

## The Fight Over Business-Interruption Coverage: Understanding why Covid-19 related closures may or may not be covered.



By Cory D. Olson

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On March 16, 2020, in an effort to slow the spread of SARS-CoV-2, the virus that causes Covid-19, Governor Walz ordered that all Minnesota bars, restaurants, theaters, gyms, and a host of other businesses close by no later than 5:00 p.m. on March 17, 2020. The original order called for a ten-day closure; it has been modified and extended several times since. Similar orders have been put into effect in nearly every other state. Although experts agree that these measures help “flatten the curve,” they have also been devastating to the closed businesses and their employees, with many locations shuttering permanently or warning that they may do so in the immediate future.

Because these losses were caused by mandatory closures, many businesses have filed claims under their business-interruption policies. Insurers have taken the position that these losses are outside the scope of coverage. Numerous businesses have since filed suit, on their own behalf or as putative class-action suits, seeking declarations of coverage.

News stories on these suits have generally focused on the affected businesses and their losses. This is understandable; stories involving characters are always more entertaining than dry recitations of the law or policy terms. But to understand the suits, and how to advise clients, it is helpful to understand the nuances of the disagreement.

It is important to remember that, like any coverage question, the answer depends on the specific policy terms and the facts of the loss at issue. Policies are often similar, and news stories on this topic often speak in generalities. But each case depends on its own facts and policy terms, as the placement of a word or phrase can be the difference between coverage and no coverage.

With those caveats out of the way, business-interruption policies generally provide coverage from closures resulting from “direct physical loss or damage to property” to locations subject to the policy. But policies often exclude coverage if the damage was caused by certain excluded events. This is often a first challenge to business-interruption coverage. Many policies specifically exclude damage caused by bacteria or viruses. Insurers increased the use of these exclusions in response to SARS, MERS, Ebola, and warnings that another pandemic was inevitable. But the exclusions are not universal, and many businesses seeking coverage have specifically noted that their policies lack a virus exclusion, even though an exclusion for viruses has been readily available to insurers for years.

The next question is whether an imperceptible virus constitutes “physical loss or damage.” The precise contours of this phrase have been litigated in other contexts, such as noxious gasses, odors, or bacteria. Courts have come to different conclusions on this issue. Some courts have held that these are physical losses because they can be perceived or involve tangible things, such as particulates; others have required a showing of tangible, material changes or alteration to property to qualify. In some cases, the courts considered how pervasive the odor was or whether the property was still usable. Outcomes will vary based on state law and specific policy language.

Even if a virus does constitute “physical loss or damage,” there is the separate question of whether the virus is actually present at the business location. Based on what we know about the virus, that may be unlikely. At the time of closures, the virus was not as widespread as it is today. Even if the virus were present, experts agree that, depending on the surface, the virus dies within a few hours to a few days. So even if the virus had been present at the time of closures, it is unlikely to be present today. There may be practical reasons to avoid this dispute. Many businesses still offer take-out or curbside services, and they will be apprehensive about publicly alleging that they qualify for coverage because the virus is in their buildings.

That last consideration may be why most coverage disputes have focused on the “civil authority” clauses. Under these clauses, an insurer will pay for closures mandated by a civil authority in response to a dangerous physical condition

in the immediate area. The businesses argue that the closures are not mandated because the virus is in their location, but because the virus can be found in surrounding areas. As proof, businesses cite mass disinfection programs in China, Italy, Spain, and France. Other cases cite the closures orders themselves, which may refer to physical damage. But such an argument can be difficult to square with governors permitting, if not encouraging, people to enjoy outdoor recreational activities, albeit at a safe social distance.

Another question is whether the mandatory closures are in response to a dangerous physical condition or a prophylactic measure to prevent future spread of the virus. If they are prophylactic, then they are generally outside of coverage. Similar questions arose after the government grounded flights in the wake of the 9/11 terrorist attacks. Courts generally held that the closures related to decreased air travel were not covered by the policies because the government’s actions were taken to prevent future attacks, rather than in response to physical damage near the airports.

Each of these issues will likely be the subject of litigation as businesses and insurers fight over coverage. In the meantime, individual states have undertaken efforts to ensure businesses receive coverage. Lawmakers in New Jersey, New York, Ohio, Pennsylvania, Massachusetts, and Louisiana have taken up bills that would require insurers to retroactively provide coverage for Covid-related closures. As the losses from the closures mount, more states will likely take up similar measures. However, whether these measures will pass and survive inevitable legal challenges by insurers remains unclear.

What is clear is that Covid-19 is quickly becoming not only the most significant health crisis of our lifetimes, but the most damaging economic one as well. As the crisis continues, businesses will be looking for any source that will help them survive these trying times. Business-interruption insurance may provide an answer to some businesses, but, absent a legislative intervention, obtaining coverage for many others will likely involve a hard-fought battle.

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