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Triggering Civil Authority Coverage After A Natural Disaster

By **Tracey Jordan** (September 27, 2018, 12:47 PM EDT)

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Natural disasters in the United States are nothing new to the insurance world. Certainly, the wildfires in the western part of the United States and the devastation that they have caused are familiar topics in the news this past summer. Now, coastal residents are in the middle of hurricane season with Florence having just occurred and the aftermath still being felt.

As the wildfires and hurricane season continue, insurers should be aware that insured business owners in the affected areas are likely to seek coverage for either the direct impact of suffering property damage as a result of the disaster or the indirect impact of a business income loss caused as a result of a slow-down in business, or both. Insureds and insurers, however, alike should understand the business income coverage provided by civil authority provisions in a commercial first party property insurance policies.

In general terms, civil authority coverage applies when a governmental authority (fire, police, National Park Service, state government, etc.) issues an evacuation order or prohibits access to certain areas as a result of public safety concerns from the threat of a natural disaster or other similar event. Specifically, a provision for additional business income coverage for interruption by civil authority may provide:

> This policy is extended to cover the actual Gross Earnings loss sustained and Extra Expense incurred while access to an Insured Location is specifically denied by order of civil authority. This order must be a result of direct physical loss of or damage to property, other than at the Insured Location, and must be caused by a Covered Cause of Loss. Unless otherwise indicated in the Declarations, this coverage extension is limited to thirty (30) consecutive days from the date of the order.

Another example of a civil authority provision is as follows:

> The Policy covers Actual Loss Sustained and Extra Expenses incurred by the Insured during the Period of Liability if an order of civil authority impairs access to the Insured Location provided such an order is the direct result of physical damage of the type insured against under this Policy at the Insured Location or within ten miles of it.

Although many of the civil authority provisions are similar in nature, there are marked differences. For example, the first provision cited above requires merely "direct physical loss of or damage to property, other than at the Insured Location." Whereas, the second provision cited above requires physical damage "at the Insured Location or within ten miles of it." Accordingly, certain policy provisions contain a proximity requirement for the physical loss or damage, while others do not.

Courts have established the general framework for determining the application of civil authority coverage to business income losses. Typically, civil authority coverage is triggered if all of the following elements are met: (1) loss of business income was caused by an action of civil authority; (2) the civil authority by an order or act must prohibit access to the insured location; (3) the action of the civil authority of prohibiting access to the insured location must be caused by direct physical loss of or damage to property other than at the insured location; and (4) the loss or damage to the property other than at the insured location must be caused by or result from a covered cause of loss. [1]

In the case of the wildfires and hurricanes (and other natural disasters), governmental authorities often issue mandatory evacuation orders. For example, both in California and in Montana parts of Yosemite National Park and Glacier National Park were evacuated and closed to further public access as a result of the wildfires in those states. Similarly, coastal counties in North Carolina and all but two coastal counties in South Carolina were under a mandatory evacuation order in advance of Hurricane Florence. These types of closures and mandatory evacuations beg the question of possible business interruption coverage for nearby hotels, restaurants and other tourist-driven businesses that suffer a decline in business as a result of the National Park closures or hurricane-stricken areas because less people not only visit the area, but they are also unable to access those businesses near or in the evacuated area. Often, however, these evacuation orders are issued only as a precaution to protect the public from safety concerns prior to any property actually being damaged. Several cases illustrate the requirements to which courts adhere in determining civil authority coverage, especially the requirement that the governmental order must be the result of property damage, and not to prevent future damage.

For example, in Jones, Walker, Waechter, Poitevent, Carrere & Denegre LLP v. Chubb Corp.,[2] a law firm in New Orleans was forced to shut down when a mandatory evacuation order for the city went into effect prior to Hurricane Gustav. The evacuation order went into effect on Aug. 31, 2008 because of anticipated high tides, winds and flooding.[3] However, on Sept. 4, 2008, the evacuation order was rescinded and changed to a voluntary evacuation.[4] The insured claimed that its employees were prohibited from accessing its office between Aug. 31 and Sept. 4, resulting in business income losses.[5]

At issue was the extent of civil authority coverage. The insured argued that coverage was triggered when the evacuation order was issued in response to physical damage in the city of New Orleans, including an area within one mile of the law firm's office. The insurer, on the other hand, contended that coverage was not triggered because the mandatory evacuation order was issued in anticipation of possible harm from the storm and not from any property damage within proximity to the insured's offices.[6]

The court agreed with the insurer and denied the law firm's claim for business income loss caused as a result of the mandatory evacuation. The court reasoned that "[t]he Policy does not insure against impairment of operations that occurs simply because a civil authority prohibits access unless the civil authority meets the requirements of the policy — one of those requirements is a nexus between the order and certain physical damage."[7] The court reasoned that the civil authority must subsequently prohibit access as a result of the connection between the property damage sustained and the issuance of the order. The court concluded that the evacuation order did not trigger coverage even though access to the law firm was prohibited because the access to the property was based on the threat of damage and not based on actual property damage "which is a clear requirement of the Policy."[8]

In another case, the court similarly emphasized that the civil authority order must have been issued as a direct result of a covered cause of loss and not as result of the threat of a future loss. In Paradise Shops Inc. v. Hartford Fire Insurance Co., the insured operated gift shops at airport terminals around the country when the Sept. 11, 2001, terrorist attacks occurred. [9] The insured argued that as a result of the FAA order for a ground stop of air travel, access to its airport shops was prohibited.[10] The insurer argued that nothing in the Federal Aviation Administration order closed all operations at the airport or prohibited access to the stores.[11] The court declined to find coverage under the civil authority provision reasoning that the ground stop was imposed to protect against future terrorist attacks and not because of the attacks on the World Trade Center, Pentagon or Shanksville, Pennsylvania, and the property damage that had already occurred at those locations.[12]

Similarly, the court in South Texas Medical Clinics PA v. CNA Financial Corp. granted summary judgment in favor of the insurer because the insured failed to establish a link between the property damage and the issuance of an evacuation order before the arrival of Hurricane Rita.[13] As Hurricane Rita passed by south Florida, property sustained damaged there as well as to oil platforms in the Gulf of Mexico.[14] As a result of this damage in Florida and the Gulf of Mexico, and because the storm was projected to make landfill near Galveston, Texas, the county judge ordered an evacuation of Wharton County.[15] As a result of the evacuation order, the insured closed clinics in Wharton County, as well as clinics in other counties.[16] Ultimately, however, Hurricane Rita did not make landfall near Wharton County, and none of the insured's clinics were damaged.[17] The insured made claim for lost revenue as result of the closing of its clinics both in Wharton Country and outside. The insured argued that the mandatory evacuation was issued as a result of property damage in Florida. The insurer, on the other hand, argued that the mandatory evacuation was simply a precaution in advance of anticipated damage in Wharton County.[18]

The court agreed with the insurer noting that "the only relevance of prior damage to other property in deciding whether to issue a civil authority order that would preclude access to the insured's property is to provide a basis for fearing future damage to the area where the insured property is located, the causal link between the prior damage and the civil authority order is missing."[19] Therefore, the court concluded that the county judge made the decision to evacuate based upon "the anticipated threat of damage to Wharton County" and not actual property damage that had occurred in Florida and the Gulf of Mexico as that property damage was only "an indication of the harm that could result" from the hurricane.[20]

Accordingly, insureds and insurers alike must be familiar with the civil authority provisions contained in their policies. For business income coverage to be triggered by the civil authority order, the order must be as a result of actual property damage and not the fear of possible damage that the natural disaster could cause. In other words, if the governmental order was issued only as a result of the possibility of property damage caused by a wildfire, hurricane or other natural disaster, then coverage is not triggered under the civil authority provision.

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[1] Dickie Brennan & Co., Inc. v. Lexington Ins. Co., 636 F.3d 683, 685 (5th Cir. 2011) (applying Louisiana law).

[2] Civil Action No. 09-6057, 2010 WL 4026375, *1 (E.D. La. Oct. 12, 2010).

[3] Id.

[4] Id.

[5] Id.

[6] Id. at *2.

[7] Id. at *3.

[8] Id.

[9] Civil Action No. 1:03-CV-3154, 2004 WL 5704715, *1 (N.D. Ga. Dec. 15, 2004).

[10] Id. at *3.

[11] Id.

[12] Id. at *7.

[13] Civil Action No. H-06-4041, 2008 WL 450012 (Feb. 15, 2008 S.D. Tex.).

[14] Id. at *2.

[15] Id.

[16] Id.

[17] Id.

[18] Id. at *4.

[19] Id. at *10.

[20] Id.