

Business Interruption for Denial of Access to Insured Property



Will your insurance cover you if a civil authority closes or denies access to your insured property due some natural or other catastrophe? The answer depends on the policy language.

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 Time Element

The last article in this column—"When Civil Authorities Take Over, Are You Covered?"—addressed the issue of coverage for business interruption as a result of an order of civil authority denying access to insured property. A closely related issue is coverage for business interruption due to a denial of access as a result of a covered peril.

Defining "Access"

A typical insurance policy wording provides:

Loss of Ingress or Egress: This policy covers loss sustained during the period of time when, as a direct result of a peril not excluded, ingress to or egress from real and personal property not excluded hereunder, is thereby denied.

Thus the elements for coverage are:

1. Ingress to or egress from insured property is prevented;
2. By a covered peril; and
3. A direct loss results.

Few, if any, of these terms will be defined by the policy; however, dictionary definitions may be relied on to determine their meaning. "Ingress" and "egress" are synonymous with "access," and "prevent" is synonymous with "deny." Thus, a covered peril that "impedes" or "hinders" access is insufficient to trigger coverage. Access must be, as a practical matter, impossible. (See discussion in last month's column.) Moreover, that denial of access must be the direct cause of a loss of business income. If the business would have been closed any way or was closed for a reason that was not the direct result of a covered peril, there can be no coverage for that loss of income.

Physical Damage Requirement

Note that "property damage" due to a covered peril is not an element of coverage under this form. This issue was discussed in *Fountain Powerboat Industries v Reliance Ins. Co.*, 19 F Supp 2d 552, 2000 U.S. Dist LEXIS 20644 (ED NC 2000). In this case, there was only one road leading to the insured facility which manufactured, distributed, and sold boats and boating equipment. Further, there was only one road that intersected with the road on which the insured facility was located.

In September 1999, Hurricane Floyd caused severe flooding in Eastern North Carolina, and the two roads that provided the sole means of vehicle access to the insured property were closed for 9 days. However, the insured property itself did not sustain physical damage. Pre-flood production levels were not reached until the end of October. The Reliance policy contained the ingress/egress provision quoted above.

Reliance argued that only a physical loss or damage could trigger a business interruption loss. In

holding for the insured, the court stated:

The court cannot find, and neither party has provided, any case in any jurisdiction that interprets an ingress/egress clause contained in the business interruption loss section of an insurance policy. The court believes that this is due to the fact the meaning of the clause is exceedingly clear. Loss sustained due to the inability to access the Fountain facility and resulting from a hurricane is a covered event with no damages physical damage [sic] to the property required.

* * *

Furthermore, Reliance was aware of the location of the Fountain facility and was aware that the facility had a limited access. The court can only conclude that the parties intended that the policy would provide coverage not only when the property itself was inaccessible, but also when the only route to the Facility caused the property to be inaccessible.

The court went on to note that its conclusion was bolstered by the coverage provision for denial of access by order of civil authority, the terms of which did not require physical damage. One could argue that, so long as some means of access were available, access is not "prevented." Thus, even if the road to Fountain's plant were closed, theoretically, access was still available by helicopter or parachute. The efforts by the insured to mitigate the loss and resume production impressed the court and doubtless contributed to imposition of a "reasonableness" limitation on the extent to which access must be "prevented."

The efforts of Fountain to pick up employees and drive them to work are extraordinary. The court finds that the ingress/egress provision relates only to reasonable access to the Fountain facility and does not therefore apply to extraordinary efforts by Fountain to get to work over closed and flooded roads. [Fn. 4.]

Denial of Access Provision

Reliance sought to rely on *Harry's Cadillac-Pontiac-GMC Truck Co., Inc. v Motors Ins. Corp.*, 486 SE2d 249 (NC App 1997). In that case, a blanket of snow prevented access to the insured car dealership for a week. The storm also caused minor damage to the roof of the facility, which was quickly repaired. In affirming the insurer's denial of coverage, the court noted that the roof damage was not the proximate cause of the loss of business income. The *Harry's Cadillac* policy, moreover, lacked any provision providing coverage for denial of access, a fact the *Fountain Powerboat* court relied on in rejecting *Harry's Cadillac* as inapposite to its decision.

Conclusion

We believe the court is correct when it notes there are no other reported decisions that discuss this coverage. Therefore, *Fountain Powerboat* provides the only written guidance on this provision. However, as is almost universally the case, the outcome in *Fountain Powerboat* turned on the policy language. The policy at issue lacked a physical damage requirement, just as the *Harry's Cadillac* policy lacked a denial of access provision. Therefore, policy language must be consulted before relying on this or any other decision.