On August 26-28, 2011, Hurricane Irene struck the eastern seaboard, causing widespread flooding and extensive property damage along 1,100 miles of the United States coastline. Media reports indicated that more than four million people were without power. Preliminary estimates are that Hurricane Irene caused in excess of $7 billion in damage. Businesses sustaining loss or damage from Hurricane Irene may seek coverage for their loss or damage under commercial property insurance policies. Some of the issues that may arise in these claims are discussed here.

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As the East Coast recovers from Hurricane / Tropical Storm Irene, insurers will likely confront the question of whether the “anti-concurrent causation” clause in the policy precludes coverage for hurricane losses due to both wind (a covered loss) and water (an excluded loss). The answer is clear: It depends.

For example, in *Tuepker v. State Farm Fire & Cas. Co.*, 507 F.3d 346 (5th Cir. 2007), the court found unambiguous the following anti-concurrent causation clause that preceded the flood exclusion:

> We do not insure for [the following losses] regardless of: (a) the cause of the excluded event; or (b) other causes of the loss; or (c) whether other causes acted concurrently or in any sequence with the excluded event to produce the loss …

*Ibid.* at 351. The court found that because wind and water losses in a hurricane are indivisible, the damage is excluded by the flood exclusion and the anti-concurrent cause clause.

But, just two years later, the same jurisdiction reached a different outcome based on a different anti-concurrent causation clause. In *Corban v. United Servs. Auto. Assoc.*, 20 So.3d 601 (Miss. 2009), the Mississippi Supreme Court held that a homeowner’s insurer may be liable for a portion of the plaintiffs’ damages to their home from Katrina where the anti-concurrent language read as follows:

> We do not insure for loss caused directly or indirectly by any of the following … regardless of any other cause or event contributing concurrently or in any sequence to the loss.

*Ibid.* at 612. The lower court had held that, based upon the persuasive authority of *Tuepker*, the anti-concurrent causation clause applied to bar the insured from recovering for any damage caused by water or a combination of water and wind.

The Mississippi Supreme Court did not agree. It focused on the clause’s use of the terms “loss,” “concurrently,” and “in any sequence.” “Loss” according to the court “occurs at that point in time when the insured suffers … destruction of the property insured” and “cannot be extinguished by a successive cause or event.” The Court then held that the wind and flood acted in sequence, not “concurrently,” resulting in separate losses. Finally, the Court found the phrase “in any sequence” to be ambiguous as applied to the water peril because of its location in the policy within an exclusion dealing solely with water damage. Accordingly, the Court interpreted the exclusion language in favor of the insured and found the proper reading of the anti-concurrent causation clause to be the following:

> We do not insure for loss caused directly or indirectly by [water damage]. Such loss [from water damage] is excluded regardless of any other cause or event [wind damage] contributing concurrently or in any sequence to the loss [from water damage].

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FLOOD EXCLUSION UPDATE

Flood claims will sometimes include allegations of contributory human conduct such as negligent design of flood protection structures, or the intentional operation of flood control devices. Does such human activity impact the coverage under a property policy that excludes flood? The typical flood exclusion states:

This policy does not insure against loss or damage caused by, resulting from, contributed to, or aggravated by:

(a)(2) Flood meaning surface water, waves, tide or tidal water, and the rising (including the overflowing or breaking of boundaries) of lakes, ponds, reservoirs, rivers, harbors, streams and other similar bodies of water, whether driven by wind or not;

Hurricane Katrina gave rise to claims where human negligence was alleged to combine with the hurricane to cause the flood. Courts nevertheless ruled that the flood exclusion applied and the loss was not covered. Sher v. Lafayette Insurance Company, 2008 La. LEXIS 796 (decided April 8, 2008); In Re: Katrina Canal Breaches Litigation, 495 F.3d 191 (5th Cir. 2007).

Several other well known flood exclusion decisions deal with dam failures, storm surge and the question of when surface water is no longer surface water. Most of these cases also take a broad view of what is excluded as “flood,” although they do not address the “intentional release” scenario. See, e.g., Tuepker v. State Farm Fire & Cas. Co., 507 F.3d 346, 353 (5th Cir. 2007)(storm surge excluded as “little more than a synonym for a tidal wave or wind-driven flood”); Kane v. Royal Ins. Co. of America, 768 P.2d 678, 681 (Colo. 1989)(rejecting argument that “efficient moving cause” of loss was design negligence, citing policy’s anti-concurrent cause language). These cases suggest that Courts afford a broad reading to flood exclusions with anti-concurrent causation language – broad enough to exclude intentional releases of flood water.

A recent Massachusetts decision found that intentional acts in the chain of causation will not circumvent the flood exclusion. In Cortina Realty Trust v. Pacific Insurance Company, Ltd., 27 Mass. L. Rep. 461 (Mass. Supr. Ct. 2010) a Massachusetts Superior Court was asked to decide if the flood exclusion barred coverage for water damage caused or significantly aggravated by the decision of town officials to open a flood valve.1

The court said “even if the opening of the flood valve by the Lynn Water & Sewer Commission increased the flooding of the plaintiff’s property, the calculated decision to open the valve was not an accident. Rather, it was deemed a necessary decision caused by and resulting from actual surface flooding, and thus, would not be covered under the policy.” Id. at 6. See also White v. West American, 2008 WL 5146555 (M.D. Pa 2008)(flood caused or contributed to by the opening of a flood valve or flood gate is still an excluded flood); TNT Speed & Sport Center, Inc. v. American States Ins. Co., 114 F.3d 731, (8th Cir. 1997) (anti-concurrent cause flood exclusion bars coverage for flood caused in part by vandalism of levees, but court criticizes as “inadequate” certain anti-concurrent cause policy language).

Policy language and the facts of each loss are always critical to the outcome of any coverage evaluation. However, recent case law strongly supports the conclusion that a flood exclusion with clear, anti-concurrent causation language will bar flood claims even if human negligence or intentional flood management actions are alleged to contribute to the flooding.

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Many businesses experienced power failures and consequent property damage or business interruption losses from Hurricane Irene. Coverage for such losses will depend on specific terms and conditions of the insurance policy. But generally property insurance policies provide coverage for property damage and business interruption when there is physical damage to insured property from a covered cause of loss.

Thus, courts have found coverage where a covered peril causes a power outage which, in turn, results in direct physical loss or damage to covered property. For example, in Lipshultz v. General Insurance Company of America, 96 N.W.2d 880 (Minn. 1959), the court found coverage where a strong windstorm caused a two-day power outage to the insured’s grocery store and food spoiled. There, the wind caused a break in the 13.8 kilovolt supply lines supplying the power company’s substation located about one-half mile from the insured’s store. The policy covered direct loss by windstorm, and the court held that the spoilage loss constituted a direct loss by windstorm.

The court in Fred Meyer, Inc. v. Central Mutual Insurance Co., 235 F. Supp. 540 (D. Or. 1964) reached the same conclusion. There, food spoiled following a windstorm that destroyed electrical power lines supplying the insured’s refrigeration facilities. By endorsement, the insurance policy provided coverage for “direct loss by windstorm.” Relying on Lipshultz, the court found that there was a direct loss caused by windstorm even though the winds did not physically strike the insured’s food products.

But some property insurance policies specifically exclude coverage for loss or damage caused by the failure of power if the failure occurs away from the insured’s premises. Other exclusions may also come into play.

Some property policies include specific power outage coverages. For example, some policies include specific utility service interruption coverage. In some cases, this coverage is subject to a waiting period, so the service interruption must exceed the indicated number of hours or days. Other policies include coverage for spoilage caused by a power outage. Some equipment breakdown coverage forms provide coverage for loss or damage caused by the interruption of utility service if the interruption was caused by an accident to certain equipment.


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As evacuation orders were issued in several areas along the path of Hurricane Irene, some businesses were shuttered and incurred loss of income without sustaining any physical damage to insured property. Insurers can expect business interruption claims under Civil authority provisions, which can provide coverage despite the absence of physical damage to covered property. As explained below, however, the insurer must still determine whether the order restricting access resulted from physical damage to other property.

Civil authority coverage is intended to apply to situations where access to covered property is prohibited by an order of a civil authority issued as a direct result of physical damage to property. The courts have defined “access” to mean a “way of approaching, or reaching, or entering” property and “prohibit” is defined to mean to “formally forbid especially by authority” or “prevent.” Southern Hospitality Inc. v. Zurich American 393 F3d. 1137 (10th Cir. 2004) citing Oxford American Dictionary and Language Guide 795 (1999). The United States District Court in Houston, which is frequently called upon to address hurricane evacuation related insurance issues, recently noted:

Civil Authority coverage provides compensation for business interruption losses resulting when a civil authority enters an order that prevents access to the insured's property, not because that property is physically damaged, but because other property is damaged. Case law examines such coverage to civil authority orders that prevent access because of weather, disturbances of the peace and most recently, terrorist attack. South Texas Medical Clinics v. CNA Financial, 2008 U.S. Dist. Lexis 11460 (S.D.Tex. 2008).

Several cases concerning civil authority coverage arise from evacuation orders issued because of the impending threat of weather related incidents such as hurricanes. The general rule is that the coverage is triggered where access is prevented or prohibited by an order of civil authority issued as a direct result of damage to property in the proximity of the insured's property. Dickie Brennan & Co. v. Lexington Ins. Co., 636 F.3d 683 (5th Cir. 2011). In Dickie Brennans, the court held that property damage caused by Hurricane Katrina in the Caribbean was not sufficiently linked to the order to evacuate New Orleans to trigger civil authority coverage. Likewise, actual property damage in Florida from Hurricane Rita was not a sufficient link to trigger coverage for evacuation in Texas where no damage had occurred in Texas. South Texas Medical Clinics v. CNA, 2008 U.S. Dist. Lexis 11460 (S.D.Tex. 2008).

The cases emphasize the requirement that the order which prohibits access must be issued as a result of physical damage and not the fear of future damage. For example, in Jones, Walker v. Chub 2010 U.S. Dist. Lexis 109055 (U.S. Dist. LA 2010), the insured claimed a loss due to two evacuation orders issued in the anticipation that Hurricane Gustav would hit the city of New Orleans. Because the first order was issued before any physical damage to the city had occurred, the court determined the order was not issued because of damage to property. The second evacuation order did trigger civil authority coverage because it was issued after damage to property occurred throughout the city including damage to property within a one-mile radius of the insured's offices as specified in the policy. The court noted that civil authority coverage contemplates a sequence of events where direct physical loss or damage to property occurs and then an order prohibiting access because of that damage is issued.

In South Texas Medical Clinic v. CNA 2008 U.S. Dist. Lexis 11460 (S.D.Tex. 2008), the insured’s three medical clinics sustained a loss of income when an evacuation order required the evacuation of the entire county for two days when Hurricane Rita was projected to land in the area that included the county. The hurricane took a different path and the county suffered no storm damage but the insured sustained a loss of income for the two days that the medical clinics were closed. The civil authority provision specifically provided for actual loss of business income “caused by 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 described premises.”

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Ingress/egress provisions provide coverage for business income loss arising from the inability to access insured property. Generally, the coverage requires that physical damage by a non-excluded peril to property of the type covered caused the prevention of ingress and egress. The coverage is not dependent on a civil authority order. Ingress/egress coverage was discussed in *Fountain Powerboat Indus. v. Reliance Ins. Co.* 119 F.Supp. 2D 552 (E.D.N.C. 2000) arising from the closure of roads due to Hurricane Floyd. The policy provided:

Loss of Ingress or Egress: This policy covers loss sustained during the period of time when, as a direct result of a peril not excluded, ingress to or egress from real and personal property not excluded hereunder is thereby prevented.

The only road to the insured’s plant was closed for approximately ten days because of the flood. The insurer did not contest coverage for the period during which the only road to the plant was closed. The insurer did challenge the claim for extended period of indemnity after access was regained. Under the specific language involved, the court found coverage for the loss during the extended period of indemnity. Note that in most instances the ingress/egress coverage is limited to a specific time such as two weeks or thirty days, and there is no intent to expand this with the extended period of indemnity coverage.

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Bill Webster’s nationwide practice focuses on representing U.S. and foreign insurers in catastrophic loss counseling and litigation. He has 23 years of experience representing insurers in a matters arising from catastrophic losses in a variety of commercial and industrial situations including claims involving refineries, pipelines, power generation plants, manufacturing feasibilities, energy industry risks and others. His experience includes complex property coverage and subrogation matters and he has represented insurers in several states.
Businesses along the East Coast were aware that Hurricane Irene was approaching for more than a week. Many businesses took measures to protect their property before Hurricane Irene made landfall. But for some businesses, the costs of these efforts were substantial. Because of the substantial costs involved, some policyholders may look to their property insurers to pay for these costs as a “sue and labor” expense.

The sue and labor clause of a commercial property insurance policy – now often designated as “Preservation of Property” – imposes a duty on the insured to take reasonable steps to protect insured property in the event of imminent covered damage and to minimize further damage once it occurs. In turn, the insurer will provide reimbursement for the insured’s expenses under appropriate circumstances. For example, an insured could recover the costs of preventing a fire from spreading to its insured property.

The concept of sue and labor, which has existed in ocean marine insurance since the seventeenth century, is designed to benefit the insurer by reducing the amount of loss it would have to pay. To be recoverable, several criteria must be met.

First, the expenses must have been incurred to avert or minimize a loss for which the insurer would have been liable under the policy. Thus, if the loss sought to be avoided would not be covered under the policy, there is no sue and labor coverage. See, e.g., Young’s Market Co. v. Am. Home Assur. Co., 481 P.2d 817 (Cal. 1971) (no coverage for expenses incurred in its successful efforts to secure the release of a cargo of liquor which had been seized by Texas authorities where policy excluded coverage for loss caused by “seizure or destruction under quarantine or customs regulations, confiscation by order of any government or public authority, or risks of contraband or illegal transportation or trade.”).

Second, the loss being averted or minimized must be actual or “imminent.” Webster’s Third New International Dictionary defines “imminent” as “ready to take place; near at hand; impending.” This should not be an issue for Hurricane Irene.

Third, the expenses must be incurred primarily for the benefit of the insurer. For example, the court in Einard LeBeck, Inc. v. Underwriters at Lloyd’s of London, 224 F. Supp. 597 (D. Or. 1963), found that the rental value of moving equipment which was left in place under a synagogue which the insured was transporting and the cost of demolition of the synagogue after it was determined that the building could not be moved, were not primarily for the benefit of the insurer.

Fourth, to be recoverable under a sue and labor clause, expenses must be preventative rather than corrective or remedial. For example, in American Home Assurance Co. v. J. F. Shea Co., 445 F. Supp. 365, 370 (D.D.C. 1978), the insured sought sue and labor coverage for expenses it incurred to repair a recently excavated subway tunnel to prevent a collapse. The court found that the sue and labor provision applied but specifically recognized that expenses for “corrective” rather than “preventive” activities were not proper sue and labor costs.

A sue and labor clause provides a mechanism for an insured to recover expenses incurred to minimize or prevent loss or damage to covered property due to an imminent covered cause of loss. But expenses incurred to minimize or prevent losses for which there is no coverage, as well as expenses that are corrective or remedial in nature, are not recoverable. Depending on the factual circumstances, an insured may be able to satisfy all or only some of these criteria required for sue and labor coverage.
**CIVIL AUTHORITY COVERAGE CONTINUED**

In agreeing with the insurers that the civil authority provision did not provide coverage, the court noted that the evacuation order was issued due to the authority’s fear that Hurricane Rita would strike nearby, not actual physical damage. Because the mandatory evacuation order was issued due to the threat of damage and not due to property damage that had occurred, there was no coverage under the civil authority provision.

It is possible for business income loss to continue after the indemnity period for civil authority coverage ends because civil authority coverage ends when the order which caused the denial of access is lifted. In *McGee v. National Fire*, 977 So.2d. 304 (LA App. 2008), a case arising from Hurricane Katrina, the evacuation order was lifted yet the insureds’ loss of income continued for several days after the evacuation order was terminated. The continuation of the insured’s loss of business income after the evacuation order was of no consequence, however, and the Court held the coverage period ended when the order terminated.