

CIVIL AUTHORITY AND INGRESS/EGRESS COVERAGE

By Clark Schirle

The devastation wrought by Hurricanes Harvey, Irma, and Maria in 2017 left many businesses damaged. Some companies may not have been directly damaged but lost income because they could not access their operations for a period of time due to a government evacuation order and/or water in the area. If a company's facilities were not physically damaged, but it could not access its operations, lost income might be recoverable under civil authority and/or ingress/egress coverage.

Overview of coverage. Generally, civil authority coverage is intended to apply to situations where access to an insured's property is prevented or prohibited by an order of civil authority issued as a direct result of physical damage, caused by an insured peril, to other premises in the proximity of the insured's property. Typically, the coverage will have a geographic limitation, providing that the physical damage that triggered the civil authority order must be to property within a certain number of miles or feet from the insured location. Although almost all the case law involves policy provisions that require an order of civil authority, some policies may contain separate ingress/egress coverage that does

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not require an act of civil authority to trigger coverage. There are three issues that appear to be most often litigated in hurricane cases involving civil authority coverage.

1. Was access prohibited or prevented? *Kean, Miller, Hawthorne,*

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D'Armond, McCowan & Jarman, LLP v. National Fire Insurance Co. of Hartford, No. 06-770-C-M2, 2007 WL 2489711 (M.D. La. Aug. 2, 2007), arising out of Hurricane Katrina, is illustrative. The insured was a law firm in Baton Rouge, Louisiana. The governor declared a state of emergency. State police and local governmental officials asked and encouraged residents to stay off the streets on a certain day, if possible. The insured closed its business that day. It made a claim for loss of income. The court granted summary judgment

to the insurer. The court stated that "prohibiting" means more than "mere hampering or limitation," it means to "formally forbid" or "prevent." The court held that there was no evidence that the authorities formally forbade or prevented the insured's employees from approaching, reaching, or entering the business. There were no roadblocks or street closures that prevented access. Further, the insured admitted that on the day it closed its business, two employees entered the office to restart the computer system.

2. Was the order issued as a result of property damage? In *South Texas Medical Clinics, P.A. v. CAN Financial Corp.*, No. H-06-4041, 2008 WL 450012 (S.D. Tex. Feb. 15, 2008), the insured owned and operated three medical clinics in Wharton County, Texas, and four clinics in surrounding counties. When Hurricane Rita became a Category 5 hurricane and one of the projected landfall areas was in Wharton County, a judge issued an order requiring the evacuation of the county for three days. The insured closed its clinic in the county, as well as its other clinics, because its database was located at and operated from its main office in Wharton County. Hurricane Rita made landfall far from Wharton County. The hurricane did not damage any of the clinics or any nearby property.

The insured sought coverage

for its loss of income pursuant to a civil authority provision. The clause provided that the loss of income had to be caused by an 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 insured premises, caused by or resulting from any covered cause of loss. The insured argued that the “due to” causation requirement was met because one of the reasons the judge ordered a mandatory evacuation was that Hurricane Rita had caused property damage to Florida.

The court found as a matter of law that there was no coverage, and entered summary judgment for the insurance company. In particular, the court discussed and relied on *United Air Lines, Inc. v. Insurance Co. of the State of Pennsylvania*, 439 F.3d 128 (2d Cir. 2006), a case involving the FAA’s shutdown of Reagan National Airport following the September 11 attacks. The court noted that *United Air Lines* held that “when the civil authority order is caused by the fear of future harm to the area where the insured property is located, not by the actual physical damage inflicted on other property, there is no causal relationship between the civil authority order and the damage to other property, as required for coverage.” Following the reasons of *United Air Lines*, the court concluded that the Wharton County judge’s decision to evacuate was based on the anticipated threat of damage to the county, not the actual physical damage that occurred in Florida and on oil rigs in the Gulf of Mexico. The court stated that the only relevance of the prior damage was an indication of the harm that could result if the hurricane made landfall in Wharton County.

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The Fifth Circuit Court of Appeals reached a similar conclusion in *Dickie Brennan & Co. v. Lexington Insurance Co.*, 636 F.3d 683 (5th Cir. 2011). As Hurricane Gustav was approaching New Orleans, the mayor issued a mandatory evacuation order declaring a state of emergency because of anticipated high tides, intensive storms, and widespread severe flooding. There was no damage in Louisiana when the order was issued. The insured operated restaurants in New Orleans and sought to recover its business losses due to their closure pursuant to a civil authority provision. The Fifth Circuit affirmed the lower court’s summary judgment ruling in favor of the insurer, finding no coverage. The court opined: “Although it does not expressly address the proximity issue, the Lexington policy requires proof of a causal link between prior damage and civil authority action. The record in this case demonstrates no such link. . . .”

3. Was property damage caused by a covered peril? Many policies exclude flood, so if the property damage that led to the order was flooding, then there should be no

civil authority or ingress/egress coverage. For example, in *Naricot Industries, Inc. v. Fireman’s Fund Insurance Co.*, No. 01-4679, 2002 WL 31247972 (E.D. Pa. Sept. 30, 2002), as a result of governmental orders arising out of Hurricane Floyd, an insured sought civil authority coverage for business income losses at two facilities, one in North Carolina and one in Virginia. The policy for the North Carolina location covered both hurricane and flood. However, the policy for the Virginia location excluded flood and also contained anticoncurrent causation language. The court held that there was no civil authority coverage for the Virginia facility. The court found that the “policy’s terms, read together, show that the conjunction of a covered peril and an excluded peril is *not* a ‘covered cause of loss.’”

Conclusion. Faced with civil authority and ingress/egress claims after a hurricane, one should carefully examine the policy language and apply it to the facts in light of the existing case law. Simply because civil authorities issued evacuation or curfew orders does not automatically mean there is civil authority coverage. ■