

COVID-19—When Civil Authorities Take over, Are You Covered?



The novel coronavirus (COVID-19) is a respiratory disease that can result in serious illness or death. It is caused by a new strain of coronavirus not previously identified in humans and easily spreads from person to person. There is currently no approved vaccine or antiviral treatment for this disease.

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 Property Insurance

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The coronavirus has spread to every state in the United States, prompting a variety of responses by federal, state, and local civil authorities. Those civil authority actions have included orders recommending social distancing,¹ stay-at-home orders,² closure of bars,³ temporary postponement of medical or dental procedures not necessary to address a medical emergency or to preserve the health and safety of a patient,⁴ and continuance of court proceedings.⁵

In light of those responses to the COVID-19 pandemic, it seems appropriate to review the requirements of policy provisions that provide coverage for the loss of business income due to the actions of civil authorities. Given the nature of the orders that have been issued, this discussion should be distinguished from those cases where physical damage due to a covered peril results in a lack of access. Although the principles are much the same, the wording of the coverages differs. And, although they are often written in conjunction with each other, the actual wording must be consulted in all claims.

While the current pandemic gives rise to the discussion, the principles also apply in the context of other catastrophes that impact a wide geographic area, such as wildfires, winter storms, or floods. This article examines the questions surrounding loss due to closure or denial of access to insured property that can be attributed to a civil authority order.

Examine the Policy Provision Language

As always, policy wording is critical, but especially so in the context of claims that assert that governmental orders have impacted the operation of a business. The civil authority provision in a standard business income and extra expense coverage form reads as follows.

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.

Civil Authority Coverage for Business Income will begin 72 hours after the time of the first action of civil authority that prohibits access to the described premises and will apply for a period of up to four consecutive weeks from the date on which such coverage began.

Civil Authority Coverage for Extra Expense will begin immediately after the time of the first action of civil authority that prohibits access to the described premises and will end:

(1) Four consecutive weeks after the date of that action; or

(2) When your Civil Authority Coverage for Business Income ends;

whichever is later.

Source: Insurance Services Office, Inc. Business Income and Extra Expense Coverage Form CP 00 30 10 12, Copyright 2011

The requirements for coverage under this provision are the following.

1. The existence of an order of civil authority that
 - A. Prohibits access to the insured premises;

- B. Is caused by or results from physical damage to property, other than insured property; and
 - C. That damage to property must be due to a peril covered under the policy; and
2. That denial of access must be the proximate cause of a loss of business income.

As the language of the provision makes clear, the purpose of the civil authority provision is to expand the business interruption coverage to apply when there is damage to the property of another business that causes civil authorities to prohibit access to the area where the insured's property is located. For example, following a tornado, authorities might cordon off the entire area that was hardest hit. This area might include some businesses that sustained little or no damage, but whose revenue would nevertheless be impacted by the civil authority order.

A claim under this provision must be distinguished from those discussed in cases such as *Syufy Enterprises v. The Home Insurance Company*, U.S. Dist LEXIS 3771, (ND Cal 1995); and *Bros., Inc. v. Liberty Mutual Fire Insurance Company*, 268 A2d 611 (DC 1970), where the policies at issue required the order of civil authority be not only in response to physical damage to property but, also, the damaged property had to be "adjacent" to the insured premises (language that was omitted by Insurance Services Office, Inc., commencing in 1986).

Another more liberal version provides the following.

- **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.

Under this provision, the threshold requirements for coverage are the following

1. The existence of an order of civil or military authority that
 - A. Prohibits access to the insured premises; and which
 - B. Is caused by or results from a peril covered under the policy.
2. That denial of access must be the proximate cause of a loss of business income.

Note that the latter policy does not require physical damage to insured property, or to any property at all for that matter. In the absence of wording requiring it, a physical damage requirement normally will not be imposed by the courts.

What Is Meant by "Prohibition" of "Access"?

While some orders incident to COVID-19 have mandated closures of particular businesses,⁶ frequently, the "order" of civil authority is in the nature of an "advisory" or "voluntary" evacuation. Sometimes access is not barred because the terms of the order in issue will say something like "nonessential" traffic is discouraged but not prohibited. In the case of orders issued in response to COVID-19, some orders involve mandatory closures of certain businesses, and others merely provide cautionary instructions to citizens. An insured, with the best interests of its employees or customers in mind, may nonetheless close the insured property because of concerns of the spread of the virus among employees or customers. The business judgment of the insured, however, no matter how prudent, will not provide a basis for coverage. Rather, the issue will be whether there had, indeed, been a "denial" or "prohibition" of "access."

Typically, the term "access" will not be defined in the policy. The mere fact that a term in a policy requires interpretation does not create an ambiguity. *Weldon v. All Am. Life Ins. Co.*, 605 S.2d 911 (Fla. 2d DCA 1992). In construing terms appearing in insurance policies, courts commonly adopt the plain meaning of words contained in legal and nonlegal dictionaries. *Watson v. Prudential Prop. & Cas. Ins. Co.*, 696 S.2d 394, 396 (Fla 3d DCA 1997).

The ordinary and plain meaning of the term "access" can be determined by looking at the various definitions of the word. For example, *Black's Law Dictionary* (6th ed. 1990) defines the term to mean "freedom of approach or communication; or the means, power, or opportunity of approaching, communicating, or passing to and from." The *American Heritage Dictionary* (3d ed. 1994) defines the term as "a means of approaching or entering; passage" or "the right to enter or make use of."

Similarly, the word "prohibit" normally will not be defined. "Prohibit," however, means "to forbid by law; to prevent—not synonymous with 'regulate.'" *Black's, supra*. Also, "to forbid by authority" or "to prevent from doing something." *Webster's New Collegiate Dictionary*.

A copy of the order in question must be obtained and closely examined. Orders that merely "impede" or "regulate" access but still permit access, albeit in reduced numbers, must be distinguished from orders that truly "prohibit" access. The latter may provide a basis for coverage, but the former will not.

What Is Meant by "Property Damage"?

A review of the policy terms is critical. Some policies require that the order prohibiting access must be 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. That requirement has been litigated

extensively in the context of hurricane evacuation orders. In *Sloan v. Phoenix of Hartford Ins. Co.*, 207 N.W.2d 434 (Mich. App. 1973), the city ordered all "places of amusement" closed due to riots and other civil disturbances. The insured sought to recover its losses under the business interruption policy that provided coverage for actual losses when, as a direct result of insured perils, access to the insured premises is prohibited by order of a civil authority.

The court held that a plain reading of the policy would lead to the conclusion that coverage was provided when, as a result of a named peril, access to the insured property was denied. Since one of the insured perils was a riot, and a riot ensued, prompting the city to require business closures, the court found that physical damage was not a prerequisite for the payment of benefits under a business interruption policy. See also *Southlands Bowl, Inc. v. Lumberman's Mut. Ins. Co.*, 208 N.W.2d 569 (Mich. App. 1973); *Allen Park Theater Co., Inc. v. Michigan Millers Mut. Ins. Co.*, 210 N.W.2d 402 (Mich. App. 1973).

However, in *Dickie Brennan & Co., Inc. v. Lexington Ins. Co.*, 636 F.3d 683 (5th Cir. 2011), the Fifth Circuit Court of Appeals addressed policy language that required physical damage in the context of a claim for the loss of business income as the result of the evacuation order incident to Hurricane Gustav. The restaurant asserted that there was coverage under the civil authority provision, which provided the following.

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 coverage will apply for a period of up to two consecutive weeks from the date of that action.

The insured asserted that the storm's prior damage in the Caribbean, coupled with Gustav's projected path toward New Orleans, satisfied the property damage element. The district court granted summary judgment for the insurer, finding no nexus was shown between the evacuation order and "damage to property, other than at the described premises." The appellate court agreed. The court noted the "general rule" that "[c]ivil authority coverage is intended to apply to situations where access to an insured's property is prevented or prohibited by an order of civil authority issued as a direct result of physical damage to other premises in the proximity of the insured's property." *Id.* at 686–87. The Fifth Circuit found that "the 'due to' language in the policy required a close causal link by its plain terms." *Id.* at 686.

Conclusion

The responses by federal, state, and local governments to the COVID-19 pandemic have prompted businesses to close stores and offices. In some jurisdictions, the orders limit the type of business that can be conducted.⁷ In the case of offices, there are efforts to allow the employees from those closed offices to work from home. However, few closures will provide a basis for coverage under civil authority provisions unless access to the specific property is truly "prohibited."

¹ On March 16, 2020, President Donald Trump and the Centers for Disease Control and Prevention issued the 15 Days to Slow the Spread guidance advising individuals to adopt far-reaching social distancing measures, such as working from home and avoiding gatherings of more than 10 people.

² Governor J.B. Pritzker of Illinois issued a "stay-at-home" order for the entire state starting at 5 p.m. on Saturday, March 20, 2020, through at least April 7, 2020.

³ Florida Executive Order 20-68: "any licensee authorized to sell alcoholic beverages for consumption on premises that derive more than 50 percent of its gross revenue from the sale of alcoholic beverages shall suspend all sale of alcoholic beverages for thirty days from the date of this order, effective at 5 p.m. today, March 17, 2020."

⁴ Michigan Executive Order. No. 2020-17.

⁵ Louisiana Supreme Court order: "All civil trials, hearings, and court appearances set for any date between the date of this Order and April 13, 2020, are hereby continued to a date to be reset by local order, except for hearings related to the following: civil protective orders, child in need of care proceedings, emergency child custody matters, proceedings for children removed from their home by emergency court order, proceedings related to emergency interdictions and mental health orders, matters of public health related to this crisis and other emergency matters necessary to protect the health, safety, and liberty of individuals as determined by each court."

⁶ Florida Executive Order 20-71 required the closure of all gymnasiums and fitness centers. A similar order pertaining to specific types of business were issued by Michigan (Executive Order 2020-20 (COVID-19)).

⁷ See Florida Executive Order 20-71, Indian Executive Order 20-04, and Maine Executive Order 14 FY 19/20, which ordered all restaurants and food establishments to suspend on-premises food and alcohol consumption for customers. Those establishments may, however, operate their kitchens for providing delivery or take-out services.