane damage were not applicable to damage caused by superstorm Sandy because that storm did not meet the definition of a hurricane. See Aidan M. McCormack & Robert C. Santoro, *Superstorm Sandy: States Order Insurers Not to Impose Hurricane Deductibles*, DLA PIPER (Nov. 2, 2012), https://www.dlapiper.com/en/us/insights/publications/2012/11/superstorm-sandy-states-order-insurers-not-to-im_/. Unlike the Oklahoma case, however, this position on the meaning of insurers' policies seemed to reflect an accurate assessment of the law.

228. Bulletin from John D. Doak, Okla. Ins. Comm'r, to All Prop. & Cas. Insurers Licensed in the St. of Okla. 3 (Mar. 3, 2015), https://www.oid.ok.gov/wpcontent/uploads/2019/10/030415_Earthquake-Bulletin-3-3-15.pdf.

229. See *id.*

ited number of attorneys, and those attorneys specialize in regulatory law rather than litigation.²³⁰ Asking them to take on the role of coordinating massively complex and important coverage litigation would simply be impractical. Of course, state insurance regulators could employ private counsel to assist them with such an effort, just as the FCA did.²³¹ But this approach is expensive; estimates are that the cost to the FCA of hiring lawyers to coordinate and prosecute the test case were roughly £7.5 million.²³² Although this cost can be passed on to insurers through a special tax or assessment,²³³ the FCA's substantial budget allowed it to bear these expenses upfront without any assurances of such repayment.²³⁴ It is unlikely that state insurance regulators would be in a similar position.

A final difficulty arises less from differences in British and American regulatory structures and more from differences in the two country's norms about the appropriate role of regulators. As noted in Part I, many state insurance regulators take the position that their proper role does not encompass the resolution of legal, as opposed to regulatory, questions.²³⁵ To some extent, of course, this view is an outgrowth of existing state insurance codes, which could be amended to accommodate a state-based test case scheme. But it also reflects the strong American belief that partisan government actors should not pick winners and losers in legal disputes.²³⁶ By contrast, the boundary line between insurance regulation and the resolution of insurance disputes has long been relatively permeable in the United Kingdom. In particular, the United Kingdom's Financial Ombudsman Service has long operated parallel to, and in collaboration with, British financial services regulators to help resolve consumer disputes with financial firms.²³⁷

III. DEVELOPING AN INSURANCE TEST CASE SCHEME FOR THE UNITED STATES

U.S. insurance law and regulation could benefit significantly from a more efficient and streamlined system for resolving widespread cover-

230. NAT'L ASS'N INS. COMM'RS, INSURANCE DEPARTMENT RESOURCES REPORT 5 (2020), <https://content.naic.org/sites/default/files/publication-sta-hb-volume-one.pdf>.

231. *See supra* Part I.A.

232. Martin Croucher, *FCA Seeks to Claw Back £7.5M in Test Case Legal Costs*, LAW360 (Apr. 22, 2021, 11:15 AM), <https://www.law360.com/articles/1377742/fca-seeks-to-claw-back-7-5m-in-test-case-legal-costs>.

233. *See supra* Part I.A.

234. *See id.*

235. *See supra* Part I.B.

236. ALEC *Agriculture Principles*, AM. LEGISLATIVE EXCH. COUNCIL, <https://www.alec.org/model-policy/alec-agriculture-principles/> (last visited Mar. 25, 2022).

237. Schwarcz, *Redesigning Consumer Dispute Resolution*, *supra* note 30, at 735.

age disputes. But as Part II suggests, simply transplanting the United Kingdom's successful test case scheme into the United States is hardly a viable option for accomplishing this goal. Part II nonetheless offers some key starting points for attempting to construct a politically viable scheme for rationalizing the treatment of widespread coverage disputes in the United States based on the successful British test case scheme.²³⁸ First, any such proposal must operate at the state level and ought to facilitate the ability of state court systems to articulate key principles of insurance law before a significant number of federal courts venture *Erie* guesses on the subject. Second, any such scheme must require a more limited and neutral role for state insurance regulators than the role played by the FCA in the context of the British test case scheme. To these basic principles, the more general condition can be added that any potential reforms are more likely to prove politically viable and practically operational to the extent that they build upon procedures and institutions that are already well-established in states, rather than imagining the development of new and untested procedural systems.

Starting from these conditions and drawing inspiration from the FCA's test case scheme, this Part advances a new proposal for facilitating the resolution of widespread coverage disputes in the United States, like the pandemic BI coverage disputes.²³⁹ Under this proposal, state insurance regulators and attorneys general would be empowered and encouraged to request that federal courts adjudicating cases raising novel coverage questions implicated in emerging and widespread coverage disputes certify those questions to the state's supreme court. The private litigants in the coverage disputes would be the principal parties charged with making arguments on the substance of the coverage question if the trial court agreed to certify the question and the state supreme court agreed to answer it. Thus, the role of the state insurance regulator and/or attorney general would focus only on identifying a set of pending coverage disputes raising key legal issues implicated in a broad set of cases in federal courts and pressing those courts to certify these questions in a coordinated fashion.

238. See *supra* Part II. Other commentators have also proposed that regulators should play a more affirmative role in resolving widespread disputes. See, e.g., Michael D. Sant'Ambrogio & Adam S. Zimmerman, *The Agency Class Action*, 112 COLUM. L. REV. 1992, 1999 (2012) (suggesting that agencies should adopt aggregation procedures for resolving disputes in some settings); Adam S. Zimmerman, *Distributing Justice*, 86 N.Y.U. L. REV. 500, 556-71 (2011) (exploring ways to address procedural concerns associated with agencies using aggregate dispute resolution mechanisms).

239. See *infra* Part III.

Section A of this Part describes this proposal in more detail. It suggests that modestly changing the rules governing certification in a way that is informed by the United Kingdom's experience with its test case scheme could dramatically improve the resolution of widespread coverage disputes in the United States while affirming the primacy of states in setting their insurance laws.²⁴⁰ Section B considers potential criticisms and complications of the proposal, acknowledging the potential that it could fail to achieve its intended goals while introducing increased complexity and cost into an already poorly designed system.²⁴¹

A. Proposal for Regulatory Certification of Key Issues Implicated by Widespread Coverage Disputes

One promising option for promoting the more efficient resolution of widespread coverage disputes is for states to adapt their approach to certification. Currently, every state allows its supreme court to answer unsettled questions of state law that are certified to it by federal courts confronting those questions in pending disputes.²⁴² Such certification procedures help to limit the risk that federal courts will make incorrect *Erie* guesses about state law while empowering state supreme courts to determine the ultimate meaning of their state's laws.²⁴³ Building on the intuition that state supreme courts should be the ultimate arbiters of contested questions of state law, some states

240. See *infra* Part III.A.

241. See *infra* Part III.B.

242. Certified questions must typically be potentially "determinative of an issue" and have no answer from "a controlling statute or appellate decision of the other State [or the tribe]." See NAT'L CONFERENCE OF COMM'RS OF UNIFORM STATE LAWS, UNIFORM CERTIFICATION OF QUESTIONS OF LAW [ACT] [RULE] § 2 (1995), <https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=6ec589f6-129c-2867-0411-22ed773dd31f&forceDialog=0>. The manner of questions that may be certified is governed by state statutes. Eight states and Washington, DC have adopted the Uniform Certification of Questions of Law Act, though other states have generally based their procedures on that act as well. See *1995 Certification of Questions of Law Act*, UNIFORM LAW COMM'N, <https://www.uniformlaws.org/committees/community-home?CommunityKey=494b84ff-bd1f-465b-89a0-ffaddf84d7b3> (last visited Mar. 25, 2022); 17A CHARLES ALLEN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4248 (3d ed. 2021). Some states have adopted certification procedures as court rules instead. See, e.g., N.J. Court Rules, R. 2:12A-1 (2000). By 2008, only North Carolina had not adopted a certification procedure. Eric Eisenberg, Note, *A Divine Comity: Certification (at Last) in North Carolina*, 58 DUKE L.J. 69, 71 (2008); see also Rebecca A. Cochran, *Federal Court Certification of Questions of State Law to State Courts: A Theoretical and Empirical Study*, 29 J. LEGIS. 157, 159 n.13 (2003) (cataloguing sources of then-existing state certification procedures).

243. *Lehman Bros. v. Schein*, 416 U.S. 386, 391 (1974); Jonathan Remy Nash, *Examining the Power of Federal Courts to Certify Questions of State Law*, 88 CORNELL L. REV. 1672 (2003); see Watkins, *supra* note 133, at 484.

even empower the courts of other states, as well as certain regulators, to certify unsettled questions of state law posed by current cases to their state supreme court.²⁴⁴ Currently, however, state approaches to certification are entirely passive; state supreme courts respond to certification requests emanating from other court systems, but state actors do nothing to encourage the certification of key legal questions to state supreme courts.

Increased use of certification in widespread coverage disputes holds the potential to generate many of the same efficiencies that the test case scheme produced for the United Kingdom. Contested questions of insurance policy meaning in a particular state can only be definitively resolved by that state's supreme court.²⁴⁵ By promptly certifying the key legal issues implicated in a targeted set of coverage disputes to these courts, federal courts could provide insurers and policyholders with definitive guidance on interpretive questions generating widespread coverage uncertainty. This is both because insurance policy terms are often relatively uniform across different insurers and because specific fact patterns commonly recur in widespread coverage disputes.²⁴⁶ Indeed, these same features of insurance policy interpretation in the context of widespread coverage disputes help to explain why the United Kingdom's test case scheme proved so successful.²⁴⁷

Prompt federal court certification of the major legal questions driving widespread coverage disputes could provide an additional key benefit: allowing states to reclaim from federal courts the practical ca-

244. The most notable example is Delaware, which allows the Securities & Exchange Commission (SEC) to certify questions to the Delaware Supreme Court. See J.W. Verret, *Federal vs. State Law: The SEC's New Ability to Certify Questions to the Delaware Supreme Court*, CORP. GOVERNANCE ADVISOR, Mar./Apr. 2008, at 12, 12, <https://ssrn.com/abstract=1156527>; Daniel R. Kahan, *The Administrative State(s): Delaware's New Administrative Certification Procedure*, 10 J. BUS. & SEC. L. 35, 36 (2009); Verity Winship, *Cooperative Interbranch Federalism: Certification of State-Law Questions by Federal Agencies*, 63 VAND. L. REV. 181, 192–93 (2010). Questions certified to the SEC must typically involve adverse parties who are contesting a legal issue before the SEC, such as a shareholder proposal to include bylaws on the corporate ballot. See generally Verret, *supra*. If the Delaware Supreme Court accepts such certified questions, the adverse parties brief and argue the case before the court; aside from requesting certification, the SEC plays no advocacy role before the Delaware Supreme Court. See *id.*

245. See Watkins, *supra* note 133, at 484.

246. Indeed, one key feature of insurance policy interpretation is that rulings on policy meaning often have broader consequences due to the relative homogeneity of insurance policy language. See Daniel Schwarcz, *Coverage Information in Insurance Law*, 101 MINN. L. REV. 1457, 1477–78 (2017); Chaim Saiman, *Why Insurance Needs a Restatement: The Case of Settlement Decision Law*, 28 CONN. J. INS. L. (forthcoming 2022).

247. In fact, the legal clarity that certification could generate in the United States might strip the clarity produced by the United Kingdom's test case scheme, as insurance policy language in the individual states tends to be more standardized than is policy language in the United Kingdom.

capacity to resolve important issues of state insurance law. As the U.S. Court of Appeals for the Second Circuit has noted, certification of state law questions by federal courts is particularly important “where, unless there is certification, the state courts are substantially deprived of the opportunity to define state law.”²⁴⁸ This can occur “when the federal courts have diversity jurisdiction over most of the cases presenting certain state law questions, a situation which is not unlikely in insurance . . . law.”²⁴⁹

These potential benefits of certification are currently not realized for two reasons. First, federal courts are often unwilling to certify unsettled questions of state insurance law, even when those questions are implicated in a wide-ranging set of disputes. As described earlier, this trend is evident in the pandemic BI litigation, where the vast majority of federal courts have declined to certify the question of whether pandemic-induced shutdowns produced “direct physical loss of or damage” to covered property.²⁵⁰ But this hesitancy by federal courts to certify questions of insurance policy interpretation predates the pandemic and has been evident in many of the key widespread coverage disputes of the last several decades, such as the litigation over CGL insurers’ responsibilities for liability under CERCLA.²⁵¹ Federal courts often justify this reluctance to certify by reasoning that insurance coverage disputes merely require the application of basic principles of contract interpretation, which are well-settled in every state.²⁵²

Second, even when courts do certify questions of state insurance policy interpretation to state supreme courts, they never do so in a coordinated fashion. To the contrary, courts determine whether to certify state law questions in isolated cases and typically only when and if one of the parties raises the possibility.²⁵³ Courts generally have no mechanism for certifying related questions arising in different cases, particularly if those cases are pending before different judges. As suggested by the United Kingdom’s financial test case scheme, however,

248. *Gutierrez v. Smith*, 702 F.3d 103, 116–17 (2d Cir. 2012).

249. *Id.* at 117; *see also* Issacharoff & Marotta-Wurgler, *supra* note 206, at 607–08 (noting the undue influence that federal courts have had over the development of state common law regarding electronic contracts).

250. *See supra* Part I.B.

251. *See* *Watkins*, *supra* note 133, at 460.

252. Federal courts have developed various guidelines for determining when certification is appropriate, focusing on factors like whether there is authoritative guidance from state courts on the underlying issue, the importance of the issue to the state, and the capacity of certification to definitively resolve the dispute. *See, e.g.*, *Tunick v. Safir*, 209 F.3d 67, 81 (2d Cir. 2000).

253. Federal courts do have the authority to certify questions of state law *sua sponte*. But they rarely exercise this authority. *See* *Nash*, *supra* note 243, at 1714.

effective guidance on the resolution of widespread coverage disputes may require definitive rulings on several different key policy terms or factual scenarios; although widespread coverage disputes implicate a small set of common policy terms and fact patterns, the central unanswered questions are rarely, if ever, all raised in a single case.²⁵⁴ In the context of the BI coverage disputes prompted by the pandemic, for instance, a supreme court decision addressing a set of closely related issues raised in several different cases would have the best chance of definitively resolving potential coverage disputes. These issues might include (i) whether pandemic-induced shutdowns constitute “direct physical loss of or damage to” property; (ii) whether close variants of this policy language, such as “direct physical loss or damage to,” are legally relevant; (iii) the proper treatment of causation issues involving virus exclusions; and (iv) whether the actual presence of coronavirus inside property could impact the resolution of the foregoing issues.²⁵⁵

States could plausibly overcome these two obstacles by developing an active and coordinated strategy for encouraging federal courts adjudicating cases that are part of an emerging set of widespread disputes to certify key legal issues raised in appropriate cases to the relevant state supreme court.²⁵⁶ To do so, a state could direct its insurance department and/or attorney general to file certification requests in federal cases raising complementary insurance coverage questions that are implicated in a significant number of ongoing insurance coverage disputes and that turn on the application of that state’s insurance laws.²⁵⁷

Unlike existing certification procedures, which are fundamentally reactive,²⁵⁸ this approach would mirror the United Kingdom’s test case scheme by directing state actors to proactively seek resolution of the most pressing legal questions driving widespread coverage disputes. And like the test case scheme, it would attempt to do so in part by leveraging the insurance market expertise of state agencies. State insurance departments are uniquely well-situated to identify emerging legal issues having potentially significant implications for a wide range

254. *See supra* Part I.A.

255. *See supra* Part I.

256. Ideally, such certification requests could be filed not only in ongoing federal coverage disputes, but also in coverage disputes before trial or intermediate appellate courts in the state. But that approach may raise complicated procedural questions for each individual state.

257. In some states, insurance regulators and attorneys general might be able to file such certification requests without the need for any statutory or regulatory reform at all.

258. *See* Frank Chang, *You Have Not Because You Ask Not: Why Federal Courts Do Not Certify Questions of State Law to State Courts*, 85 *GEO. WASH. L. REV.* 251, 269 (2017).

of coverage disputes given their regular interactions with insurers and policyholders. Meanwhile, state attorneys general are reasonably well-situated to translate these views into legal filings that clearly communicate to federal courts the public benefits that could flow from certifying these questions, as well as the state's particular interest in having these issues definitively resolved by its own supreme court. Acting together, these two state actors could therefore plausibly perform a role similar to the FCA's framing of the test case litigation in the United Kingdom.

A key difference between this proposal and the United Kingdom's test case scheme is that legal questions would be drawn from cases that had already been filed in federal courts. This approach would allow advocacy on the appropriate resolution of the underlying interpretive questions to be advanced solely by the interested parties rather than by a state agency facing potential resource and political constraints. Interested third parties could, of course, be invited to submit amicus briefs or make special appearances, as occurred in the United Kingdom. Structuring the proposal in this way also avoids any potential problems with asking state supreme courts to issue advisory opinions, an authority that is either completely foreclosed or highly limited in most states.

B. Addressing Potential Criticisms of a Regulatory Certification Scheme

The regulatory certification proposal developed above can, of course, be objected to on multiple grounds. Two such objections are particularly noteworthy: that it would make little difference relative to the status quo, and that it could result in premature and under-developed legal opinions.

Turning to the first of these objections, it is certainly possible that federal courts would refuse to certify the key legal issues implicated in widespread coverage disputes to state supreme courts, despite requests to do so by state insurance departments and attorneys general. Certification, after all, can delay resolution of the underlying case, meaning that one or even both of the litigants may resist certification. Moreover, regulatory certification requests would still have to grapple with the reasoning adopted by many past federal courts that basic principles of insurance policy interpretation are well-established under the law of virtually every state, rendering certification unnecessary. If regulatory certification requests ultimately were infrequently granted, then involving state insurance departments and attorneys general in these matters would simply impose additional costs on

courts adjudicating widespread coverage disputes and the parties litigating them without producing any meaningful countervailing benefits.

Although this concern is certainly plausible, there is good reason to believe that federal courts would be inclined to grant many certification requests coming from state regulators and attorneys general. Unlike private litigants, the primary interest of such public actors would be to efficiently resolve a targeted set of legal issues so as to prevent prolonged uncertainty about coverage in the context of a newly emerging and widespread set of coverage disputes. The very fact that these public actors identify a case as raising such issues would credibly signal to the court the public benefits of certification. In doing so, state actors could provide a powerful rejoinder to the logic that federal courts are perfectly capable of interpreting the plain meaning of insurance policy language; certification is vital not because federal courts cannot interpret insurance policy language well, but because they cannot provide a definitive interpretation of this language even though such certainty is necessary for state insurance markets to operate effectively in the context of newly emerging widespread coverage disputes. These considerations might be particularly persuasive if state actors were seeking to package together certification of complementary insurance law questions posed in several different cases, which could collectively resolve related issues implicated in emerging widespread coverage disputes.

Moreover, affirmative certification requests filed by state insurance regulators and/or attorneys general would presumably highlight for federal courts the importance of allowing the supreme court of the state whose insurance laws are at issue to resolve those questions. Federal courts being asked by a litigant to certify a question of state law rarely place significant weight on this factor, in part because there is typically no indication in such cases that state actors actually care about resolving the legal issue posed by the case. Affirmative certification requests filed by state actors acting under a scheme designed in part to reinforce the primacy of states in setting their own insurance laws would, of course, provide exactly this type of indication. Such requests could also highlight the fact that a state's insurance law is comprised not only of relatively broad principles that federal courts can apply, such as the ubiquitous plain meaning and *contra proferentem* doctrines, but also of highly specific rules keyed to particular policy language. And states ultimately have the right to determine both macro and micro principles of insurance law.

As for the administrative costs of the proposal, while perhaps they are not trivial, they are also not extensive. This is because the proposal ultimately does almost nothing to alter existing legal processes for the resolution of insurance coverage disputes. Although federal courts typically certify questions of state law after a motion by one of the parties, they have long enjoyed the authority to certify such questions *sua sponte*. Empowering state insurance regulators and/or attorneys general to request that federal courts exercise this authority in a targeted and coordinated set of cases therefore merely asks federal courts to exercise authority they have long enjoyed.²⁵⁹ This approach is thus much less radical than, for instance, existing procedures that empower regulators, like the Securities and Exchange Commission, to directly certify certain corporate law disputes to the Delaware Supreme Court.²⁶⁰

The second important set of objections to a regulatory certification proposal is that it could result in the premature resolution of complex and varying claims by a small set of judges who have not had the benefit of fully developed precedent. Recall that similar concerns have been advanced by scholars who are skeptical of existing aggregation mechanisms such as MDLs.²⁶¹ Ultimately, however, this is not a convincing objection to the specific regulatory certification proposal described above. Part of the explanation for this conclusion is detailed above: widespread insurance coverage disputes turn on a discrete set of legal, rather than factual, questions that are neither unduly difficult nor governed by widely varying state laws.²⁶² Moreover, the benefits of prompt resolution of coverage disputes are significant for both policyholders and insurers alike.²⁶³

In addition to these general responses, however, the regulatory certification proposal is specifically structured to ensure that it does not unduly tilt the balance too much in favor of speedy and non-individualized resolution of widespread coverage disputes by a small handful of judges. Most notably, each individual state supreme court typically has five or seven justices, and there are of course over fifty different

259. See Nash, *supra* note 243, at 1691–92.

260. Just as in that scheme, regulators would merely request certification from the state's high court on a specific set of legal issues, while leaving advocacy on the appropriate resolution of those issues to the private parties. Of course, this proposal would differ from the SEC certification scheme in a key respect: it would allow regulators to request certification to the state supreme court of legal issues implicated in disputes that are not presently before them. Instead, regulators would be asking a state supreme court to resolve a legal issue that is currently before a different court and that had not previously been under the regulators' domain.

261. See, e.g., Fitzpatrick, *supra* note 172, at 108–15.

262. See *supra* Part II.A.

263. See *id.*

jurisdictions. Because both the central principles of insurance policy interpretation and the relevant policy language in most widespread coverage disputes are largely uniform across different jurisdictions, a state-based regulatory certification proposal would still allow for dozens of different opinions on largely overlapping issues, each one of which would be joined by multiple judges. Just as importantly, the regulatory certification proposal developed above would not require regulators or attorneys general to seek certification immediately once a case raising a potentially widespread coverage issue was filed. To the contrary, state actors could well opt to intervene and seek certification only after a critical mass of opinions addressing the issue were published. And to the extent that regulators or attorneys general prematurely sought certification, the courts to whom such requests were directed could simply deny these requests.

To be sure, the potential benefits of a regulatory certification regime may be most significant in relatively large states. In part, this is because the insurance departments and attorneys general offices of such states are comparatively well-equipped to implement this proposal effectively, both by making a compelling argument for certification in appropriate cases and by timing such requests properly. Perhaps even more importantly, the potential benefits of a quick and global resolution of a potentially widespread insurance coverage question will generally be muted in smaller states, where the aggregate number of such disputes will tend to be correspondingly limited. Moreover, informal coordination among the attorneys that handle suits implicating a common and widespread coverage issue and the judges that hear these suits is likely to be much easier in relatively small states.²⁶⁴

CONCLUSION

More than two years after the pandemic's onset in March 2020, there is perhaps only one single definitive conclusion that can be drawn from the thousands of lawsuits that have been filed regarding BI insurers' coverage obligations: America's system for resolving these types of newly emerging and widespread coverage disputes is broken. By contrast, the United Kingdom's novel test case scheme helped to efficiently and fairly resolve a similar set of coverage disputes. Of course, innumerable differences in the two country's insurance markets and legal systems make any proposal to import

264. Indeed, the possibility of such informal coordination in some states was one factor that the MDL panel cited in declining to create a national MDL for pandemic BI cases. *See supra* Part I.B.

wholesale the United Kingdom's approach into the United States native. But the divergent experiences with pandemic BI coverage disputes in these two countries can point to sensible reforms in the United States that are inspired by the United Kingdom's experience yet tailored to reflect the unique features of U.S. insurance law and regulation. Attempting this feat, this Article proposes that states should empower their insurance departments and attorneys general to pursue a coordinated strategy for requesting that federal courts promptly certify a complementary set of key legal questions to the relevant state supreme court for definitive resolution. This proposal would represent only a modest alteration of existing legal principles and institutional roles within the United States. It would nonetheless hold the potential to produce many of the key benefits in the United States that the Financial Markets Test Case Scheme produced in the United Kingdom.

Although this Article has focused on the possibility of using a regulatory certification process to help resolve widespread insurance coverage disputes efficiently, it is possible that this procedural innovation could have more wide-scale application across a broad range of substantive legal questions. In recent years, numerous commentators have convincingly illuminated some of the deficiencies of current procedural mechanisms, like MDLs and class actions, for resolving widespread disputes like the Opioid Crisis, for example.²⁶⁵ One of the consistent themes of these criticisms is that in their quest to deliver justice efficiently, federal courts coordinating MDLs and class actions often deprive state courts of their prerogative to define the contours of state law. Regulatory certification procedures could potentially help to counteract this tendency while continuing to deliver at least some of the efficiency benefits motivating MDLs and class actions. Of course, the potential challenges of implementing a regulatory certification scheme outside of the insurance domain are also significant and include the fact-based nature of many such disputes as well as the potential lack of a specific state regulator who could lead such an effort. But the success of the British test case scheme for resolving COVID-19 BI insurance coverage disputes may well offer important lessons that are not cabined to the insurance domain.

265. See, e.g., Abbe R. Gluck & Elizabeth Chamblee Burch, *MDL Revolution*, 96 N.Y.U. L. REV. 1 (2021); Issacharoff & Marotta-Wurgler, *supra* note 206, at 607–08; Fitzpatrick, *supra* note 172, at 107–11; Elizabeth Chamblee Burch, *Monopolies in Multidistrict Litigation*, 70 VAND. L. REV. 67, 106–07 (2017); Nora Freeman Engstrom, *The Lessons of Lone Pine*, 129 YALE L.J. 2, 36–52 (2019).