

(To Be Published In The April, 2020 Edition of *Citations*
A Publication of the Ventura County Bar Association)

**Potential Business Interruption Coverage
For Corona Virus: Shut-Down By Civil Authority**

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Perhaps – just perhaps – somewhere buried in your client’s commercial property insurance policy is a provision promising coverage for loss of business “due to order of civil authority.” Now is the time to look, because the global calamity caused by the Corona virus has resulted in the shut down of many businesses by civil authority.

Consider this a brief primer on the subject while you send that email to your client right now, asking them to send you a copy of their property insurance policy so you can look for potential coverage.

When you get the policy, first look to see whether your client has coverage for “business interruption” loss. This coverage is sometimes added as a supplement to existing property coverage and it aims to cover loss of business while attending to a property loss. It lets a business owner recover profits that otherwise would have been generated during the period of shut down and repair.

If your client does *not* have business interruption insurance, then your client may have a tall order in proving damage to property for the Corona virus. Business interruption coverage is typically triggered by some physical damage to property, which is readily seen in examples like fire or water. But how does a virus cause physical damage to property? Scant case law exists in this area.

On the one hand, a virus damages people, not property. On the other hand, a virus may be caught through contact with tangible property. The few cases that have addressed such issues seem to offer support for this latter position. See *Motorists Mut. Ins. Co. v. Hardinger*, 131 F. App’x 823, 826 (3d Cir. 2005) (presence of e-coli bacteria constituted direct physical damage to property rendering a house uninhabitable); *Brand Mgt., Inc. v. Md. Cas. Co.*, 2007 WL 1772063 at *2 (D. Colo. 2007) (sushi manufacturer was entitled to business interruption loss after discovery of listeria forced shut down); *Coopers v. Travelers Indem. Co.*, 2002 WL 32775680 at *5 (N.D. Cal. 2002) (presence of e-coli in well constituted direct physical damage to property).

In any case, if your client *does* have business interruption coverage, keep looking. Sometimes coverage is provided for when a business is shut down by order of civil authority. Language varies widely, but some provisions *may* provide a basis for coverage of losses due to the Corona virus. Consider this language:

Civil Authority. 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.

This language allows coverage on these conditions: When an order of civil authority (1) Prohibits access to the insured premises; (2) Is caused by or results from physical damage to property, other than insured property; and (3) The damage to property must be due to a peril covered under the policy. The purpose behind such language is to protect a business from loss when the business is shut down by order of civil authority because of some *other* property owner's damage.

For example, a fire rages through an area and destroys some buildings, but not others, and not yours. The Fire Marshall then closes your business, because it is dangerously close to the adjacent property. You therefore have coverage for the loss of business, even though you have little or no property damage. Under this language, a business owner would have to prove that the Corona virus caused physical damage to *other* property, requiring the owner to shut down its business. Time will tell whether this is a tall order of proof, but at least it remains within the realm of possibility now.

But other policy language is broader and may be more helpful:

Interruption by Civil or Military Authority: This policy is extended to cover the loss sustained during the period of time when, as a result of a peril not excluded, access to real or personal property is prohibited by order of civil or military authority.

These requirements do *not* limit coverage to physical damage to property. Instead, coverage is allowed when a civil authority issues an order which (1) Prohibits access to the insured premises; and which (2) Is caused by or results from a peril covered under the policy.

The first condition is generally clear. "Civil authority, when contained in an insurance policy, refers to the situation when a civil authority prohibits access to the insured's premises resulting in a total loss of business income." *New York Career Institute v. Hanover Ins. Co.*, 6 Misc.3d 734 (N.Y.S. 2005); *see also US Airways, Inc. v. Commonwealth Ins. Co.*, 2004 WL 1094684, 65 Va. Cir. 238 (2004) (Metro Authority's closure of airport following 9/11 attack was a closure by civil authority that resulted in denial of access for purposes of business interruption coverage). In the case of the Corona virus, multiple civil authorities have issued closure notices at all levels of government. And some are more particular than others.

Notably, mere *fear* of the virus will not be enough. Coverage will only be triggered when a civil authority actually issues an order. *See Dickie Brennan & Co., Inc. v. Lexington Ins. Co.*, 636 F.3d 683, 686-87 (2011) (mere fear of hurricane damage was insufficient to claim loss of business interruption due to civil authority).

The second condition seems problematic. Can a virus be deemed "a peril covered under the policy?" It might. Again, it depends on what and how the policy considers a "peril." Typically, that would include fire, explosions, burst pipes, storms, theft, and vandalism. But

natural disasters can appear in the list. Same with riots and “civil commotion.” The Corona virus might fit within one of those categories.

But even if it can’t, several court decisions have made clear that, in the case of closure by civil authority, a business need not show that direct physical damage to property occurred. One of the earliest cases to address loss of business income due to civil authority – *Sloan v. Phoenix of Hartford Ins. Co.*, 46 Mich. App. 46 (1973) – makes clear that coverage for loss due to civil authority may be independent of any requirement to show physical damage.

There, the policy included coverage for actual loss “when as a direct result of the peril(s) insured against, access to the premises described is prohibited by order of civil authority.” An owner of several movie theatres claimed loss of income when its theatres were shut down by order of the Michigan governor due to riots in Detroit.

The insurance company argued that the insured was required to demonstrate physical damage as a prerequisite to coverage. The Court disagreed, ruling that the civil authority coverage provision was *separate and independent* from the damage provision and that its terms controlled. Under this rationale, any civil order requiring a business to close because of the Corona virus may well offer coverage to affected businesses, without any need to show that the virus itself caused damage to the business.

When courts have denied coverage for loss due to civil authority, they have done so for reasons that are unique to the policy language at issue, such as that the damage leading to the closure order must have occurred on “adjacent property.” See *Syufy Enterprises v. The Home Ins. Co. of Indiana*, 1995 WL 129229 (N.D. Cal. 1995) (finding no business income coverage for loss by civil authority, because the Rodney King curfew orders were not based on adjacent property damage or a direct result of the riots); *United Airlines, Inc. v. Ins. Co. of the State of Pa.*, 385 F.Supp.2d 343, 351-54 (S.D.N.Y. 2005), *aff’d*, 439 F.3d 128 (2006) (claim for business interruption loss due to civil authority was denied, because the damage did not occur to an “adjacent” property – the Pentagon is not “adjacent” to Ronald Reagan Airport).

In contrast, cases addressing loss of business interruption due to order of civil authority make clear that the terms of coverage will control when the terms are capable of a plain reading. See *By Development, Inc. v. United Fire and Cas. Co.*, 206 Fed.Appx. 609 (8th Cir. 2006) (losses caused by action of civil authority that prohibited access to insured’s premises due to “Grizzly Gulch” fire began seventy hours after governor’s order, because policy said so); *Zurich Am. Ins. Co. v. ABM Indus., Inc.*, 397 F.3d 158, 171 (2nd Cir. 2005) (janitorial service contractor was entitled to prove claims for loss of business interruption due to civil authority by showing which sites it was denied access due to post 9/11 access orders, because policy terms controlled).

American businesses need every available option to help them survive this global calamity. If insurance coverage for loss due to closure by order of civil authority will help them survive, you can do your client a world of good by checking into this option for them.

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