



CIVIL AUTHORITY AND INGRESS/EGRESS COVERAGE

CLAIMING LOST INCOME AFTER HURRICANES AND OTHER CATASTROPHIC EVENTS

BY CLARK SCHIRLE

The devastation wrought by Hurricanes Harvey, Irma, and Maria in 2017, particularly in Texas, Florida, and Puerto Rico, left many businesses damaged. Companies lost income because their facilities were physically damaged by wind and/or water. Some businesses may not have been directly damaged but lost income because they could not access their operations for a period of time due to a government evacuation order and/or water in the area. If a company's facilities were not physically damaged, but it could not access its operations, lost income might be recoverable under civil authority and/or ingress/egress coverage. This article provides an overview of such coverages.

OVERVIEW OF COVERAGE

Generally, 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 issued as a direct result of physical damage, caused by an insured peril, to other premises in the proximity of the insured's property.¹ As one court stated, to provide coverage under a civil authority provision, the insured must establish a loss of business income:

(1) caused by an action of civil authority; (2) the action of civil authority must prohibit access to the described premises of the insured; (3) the action of civil authority prohibiting access to the described premises must be caused by direct physical loss of or damage to property other than at the described premises; and (4) the loss or damage to property other than the described premises must be caused by or result from a covered cause of loss as set forth in the policy.²

Typically, the coverage will have a geographic limitation, providing that the physical damage which triggered the civil authority order has to be to property within a certain number of miles or feet from the insured location. Although almost all of the case law involves policy provisions that require an order of civil authority, some policies may contain separate ingress/egress coverage that does not require an act of civil authority to trigger coverage.³ Typically, insurance

policies will have a sublimit for these coverages, and there will usually be a deductible, likely measured by a certain number of days.

Civil authority cases have arisen in a number of contexts over the past 60 or so years. As early as 1958, the Pennsylvania Supreme Court issued two opinions in the aftermath of a hurricane after a mayor ordered all stores closed because of serious fire danger resulting from flash floods that broke water mains and cut off the water supply to the city.⁴ In the early 1970s, courts issued a number of opinions arising out of curfews imposed due to rioting after Martin Luther King Jr.'s death.⁵ There is also one California case that arose out of the riots in Los Angeles after the Rodney King verdict.⁶ Civil authority cases in the late 1990s and first few years of this century arose out of events like Hurricane Floyd,⁷ the closure of a bridge over a river after a barge collided with it,⁸ and the police closure of Santa Monica Pier to apprehend a suspect who had barricaded himself with hostages in an arcade.⁹ The events of September 11, 2001, also generated a significant number of civil authority cases.¹⁰

There are three issues that appear to be most often litigated in hurricane cases involving civil authority coverage.

WAS ACCESS PROHIBITED OR PREVENTED?

The first is whether the insured's access to its property was prohibited or prevented. *Kean, Miller, Hawthorne, D'Armond, McCowan & Jarman, LLP v. National Fire Insurance Co. of Hartford*,¹¹ arising out of Hurricane Katrina, is illustrative. The insured was a law firm in Baton Rouge, Louisiana. The governor declared a state of emergency. State police and local governmental officials asked and encouraged residents to stay off the streets on a certain day, if possible. The insured closed its business that day. The insured made a claim for loss of income under a civil authority provision, which required that the civil authority action "prohibit access" to the insured premises. The court granted summary judgment to the insurer, finding that there was no coverage. The court, citing to numerous cases, stated that "prohibiting" means more than "mere hampering or limitation," it means to "formally forbid" or



TIP

Even if your business was not physically damaged during the recent hurricanes, there may be coverage for your income loss if you had to close your operations due to an evacuation order.

“prevent.”¹² The court held that there was no evidence that the authorities formally forbade or prevented the insured’s employees from approaching, reaching, or entering the business. There were no roadblocks or street closures that prevented access. Further, the insured admitted that on the day it closed its business, two employees entered the office to restart the computer system.¹³

WAS THE ORDER ISSUED AS A RESULT OF PROPERTY DAMAGE?

The second frequently litigated issue is whether the civil authority order was issued due to or as a result of property damage.¹⁴ There are several hurricane cases, including one applying Texas law, that address this issue.

In *South Texas Medical Clinics, P.A. v. CNA Financial Corp.*,¹⁵ the insured owned and operated three medical clinics in Wharton County, Texas, and four clinics in surrounding counties. Hurricane Rita had damaged the Florida Keys as well as offshore rigs in the Gulf of Mexico. After entering the Gulf of Mexico it became a Category 5 hurricane, and one of the projected landfall areas was in Wharton County. A Wharton County judge issued an order requiring the evacuation of Wharton County for three

days. The insured closed its clinics in Wharton County, as well as its other clinics, because its database was located at and operated from its main office in Wharton County. Hurricane Rita did later make landfall near the Texas-Louisiana border, but far from Wharton County. The hurricane did not damage any of the clinics or any nearby property.

The insured sought coverage for its loss of income pursuant to a civil authority provision. The clause provided that the loss of income had to be caused by an 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 insured premises, caused by or resulting from any covered cause of loss. The insured argued that the “due to” causation requirement was met because one of the reasons the judge ordered a mandatory evacuation was that Hurricane Rita had caused property damage to Florida. The insurer contended that the “due to” standard requires a more direct causal link between the damage to other property and the civil authority order. The insurer argued that the judge issued the order as a precaution in advance of anticipated damage to properties in Wharton County, not “due to” the hurricane damage in Florida and offshore.

In a detailed opinion, the court, examining other cases and reviewing the facts, found as a matter of law that there was no coverage, and entered summary judgment for the insurance company. In particular, the court discussed and relied on *United Air Lines, Inc. v. Insurance Co. of the State of Pennsylvania*,¹⁶ a case involving the FAA’s shutdown of Reagan National Airport following the September 11 attacks. The court noted that *United Air Lines* held that “when the civil authority order is caused by the fear of future harm to the area where the

insured property is located, not by the actual physical damage inflicted on other property, there is no causal relationship between the civil authority order and the damage to other property, as required for coverage.”¹⁷ Following the reasoning of *United Air Lines*, which the court found consistent with other civil authority cases, the court concluded that the Wharton County judge’s decision to evacuate was based on the anticipated threat of damage to the county, not the actual physical damage that occurred in Florida and on oil rigs in the Gulf.¹⁸ The court stated that the only relevance of the prior damage was an indication of the harm that could result if the hurricane made landfall in Wharton County. Accordingly, the court said that the “causal link between the prior damage and the civil authority order is missing.”¹⁹

The Fifth Circuit Court of Appeals reached a similar conclusion in *Dickie Brennan & Co. v. Lexington Insurance Co.*²⁰ As Hurricane Gustav was approaching New Orleans, the mayor issued a mandatory evacuation order. The order declared a state of emergency because of anticipated high tides, intensive storms, hurricane force winds, and widespread severe flooding. Further, the hurricane had already damaged property in the Caribbean when the order was issued. There was, however, no damage in Louisiana when the order was issued. The insured operated restaurants in New Orleans and sought to recover its business losses due to their closure pursuant to a civil authority provision. The Fifth Circuit, persuaded by the reasoning in *South Texas Medical Clinics* and *United Air Lines*, affirmed the lower court’s summary judgment ruling in favor of the insurer, finding no coverage. The court opined: “Although it does not expressly address the proximity issue, the Lexington policy requires

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proof of a causal link between prior damage and civil authority action. The record in this case demonstrates no such link”²¹

WAS THE DAMAGE CAUSED BY A COVERED PERIL?

If there was property damage, the third frequently litigated issue is whether the damage was caused by a covered peril. Many policies exclude flood, so if the property damage that led to the order was flooding, then there should be no civil authority or ingress/egress coverage. For example, in *Narricot Industries, Inc. v. Fireman’s Fund Insurance Co.*,²² as a result of governmental orders arising out of Hurricane Floyd, an insured sought civil authority coverage

CONCLUSION

The devastating hurricanes of 2017—and those in the future—will generate many civil authority and ingress/egress claims. Faced with such a claim, one should carefully examine the policy language and apply it to the facts in light of the existing case law. Simply because civil authorities issued evacuation or curfew orders does not automatically mean there is civil authority coverage. ■

NOTES

1. For example, the civil authority clause in *Penton Media, Inc. v. Affiliated FM Ins. Co.*, No. 1:03 CV 2111, 2006 WL 2504907, at *1 (N.D. Ohio Aug. 29, 2006), *aff’d*, 245 F. App’x 495 (6th Cir. 2007), stated: “Coverage is

egress clause where hurricane-related flooding cut off access to an insured manufacturing facility).

4. *Cleland Simpson Co. v. Firemen’s Ins. Co.*, 140 A.2d 41 (Pa. 1958); *Simpson Real Estate Corp. v. Firemen’s Ins. Co.*, 140 A.2d 47 (Pa. 1958).

5. *See, e.g., Two Caesars Corp. v. Jefferson Ins. Co. of N.Y.*, 280 A.2d 305 (D.C. 1971); *Mac’s Pipe & Drum, Inc. v. N. Ins. Co.*, 280 A.2d 308 (D.C. 1971); *Bros., Inc. v. Liberty Mut. Fire Ins. Co.*, 268 A.2d 611 (D.C. 1970); *Allen Park Theatre Co. v. Mich. Millers Mut. Ins. Co.*, 210 N.W.2d 402 (Mich. Ct. App. 1973); *Southlanes Bowl, Inc. v. Lumbermen’s Mut. Ins. Co.*, 208 N.W.2d 569 (Mich. Ct. App. 1973); *Sloan v. Phoenix of Hartford Ins. Co.*, 207 N.W.2d 434 (Mich. Ct. App. 1973); *Adelman Laundry &*

POLICY LANGUAGE SHOULD BE APPLIED TO THE FACTS IN LIGHT OF EXISTING CASE LAW. SIMPLY BECAUSE CIVIL AUTHORITIES ISSUED EVACUATION OR CURFEW ORDERS DOES NOT AUTOMATICALLY MEAN THERE IS CIVIL AUTHORITY COVERAGE.

for business income losses at two facilities, one in North Carolina and one in Virginia. The policy for the North Carolina location covered both hurricane and flood. However, the policy for the Virginia location excluded flood, and also contained anticoncurrent causation language. The court held that there was no civil authority coverage for the Virginia facility. The court found that the “policy’s terms, read together, show that the conjunction of a covered peril and an excluded peril is not a ‘covered cause of loss.’”²³ The court explained: “Although Hurricane Floyd caused the damage to the other property, because flood here also caused the damage, the damage to the other property was not caused by a covered cause of loss.”²⁴

provided when access to the described location is prohibited by order of civil authority. This order must be given as a direct result of physical loss or damage from a peril of the type insured by this policy. The company will be liable for the actual amount of loss sustained at such location for a period of up to 30 consecutive days from the date of this action.”

2. *Dickie Brennan & Co. v. Lexington Ins. Co.*, 636 F.3d 683, 685 (5th Cir. 2011); *accord* *Kean, Miller, Hawthorne, D’Armond, McCowan & Jarman, LLP v. Nat’l Fire Ins. Co. of Hartford*, No. 06-770-C-M2, 2007 WL 2489711, at *3 (M.D. La. Aug. 29, 2007).

3. *See, e.g., Fountain Powerboat Indus., Inc. v. Reliance Ins. Co.*, 119 F. Supp. 2d 552, 555–56 (E.D.N.C. 2000) (finding coverage for loss under ingress/

Cleaners, Inc. v. Factory Ins. Ass’n, 207 N.W.2d 646 (Wis. 1973).

6. *Syufy Enters. v. Home Ins. Co. of Ind.*, No. 94-0756 FMS, 1995 WL 129229 (N.D. Cal. Mar. 21, 1995).

7. *See, e.g., Narricot Indus., Inc. v. Fireman’s Fund Ins. Co.*, No. 01-4679, 2002 WL 31247972 (E.D. Pa. Sept. 30, 2002); *Assurance Co. of Am. v. BBB Serv. Co.*, 593 S.E.2d 7 (Ga. Ct. App. 2003).

8. *St. Paul Mercury Ins. Co. v. Magnolia Lady, Inc.*, No. 2:97CV-153-B-B, 1999 WL 33537191 (N.D. Miss. Nov. 4, 1999).

9. *Santa Monica Amusements, LLC v. Royal Indem. Co.*, No. B155253, 2002 WL 31429795 (Cal. Ct. App. Oct. 31, 2002).

10. *See, e.g., United Air Lines, Inc. v. Ins. Co. of State of Pa.*, 439 F.3d 128 (2d Cir. 2006); *S. Hospitality, Inc. v.*



Zurich Am. Ins. Co., 393 F.3d 1137, 1139–41 (10th Cir. 2004); Penton Media, Inc. v. Affiliated FM Insurance Co., No. 1:03 CV 2111, 2006 WL 2504907 (N.D. Ohio Aug. 29, 2006), *aff'd*, 245 F. App'x 495 (6th Cir. 2007); Phila. Parking Auth. v. Fed. Ins. Co., 385 F. Supp. 2d 280, 289–90 (S.D.N.Y. 2005); Paradise Shops, Inc. v. Hartford Fire Ins. Co., No. 1:03-CV-3154-JEC, 2004 WL 5704715 (N.D. Ga. Dec. 15, 2004); City of Chicago v. Factory Mut. Ins. Co., No. 02 C 7023, 2004 WL 549447 (N.D. Ill. Mar. 18, 2004); Abner, Herrman & Brock, Inc. v. Great N. Ins. Co., 308 F. Supp. 2d 331, 336–37 (S.D.N.Y. 2004); 730 Bienville Partners, Ltd. v. Assurance Co. of Am., No. 02-106, 2002 WL 31996014 (E.D. La. Sept. 30, 2002), *aff'd*, 67 F. App'x 248 (5th Cir. 2003); Royal Indem. Co. v. Retail Brand Alliance, Inc., 822 N.Y.S.2d 268, 270 (App. Div. 2006); 54th St. Ltd. Partners, L.P. v. Fid. & Guar. Ins. Co., 763 N.Y.S.2d 243, 244 (App. Div. 2003); U.S. Airways, Inc. v. Commonwealth Ins. Co., 65 Va. Cir. 238 (2004); U.S. Airways, Inc. v. Commonwealth Ins. Co., 64 Va. Cir. 408 (2004). For a discussion of some of the September 11 cases, see Clark Schirle, *Time Element Coverages in Business Interruption Insurance*, 37 THE BRIEF, no. 1, Fall 2007, at 32.

11. No. 06-770-C-M2, 2007 WL 2489711 (M.D. La. Aug. 2, 2007).

12. *Id.* at *6.

13. *Id.*; see also *Commstop, Inc. v. Travelers Indem. Co. of Conn.*, No. 11-1257, 2012 WL 1883461, at *8–10 (W.D. La. May 17, 2012) (concluding that there was no civil authority coverage where a road construction project in front of the insured convenience store diminished or limited access to the store, and ruling that the insured must show that access to its premises was completely blocked); *Dixon Produce, LLC v. Nat'l Fire Ins. Co. of Hartford*, 99 P.3d 725, 729 (Okla. Civ. App. 2004) (affirming denial of coverage for the insured's loss of business income after a tornado hit the city based on a finding that even though some streets were closed and travel to

the business was not as convenient as it had been before the tornado, civil authority did not prohibit access to the insured's business).

14. Under civil authority or ingress/egress coverage, the physical damage has to be to property other than the insured premises. Further, there may be a geographic limitation under the policy. For example, the policy may provide that for there to be coverage, the property damaged has to be within so many miles or feet of the insured property. If the insured's property is physically damaged, there may be business interruption and/or extra expense coverage that may be triggered to compensate the insured for its loss of business income.

15. No. H-06-4041, 2008 WL 450012 (S.D. Tex. Feb. 15, 2008).

16. 439 F.3d 128 (2d Cir. 2006).

17. *S. Tex. Med. Clinics*, 2008 WL 450012, at *9.

18. *Id.* at *10.

19. *Id.*

20. 636 F.3d 683 (5th Cir. 2011).

21. *Id.* at 687; see also *Jones, Walker, Waechter, Poitevent, Carriere & Denegre, LLP v. Chubb Corp.*, No. 09-6057, 2010 WL 4026375 (E.D. La. Oct. 12, 2010) (finding no coverage under a civil authority provision for the insured's losses due to the New Orleans mayor's mandatory evacuation order in anticipation of Hurricane Gustav: "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."). *But see Assurance Co. of Am. v. BBB Serv. Co.*, 593 S.E.2d 7 (Ga. Ct. App. 2003) (affirming bench trial judgment in favor of the insured for civil authority coverage when the insured shut down restaurants due to an evacuation order in Brevard County, Florida; the county issued the order because Hurricane Floyd had caused damage in the Bahamas and was forecast to head to Brevard County).

22. No. 01-4679, 2002 WL 31247972 (E.D. Pa. Sept. 30, 2002).

23. *Id.* at *12.

24. *Id.*; see also *Bamundo, Zwal & Schermerhorn, LLP v. Sentinel Ins. Co.*, No. 13-cv-6672, 2015 WL 1408873 (S.D.N.Y. Mar. 26, 2015) (concluding that there was no civil authority coverage for a law firm that lost business when it could not access its office after evacuation orders were issued as a result of flooding of parts of Manhattan due to Hurricane Sandy; there was only coverage if the order of civil authority was the direct result of a covered cause of loss, and the policy contained a flood exclusion).

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