The Basic Elements of Civil Authority Coverage

By: Stephen E. Goldman
Robinson & Cole LLP

Presented to the American College of Coverage Counsel

September 9-11, 2020

"Basic" business interruption coverage provides coverage for loss of "Business Income" (net profit plus continuing expenses or gross profit minus non-continuing expenses) if that loss was caused by a suspension of the operations of the insured business and if the suspension was caused by direct physical loss of or damage to property at the insured premises if that direct physical loss or damage was caused by a "Covered Cause of Loss" (usually defined as a risk of loss not otherwise excluded).

Coverage for loss of business income caused by an order of civil authority usually appears in property insurance policies as an extension of basic business interruption coverage and covers certain instances when a business loses income as the result of an order prohibiting access to the insured premises. Although the language of a grant of civil authority coverage varies from one policy to another, the most common elements to the coverage are: 1) A governmental order that prohibits access to the insured premises; 2) The Order must be the result of (caused by) loss of or damage to off-site property caused by a covered cause of loss; and 3) the claimed loss of income must have been caused by the prohibition of access.

I. Did Order Prohibit Access?

Initially, the insured must establish that the order relied upon prohibited access to the insured premises. In *Commstop v. Travelers Indem. Co. of Conn.*, CIV.A. No. 11-1257, 2012 WL 1883461, * 9 (W.D. La. May 17, 2012), the court held that the phrase "prohibit access" means access to the insured premises is "totally and completely prevented— *i.e.*, made impossible" by action of civil authority. In *Comstop*, the court held that plaintiff's claim for business income loss due to restricted road access did not trigger coverage under the policy's civil authority provision. Another court refused to find a "prohibition of access" when state or local advisories request the public to stay off streets. *Kean, Miller LP v. Nat'l Fire Ins. Co. of Hartford*, CIV.A. No. 06-770-C, 2007 WL 2489711, at *5 (M.D. La. Aug. 29, 2007) (holding that a civil authority order recommending residents to remain off the streets did not "prohibit" access to the insured's premises, and thus the insured's claim for business loss were not covered under the policy's civil authority clause). In *Ski Shawnee, Inc. v. Commonwealth Ins. Co.*, CIV.A. No. 3:09-CV-02391, 2010 WL 2696782, * 4 (M.D. Pa. July 6, 2010) the court found no coverage involving the Pennsylvania Department of Transportation's closure of main route to insured's ski resort did not prevent some customers from accessing resort through alternate routes. In *Abner, Herrman & Brock, Inc. v. Great N. Ins. Co.*, 308 F. Supp. 2d 331, 335-36 (S.D.N.Y. Mar. 12, 2004), following the World Trade Center attacks, the court found that the civil authority provision coverage applied only when civil authority actually and completely prohibits access to the insured premises and not during subsequent days when other traffic restrictions made access to the premises more difficult. In *54th St. Ltd. Partners, L.P. v. Fid. & Guar. Ins. Co.*, 306 A.D.2d 67, 763N.Y.S.2d 243 (1st Dep't 2003), the court held that a civil authority provision applied only to the two days when access to the premises was denied and did

not apply to the days thereafter because although vehicle and pedestrian traffic to the premises was diverted, access was not denied to the public, employees, or vendors, as there was not a "total interruption or cessation" of business. In *St. Paul Mercury Ins. Co. v. Magnolia Lady, Inc.*, CIV.A.No.297-CV-153, 1999 WL 33537191, at *3 (N.D. Miss. Nov. 4, 1999), the court found no coverage when state authorities hampered access to claimant's casino-hotel by closing damaged bridge, because "casino-hotel was accessible during the period of time the bridge was under repair." A similar result was obtained when the FAA Ground Stop Order restricted air travel after the September 11th attack on the World Trade Center, but did not prohibit all access to airports and their associated businesses. *See Paradies Shops, Inc. v. Hartford Fire Ins. Co.*, No. 1:03-CV-3154-JEC, 2004 WL 5704715, at *7 (N.D. Ga. Dec. 15, 2004) ("The Court sees no reasonable means of construing [the] order to ground all aircraft as an order specifically forbidding access to plaintiff's premises" in airport terminal stores"); *Philadelphia Parking Auth. v. Fed. Ins. Co.*, 385 F. Supp. 2d 280, 289 (S.D.N.Y. 2005) (finding no coverage where the order "may have temporarily obviated the need for plaintiff's parking services, [but] it did not prohibit access to Plaintiff's garages and therefore cannot be used to invoke coverage").

II. Was the Order caused by Covered Loss of or Damage to Property?

As noted, the insured must also prove that the Order itself was caused by property damage. This invokes two questions: a) was the presence of a virus in a building "loss of or damage to property"?; if so, is the claimed loss caused by an excluded cause of loss; and b) if so, is that loss or damage caused by a covered cause of loss?

A. Was the Presence of Virus in a Building "Loss of or Damage to Property?

The question of whether the presence of a virus on a surface within a building constitutes "direct physical loss of or damage to" the building or property within it is the subject of ongoing litigation. Three of four courts that have considered the issue have rejected the insured's argument that a "loss of use" or "loss of functionality" of the premises constituted "direct physical loss of or damage to property." *See Diesel Barbershop*, 2020 WL 4724305, at *5; *Rose's 1 LLC et al. v. State Farm Lloyds*, 2020 WL 4589206, *2 (D.C. Super.Ct. Aug. 6, 2020); *Gavrilides Management Co. v. Michigan Ins. Co*., Case No. 20 258 CB, Mich. Cir. Ct for Ingram County, Tr. Of July 1, 2020 Hearing tr. at 18-20. *But see. Studio 417, Inc. v. Cincinnatti Ins. Co*., No. 20 CV 03127 SRB, 2020 WL 4692385 (W.D. Mo. Aug. 12, 2020)(finding that discovery was needed to determine the nature and extent of the presence of the virus).

B. Is the Claimed Loss Excluded?

Even if a court were to conclude that a virus in an off-site building constitutes direct physical loss of or damage to property within the geographical scope contemplated by the policy language, an insured must also prove that the physical loss or damage to the off-site property was the result of (i.e., caused by) a covered cause of loss. Many policies have virus exclusions that make "virus within a building" out of coverage even if it is found to be physical loss or damage to that building. *See Diesel Barbershop, LLC et al v State Farm Lloyds*, 2020 WL 4724305, at *6 (W.D. Tex. Aug. 13, 2020) (holding that virus exclusion applied because "it was the presence of COVID-19 in Bexar County and in Texas that was the primary root cause of Plaintiffs' businesses temporarily closing"); *Gavrilides Management Co. v. Michigan Ins. Co*., Case No. 20 258 CB, Mich. Cir. Ct for Ingram County, Tr. Of July 1, 2020 Hearing at 21 (concluding that the virus exclusion "supplies a completely workable, understandable, usable definition of the word

virus," and "the plaintiff has not supported that [the virus exclusion] doesn't apply"). Many policies have other exclusions that are also potentially applicable, such as contamination exclusions and pollution exclusions.

C. Was the Claimed Loss of or Damage to Property the Cause of the Order?

If the insured can overcome the burden of proving that loss of or damage to off-site property caused by a covered cause of loss occurred, the insured must also establish that the property damage identified was the cause of the Order. This is particularly important in the context of the Stay at Home Orders issued by many state and municipal governments, where the orders were issued to create the social distancing needed to prevent the spread of the virus, and were not the result of the short term presence of a virus in a building. The simple need to avoid future human infection or property damage at other premises does not establish the required causation between the alleged damage to off-site property and the issuance of the order. Simple fear of future contamination of people or property is not sufficient. *See United Air Lines, Inc. v. Ins. Co. of State of Pa.*, 439 F.3d 128, 134 (2d Cir. 2006) (holding that civil authority coverage did not apply where "the government's subsequent decision to halt operations at the Airport indefinitely was based on fears of future attacks" on September 11, 2001, not because of property damage to adjacent property); *Paradies Shops, Inc. v. Hartford Fire Ins. Co.*, CIV.A. No. 1:03-CV-3154, 2004 WL 5704715, *7 (N.D. Ga. Dec. 15, 2004) (Secretary of Transportation grounded air traffic due to fear of future terrorist attacks using airplanes, not because of physical damage that occurred in Manhattan, Washington D.C., or Shanksville, PA); *Dickie Brennan & Co. v. Lexington Ins. Co*., 636 F.3d 683, 687 (5th Cir. 2011) ("the 'due to' language in [the] policy required a close causal link by its plain terms."); *Syufy Enterprises v. Home Ins. Co. of Indiana*, No. 0756 FMS, 1995 WL 129229 (N.D. Cal. 1995)(curfews imposed

to avoid "potential looting" were not caused by damage to adjacent property); Two Ceasars Corp. v. Jefferson Ins. Co., 208 A.2d 305 (D.C. Cir. 1971)(governmental objective of avoiding civil unrest did not create causal nexus between property damage and curfew order).

Finally, if the insured can establish all of the elements of coverage, it must still prove that its claimed loss of income was caused by the prohibition of access to its premises, not the losses of its customers or suppliers, and not by a general loss of market.