

[Click to print](#) or Select 'Print' in your browser menu to print this document.

Page printed from: <https://www.propertycasualty360.com/2020/2020/06/24/civil-unrest-adds-to-challenges-facing-business-interruption-claims/>

Civil unrest adds to challenges facing business interruption claims

Many businesses have been forced to close amid protests, worsening their loss of business income suffered as a result of the pandemic.

By **Eric J. Robbie** | June 24, 2020



A Starbucks store, partially reopened during the Coronavirus pandemic, is boarded up to protect against vandalism during the days of demonstrations protesting the killing of George Floyd and police brutality, Washington, D.C. June 6, 2020. (Photo: Diego M. Radzinski/ALM)

The COVID-19 pandemic has brought a wave of business interruption claims and related coverage lawsuits from businesses impacted by widespread closures.

These businesses already face significant hurdles in obtaining coverage for pandemic-related losses, as insurers and policyholders litigate over whether COVID-19 contamination and mandatory closures to force social distancing measures to constitute “*direct physical loss of or damage to property*” sufficient to trigger coverage under business interruption policies (<https://www.propertycasualty360.com/2020/05/20/insurance-speak-business-interruption-claims-covid-19/>). In these suits, insurers have argued that these policies provisions were written to insure against natural disasters that cause tangible physical damage to property such as hurricanes and earthquakes, not viral pandemics. At least one court has agreed (<https://www.cmbg3.com/business-interruption-two-rulings>).

Now, just as reeling businesses begin to slowly reopen, the death of George Floyd by a Minneapolis police officer has led to massive protests, some of which have become unruly and resulted in property destruction. As a result, many businesses have been closed — some by government orders such as curfews, others on their own volition to prevent the potential for damage. These closures have compounded their loss of business income.

The good news for these concerned business owners is that most commercial property insurance policies will cover physical property damage from fires and vandalism (<https://www.propertycasualty360.com/2020/06/01/riots-civil-commotion-and-vandalism-generally-covered-by-insurance/>) resulting from civil unrest. However, income losses resulting from anticipatory or mandatory business closures may not be covered.

Physical property damage

Theft of goods and personalty, such as furniture, computers, machinery and office supplies, typically qualify for coverage under personal property coverages. Coverage provisions for such physical property damage are typically found in both “covered perils” and “all-risk” policies.

As with any contractual policy, policyholders have a duty to mitigate risks to the extent feasibly possible. A commercial policy typically covers expenditures made to secure property against further loss. The extent of such coverage will depend upon the facts and circumstances of each situation.

Loss of income: Anticipatory closures

Insurers are expected to take a less forgiving position regarding the loss of income (<https://www.propertycasualty360.com/2019/12/04/common-issues-in-business-income/>) due to closing a business in anticipation of COVID-19. As we see in COVID-19-related coverage disputes, insurers insist that “direct physical loss of or damage to property” is required to trigger coverage.

For those businesses whose closures resulted from the occurrence of actual property damage — broken windows, fire damage, etc. — this trigger will undoubtedly be met. On the other hand, businesses that unilaterally closed in anticipation of potential damage will be hard-pressed to obtain relief for losses resulting from such closures in the absence of physical damage.

Loss of income: Mandatory closure

What is less clear is the fate of businesses that suffer loss of income from closures in compliance with civil authority orders issued in anticipation of potential disruption or property damage, including the institution of curfews. Many commercial property or business owner policies contain “civil authority” clauses that provide coverage for loss of business income caused by an “action of civil authority” that “prohibits access” to the insured’s property as a result of damage to property occurring elsewhere. The weight of authority

indicates that civil authority coverage is intended to apply to situations where access to an insured's property is prevented or prohibited by order of civil authority issued as a direct result of physical damage to other premises *in the proximity* of the insured's property.

For example, in a 1995 case, *Syufy Enterprises v. Home Ins. Co. of Indiana*, a federal district court in Northern California held that curfew orders issued in anticipation of rioting, looting and property damage after the Rodney King verdict did not entitle a business owner to coverage under the civil authority provision because the "requisite causal link between damage to adjacent property and denial of access" was lacking. Likewise, in *Dickie Brennan & Co. v. Lexington Ins. Co.*, the U.S. Court of Appeals for the 5th Circuit held that mandatory evacuation order issued in anticipation of damage from the impending Hurricane Gustav, which had caused damage in the Caribbean, did not trigger business interruption coverage under civil authority provisions.

As always, the specific policy language will govern, and any ambiguities will tend to favor policyholders — for example, the court in *Sloan v. Phoenix of Hartford Ins. Co.*, the Michigan Court of Appeals rejected the insurers' claim that the loss had to be accompanied by "direct physical loss or damage". In *Sloan*, following the assassination of Dr. Martin Luther King, Jr., the Mayor of Detroit ordered the closure of "places of amusement," which included the plaintiff's theatre. The business-interruption policy provided in relevant part:

"1. This policy covers against loss resulting directly from necessary interruption of business *caused by damage to or destruction of real or personal property by peril(s) insured against...*" (emphasis added)

"7. Interruption by Civil Authority. This policy is extended to include the actual loss... when *as a direct result of the peril(s) insured against, access to the premises described is prohibited by order of civil authority.*"

The *Sloan* court compared the two provisions and found that they "contemplate separate and distinguishable business losses," namely that the Civil Authority provisions "speaks to business-interruption losses occasioned by the denial of access to the premises by order of civil authority." In finding in favor of the policyholder, the court found the absence of language requiring such coverage to be triggered by physical damage to be "conspicuous," and therefore equivocal.

Even where property damage has occurred in a location other than the policyholders' property, many civil authority coverage provisions require an element of proximity.

In *United Air Lines, Inc. v. Ins. Co. of State of PA*, United Airlines sought coverage for losses uncured due to the government-ordered grounding of air travel immediately following the 9/11 terrorist attacks shutdown. At issue was coverage resulting from the tragic crash of American Airlines Flight 77 into the Pentagon. The civil authority provision at issue provided coverage "when access to the Insured Locations is prohibited by order of civil authority as a direct result of damage to *adjacent* premises." United argued that damage to the Pentagon from qualified as an "adjacent premise" to the Ronald Reagan Washington National Airport, in Arlington, Virginia, where United maintained a ticket office.

While the court upheld the denial of coverage where U.S. Government's decision to ground airplanes following 9/11 terrorist attacks, was based on fears of future attacks — not physical damage to arguably adjacent property, the court commented, in dicta, that the term "adjacent" was likely ambiguous given that two properties can be adjacent without necessarily sharing a border.

Damages

Even if coverage is found, the calculation of damages is bound to be another issue ripe for dispute. Insurers will view closure orders issued in relation to civil unrest as distinct from closure orders or limitations issued as a result of the COVID-19 pandemic. Complicating matters further, claims will be valued on the basis of expected revenues a business would have seen had there not been any civil unrest. In the wake of COVID-19 closures, insurers are likely to determine this to be significantly less value than full operations prior to COVID-19.

As always, each the language of each policy will control and should be evaluated in light of the facts and circumstances of each individual claim. Even so, the above considerations show that business owners seeking coverage under business interruption insurance policies face increasingly complicated challenges.

Eric J. Robbie, Esq., is an attorney at CMBG3 Law in Boston. He focuses his practice on toxic torts, environmental and business interruption litigation and insurance issues. He can be reached at erobbie@cmbg3.com (<mailto:erobbie@cmbg3.com>).

This article originally appeared on CMBG3 Law's blog (<https://www.cmbg3.com/articles>) and is republished here with consent.

Related:

- **Evaluating business interruption claims in a post-COVID-19 world**
(<https://www.propertycasualty360.com/2020/05/13/evaluating-business-interruption-claims-in-a-post-covid-19-world/>)
- **Pandemic B.I. claims: After the sound and fury, where are we now?**
(<https://www.propertycasualty360.com/2020/06/18/pandemic-b-i-claims-after-the-sound-and-fury-where-are-we-now/>)
- **Workplace safety during civil unrest**
(<https://www.propertycasualty360.com/2020/06/11/workplace-safety-during-civil-unrest/>)

Copyright 2020. ALM Media Properties, LLC. All rights reserved.