

**Civil Authority Order Provisions in Business Interruption
Insurance Policies: Why the Unique Circumstances Surrounding
the Hurricane Katrina Evacuation will Result in More Policyholder
Recoveries than those Received by 9/11 Policyholders**

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**Civil Authority Order Provisions in Business Interruption Insurance Policies:
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“It was the best of times, it was the worst of times”¹ Not long ago, answers in the insurance world regarding the effects of civil authority orders on business interruption claims were relatively straight-forward. Public adjusters could accurately predict the outcome of the majority of the claims they encountered. Unfortunately, with that consistency came inflexibility. A victory was usually a solid victory, but some predictions resulted in unavoidable detrimental outcomes for policyholders.

The time of consistency was smothered in the wake of September 11, 2001. The terrorist attack on the World Trade Center virtually wiped out the ability of a public adjuster to accurately predict the outcome of business interruption litigation. As litigation unfolded and precedents were set, the courts revealed their preference to avoid a slippery slope that would lead to granting coverage to businesses around the country. Although specific policy language governed the outcome of each case, most cases that involved civil authority provisions shared two common requirements. Two elements² had to be satisfied before triggering the civil authority order clauses in the business interruption policies. Many claimants had difficulty satisfying the requisite elements, and public adjusters watched the predictability of claims slowly re-emerge into judgments favoring the insurance companies.

On August 29, 2005, Hurricane Katrina pummeled the Gulf Coast, and nearly everyone in the area was affected. Business owners and public adjusters suddenly recognized an all too

¹ CHARLES DICKENS, A TALE OF TWO CITIES 1 (Richard Maxwell ed., Penguin Books 2000) (1859).

² Two elements were required to trigger a civil authority order provision in a business interruption policy in most 9/11 cases: 1) some type of physical damage must trigger the civil authority order; and 2) a direct relationship must exist between the damaged property, the civil authority order, and the prohibition of access to the insured’s premises. The elements are discussed in more detail below.

familiar situation—a disaster with national implications. Some anticipate that business interruption claims resulting from civil authority order policy provisions will have the same result as the World Trade Center litigation—a majority of judgments favoring the insurance companies. However, several important factors distinguish the Hurricane Katrina civil authority orders from that of 9/11 including: a) the proactive nature of the Katrina order versus the reactive nature of the 9/11 order, b) the existence of multiple orders for Katrina rather than only one for 9/11, and c) the prohibition of access to the entire city of New Orleans versus the prohibition of access to a portion of New York City. Although the 9/11 precedents will have important effects on the Katrina litigation, the difference between the civil authority orders may be enough to give public adjusters and their clients an edge over the insurance companies.

Hurricane Katrina: A Timeline of Evacuation

In anticipation of Hurricane Katrina, the Governor of Louisiana, Kathleen Blanco, declared a state of emergency for the state of Louisiana on Friday, August 26, 2005.³ On August 27, President Bush also declared a state of emergency for Louisiana, and New Orleans Mayor, Ray Nagin, ordered a voluntary evacuation for all residents of New Orleans.⁴ By August 27, officials in most parishes surrounding New Orleans ordered mandatory evacuations of all residents.⁵ Many others like Jefferson Parish declared a split evacuation order—voluntary evacuations for

³ See Press Release, Office of the Governor of La., Testimony of Kathleen Babineaux Blanco, Governor of La., *Proclamation No. 48 KBB 2005* (August 26, 2005), available at <http://www.gov.state.la.us/index.cfm?md=newsroom&tmp=detail&catID=1&articleID=776&navID=3>.

⁴ See Press Release, Office of the Press Secretary, Testimony of George W. Bush, President of the United States (August 27, 2005), available at <http://www.whitehouse.gov/news/releases/2005/08/20050827-1.html>.

⁵ *Some Order Katrina Evacuations*, TIMES-PICAYUNE ARCHIVES, August 27, 2005, available at http://www.nola.com/newslogs/breakingtp/index.ssf?/mtlogs/nola_Times-Picayune/archives/2005_08_27.html#074505.

some inland areas of the parish and a mandatory evacuations for other coastal parts.⁶ Some parishes followed the lead of St. Bernard parish and refused to order mandatory evacuations since they could not provide shelters.⁷ On August 28, Nagin made his order of evacuation mandatory for the city of New Orleans.⁸

The storm wreaked havoc on the city and the Gulf Coast. On August 31, 2005, Kathleen Blanco declared a public health emergency for the entire Gulf Coast and ordered a mandatory evacuation to all those remaining in New Orleans.⁹ Then, on September 5, 2005, Mayor Nagin ordered a forced evacuation of everyone from the city who was not involved in clean up work.¹⁰

Residents and business owners that evacuated were not permitted to return to the city and salvage the remains of their properties until September 17, 2005, and even upon re-entry, they were only permitted to go to four areas of the city.¹¹ Then, on September 20, in anticipation of Hurricane Rita, Mayor Nagin ordered those that had returned to the city to evacuate once again.¹² Finally, business owners were allowed reentry into certain ZIP codes in the city beginning on

⁶ *Id.*

⁷ *Id.*

⁸ See Bernard Hibbitts, *Mayor Orders New Orleans Evacuated Ahead of Hurricane Hit*, JURIST PAPER CHASE ARCHIVE, August 28, 2005, available at http://jurist.law.pitt.edu/paperchase/2005_08_28_indexarch.php.

⁹ See Howard Witt, *New Orleans Ravaged*, CHICAGO TRIBUNE, August 31, 2005, available at <http://www.chicagotribune.com/news/columnists/chi-0508310194aug31,1,1829183.story>.

¹⁰ See *New Orleans Will Force Evacuations*, CNN.COM SPECIAL REPORT, September 7, 2005, available at <http://www.cnn.com/2005/US/09/06/katrina.impact/index.html>.

¹¹ See William Yardley, *Back in New Orleans, Business Owners Take Stock*, THE NEW YORK TIMES, available at <http://www.iht.com/articles/2005/09/18/news/katrina.php>. The four areas in which people were permitted reentry were Uptown, the French Quarter, the central business district and, across the Mississippi River, the neighborhood of Algiers.

¹² See Raja Mishra and Keith O'Brien, *As Another Storm Looms New Orleans Halts Reentry*, BOSTON GLOBE, September 20, 2005, available at http://www.boston.com/news/nation/articles/2005/09/20/as_another_storm_looms_new_orleans_halts_reentry/.

September 29, 2005.¹³ Residents of those areas began reentering the city the next day, and business owners and residents of the remaining ZIP codes were permitted to begin reentering on October 5, 2005.¹⁴

The Role of Business Interruption Insurance in Commercial Insurance

The purpose of business interruption coverage is “to do for the insured during a period of business interruption what the business would have done had no loss occurred.”¹⁵ Business interruption coverage is almost always triggered by a loss which is or would be covered by property insurance.¹⁶ A policy can cover anything from net income to lost rental value; the coverage is determined when the policy is initially purchased.¹⁷ While all policies differ, the typical, more traditional requirements of a business income loss claim are: 1) a direct physical loss or damage to property; 2) caused by a covered peril; 3) resulting in a necessary suspension of operations; 4) which causes a loss of business income.¹⁸

The key to recovery under a business interruption policy is explicit policy language. Policy language plays an especially important role in business interruption policies when those policies contain civil authority order (hereinafter referred to generally as “AOs”)¹⁹ provisions. In the

¹³ See *City Expands Re-entry ZIP Codes*, NOLA.COM, September 28, 2005, available at http://www.lidi.state.la.us/whats_new/Archives/ReentryIntoNO-092805.pdf.

¹⁴ *Id.*

¹⁵ See Arthur E. Pape, *Business Income Coverage and Other Mysteries*, (AMERICAN LAW INSTITUTE-AMERICAN BAR ASSOCIATION 2006) 545.

¹⁶ Pape, 546.

¹⁷ Pape, 546.

¹⁸ Pape, 546; See also Norbert Schechter, *Business Income Insurance*, THE CPA JOURNAL, November 2004, available at <http://www.nysscpa.org/cpajournal/2004/1104/essentials/p64.htm>.S.

¹⁹ Although many policies group civil and military authority orders together in one provision, the cases in this analysis only deal with civil authority orders.

business interruption context, the vast litigation of claims resulting from the language of civil authority order provisions exemplifies the many debatable issues surrounding them. AO clauses are among the many supplemental provisions related to business interruption coverage, but in some instances, such as the Hurricane Katrina litigation, they can be the most important provisions in the policy because they can potentially provide coverage for a negatively affected, yet not physically damaged property. Such clauses extend business interruption coverage to cover lost revenue where the insured's access to property is prevented, hindered, or impaired by the order or action of a civil authority.

The common intent [of civil authority coverage] was to extend business interruption coverage to include situations where the insured's own property has not itself been damaged (or was not sufficiently damaged to cause as severe a business income loss as a total inability to occupy would cause) but because of damage to nearby property, the police or fire fighters cordon off the area and prohibit access, perhaps even to premises that have not been directly involved in the loss.²⁰

The recovery or denial of damages turns on the explicit language of the AO provision in the business interruption policy. Some policies only provide coverage where an actual, official order has been mandated, and other policies cover prohibition of access by a civil action without an official order.²¹ The AO issues in the Katrina litigation will likely turn on the same issues that were hotly debated in the 9/11 litigation: a) the requirement of physical damage to trigger the civil authority order; b) and the necessity of a direct relationship between the damage, the civil authority order, and the prohibition of access.

²⁰ See *Civil Authority Coverage and Related Coverages*, PRACTICING LAW INSTITUTE, April 2002, Westlaw 674 PLI/Lit 59, 62 citing FC&S Bulletins, Business Interruption Ca-1 (May 1987).

²¹ Although this distinction has been a deciding issue in some cases, both civil authority order and civil actions will be referred to as "AOs" throughout the paper for brevity. If the distinction is pertinent to the analysis, they will be referred to separately.

The Traditional Law Governing Civil Authority Order Provisions in Business Interruption Policies.

While business interruption litigation, in general, has a long history, business interruption litigation surrounding AO clauses did not become common until the late 1960's as a result of riots and curfews stemming from the assassination of Dr. Martin Luther King.²² Traditionally, AO provision language in business interruption policies only covered interruption from AOs ordered because of actual physical damage to the insured property or a property directly adjacent to the insured property.²³ For example, a traditional clause provided:

Interruption by Civil Authority. This policy is extended to include the actual loss sustained by the Insured, resulting directly from an interruption of business as covered hereunder, during the length of time, not exceeding 2 consecutive weeks, *when as a direct result of damage to or destruction of property adjacent to the premises herein* described by the peril(s) insured against, access to such described premises is specifically prohibited by order of civil authority. (emphasis added).

The courts construed such policy language in a very restrictive manner.²⁴ They required that physical damage to the insured's property or an adjacent property be the reason for the AO. For example, in *Two Caesars Corp. v. Jefferson Ins. Co.*,²⁵ the D.C. Court of Appeals found that the mere existence of an AO clause was insufficient to trigger coverage. It found that even though a) business interruption by order of civil authority was insured against, and b) the loss resulted from a business interruption during effective periods of an ordered curfew, "[t]he inescapable fact is...

²² *Civil Authority Coverage and Related Coverages*, at 64.

²³ *Id.*

²⁴ See, e.g., *Brothers, Inc. v. Liberty Mut. Fire Ins. Co.*, 268 A.2d 611 (D.C. Ct. App. 1970) (finding no direct physical damage due to business falloff attributable to the imposition of curfew restrictions during a civil disturbance); *Mac's Pipe & Drum, Inc. v. Northern Ins. Co.*, 280 A.2d 308 (D.C. Ct. App. 1971) (finding that a reduction in sales does not constitute the "damage" required by the civil authority clause in a business interruption policy).

²⁵ 280 A.2d 305 (D.C. Ct. App. 1971).

that, by the clear provisions of the policy, the loss is compensable only when the Order of Civil Authority, which prohibits access, is predicated upon damage to or destruction of the business property.”²⁶

Restrictive readings of policies did not only benefit the insurance companies; however, policyholders also benefited from the courts’ restrictive readings of the policy language. For example, courts refused to enforce the physical damage necessity unless the policy specifically required it.²⁷ In *Sloan v. Phoenix of Hartford Insurance Co.*,²⁸ the Michigan Court of Appeals found coverage for the insured where the AO clause in the business interruption policy did not specify the necessity for a physical damage trigger. In that case, the court read the policy in its strictest sense and found that “the policy would lead the ordinary person . . . to believe that, irrespective of any physical damage to the insured property, coverage was provided . . . when, as a result of one of the perils insured against, access to the insured premises was prohibited by order of civil authority.”²⁹ The courts sent a clear message about AO policy provision triggers—they will determine the case based solely on specific policy language.

The courts’ restrictive treatment of AO clauses remained the norm in business interruption litigation throughout the last part of the twentieth century.³⁰ By this time, the courts

²⁶ See *Two Caesars*, 280 A.2d at 307-08 (citing *Bros., Inc. v. Liberty Mutual Fire Ins. Co.*, 268 A.2d 611 (D.C. Ct. App. 1970)).

²⁷ See *Southlanes Bowl, Inc. v. Lumbermen’s Mutual Ins. Co.*, 46 Mich. App. 758, 760, 208 N. W. 2d. 569, 570 (Mich. App. 1973) (emphasizing that where the insured’s business were closed by order of civil authority and where the policy made no explicit prerequisite of physical damage, physical damage to the insured premises was not a prerequisite to the insurer’s obligation to reimburse the insured for the net losses resulting therefrom).

²⁸ 207 N.W. 2d 434 (1973).

²⁹ *Sloan*, 207 N.W. at 437.

³⁰ See *Howard Stores Corp. v. Foremost Ins. Co.*, 82 A.D.2d 398, 401, 441 N.Y.S.2d 674, *affd. for reasons stated* 56 N.Y.2d 991, 453 N.Y.S.2d 682, 439 N.E.2d 397 (no coverage under terms of policy for business interruption loss where no physical damage occurred); *Harry’s Cadillac-Pontiac-GMC Truck Co., Inc. v. Motors Ins. Corp.*, 126 N.C.App. 698, 486 S.E.2d 249 (Ct.App.N.C.1997) (Snow storm-no business interruption coverage where no "direct

were very consistent with their treatment of AO clauses. As a result, insurance companies and public adjusters could predict the outcome in most cases with relative accuracy. Then, on September 11, 2001, “one occurrence” caused the insurance world to question that predictability.

The September 11 Terrorist Attack: An Unfamiliar Wrinkle in the Trigger Requirements for Civil Authority Order Provisions in Business Interruption Policies.

On September 11, 2001 at 8:45 am, American Airlines Flight 11 crashed into the North Tower of the World Trade Center.³¹ Less than twenty minutes later, United Airlines Flight 175 hit the South Tower.³² In a matter of minutes, New York City was thrown into a state of chaos. The Federal Aviation Administration canceled all commercial air traffic.³³ Among many other measures, Mayor Giuliani ordered an evacuation of south Manhattan.³⁴ At its most restrictive point, the evacuated zone encompassed all places south of Canal Street in lower Manhattan; access was denied to everyone except essential personnel.³⁵

Over the following days, the restrictions were gradually lifted or relaxed. Immediately after the attacks, business operations, nation-wide, screeched to a halt. As areas of lower Manhattan were opened but still restricted to pedestrian access only, many local businesses resumed to a mere crawl. The reduction in profitability led businesses around the country to file

physical loss" to premises under terms of policy); *Syufy Enterprises v. Home Insurance Co.*, No. 94-0756 FMS, 1995 WL 129229 (N.D. Cal. 1995) (Curfews resulting from Rodney King riots); *Fountain Powerboat Indus., Inc. v. Reliance Ins. Co.*, 119 F.Supp.2d 552 (E.D. N.C. 2000) (finding coverage under policy which covered losses sustained during a time when, as a direct result of a covered peril, access to real or personal property was prohibited by order of a civil or military authority).

³¹ *September 11: Chronology of Terror*, CNN.COM/U.S., September 12, 2001, available at <http://archives.cnn.com/2001/US/09/11/chronology.attack/>.

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

claims under the AO provisions in their business interruption policies.

Physical damage and its proximity to the insured property again became the hot issue surrounding AO provision triggers in business interruption claims. While the courts had been relatively clear in the past, the unprecedented events in New York City raised new issues. The issues no longer revolved around curfews and local riots; now, they determined the success or failure of businesses throughout the country.

Public adjusters and insurance companies questioned whether the national implications of the disaster would affect the courts' decisions. The 9/11 AO litigation made two important and lasting implications on the future of business interruption litigation in that a claimant had to satisfy two elements in order to collect under the AO provision in his business interruption policy: 1) he must demonstrate that some type of covered physical damage triggered the civil authority order; and 2) he must demonstrate a direct relationship between the damaged property, the civil authority order, and the prohibition of access to the insured's premises.

The Second Circuit outlined both required elements in the dicta of its decision in *Zurich American Ins. Co. v. ABM Industries, Inc.*³⁶ Although the case did not focus on the existence of an AO order for the World Trade Center,³⁷ the court addressed the issue of AO coverage for business income losses at thirty-four ABM properties that were not located in the World Trade

³⁶ 397 F.3d 158 (2nd Cir. 2005).

³⁷ The case turned on the specific policy language in ABM's general business income loss coverage. The Court found that a company that provided maintenance to nearly all of the tenants of the World Trade Center had a valid claim under the business income loss provision of its policy. The policy covered physical damage to property "owned, controlled, used, leased, or intended for use by the Insured," and the Court found that the policyholder's stronghold of the World Trade Center contracts constituted the "control" that the policy required. The Court emphasized that "[t]o deny ABM's loss-of-income coverage simply because its income is derived from labor that occurs outside of its own . . . offices, artificially excludes service providers when the contract itself does not limit coverage in such a manner." Although the Court considered itself to have read the policy language in its strictest sense, its decision to broaden the term "control" in the policy to include a state less than ownership may have a huge impact on Katrina litigation.

Center.³⁸ The court found that the ABM properties that were not damaged, and therefore not eligible for basic business income loss coverage, could be covered by the policy's AO clause extension if the AO was the reason for the loss of income.³⁹ In other words, since the damage to the World Trade Center caused the AO, ABM could collect if it could demonstrate that ABM's lost income resulted directly from the AO. By recognizing this fact, the court revealed that the damage required to trigger the AO coverage does not necessarily have to occur to a property adjacent to that of the insured. Also, the court implied that a relationship needs to exist between the damage, the AO, and the prohibition of access to the insured's premises.

The direct relationship requirement the Second Circuit described in ABM is called the "direct nexus" requirement. Before litigation began, some in the insurance industry incorrectly hypothesized that commercial businesses all over the country would have business interruption claims as a result of the Federal Aviation Administration's order grounding commercial flights. People hypothesized that since the order resulted from direct physical damage to property (World Trade Center damage) which occurred as a result of a covered cause (dependent upon the policy: fire, terrorism, etc.), businesses in distant states would likely have claims under their business interruption policies.⁴⁰ Foreseeing the vast, nation-wide implications of their decisions, the courts outlined the requirement that there exist a direct nexus between the AO and the prohibition of access to the insured's premises. For example, in *Southern Hospitality Inc. v.*

³⁸ *ABM*, 397 F.3d at 172.

³⁹ *ABM*, 397 F.3d at 171. The Court speculates that the loss of income may have occurred as a result of internal ABM policies not to service the thirty-four non-World Trade Center locations and not the AO.

⁴⁰ *Attack on America: The Insurance Coverage Issues Part 2: General Coverage Provisions*, INTERNATIONAL RISK MANAGEMENT INSTITUTE, EXPERT COMMENTARY, September 2001, available at <http://www.irmi.com/Expert/Articles/2001/Gibson09a.aspx>.

Zurich Am. Ins. Co.,⁴¹ the Tenth Circuit found that the civil authority provision did not apply because "the FAA's order grounding flights did not itself prevent, bar, or hinder access to Southern Hospitality's hotels in the manner contemplated by the policies."⁴²

In *Philadelphia Parking Authority v. Federal Ins. Co.*,⁴³ a New York court exemplified the extremes of the "direct nexus" requirement when it denied insurance coverage to an airport parking garage business. The court found that the garage failed to plead the three elements that the policy required to trigger civil authority coverage: 1) that the FAA's order prohibited access to the garages; 2) that the order occurred because of direct physical loss or damage; and 3) that such damage occurred to property "in the vicinity of" the garages.⁴⁴ The court found that the FAA's order severely decreased the need for the garages but it did not prohibit access to them, and as a result, the first element necessary to invoke the AO provision of the policy could not be satisfied. By requiring a direct nexus, the courts demonstrated that not every business with an AO clause in its business interruption policy could recover from the disaster.

Cases like *54th St. Ltd. Partners, L.P. v. Fid. and Guar. Ins. Co.*⁴⁵ and *Abner, Herrman & Brock, Inc. v. Great Northern Ins. Co.*⁴⁶ demonstrated that location, alone, could not satisfy the direct nexus requirement. In such cases, New York courts outlined the limits of local business interruption coverage resulting from AOs. Along with demonstrating that the AO resulted from

⁴¹ 393 F.3d 1137, 1138 (10th Cir. 2004).

⁴² *Southern Hospitality*, 393 F.3d at 1141. See also *Bienville Partners, Ltd. v. Assurance Co. of Am.*, 2002 WL 31996014, at *2 (E.D. La. Sept. 30, 2002) (unpublished) (disregarding a local hotel's claim that the FAA's order "effectively" prohibited access to the hotel when it closed all airports because the closure of airports did not prohibit all access to the insured's business).

⁴³ 385 F. Supp. 2d 280 (S. D. N. Y. 2005).

⁴⁴ *Philadelphia Parking Authority*, 385 F. Supp. 2d at 289.

⁴⁵ 763 N.Y.S.2d. 243, 244, 306 A.D.2d. 67 (1st Dep't 2003).

⁴⁶ 308 F. Supp. 2d 331 (S.D.N.Y. Mar. 12, 2004).

damage to a nearby structure, Manhattan businesses had to prove a complete prohibition to their premises. Similar to the claims of businesses around the country, Manhattan businesses were permitted coverage only to the extent that the AO completely prohibited access to their property. The moment that access was merely hindered and not completely prohibited, the AO was considered lifted and the coverage period ended.⁴⁷

The litigation following 9/11 took its toll on policyholders. The restrictions the courts used to stifle the claims of businesses across the country resulted in bars to recovery for local New York businesses as well. The courts sent a clear message that national disasters do not necessarily lead to universal recovery for all affected policyholders.

The Characteristics that Distinguish the Hurricane Katrina Evacuation from that of 9/11 Will Likely Lead to More Victories for Policyholders

Although Hurricane Katrina differed from 9/11 in a variety of ways, its nation-wide implications assure that certain elements of the 9/11 litigation will serve as important precedents for the resolution of Katrina commercial insurance claims. Specifically, Katrina claimants making claims under the AO provisions of their business interruption policies will have to meet the two requirements derived from the 9/11 litigation: a) the requirement that physical damage triggers the civil authority order; b) and the necessity of a direct relationship between the damage, the civil authority order, and the prohibition of access to the insured property.

Differences between the evacuation orders resulting from 9/11 and Katrina may distinguish the

⁴⁷ The courts have emphasized that the main purpose of business interruption coverage is to supplement a policyholder's income until it is able to resume operations and that the lifting of a prohibition order is often the triggering element to that resumption. See *Broad Street, LLC v. Gulf Ins. Co.*, 13 A.D.3d 126 (N.Y.A.D. December 12, 2006) (finding that a motel did not meet the suspension of business requirement despite the fact that it was losing tenants, forced to offer reduced rents, and required to conduct monthly air and water quality tests); *Admiral Indem. Co. v. Bouley Intl. Holding, LLC*, 2003 WL 22682273 (S.D.N.Y. November 13, 2003) (unpublished) (finding that a restaurant's suspension of business period ended "when it began serving Red Cross volunteers, even though it had not opened," because the business could resume operations). Although restoration period is not a main topic in this paper, it is related to civil authority orders and will undoubtedly be a huge topic of debate in the Katrina litigation.

two disasters just enough to avoid an overwhelming number of insurance company victories.

The evacuation of New Orleans differed from New York City in several important ways including: a) the nature of the order, b) the number of orders, and c) the level of prohibition.

Although the specific language in the AO clauses in the business interruption policies will likely require Katrina claimants to satisfy the damage trigger and direct nexus requirements, the differing circumstances surrounding the AO in each case will likely lead the courts to distinguish Katrina cases from 9/11 cases.

New Orleans announced the first mandatory evacuation of the city before the hurricane actually hit the city. New York, on the other hand, ordered the evacuation of lower Manhattan after the terrorist attack damaged the World Trade Center. The proactive nature of the New Orleans order versus the reactive nature of the New York City order will have a large impact on the Katrina litigation. Although the physical damage trigger requirement of the 9/11 litigation will surely be litigated, courts will most likely distinguish the two incidents and recognize that the same type of physical damage trigger cannot be required of Katrina policyholders. If the courts applied the same standard to both incidents, it would be impossible for a single business to recover under its AO provision. It is likely that Katrina claimants will be able to satisfy it using case law from other hurricane litigation.

Insurance companies will likely argue that since the evacuation order was given before damage occurred, the requisite damage trigger in the AO provisions of the business interruption policies did not occur. The insurers will claim that an actual peril insured against must invoke the coverage under the AO provision rather than the mere threat of that peril.⁴⁸ On the other hand, public adjusters will argue that orders of evacuation in response to an impending storm's

⁴⁸ *Washington Mut. Bank v. Commonwealth Ins. Co.*, 133 Wash. App. 1031 *3 (Wash. App. Div. 1, 2006) (unpublished).

damage to an area previously in the storm's path can satisfy such a requirement. In *Assurance Co. of America v. BBB Service Co., Inc.*, a Georgia court found that an evacuation order made as a result of the damaging effects of a storm in another area was enough to satisfy the damage trigger for an AO provision in a business interruption clause.⁴⁹ In that case, the policyholder recovered under its business interruption policy when a mandatory hurricane evacuation was ordered as a result of the damage the hurricane had done to other areas in its path.⁵⁰ In the case of Hurricane Katrina, Nagin evacuated New Orleans as a result of the horrendous damage that the hurricane had inflicted upon Florida. Since the New Orleans mandatory evacuation was ordered as a result of the storm's physical damage to an area in its path and that storm did indeed cause physical damage to New Orleans, the order will likely satisfy the physical damage trigger requirement in a typical AO provision.

Even if the courts reject public adjusters' claims that the physical damage Katrina caused in Florida acted as the physical damage trigger for the first New Orleans evacuation order, coverage options will not be completely lost. The second and third evacuation orders were implemented after the hurricane hit New Orleans. Thus, those AOs were implemented as a result of physical damage and they thereby satisfy the physical damage requirement. As a result, insured businesses throughout New Orleans will be able to recover losses incurred on and after the August 31, 2005 city-wide mandatory evacuation order.⁵¹

⁴⁹ 593 S.E.2d 7, (Ga. App. Dec. 02, 2003), *reconsideration denied* (Jan 07, 2004), *certiorari denied* (May 03, 2004).

⁵⁰ *BBB*, 265 Ga. App at 7. *See also By Development, Inc. v. United Fire & Cas. Co.*, 2006 WL 694991 (D.S.D. March 14, 2006) (unpublished) (noting that an evacuation ordered due to a quickly-spreading wildfire satisfied the damage trigger required by the business interruption policy's AO provision); *Washington Mut. Bank, supra at note 59*, (implying that an evacuation ordered in expectation of physical damage constitutes the damage trigger as long as that peril eventually occurs).

⁵¹ Policyholders should be weary of the September 20, 2005 evacuation in anticipation of Hurricane Rita. That evacuation was not made as a result of the damage that Rita was doing in other areas but on the assumption that New Orleans would be unable to handle the flooding that would inevitable result.

The New Orleans evacuation also differed from that of 9/11 evacuation because New Orleans implemented multiple evacuation orders. The first mandatory evacuation occurred before the hurricane hit on August 28, 2005. On August 31, 2005, after the hurricane destroyed the city, Governor Blanco ordered the mandatory evacuation of all those that had not previously heeded the order. Finally, the city implemented a third mandatory evacuation order on September 5, 2005.

Insurance companies will likely claim that the AO provision in a given policy only covers the period of time between the final mandatory evacuation order on September 5, 2005 and the first notice permitting reentry on September 17, 2005. The insurers will likely claim that the final AO controls because that was the point when the city was the emptiest. However, no case law supports this position. Throughout the history of AO clauses in business interruption insurance, the courts have focused on specify policy language. The courts will likely continue to read the AO provision in each business interruption policy according to its specific policy language. As a result, the courts will likely find that unless an AO provision specifically addresses the treatment of consecutive AOs, the first AO will begin the recovery period.

The business owners that were evacuated days before the hurricane were not permitted to re-enter New Orleans until September 17, 2005, and at that time, the re-entry was only permitted for certain areas of the city. Business owners in the rest of the city were not permitted re-entry until October 5, 2005. The courts will likely grant coverage from the August 28, 2005 mandatory evacuation date until the date on which reentry was granted for each business' individual ZIP code.

One possible requirement by the courts could help insurance companies. The courts will likely require each insured business to produce evidence supporting what date it closed and what

date it resumed operations. If the court finds that a business resumed operations three days after the hurricane hit to aid hurricane rescue volunteers, it will limit recovery to the three days in which the business experienced a complete cessation of business. Insurance companies can claim that such a situation is identical to the situation in *Admiral Indem. Co. v. Bouley Intl. Holding, LLC* where the court found that a restaurant's ability to serve food to 9/11 volunteers qualified as a resumption of business and thus ended the recovery period.⁵² Public adjusters can claim that the Katrina situation is distinguishable from 9/11 since the mandatory evacuation for New Orleans was still in place and thus access to the city was still prohibited, but the courts will likely adhere to the idea that business interruption recovery is meant to aid a business during the period that it is unable to operate its business. Therefore, the recovery for any business that resumed operations while the evacuation order was still in place will likely be limited to the time that the business operations were completely halted.

The final important distinguishing characteristic between the evacuation orders is the extent to which the AO prohibited access to the businesses. Although each of New Orleans' evacuation orders called for a complete prohibition of access to the city, citizens still refused to abide by them. Where New York City was at its most prohibitive state the day that the city implemented the AO, New Orleans did not reach its most prohibitive point until more than a week after the implementation of the first mandatory evacuation order.

Insurance companies will likely raise several claims with familiar 9/11 implications. One likely claim will be that access to the businesses was never completely prohibited since some people remained in the city despite the mandatory evacuation order. Citing 9/11 cases like

⁵² 2003 WL 22682273 (S.D.N.Y. November 13, 2003) (unpublished).

*54th St. Ltd. Partners, L.P.*⁵³ and *Abner, Herrman & Brock, Inc.*⁵⁴ in which the court denied coverage where access to business was limited but not completely prohibited, insurance companies will claim that there was no period of time in which access to the businesses was completely denied. Public adjusters can emphasize that an official AO prohibited access to the city, and that the AO was triggered despite the defiance of some citizens. Strict insurance contract interpretation will likely force courts to consider only whether an official AO was in place. Since an official AO completely prohibited access to the city which included the insureds' properties, it is doubtful that the courts will find that the defiance of the AOs by some citizens destroys the businesses' abilities to recover.

Conclusion: The Civil Authority Orders Implemented in New Orleans Will Trigger Business Interruption Coverage for those Policies that Include a Civil Authority Order Provision

Ultimately, Katrina claimants have notions of justice on their side. In order for a single New Orleans business to recover under the AO clause in its business interruption policy, the courts will have to distinguish the two incidents. During the 9/11 litigation, the courts demonstrated their willingness to provide coverage during the prohibited access period to those businesses that had AO clauses in their policies. Just as a short period of prohibited access to New York City benefited insurance companies in the majority of the business interruption litigation, the longer period of prohibited access to New Orleans will likely give public adjusters and their clients the advantage. The courts will continue to demand that claimants satisfy the two basic AO provision requirements that the 9/11 litigation, but they will likely find the terrorist attack and Hurricane Katrina distinguishable. While public adjusters involved in the 9/11

⁵³ *Supra at note 45.*

⁵⁴ *Supra at note 46.*

litigation may feel discouraged about the outcomes of that litigation, the outlook for Hurricane Katrina recovery looks promising.