



Civil Authority Coverage For Coronavirus Claims

March 20, 2020

**By Jonathan R. MacBride, Zelle LLP
(484) 532-5341 | jmacbride@zelle.com**

As more and more businesses seek coverage for the loss of income arising from the coronavirus (Covid-19) pandemic, one of the key issues in determining whether there is coverage under commercial property insurance policies will be whether orders from local and state authorities seeking to enforce “social distancing” and slow the spread of the virus will trigger coverage under policies’ civil authority provisions. While the language of these civil authority provisions varies, one common wording reads as follows:

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 your premises due to direct physical loss of or damage to property, other than at the ‘covered premises,’ caused by or resulting from any Covered Cause of Loss.

Some policies contain more restrictive language requiring the triggering property damage to be adjacent to or near the insured property:

When a Covered Cause of Loss causes damage to property other than property at the described premises, 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, provided that both of the following apply:

- (1) Access to the area immediately surrounding the damaged property is prohibited by civil authority as a result of the damage, and the described premises are within that area but are not more than one mile from the damaged property; and
- (2) The action of civil authority is taken in response to dangerous physical conditions resulting from the damage or continuation of the Covered Cause of Loss that caused the damage, or the action is taken to enable a civil authority to have unimpeded access to the damaged property.

One of the core requirements of this coverage is that the access to the insured property be prohibited by an action of civil authority “due to” or “as a result” of damage to property other than the insured property. Therefore, whether the civil authority order was issued because of damage to property from the Covid-19 virus is going to be key to any analysis of coverage under civil authority provisions.

In an apparent attempt to influence the outcome of coverage analyses under commercial property policies, some directives being issued by state and local governments in response to the Covid-19 pandemic have specifically referenced purported “property damage.” For instance, a Broward County, Florida executive order stated that the virus is “physically causing property damage due to its proclivity to attach to surfaces for prolonged periods of time.”¹ Some orders stop short of definitively stating that there is property damage, instead stating the Covid-19 virus “may remain viable for hours to days on surfaces made from a variety of materials located in businesses and other places, thus contaminating certain property and places.”² In some instances, local orders refer to supposed property damage while state-level orders in the same jurisdiction contain no such reference to property damage.³

Like any policy interpretation issue, the words of the applicable policy itself will ultimately drive resolution of the issue. While the inclusion of references to “property damage” in civil authority orders appears to be the result of an effort by policyholder advocates to influence determinations as to the existence of coverage for businesses in locations subject to the orders, the ultimate resolution of the issue must be based on policy wording interpretation issues such as whether there was “damage to property” within the “area immediately surrounding” the insured premises and whether the orders were actually issued “due to” or “as a result” of actual physical damage.

A threshold issue will be whether there exists “physical loss or damage.” As discussed in a recent Zelle LLP article, courts have come to different conclusions with respect to what constitutes “physical loss or damage” within the meaning of a commercial property insurance policy.⁴ While some courts require tangible changes to the physical characteristics of the property, others have found “physical loss” where the changes cannot be seen or observed, as long as there is some discernable alteration of the property.⁵ Therefore, the mere presence of coronavirus on a property may not constitute “physical loss or damage.” Depending on the jurisdiction, there will necessarily be a deeper analysis of whether and how the presence of the virus purportedly “damage[d]” the property.

Equally important is the requirement that the order be “due to” or “as a result” of property damage. The Court’s analysis in *South Texas Med. Clinics, P.A. v. CNA Fin. Corp* is instructive in this regard.⁶ In *South Texas*, the court was faced with a judicial order requiring the evacuation of Wharton County, Texas in advance of Hurricane Rita. During discovery, evidence demonstrated that the judge based his decision to issue the order on all of the information he had on the impending hurricane, including damage that had already occurred in Florida, its likely path and

¹ See <https://www.broward.org/CoronaVirus/Documents/BerthaHenryExecutiveOrder20-01.pdf>

² See <https://www.phila.gov/media/20200322130746/Order-2-Business-And-Congregation-Prohibition-Stay-At-Home.pdf>

³ See <https://www.mass.gov/doc/march-23-2020-essential-services-and-revised-gatherings-order/download>; <https://www.governor.pa.gov/wp-content/uploads/2020/03/03.23.20-TWW-COVID-19-Stay-at-Home-Order.pdf>; <https://governor.delaware.gov/wp-content/uploads/sites/24/2020/03/Fifth-Modification-to-State-of-Emergency-03222020.pdf>; https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/EO_202.10.pdf

⁴ https://www.zelle.com/Commercial_Property_Insurance_Coverage_and_Coronavirus

⁵ *Id.*

⁶ No. CIV.A. H-06-4041, 2008 WL 450012 (S.D. Tex. Feb. 15, 2008).

intensity.⁷ He relied upon information that the hurricane could make landfall near Wharton County as a Category 5 hurricane.⁸ Ultimately, Hurricane Rita did not make landfall near the county and there was no damage in the county.⁹ Plaintiff, South Texas, submitted a claim for business interruption as a result of its closure of several clinics in response to the evacuation order.

South Texas's insurer denied coverage for the claim, and South Texas filed suit. On cross-motions for summary judgment, the court had to determine if the order was "due to" physical loss or damage.¹⁰ The policy did not contain any geographic limitation on the location of the physical damage.¹¹ South Texas argued that the judge issued the order "due to" the property damage in Florida and other locations.¹² The defendants argued that the judge did not issue the order due to the physical damage, but out of a concern for potential damage should the hurricane make landfall near the county.¹³

South Texas relied primarily upon a Georgia appellate decision in which the Georgia Court of Appeals affirmed a trial court's order finding coverage for business interruption arising under very similar circumstances after a hurricane.¹⁴ In that case, a member of the group who issued the evacuation order testified that they did so in part because the hurricane had caused damage to property in its path.¹⁵ The trial court ruled that coverage was triggered because a basis for issuance of the order was damage to property other than the insured premises.¹⁶ On appeal, the Court of Appeals held that there was evidence that supported the finding and that it was not clearly erroneous.¹⁷

The insurer, CNA, argued that the Georgia case was distinguishable and instead relied upon *United Air Lines, Inc. v. Insurance Co. of the State of PA.*¹⁸ In that case, the Second Circuit found that the FAA's decision to close Reagan National Airport after the attack on September 11, 2001 was not as a result of damage to the Pentagon.¹⁹ The court observed that there had been a temporary halt of flights before the damage to the Pentagon occurred, and the order indicated that the airport remained closed because the flight paths would take planes close to the White House and other

⁷ *Id.* at *2.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.* at *1.

¹¹ *Id.* at *2

¹² *Id.* at *6

¹³ *Id.*

¹⁴ *Id.* at* 7, citing *Assurance Co. of Am. v. BBB Serv. Co.*, 265 Ga. App. 35, 593 S.E.2d 7 (2003)

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ 439 F.3d 128 (2d Cir. 2006)

¹⁹ *Id.* at 134.

sensitive government facilities.²⁰ Furthermore, the Second Circuit concluded the evidence showed that the order was issued based on the fear of future attacks.²¹ The Court noted the timetable to re-open the airport was not related to repairing or mitigating the damage at the Pentagon.²²

The court in *South Texas* was persuaded by the Second Circuit’s reasoning in *United Air Lines* as it required that the order be causally related to the property damage and not issued based on the fear of future damage.²³ The court also concluded that the *United Air Lines* holding was more consistent with other cases interpreting civil authority coverage provisions.²⁴

The *South Texas/United Air Lines* cases provide a strong analytical framework that should be applied in Covid-19-related civil authority claims. At this time, it does not appear that virus-related orders are being issued “due to” or “as a result” of any identified property damage at business locations. Instead, it appears that the orders are being issued principally to reduce person-to-person transmission and “flatten the curve” of infection rates.²⁵ Like the orders in *South Texas* and *United Air Lines* these orders have been issued out of a concern for future health consequences – not from the consequences of any physical damage. Applying the reasoning of *United Air Lines*, even if there was no property damage from the Covid-19 pandemic, these same orders would have still been issued for purposes of reducing person-to-person transmission. Therefore, a strong argument exists that there is no causal relationship between these orders and any property damage. Instead, these orders are being issued based on the concern about preventing the future person-to-person spread of the virus. Therefore, it would be reasonable to conclude that courts would generally find that these and similar orders do not trigger coverage under civil authority provisions.

In addition, for policies requiring the property damage to be near or within some defined proximity of the insured property, even if these orders could be considered to have been issued “due to” or “as a result” of property damage, it will be necessary for insureds to establish the existence of property damage within the geographic range contemplated by the policy.²⁶

²⁰ *Id.*

²¹ *Id.*

²² *Id.* at 135.

²³ 2008 WL 450012 at *10.

²⁴ *Id.*

²⁵ <https://www.washingtonpost.com/world/2020/03/19/coronavirus-latest-news/>;
<https://newsroom.ocfl.net/2020/03/stay-at-home-to-flatten-the-curve-orange-county-issues-stay-at-home-order-effective-march-26-2020-faqs/>;
<https://www.local10.com/news/local/2020/03/26/broward-county-issues-shelter-in-place-order/>;
<https://www.austinmonitor.com/stories/2020/03/austin-issues-shelter-in-place-order-to-stop-coronavirus-spread/> <https://www.khou.com/article/news/health/coronavirus/montgomery-county-issues-stay-home-stop-the-spread-order-and-curfew-for-all-residents/285-ff4b94f6-4713-484e-8c51-305c7b80fa65>

²⁶ *Syufy Enterprises v. Home Insurance Co. of Indiana*, No. 94-0756, 1995 WL 129229 (N.D. Cal. Mar. 21, 1995) (denying coverage because no property adjacent to Syufy’s premises sustained physical damage); *Bros., Inc. v. Liberty*

Finally, courts typically require the civil authority action must completely prohibit access to the insured premises for coverage to be triggered.²⁷ While many virus-related orders have closed “non-essential” businesses, what is considered “non-essential” varies widely by state, and these orders may not actually prohibit access to the insured premises. For example, most orders have allowed restaurants to stay open and continue delivery or take out. Under these circumstances, the orders have not prohibited access to the insured premises. Therefore, it will be necessary to determine if the order completely prohibited access or if the order simply limited access and the resulting effect of this distinction, if any, on coverage.²⁸

Like all insurance claims, Covid-19 claims for business interruption coverage will be evaluated based on the particular facts of each claim and the applicable insurance policy language. However, the inclusion of incidental language regarding “property damage” in some civil authority orders issued principally to reduce person-to-person transmission should not be the determining factor as to whether an insurance policy provides coverage under a civil authority provision.

Jonathan MacBride is a partner with Zelle LLP in Philadelphia. He can be reached at jmacbride@zelle.com.

The opinions expressed are those of the author and do not necessarily reflect the views of the firm or its clients. This article is for general information purposes and is not intended to be and should not be taken as legal advice.

Mut. Fire Ins. Co., 268 A.2d 611, 613 (D.C. App. 1970) (denying coverage because the regulations were not the direct result of damage or destruction of adjacent property)

²⁷ *Kean, Miller, Hawthorne, D’Armond McCowan & Jarman, LLP v. Nat’l Fire Ins. Co. of Hartford*, No. 06-770-C, 2007 WL 2489711, *4 (M.D. La. Aug. 29, 2007) (citing *Southern Hospitality, Inc. v. Zurich American Ins. Co.*, 343 F.3d 1137 (10th Cir. 2004); *TMC Stores, Inc. v. Federated Mutual Ins. Co.*, 2005 WL 1331700 (2005); *By Development, Inc. v. United Fire & Casualty Co.*, 2006 WL 694991 (D.S.D. 2006); *730 Bienville Partners Ltd. v. Assurance Co. of America*, No. Civ. A. 02-106, 2002 WL 31996014 (E.D. La. Sept. 30, 2002)).

²⁸ *Ski Shawnee, Inc. v. Commonwealth Ins. Co.*, No. 3:09–CV–02391, 2010 WL 2696782, *5 (M.D. Pa. Jul. 6, 2012)(closure of main road to ski resort did not completely prohibit access to resort); *Southern Hospitality, Inc. v. Zurich American Insurance Co.*, 393 F.3d 1137, 1140-41 (10th Cir. 2004)(FAA order cancelling flights did not prohibit access to insured’s hotels)