

CIVIL AUTHORITY COVERAGE IN THE AFTERMATH OF HURRICANES AND OTHER NATURAL DISASTERS

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“We will pay for the actual loss of Business Income you sustain and necessary Extra Expense 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 described premises, caused by or resulting from any Covered Cause of Loss.” Business Income (And Extra Expense) Coverage Form, CP 00 30 10 00, p. 2 of 8.

The recent lull in hurricane activity came to an abrupt end over the past few weeks with Hurricanes Harvey and Irma. In addition to the myriad of coverage issues created by these monstrous storms, Civil Authority coverage may be an important consideration.

Civil Authority provisions are intended to apply where access to a policyholder’s property is prevented or prohibited by an order of a civil authority issued as a direct result of physical damage to other properties near the policyholder’s property.¹ A policyholder may be entitled to recover a loss of business income under this provision if it is caused by (1) an action of civil authority; (2) prohibiting access to the policyholder’s property; (3) caused by direct physical loss of or damage to property other than the policyholder’s property; and (4) the loss or damage to property must be caused by a loss covered under the policy.²

Coverage disputes typically center around the first three of these elements.

WHAT IS AN “ACTION OF CIVIL AUTHORITY?”

As observed by the United States District Court for the Eastern District of Pennsylvania, absent language to the contrary, Civil Authority coverage does not require a formal order.³ It is not even necessary that there be a written order to constitute an “action of civil authority.”⁴ A township sending police officers to bar access to a road and instructing businesses to halt operations constituted an action of civil authority within the scope of Civil Authority coverage.⁵ Courts have also held that a recommendation to remain off the streets during a hurricane was an action by civil authority.⁶

WHEN IS ACCESS TO PROPERTY “PROHIBITED?”

While courts have liberally interpreted what constitutes an “action of civil authority,” their focus narrows in determining when access to property is been prohibited. Courts have refused to find coverage under Civil Authority Coverage unless access to the policyholder’s property was “totally and completely prevented” or “made impossible” by the action of civil authority.⁷ Conversely, where the action of civil authority merely hinders access to the policyholder’s property, the coverage is not available.⁸

For example, *Commstop, Inc. v. Travelers Indemnity Co.*⁹, involved a road renewal program run by the State of Louisiana. As part of the program, work was to be performed on a portion of the road in front of the plaintiff's business. Traffic was detoured, thus reducing the traffic in front of the plaintiff's business. However, access to plaintiff's property was never completely prevented. Therefore, there was no Civil Authority Coverage.¹⁰

The United States District Court of the Middle District of Pennsylvania faced a similar issue in *Ski Shawnee, Inc. v. Commonwealth Ins. Co.*¹¹ A bridge collapsed on the main route of ingress to the plaintiff's ski resort. The road was closed for repairs, but the plaintiff's resort remained accessible via alternative routes. The court refused to extend Civil Authority coverage to these circumstances, noting that there was no inability to access the premises, nor was there a forced closing by civil authority.¹²

Travel advisories have been held insufficient to satisfy the requirement of a prohibition.¹³ In *Kean*, the Governor of Louisiana declared a state of emergency in connection with Hurricane Katrina. As part of the declaration, residents were encouraged to stay off the streets until further notice. The plaintiff closed its office, but the court refused to grant coverage because "the advisories and recommendations given did not actually 'prohibit access' to the insured premises."¹⁴

WHEN IS AN ACTION "DUE TO DIRECT PHYSICAL LOSS OF OR DAMAGE TO PROPERTY?"

Analyzing the first two elements of a claim for Civil Authority coverage is typically straightforward. However, determining whether an action of civil authority is due to property damage sometimes requires courts to engage in a bit of intellectual gymnastics.¹⁵

It is clear that when civil authority orders are issued in connection with storm damage that is *actually occurring* in the vicinity of the policyholder's property, courts will find that the order is "due to property damage."¹⁶ However, as illustrated by the recent events in Texas, Florida, Georgia, and South Carolina, state and local governments frequently order evacuations or impose curfews in anticipation of hurricanes and other natural disasters. Where such preventative measures take place, courts have difficulty connecting an alleged loss of business with property damage.

South Texas Medical Clinics involved a civil authority order requiring evacuation in advance of the anticipated landfall of Hurricane Rita. The evacuation order was issued due to fear the hurricane would strike nearby after observing damage the storm caused in other locations. As a result of the evacuation order, the plaintiff was forced to shut down several of its medical clinics. The court held that the evacuation order was not issued due to the property damage that had occurred in other locations, but due to the anticipated threat to Texas. The court reasoned that when the only role prior damage to other property plays in deciding whether to issue a civil authority order is to provide a basis for fearing future damage, the causal link between the prior damage and the civil authority order is absent.¹⁷ This appears to be rule followed by most jurisdictions.¹⁸

The Court of Appeals of Georgia reached the opposite conclusion on substantially similar facts.¹⁹ In *BBB Service Company*, Brevard County, Florida issued an evacuation order in connection with

the anticipated landfall of Hurricane Floyd. Evidence was introduced to suggest that the decision to issue the order was made out of concern for the anticipated impact of the storm after county officials observed the damage caused by the storm in other areas. The court held that this rationale was sufficient to establish that the evacuation order was issued “due to” property damage in other locations.²⁰

Before Hurricanes Harvey and Irma made landfall, authorities in Texas, Florida, South Carolina, and Georgia issued evacuation orders and imposed curfews. These preventative measures will undoubtedly be the focus of numerous claims for Civil Authority coverage. As illustrated above, there is no magic bullet for these claims. Insurance companies will need to conduct a thorough investigation and analysis of the reasons for the civil authority order with detailed consideration of the relevant legal authority.

The attorneys at Horst Krekstein & Runyon pride ourselves on being at the forefront of developing insurance coverage issues. If you would like additional information concerning this or any other issue, please do not hesitate to contact us.

¹ See Clark Schirle, *Time Element Coverages in Business Interruption Insurance*, 37 *The Brief* 32, 38 (2007).

² See *Dickie Brennan & Co. v. Lexington Ins. Co.*, 636 F.3d 683, 685 (5th Cir. 2011)(citing *Kean, Miller, Hawthorne, D’Armond McCowan & Jarman, LLP v. Nat’l Fire Ins. Co. of Hartford*, 2007 U.S. Dist. LEXIS 64849, *9 (M.D.La. Aug. 2, 2007)).

³ See *Narricot Indus. V. Fireman’s Fund Ins. Co.*, 2002 U.S. Dist. LEXIS 19074 (E.D.Pa. Sept. 30, 2002).

⁴ *Id.*

⁵ *Id.*, at *14.

⁶ See *Kean, Miller, Hawthorne, D’Armond McCowan & Jarman, LLP v. Nat’l Fire Ins. Co. of Hartford*, 2007 U.S. Dist. LEXIS 64849, *9 (M.D.La. Aug. 2, 2007).

⁷ See e.g., *Commstop, Inc. v. Travelers Indemnity Co.*, 2012 U.S. Dist. LEXIS 69962 (W.D.La. May 17, 2012). See also, *Southern Hospitality, Inc. v. Zurich American Ins. Co.*, 393 F.3d 1137, 1141 (10th Cir. 2004)(holding plain and ordinary meaning of “prohibits access” is to “formally forbid or prevent”).

⁸ See e.g., *Southern Hospitality, Inc. v. Zurich American Ins. Co.*, 393 F.3d 1137 (10th Cir. 2004).

⁹ 2012 U.S. Dist. LEXIS 69962 (W.D.La. May 17, 2012).

¹⁰ *Id.*, at *33.

¹¹ 2010 U.S. Dist. LEXIS 67092 (M.D. Pa. July 6, 2010).

¹² *Id.*, at *12.

¹³ See *Kean, Miller, Hawthorne, D’Armond McCowan & Jarman, LLP v. Nat’l Fire Ins. Co. of Hartford*, 2007 U.S. Dist. LEXIS 64849 (M.D.La. Aug. 2, 2007).

¹⁴ *Id.*, at *11.

¹⁵ Compare *S. Tex. Med. Clinics, P.A. v. CNA Fin. Corp.*, 2008 U.S. Dist. LEXIS 11460 (S.D.Tex. Feb. 15, 2008) with *Assurance Co. of Am. v. BBB Serv. Co.*, 593 S.E.2d 7 (Ga.Ct.App. 2003).

¹⁶ See e.g., *Narricot Indus. v. Fireman's Fund Ins. Co.*, 2002 U.S. Dist. LEXIS 19074 (E.D.Pa. Sept. 30, 2002).

¹⁷ *S. Tex. Med. Clinics, P.A. v. CNA Fin. Corp.*, 2008 U.S. Dist. LEXIS 11460, *31 (S.D.Tex. Feb. 15, 2008).

¹⁸ See e.g., *Two Caesars Corp. v. Jefferson Ins. Co.*, 280 A.2d 305 (D.C. App. 1971)(imposition of a curfew to facilitate movement of police and fire equipment was not due to property damage); *United Air Lines v. Ins. Co. of the State of Pa.*, 439 F.3d 128 (2d Cir. 2006)(airport shutdown based on fear of future terrorist attacks was not due to property damage); *Dickie Brennan & Co. v. Lexington Ins. Co.*, 636 F.3d 683 (5th Cir. 2011)(mandatory evacuation order issued due to fear of future hurricane damage was not issued due to property damage in other locations).

¹⁹ See *Assurance Co. of Am. v. BBB Serv. Co.*, 593 S.E.2d 7 (Ga.Ct.App. 2003).

²⁰ *Id.*, at *8-9.