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INSURANCE COVERAGE FOR POWER OUTAGE LOSSES

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Power failures can occur from any number of causes. Wind, snow, or ice storms, for instance, can knock down transmission lines. Lightning strikes or earthquakes can damage transformers, and equipment failure on a regional or local system can cause power failures.¹

More recently, power outages have occurred when utility companies shut off power to rotating areas when the demand for electricity exceeds the supply.² Indeed, in January 2001, California residents and businesses experienced the first of these so-called "rolling blackouts."³ The rolling blackouts in California stem from the state's flawed deregulation of the electric power

¹ For example, the famous November 9, 1965 blackout of the Northeast was caused by a failure of an interconnect relay system. *See, e.g.*, "'65 Northeast Power Loss, Was Shorter, But Bigger," *Wash. Post*, July 15, 1977, at 10.

² Susan Massman. "California Blackouts Leave Insureds in the Dark," *Nat'l Underwriter*, April 9, 2001, at 6.

³ Rolling blackouts are controlled events where utilities, which divide their millions of customers into blocks, shut down power to the blocks one by one, usually for one or two hours. *See, e.g.*, Massman, *supra* n.2. at 6; Dan Morain & Nancy Rivera Brooks, "Rolling Blackouts Hit Southland for First Time as Production Falls," *L.A. Times*, Mar. 20, 2001, at A18. The first rolling blackouts occurred in January 2001 in northern California and throughout California on March 19 and 20, 2001. *See, e.g.*, John Greenwald, "The New Energy Crunch," *Times*, Jan. 29, 2001, at 37; Mitchell Landsberg & Eric Bailey. "Second Day of Blackouts Disrupts 500,000 Homes and Businesses," *L.A. Times*, Mar. 21, 2001, at A1; Morain & Brooks, *supra*, at A1. Many predicted that the rolling blackouts would continue, especially during the warmer summer when electricity demands would be high. *See, e.g.*, Morain & Brooks, *supra*, at A1.

industry.⁴ Industry experts believe that power outages will be common occurrences not only in California but elsewhere as deregulation becomes more widespread throughout the country.⁵

Power outages vary in size and duration. Some affect a small number of homes or businesses for a very short time period. Others are more widespread. For example, during the famous November 9, 1965, blackout, 30 million people in eight states in the Northeast lost power for an average of 12 hours.⁶ The August 10, 1996, Western Power Grid blackout affected 15 Western states and millions of people, lasting up to six hours.⁷ And on July 14, 1997, some nine million New Yorkers lost power for 15 hours or more.⁸

When power outages occur, loss or damage may result: Perishable goods spoil; production and computer equipment shuts down; and business income is lost. As a result, business owners may look to their property insurance policy to recover for their power outage losses.

⁴ See, e.g., Greenwald, *supra* n.3, at 38) 39. The California Legislature unanimously approved electricity deregulation in 1996. Morain & Brooks, *supra* n.3, at A18. Deregulation was meant to introduce competition into the market, which theoretically meant lower prices. See, e.g., Greenwald, *supra* n.3 at 38. Before regulation, utility companies owned the power plants and sold electricity to customers subject to state regulation. E.g., Rebecca Smith & John R. Emshwiller, "Why California Isn't the Only Place Bracing for Electrical Shocks." *Wall. St. J.*, Apr. 26, 2001, at A1. After deregulation, many utilities sold off power plants and then bought back the output. But a rate freeze and escalating power prices left the utilities unable to make payments to their power suppliers. See, e.g., Greenwald, *supra* n.3, at 39) 42; Smith & Emshwiller, *supra*, at A1.

⁵ Greenwald, *supra* n.3, at 37; Smith & Emshwiller, *supra* note 4, at A1. In fact, Las Vegas suffered a rolling blackout on July 2, 2001, when temperatures reached 120° F and triggered a record demand for electricity. See Tom Gordon, "Casinos Help to End Las Vegas Blackout," *L.A. Times*, July 3, 2001 at A12. Currently, about half the country has deregulated electronic power. See, e.g., Daniel Eisenberg, "Which State is Next," *Time*, Jan. 29, 2001, at 45; Smith & Emshwiller, *supra* n.4, at A1. Additionally, concerns have been raised about the reliability of transmission lines because they are old and becoming overloaded, which also could lead to power outages across the country. *Id.*

⁶ See, e.g., "'65 Northeast Power Loss Was Shorter, But Bigger," *supra* n.1, at A10.

⁷ See, e.g., Mark Genrich, "What's Behind 2 Major Outages and What's to Prevent Another?" *Phoenix Gazette*. Aug. 28, 1996, at B5; "Power and the Gory: A Pair of Blackouts Across Large Areas of the Western U.S. Could Signal Problems in Deregulation of Electric Utilities." *S.F. Examiner*, Aug. 22, 1996. at A16.

⁸ *Id.*

This article analyzes coverage under property insurance and boiler and machinery insurance policies for power outage losses. It addresses the prerequisites to coverage under both types of policies. This article also discusses the special coverages that are available to cover power outage losses. Finally, it discusses coverage under a property policy's sue and labor clause.

THE DIRECT PHYSICAL LOSS OR DAMAGE REQUIREMENT

The first step in analyzing property insurance coverage for power outage losses is to determine whether there has been direct physical loss or damage. indeed, property insurance policies insure only against risks of direct physical loss or damage to property insured under the policy, as this common policy form states: "We will pay for direct physical loss of or damage to Covered Property at the premises described in the Declarations caused by or resulting from any Covered Cause of Loss."⁹ Similarly, direct physical loss or damage is a prerequisite to business interruption coverage.¹⁰

The direct physical loss or damage requirement means that there must be some physical change to the property's condition or structure; economic loss alone is not enough, as *Great Northern Insurance Co. v. Benjamin Franklin Federal Savings & Loan Association*¹¹ illustrates. There, Benjamin Franklin removed asbestos from a commercial building it owned. It then sought to recover these costs from its property insurer, Great Northern.¹² The court found no coverage because there was no direct physical loss or damage:

There is no evidence here of physical loss, direct or otherwise. The building has remained physically intact and undamaged. The only loss is economic. The policy, by its terms, covers

⁹ ISO Standard Property Policy (CP 00 99 06 95) at 1.

¹⁰ For example, ISO's business income form provides: We will pay for the actual loss of Business Income you sustain due to the necessary suspension of your "operations" during the "period of restoration". The suspension must be caused by direct physical loss or damage to property, including personal property in the open (or in a vehicle) within 100 feet, at premises which are described in the Declarations and for which a Business Income Limit of Insurance is shown in the Declarations. The loss or damage must be caused by or result from a Covered Cause of Loss. ISO Business income (and Extra Expense) Coverage Form (CP 00 30 06 95) at 1; ISO Business Income (without Extra Expense) Coverage Form (CP 00 32 06 95) at 1.

¹¹ *Great N. Ins. Co. v. Benjamin Franklin Fed. Sav. & Loan Assoc.*, 793 F. Supp. 259 (D. Or. 1990), *aff'd*, 953 F.2d 1387 (9th Cir. 1992).

¹² *Id.* at 261.

only direct physical loss. The inclusion of the terms “direct” and “physical” could only have been intended to excluded indirect, non-physical losses.¹³

Other courts have reached similar conclusions under different facts.¹⁴ In *Pirie v. Federal Insurance Co.*,¹⁵ for example, the court found that there was no coverage for the cost of removing lead paint from a 154-year-old house, reasoning that “an internal defect in a building (*e.g.*, bad title, bad paint, etc.) does not rise to the level of a physical loss.”¹⁶ Likewise, in *Glen Falls Insurance Co. v. Covert*,¹⁷ the court found no coverage for 81 safety stabilizers that fell to the floor at the insured’s auto supply store because there was no evidence of any physical damage to them. Even though the manufacturer withdrew its warranty and the units lost their merchantability, the court found that there was no coverage in the absence of any physical damage to the units.¹⁸

Some courts, however, have had a more expansive view of direct physical loss or damage. In *Western Fire Insurance Co. v. First Presbyterian Church*,¹⁹ for instance, the court found that the insured’s church sustained physical loss or damage in that gasoline infiltration in the soil under and around the building and gasoline vapor accumulation inside made the church inhabitable.²⁰ The court acknowledged that loss of use standing alone was not direct physical loss.²¹ Yet it concluded that this particular loss of use caused by the gasoline accumulation around and under the church

¹³ *Id.* at 263.

¹⁴ The New Mexico Supreme Court reached the same conclusion as the court in *Great Northern* did in a factually similar case involving the presence of asbestos in a building. *See Leafland Group-II, Montgomery Towers Ltd. P’ ship v. Insurance Co. of N. Am.*, 881 P.2d 26, 27 (N.M. 1994).

¹⁵ *Pirie v. Federal Ins. Co.*, 696 N.E.2d 553 (Mass. Ct. App. 1998).

¹⁶ *Id.* at 555. In *Pirie*, the levels of lead paint were many times the legal limit, As a result, the governmental authorities required deleading. *Id.* at 554. The insureds sought coverage under their property policy which covered “all risk of physical loss.” *Id.*

¹⁷ *Glen Falls Ins. Co. v. Covert*, 526 S.W.2d 222 (Tex. Ct. App. 1975).

¹⁸ *Id.* at 222-223. The units were sealed, so they could not be inspected for internal damage. The appellate court relied on the absence of any proof that the units were in fact damaged. *Id.*

¹⁹ *Western Fire Ins. Co. v. First Presbyterian Church*, 437 P.2d 52 (Colo. 1968).

²⁰ *Id.* at 54.

²¹ *Id.*

building, which rendered the premises uninhabitable and dangerous, “equates to a direct physical loss.”²²

In an unpublished opinion, the court in *American Guarantee & Liability Insurance Co. v. Ingram Micro, Inc.*²³ held that “physical damage” included loss of access, loss of use, and loss of functionality of computer data. There, Ingram, a microcomputer products wholesaler, experienced a 30-minute power outage at its Tucson Data Center, and all of its computer equipment stopped working.²⁴ Three mainframe computers lost all information stored in their random access memory.²⁵ Additionally, Ingram lost connections between the Tucson Data Center and six other Ingram locations in the United States and Europe for eight hours and, as result, could not do business.²⁶ Finally, Ingram lost the custom configurations for the random access memory that existed before the power outage, and it had to reprogram the equipment.²⁷

American Guarantee denied coverage for Ingram’s business interruption losses, asserting that there was no physical damage because the computer equipment’s capability to perform its intended functions remained intact.²⁸ But the trial court agreed with Ingram’s broader interpretation that “physical damage” includes the loss of use and functionality:

At a time when computer technology dominates our professional as well as personal lives, the Court must side with Ingram’s broader definition of “physical damage.” The Court finds that “physical damage” is not restricted to the physical destruction or harm of computer circuitry but includes loss of access, loss of use, and loss of functionality.²⁹

²² *Id.* at 55.

²³ *American Guar. & Liability Ins. Co. v. Ingram Micro, Inc.*, No. 99-185. 2000 WL 726789 (D. Ariz. Apr. 18, 2000).

²⁴ *Id.* at *1. The power failure occurred on December 22, 1998. *Id.*

²⁵ *Id.* Ingram employees reloaded the lost programming information, which took more than 90 minutes. *Id.*

²⁶ *Id.* at *2. Ingram Micro used a worldwide computer network, known as the Impulse System, to track customers, products, and daily business transactions. *Id.* at * 1. The other six locations were part of the Impulse System. *Id.* at *2.

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

The trial court relied principally on the federal computer fraud statute that defines “damage” as “any impairment to the integrity or availability of data, a program, a system, or information” and on several state statutes with similar provisions.³⁰

In sum, and as a threshold matter, there must first be direct physical loss or damage before there can be any coverage for losses caused by a power outage. In other words, the power outage must cause some physical change to the insured property; economic loss alone is not enough.

In some cases, a power failure causes physical loss or damage. For example, food spoils, something breaks, or production is damaged. In other cases, a power failure only impairs the insured’s ability to continue to do business, such as when a power outage shuts down only the insured’s computers or production equipment. In these instances, and as demonstrated in the *Great Northern*, *Pirie*, and *Glens Falls* cases, the insured’s loss is purely economic, and the absence of any direct physical loss or damage precludes coverage.

Citing *First Presbyterian Church* and *Ingram Micro*, insureds may argue that the simple loss of use of computer or production equipment or computer data constitutes direct physical loss or damage. But the cases do not support that broad proposition. In *First Presbyterian Church*, the infiltration and accumulation of gasoline and vapors in and around a building rendered it uninhabitable and dangerous. The temporary loss of electricity and consequent inability to use computers or production equipment or computer data is in no way analogous. The *Ingram Micro* case is unreported and, thus, carries little, if any, precedential value. More importantly, the court’s reliance on the “damage” definition in various criminal statutes was flawed; the meaning of “damage” in a criminal fraud statute is not the same as “physical loss or damage” in an insurance contract.

THE COVERED PROPERTY REQUIREMENT

³⁰ *Id.* The court cited 18 U.S.C. § 1030 (West 1999), Conn. Gen. Stat. § 53a-251 (2000), Minn. Stat. § 609.88 (1999), Mo. Ann. Stat. § 569.093 (West 1999), and N.Y. Penal Law § 156.20 (McKinney 1999). It then wrote:

Lawmakers around the country have determined that when a computer’s data is unavailable, there is damage; when a computer’s services are interrupted, there is damage; and when computer’s network or software is altered, there is damage. Restricting the policy language to that proposed by American would be archaic.

Id. *2.

The next step in analyzing property insurance coverage for a power outage loss is to determine whether the required direct physical loss or damage was to insured property.³¹ Typically, the policy will describe the insured property. This is accomplished through a variety of formats, some very general, such as “all real property” or “all personal property” (or both), and some specific, setting forth the locations and specific property types insured.

Of course, there are exclusions to the covered classes of property, just as there are exclusions to the covered perils. The insured has the initial burden of proving that the damaged property falls within the class of property covered.³² As in the case of perils, the insurer has the burden of proving that an exclusion for property applies.³³

In short, direct physical loss or damage to insured property is a prerequisite to insurance coverage for losses caused by a power outage. If there is no physical loss or damage to covered property, there can be no coverage for that item of property. Similarly, if no covered property is damaged, no business interruption coverage applies.³⁴

THE COVERED CAUSE OF LOSS REQUIREMENT

Assuming that there is the required direct physical loss or damage to covered property, the final step in analyzing property insurance coverage for power outage losses is to determine whether the loss or damage was caused by a peril or risk covered by the policy.³⁵ If the policy is written on an “all risk” basis, there is coverage for all fortuitous losses involving the insured property unless

³¹ See *supra* n. 9 and accompanying text.

³² See, e.g., *Pan Am. World Airways, Inc. v. Aetna Cas. & Sur. Co.*, 505 F.2d 989, 999 (2d Cir. 1974); *Great N. Ins. Co. v. Dayco Corp.*, 620 F. Supp. 346, 351 (S.D.N.Y. 1985).

³³ See, e.g., *Strubble v. United Servs. Auto. Ass’n*, 110 Cal. Rptr. 828, 831-832 (Cal. Ct. App. 1973).

³⁴ See generally 3 Linda G. Robinson & Jack P. Gibson, *Commercial Property Insurance* XI.H.2 (2000).

³⁵ See *supra* n. 9 and accompanying text. In most jurisdictions, causation questions are resolved by reference to the “efficient proximate cause” of the loss. See generally Robert H. Jerry, II, *Causation in 3 Insuring Real Property* § 48.03(2), at 48-20 (Stephen A. Cozen ed. 2000); Peter J. Kalis et al., *Policyholder’s Guide to the Law of Insurance Coverage* § 13.05, at 13-19) 13-20 (2001). Under this approach, if the “efficient proximate cause” of the loss is a covered peril there is coverage: if it is an excluded peril, there is not. See Jerry, *supra*, § 48.03[2] at 48-20; Kalis, *supra*, § 13.05 at 13-19-13-20. Courts generally define “efficient proximate cause” to mean the “predominating” or most important cause. See, e.g., *Garvey v. State Farm Fire & Cas. Co.*, 770 P.2d 704, 708 (1989).

the policy contains a specific provision expressly excluding the loss from coverage.³⁶ However, if the policy provides “named perils” coverage, there is coverage only if a fortuitous loss was caused by one of the specific perils identified and is not thereafter excluded.³⁷ Named peril policies typically cover only losses caused by limited perils, such as fire, lightning, explosion, windstorm, smoke, aircraft or vehicles, riot, vandalism, sprinkler leakage, sinkhole collapse, and volcanic action.³⁸ Today, most commercial property insurance policies provide all risk coverage.

Thus, courts have found coverage when a covered peril causes a power outage, which, in turn, results in direct physical loss or damage to covered property. In *Lipshultz v. General Insurance Company of America*,³⁹ for example, the court found coverage when 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.⁴⁰ The policy covered direct loss by windstorm, and the court held that the spoilage loss constituted a direct loss by windstorm.⁴¹

The court in *Fred Meyer, Inc. v. Central Mutual Insurance Co.*⁴² reached the same conclusion. There, a windstorm destroyed electrical power lines supplying the insured’s refrigeration facilities, and, as a result, food spoiled.⁴³ By endorsement, the insurance policy provided coverage

³⁶ See, e.g., *C.H. Leavell & Co. v. Fireman’s Fund Ins. Co.*, 372 F.2d 784, 787 (9th Cir. 1967); *Kilroy Indus. v. United Pac. Ins. Co.*, 608 F. Supp. 847, 855 (C.D. Cal. 1985).

³⁷ See, e.g., *IBM World Trade Corp. v. Granite State Ins. Co.*, 455 N.Y.S.2d 914, 917 (N.Y. Sup. Ct. 1982); *Ellis v. New Hampshire Ins. Co.*, 279 S.E.2d 417, 209) 210 (W. Va. 1981).

³⁸ See, e.g., ISO Causes of Loss-Basic Form (CP 10 10 06 95) at 1-2.

³⁹ *Lipshultz v. General Ins. Co. of Amer.*, 96 N.W.2d 880 (Minn. 1959).

⁴⁰ *Id.* at 881.

⁴¹ *Id.* The court also noted the absence of an exclusion that would address coverage for these type of losses. *Id.* at 885-886.

⁴² 235 F. Supp. 540 (D. Or. 1964).

⁴³ *Id.* at 541.

for “direct loss by windstorm.”⁴⁴ 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 foodstuffs.⁴⁵

EXCLUSIONS

If the loss does fall within the policy’s insuring clause, the next question is whether any exclusion applies. A clear and unambiguous exclusion overrides the insuring clause and eliminates coverage a policy might otherwise afforded.⁴⁶ As discussed below, several exclusions may apply to power outage losses, including the “off-premises services” exclusion, which would have precluded coverage for the losses suffered by the insureds in *Lipshultz* and *Fred Meyer*.

Off-Premises Services Exclusion

Many policies specifically exclude coverage for losses caused by power outages stemming from off-premises damage, except for a covered resulting loss. For example, ISO’s standard property policy and all of the ISO causes of loss forms contain this exclusion, commonly referred to as the off-premises services exclusion:

1. We will not pay for loss or damage caused directly or indirectly by any of the following. . .
 5. Utility Services
The failure of power or other utility service supplied to the describe premises, however caused, if the failure occurs away from the de scribed premises.
But if the failure of power or other utility service results in a Covered Cause of Loss, we will pay for the loss or damage caused by that Covered Cause of Loss.⁴⁷

⁴⁴ *Id.* at 542.

⁴⁵ *Id.* at 543-544.

⁴⁶ *See, e.g., American Star Ins. Co. v. Insurance Co. of the W.*, 284 Cal. Rptr. 45, 47 (Cal. Ct. App. 1991). In the all-risk format, the burden of proof largely falls upon the insurer in a coverage dispute because it must prove that a specified exclusion applies to avoid coverage. *See, e.g., Strubble v. United Servs. Auto. Ass’n*, 110 Cal. Rper. 828, 831-832 (Cal. Ct. app. 1973). In the named perils format, on the other hand, the insured has the burden of proving that the loss was caused by one of the named perils, while the insurer still has the burden of proving that an exclusion applies. *See, e.g., id.* at 831.

⁴⁷ ISO Standard Property Policy (CP 00 99 06 95) at 5; ISO Causes of Loss) Basic Form (CP 10 10 06 95) at 3; ISO Causes of Loss) Broad Form (CP 10 20 06 95) at 3; ISO Causes of Loss) Special Form (CP 10 30 06 95) at 2. Coverage under the ISO business income forms is
(continued...)

This exclusion applies to spoilage and other property damage caused by utility service interruption originating off-premises. The exclusion operates regardless of the power failure's cause. Thus, if a lightning strike away from the insured premises causes a power failure at the premises, the consequential property damage on the premises, such as spoilage of perishable products, is not covered.⁴⁸ If, however, damage to insured property on the premises from a covered cause of loss results from this power failure, the resulting damage is covered. For example, if the power interruption causes a fire, there would be coverage for any fire damage.

Notably, the ISO business interruption forms are exempt from the off-premises services exclusion and subject to a more restrictive exclusion that eliminates coverage for time element losses if the failure occurs "outside of a covered building."⁴⁹ Hence, if a windstorm damages transmission lines on the insured's premises, resulting in a power failure, any direct physical loss or damage to the insured's property is covered because the loss originated on the premises. The business income and extra expense loss resulting from the damage are not covered because the utility service failure occurred outside of the building.

Courts have reached differing interpretations of the off-premises services exclusion. The Rhode Island Supreme Court, for instance, found the off-premises services exclusion ambiguous and illusory in two cases, *Pressman v. Aetna Casualty & Surety Co.*⁵⁰ and *Jerry's Supermarkets, Inc. v. Rumford Property & Liability Insurance Co.*⁵¹ In *Pressman*, a sole-proprietor psychologist's office was closed for business for six days because of a power failure that occurred when a tree adjacent

⁴⁷ (...continued)

determined by whichever Causes of Loss form the policy includes. See ISO Business Income (and Extra Expense) Coverage Form (CP 00 30 06 95) at 1; ISO Business Income (without Extra Expense) Coverage Form (CP 00 30 06 95) at 1.

⁴⁸ See Fire, Casualty & Surety Bulletins. Commercial Property at D.1-8 (2001).

⁴⁹ See ISO Causes of Loss) Basic Form (CP 10 10 06 95) at 3; ISO Causes of Loss) Broad Form (CP 10 20 06 95) at 3) 4; ISO Causes of Loss) Special Form (CP 10 30 06 95) at 2, 4.

⁵⁰ *Pressman v. Aetna Cas. & Sur. Co.*, 574 A.2d 757 (R.I. 1990)

⁵¹ *Jerry's Supermarkets, Inc. v. Rumford Propr. & Liability Ins. Co.* 586 A.2d 539 (R.I. 1991). The court in *Brooklyn Bridge, Inc. v. South Carolina Insurance Co.*, 421 S.E.2d 511 (S.C. Ct. App. 1992), found an earlier version of the same exclusion to be ambiguous. There, the court said that the "simple addition of these four words") "*from a power failure*" would make the intent "clear and unambiguous." *Id.* at 512 (italics in original). These four words were in fact added to and are now a part of the off-premises services exclusion. See ISO Standard Property Policy (CP 00 99 06 95) at 5; ISO Causes of Loss) Basic Form (CP 10 10 06 95) at 3; ISO Causes of Loss) Broad Form (CP 10 20 06 95) at 3; ISO Causes of Loss) Special Form (CP 10 30 06 95) at 2.

to the psychologist's property fell onto the power line running to his building.⁵² Pressman was unable to see his scheduled patients and could not do computerized diagnostic testing. Also, after power was restored, one of his two computers was down because a ROM chip was not functioning.⁵³ The appellate court found the off-premises exclusion ambiguous and illusory because it precluded coverage in almost any circumstances unless the insured had his or its own generator inside the building.⁵⁴ Similarly, in *Jerry's Supermarkets*, the insured suffered food spoilage caused by the power loss due to a windstorm generated by Hurricane Gloria.⁵⁵ Relying on *Pressman* and the insured's reasonable expectation of coverage for losses caused by hurricanes, the court again found coverage.⁵⁶

This reasoning has not been accepted outside of Rhode Island. In fact, more recently courts have found the exclusion to clearly and unambiguously preclude coverage for off-premises power failures.⁵⁷ One such example is *Mapletown Foods, Inc. v. Motorists Mutual Insurance Co.*⁵⁸ In *Mapletown Foods*, high winds and severe storms struck the northeast Ohio area, causing power outages and food spoilage at two Mapletown grocery stores. Distinguishing *Pressman*, the court held that the off-premise' services exclusion precluded coverage for Mapletown Foods' loss:

If the power failure in instant case does not fall within the meaning of a power failure 'away from the premises' then the phrase is bereft of meaning . . . We must give meaning to the exclusion if we reasonably can. Its ordinary meaning is that there is no coverage when the power failure occur away from the premises, *i.e.*, at the utility power station or somewhere off the plaintiff's premises. That is a reasonable construction and the one applicable to the instant case.⁵⁹

⁵² *Pressman*, 574 A.2d at 758.

⁵³ *Id.*

⁵⁴ *Id.* at 759.

⁵⁵ *Jerry's Supermarkets*, 586 A.2d at 540.

⁵⁶ *Id.*

⁵⁷ *See, e.g., Noonan, Astley & Pearce, Inc. v. Insurance Co. of N. Am.*, No. 92 CIV. 2824, 1994 WL 114823 (S.D.N.Y. Mar. 31, 1994) (no coverage where a fire at a Consolidated Edison substation caused a power interruption and the loss of electricity at the insured's place of business.)

⁵⁸ *Mapletown Foods, Inc. v. Motorists Mut. Ins., Co.*, 662 N.E.2d 48 (Ohio Ct. App. 1995).

⁵⁹ *Id.*

The South Dakota Supreme Court reached the same conclusion in *Lakes' Byron Store, Inc. v. Auto-Owners Insurance Co.*⁶⁰ There, a severe snow and ice storm knocked out power poles and lines, and the insured's hunting resort lost power for nine days.⁶¹ None of the power poles or lines on the insured premises were damaged. Auto-Owners denied Lakes' claim for food spoilage and business interruption because the power failure occurred away from the premises.⁶² The appellate court found that there was no coverage because "the power failure occurred away from the described premises and the exclusion precluded coverage."⁶³

In short, the off-premises services exclusion precludes coverage for property damage caused by utility service interruption originating off-premises. However, if damage to insured property on the premises from a covered cause of loss results from the power failure, the resulting damage is covered.

Acts or Decisions Exclusion

Many policies exclude loss or damage caused by "Acts or decisions including the failure to act or decide, of any person, group, organization or governmental body."⁶⁴ However, if this excluded cause results in covered cause of loss, the insurer will pay for the loss or damage cause by the covered cause of loss.⁶⁵

The few courts that have interpreted this exclusion have interpreted it narrowly. For instance, in *Jussim v. Massachusetts Bay Ins. Co.*,⁶⁶ the court held that the acts or decisions exclusion did not preclude coverage in a case in which negligent acts caused 500 gallons of fuel oil to be pumped

⁶⁰ *Lakes Bryon Store, Inc. v. Auto-Owners Inc. Co.*, 589 N.W.2d 608 (S.D. 1999).

⁶¹ *Id.* at 608.

⁶² *Id.*

⁶³ *Id.* at 610.

⁶⁴ *See, e.g.*, ISO Causes of Loss—Special Form (CP 10 30 06 95) at 3.

⁶⁵ *See, e.g., id.*

⁶⁶ *Jussim v. Massachusetts Bay Ins. Co.*, 597 N.E.2d 1379 (Mass Ct. App. 1992), *aff'd*, 610 N.E.2d 954 (Mass. 1993).

through a disconnected fuel delivery line into the insured's basement.⁶⁷ The *Jussim* court reasoned that the exclusion could not be read literally.⁶⁸

Similarly, in *Auto-Owners Ins. Co. v. Hansen Housing, Inc.*,⁶⁹ the court found the exclusion inapplicable when the insured's property was damaged when the Montana-Dakota Utilities (MDU) deliberately cut off the power supply for safety reasons. There, the insured's building sustained damage when cold temperatures caused the sprinkler pipes to freeze and break.⁷⁰ The fire suppression alarm activated and electronically summoned the fire department.⁷¹ The fire department had MDU shut off electricity to the building for safety reasons.⁷² Thereafter, the building was broken into and property was taken.⁷³ Auto-Owners asserted that the acts or decisions exclusion precluded coverage for the additional losses caused by the decision to shut off the power. The court, however, found that the decision to shut off the power was not the proximate cause of the insured's losses:

The action taken by MDU in turning off the electrical supply to the building was done to prevent injury to emergency personnel, as well as further, more serious, damage to the building. The proximate cause of the loss remained the broken water pipes. The act by MDU of turning off the electrical supply did not bar Hansen Housing's claim?⁷⁴

To summarize, the acts or decisions exclusion precludes coverage if a loss is caused by any person's or entity's deliberate decision. The exclusion should preclude coverage in those cases in which direct physical loss or damage occurs as a result of a rolling blackout unless the blackout results in a covered cause of loss. Indeed, the rolling blackouts are controlled, planned events in which a utility company shuts down power to various areas.⁷⁵ Thus, the utility company's decision to shut down power is the cause of any subsequent losses. This situation is quite unlike *Hansen Housing*, in which the utility shut off power in response to a fire department request to prevent injury to firefighting personnel and more serious damage to the building. In contrast, the decision to shut

⁶⁷ *Id.* at 1382.

⁶⁸ *Id.*

⁶⁹ *Auto-Owners Ins. Co. v. Hansen Housing, Inc.*, 604 N.W.2d 504 (S.D. 2000).

⁷⁰ *Id.* at 508.

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.* at 512.

⁷⁵ *See, e.g.*, Massman, *supra* n.2, at 6; Morain & Brooks, *supra* n.3, at A18.

down power to various blocks of consumers because the demand for electricity exceeds the supply falls squarely within the acts or decisions exclusion.

Idle Periods Exclusion

Some business interruption coverage forms include an “idle periods” exclusion that may apply to some power outage losses. Under this exclusion, the period when business operations would have been suspended for reasons other than the direct physical loss or damage is an “idle period,” and business interruption losses attributable to that idle period are excluded.⁷⁶

*Manufacturers Mutual Fire Insurance Co. v. Royal Indemnity Co.*⁷⁷ illustrates the application of an idle periods exclusion to a power failure loss. There, Hurricane Betsy struck the New Orleans area.⁷⁸ One of Kaiser’s aluminum plants suffered on-premises damage to electrical transmission lines and distribution equipment that resulted in a total shutdown of Kaiser’s on-premises power plant and total power interruption for 37 hours.⁷⁹ With the absence of electrical power, molten metal solidified, and the plant was shut down for several days, which, in turn, resulted in \$4 million profit loss.⁸⁰

Kaiser had two insurance coverages: property and business interruption through Manufacturers and boiler and machinery from Royal. Both policies provided coverage for on-premises physical damage.⁸¹ In addition, Endorsement 8 in Royal’s policy provided coverage for business interruption losses arising out of a power loss caused by an off-premises occurrence. Both policies contained idle periods clauses.⁸² The issue before the court was the manner in which liability for the loss should be apportioned between Manufacturers and Royal. The Ninth Circuit reasoned that application of the idle periods exclusion required the court to engage in hypotheses:

⁷⁶ *Air Liquide Am. Corp. v. Protection Mut. Ins. Co.*, No. 96-16661, 1997 WL 781688 at *1 (9th Cir. Dec. 18, 1997). In *Air Liquide*, the court found that the idle periods exclusion precluded coverage for business interruption losses caused by damage to insured’s supplier’s plant. See also *Cargill, Inc. v. Appalachian Ins. Co.*, No. 4-77-238, 1983 U.S. Dist. LEXIS 20156 (D. Minn. Jan. 10, 1983) (idle periods exclusion precluded coverage for time period where insured’s barge berth, although damaged, was inaccessible because of high water).

⁷⁷ *Manufacturers Mut. Fire Ins. Co. v. Royal Indem. Co.*, 501 F.2d 299 (9th Cir. 1974).

⁷⁸ *Id.* at 299. The hurricane struck on September 9, 1965. *Id.*

⁷⁹ *Id.* at 300.

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

It is this [idle periods] clause that required the court to indulge in hypotheses. Under the clause the court was required to hypothesize a situation in which no damage had been suffered by on-premises facilities. If, in that hypothetical situation, there was a period when (for reasons other than on-premises damage) goods would not have been produced or operations and services maintained, then, as to that hypothetically “idle” period there was no liability. The court found that there was such a period and that the exemption accordingly became effective.⁸³

Under this analysis, the court apportioned the loss to Royal because the off-premises damage “idled” the Kaiser plant, so Royal was entirely liable because its Endorsement 8 covered losses caused by off-premises occurrences.⁸⁴

In short, the idle periods exclusion precludes coverage for business interruption losses sustained during any period when business operations would have been suspended for reasons other than the direct physical loss or damage covered by the policy. Thus, and for example, if the policy includes an off-premises services exclusion and the insured sustains on-premises physical loss caused by an off-premises power failure, the time period that the insured’s business could not operate because of the excluded off-premises power interruption would be an excluded idle period.

Not all business interruption forms include idle periods exclusions. The ISO forms, for example, do not.⁸⁵ Commentators have noted, however, that since almost all gross earnings business interruption forms provide coverage for the actual loss sustained, there likely would not be coverage for any period during which the insured’s business operations would have been suspended even if no loss had occurred, with or without an idle periods exclusion.⁸⁶

⁸³ *Id.* at 301.

⁸⁴ *Id.* The court reasoned:
While Manufacturers received the benefit of this exception, Royal’s Endorsement 8 precluded Royal from enjoying it, since the endorsement provided coverage for the very risk that hypothetically had created the “idle period.” If we accept the hypothesis that makes the exemption effective, we must in turn extend that hypothesis to Endorsement 8. Assuming that off-premises damage would have “idled” the Kaiser plant, then Royal is, by the same assumption, liable under Endorsement 8.

Id.

⁸⁵ See ISO Business Income (and Extra Expense) Coverage Form (CP 00 30 06 95); ISO Business Income (without Extra Expense) Coverage Form (CP 00 32 06 95).

⁸⁶ See 1 Robinson & Gibson, *supra* n.34, at II.F.11.

SPECIAL POWER OUTAGE COVERAGES

There are several specific coverages that can be purchased to provide coverage for certain power outage losses. First, “spoilage coverage” is available for insureds that process, sell, or store perishable goods, like food or medicine. That coverage insures the spoilage of perishable stock caused by a power outage:

2. Covered Causes of Loss

- b.** Power Outage, meaning change in temperature or humidity resulting from complete or partial interruption of electrical power, either on or off the described premises, due to conditions beyond your control.⁸⁷

The spoilage coverage is very broad because it applies whether the power interruption occurs on or off the premises, and there is no requirement that the power outage be the result of a covered cause of loss. In addition, the coverage is subject to few exclusions. For one, coverage is excluded when the power outage is caused by the “inability of a power source at the described premises to provide sufficient power due to lack of generating capacity to meet demand.”⁸⁸ Any losses caused by a utility company’s inability to provide sufficient power due to lack of fuel or governmental order are also excluded.⁸⁹

Thus, spoilage coverage provides coverage for losses caused by most power outages, including those caused by rolling blackouts. While the rolling blackouts are caused by the utility’s inability to meet demand, the spoilage coverage endorsement excludes coverage only when the loss is caused by the inability of an *on-premises* power source to meet demand; rolling blackouts are caused by the inability of an off-premises power source to meet demand.⁹⁰

Second, insureds can purchase utility service interruption coverage. The ISO utility service) direct damage endorsement, for instance, adds coverage for damage to the insured’s property resulting from an interruption of any of the utility services identified, such as water, communication, and power, in the endorsement schedule as covered:

- A. We will pay for loss of or damage to Covered Property described in the Schedule caused by the interruption of service to the described premises. The interruption

⁸⁷ ISO Spoilage Coverage (CP 04 40 06 95) at 2.

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *See supra* n.3 and accompanying text.

must result from direct physical loss or damage by a Covered Cause of Loss to the following property, not on the described premises, if indicated by an “X” in the Schedule.⁹¹

Thus, for coverage to apply, the service interruption must be caused by a covered cause of loss, such as windstorm.⁹² Hence, there is no coverage if the service interruption is caused by a non-covered peril, like mechanical breakdown. For example, there would be no coverage for power failure losses when the power failure was caused by mechanical breakdown of the utility’s equipment.⁹³ Nor would there be coverage for rolling blackout losses because the power failure results from a voluntary decision to shut off power and not from a direct physical loss or damage by a covered cause of loss to the utility’s property.

The ISO utility service) time element endorsement is similar; it adds coverage for an insured’s business income and extra expense loss caused by a utility service interruption:

4. We will pay for loss of Business Income or Extra Expense at the described premises caused by the interruption of service to the described premises. The interruption must result from direct physical loss or damage by a Covered Cause of Loss to the Property described in paragraph **B**, if such property is indicated by an “X” in the Schedule and is located outside of a covered building described in the Declarations.⁹⁴

Paragraph B lists water supply services, communication supply services, and power supply services. Coverage can be obtained for one, two, or all three.⁹⁵

As with the direct damage endorsement, the time element endorsement requires that the service interruption result from direct physical loss or damage by a covered cause of loss to the types of utility services identified in the endorsement schedule.⁹⁶ As noted, the ISO business interruption forms are subject to a more restrictive exclusion that eliminates coverage for time element losses if the failure occurs “outside of a covered building.”⁹⁷ The ISO utility service—time element

⁹¹ ISO Utility Service—Direct Damage (CP 04 17 06 95) at 1.

⁹² *Id.*

⁹³ *See* 3 Robinson & Gibson, *supra* n.34, at VI.F.16.

⁹⁴ ISO Utility Services—Time Element (CP 15 45 06 95) at 1.

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *See* ISO Causes of Loss—Basic Form (CP 10 10 06 95) at 3; ISO Causes of (continued...)

endorsement adds back this coverage; it applies not only to service interruption originating off the insured's premises but also to service interruption originating outside of covered building.⁹⁸ Accordingly, loss or damage to transmission lines located on the insured's premises is covered, assuming, of course, that transmission lines are selected on the endorsement's schedule.

SUE-AND-LABOR COVERAGE

Insureds may incur expenses to prevent or minimize power outage losses. As one example, an insured may purchase and install an on-site emergency generator to supply power in the event of a power failure. An insured also may purchase and install equipment or software to prevent loss or damage to property in the event of a power failure. Or an insured make take other measures to reduce the impact of a power outage.

Because substantial costs may be involved, some insureds may look to their property insurers to pay that cost as a "sue-and-labor" expense. Indeed, some commercial property insurance policies include sue-and-labor clauses that provide mechanisms for the insureds to recover expenses incurred to minimize or prevent loss or damage to covered property due to an actual or imminent covered cause of loss.⁹⁹ A typical sue-and-labor clause reads:

SUE AND LABOR: In case of actual or imminent loss or damage it shall be lawful and necessary for the Insured, their factors, servants or assigns, to sue, labor and travel for, in and about the defense, safeguard and recovery of property insured hereunder, or any part thereof, without prejudice to this insurance; . . . to the charges whereof, this Company will contribute according to its proportion to the sum hereby insured.¹⁰⁰

⁹⁷ (...continued)

Loss—Broad Form (CP 10 20 06 95) at 3–4; ISO Causes of Loss—Special Form (CP 10 30 06 95) at 2, 4.

⁹⁸ ISO Utility Services—Time Element (CP 15 45 06 95) at 1.

⁹⁹ The sue-and-labor clause is an ancient one: its use in marine insurance policies dates back to the 17th century. *See, e.g.*, *Reliance Ins. Co. v. The Yacht Escapade*, 280 F.2d 482, 488 n.11 (5th Cir. 1960); *Young's Mkt. Co. v. American Home Assur. Co.*, 481 P.2d 817, 820 (Cal. 1971). The clause imposes a duty on the insured to the insurer to exercise the care of a reasonable, uninsured owner to protect the insured property in order to minimize or prevent an *actual or imminent loss* for which the insurer would be liable under the policy. *See, e.g.*, *Tillery v. Hull & Co., Inc.*, 717 F. Supp. 1481, 1486 (M.D. Fla. 1988), *aff'd*, 876 F.2d 1517 (11th Cir. 1989); *Einard LeBeck, Inc. v. Underwriters at Lloyd's of London, England*, 224 F. Supp. 597, 598 (D. Or. 1963).

¹⁰⁰ From a policy issued by American Home Assurance Company and quoted in *Young's Market*, 481 P.2d at 818.

Sue-and-labor coverage is available only in limited circumstances. To be recoverable under a sue-and-labor clause, expenses must have been incurred to avert or minimize an actual or imminent loss that would be covered under the policy.¹⁰¹ Also, the expenses must be incurred primarily for the insurer's benefit.¹⁰² Thus, there is no coverage for expenses incurred to prevent a loss that would be excluded from policy coverage.¹⁰³

Stated differently, whether sue-and-labor expenses are covered is tied directly to the policy's insuring provisions.¹⁰⁴ Hence, one must determine whether the insured's actions correlate to an excluded loss, in which case the sue-and-labor expenses do not benefit the insurer because the loss would not be covered, or to a covered loss, in which case the actions benefit the insurer by reducing or eliminating a loss for which the insurer would be liable.¹⁰⁵

Consequently, expenses incurred to prevent or minimize the impact of a power outage loss are recoverable under a sue-and-labor clause only if the insured satisfied the criteria outlined above. Of those criteria, the actual or imminent loss requirement may be the most problematic. "Imminent" means "likely to occur at any moment"¹⁰⁶ and "ready to take place; near at hand; impending."¹⁰⁷ In most cases, an insured has little or no warning of a power failure, so it is unlikely that an insured could ever meet the imminent loss requirement. Measures taken after a power failure occurs, such as purchasing and installing a back up generator, may meet this threshold requirement.

Even so, the insured also must demonstrate that the expenses were incurred to avert or minimize a loss for which the insurer would have been liable under the policy. If the loss sought to

¹⁰¹ E.g., *The Yacht Escapade*, 280 F.2d at 488 n.11; *Archer-Daniels-Midland Co. v. Phoenix Assur. Co. of N.Y.*, 975 F. Supp. 1129, 1133 (S.D. Ill. 1997); *Tillery*, 717 F. Supp. at 1486; *American Home Assur. Co. v. J. F. Shea Co.*, 445 F. Supp. 365, 367 n.5 (D.D.C. 1978).

¹⁰² E.g., *Blasser Bros., Inc. v. Northern Pan-Am. Line*, 628 F.2d 376, 386 (5th Cir 1980); *Einard LeBeck*, 224 F. Supp. at 598; *Southern Cal. Edison Co. v. Harbor Ins. Co.*, 148 Cal. Rptr. 106, 113 (Cal. Ct. App. 1978).

¹⁰³ See, e.g., *Young's Mkt.*, 481 P.2d at 820) 821 (holding that there was no recovery under a sue and labor clause for the costs incurred to secure release of liquor seized by governmental authorities where policy contained a governmental seizure exclusion).

¹⁰⁴ E.g., *Southern Cal. Edison Co. v. Harbor Ins. Co.*, 148 Cal. Rptr. 106 112-113 (Cal. App. 1978).

¹⁰⁵ *Id.*

¹⁰⁶ Oxford American Dictionary 438 (Heald Colleges ed. 1988); The Random House Webster's College Dictionary 652 (2d ed. 1997).

¹⁰⁷ Webster's Third New International Dictionary 1130 (1993).

be prevented or minimized is excluded by the policy, there can be no sue-and-labor coverage. Similarly, if the expenses were not incurred to avoid direct physical loss or damage to the insured's property, there is no sue-and-labor coverage. As a result, expenses incurred to prevent or minimize purely economic losses are not recoverable.

BOILER AND MACHINERY COVERAGE

Boiler and machinery insurance is a specialized type of property insurance. This insurance generally covers boilers, pressure vessels, and production machinery and equipment, coverage for which typically is excluded in most commercial property insurance policies.¹⁰⁸ Notably, boiler and machinery policies do not cover electronic data processing equipment or any recording or storage media used in connection with an electronic computer or electronic data processing equipment.¹⁰⁹

Boiler and machinery policies generally cover losses caused by an “accident” to a covered “object.”¹¹⁰ The ISO boiler and machinery policy, as one example, defines “accident” as “a sudden and accidental breakdown of the ‘object’ or a part of the ‘object.’”¹¹¹ Courts generally apply dictionary definitions of “sudden”—“happening unexpectedly”—and “accidental”—occurring by “chance or unexpectedly.”¹¹² Also, to be covered, there must be physical damage to the object that requires repair or replacement.¹¹³ Object is defined to mean the equipment shown in the declarations.¹¹⁴ Objects can be expressed as classes of property as well as individual items. A full description of the specific object categories is often found in the object definition endorsements for the various classes of objects covered by the policy.¹¹⁵

¹⁰⁸ See generally Kalis, *supra* n.35, § 14.01, at 14-3; Jeffrey W. Stempel, Law of Insurance Contract Disputes § 22.04, at 22-26-22-27 (2d ed. 2001).

¹⁰⁹ *Id.*

¹¹⁰ See, e.g., ISO Boiler and Machinery Coverage Form (BM 00 25 06 95) at 1 (“A Covered Cause of Loss is an ‘accident’ to an ‘object’ shown in the Declarations.”)

¹¹¹ See, e.g., *id.* at 7.

¹¹² E.g. Cyclops Corp. v. Home Ins. Co. 352 F. Supp. 931, 934-935 (W.D. Pa. 1973).

¹¹³ See, e.g., ISO Boiler and Machinery Coverage Form (BM 00 25 06 95) at 7.

¹¹⁴ *Id.*

¹¹⁵ *Id.* There are six ISO object definitions. See ISO Object Definition No. 1—Pressure and Refrigeration Objects (BM 00 26 06 95); ISO Object Definition No. 2—Mechanical Objects (BM 00 27 06 95); ISO Object Definition No. 3—Electrical Objects (BM 00 28 06 95); ISO Object
(continued...)

An unendorsed boiler and machinery policy usually will not provide coverage for power outage losses because boiler and machinery policies typically exclude damage caused directly or indirectly by “lack of power, light, heat, steam or refrigeration.”¹¹⁶ This exclusion is even broader than the off-premises power exclusion found in commercial property policies because it eliminates coverage for both off-premises and on-premises utility service interruptions.¹¹⁷

In *Sawyer Fruit & Vegetable Cooperative Corp. v. Lumbermens Mutual Casualty Co.*,¹¹⁸ the court found the lack of power exclusion to be unambiguous and, thus, precluded coverage when a four-hour power failure caused snow and freezing weather conditions to damage refrigeration compressors:

The contract plainly, clearly, and unambiguously states that loss caused indirectly by wind or from loss of power and heat is not covered by the policy. When plaintiff contracted to exclude damage from loss of power and heat, we may reasonably assume that they also contracted with reference to what would follow if power and heat were lost in freezing weather. We cannot ignore the language in and the purpose of the policy and impose liability for a loss not contemplated by the parties.¹¹⁹

As with commercial property insurance, insureds can purchase several boiler and machinery endorsements that provide coverage for certain power outage losses. A business interruption endorsement is one such coverage. The ISO business interruption endorsement, for instance, provides coverage for business interruption losses sustained as a result of direct physical damage to covered property caused solely by an “accident” to an “object” listed in the business interruption

¹¹⁵ (...continued)

Definition No. 4—Turbine Objects (BM 00 29 06 95); ISO Object Definition No. 5—Comprehensive Coverage (Excluding Production Machines) (BM 00 30 06 95); and ISO Object Definition No. 6—Comprehensive Coverage (Including Production Machines) (BM 00 31 06 95).

¹¹⁶ *Id.*

¹¹⁷ *See* 3 Robinson & Gibson, *supra* n.34, at XI.G.21.

¹¹⁸ *Sawyer Fruit & Vegetable Coop. Corp. v. Lumbermens Mut. Cas. Co.*, 453 N.E.2d 826 (Ill. Ct. App. 1983).

¹¹⁹ *Id.* at 827.

schedule.¹²⁰ The “lack of power” exclusion does not apply to business interruption losses.¹²¹ Thus, this endorsement has the effect of providing coverage for the business income loss resulting from spoilage of perishable goods from a covered accident to a covered object.¹²²

Additionally, ISO has a utility interruption endorsement that provides coverage for time element losses caused by a service interruption resulting from accidental damage to the utility supplier’s equipment.¹²³ Unlike the business interruption endorsement, the utility interruption coverage applies when there is off-premises damage to an object owned by the utility.¹²⁴ The endorsement has a schedule to list the utility services, the suppliers, and a waiting period that applies.¹²⁵

Finally, the ISO consequential damage endorsement covers loss due to spoilage from lack of power.¹²⁶ The lack of power must result from an accident to an insured object.¹²⁷ The object that has the accident must be specified as covered in the consequential damage schedule, at a location specified in the consequential damage schedule, and in use or connected ready for use.¹²⁸

All three of these endorsements require an “accident” to a covered “object” to trigger coverage. If there is no accident, there is no coverage, as *Pruett Enterprises, Inc. v. Hartford Steam Boiler Inspection & Insurance Co.*¹²⁹ illustrates. There, a snow storm disrupted electrical power, and Pruett suffered food spoilage at two grocery stores. Pruett sought coverage under its boiler and

¹²⁰ See, e.g., ISO Business Interruption—Valued Coverage Endorsement (BM 15 25 06 95) at 1-2.

¹²¹ *Id.* at 2.

¹²² See 3 Robinson & Gibson, *supra* n.34, at XI.H.6.

¹²³ See ISO Utility Interruption Endorsement (BM 15 35 02 91).

¹²⁴ See 3 Robinson & Gibson, *supra* n.34, at XI.H.6.

¹²⁵ See ISO Utility Interruption Endorsement (BM 15 35 02 91) at 1.

¹²⁶ See ISO Consequential Loss Endorsement (BM 15 28 06 95) at 2.

¹²⁷ See *id.*

¹²⁸ See *id.*

¹²⁹ *Pruett Ent., Inc. v. Hartford Steam & Boiler Inspection & Ins. Co.*, No 03A01-9609-CH-00309, 1997 WL 170302 (Tenn. Ct. App. Apr. 11, 1997).

machinery policy, and the issue before the court was whether the loss was caused by an “accident.”¹³⁰ Lightning caused a blown out fuse at one store, and a tree fell on the power lines at the other store.¹³¹ The court found coverage for the losses caused by lightning, concluding that there was an “accident” because there was physical damage that required repair or replacement.¹³² Where the trees fell on power lines, however, the court found that there was no “accident” because there was no physical damage and because the power lines were not covered equipment.¹³³

In sum, a standard unendorsed boiler and machinery policy will not provide coverage for loss or damage caused by a power outage if the policy includes the typical “lack of power” exclusion. However, there are several endorsements that provide coverage for certain power outage losses. All of these endorsements require an “accident” to a covered “object” to trigger coverage. In other words, there must be a sudden and accidental breakdown of the covered object that causes physical damage to the object that requires repair or replacement. This is akin to the direct physical loss or damage requirement under property insurance policies. Thus, a boiler and machinery policy will not provide coverage for losses where a power outage only shuts down the covered boilers and equipment; there must be physical damage necessitating repair or replacement.

CONCLUSION

Property insurance policies provide coverage for power outage losses only where a covered cause of loss causes direct physical loss or damage to covered property. There would be no coverage if a power outage only shuts down the insured’s computers or production equipment. Unendorsed boiler and machinery policies will not provide coverage for power outage losses because of the lack of power exclusion. There are several boiler and machinery endorsements that provide coverage for certain power outage losses, but all of these require an “accident” to a covered “object” to trigger coverage. As with a property policy, a boiler and machinery policy will not provide coverage for losses where a power outage only shuts down the insured’s covered boilers and equipment.

Finally, if a loss is covered, the amount of the loss must exceed the applicable deductible or waiting period. Property damage deductibles are typically a specific dollar amount. Business interruption policies either have a deductible expressed in dollars or a waiting period. The ISO

¹³⁰ *Id.* at *1. The policy defined “accident” to mean “a sudden and accidental breakdown of . . .[a]ny mechanical or electrical machine or apparatus used for the generation, transmission or utilization of mechanical or electrical power. At the time the breakdown occurs, it must become apparent by physical damage that requires repair or replacement of the covered equipment or part thereof.” *Id.* at *3.

¹³¹ *Id.* at *2.

¹³² *Id.* at *6.

¹³³ *Id.* at *7.

forms, for example, have a 72-hour waiting period. In some cases, power outages will be too brief or the losses will be too small to exceed the applicable deductible or waiting period.¹³⁴

¹³⁴ The ISO Business Income Coverage Form defines “period of restoration” to mean “the period of time that begins 72-hours after the time of direct physical loss or damage for Business Income coverage” *See* ISO Business Income (and Extra Expense) Coverage Form (CP 00 30 06 95) at 8; ISO Business Income (without Extra Expense) Coverage Form (CP 0032 06 95) at 7.