

# Catastrophic Loss

## **Time Element Extensions Of Business Income Coverage: New Lessons Apply In New And Old Contexts**

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# Commentary

## Time Element Extensions Of Business Income Coverage: New Lessons Apply In New And Old Contexts

By  
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### I. Introduction

The terrorist attacks of 9/11 have spawned much coverage litigation and more articles involving the applicability of time element extensions of business income provisions of insurance policies. Many of these articles have focused on certain aspects of "Civil Authority" and "Ingress/Egress" provisions such as what constitutes a "prohibition of access" under those provisions. This essay primarily addresses a different but equally important issue involving time element provisions, which has not received as much attention in the literature — namely, the degree of causal nexus that must be shown between a prohibition of access to the insured's premises and physical damage that has occurred. This issue has been at the heart of several 9/11 cases and has potentially significant ramifications for coverage disputes, not only in the context of hurricanes and other natural disasters, but also in the context of other types of terrorist attacks that were once, but are no longer, unimaginable.

### II. The 'Civil Authority' Clause

In general, "Civil Authority" provision typically require the following elements:

- (1) an "action" or "order" of a "Civil Authority"
- (2) that "prohibits access" or "impairs" access to the insured's premises and that
- (3) results from physical loss or damage
- (4) that occurs at a location *other* than at the insured's premises

However, variations in the language of Civil Authority provisions may be important in determining whether or not there is coverage. As will be discussed below, this is especially true with respect to the third and fourth factors — namely, the degree to which there must be a causal nexus between the physical damage and the action of the Civil Authority; and, potential limitations on the location of where the physical damage must occur.

#### A. 'Action' Or 'Order' Of 'Civil Authority'

##### 1. 'Civil Authority'

The term "civil authority" is typically not defined in insurance policies. One court has interpreted the term to encompass "civil officers in whom a portion of the sovereignty is vested and in whom the enforcement of municipal regulations or the control of the general interest of society is confided . . . ."<sup>1</sup>

The dictionary defines "civil" to mean, in relevant part, "1a: of or relating to citizens . . . b: of or relating to the state or its citizenry . . . 3a: of, relating to, or based on civil law . . . c: established by law . . . 5: of, relating to, or involving the general public, their ac-

tivities, need, or ways, or civic affairs as distinguished from special (as military or religious) affairs.”<sup>2</sup>

## 2. ‘Action’ Or ‘Order’

Many policies require that there be an “action” of a civil authority that prohibits access. Other policies require that there be an “order” of a civil authority. The potential distinction between these two terms is pointed up by the fact that some policies require either an “action or order” of a civil authority.<sup>3</sup>

The distinction can be of practical importance. For example, where a policy requires an “action” of a civil authority, once it is shown that local police took actions to prohibit access, a policyholder will argue that it is not necessary to prove in addition who if anyone issued an “order” that those actions be undertaken, or to produce a formal written order to that effect.

### B. ‘Prohibits Access’ vs. ‘Impairs Access’

Civil Authority clauses often require that the action or order of a Civil Authority “prohibits access” to the insured’s premises. In contrast, some Civil Authority provisions explicitly require that access merely be “impaired,” rather than “prohibited”<sup>4</sup>. This distinction can be important. Where policies require that access be “prohibited,” courts have generally interpreted this provision to require that access must be forbidden, rather than merely hindered. For example, in *Abner, Herman & Brock, Inc. v. Great Northern Ins. Co.*<sup>5</sup>, the court held that coverage was potentially available for the period when access to the insured’s Manhattan office was forbidden in the three days immediately following the September 11th terrorist attacks — but coverage was not available thereafter, when vehicular traffic was restricted, but pedestrian and public transit access was possible. See also, *Southern Hospitality, Inc. v. Zurich American Ins. Co.*<sup>6</sup>; *730 Bienville Partners, Ltd. v. Assurance Co. of America*<sup>7</sup>; (FAA orders prohibiting air travel on September 11, 2001 may have hindered access, but did not “prohibit access” to the insured’s hotels that were located near airports, although those orders may have adversely affected the insured’s business).

One context in which the question of access “prohibition” has arisen is in 9/11-related coverage claims initiated by businesses that operated food, beverage and other concessions at airports around the country, as well as municipalities and other airport operators.

These plaintiffs have claimed that actions of civil authorities prohibited access to airports in the immediate aftermath of the 9/11 attacks on the World Trade Center and Pentagon. Plaintiffs have commonly alleged two different types of access prohibitions. First, on the morning of 9/11, the FAA issued a series of emergency orders that prohibited all domestic commercial air travel for several days. Second, plaintiffs have argued that apart from those FAA orders, numerous airport authorities took actions to evacuate airport concourses and terminals.

Several courts have stated that the FAA orders themselves prevented access to airports, by preventing the public from flying to or from them. *City of Chicago v. Factory Mut. Ins. Co.*<sup>8</sup> (ingress to and egress from O’Hare airport was prevented by the FAA order); *County of Clark v. Factory Mut. Ins. Co.*<sup>9</sup> (“The prevention of ingress to and egress from the insured locations is indisputably the result of the FAA’s mandatory ground stop order.”); *US Airways, Inc. v. Commonwealth Ins. Co.*<sup>10</sup>, (FAA orders closing the nation’s airspace were covered events under Civil Authority provision). Compare *The Paradies Shops, supra* (FAA orders did not “specifically” prohibit access as required by the policy at issue). In *HMSHost Corporation v. Zurich American Ins. Co.*<sup>11</sup>, on the defendant’s motion for summary judgment, the Court found it unnecessary to rule on this issue because other evidence established that airport authorities had taken actions to prohibit access.<sup>12</sup>

Several courts have found that, irrespective of the FAA orders, airport authorities themselves took action to prohibit access to airports in the wake of the 9/11 attacks. *United Airlines, Inc. v. Insurance Co. of the State of Pennsylvania*<sup>13</sup>; *US Airways, supra*; *HMSHost Corporation, supra* (Order denying defendant’s motion for summary judgment, March 6, 2006, on file with the author). In *The Paradies Shops, supra*, the Court found that plaintiff had not proven that airport authorities had taken action to prohibit access at airports around the country where Paradies did business. The court found that hearsay affidavits submitted by Paradies managers did not provide a sufficient evidentiary basis to defeat the defendant’s motion for summary judgment. In contrast, in *HMSHost Corporation, supra*, depositions taken of airport officials around the country provided sufficient proof of access prohibitions to establish coverage.

The differing outcomes in *Paradies* and *HMSHost* point up the fact that insurance companies are putting policyholders to their proof on critical factual issues that may be “common knowledge” and readily provable, but where it will require substantial time and effort on the part of the policyholder to gather admissible evidence.

### C. The Required Nexus Between Action Of Civil Authority And Damage Elsewhere

A key component of Civil Authority provisions is that there must be some link between actions taken by civil authorities to prohibit access to the insured's location and damage caused elsewhere. The exact nature of the required link, however, has been subject to much litigation and ultimately may depend on wording of the policy at issue.

In cases arising out of the 9/11 attacks, policyholders contend that the actions prohibiting access to airports and other insured locations were caused by the attacks on, and damage to, the World Trade Center (WTC) and Pentagon. Insurance companies, on the other hand, contend that any access prohibitions resulted from fears of further attacks, rather than the damage to the WTC and Pentagon.

Insurance companies have prevailed on this issue in most, but not all, cases. The significance of this issue is hardly confined to 9/11 cases; it can be a particularly pivotal issue in determining coverage disputes in other types of disasters. For example, in the case of a hurricane or tornado, when a county or city government orders an area evacuated, does it do so because of prior damage that has already occurred elsewhere, or because of a fear of the damage that may strike within its jurisdiction? Or imagine what, prior to 9/11, was barely imaginable. If a terrorist detonates an explosive device at the Governor's mansion and the police then evacuate an area around the State legislature or other public buildings, have those access prohibitions been initiated because of damage done at the Governor's mansion or because of a fear of future damage?

In order to answer this question, a preliminary issue must first be addressed: Does the Civil Authority provision require causation to be parsed this finely?

The answer to these and related questions may depend on the precise wording of the policy at issue. Consider the following variations in language:

- (1) “We will pay for the actual loss of ‘business income you sustain . . . caused by action of civil authority that prohibits access to your premises **due to** direct physical loss of or damage to property [other than the insured premises].”
- (2) “We will pay for the actual loss of Business Income you sustain . . . caused by action of civil authority that prohibits access to the described premises **as a direct result of** damage to [other property]”.
- (3) “This policy is extended to cover the loss sustained during the period of time when access to real or personal property is impaired by order or action of civil or military authority issued **in connection with or following** a peril insured against.”

In cases where the Civil Authority provision requires that the prohibition of access be a “direct result” of damage that occurs elsewhere, courts have ruled against the insured, holding that actions taken by the FAA and airport authorities in the wake of the 9/11 attacks were not the “direct result” of damage to the WTC and Pentagon but were instead the “direct result” of a fear of future attacks.. *E.g., United Airlines, supra; The Paradies Shops, supra.*

In contrast, in *HMSHost Corporation, supra*, the policy required only that the access prohibition be “due to” damage occurring elsewhere. The Court found that there was clearly a sufficient causal link between the crashes at the WTC and Pentagon and the actions of civil authorities prohibiting access to airports to establish coverage — that the actions of civil authorities were “due to” the WTC/Pentagon crashes within the meaning of the policy. Prior to *HMSHost Corporation*, an analogous result was reached by a Georgia appellate court in a case involving the application of the identical Civil Authority provision to Hurricane Floyd. In *Assurance Co. of America v. BBB Service Co., Inc.*<sup>14</sup>, the court reversed the lower court's grant of summary judgment to the defendant and remanded the case for a determination as to whether an evacuation order had been issued, “at least in part,” due to damage that had occurred elsewhere. On remand, Brevard County officials testified that they had ordered the evacuation for several reasons — including that the “storm had been causing damage in its path; the forecast that the storm was headed to Brevard

County; and the anticipated impact of the storm if it reached Brevard County.” On subsequent appeal, the court of appeals held that this evidence was sufficient to establish that the evacuation had been “due to” damage caused elsewhere as required by the policy — it was sufficient that “damage to property other than the insured premises was a basis for the evacuation order.”<sup>1516</sup> The *Assurance Co. of America* and *HMSHost* cases suggest that — at least where the Civil Authority provision merely requires that an access prohibition be “due to” damage occurring elsewhere — any attempted distinction between damage that has already occurred and a fear of future damage is an unduly artificial distinction for purposes of determining coverage.

Applicable State case law concerning causation in the context of insurance policies may help to inform this issue. See, e.g., *The Hartford Steam Boiler Inspection and Ins. Co. v. Henry Sonneborn & Co.*<sup>17</sup> (finding coverage under an insurance policy covering “all immediate loss or damage caused by the explosion collapse, or rupture of steam boiler” where the explosion of the boiler “put in motion” a series of events that ultimately caused property damage). Moreover, the determination of causation is quintessentially a question for the jury.<sup>18</sup>

#### **D. Damage Occurring Elsewhere: Where Does It Have To Occur?**

By its terms, the Civil Authority clause provides coverage when damage occurs to property other than the insured premises, leading to an action of a civil authority that prohibits access to the insured’s location. Again, policy provisions vary significantly as to exactly where the damage must occur. Some policy provisions require that the damage occur to property within 1,000 feet of the insured’s location. E.g., *Clark County, supra*. Other policies require that the damage occur “adjacent to” the insured’s premises. E.g., *United Airlines, supra*. Other policies contain no geographical limitation. E.g., *HMSHost Corporation, supra*.

### **III. Ingress/Egress Clauses**

Ingress/Egress clauses are similar to Civil Authority clauses in that they provide coverage for business losses (subject to defined limitations) that are sustained when physical damage makes it impossible to gain access to the insured’s premises. Under the In-

gress/Egress provision, however, it is not the action of a civil authority that must prohibit access, but rather the physical damage itself must prevent access to the insured’s premises, and cause the insured’s business losses. See, e.g., *Fountain Powerboat Industries, Inc. v. Reliance Ins. Co.*<sup>19</sup> (applying Ingress/Egress provision where Hurricane Floyd caused flooding of the only road providing access to plaintiff’s business). A typical provision was at issue in *Clark County, supra*:

This Policy covers the Actual Loss Sustained . . . due to the necessary interruption of the Insured’s business due to the prevention of ingress to or egress from an Insured Location, whether or not the premises or property of the Insured is damaged, provided that such prevention is a direct result of physical damage of the type insured by this Policy, to the kind of property not excluded by this Policy.

In *City of Chicago, supra*, the plaintiff sought recovery under the Ingress/Egress provision for business losses sustained at O’Hare airport in the wake of the 9/11 terrorist attacks, arguing that damage to the World Trade Center had caused a prevention of ingress/egress to and from O’Hare. . . . The district court granted the insurance company’s motion for summary judgment, finding that the direct cause of business interruption at O’Hare airport was the FAA orders shutting down air commerce, and not the damage to the World Trade Center. Moreover, since the policy limited coverage to damage that occurred within 1,000 feet of O’Hare, damage to the World Trade Center could not trigger the Ingress/Egress clause. This holding was followed by the district court in *Clark County, supra*.

Nonetheless, in the case of natural disasters or terrorist attacks, the Ingress/Egress provision will undoubtedly continue to be relied upon by insureds as an alternative means to recover business income losses in cases where access is prevented by virtue of physical damage to roads leading to the insured’s premises.

### **IV. Extended Coverage**

Typically, a Civil Authority or Ingress/Egress provision will specifically limit the number of days of access prohibitions for which business interruption losses may be recovered. The period typically ranges for two to four weeks, but may be subject to negotiation. (In

the *HMSHost* case, at the time of the policy renewal plaintiff's broker negotiated an extension to cover 90 days of access prohibitions).

At the same time, however, policies typically contain provisions for extended periods of coverage for business interruption. In certain circumstances. In *HMSHost, supra*, plaintiff sought to recover for business income losses sustained for a period of sixty days after the termination of access prohibitions, based on the policy's Extended Coverage provision which stated that:

We will pay for the actual loss of Business Income you sustain during the period that: Begins on the date property (except finished stock) is actually repaired, rebuilt or replaced *and* operations are resumed, and ends the earlier of the date you could restore your operations with due diligence, to the condition that would have existed if no direct physical loss or damage occurred; or sixty (60) consecutive days after the date the property is actually repaired, rebuilt or replaced *and* operations are resumed. . . (emphasis added)

On the carrier's motion for summary judgment, the Court held that plaintiff could not recover an extra 60 days of business income loss under this provision beyond the period when access was actually prohibited, because the italicized language made clear that the Extended Coverage provision applied only in situations where there is physical damage at the location where the insured does business — whereas by definition, the Civil Authority provision applies only when the physical damage occurs elsewhere.

The Court assumed that the term "property" means only the real property where the insured does business. However, the reference to "finished stock" suggests that "property" as used in this clause can refer to any type of property owned or used by the insured. Moreover, the fact that coverage applies until such property is "replaced" and not "repaired" or "rebuilt" indicates that the provision could encompass something other than physical damage. So, for example, if access is prohibited to a policyholder's restaurant for 10 days, but spoiled meat and dairy food is not "replaced" for another 30 days, the provision reasonably

could be read to cover the business interruption losses sustained by the policyholder during those additional thirty days.

Further, insurance policies typically use a defined term, such as "the Insured Location," or "the Described Premises," to refer to the real estate where the insured conducts its business. In contrast, the Extended Coverage provision referred generally to "property" and did not limit its reference to the "Described Premises." This further suggests that the Extended Coverage provision may not necessarily be limited to situations where damages has occurred to the physical location where the insured does business.

In any event, the specific policy language should be reviewed carefully to determine if a reasonable argument can be made for extended coverage.

### Conclusion

The Civil Authority provision and Ingress/Egress provisions will continue to be relied upon by insureds who seek Business Interruption coverage in cases of natural or other disasters, where the insured suffers economic losses that result from damage that occurs elsewhere. Judicial interpretations of these provisions in the context of 9/11-related claims point up the need to carefully analyze the specific language of the policy provisions at issue and, more importantly, to negotiate carefully the language of any such provisions when procuring or renewing a policy.

### Appendix — Various Civil Authority Provisions

"We will pay for the actual loss of business income you sustain caused by action of civil authority that prohibits access to the Described Premises due to direct physical loss or damage from Covered Causes of Loss other than at the Described Premises. This Coverage will apply up to ninety (90) days from the date of that action." (*HMSHost, supra*).

"This policy is extended to cover the loss sustained during the period of time when access to real or personal property is impaired by order or action of civil or military authority issued in connection with or following a peril insured against. Coverage shall apply for a period of 4 weeks." (*ABM Indus., Inc., supra*)

"We will pay your actual loss of earning and expense . . . when a Civil Authority like a fire department

denies access to the describe location because of direct physical loss or damage to property by a covered cause of loss other than at the described location. We'll pay for loss up to two consecutive weeks while access is denied." (*St. Paul Mercury Ins. Co. v. Magnolia Lady, Inc.*, 1999 U.S. Dist. LEXIS 17895 (N.D.Miss. Nov. 4, 1999))

"This section is specifically extended to cover a situation when access to the Insured Locations is prohibited by order of civil authority as a direct result of damage to adjacent premises, not exceeding, however, two (2) consecutive weeks." *US Airways, supra*).

This insurance is extended to apply to Business Income and Extra Expense loss when access to insured premises is specifically prohibited by order of a civil authority as the direct result of a Covered Cause of Loss to property away from your premises. This coverage will apply up to 30 consecutive days from the date of the civil action." (*The Paradise Shops, supra*).

Coverage is provided in the event an order of "civil authority prohibits access to the Insured Location" when the order is the result of "direct damage . . . at the Insured Location" or within 1,000 feet of it. (*Clark County, supra*).

**Endnotes**

1. *Narricot Indus. V. Fireman's Fund Ins. Co.*, 2002 U.S. Dist. LEXIS 19074, 12-13 (D.Pa. 2002).
2. Webster's Ninth New Collegiate Dictionary, at 244 (Merriam-Webster Inc. 1990).
3. *See, e.g., Narricot Indus. V. Fireman's Fund Ins. Co., supra*. (Civil Authority clause at issue did not require a formal order or a written order; it did not mention an order at all, but only an "action" of a civil authority.)
4. *See, e.g., Zurich Am. Ins. Co. v. ABM Indus.*, 397 F.3d 158 (2d Cir. 2005).
5. 308 F.Supp.2d 331, 336-7 (S.D.N.Y. 2004)
6. 393 F.3d 1137, 1139-40 (10th Cir. 1004)
7. 2002 WL 31996014 (E.D.La. 2002), *aff'd*, 67 Fed. Appx. 248 (5th Cir. 2003)
8. 2004 WL 549447, 2004 U.S. Dist. LEXIS 4266 (N.D.Ill.)
9. CV-S-01-1258-KJD-RJJ (D.Nev.).
10. 2004 WL 1637139 (Va. Cir. Ct. July 23, 2004)
11. No. CV 04-2079 RWT (D.Md.)
12. In *Phila. Parking Auth. v. Fed. Ins. Co.*, 385 F.Supp.2d 280 (S.D.N.Y. 2005), the court held that the FAA orders shutting down commercial air travel did not "prohibit access" to *parking garages* operated by plaintiff near the airport terminal although they may have "temporarily obviated the need" for plaintiff's parking services.
13. 385 F.Supp.2d 343 (S.D.N.Y. 2005), *aff'd*, 2006 U.S. App. LEXIS 4169 (Feb. 22, 2006)
14. 259 Ga. App. 54 (Ga. App. Ct. 2002)
15. *Assurance Co. of America v. BBB Service Co.*, 265 Ga. App. 35 (Ga. App. Ct. 2003)(emphasis added).
16. *Assurance Co. of America v. BBB Service Co.*, 265 Ga. App. 35 (Ga. App. Ct. 2003)(emphasis added).
17. 96 Md. 616 (Md. 1903)
18. *Lesley v. American Security Ins. Co.*, 261 S.C. 183 (S.C. 1973); *Eichacker v. The Paul Revere Life Ins. Co.*, 354 F.2d 1142 (9th Cir. 2004).
19. 119 F.Supp.2d 552 (E.D.N.C. 2000) ■



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