

COMMENTARY: Viral Immunity: Policyholders Face Barriers To Coverage For Covid-19 Business Interruption Claims

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COVID-19 has infected more than 4 million people worldwide since the initial outbreak in Wuhan, China only a few months ago. What we hoped would be a localized problem is now a worldwide pandemic as declared by the World Health Organization. As the virus continues to make its slow but relentless spread across the globe, researchers pursue an elusive vaccine or an effective treatment to ease the human toll of the pandemic.

The virus is impacting American life in unprecedented ways. As the virus gained a foothold in the United States, many citizens, governments and businesses followed strategies of increasing lockdown and isolation. In Illinois Governor Pritzker issued an Executive Order (2020-10) requiring Illinois citizens to shelter in place. The shelter-in-place Order remains in effect through May 30, 2020. Many other state governors have issued similar directives.

While medical professionals seek a cure for COVID-19, business owners seek a remedy to resuscitate their ailing businesses that have experienced a drop in sales while consumers remain locked down at home and generally skittish about spending. As is often the case, when businesses experience setbacks, they explore new and creative sources of revenue to reverse their financial fortunes. Business interruption insurance is a common target to exploit in uncertain financial times.

Insurance litigation seeking business interruption coverage has already begun to proliferate. Policyholder counsel have filed lawsuits for individual claim denials, as well as class actions against some of the country's most respected insurers. With a large economic output, Illinois has not avoided the concerted effort by the policyholder bar to gain access to business interruption coverage. Insurers who provide protection to Illinois residents and businesses face class actions in Illinois, exposing them to the existential risk of insolvency as the volley of lawsuits threatens to drain their reserves.

Civil Authority Coverage

The general principles of contract construction should guide any court's analysis of the availability of business interruption coverage. Insurance policies are subject to the same rules governing the interpretation of other types of contracts.¹ A court's primary objective in construing an insurance policy is to ascertain and enforce the parties' intentions as expressed in the policy.² If the terms of the policy are clear and unambiguous, the court should give the terms their plain and ordinary meaning.³ The contract should not be rendered ambiguous merely because the parties disagree on its meaning.⁴ To satisfy its burden in a first-party coverage action, the insured must show all of the following: (1) a loss occurred, (2) the loss resulted from a fortuitous event and (3) an all-risk policy covering the property was in effect at the time of the loss.[v]

Much ink has already been spilled on behalf of insureds seeking coverage under the Civil Authority coverage that is included in many business insurance policies.[vi] The tone of many of these reports

optimistically predicts few obstacles to Civil Authority coverage under the typical business insurance policy. Nevertheless, most policies provide few avenues of recovery for Civil Authority coverage under the current circumstances imposed by the many state-wide shutdown orders.

The Policy Wording

The typical wording for Civil Authority coverage states that the coverage applies when the insured can satisfy all four of the following conditions:

- A peril insured against causes damage to property that is not the insured property.
- Access to the area "immediately surrounding" the damaged property is prohibited by civil authority "as a result of the damage."
- The insured property is not more than one mile [or other explicit distance limitation] from the damaged property.
- The civil authority action is taken "in response to the dangerous physical conditions resulting from the damage."

As an initial matter, Civil Authority coverage may not attach without a "direct physical loss," a standard that COVID-19 may not satisfy if it does not cause any structural damage to the property.⁷ If the insured can overcome this initial hurdle to coverage, Civil Authority does not apply unless 1) the civil authority took action "in response to" the property damage; 2) the insured premises is not more than one mile [or other explicit distance limitation] from the damaged property; and 3) access to the insured's premises is prohibited "as a result of the damage."

In Illinois Executive Order 2020-10, issued by Governor Pritzker, declared a cessation of all "non-essential business and operations." The Order makes statements in the preamble that do not appear to satisfy the elements of the Civil Authority coverage.

- For the preservation of public health and safety throughout the entire State of Illinois, and to ensure that our healthcare delivery system is capable of serving those who are sick, I find it necessary to take additional measures consistent with public health guidance to slow and stop the spread of COVID-19.
- **Intent of this Executive Order.** The intent of this Executive Order is to ensure that the maximum number of people self-isolate in their places of residence to the maximum extent feasible, while enabling essential services to continue, to slow the spread of COVID-19 to the greatest extent possible.

IL. Exec. Order 2020-10 (Mar. 20, 2020).

Executive Order 2020-10, which resulted in the shut down of all non-essential business in the state, expressly states that the purpose of the shut down is "to slow and stop the spread of COVID-19." The Order does not state that its purpose is "in response to" any dangerous physical conditions "resulting from the damage." In other words, Governor Pritzker issued the Order to slow the spread of the virus rather than to address a particular harm or damage that the virus has already caused. Civil Authority coverage should not apply unless the civil authority exercises its powers to address discrete property damage. Generalized orders for the future protection of human health do not qualify as orders in response to a specific loss.

Civil Authority Coverage Does Not Apply to General Shutdown Orders

Authority from the United States District Court for the Northern District of Illinois has rejected Civil Authority coverage on this issue. In a post-9/11 decision, the District Court in *City of Chicago v. Factory Mutual Insurance Co.*, No. 02 C 7023, 2004 U.S. Dist. LEXIS 4266, 2004 WL 549447 (N.D. Ill. Mar. 18, 2004), granted summary judgment to an insurer that denied coverage. The insurer provided coverage for the airports in Chicago.⁸ Following the terrorist attacks on September 11, 2001, the Federal Aviation Administration ("FAA") issued a nationwide ground stop order, banning all civil aviation activity. *Id.* The city of Chicago filed a business interruption claim due to the shutdown of the local airports, which the insurer denied.⁹

The coverage stated:

This policy will cover the Actual Loss Sustained by the Insured due to the necessary

interruption of the Insured's business due to prevention of ingress to or egress from the Insured's property, whether or not the premises or property of the Insured shall have been damaged, provided that such interruption must be a result of physical damage of the type insured against and not excluded by this policy, to the kind of property not excluded by this policy.¹⁰

The coverage also excluded "indirect or remote loss or damage."¹¹

The court concluded that the coverage did not apply because, first, the damage was not damage "not excluded by this policy." The exclusion for "indirect or remote loss or damage" excluded coverage because the terrorist attacks in New York City were indirect and remote.¹²

Second, the court held that the property damage in New York City did not meet the condition of the "kind of property not excluded by this policy." The covered property was property in which Chicago had an insurable interest.¹³ Because Chicago did not have an insurable interest in the damaged property in New York City that prevented access to Chicago airports, the policy did not provide coverage.¹⁴

Third, the policy included a separate coverage for Protection and Preservation of Property that covered business interruptions caused by temporary actions "to prevent immediately impending physical loss or damage insured by this policy."¹⁵ On this issue, the court's conclusion is instructive that the FAA did not issue the ground stop to prevent damage specifically at the Chicago-area airports.

The ground stop was ultimately imposed to protect against any further terrorist attacks like those that damaged and/or destroyed the World Trade Center and the Pentagon. There is no evidence that the FAA's ground stop was in any way imposed in order to protect Midway, O'Hare, or Meigs Field from immediately impending physical loss or damage.¹⁶

The policy in *Factory Mutual* afforded coverage where a civil authority issued an order "to prevent immediately impending physical loss." The court's broad ruling held, in effect, that the FAA did not intend the shut down order to protect Chicago airports from attack, despite the events of 9/11 and the widespread fear that additional attacks could take place in other cities.

If the FAA shutdown order on 9/11 could not be directly linked to the prevention of an attack in Chicago, a court should not find a link between Governor Pritzker's Executive Order 2020-10 – for the protection of human safety – and physical damage to property that is not insured property.

The court in *United Airlines, Inc. v. Insurance Co. of the State of Pennsylvania*, 385 F. Supp. 2d 343, 353 (S.D.N.Y. 2005), *aff'd*, 439 F.3d 128 (2d Cir. 2006), relied on *Factory Mutual* to issue a similar ruling that the FAA's shut down order did not impede access to Reagan airport. Thus, United Airlines did not qualify for business interruption coverage that applied where access to insured locations is prevented "as a direct result of damage to adjacent premises."¹⁷

A Drop in Sales Is Not Business Interruption

Business interruption coverage generally applies when the business has closed rather than experienced a decrease in sales.¹⁸ Businesses that remain open during the pandemic may see their sales slump. Most people and businesses have reduced their personal and commercial spending. A restaurant in Times Square, for example, is not likely to attract much business during the pandemic even if it remains open. The governmental shut down orders may not have as much effect on the restaurant business as the public's desire to avoid restaurants and other public spaces altogether. Decreased demand, however, should not trigger coverage for business interruption.

The Virus Exclusion Prohibits Access to Coverage

Virus exclusions do not cover loss caused "[b]y or resulting from any virus, bacterium, or other microorganism that induces or is capable of inducing physical distress, illness, or disease."

A series of decisions has consistently enforced the virus exclusion for insurance claims. In *Lambi v. American Family Mutual Insurance Co.*, 498 Fed. App'x 655 (8th Cir. 2013), the claimant alleged that

he contracted HIV from the insured. The homeowner policy excluded coverage for "disease, bacteria, parasite, virus, or other organism which are transmitted by any insured to any other person."¹⁹ The court affirmed summary judgment for the insurer, stating that "infecting another with the HIV virus clearly falls within the plain and ordinary meaning of the transmission of a communicable disease."²⁰ Like HIV, COVID-19 is a virus that eliminates coverage under a policy with the exclusion.

Endnotes

1. *Id.*
2. *Bozek v. Erie Ins. Group*, 2015 IL App (2d) 150155, ¶ 19, 46 N.E.3d 362, 367.
3. *Tracy Holdings LLC v. W. Bend Mut. Ins. Co.*, 333 F. Supp. 3d 809, 816 (C.D. Ill. 2018).
4. *Bozek*, 2015 IL App (2d), ¶ 19, 46 N.E.3d at 367.
5. *Johnson Press of Am., Inc. v. N. Ins. Co. of N.Y.*, 339 Ill. App. 3d 864, 871, 791 N.E.2d 1291, 1298 (1st Dist. 2003).
6. Civil Authority is often the coverage of "last resort" for policyholders who cannot trigger coverage for business interruption claims under the more favored terms of the policy for "direct physical loss." Business interruption coverage for COVID-19 claims for "direct physical loss" is questionable because the virus is only a surficial attachment to property at the microscopic level that does not physically alter the structure of the property itself. See *Traveler's Ins. Co. v. Eljer Mfg., Inc.*, 197 Ill. 2d 278, 312, 757 N.E.2d 481, 502 (2001) (determining that property damage "connotes damage to tangible property causing an alteration in appearance, shape, color or in other material dimension"). See also *Mama Joe's, Inc. v. Sparta Ins. Co.*, No. 17-CV-23362-KMM, 2018 U.S. Dist. LEXIS 201852 (S.D. Fla. June 11, 2018) (dust and debris from construction, which could be cleaned to return the property to its pre-loss condition, were "intangible and incorporeal" losses that did not result in "direct physical loss"); *Universal Image Prods., Inc. v. Chubb Ins.*, 703 F. Supp. 2d 705, 708 (E.D. Mich. 2010) (denying coverage where strong and possibly noxious odor on the insured's property did not cause any "structural or any other tangible damage to the insured property"); *Mastellone v. Lightning Rod Mut. Ins. Co.*, 175 Ohio App. 3d 23, 39-42, 884 N.E.2d 1130, 1142-44 (Ohio Ct. App. 2008) (finding against direct physical loss because the dark staining from mold on the insured's siding did not result in structural or any other tangible damage to the insured property which could be cleaned using "trisodium phosphate and bleach sodium or hyper chloride, in conjunction with a power washer").
7. See n.8, *supra*.
8. *Id.* at *1.
9. *Id.* at *1-*2.
10. *Id.* at *2.
11. *Id.* at *3.
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.* at *4.
16. *Id.*
17. *Id.* at 345.
18. See *Ramada Inn Ramogreen, Inc. v. Travelers Indem. Co. of Am.*, 835 F.2d 812 (11th Cir. 1988) (business interruption policy does not cover hotel for decrease in occupancy after fire); *Alon v. State Farm Fire & Cas. Co.*, No. 2:11-CV-2111, 2013 U.S. Dist. LEXIS 204859, 2013 WL 12250466, *6 (D. Ariz. Aug. 19, 2013) ("Courts have consistently construed the 'necessary suspension of your operations' language to mean a complete cessation of all business activities.").
19. *Id.* at 656.
20. *Id.* See also *Clarke v. State Farm Fla. Ins.*, 123 So. 3d 583 (Fla. Dist. Ct. App. 2012) (affirming summary judgment for virus exclusion in third-party action where claimant allegedly contracted herpes virus from insured); *Doe v. State Farm Fire & Cas. Co.*, No. 2015-0136, 2015 N.H. LEXIS 181, 2015 WL 11083311 (N.H. Sept. 21, 2015) (same); *Plaza v. Gen. Assurance Co.*, 244 A.D.2d 238, 664 N.Y.S.2d 444 (N.Y. App. Div. 1997) (affirming summary judgment for "communicable disease" exclusion in third-party liability action where claimant allegedly contracted HIV from insured).