The COVID-19 Shutdown: Are You Covered?

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"I wish it need not have happened in my time," said Frodo.
"So do I," said Gandalf, "and so do all who live to see such times. But that is not for them to decide. All we have to decide is what to do with the time that is given us."

— J.R.R. Tolkien, The Fellowship of the Ring

I. Background

For the past year, Dayton has taken a beating. In the heart of the city is the Oregon District: 12 square blocks containing bars and restaurants that serve as an informal gathering ground for people of all ages and backgrounds. After suffering through the effects of tornados and a mass shooting, the businesses of the Oregon District now face the economic fallout of a state-wide stay-at-home order, which has all-but-shutdown the city's social hub. And they are not alone: restaurants all over the country have been shuttered by similar orders, and are looking for solutions to keep themselves afloat.

Some have looked to their insurance policies, only to find insurers denying coverage. On March 25, 2020, the owners of the French Laundry and Bouchon Bistro in Napa County, California filed complaints for judgment on whether their commercial general liability policies covered losses related to the State of California's stay-at-home orders.[1] This follows on the heels of a lawsuit filed by the Oceana Grill, a New Orleans restaurant, only a handful of days before.[2] In each case, the underlying issue is the same: ***can the restaurant recover business losses arising after being forced to close by a state's order?***

II. Legal Analysis and History

A. *The Policy's Language*

The restaurants' claims arise out of their business interruption insurance coverage, which is found in most commercial general liability policies. The purpose of this coverage is to protect against financial loss suffered due to direct physical loss or damage to insured property; the policy is to do for the insured what the business itself would have done if no business interruption had occurred.[3] Below is a sample of what the primary coverage language might look like:

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[1] *French Laundry Partners, LP, dba The French Laundry v. Hartford Fire Insurance Company*, Napa County Superior Court, Case No. _____.

[2] *Cajun Conti, LLC v. Certain Underwriters at Lloyd's London*, La. Dist. Ct., Orleans Parish, No. 2020-02558, filed Mar. 16, 2020.

[3] See, e.g., *Fireman's Fund Ins. v. Mitchell-Peterson, Inc*., 63 Ohio App.3d 319, 326, 578N.E.2d 851 (12th Dist. 1989).

> **We will pay for the actual loss of business income you sustain due to the necessary "suspension" of your "operations" during the "period of restoration". The "suspension" must be caused by direct physical loss of or damage to property at premises which are described in the Declarations and for which a Business Income Limit of Insurance is shown in the Declarations. Such loss or damage must be caused by or result from a Covered Cause of Loss.**

The terms in quotation marks are defined within the section in which they are found, or in a separate section of the policy. The first sentence is the most important for the business owner; however, the other two sentences is where insurers deny coverage.

Under this coverage, the first step is identifying the cause of loss and determining if it is covered. All policies have a section describing covered causes of loss, which are also referred to as risks. These sections begin deceptively simply; here is an example:

> **Covered Causes of Loss means RISKS OF DIRECT PHYSICAL LOSS unless the loss is:**
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> **1. Excluded in Section B., Exclusions; or**
> **2. Limited in Section C., Limitations;**
>
> **that follow.**

As one may imagine the following sections – Sections B and C – include an exhaustive list of exclusions and limitations which remove many risks from coverage, including viruses. The relevant language in the policy might look like this:

> **We will not pay for loss or damage caused by or resulting from any of the following, regardless of any other cause or event, including a peril insured against, that contribute to the loss at the same time or in any other sequence:**
>
> *** * ***
>
> **10. The actual or suspected presence or threat of any virus, organism or like substance that is capable of inducing disease, illness, physical distress or death, whether infectious or otherwise, including but not limited to any epidemic, pandemic, influenza, plague, SARS, or Avian Flu.[4]**

Alternately, the language may be found in a separate endorsement or amendment to the policy, and might look like this:

[4] *Meyer Natural Foods, LLC v. Liberty Mut. Fire Ins*., 218 F.Supp.3d 1034, 1038-9 (D. Neb. 2016).

> **We will not pay for loss or damage caused by or resulting from any virus, bacterium, or other micro-organism that induces or is capable of inducing physical distress, illness, or disease.[5]**

Sometimes, the language is found in an exclusion related to losses caused by pollution or contamination may be expressly excluded in the policy or by a separate endorsement.[6] The relevant language would be found in the definition of the term "pollutant" or "contaminant," which might read like this:

> **CONTAMINANTS or POLLUTANTS mean any material which after its release can cause or threaten damage to human health or human welfare or cause or threaten damage, deterioration, loss of value, marketability or loss of use to property insured hereunder, including, but not limited to, bacteria, fungi, virus, or hazardous substances as listed in the Federal Water Pollution Control Act, Clean Air Act, Resource Conservation and Recovery Act of 1976, and Toxic Substances Control Act, or as designated by the U.S. Environmental Protection Agency.[7]**

Conversely, some policies may contain a health care endorsement including coverage for communicable diseases.[8] Such language might look like this:

> **We will pay for the following under Communicable Disease Coverage:**
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> **Direct Physical loss or damage to Property Insured cased by or resulting from a covered communicable disease event at the premises described in the Declarations.**
>
> *** * ***
>
> **If the Declarations show you have Business Income with Extra Expense Coverage * * * we will pay for the actual loss of business income, rental value, or necessary extra expense or expediting expense that you sustain due to the necessary full or partial suspension of operations during the period of restoration. The suspension must be caused by direct physical loss or damage caused by or resulting from a covered communicable disease event at the premises described in the Declarations.[9]**

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[5] ISO Properties, Inc., "Commercial Property Form CP 01 40 07 06", 2006.

[6] See, e.g., *PBM Nutritionals, LLC v. Lexington Ins. Co*., 283 Va. 624, 630-631, 724 S.E.2d 707 (2012) (definition of "contaminants" and "pollutants" included any material which can cause or threaten damage to human health including, but not limited to, "bacteria, fungi, virus, or hazardous substances").

[7] Id. at 630-1.

[8] See, e.g., *Catholic Med. Ctr. v. Fireman's Fund Ins. Co*., Case No. 14-cv-180, 2015 WL 3463417 (D.N.H. June 1, 2015.)

[9] Id. at *2.

Every insurance policy is different, so businesses interested in pursuing an insurance claim should examine their policy carefully to determine whether the virus is a covered risk or excluded.

Presuming that a virus is a covered risk, the next step is to determine whether there has been a suspension of business due to damage to the business' property. Most policies define a suspension of business as being a complete shutdown, rather than a mere reduction in cash flow;[10] however, this is not always the case.[11] They also require actual physical loss to business property, which means that the property has to be physically damaged by the risk. Just because the property cannot be put to its intended use does not mean there has been a physical loss.[12]

Even if there is no direct physical loss, there may be loss caused indirectly by a government order. Most businesses may also claim businesses losses from a suspension caused by the action of a civil authority in response to physical damage under what is called a "civil authority extension" to business interruption coverage. Such extensions often read as follows:

> **We will pay for the actual loss of business income you sustain and necessary extra expenses 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 business' premises, caused by or resulting from any covered cause of loss.**

Under the extension a business may be entitled to coverage for actual business losses resulting from a government's order that prohibits access to business property, but such order must be the result of direct physical loss or damage to non-business property.

B. *Examination of Case Law*

Unfortunately, opinions involving government actions related to non-business property and business interruption coverage are few and far between. Such coverage appears to have been issued after World War II and claims generally relate to government action taken to address damage caused by fires, floods, earthquakes, tornados, and other natural disasters. Stay-at-home orders, such as those made to address the COVID-19 pandemic, are prophylactic in nature and calculated to prevent or minimize future damage.

Judicial opinions related to prophylactic orders do not arise until the 1960s, when the nation erupted into violence over civil rights in the wake of Martin Luther King, Jr.'s assassination. For instance, in April 1968, Washington D.C. implemented regulations and a curfew prohibiting

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[10] See, e.g., *Buxbaum v. Aetna Life & Casualty Co*., 103 Cal App.4th 434, 451, 126 Cal.Rptr.2d 682 (2d Dist. 2002) (slowdown of business at law firm as a result of flood at one of the firm's offices was not a suspension sufficient to trigger coverage).

[11] See, e.g., *Archer Daniels Midland Co. v. Aon Risk Services, Inc. of Minnesota*, 356 F.3d 850 (8th Cir. 2004); *Catholic Med. Ctr*., supra.

[12] *Source Food Technology, Inc. v. United States Fidelity and Guaranty Co*., 465 F.3d 834, 838 (8th Cir. 2006).

the sale of alcoholic beverages in response to widespread riots and civil disorder. A restaurant thereafter filed a claim for coverage, arguing that the government actions caused a "falloff" in business, which the insurer denied.[13] The D.C. Circuit Court concluded that there was no coverage because the government actions did not completely bar access to the restaurant's property.[14]

In a different part of the country, there was a different result. In response to the Detroit riots, the Governor of Michigan issued an executive order imposing a curfew and closing all places of amusement in the city. The owner of movie theaters filed a claim similar to the one filed by restaurants in Washington, D.C.[15] The Court of Appeals of Michigan, Division 1, concluded that there was coverage because "a plain reading of the policy would lead the ordinary person of common understanding to believe that, irrespective of any physical damage to the insured property, coverage was provided and benefits were payable * * *."[16]

But later opinions followed the theory that a civil authority action had to result in a total suspension of operations to trigger coverage. For example, in the 1990s, following the controversial verdict in the Rodney King case, authorities in San Francisco, Los Angeles, and other cities on the west coast enacted dawn-to-dusk curfews.[17] A chain of theatres filed a claim for business interruption coverage as a result, but the insurer rejected the claim because the curfews did not prohibit actual access to the business' premises, even if nearby businesses had been affected.[18] The U.S. District Court for the Northern District of California sided with the insurer.[19]

Case law shifted towards a more liberal interpretation of coverage after Hurricane Floyd devastated the east coast. In 1999, Brevard County, Florida issued an order declaring a state of emergency and ordering people to evacuate the area, which prompted an owner of several restaurants to shut down locations in the county.[20] Its insurer rejected the claim, arguing that the order was not made as a direct result of property damage, but a reviewing court disagreed; it concluded that the Governor issued the order after seeing the hurricane's effect on the Bahamas and therefore was made as a result of damage to other property.[21] Other courts concluded similarly.[22]

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[13] *Brothers, Inc. v. Liberty Mut. Fire Ins. Co*., 268 A.2d 611 (D.C. App. 1970).
[14] Id. at 613-4; see, also, *Two Caesars Corp. v. Jefferson Ins. Co*., 280 A.2d 305, 308 (D.C. App. 1971) (court held that loss of income from sales of food and alcohol was not a direct loss to described property sufficient to trigger coverage under business interruption policy).
[15] *Sloan v. Phoenix of Hartford Ins. Co*., 46 Mich.App. 46, 48, 207 N.W.2d 434 (1973).
[16] Id. at 51; see, also, *Southlanes Bowl, Inc. v. Lumbermen's Mut. Ins. Co*., 46 Mich.App. 758, 208 N.W.2d 569 (1973); *Allen Park Theatre Co., Inc. v. Michigan Millers Mut. Ins. Co*., 48 Mich.App. 199, 210 N.W.2d 402 (1973).
[17] *Syufy Enterprises v. Home Ins. Co. of Indiana*, U.S. Dist. Ct. N.D. Cal. No. 94-0756 FMS, 1995 WL 129229 (Mar. 21, 1995).
[18] Id. at *2.
[19] Id.
[20] *Assurance Co. of America v. BBB Service Co., Inc*., 265 Ga.App. 35, 593 S.E.2d 7, 8 (2003).
[21] Id. at 9.
[22] See, e.g., *Narricot Indus., Inc. v. Fireman's Fund Ins. Co*., U.S. Dist. Ct. E.D. Pa. No. CIV.A.01-4679, 2002 WL 31247972 (Sept. 30, 2002).

But the pendulum swung back regarding claims arising from government actions in response to the September 11, 2001 attack on the World Trade Center. Courts found no coverage under the civil authority exception where: (1) government orders redirected vehicular and pedestrian traffic, but did not require complete closure;[23] (2) the FAA's ground stop order following the attack did not prohibit access to the insured's property at an airport;[24] and (3) government's seizure of a convention center at which a trade show was to be held did not result in complete denial of access.[25] Courts concluded that such actions were taken in anticipation of future attacks rather in response to damage caused by the attack, and therefore could not have been a direct result of a physical loss.[26]

Whether coverage existed depended on whether an order was made in anticipation of future damage or responsive to present harm.[27] If an order was calculated to prevent future harm, then it was not a result of a loss and therefore did not trigger coverage; however, if an order was made in response to existing damage, then it could be the result of a loss and therefore trigger coverage. While this may seem unreasonable, this interpretation is consistent with the plain policy language requiring that the action on which a claim is based be the direct result of physical loss.

Thus, many businesses discovered they had no coverage for business losses resulting from evacuation orders issued in anticipation of the hurricanes that struck the southern states in the 2000s. Courts and insurers summarily rejected coverage for evacuation orders, finding that such orders were the result of fears of future damage rather than the need to repair, mitigate, or respond to existent physical damage, despite the fact that the insureds may have expected otherwise.[28] In one case, a court wrote succinctly:

> **Reading the Civil Authority section as a whole, it is clear that it was not written with the expectation that a civil authority order prohibiting access would issue *before* the property damage that forms the basis of the order actually occurs. The direct nexus between the damage sustained and the order that the policy requires suggests that the Policy was designed to address the situation where damage occurs and the civil authority *subsequently* prohibits access. Although those of us living in the hurricane-plagued gulf coast region are not strangers to the reverse situation, unarguably the coverage was written for the far more**

[23] *54th Street Ltd. Partners, LP v. Fidelity and Guar. Ins. Co*., 306 A.D.2d 67, 763 N.Y.S.2d 243 (2003).
[24] *United Airlines, Inc. v. Insurance Co. of State of Pa.*, 385 F.Supp.2d 343 (S.D.N.Y. 2005), aff'd by 439 F.3d 128 (2nd Cir. 2006).
[25] *Penton Media, Inc. v. Affiliated FM Ins. Co*., 245 Fed.Appx. 495 (6th Cir. 2007).
[26] See, e.g., *City of Chicago v. Factory Mut. Ins. Co*., U.S. Dist. Ct. N.D. Ill. No. 02 C 7023, 2004 WL 549447 (Mar. 18, 2004); *County of Clark v. Factory Mut. Ins. Co*., U.S. Dist. Ct. D. Nev. No. CV-S-02-1258-KJD-RJJ, 2005 WL 6720917 (Mar. 28, 2005).
[27] *Southern Hospitality, Inc. v. Zurich American Ins. Co*., 393 F.3d 1137, 1141 (10th Cir. 2004).
[28] See, e.g., *South Texas Medical Clinics, PA v. CNA Financial Corp*., U.S. Dist. Ct. S.D. Tex. No. H-06-4041, 2008 WL 450012 (Feb. 15, 2008).

> **likely sequence of events in that damage occurs and then a civil authority prohibits access as a result.[29]**

Recent case law affirms that, even if contrary to the reasonable expectations of the insured, the prevailing position of courts is that the civil authority extension requires an action to occur as a result of damage, rather than in anticipation of the same.[30]

C. *Other Considerations*

What happens when the reasonable expectations of an insured clashes with the language of a policy issued by an insurer?

Courts are directed to give effect to the plain language of all contracts, including insurance companies.[31] A court must give all words and phrases their ordinary meaning, unless another meaning is apparent from the contents of a policy.[32] But where a provision in a policy is reasonably susceptible to more than one interpretation, a court must construe it strictly against the insurer and liberally in favor of the insured.[33] In such cases, the reasonable-expectations doctrine arises: that doctrine posits that policies should be interpreted in such a way that meets the reasonable expectations of an insured.[34]

For example, an apartment complex filed a claim under its insurance policy for monetary damages related to the deaths and injuries from carbon monoxide inhalation caused by a faulty heating unit.[35] The insurer denied the claim under an exclusion for "pollutants," which were defined as "any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste."[36] The trial court found in favor of the insured, and the appellate court found in favor of the insurer. The Ohio Supreme Court wrote regarding the exclusion:

> **In the case at bar, the policy in question never clearly excludes claims for deaths or injuries caused by residential carbon monoxide poisoning. It is not the responsibility of the insured to guess whether certain occurrences will or will not be covered based on nonspecific and generic words or phrases that could be construed in a variety of ways.[37]**

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[29] *Jones, Walker, Waechter, Poinevent, Carrere & Denegre, LLP v. Chubb Corp*., U.S. Dist. Ct. E.D. La. No. 09-6057, 2010 WL 4026375 (Oct. 12, 2010).
[30] See, e.g., *Kelaher, Connell & Conner, P.C. v. Auto-Owners Ins. Co*., U.S. Dist. No. D.S.C. No. 4:19-cv-00693-SAL, 2020 WL 886120 (Feb. 24, 2020).
[31] *Kelly v. Med. Life Ins. Co*., 31 Ohio St.3d 130, 132, 509 N.E.2d 411 (1987).
[32] *Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d 216, 2003-Ohio-5849, 797 N.E.2d 1256, ¶ 11.
[33] *King v. Nationwide Ins. Co*., 35 Ohio St.3d 208, 211, 519 N.E.2d 1380 (1988).
[34] *Andersen v. Highland House Co.*, 93 Ohio St.3d 547, 550-1, 757 N.E.2d 329 (2001).
[35] Id. at 547.
[36] Id. at 548.
[37] Id. at 549. (Citations omitted.)

The Court later recognized the doctrine of the reasonable-expectations doctrine, declined to weigh in as to its merits, but concluded that it could have applied.[38]

The reasonable-expectations doctrine, which has not been formally adopted by the Ohio Supreme Court, is calculated to spare a party to a contract from the effects of arcane language insisted upon by the other.[39] Said another way:

> **The objectively reasonable expectations of applicants and beneficiaries regarding the terms of insurance contracts will be honored even though painstaking study of the policy provisions would have negated those expectations.[40]**

In effect, the doctrine negates the effect of provisions which one party to a contract, often the drafter, knows the other party would not have agreed to at the time the contract was executed.[41] At the moment, in Ohio, the doctrine only applies where there is language that is ambiguous; however, a jury could conclude that a provision conflicts with the reasonable expectations of an insured.[42]

Other courts have been less conservative. In Colorado, for example, the doctrine of reasonable expectations obligates insurers to clearly and adequately convey coverage-limiting provisions to insureds.[43] This is because, given insurance policies' unique nature, which includes significant potential for insurers to take advantage of or mislead insureds, such policies are subject to heightened scrutiny.[44] As another example, in West Virginia, the doctrine of reasonable expectations may apply even where language is clear and unambiguous.[45] In such cases, the Court determined that the insured was misled by the insurer's promotional materials or was not informed that a particular risk was excluded.[46] Unfortunately, the doctrine's applicability and enforceability changes from state to state, which makes it difficult to predict how it may affect a particular business or if it may be officially adopted in Ohio.

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[38] Id. at 550-1.
[39] *Wallace v. Balint*, 94 Ohio St.3d 182, 189, 761 N.E.2d 598 (2002).
[40] Id.
[41] Id.
[42] See, e.g., *I.G.H. II, Inc. v. Selective Ins. Co. of South Carolina*, 6th Dist. No. WD-06-058, 2007-Ohio-2258, ¶ 46; *HoneyBaked Foods, Inc. v. Affiliated FM Ins. Co*., 757 F.Supp.2d 738, 750-1 (N.D. Ohio 2010).
[43] *Bailey v. Lincoln General Ins. Co*., 255 P.3d 1039, 1048-9 (Colo. 2011).
[44] Id.
[45] *Luikart v. Valley Brook Concrete & Supply, Inc*., 216 W.Va. 748, 755, 613 S.E.2d 896 (2005).
[46] Id.

III. Discussion and Conclusions

A. *So where should a business start?*

The first step to do is go to one's policy and determine if there is coverage for business interruptions and whether a virus is a covered cause of loss. If your business does not have the policy, request a copy from your insurance agent, including your declarations. Business interruption coverage is found in commercial property insurance policies, and, presuming the policy has the "all-risk" language stated earlier, the analysis will begin with the exclusions

The next step is to determine whether there has been a suspension of business sufficient to trigger coverage. As previously stated, the term "suspension" connotes a complete cessation of operations (but as stated before the policy may state otherwise).[47] Whereas some businesses shuttered completely in response to Dr. Acton's March 15, 2020 order, others continued to operate as a carryout, which was permitted. That said, a policy may have language which permits recovery of business income where business operations have not been totally suspended.

The final step is to evaluate the extent of the business's losses. Every policy has a method for determining what losses are covered and what are not, but most, if not all, replace lost income to the business, rather than lost profits. How an insurer calculates a business's losses is in and of itself a complicated analysis, and a separate topic for another article. Regardless, having an idea of how much the business may be able to recover is important when determining the economic benefit of filing a claim at all.

If the virus is a covered loss, the business has suffered a suspension, and a claim is economically beneficial, then there may be a claim. Unfortunately, this is the easy part.

B. *What are the chances the business will prevail?*

The problem with living in unprecedented times is the lack of certainty in the rule of law. The steps taken to address the COVID-19 are novel and widespread; civil authorities did little to restrict businesses in response to the 1957-1958 Asian Flu pandemic, for example.[48] Case law related to government orders issued in response to outbreaks of disease involve the contamination of inventory,[49] and the evacuation orders issued in response to hurricanes are fundamentally different than the stay-at-home order issued by states in response to the pandemic.

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[47] *Buxbaum*, 103 Cal.App.4th at 451.

[48] Henderson, D.A., et al. "Public Health and Medical Responses to the 1957-58 Influenza Pandemic." Biosecurity and Bioterrorism: Biodefense Strategy, Practice, and Science, Vol. 7, No. 3, 2009, Mary Ann Liebert, Inc.: https://www.liebertpub.com/doi/pdfplus/10.1089/bsp.2009.0729

[49] See, e.g., *Source Food, Inc*., supra.

The two cases filed by restaurant owners serve as a useful springboard. In their complaints, they allege that the COVID-19 virus is a covered risk that has caused both direct loss to their property as well as indirect loss from the actions of civil authority addressing the same.[50] They argue that the virus has caused physical damage because it "physically infects and stays on surfaces of objects or materials" for up to twenty-eight days and that fumigation and cleaning is necessary before opening up their premises.[51] They also claim that officials in their respective states have ordered the closure of their premises or limitation of their operations.[52] On their faces, the complaints seem to have stated facts sufficient to warrant relief, but whether a court will agree with the opinion-based allegations of fact is another matter entirely.

For instance, whether the virus causes physical damage to a restaurant is a matter of opinion. It would be reasonable to presume that each side can summon scientific authorities to give opposing opinions on this factual issue; whether property which has been exposed to a contaminant may become unfit for its use is a matter of fact. On the one hand, a virus does not visibly or practically render a table unusable; on the other hand, a customer would be less likely to eat food at that table unless it has been "repaired" or "remedied" by a thorough cleaning. Although there is no case law directly on point, in at least one case a court found physical damage to covered property where after a chemical was released that required remedial measures before property could be used again.[53] But a jury may find it reasonable for a customer to refuse to come into a business due to the virus, which is an interpretation favorable to the business.

Whether an order causes a suspension enough to warrant coverage is another opinion. In Ohio, Dr. Acton's March 15, 2020 order prohibited restaurants from permitting diners to eat-in but did not prohibit bars and restaurants from offering carryout. As a result, many restaurants continued to operate, albeit with a substantial reduction in customers. Some restaurants, however, shut down completely because it was not economically feasible to operate as a carryout business. Whereas some businesses were required to close – daycare centers, private schools, etc. – some elected to shut down for financial reasons, and whether those reasons were reasonable is a matter of opinion.

But the largest issue is whether Dr. Acton's order was made in anticipation of future damage or in reaction to damage elsewhere. Her order contains an exhaustive recitation of known facts and a long timeline of events, at the conclusion of which she wrote:

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[50] Complaint, Napa County Superior Court Case No. _____, ¶¶ 15-17; Complaint, La. Dist. Ct., Orleans Parish, No. 2020-02558, ¶¶ 13-16.
[51] Complaint, Napa County Superior Court Case No. _____, ¶¶ 19-21; Complaint, La. Dist. Ct., Orleans Parish, No. 2020-02558, ¶¶ 19-23.
[52] Complaint, Napa County Superior Court Case No. _____, ¶¶ 22-25; Complaint, La. Dist. Ct., Orleans Parish, No. 2020-02558, ¶¶ 25-31.
[53] *Gregory Packaging, Inc. v. Travelers Property Cas. Co. of America*, U.S. Dist. Ct. D.N.J. No. 2:12-cv-04418, 2014 WL 6675934, *3 (insurer admitted that remediation work was to reduce the ammonia gas to reach a safe level for occupancy).

> **Multiple areas of the United States are experiencing "community spread" of the virus that causes COVID-19. Community spread, defined as the transmission of an illness for which the source is unknown, means that isolation of known areas of infection is no longer enough to control spread.**
>
> **Previously studied human coronaviruses (including SARS, which is very closely related to COVID-19) can survive on paper, wood, glass, [sic] plastic for up to 4-5 days.**

These statements, along with others in the order, suggest that Dr. Acton's decision was made in response to known facts as to the damage the virus could cause, so it would be reasonable to conclude that a court would find the order to be a direct result of the damage the virus has caused; on the other hand, the order is undeniably calculated to combat the spread of the virus and future infections. Unfortunately, it is impossible to predict how a court might treat it because of the absence of legal analysis of similar quarantine actions.

Thus, whether a business – bar, restaurant, or otherwise – will prevail on their claim is beyond prediction, but the complaints already filed provide a useful template on which to model any such claim.

C. *Are we truly treading new ground?*

Undeniably. Although there have been several pandemics in the past century, no cases have been filed related to whether a business can recover its economic losses as a result of quarantine measures calculated to halt the disease's spread. The closest is a case where a business claimed coverage for losses related to the federal government's ban on the importation of beef from Canada due to mad cow's disease – and the business lost that case.[54]

Predictably, politicians have reacted. A bipartisan group of members of Congress urged insurance trade organizations to consider providing coverage for such losses, to which CEOs of four such organizations responded as follows:

> **Standard commercial insurance policies offer coverage and protection against a wide range of risks and threats that are vetted and approved by state regulators. Business interruption policies do not, and were not designed to, provide coverage against communicable diseases such as COVID-19.[55]**

In response, legislators have taken steps to introduce bills to force insurers to provide coverage. In New Jersey, for example, legislators have proposed a bill to permit claims for business

[54] *Source Food, Inc*., supra.
[55] https://www.insurancejournal.com/news/national/2020/03/20/561810.htm

interruption losses arising out of the state's orders to address the pandemic; the draft of Bill A-3844 reads:

> **Notwithstanding the provisions of any other law, rule or regulation to the contrary, every policy of insurance insuring against loss or damage to property, which includes the loss of use and occupancy and business interruption in force in this State on the effective date of this act, shall be construed to include among the covered perils under that policy, coverage for business interruption due to global virus transmission or pandemic, as provided in the Public Health Emergency and State of Emergency declared by the Governor in Executive Order 103 of 2020 concerning the coronavirus disease 2019 pandemic.**[56]

The National Association of Mutual Insurance Companies has opposed the legislation, and there appears to be constitutional issues regarding its provisions. Regardless of whether the legislation passes, it signals the willingness of politicians to consider drastic measures to address what they perceive to be a major economic crisis in the future. The fact that no such legislation was proposed or passed in the wake of other major catastrophes speaks to the projected severity of times to come.

D. *So what's the prognosis?*

As with unusual claims, everything depends on the nature of the business and the policy's language. And history suggests that these claims are the most unusual.

Any conclusion as to success would be conjecture. For example, one may conclude that insurers are more likely to cover damages claimed by small businesses due to the absence of judicial opinions involving the same. The opinions rising out of the government's orders in response to the September 11, 2001 attacks generally involve large corporations or municipalities. On the other hand, it may be that such claimants were unable to fund the expensive litigation necessary to bring their claims to their conclusions, and instead filed bankruptcy.

The ultimate factor may be whether litigation is economically reasonable. But if a business's policy does not exclude viruses as a covered risk, it may be worthwhile to pursue a claim and break new ground. Sadly, it is more likely that a small business like those operating in the Oregon District will file for bankruptcy than be able to pursue a claim against their insurance.

(For questions or concerns please contact the author at jfhung@green-law.com.)

[56] Drennan, T. & Tucker, J. "Business Interruption, Insurance Coverage, and COVID-19." The National Law Review, March 29, 2020, https://www.natlawreview.com/article/business-interruption-insurance-coverage-and-covid-19.