



Does Civil Authority Coverage Apply to Claims Resulting from COVID-19?

By [Adam H. Fleischer](#) and [Michael H. Passman](#)

As a result of the ongoing coronavirus (“COVID-19”) pandemic, state officials in [California](#), [Connecticut](#), [Illinois](#), and [New York](#) have issued orders limiting approximately [75 million Americans’](#) access to [retail, recreation, and entertainment businesses](#). Local authorities have also issued [similar orders](#). Under these circumstances, insurers may see a surge of claims under civil authority coverage, which protects against lost income suffered when the insured’s property becomes inaccessible as a result of a civil authority order. This article presents a summary of the civil authority provision, the scope of the recent government orders, and questions as to whether there exists the property damage necessary to trigger this little-known coverage provision.

1. WHAT IS CIVIL AUTHORITY COVERAGE?

Civil 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 that was issued as a direct result of physical damage to other premises in the proximity of the insured’s property. *Dickie Brennan & Co. v. Lexington Ins. Co.*, 636 F.3d 683, 686–87 (5th Cir. 2011). In addition, depending on the specific language of the civil authority clause, coverage may apply only when the insured’s property is actually totally inaccessible. See *Schultz Furriers, Inc. v. Travelers Cas. Ins. Co. of America*, 2015 WL 13547667, at *6 (N.J. Super. Ct., Essex County 2015) (no coverage applied where access to the insured’s store was made more difficult because of road closures but access to the store was not completely impossible).

For example, in *Dickie Brennan & Co.*, the insured restaurant was issued a policy containing a Business Income and Extra Expense form with the following civil authority clause:

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.

Coverage under some civil authority clauses, like the one above, is triggered by physical loss or physical damage to **any property** other than the insured’s own property. However, coverage under other civil authority clauses is triggered only by physical loss or physical damage to property **adjacent to the insured’s own property**. For example, in *United Airlines, Inc. v. Ins. Co. of State of Pa.*, 385 F. Supp. 2d 343, 345 (S.D.N.Y. 2005), *aff’d sub*



nom. United Air Lines, Inc. v. Ins. Co. of State of PA, 439 F.3d 128 (2d Cir. 2006), the court considered the application of the following civil authority clause:

This [business interruption coverage] section is specifically extended to cover a situation when access to the Insured Locations is prohibited by order of civil authority as a direct result of damage to *adjacent premises*, not exceeding, however, two (2) consecutive weeks.

In *United Airlines, Inc.*, the court concluded that the insured's property at Reagan Airport was not "adjacent" to the Pentagon, and therefore civil authority coverage was not triggered for the airline's income that was lost when the FAA closed Reagan Airport following the September 11 attack on the Pentagon. *Id.* at 352.

Civil authority clauses can also vary in whether they are triggered by government **orders** or government **action**. The civil authority clause quoted above from *United Airlines, Inc.* was triggered by government **orders**. On the other hand, a clause triggered by government **action**, like the clause quoted above from *Dickie Brennan & Co.*, can potentially be triggered even in the absence of a government order. See *Kean, Miller, Hawthorne, D'Armond McCowan & Jarman, LLP v. Nat'l Fire Ins. Co. of Hartford*, 2007 WL 2489711, at *3 (M.D. La. Aug. 29, 2007) (*request from civil authorities to stay off the streets constituted a potentially covered "action" by civil authorities*).

Despite these differences, there are a few common requirements to trigger coverage under most civil authority clauses: (1) loss of business income caused by an action (or order) of civil authority; (2) the action of civil authority must prohibit access to the insured's property; (3) the action of civil authority prohibiting access to the insured's property must be caused by direct physical loss of or damage to property other than (or adjacent to) the insured's property; and (4) the loss or damage to property other than (or adjacent to) the insured's property must be caused by or result from a covered cause of loss. See *Dickie Brennan & Co.*, 636 F.3d at 685.

2. WHAT IS THE SCOPE OF THE COVID-19 ORDERS?

The next question becomes, what exactly do the recent "shelter in place" and "stay-at-home" orders say, and do they qualify as an "order" or "action" for purposes of civil authority coverage. The COVID-19 orders issued in California and Illinois are "stay-at-home" orders. The orders issued in Connecticut and New York are more focused on keeping most businesses closed. All of these orders generally restrict residents from accessing businesses other than those designed "critical" or "essential." Residents in all these states can generally access businesses providing food, prescription medicine, and healthcare. In other words, the public likely still has access to many businesses in the grocery, pharmaceutical, and healthcare industries, among others, even in light of the "shelter in place" or "stay-at-home" orders.

The Connecticut order contains a lengthy list of other businesses that can stay open, including liquor stores, some restaurants, banks, and landscaping services. Similarly, the Illinois order permits leaving the home for a variety of reasons, including construction work, manufacturing work, warehouse operations, healthcare services for animals, and some outdoor entertainment. New York also permits healthcare, infrastructure, and manufacturing businesses to stay open. These provisions are similar to one another but not uniform. Accordingly, whether access to a specific business is actually prohibited will depend on the scope of the applicable order, as well as an analysis of situations where a state and local order may both apply to a certain business.

The Illinois order specifically refers to the ability of the COVID-19 virus to impact property, although it of course does not go as far as to comment on direct physical damage to that property:



Schools and other entities that typically provide food services to students or members of the public may continue to do so under this Executive Order on the condition that the food is provided to students or members of the public on a pick-up and takeaway basis only. Schools and other entities that provide food services under this exemption shall not permit the food to be eaten at the site where it is provided, or at any other gathering site *due to the virus's propensity to physically impact surfaces and personal property.*

However, even the Illinois order does not specify the impact to property as the *reason* for issuing the stay-at-home order. Instead, the Illinois order states that it is issued to preserve public health and safety. As such, it may not trigger civil authority coverage, as explored below.

3. ARE THE COVID-19 ORDERS ISSUED “AS A DIRECT RESULT OF” PROPERTY DAMAGE?

To determine whether COVID-19 claims trigger civil authority coverage, courts will need to address two key issues: (1) does COVID-19 cause physical property loss or physical property damage; and (2) assuming COVID-19 causes physical property loss or physical property damage, are the orders prohibiting access to the insured's property issued “as a direct result of” physical property loss or physical property damage?

First, courts will need to consider whether the presence of COVID-19 virus can constitute “direct physical loss of or damage to property,” as is required to trigger civil authority coverage under many civil authority clauses. The presence of a virus, which cannot be detected by normal human senses, may not qualify as “*physical loss of or damage to property.*” See 10A Couch on Ins. § 148:46 (“The requirement that the loss be ‘physical,’ given the ordinary definition of that term, is widely held to exclude alleged losses that are intangible or incorporeal and, thereby, to preclude any claim against the property insurer when the insured merely suffers a detrimental economic impact unaccompanied by a distinct, demonstrable, physical alteration of the property”).

Last week, on March 18, a group of 18 members of the House of Representatives wrote to four insurance industry groups, arguing that businesses shut down by COVID-19 concerns do indeed trigger civil authority coverage, and that such closures are indeed attributable to direct physical loss. In response, the insurance groups wrote a joint letter, explaining that business interruption policies “do not and were not designed to provide coverage against communicable diseases such as COVID-19.”

This issue is already being litigated in the case *Cajun Conti LLC v. Certain Underwriters at Lloyds, London*, Case No. 2020-02558, which was filed on March 16, 2020 in the Civil District Court for the Parish of Orleans, Louisiana. In *Cajun Conti LLC*, the insured alleges that COVID-19 physically impacts public and private spaces and that COVID-19 “physically infests and stays on the surface of objects and materials....” It remains to be seen how this issue will be resolved by the courts.

Second, assuming COVID-19 causes physical property loss or physical property damage, courts will then consider whether the orders prohibiting access to the insured's property are “as a direct result” of property loss or property damage. In other words, to trigger coverage, the insured must show that loss of or damage to property was the “proximate, efficient and dominant cause” for the order of civil authority that barred access to the insured's property. *United Airlines, Inc.*, 385 F. Supp. 2d at 353 (civil authority coverage not triggered when security concerns rather than property damage caused loss of access to the airport).

In considering the requirement that action by civil authorities be *due to property loss or property damage*, courts may consider the specific language of the state's order and the specific reasons the civil authorities gave for why they took action. See *Kelaher Conner and Conner PC v. Auto-Owners Ins. Co.*, --- F.Supp.3d ---, 2020 WL 886120, at *8 (D. S.C. 2020) (civil authority coverage not triggered when evacuation order was issued before



any physical damage occurred and the order itself did not mention any physical damage as a basis for requiring evacuation).

As illustrated by the *Kelahr Conner and Conner PC* decision cited above, the fact that the COVID-19 orders do not refer to property loss or property damage as reasons for their issuance may defeat efforts to trigger civil authority coverage. The California order states that it was issued to “protect public health.” The Connecticut order was issued to “facilitate the most timely and effective respond to the COVID-19 emergency disaster.” The New York order was issued to “mitigate the spread of COVID-19.”

Even the Illinois order, which references the ability of the COVID-19 virus to impact property, does not specify property damage as the *reason* for issuing the stay-at-home order. Instead, the Illinois order states that it was issued 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.” Accordingly, given the clear evidence in the orders that they were issued for health reasons rather than because of property damage, it is highly unlikely that an insured can satisfy the coverage requirement that action by civil authorities be due to or caused by property loss or property damage.

The language of the order may only be the beginning of the analysis. In considering whether property damage was the proximate cause for the order that barred access to the insured’s property, the court in *United Airlines, Inc.*, 385 F. Supp. 2d at 353-54, considered witness testimony, correspondence, and other documents that indicated the civil authority’s reason for issuing its order. Accordingly, some courts may look outside the order, perhaps to statements by governors or state health officials, to determine whether the COVID-19 orders were due to property loss or property damage.

However, even looking outside the language of the orders, state officials have indicated that the COVID-19 orders were issued to protect health. For example, Illinois Governor J.B. Pritzker [stated](#) that he issued the Illinois order “[t]o avoid the loss of potentially tens of thousands of lives.” Similarly, California Governor Gavin Newsom issued a [press release](#) indicating that he issued the California order “to protect the health and well-being of Californians.” These statements further suggest that it may be highly unlikely for insureds to satisfy the coverage requirement that action by civil authorities be due to or caused by property loss or property damage.

The BatesCarey [COVID-19 team](#) continues to monitor and track “shelter in place” and “stay-at-home” orders and other coverage developments on behalf of its clients. Should you have any questions on this article, or other related issues, please contact the authors, [Adam Fleischer](#) and [Michael Passman](#), or our team at COVID-19@BatesCarey.com.