Is a COVID-19 Stay-Home Order Alone Enough to Trigger Business Interruption Coverage?

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- Coronavirus News
- Corporate & Business Organizations
- Insurance Reinsurance & Surety

- All Federal
- Pennsylvania
- District of Columbia
- 5th Circuit (incl. bankruptcy)

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Back in March, when the novel coronavirus was spreading and local and state governments were issuing stay-home orders, we published a blog post on Civil Authority Orders and COVID-19 Coverage. Since that time, there have been over 125 lawsuits filed by insured businesses, many of them arguing that the economic damages caused by these COVID-19 governmental orders, by themselves, trigger coverage under business interruption-type provisions of property policies. The argument goes that because the civil orders restricted operations or forced businesses to close, the insurance policies should pay regardless of whether there is actual physical damage to property.

In this blog post, we take a further look into civil authority order provisions and whether the order alone is a sufficient trigger of coverage. As has been said previously, the specific facts of the alleged loss and the actual words of the individual policy may affect whether coverage exists.
Many business and property insurance policies contain a civil authority coverage provision. Under the most common policy language, this coverage applies when a civil authority (e.g., state, local or federal governmental entity) prohibits or restricts access to an insured’s premises due to direct physical loss of or damage to property other than at the insured’s premises, from a covered cause of loss.

A form of civil authority coverage has been in use for at least sixty years. In an early case, *Cleland Simpson Co. v. Firemen’s Insurance Co. of Newark, N.J.*, 140 A.2d 41 (Pa. 1958), the Pennsylvania Supreme Court declined to find coverage after the mayor proclaimed a state of emergency and ordered stores closed in anticipation of a hurricane and related fire damage. The policy provision stated:

> Liability under this policy is extended to include actual loss as covered hereunder sustained during the period of time, not exceeding two weeks, when as a direct result of a *peril* insured against access to the premises described is prohibited by order of civil authority.

*Id.* at 45. (Emphasis added). The court stated, “We can only conclude that the clear language of the policy restricts the loss to that following a direct invasion of the property by fire or another specified peril and the subsequent prohibition by civil authority of access to the properties.” *Id.* The court made two points. First, the order had to come after the peril for coverage to apply. Second, the peril had to affect the property (direct invasion of property by fire).

Several years later, in *Bros., Inc. v. Liberty Mutual Fire Insurance Co.*, 268 A.2d 611 (D.C. 1970), the D.C. Court of Appeals affirmed summary judgment for the insurer and declined to find coverage under a civil authority provision. A restaurant’s business was interrupted after the District ordered a curfew to deter demonstrations in response to Dr. Martin Luther King, Jr.’s assassination. The policy in *Bros.* provided that:

> This policy is extended to include the actual loss sustained by the Insured, resulting directly from an interruption of business as covered hereunder, during the length of time, not exceeding 2 consecutive weeks, when, as a *direct result of damage to or destruction of property* adjacent to the premises herein described by the peril(s) insured against, access to such described premises is specifically prohibited by order of civil authority.

*Id.* at 613. (Emphasis added). The court noted the insured “did not claim physical damage to the premises,” and “the claim was founded on loss of business due solely to the curfew and accompanying municipal regulations.” *Id.* at 612. When declining coverage, the court stated “though the loss alleged resulted from the curfew and municipal regulations, these did not prohibit access to the premises because of damage to or destruction of adjacent property.” *Id.* at 614. This is precisely the same factual situation presented by many of the COVID-19 declaratory judgment actions. The claims are founded on loss of business due solely to the stay-home orders closing non-essential businesses and not because of direct physical damage to adjacent property.

Since *Cleland* and *Bros.*, civil authority provisions have continued to evolve. For
instance, ISO Form CP 00 30 (4-02 ed.) states:

We will pay for the actual loss of Business Income you sustain and necessary Extra Expense caused by action of civil authority that prohibits access to the described premises due to direct physical loss of or damage to property, other than at the described premises, caused or resulting from any Covered Cause of Loss (Emphasis added).

As numerous courts have stated, the presence of the phrase “due to direct physical loss of or damage to property,” or its equivalent, in policy language is crucial to determining whether coverage exists.

It is clear that the loss of income triggered by a civil authority order shuttering a business is, by itself, insufficient to trigger coverage. When a policy specifies “direct physical loss,” the absence of “physical loss” prior to a civil authority order is a dispositive factor that likely will preclude coverage.

For example, in Dickie Brennan & Co. v. Lexington Insurance Co., 636 F.3d 683 (5th Cir. 2011), the court addressed whether a series of New Orleans restaurants were entitled to coverage for income lost as a result of a mandatory evacuation order issued prior to Hurricane Gustav's landfall. Id. at 684. The order specified “anticipated high lake and marsh tides due to the tidal surge, combined with the possibility of intense thunderstorms, hurricane force winds, and widespread severe flooding.” Id. at 684. The policy stated:

We will pay for the actual loss of Business Income you sustain and necessary Extra Expense caused by action of civil authority that prohibits access to the described premises due to direct physical loss of or damage to property, other than at the described premises, caused by or resulting from any Covered Cause of Loss.

Id. at 685. (Emphasis added). The Fifth Circuit affirmed summary judgment for the insurer and set out a four-factor test for coverage under a civil authority provision. The test required a policyholder to establish a loss of business income:

(1) caused by an action of civil authority; (2) the action of civil authority must prohibit access to the described premises of the insured; (3) the action of civil authority prohibiting access to the described premises must be caused by direct physical loss of or damage to property other than at the described premises; and (4) the loss or damage to property other than the described premises must be caused by or result from a covered cause of loss as set forth in the policy.

Id. at 685. (Emphasis added). Focusing on the third factor, the court found the insured failed to “demonstrate a nexus between any prior property damage and the evacuation order.” Id. at 686. The court found that “physical damage to other premises in the proximity of the insured’s property” was a prerequisite to civil authority coverage. Id. at 687.

The court also rejected the policyholder’s argument that prior damage in the Caribbean and the hurricane’s projected path toward New Orleans were sufficient
when the policy did not specify any geographical limitations. *Id.* at 686 (“Nothing in
the record, including the order itself, shows that the issuance of the order was ‘due
to’ physical damage to property, either distant property in the Caribbean or property
in Louisiana.”). The court also acknowledged that both sides agreed there had been
no property damage in Louisiana at the time the order was issued and the order
identified future harm, e.g., “possible future storm surge, high winds, and flooding
based on Gustav’s predicted path as reasons for evacuation.” *Id.* at 686.

Similarly, in *Jones v. Chubb Corp.*, No. 09-6057, 2010 U.S. Dist. LEXIS 109055 (E.D.
La. Oct. 12, 2010), the court granted summary judgment for the insurer. Citing
“anticipated high tides and the possibility of hurricane force winds and widespread
severe flooding” as factors that necessitated evacuation, the mayor of New Orleans
issued two evacuation orders and declared a state of emergency. *Id.* at *3*. The
insured’s policy stated:

> We will pay for the actual business income loss you incur due to the actual
impairment of your operations, directly caused by the prohibition of access
to your premises by a civil authority. **This prohibition of access by a
civil authority must be the direct result of direct physical loss** or
damage to property away from such premises or such dependent business
premises by a covered peril.

*Id.* at *7*. (Emphasis added). For the *Jones* court, the presence of the bolded
language meant a prompt answer to the coverage question. The court found the
policy should be strictly construed and stated:

> The Policy does not insure against impairment of operations that occurs
simply because a civil authority prohibits access unless the civil authority
order meets the requirements of the policy—one of those requirements is a
nexus between the order and certain physical damage. Reading the Civil
Authority section as a whole, it is **clear that it was not written with
the expectation that a civil authority order prohibiting access
would issue before the property damage that forms the basis of
the order actually occurs.**

*Id.* at **8-9*. (Emphasis added). In *Jones*, the absence of prerequisite physical
damage under common policy terms meant a civil authority order could not trigger
coverage by itself. Underscoring that physical damage is a prerequisite to coverage,
the court stated that the second evacuation order, issued after the hurricane made
landfall, “arguably . . . could trigger Civil Authority coverage” because it prohibited
access “in light of damage sustained throughout the City of New Orleans.” *Id.* at
*10*. Ultimately, the court held there was no coverage because of the waiting period
in the policy.

The civil orders issued across the nation in response to the novel coronavirus
pandemic, on their own, should not trigger coverage under most business
interruption insurance provisions. Where the insurance policy requires direct
physical loss of or damage to property by a covered cause of loss, the same analysis
as the cases discussed above apply. Moreover, civil orders issued as preventive
measures prior to any physical damage should not trigger coverage, as there has to
be a direct nexus between preexisting physical damage to property and the civil
order.

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