The Winter of Our Discontent:
Addressing Common Coverage Issues in the Wake of Historic Winter Weather

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This winter season introduced many of us to what meteorologists call the "polar vortex." Blamed for dozens of deaths, historically low temperatures, and weather emergencies throughout the country, the severe weather took a projected $5 billion toll on property and businesses.

Insurance claims for damage from winter storms, including from ice and freezing, made up 7.1% of all insured catastrophe losses from 1993 to 2012. For those of us dealing with the effects of ice damming and pipe breaks, there is no doubt that this percentage is likely to rise dramatically this year.

In the wake of the extreme weather, numerous insurance coverage issues are certain to arise. While the existence or extent of available coverage obviously turns on the nuances of applicable law and the unique factual circumstances of each loss, below we highlight some common issues that we expect to appear and offer guidance on some law you may find helpful. If you have specific questions regarding the law in your area, call the Butler Pappas office nearest you.

CONCURRENT CAUSATION

The combined impacts of wind, snow, ice, rain and freezing temperatures mean that insurers may be confronted with "concurrent causation" problems. In response to decisions out of California some decades ago which delegated to the jury the question of coverage for losses involving joint causation between covered and non-covered perils (i.e. the "efficient proximate cause" rule), insurers responded by incorporating "anti-concurrent causation" provisions into their policies. The gist of these provisions is to provide that a loss caused by certain enumerated perils will be excluded, even if other covered perils contributed concurrently or in sequence to cause the loss. In most policies, these enumerated perils include: ordinance of law; earth movement; government action; nuclear hazard; utility service; water; and fungus.

The majority of states enforce anti-concurrent causation clauses as written. "[T]here is no violation of public policy when parties to an insurance contract agree that there will be no coverage for loss due to sequential causes even where the first or the last cause is an included cause of loss." *Simonetti v. Selective Ins. Co.*, 372 N.J.Super.

421, 431, 859 A.2d 694 (App.Div. 2004) (quoting *Assurance Co. of Am. v. Jay-Mar*, 38 F.Supp.2d 349, 354 (D.N.J.1999)); *T.H.E. Ins. Co. v. Charles Boyer Children's Trust*, 455 F.Supp.2d 284, 294 (M.D.Pa. 2006), *aff'd* 269 F. App'x 220 (3d Cir. 2008); *Bishops, Inc. v. Penn Nat'l Ins.*, 984 A.2d 982, 993–94 (Pa.Super. 2009); *Cashew Holdings, LLC v. Canopius U.S. Insurance, Inc.*, 2013 WL 4735645 (E.D.N.Y. September 3, 2013), (anti-concurrent causation clause for water damage enforced to exclude claim for damage arising out of Superstorm Sandy). Accordingly, be sure to look for such prefatory language when evaluating the impact of policy exclusions.

ENSUING LOSS

Juxtaposed with anti-concurrent causation provisions are exclusions containing ensuing loss provisions, which, in a broad sense, are designed to ensure that otherwise insured losses that follow as a consequence of an excluded loss are still covered. However, it is important to remember that "[e]nsuing loss provisions do not 're-insert the named perils back into the policy after ... [other clauses] expressly excluded them.' The ensuing loss provision does not provide coverage for excluded losses; it provides coverage for certain secondary losses ultimately caused by excluded perils." *Myung Sung, Inc. Firstline Nat. Ins. Co.*, No. 95-2663, 1996 WL 57937, at *2-3 (E.D.Pa. 1996) (quoting *Banks v. Allstate Ins. Co.*, 1993 WL 40113, at *5 (E.D.Pa. Feb. 12, 1993)). In the context of the faulty material exclusion, some courts have held that "an ensuing loss provision does not cover loss caused by the excluded peril, but rather covers loss caused to *other* property wholly separate from the defective property itself." *GTE Corp. v. Allendale Mutual Ins. Co.*, 372 F.3d 598, 613-14 (3d Cir. 2004), (citing *Swire Pac. Holdings, Inc. v. Zurich Ins. Co.*, 139 F.Supp.2d 1374, 1380 (S.D.Fla.2001), certified *on appeal* 284 F.3d 1228 (11th Cir.2002)); *Narob Dev. Corp. v. Insurance Co. of North America*, 631 N.Y.S.2d 155, 219 A.D.2d 454 (1995).

Understanding how courts in a particular jurisdiction will apply policy terms involving "ensuing loss" is critical in adjusting a loss and analyzing coverages for weather-related losses. Among others, pipe breaks, collapses and ice-damming losses will likely present such issues.

BUSINESS INTERRUPTION AND CBI

Business owners have suffered significant financial injury as the result of the recent weather and time element losses can surely be expected to arise out of the winter weather claims. Business Interruption claims almost universally require insured physical damage to property as a trigger. *Harry's Cadillac-Pontiac-GMC Truck Co., Inc. v. Motors Insurance Co.*, 486 S.E.2d 249 (N.C. Ct. App. 1997) (lost profits due to inaccessibility at a car dealership were not covered where loss was not caused by direct physical damage to dealership, but rather by an inability to gain access to it during a storm). However, the concept of what constitutes "physical damage" was recently extended by the New Jersey Superior Court in *Wakefern Food Corp. v. Liberty Mutual Fire Insurance Co.*, 406 N.J. Super. 524 (App.Div. 2009) wherein it held that the "failure

to function" of the power grid was the equivalent of physical damage, albeit in the context of a claim for damages from off-premises power interruption.

A component of business interruption coverage is "contingent business interruption" (CBI), where the insured may be entitled to recover for losses caused by damage to third party property. "By its express terms, the CBI provision of the policy covers business interruption due to loss or damage to properties '*not operated by the Insured*,' that is to say, it insures against events that prevent entities from *supplying* goods to, or *receiving* goods from, the insured." *Id.* at 169 (emphasis added). *See also Archer Daniels Midland Co. v. Hartford Fire Ins. Co.*, 243 F.3d 369, 371 (7th Cir.2001) ("Regular business-interruption insurance replaces profits lost as a result of physical damage to the insured's plant or other equipment; contingent business-interruption coverage goes further, protecting the insured against the consequences of suppliers' problems.").

While CBI polices may vary in the precise language used, a typical policy will require the insured to satisfy four requirements in order for a loss to be covered: "(1) partial or total cessation of [the insured's] business, (2) an identified receiver of [the insured's] services, (3) that a receiver of [the insured's] services was prevented, directly or indirectly, from receiving [the insured's] services, and (4) that the loss was the result of damage to property." *See Arthur Andersen LLP v. Federal Ins. Co.*, 416 N.J.Super. 334, 343, 3 A.3d 1279 (N.J.Super.A.D. 2010).

Another critical requirement in CBI coverage disputes is determining whether the insured's business was sufficiently related to or dependant on the damaged third party property. Courts have rejected "attempts by non-retail businesses where the purpose of the business was not tied to the real property" of the third party. Retail Brand Alliance, Inc. v. Factory Mut. Ins. Co., 489 F.Supp.2d 326, 332 (S.D.N.Y. 2007). Rather, it should be established that "the insured's business depended on the existence of the real property" of the third party. *Id.* (citing *Zurich American Ins. Co. v. ABM Industries, Inc.*, No. 01-11200, 2006 WL 1293360, at *2 (S.D.N.Y. 2006)).

FREEZING LOSSES

While a typical all risk policy will usually provide coverage for damage caused by ice damming and other "freezing" conditions, the outcome of freezing claims is often determined by the condition of the building or structure at the time of the loss and/or the steps taken by the insured to protect the property from the cold weather.

Policies frequently have provisions excluding coverage for freezing losses in vacant or unoccupied buildings. "Vacant" is ordinarily a defined term in the policy. It has been held that "'unoccupied' in an insurance policy carries its ordinarily accepted meaning and that '[i]t is the regular presence of inhabitants that makes occupancy.'" *McCabe v. Allstate Ins. Co.*, 260 A.D.2d 850, 851, 688 N.Y.S.2d 764 (N.Y.App.Div.3.Dept. 1999), (quoting *Coutu v. Exchange Ins. Co.*, 174 A.D.2d 241, 244, 579 N.Y.S.2d 751 (N.Y.App.Div.3.Dept. 1992)) (declining to adopt plaintiff's rationale

that a vacation home was occupied as a result of their "continuing, albeit seasonal use of the premises").

Whether an insured's efforts to avoid freezing losses are sufficient can be difficult question to resolve. *See Haardt v. Farmer's Mut. Fire Ins. Co. of Salem County*, 796 F.Supp. 804, 810 (D.N.J.,1992) (holding that the question of whether the insured "exercised caution and diligence to prevent the pipes from freezing ... involves a factual determination that must be resolved by the finder of fact").

Several courts have found it necessary to distinguish "freezing" conditions from other water-related provisions in an insurance policy. For example, one court declined to treat water below the ground as an excluded cause where the pressure exerted manifested itself when the water froze, thereby bringing the loss within coverage under the policy. *Ariston Airline & Catering Supply Co. Inc. v. Forbes*, 511 A.2d 1278 (N.J.Super.Law 1986). Another found that a mold-related loss was not insured despite the insured's protestations that the damage occurred as a result of ice damming in the home's gutters. *Chadwell v. New Jersey Mfrs. Ins. Co.*, 2011 WL 31353 (N.J.Super.App.Div. 2011).

INGRESS OR EGRESS

Coverage may also exist for "ingress/egress" "loss[es] sustained during the period of time when ... ingress to or egress from real and personal property ... is thereby prevented." *Fountain Powerboat Indust. v. Reliance Ins. Co.*, 119 F.Supp.2d 552 (E.D.N.C.2000). A loss of ingress or egress is typically a form of "civil authority" coverage, which is discussed next, such as the declaration of a weather related "state of emergency." The question of whether ingress or egress has been prevented is arguably an easier question than other varieties of non-property related coverage, possibly a reason that there exists a limited body of case law on the topic. *See e.g. Philadelphia Parking Authority v. Federal Ins. Co.*, 385 F.Supp.2d 280, 289-90 (S.D.N.Y. 2005).

CIVIL AUTHORITY

Although seen less often in connection with weather events, creative insureds may seek this coverage after a state of emergency declaration. "Civil authority, when contained in an insurance policy, refers to the situation when a civil authority prohibits access to the insured's premises resulting in a total loss of business income." *New York Career Institute v. Hanover Ins. Co.*, 6 Misc.3d 734, 738, 791 N.Y.S.2d 338 (N.Y.Sup. 2005), (citing *54th St. Ltd. Partners, L.P. v. Fidelity and Guaranty Ins. Co.*, 306 A.D.2d 67, 763 N.Y.S.2d 243 (N.Y.App.Div. 2003)). Such a claim is "properly limited to plaintiff's loss of income *while access to its premises was denied by an act of civil authority*," but not beyond such time. *54th Street Ltd. Partners*, 306 A.D.2d at 67. In *54th Street Ltd. Partners*, any coverage under the "civil authority" provision ceased when the exercise had ended, because "although vehicular and pedestrian traffic in the area was diverted, access to the restaurant was not denied; the restaurant was accessible to the public, plaintiff's employees and its vendors."

Some "civil authority" provisions require "damage to or destruction of real or personal property" as a condition of coverage, while others do not. *See Roundabout Theatre Co., Inc. v. Continental Cas. Co.*, 302 A.D.2d 1, 8-9, 751 N.Y.S.2d 4 (N.Y.App.Div. 1 Dept. 2002). There may also be a physical damage requirement relating to other property, not unlike the CBI requirements discussed above.

Another element to consider in analyzing a "civil authority" claim is the scope or extent of the exercised authority. "When the action of a civil authority completely shuts down access to a party's premises, federal courts have held that the coverage in insurance policies similar to the one at bar are triggered." *Ski Shawnee, Inc. v. Commonwealth Ins. Co.*, No. 09-02391, 2010 WL 2696782, at *4 (M.D.Pa. 2010) (citing *Narricot Industries, Inc. v. Fireman's Fund Ins. Co.*, No. 01-4679, 2002 WL 31247972, at *4-5 (E.D.Pa. 2002)). "However, where the action of a civil authority merely hinders access to the covered premises, without completely prohibiting access, federal courts have held that such action is not covered...." *Id. See Southern Hospitality, Inc. v. Zurich American Ins. Co.*, 393 F.3d 1137, 1140–41 (10th Cir.2004).

Finally, courts have long recognized that, depending on the particular policy language in a given case, an exercise of "civil authority" will only provide a basis for coverage where the peril that compels the exercise of authority is itself covered, or the loss is a direct result of the exercise. *See Cleland Simpson Co. v. Firemen's Ins. Co. of Newark, N.J.*, 392 Pa. 67, 70-72, 140 A.2d 41 (Pa. 1958).

COLLAPSE

While this winter lacked the heavy, collapse-causing snow events which seem to pop up every winter, it is helpful to review existing law on the peril of "collapse." Some courts conclude that policy language clearly defines "collapse" and will not disturb the definition contained in the insurance contract. *See, e.g.*, *Residential Mgmt. (N.Y.) Inc. v. Fed. Ins. Co.*, 884 F.Supp.2d 3, 9 (E.D.N.Y. 2012); *Mount Zion Baptist Church of Marietta v. GuideOne Elite Ins. Co.*, 808 F.Supp.2d 1322, 1325 (N.D.Ga. 2011).

Courts recognize that there exist differing views with respect to the interpretation of the word "collapse." *See 401 Fourth Street, Inc. v. Investors Insurance Group*, 879 A.2d 166, 172 fn.2 (Pa. 2005), Under the "traditional" view applied in most jurisdictions, absent an express definition contained in an insurance policy, the word "collapse" is to be given its "plain, ordinary meaning." *Skelly v. Fidelity & Casualty Co.*, 313 Pa. 202, 169 A. 78 (Pa. 1933). States in the Third Circuit have expressed differing opinions with respect to interpretation of "collapse" provisions in insurance contracts. Pennsylvania has been recognized as a "traditional" view jurisdiction. See *Dominick v. Statesman Ins. Co.,* 692 A.2d 188 (Pa.Super.Ct.1997), appeal denied, 555 Pa. 701, 723 A.2d 671 (Pa.1998) (holding that structure must "fall together" or "fall in" to constitute "collapse" within insurance policy). In contrast, New Jersey and New York have apparently adopted the "broad" view. See *Fantis Foods, Inc. v. North River Ins. Co.*, 332 N.J.Super. 250, 753 A.2d 176 (2000), cert. denied, 165 N.J. 677, 762 A.2d 658 (2000) (holding that, under New York or New Jersey law, "collapse" means "any serious

impairment of structural integrity that connotes imminent collapse threatening preservation of the building as a structure or the health and safety of occupants and passers-by"). Similarly, citing *Fantis Foods*, Delaware has approved of the "broad" view. *Weiner et al. v. Selective Way Ins. Co.*, 793 A.2d 434 (Del.Super. 2002).

MATCHING

When an insured makes a claim for a loss that involves a damaged part of a whole "system", typically roofing, siding or the like, there are inevitably disagreements with respect to how far coverage goes with respect to repair or replacement of undamaged portions of such a system. One thing is clear: unless a policy expressly provides for "identical" material replacement, which it typically does not, the insurer is under no obligation to do so. Ordinarily, the replacement obligation is limited to "like kind and quality."

The critical question, then, is whether there exists a suitable material that "matches" the existing undamaged portions of the system for purposes of repair or replacement, based on an objective analysis of the facts in a given case.

A prominent "matching" case from Pennsylvania involved claimed damage to a roof. The court rejected the plaintiff's contention that the insurer was obligated to pay for replacement of the entire roof in order to obtain a uniform appearance consistent with "like construction" language contained in the policy. *Greene v. United Services Auto. Ass'n*, 936 A.2d 1178, 1186-87 (Pa.Super. 2007). Ultimately, the court held that the insurer was not obligated to pay for replacement of the entire roof, absent competent evidence or testimony that there existed no replacement material of "like construction" for use in repairing the damaged property. *See also Enwereji v. State Farm Fire and Cas. Co.*, 2011 WL 3240866 at *5 (E.D.Pa. 2011).

On the other hand, where an insurer fails to advance its theory properly supported by expert evidence or testimony, its position is vulnerable to the evidence or testimony of the plaintiff. For example, in *Collins v. Allstate Ins. Co.*, 2009 WL 4729901 (E.D.Pa. 2009), the court declined to grant summary judgment because there was a genuine issue with respect to matching raised by plaintiff's credible expert report. *Id.* at *5-6, citing *Metz v. Travelers Fire Ins. Co. of Hartford*, 355 Pa. 342, 49 A.2d 711, 713 (Pa. 1946); see also *Pellegrino v. State Farm Fire and Cas. Co.,* 2013 WL 3878591 (E.D.Pa 2013).

In the event the insured maintains that otherwise undamaged property needs to be replaced so that the repaired portion of the building will "match," carriers are reminded that of the policy requirement that repairs need actually be completed before the obligation to pay replacement cost arises. *Pellegrino*, 2013 WL 3878591 at *6-7 ("insurance policies are based on principles of indemnity rather than enrichment," and "[their] object is not to permit a gain by the insured but only to compensate him for a loss.").

In conclusion, we believe that this year's extreme weather presents our clients with another opportunity for good claims handling. Hopefully, we have identified some of the critical questions you will face when dealing with winter weather claims. As always, we are available to answer more specific questions should they arise. Please feel free to contact us if you need any assistance.