Expedited Appeal No. 20-cv-0535

DISTRICT OF COLUMBIA
COURT OF APPEALS

ROSE'S 1, LLC d/b/a ROSE'S LUXURY
ELAINE'S ONE, LLC d/b/a PINEAPPLE AND PEARLS
DANNY BOY LLC d/b/a LITTLE PEARL
BUTTERCREAM BAKESHOP LLC
GRAVITAS NW LLC d/b/a GRAVITAS
KARMA HEALTHY FOODS L.L.C. d/b/a KARMA MODERN INDIAN
PURPLE PATCH LLC
3313 11TH HOSPITALITY LLC d/b/a EL CHUCHO
1825 18TH HOSPITALITY LLC d/b/a BAR CHARLEY
SRG WATERFRONT LLC d/b/a LA VIE
JADI GOOSE LLC d/b/a QUEEN'S ENGLISH
ANB 623 LLC d/b/a BEUCHERT'S SALOON
SERVICE BAR LLC
and
MAKETTO, LLC

Plaintiffs-Appellants,

v.

ERIE INSURANCE EXCHANGE

Defendant-Appellee.

ON APPEAL FROM THE SUPERIOR COURT
OF THE DISTRICT OF COLUMBIA, CIVIL DIVISION
2020 CA 002424 B
(The Honorable Kelly A. Higashi)

PROPOSED BRIEF OF *AMICI CURIAE* RESTAURANT ASSOCIATION OF METROPOLITAN WASHINGTON AND RESTAURANT LAW CENTER IN SUPPORT OF APPELLANTS

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RULE 29(a)(4)(A) DISCLOSURE STATEMENT

The Restaurant Association of Metropolitan Washington is a 501(c)(6) non-profit corporation organized under the laws of the District of Columbia. It has no parent corporation or publicly held corporation that owns 10% or more of its stock.

The Restaurant Law Center is a 501(c)(6) non-profit corporation organized under the laws of the District of Columbia. It has no parent corporation or publicly held corporation that owns 10% or more of its stock.

RULE 29(3)(D) STATEMENT OF IDENTITY AND INTEREST OF *AMICI CURIAE*

The Restaurant Association of Metropolitan Washington ("RAMW") is a trade organization representing restaurants and the food service industry in the Washington, DC metropolitan area. Its members comprise 1,300 restaurants and food service businesses in the District of Columbia, Maryland, and Northern Virginia. Many of RAMW's members, and restaurants more generally, have purchased business interruption insurance, and coverage under these policies is crucial to the continuing vitality of the restaurant industry in the District of Columbia.

The Restaurant Law Center ("RLC") is a 501(c)(6) legal entity launched in 2015, and incorporated in 2016, by industry leaders with the express purpose of promoting laws and regulations that allow restaurants to continue growing, creating jobs and contributing to a robust American economy. RLC's goal is to protect and advance the restaurant industry and to ensure that the views of America's restaurants are taken into consideration by giving them a stronger voice in the regulatory process and in the courtroom. RLC regularly pursues cases and submits *amicus curiae* briefs

on issues of importance to the restaurant industry, as is the case now.[1]

A Motion for Leave is filed contemporaneously with this Brief pursuant to Rule 29(a)(3).

ARGUMENT

Business interruption insurance ("BII") is an important tool for managing the risks associated with owning and operating a business. For small businesses operating with low profit margins – like restaurants – it can be crucial. Arising out of "use and occupancy" insurance, BII is designed to protect the business's commercial viability by allowing it to meet its on-going obligations and to replace lost revenue when confronted with a sudden, unplanned closure. As seen in the case at bar, this type of coverage is typically provided in comprehensive businessowner's insurance policies and is effectuated through provisions covering business income that are distinct from the provisions insuring the business's real or personal property.[2] Restaurants across the District of Columbia have purchased BII at significant cost.

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[1] *See, e.g.*, *Lewis v. Governor of Ala.*, 944 F.3d 1287 (11th Cir. 2019); *First Student, Inc. v. NLRB*, 935 F.3d 604 (D.C. Cir. 2019); *Texas v. Dep't of Labor*, 929 F.3d 205 (5th Cir. 2019); *Robles v. Domino's Pizza, LLC*, 913 F.3d 898 (9th Cir. 2019); *Rodriguez v. Kaiaffa, LLC*, —A.3d—, SC 20274, 2020 WL 5919680 (Conn. Oct. 6, 2020); *Kim v. Reins Int'l Cal., Inc.*, 459 P.3d 1123 (Cal. 2020); *Pa. Restaurant & Lodging Ass'n v. City of Pittsburgh*, 211 A.3d 810 (Pa. 2019); *Rosenbach v. Six Flags Ent. Corp.*, 129 N.E.3d 1197 (Ill. 2019).

[2] Joint Appendix ("JA") at 77–80, 169–72.

Despite the importance of this coverage for restaurants, when policyholders like Appellants were forced to close or significantly curtail operations by order of public health authorities beginning in March, insurance companies across the country – including Appellee Erie Insurance Exchange – uniformly denied their claims. These restaurant closures are having, and will continue to have, a devastating effect on these businesses, their employees, and the broader economy.

Black letter insurance law requires that all ambiguities in insurance policies be resolved in favor of the insured; if the insured can demonstrate a reasonable reading of the policy, it is entitled to coverage. The insurance industry has anticipated for years not just the probability of a global pandemic, but the likelihood that restrictive public health interventions would be needed to combat such a pandemic. The insurance industry also understood the impact such events would have on businesses and the exposure that insurers faced under the all-risk policies that they issued to an estimated 11 million small businesses nation-wide, including roughly 25,000 in the District of Columbia alone.[3] Despite that knowledge, the industry failed to unambiguously define key policy terms and articulate clear

[3] Nat'l Ass'n of Ins. Comm'rs, *Business Interruption/Businessowner's Policies*, https://tinyurl.com/y2rjzl2f (last visited Sept. 2, 2020) (30–40% of small businesses carry BII); U.S. Small Business Admin. Office of Advocacy, *2020 Small Business Profile*, https://tinyurl.com/yxcz2x8w (last visited Oct. 26, 2020) (31.7 million small business nationally, 78,313 in D.C.).

exclusions that would exclude business income coverage under the very circumstances that have unfolded in 2020.[4] A reasonable reading of policies like the Appellants' leads to the conclusion that insureds are entitled to coverage. In light of the requirements of insurance contract interpretation and as a matter of public policy, this Court should reverse the Superior Court and find that Appellants are entitled to coverage under their Policies.

I. Business Interruption Insurance Protects Against Risks to Businesses' Use of Their Property

Since its creation, the purpose of BII has been to protect the business as an entity, separate and distinct from property insurance covering its real estate or personal property at its business location. Modern BII grew out of "use and occupancy" insurance.[5] BII and its predecessors arose because traditional property insurance covered only "loss and the value of the tangible asset," whereas with "commercial enterprises, it became apparent that another form of economic loss – loss of business income generated by the use of the tangible business property – was

[4] Appellants' policies do not include any provision purporting to exclude loss or damage caused by viruses. Therefore, the question of how such a provision should be interpreted and whether it is valid and enforceable is not before the Court.

[5] William H. Danne, Jr., *Business Interruption Insurance*, 37 A.L.R.5th 41 § 2[a] (1996); David A. Borghesi, *Business Interruption Insurance – A Business Perspective*, 17 Nova L. Rev. 1147, 1148 (1993); H. Michael Bagley, *The Clock Is Ticking: A Look at Business Interruption Insurance*, 18-SPG Brief 8, 9 (1989).

also at risk."[6]

That BII protects the business rather than merely the property also comports with fundamental realities of the restaurant business. Restaurants, including RAMW's members and Appellants, are businesses seeking to generate income. These businesses own and rent property not for its own sake, but as a means of generating income; this is why the insured is described in a businessowner's policy as a particular type of business – here, a particular type of restaurant or food establishment, and not as an owner or renter of property.[7] It is also why there are separate limits under business insurance policies for real property, business personal property (fixtures, furnishings, equipment, and inventory), and business income losses due to necessary interruptions to operating the business, in whole or in part, as the result of a covered cause of loss.[8] And generating income is not only the goal of these restaurants; it is also essential to their continued operation. Even when they cannot conduct business operations at full or near maximum operational status (*i.e.*, to be open for business as usual), restaurants must still meet outstanding liabilities and on-going operating expenses – including paying rent, paying and retaining their employees, and purchasing supplies – to ensure successful resumption of the

[6] Borghesi, *supra*, at 1148.
[7] *See, e.g.*, JA 40, 167.
[8] *See, e.g.*, *id.*

business following an interruption. Without BII coverage, they cannot do this.

II. D.C. Restaurants Pay Significant Premiums for BII to Protect Their Interests in Operating Sit-Down Restaurants

Restaurants form a central part of the D.C. economy. There are 5,536 public food establishments in the District, including 2,432 restaurants. In 2019 food service establishments in D.C. employed 56,000 people.[9] Many of these restaurants carry BII.

Amici estimate that the overwhelming majority of restaurants in the District do not own the property where they operate.[10] Instead, they lease it. Many standard commercial leases in the District require tenants to carry BII or contribute toward their landlord's insurance cost. This norm has taken root because commercial lenders require landlords to carry rental interruption insurance.[11] As residential landlords require proof of income, commercial landlords want to ensure that their tenants will

[9] District of Columbia Office of the Chief Financial Officer, *D.C. Economic Indicators: September 2020*, https://tinyurl.com/y3wpen (last visited Oct. 21, 2020).

[10] Nationally, only about 40% of restaurants own both the land and the building where they operate. In the District of Columbia, where real property is considerably more expensive than in many other parts of the country, that number is likely much lower.

[11] Richard R. Goldberg, Am. Law Inst. Continuing Legal Ed., *Commercial Real Estate Leases: Selected Issues in Drafting and Negotiating in the Current Market*, available on Westlaw at SV013 ALI-ABA 1135, 1144 (Nov. 7–8, 2013) ("It has become mandatory for lenders to require landlords to carry rental interruption insurance and for landlords to require tenants to pay for the cost of the policies.").

continue to pay rent and maintain the business.[12] Thus, the requirement to carry BII is intended to maintain a steady stream of business income for each party in this chain of commercial relationships – tenant-landlord-lender – in the event the business is required to suspend operations in whole or in part.

The BII coverage obtained by D.C. restaurants is also specific to the type of business operated, which might be full-service (*i.e.*, seated dining), fine dining (for upscale restaurants), fast food, or some other specialized designation. This is crucial because BII insures against risks to the business's ability to use its property and operate its business in a particular way. Restaurants are created by their owners to operate in a specific manner and to achieve a certain level of income to support the costs of building out and operating. The District's full-service restaurants, for example, were not designed to operate as take-out or delivery only establishments, and transitioning from seated, full-service dining to take-out/delivery-only dining imposes significant burdens and costs on those restaurants, if they are even able to make the transition. People spend money for restaurant dining because they want the ambience, presentation, and service that makes restaurant dining enjoyable; consumers don't want to pay restaurant prices (and more) for lesser experiences. Providing comparable quality – *i.e.*, food that fits a restaurant's brand, meets its

[12] Tracey M. Stockton, Mass. Lawyers Weekly, *Business Interruptions: Whose Liability Is It?*, https://tinyurl.com/y4dsyqww (Oct. 7, 2013).

standards, and survives transport – requires a significant re-tooling of both the menu and the processes for handling orders. But even if a restaurant could possibly transform its business model from a fully-staffed, seated, full-service operation to a minimally-staffed take-out and delivery operation, the income derived from a carryout and delivery operation is only a fraction of what a full-service restaurant needs to be viable.

D.C. restaurants pay significant insurance premiums for comprehensive businessowner's insurance, including BII. Just the handful of examples in the record reflect thousands of dollars paid by each business annually.[13] Despite paying these hefty premiums, claims for BII coverage are infrequent. Restaurants recognize that short term disruptions like power outages or unexpected street closures to repair a ruptured water or gas line, which are common causes of temporary closures, are not covered due to "waiting periods." They purchase these policies to protect themselves when extended closures over which they have no control occur. A day of income loss is survivable, which is why most policies have anywhere from a 24- to 72-hour

[13] JA 38, 165. Some restaurant policyholders in the District of Columbia have paid even higher premiums. *See, e.g.*, Compl. ¶¶ 4, 18, *FT DC, LLC v. Charter Oak Fire Ins. Co.*, 1:20-cv-02026-CJN (D.D.C. July 24, 2020) ($163,934 annually for 5 restaurants); Compl. ¶¶ 4, 7, *RW Rest. Grp. LLC v. Charter Oak Fire Ins. Co.*, No. 8:20-cv-02161-GJH (D. Md. July 24, 2020) ($123,936 annually for 8 restaurants); Compl. ¶¶ 4, 7, *ThinkFood Grp. LLC v. Travelers Prop. Cas. Co. of Am.*, No. 8:20-cv-02201-PWG (D. Md. July 29, 2020) ($456,155 annually for 17 restaurants).

waiting period before benefits begin. Months with no revenue or significantly diminished revenue are not. D.C. restaurants and other businesses have continued to pay these premiums in part to guard against unlikely but potentially substantial "tail risks" – like a global pandemic – that could cause catastrophic damage to their business.

III. Insurance Companies Have Summarily Denied Claims for Coverage

Despite the large premiums that businesses across the country have paid for BII, and despite (or perhaps because of) the ubiquity of BII coverage among restaurants and other businesses, insurance companies have summarily denied claims for BII coverage arising from this year's governmental closure orders.

The facts set forth by Appellants regarding the handling of their claims are consistent with the allegations set forth in over 1,000 lawsuits[14] on file across the country: rapid, boilerplate denials asserting that numerous policy provisions exclude or preclude coverage – without any investigation and regardless of the information provided in the insured's notice of loss.[15] This is unsurprising only because insurance industry executives telegraphed their intentions to deny BII coverage to policyholders before more than a few isolated cases of COVID-19 were detected on

[14] Tom Baker, Penn Law, *Covid Coverage Litigation Tracker*, https://cclt.law.upenn.edu/ (last visited Oct. 26, 2020) (1,290 filings as of October 5, 2020).

[15] JA 352–53 (claims denied "on the exact same grounds").

U.S. soil.[16] Due in part to the swift campaign by the insurance industry to advance its narrative, by the end of March, non-attorney insurance commentators had proclaimed a "consensus" that BII does not provide coverage.[17] Days after Mayor Bowser issued her first order ("District's Order") restricting seated dining in the District's restaurants, the leading insurance industry trade groups categorically stated that BII does not "provide coverage against communicable diseases such as COVID-19" in response to Congressional calls for BII coverage.[18] In the months since, insurance industry executives have encouraged Congress to create a fund to assist struggling businesses.[19] The insurance industry has sought to shift the burden

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[16] For example, in early February, the Chairman and CEO of Chubb told analysts that the insurance industry would see "very minimal loss exposure." Mark Hollmer, Carrier Mgmt., *Chubb CEO Greenberg Predicts "Modest" Coronavirus Impact for Now*, https://tinyurl.com/y4sdee3s (Feb. 5, 2020).. Allianz made a similar statement. Patricia L. Harman, NU Property Casualty 360, *Is the Coronavirus a Covered Insurance Loss?*, https://tinyurl.com/y5x7ark3 (Feb. 3, 2020). At the same time, lawyers friendly to the insurance industry were opining that BII coverage did not extend to losses caused by closure orders. *See* Martin Croucher, Law360, *Insurers Braced For Claims Following Coronavirus Lockdown*, https://tinyurl.com/y2gjpxes (Feb. 3, 2020).

[17] Bill Wilson, Ins. J., *Commentary: Does Business Income Insurance Cover Coronavirus Shutdowns?*, https://tinyurl.com/yyhhcoej (Mar. 24, 2020).

[18] Hinshaw & Culbertson LLP, *Letter from Charles Chamness et al. to Honorable Nydia M. Velazquez*, https://tinyurl.com/y4l9w6gg (Mar. 18, 2020); Ins. J., *Insurers Reject House Members' Request to Cover Uninsured COVID Business Losses*, https://tinyurl.com/y6dgj6nl (Mar. 20, 2020).

[19] Claire Wilkinson, Bus. Ins., *Members of Congress Push Plan to Force Insurers to Cover Virus Losses*, https://tinyurl.com/yxn785hc (Apr. 15, 2020); Suzanne Barlyn, Reuters, *U.S. Insurers Want Taxpayers to Back Pandemic Coverage for Businesses* (Apr. 29, 2020), https://tinyurl.com/ycjr8k34.

to small businesses and taxpayers, while disclaiming any responsibilities or obligations for itself.

Insurers have denied claims both where businesses found COVID-19 physically present on their property[20] and where businesses did not.[21] Insurers have also argued, as they do here, that structural damage or alteration of the insured's premises is necessary to trigger coverage,[22] even though these policies clearly identify loss of property and damage to property as distinct bases for asserting coverage, and indeed coverage is provided for business interruptions in several other contexts that do not include physical damage or alteration of the insured's premises, such as evacuation orders before a hurricane or wildfire, losses due to cyber-intrusions, and interruptions due to civil unrest, just to name a few. Although not at issue in this case, insurers have also frequently invoked so-called virus exclusions in policies, which policyholders have challenged as inapplicable, invalid, and

[20] *Blue Springs Dental Care, LLC v. Owners Ins. Co.*, No. 20-cv-00383-SRB, 2020 WL 5637963, at *4 (W.D. Mo. Sept. 21, 2020); *Studio 417, Inc. v. Cincinnati Ins. Co.*, No. 20-cv-03127-SRB, 2020 WL 4692385, at *2 (W.D. Mo. Aug. 12, 2020).
[21] *Henry's Louisiana Grill, Inc. v. Allied Ins. Co. of Am.*, No. 1:20-CV-2939-TWT, 2020 WL 5938755, at *4 (N.D. Ga. Oct. 6, 2020); *Urogynecology Specialist of Fl. LLC v. Sentinel Ins. Co.*, No. 6:20-cv-1174-Orl-22EJK, 2020 WL 5939172, at *3 (M.D. Fla. Sept. 24, 2020); *Pappy's Barber Shops, Inc. v. Farmers Grp., Inc.*, No. 20-CV-907-CAB-BLM, 2020 WL 5500221, at *2 (S.D. Cal. Sept. 11, 2020); *Turek Enters., Inc. v. State Farm Mut. Auto. Ins. Co.*, No. 20-11655, 2020 WL 5258484, at *4 (E.D. Mich. Sept. 3, 2020).
[22] *Henry's Louisiana Grill, Inc. v*, 2020 WL 5938755, at *4; *Turek Enters.*, 2020 WL 5258484, at *5; *Studio 417, Inc.*, 2020 WL 4692385, at *4.

unenforceable.[23] Overseas, where some policies have expressly included coverage for losses caused by communicable diseases, insurers have argued that government-ordered closures are the proximate cause of their insureds' losses and are not expressly covered.[24] In short, the common theme running through the insurance defense is simply that there is *no* coverage under *any* scenario – and the insurers seem to believe that support for their positions exists in these policies, which are lengthy, dense, and difficult for anyone (other than an insurance specialist) to understand.

IV. The District's Restrictions on In-Person Dining Effectively Closed Restaurants

BII is issued for particular uses of property; for most restaurants, that use is seated dining. The District's Orders prevented in-person dining and therefore prevented these businesses from using their property as they had intended and secured insurance to protect. As such, the District's Orders were, effectively, closure orders.

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[23] *Henry's Louisiana Grill, Inc.,* 2020 WL 5938755, at *3; *Urogynecology Specialist of Fl. LLC*, 2020 WL 5939172, at *3 (M.D. Fla. Sept. 24, 2020); *Pappy's Barber Shops, Inc.,*, 2020 WL 5500221, at *2; *Turek Enters., Inc.*, 2020 WL 5258484, at *4; *10E, LLC v. Travelers Indem. Co. of Conn.*, No. 2:20-cv-04418-SVW-AS, 2020 WL 5359653, at *1–2 (C.D. Cal. Sept. 2, 2020).

[24] *See, e.g.*, C*afé Chameleon CC v. Guardrisk Insurance Company LTD* Case No. 5736/2020 [2020] (S. Africa High Ct. W. Cape Div., Cape Town June 26, 2020), https://tinyurl.com/yy4ycxyl.

The District's Orders were implemented to slow infection rates among the populace and slow the pandemic to lessen the burden on health care services and critical infrastructure in the District of Columbia and the greater metropolitan area so that these systems would not be overwhelmed. "Flattening the curve" was a strategy implemented in response to the limits of the health care system. As explained in an early order, "'Flattening the curve' is not expected to greatly reduce the total number of people that will become infected with COVID-19, but those infections will take place over a longer period of time, which will result in a less stressed health care system, and in turn, better patient outcomes."[25]

The Superior Court held that the District's Orders were not the direct cause of Appellants' losses because the Orders "[s]tanding alone and absent intervening actions by individuals and businesses . . . did not effect any *direct changes* to the properties."[26] The Superior Court did not identify actual or theoretical intervening persons or events, specifically or categorically, but the only logical inference to be drawn from the Superior Court's reasoning on this point is that businessowners' compliance with the District's Orders resulted in business closures. This reasoning is faulty.

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[25] Mayor Muriel Bowser, Government of the District of Columbia, *Mayor's Order 2020-053* at 2 (Section I.4), https://tinyurl.com/yy7v2zky (Mar. 24, 2020).
[26] JA 5 (emphasis added).

There were no intervening people or events. The District issued mandatory orders, not suggestions, which specified that non-compliance could lead to criminal, civil and administrative penalties, including summary suspension or revocation of licensure.[27] Appellants and other D.C. restaurants had no choice whether to suspend operations. Thus, the District's Orders directly led to the closure of Appellants' restaurants and others.[28] Compliance with these Orders should not result in a forfeiture of insurance coverage. Allowing this aspect of the Superior Court's decision to stand would create disincentives for adherence to the law with potentially disastrous consequences.

When the District's Orders prevented D.C. restaurants from operating as "seated dining" establishments, these entities were prevented from using their property and operating their businesses as intended and insured and should have received the benefits of their BII coverage. To date, they have not received those benefits. Many of the District's restaurants have rallied and tried to make ends meet

[27] *See, e.g.*, Mayor Muriel Bowser, Government of the District of Columbia, *Mayor's Order 2020-048*, at 3 (Section II), https://tinyurl.com/y3mvmum6 (Mar. 16, 2020).

[28] As explained in a recent North Carolina state court case, "Plaintiffs were expressly forbidden by government decree from accessing and putting their property to use for the income-generating purposes for which the property was insured. These decrees resulted in the immediate loss of use and access without any intervening conditions." *North State Deli v. Cincinnati Ins. Co.*, Case No. 20-CVS-02569, at *6 (N.C. Super. Ct. Oct, 9, 2020), https://tinyurl.com/yxw6ndq4.

by radically changing their menus, expanding takeout/delivery services, and selling groceries and kits for home cooks. But none of this is required by the insurance policies in the wake of a business interruption. The insurance contract is premised upon both parties' agreement regarding the nature of the business, and premiums are priced by the insurer according to the risks the underwriter assigns based on the nature of the business.[29]

V. The Impacts Have Been and Will Continue to Be Devastating

Restaurants in the District of Columbia and across the country have experienced significant losses as governments have forced their businesses to close. Between March 1 and March 22, 2020, 44% of D.C. restaurant operators temporarily closed their restaurants. In April 2020, the first full month of business interruption, District restaurant sales had fallen over 80% from the previous year.[30] With restaurants operating at partial capacity during the warm summer months, restaurant sales were still 63% below their 2019 levels.[31] Many restaurants have not been able to stay open in this environment. RAMW estimates that as many as three-quarters of its members may have to close if their circumstances are not changed.

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[29] In fact policies like Appellants' explicitly allow insurers to cancel the policy if "[t]he property, interest or use of the property or interest has materially changed with respect to its insurability." JA 74, 255].

[30] DowntownDC, *DowntownDC Economy Update* at 1, https://tinyurl.com/y2ul5ugx (Aug. 31, 2020).

[31] *Id.*

Social scientists assessing the economic impact of the pandemic have found "[t]he hardest hit sector nationally and in every state continues to be Leisure and Hospitality," which includes restaurants.[32] This impact on businesses is felt not just by the businesses themselves but by the broader economy. Restaurants have been forced to furlough or lay off employees in large numbers. Between March 1 and March 22, 2020, 70% of D.C. restaurants laid off employees or reduced their hours. In the District of Columbia, food service employment is down 39.5% from last year, representing 22,100 people who have lost their jobs.[33] Food service represents 41% of all the job losses in the District of Columbia.[34]

The inability of restaurants to generate income – either through normal operations or through BII coverage for lost income – has had downstream effects for the rest of the economy as well. Commercial landlords have been forced to forgo rents. The retail vacancy rate in the District of Columbia is 33% higher than it was at the height of the Great Recession in 2009.[35] The District's unemployment rate is

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[32] Michael Ettlinger & Jordan Hensley, University of New Hampshire Carsey School of Public Policy, *COVID-19 Economic Crisis: By State*, https://tinyurl.com/yxdo5njk (Oct. 20, 2020).

[33] District of Columbia Office of the Chief Financial Officer, *D.C. Economic Indicators: September 2020*, https://tinyurl.com/y3wpen34 (last visited Oct. 21, 2020).

[34] *Id.*

[35] DowntownDC, *DowntownDC Economy Update* at 2, https://tinyurl.com/y2ul5ugx (Aug. 31, 2020).

8.7%.[36] The D.C. government expects to receive $406 million less in tax revenues from hotels and restaurants in 2020 than it did in 2019.[37]

It is likely that these conditions will only worsen. Many restaurant businesses are on the brink of financial ruin, and their losses will cause further harm to workers and their families, landlords, neighbors, and communities.

VI. The Burden of Failing to Clearly Define the Limits of Coverage Should Fall on the Insurers

The insurance industry foresaw the possibility of a global pandemic and its effect on businesses years ago. Despite their current position that BII coverage does not extend in the present circumstances, insurers failed to issue policies that unambiguously exclude losses of this kind. Insurance law favors the reasonable expectations of the insured and resolves ambiguity in their favor. For those reasons, insurers should assume the burden of their failure to clearly exclude coverage for business interruptions caused by pandemic or related public health counter-measures.[38]

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[36] U.S. Bureau of Labor Statistics, *Economy at a Glance: District of Columbia*, https://www.bls.gov/eag/eag.dc.htm (Oct. 20, 2020).

[37] Government of the District of Columbia Office of the Chief Financial Officer *Letter from CFO Jeffrey S. DeWitt to Mayor Muriel Bowser and Council Chairman Phil Mendelson RE: September 2020 Revenue Estimates*, at 3, https://tinyurl.com/y5aaf8uq (Sept. 30, 2020).

[38] As mentioned above, some insurers (but not Appellee Erie Insurance Exchange) have invoked "virus exclusions" in their policies as a basis for denying their policyholders' claims for BII coverage. Questions regarding whether the language

"[A]mbiguities in an insurance policy are construed against the insurer and in favor of 'the reasonable expectations of the purchaser of the policy.'" *Chase v. State Farm Fire & Casualty Co.*, 780 A.2d 1123, 1127 (D.C. 2001) (quoting *Smalls v. State Farm Mutual Automobile Insurance Co.*, 678 A.2d 32, 35 (D.C. 1996)). This interpretive principle recognizes the often one-sided dynamic under which insurance contracts are entered. *Id.* These policies "are lengthy, complex standard form contracts of adhesion drafted by insurers and sold on a take-it-or-leave-it basis with respect to their terms."[39] "Virtually no one expects the policyholder to have read or understood the language,"[40] a reality that holds for restaurant businesses as much as for individuals.[41]

Ambiguity in terms exists when the contract "is susceptible of more than one reasonable interpretation." *Chase*, 780 A.2d at 1127–28 (emphasis removed) (quoting *Am. Bldg. Maint. Co. v. L'enfant Plaza Prop., Inc.*, 655 A.2d 858, 861 (D.C. 1995)). Thus,

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of those policies should be construed to exclude coverage or should be enforced are being litigated in federal and state courts across the country but are not presented here.

[39] Christopher C. French, *Understanding Insurance Policies as Noncontracts*, 89 Temple L. Rev. 535, 546 (2017).

[40] Eugene R. Anderson & James J. Fournier, *Why Courts Enforce Insurance Policyholders' Objectively Reasonable Expectations of Insurance Coverage*, 5 Conn. Ins. L. J. 335, 363 (1998).

[41] Kenneth S. Abraham, *Four Conceptions of Insurance*, 161 U. Pa. L. Rev. 653, 660–61 (2013).

> [t]he insurer must establish not merely that the policy is capable of the construction it favors, but rather that such an interpretation is *the only one that can fairly* be placed on the language in question. It will not suffice for the insurer to demonstrate that its interpretation is more reasonable than the policyholder's. Rather, [the insurer] must show that [the insured's] construction is altogether *unreasonable*.[42]

District law requiring insurance contracts to be construed in favor of the insured should apply with particular force here, where insurers were aware of a pandemic risk yet failed to exclude it in unambiguous terms.[43]

The insurance industry has been aware for some time of the possibility of a global pandemic and its ability to trigger BII. In 2015 the National Association of Insurance Commissioners hosted a half-day conference titled *The Risk of Pandemics*

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[42] *Richardson v. Nationwide Mut. Ins. Co.*, 826 A.2d 310, 324 (D.C. 2003)); *accord Rockhill Ins. Co. v. Hoffman-Madison Waterfront, LLC*, 417 F. Supp. 3d 50, 59 (D.D.C. 2019) (citing *Chase*, 780 A.2d at 1127). Subsequent to the *Richardson* decision, this Court granted a rehearing of the case *en banc* and ordered that the opinion be vacated. 832 A.2d 752 (D.C. 2003). Before the *en banc* ruling, the parties settled, and the Court ordered the majority and dissenting opinions vacated. 844 A.2d 344 (D.C. 2004). Nonetheless, the case remains persuasive authority. *See, e.g.*, *District of Columbia v. Tulin*, 994 A.2d 788, 797 n.10 (D.C. 2010).

[43] *See Limelight Prods., Inc. v. Limelight Studios, Inc.*, 60 F.3d 767, 769 (11th Cir. 1995) ("When [insurers] issued these policies they knew of the Lanham Act, were on notice plaintiffs could recover ill-gotten profits, and must be held to have intended to cover these damages because they did not exclude them."); *Atchison, Topeka & Santa Fe Ry. Co. v. Stonewall Ins. Co.*, 71 P.3d 1097, 1137 (Kan. 2003) ("[B]ecause Insurers were aware of NIHL as a potential risk, they were in a position to expressly exclude NIHL coverage. Because Insurers did not exclude coverage, they are not in a position to claim that coverage is precluded by the known loss doctrine.").

to the Insurance Industry.[44] The American Academy of Actuaries presented at that conference and specifically named "Business Continuity/Business Interruption/Extra Expense Loss" as one type of insurance coverage potentially affected.[45] The presentation went on to note, "Such claims usually require physical damage but could include the following conditions: Quarantines; Shutdown of healthcare facilities; Building closures; Contingent business interruption (outbreak in another location could disrupt supply chain); Could also cover diminished revenues resulting from above[.]"[46] To address this risk to insurers, the presentation recommended reinsurance, suggesting that the insurance industry believed that it would be responsible for providing coverage in light of a pandemic like this one.[47]

Insurers were doing more than speculating about the impact of a hypothetical pandemic; they had faced a similar issue in the 2003 SARS outbreak. The American Academy of Actuaries presentation noted that that outbreak had resulted in "Lost business revenue" due to "Travel restrictions," "Quarantines," and "Building closures."[48] The insurance industry knew that when a pandemic occurred, it would

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[44] Nat'l Ass'n of Ins. Comm'rs, *The Risk of Pandemics to the Insurance Industry*, https://tinyurl.com/y5eacwwv (Mar. 27, 2015).
[45] Mary D. Miller, Am. Academy of Actuaries, *CIPR Event: The Risk of Pandemics to the Insurance Industry* at 5, https://tinyurl.com/y379wj2w (Mar. 27, 2015).
[46] *Id.* at 10.
[47] *Id.* at 14.
[48] *Id.* at 12.

be responsible for paying claims.

By contrast, restaurant owners were not acutely aware of the fallout that would result from an event like the pandemic now circling the globe. And to the extent restaurant owners had any expectations, they expected that unforeseen contingencies like this one would lead to coverage. In fact, in the first quarter of 2020, as COVID-19 spread across Asia and Europe and began to enter the United States, there was a 47% increase in the demand for BII.[49] "[A]t least part of the increase was 'purely driven by companies looking for coverage that includes viruses/pandemics.'"[50]

Not only was there a large disparity in the parties' knowledge, there is also a large disparity in the parties' ability to pay for the losses sustained. The property and casualty insurance industry currently holds $800 billion in reserves.[51] Insurers also have reinsurance which, presumably, they have acquired specifically as a backstop for catastrophic events. By contrast, restaurants, facing very elastic consumer demand and substantial fixed costs for real estate, labor, and taxes, run on razor-thin

[49] Jill M. Bisco, Stephen G. Fier, & David M. Pooser, *Business Interruption Insurance and COVID-19: Coverage and Issues and Public Policy Implications*, 39 J. Ins. Reg. No. 5, 1, 16 (2020), https://tinyurl.com/y67skzpw.
[50] *Id.*
[51] Neil Spector & Robert Gordon, American Property Casualty Insurance Association, *Property/Casualty Insurance Results: First-Quarter 2020*, https://tinyurl.com/y5wabho5 (last visited Oct. 25, 2020).

margins and have very little ability to cover losses.[52] On average, restaurant profit margins are between 2% and 6%; full-service restaurants are at the lower end of this range and limited-service (or quick service) restaurants are at the higher end.[53] The average restaurant has only enough cash on hand to cover 16 days of expenses.[54]

Where, as here, insurance agreements do not ambiguously exclude coverage, the insurer anticipated the risks involved, and insurers have greater ability to shoulder these losses, numerous doctrines counsel in favor of finding that the insured is entitled to coverage. Nevertheless, the court below denied coverage, and numerous federal courts have done likewise. These decisions are erroneous.

To begin, it is not the court's role to decide whether insureds or insurers have the "better" or "correct" interpretation; it is to determine whether the insured's reading is a reasonable one and to grant coverage if it is.[55] Relatedly, many of these decisions have finely parsed the wording of the insurance policies while ignoring a bedrock principle of insurance law: "The objectively reasonable expectations of

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[52] National Restaurant Association and Deloitte & Touche LLP, Restaurant Operations Report 2016 Edition; *see also*, Sebastien Rankin, Lightspeed, *The Complete Guide to Restaurant Profit Margins*, https://tinyurl.com/y64z9xnc (July 30, 2019).
[53] *Id.*
[54] Diana Farrell, Chris Wheat, JPMorgan & Chase Co. Inst., Cash Is King: Flows, Balances, and Buffer Days at 15, https://tinyurl.com/y67ct2xg.
[55] *Richardson*, 826 A.2d at 324; *Chase*, 780 A.2d at 1127; *North State Deli*, at *6; 2 Steven Plitt et al., Couch on Insurance § 22:11 (3d ed., June 2020 update); Restatement of the Law of Liab. Ins. § 4 (Am. Law Inst. 2020).

applicants and intended beneficiaries regarding the terms of insurance contracts will be honored even though painstaking study of the policy provisions would have negated those expectations."[56] Interpreting a policy to honor the reasonable expectations of insureds would account for the facts that BII is designed to protect against business losses, insurers knew about the risks related to pandemics, and they failed to unambiguously exclude coverage. It is also what public policy in the District of Columbia requires.[57]

The abandonment of these core principles of insurance contract interpretation contrasts with the approach taken by several foreign courts. In a test case brought by the United Kingdom insurance regulator, the High Court of Justice found that businesses similarly situated to Appellants are entitled to coverage.[58] Similarly, the High Court of South Africa ruled that the insured is entitled to coverage.[59] While the

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[56] Robert E. Keeton, *Insurance Law Rights at Variance with Policy Provisions*, 83 Harv. L. Rev. 961, 967 (1970).

[57] *See, e.g.*, *Mueller v. Healthplus, Inc.*, 589 A.2d 439, 442 (D.C. 1991) (citation omitted); *Buchanan v. Mass. Protective Ass'n*, 223 F.2d 609, 612–13 (D.C. Cir. 1955) ("The public policy which dictates resolution of ambiguities in favor of the insured rests upon the need to protect against the opportunity which insurance companies have to engage in the sort of obscurantism which conveys one meaning of their contracts to lawyers and another meaning to laymen." (citation omitted)).

[58] *Financial Conduct Authority v. Arch Insurance (UK) Ltd.*, [2020] EWHC 2448 (Comm) (U.K High Court Queen's Bench Div.), https://tinyurl.com/y3ktnghs.

[59] *Café Chameleon CC v. Guardrisk Insurance Company LTD*, Case No. 5736/2020 [2020] (S. Africa High Ct. W. Cape Div., Cape Town June 26, 2020) https://tinyurl.com/yy4ycxyl.

specific insurance policies and applicable law are different from those at issue here,[60] the principles animating these decisions should inform this Court. These decisions rejected the insurers' overly technical readings of policy language while focusing on whether coverage would be reasonable under policy terms considering all the circumstances. This approach is entirely consistent with the opinions of this Court in *Chase v. State Farm Fire & Casualty Company*, 780 A.2d 1123, 1127–28 (D.C. 2001), and *Richardson v. Nationwide Mutual Insurance Company*, 826 A.2d 310, 324 (D.C. 2003), and is consistent with the public policies that both protect consumers and encourage the use of insurance to manage risk.

Insurance industry executives have asserted that the magnitude of business losses associated with the pandemic could wipe their companies out.[61] Given significant insurer reserves and the protections afforded by reinsurance, this assertion cannot be accepted without question. Instead, policymakers should be concerned about another risk: If small businesses believe that they've been denied insurance benefits by their insurers and by the courts, they will lose confidence in

[60] In these cases, the relevant policies included some coverage for losses caused by communicable diseases. In the United Kingdom, insurers nevertheless asserted that the coverage was limited to localized incidents and not broad enough to encompass the coronavirus pandemic. In South Africa, the insurer asserted that the coverage did not include the public health countermeasures – government closures like those presented here – that directly caused the policyholder's losses.

[61] Karen Epper Hoffman, CFO, *Business Interruption: Insurers Balk at Paying Claims*, https://tinyurl.com/yxpy8t9x (Sept. 10, 2020).

the insurance market. Commentators are already warning, "demand could decline if businesses question the value of the coverage, lose trust in their insurer's ability or willingness to cover claims, or decide that it is unclear as to the types of losses that could be covered under the policy."[62] In other words, businesses purchased BII in huge numbers because they expected coverage when they would most need it; if coverage is not forthcoming, these businesses may no longer buy insurance. That type of shift could lead to greater instability in the economy.

CONCLUSION

For the foregoing reasons, *amici curiae* RAMW and RLC respectfully submit that the Court should reverse the Superior Court's Order and hold that Appellants are entitled to insurance coverage under their Policies.

[62] Jill M. Bisco, Stephen G. Fier, & David M. Pooser, *Business Interruption Insurance and COVID-19: Coverage and Issues and Public Policy Implications*, 39 J. Ins. Reg. No. 5, 1, 16 (2020), https://tinyurl.com/y67skzpw.

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CERTIFICATE OF SERVICE

I hereby certify that on October 30, 2020, a copy of the foregoing was filed and served via the Court's electronic filing system, which will serve as notice of such filing upon all counsel of record.

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