

CLEAR AND PRESENT DANGER OR FEAR OF THE FUTURE

The effect of Civil Authority provisions on insurance claims resulting from the Baltimore Curfew

By: Kari M. Kelly

Was the curfew imposed by Baltimore City Mayor Stephanie Rawlings-Blake on April 28th initiated because of the rioting and looting that started at Mondawmin Mall following the death of Freddie Gray, or because of the fear of additional rioting and looting throughout the City of Baltimore? For local businesses carrying property insurance containing a “civil authority” provision that were affected by the 10 p.m. to 5 a.m. curfew that commenced on April 28, 2015 and was lifted on May 3, 2015, a lot may ride on the answer to that question.

The “civil authority” provision in business interruption coverage is designed to compensate a business owner for lost profits caused by the government prohibiting access to an insured business. As the curfew imposed by Mayor Rawlings-Blake prohibited individuals from accessing businesses within the Baltimore City limits after 10 p.m., it would be reasonable for those business owners carrying such coverage to expect that the income they lost as the result of the curfew would be recoverable under their insurance policies.

As with any claim, an insured must review the “civil authority” provision of its policy and determine what requirements are necessary to establish a valid claim. Requirements of a sample civil authority provision include: (1) that a civil authority took action/issued an executive order; (2) the action prohibited access to the insured business; (3) the action directly resulted from or was because of a direct physical loss or damage; (4) the damage causing the civil authority action happened at a location other than at the insured business; and (5) the damage at the other location was caused by a Covered Loss under the insured’s policy. Some policies have a geographical component, requiring the physical damage that prompted the civil authority to restrict access to the insured property to have occurred adjacent to the insured property or within a certain number of miles from the insured property. Additionally, some policies require access to the insured property to be restricted for a certain number of hours, typically 48-72 hours, before coverage kicks in.

However, as demonstrated by the numerous lawsuits and opinions concerning business interruption coverage following the terrorist attacks of 9-11, and more recently, Hurricane Sandy, the determination of whether coverage is available rests largely on the determination of whether the “civil authority” order was issued as the result of damage that had already occurred, or in anticipation of the possibility of future damage.ⁱ

In *United Airlines, Inc., v. Ins. Co., of the State of PA*, 439 F.3d 128 (2d Cir. 2006), United Airlines claimed that it lost income “caused by the national disruption of flight service and government’s temporary shutdown of [Regan National Airport].” *Id.* at 29. In ruling against United Airlines, the Second Circuit found that the “civil authority” provision of the policy did not cover the shutdown of Reagan National as United Airlines did not show that the airport shutdown by the government was a direct result of damage to the Pentagon. *Id.* at 134. Furthermore, the Court stated that “The evidence

also indicates, not surprisingly, that the government’s decision to halt operations at the airport indefinitely was based on fears of future attacks.” *Id.* at 134.

Conversely, in the case of *Assurance Co. of Am. v. BBB Serv. Co.*, 265 Ga. App. 35 (Ga. Ct. App. 2003) the Court found in favor of the owner of several Wendy’s restaurants whose businesses were forced to close due to the issuance of mandatory evacuations because of Hurricane Floyd. The insurer, in this case, argued that the evacuation order was issued prior to Hurricane Floyd making landfall, and therefore the evacuation order was issued based on the threat of physical damage, not actual damage. The insured, however, presented evidence showing that the government had examined photographs of damage that Hurricane Floyd had caused in the Bahamas, and that such damage was the impetus for the evacuation order. *Id.* at 37. Since the policy in question did not have a geographical limitation relating to the location of the damage, and the evacuation order was based on actual damage, the court found in favor of the insured.

It is important to keep in mind that the insured bears the burden of establishing the necessary link between the damage and the action of the “civil authority.” Therefore, Baltimore City businesses wishing to recover under their business interruption coverage will bear the burden of proving that Mayor Rawlings-Blake’s curfew order was a direct result of the rioting and damage to Mondawmin Mall and other businesses located in the City and not based on the fear of further rioting and looting that may impact businesses. A link to the full text of the emergency curfew can be found here - <http://www.baltimorecity.gov/emergency-curfew-20150427>.

For any of your other real estate needs, please contact an attorney in our real estate group:

Barry C. Greenberg	bgreenberg@rosenbergmartin.com
Stanley S. Fine	sfine@rosenbergmartin.com
Cynthia L. Spell	cspell@rosenbergmartin.com
Shawn J. Sefret	ssefret@rosenbergmartin.com
Hilary J. O’Connor	hoconnor@rosenbergmartin.com
Gail Stern	gstern@rosenbergmartin.com
Patrick M. Martyn	pmartyn@rosenbergmartin.com
Caroline L. Hecker	checker@rosenbergmartin.com
Sheelagh Allston	sallston@rosenbergmartin.com
Kari M. Kelly	kkelly@rosenbergmartin.com
Justin A. Williams	jwilliams@rosenbergmartin.com

ⁱ The determination of whether coverage is available under a civil authority provision is based upon the requirements of each specific civil authority provision, which may differ from policy to policy.