



## THE BASICS OF TIME ELEMENT COVERAGE

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### Introduction

Time element coverage generally refers to insurance for financial losses resulting from the inability to use property due to physical damage. This white paper will explain the different types of time element coverages that may be available under a commercial policy, including Business Income, Extra Expense, Civil Authority, Contingent Business Income, Ingress/Egress, Supply Chain Coverage, and Service Interruption/Utility Service Coverage.

### Business Income Coverage

Business Income Coverage provides for the net income that a business loses due to a covered loss during the time that the insured property cannot be used. For coverage to apply, the commercial policy will likely require that the suspension of operations be the result of direct physical loss or damage to the insured property caused by a covered peril. Coverage will likely be available for a “period of restoration,” which may be measured as the reasonable period of time that the property *should* be repaired with reasonable speed and quality.

The phrase “direct physical loss or damage”, and similar variations, have been the subject of litigation surrounding business interruption losses caused by COVID-19 and/or the associated governmental orders closing or restricting certain businesses. Courts have generally found that the COVID-19 virus, and/or the related governmental orders, do not constitute direct physical loss or damage.<sup>1</sup>

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<sup>1</sup> See *Wilson v. USI Insurance Serv. LLC*, 2023 U.S. App. LEXIS 303, \*19-20 (3d Cir. Jan. 6, 2023) (“...the loss of the ability to use property in certain ways does not render the properties useless or uninhabitable. The properties could certainly be used or inhabited, just not in the way the businesses would have liked.”); *Legal Sea Foods, LLC v. Strathmore Ins. Co.*, 36 F.4th 29 (1st Cir. 2022); *10012 Holdings, Inc. v. Sentinel Ins. Co.*, 21 F.4th 216 (2d Cir. 2021); *Uncork & Create LLC v. Cincinnati Ins. Co.*, 27 F.4th 926 (4th Cir. 2022); *Terry Black's Barbecue, L.L.C. v. State Auto. Mut. Ins. Co.*, 22 F.4th 450 (5th Cir. 2022); *Santo's Italian Café LLC v. Acuity Ins. Co.*, 15 F.4th 398 (6th Cir. 2021); *Sandy Point Dental, P.C. v. Cincinnati Ins. Co.*, 20 F.4th 327 (7th Cir. 2021); *Oral Surgeons, P.C. v. Cincinnati Ins. Co.*, 2 F.4th 1141 (8th Cir. 2021); *Mudpie, Inc. v. Travelers Cas. Ins. Co. of Am.*, 15 F.4th 885 (9th Cir. 2021); *Goodwill Indus. of Central Okla., Inc. v. Phi-la. Indem. Ins. Co.*, 21 F.4th 704 (10th Cir. 2021); *Gilreath Family & Cosmetic Dentistry, Inc. v. Cincinnati Ins. Co.*, No. 21-11046, 2021 U.S. App. LEXIS 26196, 2021 WL 3870697 (11th Cir. Aug. 31, 2021); but see *Huntington Ingalls Indus., Inc. v. Ace Am. Ins. Co.*, No. 2021-173, 2022 Vt. LEXIS 47, 2022 WL 4396475, at \*11 (Vt. Sept. 23, 2022) (holding that a complaint that alleged

## Extra Expense Coverage

Extra Expense provisions are intended to provide coverage for those necessary additional expenses incurred in the operation of a business following direct physical loss to a property. For instance, if there was a fire at a commercial property, in addition to potentially providing replacement of business income, an insurance policy could also provide Extra Expense protection such as the cost of relocating the business to another facility.<sup>2</sup>

## Civil Authority Coverage

Civil Authority provisions cover the loss of business income caused when an action of civil authority prohibits access to the insured property due to physical loss or damage to property other than the insured location. For instance, the coverage might apply where a local government prohibits access to a downtown block, including the insured premises, because of a fire at a nearby property. Courts have held that for coverage to apply, access to the insured premises must be completely prevented by an action of civil authority,<sup>3</sup> and that the governmental orders must be in response to dangerous physical conditions, rather than preventative in nature.<sup>4</sup>

This coverage has also been considered in the recent COVID-19 business interruption litigation. Since direct physical loss or damage to property is often a pre-requisite to coverage under civil authority provisions -- similar to business income and extra expense coverages -- many courts have found that the governmental orders in response to the COVID-19 pandemic do not trigger civil authority coverage.<sup>5</sup>

## Ingress/Egress Coverage

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COVID-19 adhered to and altered property survived judgment on the pleadings under Vermont's "extremely liberal" pleading standard).

<sup>2</sup> See *Am. Med. Imaging Corp. v. St. Paul Fire & Marine Ins. Co.*, 949 F. 2d 690 (3d Cir. 1991).

<sup>3</sup> 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 the plain and ordinary meaning of "prohibits access" is to "formally forbid or prevent"); *TMC Stores, Inc. v. Federated Mut Ins. Co, No A04-1963*, 2005 WL 1331700, at 4 (Minn Ct. App, June 7, 2005).

<sup>4</sup> See e.g., *Cleland Simpson Co. v. Firemen's Ins. Co.*, 11 Pa. D. & C.2d 607 (Lackawanna C.C.P. 1957), *aff'd without opinion*, 392 Pa. 67, 140 A.2d 41 (Pa. 1958); *United Air Lines, Inc. v. Insurance Co. of the State of PA.* 439 F.3d 128 (2d Cir. 2006) (order based on fear of future attacks insufficient to trigger civil authority coverage).

<sup>5</sup> See *Penton Media, Inc. v. Affiliated FM Ins. Co.*, 245 F. App'x 495 (6th Cir. 2007); *Three Won Three, Corp. v. Property-Owners Ins. Co.*, 2022 Mich. App. LEXIS 2851, 2022 WL 1594828 (Mich. Ct. App., May 19, 2022); *Wilson v. USI Insurance Serv. LLC*, 2023 U.S. App. LEXIS 303 (3d Cir. Jan. 6, 2023)

Loss of Ingress or Egress provisions extend coverage for losses incurred when access to or from an insured location is prevented. Unlike the Civil Authority Coverage, no action or order from a civil agent is required under this endorsement. Whether physical damage to your insured premises is required depends on the specific policy language. A change in the ingress/egress provision can lead to a significantly different result.<sup>6</sup>

### **Contingent Business Interruption Coverage**

Contingent Business Interruption Coverage, sometimes referred to as “Supply Chain Coverage” or “Contingent Time Element Coverage,” insures against business interruption or extra expense losses caused by physical loss, damage or other disruption not to the insured property, but instead to a supplier, customer, or another entity in a supply chain. In other words, contingent business interruption coverage covers financial losses due to third party supply chain issues.<sup>7</sup> This endorsement is triggered by physical loss or damage from an insured peril sustained by a customer or supplier, which results in a loss of a dependent customer or inability to obtain materials needed to produce the insured’s product.<sup>8</sup>

Coverage may also depend on how closely connected the supplier is to the insured’s business, as many of these endorsements require a direct relationship between the insured and the supplier.<sup>9</sup> Others will specifically define what constitutes a “dependent property.”<sup>10</sup> Finally, an contingent time element endorsement will likely require that the damage be caused by a covered peril.<sup>11</sup>

### **Service Interruption or Utility Services Coverage**

Service interruption coverage generally covers financial losses caused by interruption of utility services (such as water, power, communications, etc.) at the insured property, depending on the specific language in the policy.<sup>12</sup> This type of coverage, primarily included as a policy

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<sup>6</sup> See *Fountain Powerboat Indus. v. Reliance Ins. Co.*, 119 F.Supp.2d 552, 554 (E.D.N.C. 2000) (holding that the specific policy provision in that case did not require property damage); *but see County of Clark v. Factory Mut. Ins. Co.*, 2005 U.S. Dist. LEXIS 47574 (D.Nev. March 28, 2005) (holding that the policy provision included a requirement that prevention of ingress/egress be the direct result of physical damage).

<sup>7</sup> See Pennsylvania Insurance Department, FAQ: Covid-19 Business Interruption Insurance. Retrieved from: <https://www.insurance.pa.gov/coronavirus/Pages/COVID-Business-Insurance.aspx> (“Contingent business interruption insurance covers when your property damage occurs on someone else’s property but causes you a business interruption, like a supply chain disruption.”) (last visited, Jan 31, 2023).

<sup>8</sup> See *Penton Media, Inc. v. Affiliated FM Ins. Co.*, 245 Fed. Appx. 495 (6th Cir. 2007).

<sup>9</sup> See *Millennium Inorganic Chems. Ltd. v. Nat’l Union Fire Ins. Co. of Pittsburg*, 744 F.3d 279 (4th Cir. 2014).

<sup>10</sup> See *e.g., S. Hospitality, Inc. v. Zurich Am. Ins. Co.*, 2003 U.S. Dist. LEXIS 18325 (W.D.Okla. Sept. 30, 2003).

<sup>11</sup> *Id.*

<sup>12</sup> See generally, Scott G. Johnson and Amy M. Churan, *The August 2003 Blackout And Insurance Coverage For Power Outage Losses*, 39 TORT TRIAL & INS. PRAC L.J., 813 (Spring 2004).

endorsement, may require that the utility service provider be specifically named in the policy (water, communications, and/or power) and that there is *physical* damage to the third-party supplier. This provision may also include a waiting period, i.e., only provide coverage if services are interrupted for longer than a specified period, such as 72 hours.

## **Conclusion**

While we have provided a general outline of potentially available time element coverages, the specific terms and requirements of each provision will vary across different policy forms. It is important that insurance professionals be aware of how these provisions operate in a general manner, but a close reading of the specific terms of the applicable policy is also necessary when considering coverage.

At Horst Krekstein & Runyon, LLC we pride ourselves on being experts regarding Time Element coverages accompanying coverage and valuation issues. If you would like additional information concerning this or any other issue, please do not hesitate to contact us.