Insurance Coverage For Power Interruption-Related Business Losses, Costs And Damages

By
Ricky S. Torrey
And
William J. Russell

[Editor's Note: William J. Russell, JD, is CEO of Dispute Resolution Management, Inc. (DRM), (Denver, Colorado) and Chairman of DRM UK (London, UK). Ricky S. Torrey, JD, LLM, is Director of Research for DRM (Salt Lake City, Utah). DRM is a consulting company that specializes in advising policyholders in the settlement of complex and long-tail insurance claims.

I. Introduction

Rolling brown-outs and black-outs have been commonplace in parts of California during the spring and early summer of 2001. Problems resulting from structural and legal failures, inefficiencies and diseconomies in power production and distribution will, in all likelihood, continue to plague California through the coming months and years. Reports also indicate a possibility that such problems will impact other areas of the country. Power interruption first hits industries with interruptible power contracts but others are similarly vulnerable when power is scarce. Damages and losses may follow the interruption. When such damages and losses occur, those impacted will turn to their insurers for coverage.

This paper briefly reviews extant case law concerning insurance coverage for power failures and outages. It is not the intent here to analyze policy language, consider arguments for or against coverage, or advance novel theories of insurance law.

In the past, power interruption has occurred on a sporadic basis, with little sustained or systemic causation to drive large numbers of cases. Thus, litigation over coverage for power interruption has been rare. Although a large number of cases are not evident, several key issues and several clear findings emerge from the cases. The historical cases, though relatively few in numbers, will guide coverage determinations as claims become more numerous.

This introductory section offers a brief overview of the primary issues and findings derived from the extant case law concerning coverage for power interruption-related losses and damages. A more detailed discussion follows.

Because loss of power often causes the suspension of business activities (and resulting damages), most of the relevant cases involve business interruption coverage under first-party policies. This pattern should repeat: most future cases will also involve

business interruption coverage. However, other forms of first-party coverage are sometimes implicated. In certain cases the insurers covered losses associated with power outages and the dispute focuses on matters such as the extent of losses or allocation between insurers. A few cases against utilities are also instructive. These include subrogation actions by insurers against utilities and other responsible entities. Direct ratepayer actions against utilities (and other responsible entities) for power outage related losses and damages are not uncommon. This may ultimately lead to CGL claims against the utilities' carriers. Finally, several cases deal with broker or agent liability for failing to provide coverage of power outage-related losses. The lesson is that an array of possible coverage types will come into play as power interruption problems proliferate.

Several findings emerge from a study of the case law. First, the cases illustrate a wide variety of factual scenarios involving coverage for power outage-related losses and damages. Power outages can act as the sole cause of a loss, the catalyst of a chain of events leading to loss, the result of a series of events leading to loss, or an intervening factor in the chain of events. This has the effect of making the claims handling process more complex. Policyholders who are aware of the issues and who manage such issues effectively will be more successful.

Secondly, power outage cases may invoke special power-related exclusions and endorsements. Utility service failure exclusions are frequently encountered in this arena, which purport to limit coverage of damages resulting from "off-premises" power interruptions. Although this exclusion has not been extensively litigated, a majority approach has emerged rejecting application of this exclusion to deny coverage. Another exclusion encountered is the electrical arcing exclusion. This exclusion results in denial of coverage in some cases. Other power-related exclusions and endorsements also come into play in certain cases for losses of perishable goods. Again, policyholders who are aware and prepared are more likely to prevail.

Third, the definition of covered and excluded losses is relevant in deciding whether or not there is coverage for power outage-related losses. Business interruption policies typically require "physical damage" to insured property before coverage applies. However, certain courts have adopted interpretations of these terms to find coverage of various losses which may be denied in other cases. Indeed, certain interpretations present significant inroads into the "physical damage" requirement.

Fourth, a major issue underlying many power outage cases is causation analysis. Causation plays a central role in determining whether the loss is covered, particularly when various exclusions and endorsements are interpreted in light of a complex chain of events leading to the loss. Causation analysis sometimes involves the interpretation and effect of "anti-concurrent cause exclusions," which generally purport to exclude losses when covered causes of loss are conjoined with excluded causes of loss. Concurrent cause analysis can involve the confluence of contract interpretation, legal doctrines, and public policy concerns.

Finally, it is evident that many of the coverage issues that will arise in upcoming months find no answer in past judicial precedent. For example, no case is apparent which discusses the issue of coverage for damages resulting from interruptions that occur pursuant to interruptible power provisions in electrical supply contracts. There is no apparent court decision regarding the effect on claims under various policy types of selling power at a profit while suffering shut-downs or interruptions. Pricing and price gouging issues that have emerged in California are apparently not yet the subject of decisive precedent. It is clear that ongoing power shortages will generate significant new lines of case law.

In summary, although a limited number of power outage-related cases have been reported at present, certain key issues and provisions can be identified. Several varieties of coverage for power outage-related losses are available. The cases offer insight into potential obstacles to coverage, and ways they might be overcome. Ultimately, significant insurance coverage may well be available to respond to losses resulting from power interruption. Policyholders should be prepared and should create careful documentation if coverage is apparent or possible.

One final note is also in order. As the problem of power interruption spreads, the problem itself will bring about changes. New legislative initiatives may alter the landscape with regard to insurance coverage. More importantly, insurers will learn to insert new exclusions into policies upon renewal. This was true with regard to product liability, it was true with regard to pollution, it was true with regard to Y2K, and it will be true with regard to power interruptions. Policyholders may never have better coverage than that which they currently possess.

II. Power Interruption Coverage – Case Survey

A. *Business Interruption Coverage Cases*

The most obvious potential coverage arises from business interruption policies. Several cases have addressed such coverage, and it is likely that much future activity will occur in this arena.[1] Case law provides a good insight into the issues which are likely to arise.

For example, *Manufacturers Mutual Fire Ins. Co. v. Royal Indemnity Co.* is an action between two insurers after Hurricane Betsy caused a power outage that left Kaiser's aluminum plant without power for 37 hours.[2] Due to resulting equipment damage, full production was not achieved for several months.[3] Kaiser had been issued two insurance policies, both of which insured against business interruptions resulting from on-premises physical damage caused by named perils. In addition, one of the policies included an endorsement for power interruptions caused by off-premise occurrences. The opinion categorically stated that, "Kaiser suffered on-premises damages to electrical transmission lines and distribution equipment," and went on to describe the business interruption losses which resulted.[4] The dispute in this case concerned allocation of losses between the two insurers. The primary dispute focused on calculating lost

profits, taking into account, among other things, the "idle periods" exemption for periods of nonoperation which would have occurred under normal circumstances.

Similarly, in *Charlton v. United States Fire Insurance Co.*, the insurer had already paid several business interruption claims submitted by insured restaurants after a fire in a utility substation caused an area-wide power outage lasting several days.[5] The case focuses on the parties' subsequent dispute over whether the insured had submitted the necessary proof of claims for additional losses, and finds the requirements of proof had been met. Likewise, in *Shark Information Services Corp. v. Crum & Forster Commercial Insurance*, the insured filed a business interruption claim after a storm-induced power outage interrupted its data processing operations.[6] The insurers disclaimed the loss, asserting that an exclusion had been omitted from the policy by mutual mistake. The court granted the insured's motion for summary judgment, finding that the policy represented an integrated expression of the parties' intent.

A recent and promising case in this context is *American Guarantee & Liability Insurance Co. v. Ingram Micro, Inc.*[7] In 1998, Ingram, a wholesale distributor of microcomputer products, suffered a power outage caused by a ground fault in its fire alarm panel. Although the outage lasted only one-half hour, several mainframe computers lost programming and data and became nonfunctional for several days. The property damage policy at issue "insured against certain business interruption and service interruption losses."[8] The insurers argued that the power outage had not caused "direct physical loss or damage" under the policy, while Ingram argued that covered "physical damage" included the loss of use of the computers.

The court recognized a broad definition of "physical damage," stating: "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. "[9] In coming to this conclusion, the judge observes, "The Court is not alone in this interpretation."[10] In support for this interpretation, the court cites several state and federal statutes on computer crime and cases construing them, noting that these cases have ruled that the interruption of computer services, the unavailability of data or the alteration of software or networks each constitutes "damage."[11]

The *Ingram* decision is still new and has yet to be considered in other insurance-related cases. Nonetheless, the precedential value of this decision was reinforced when the Ninth Circuit Court denied the insurer permission to appeal the case.[12] Moreover, *Ingram* has already been cited as authority for a court's finding that a flood of unsolicited bulk email "impaired" the availability of AOL's "system."[13]

Industry members who lose access to their power supply with resultant damages should look first to their business interruption policies. Such coverage may well apply.

B. *Power-Related Exclusions*

i. Utility Service Failure Exclusion

Several cases consider the interpretation and effect of the utility service failure exclusion. The majority of these cases construe business interruption coverage, with a couple of exceptions. The utility service failure exclusion typically "bars coverage for a loss of power 'if the failure occurs away from the described premises' but does not apply to the extent a utility failure 'results in a Covered Cause of Loss.'"[14] One insurance law treatise comments, "There is relatively little case law on the exclusion."[15] However, it appears that the majority of courts considering this exclusion have rejected it as the sole basis for denying coverage, on a variety of grounds.

Cases treating this exclusion identify significant problems and concerns with its application. A primary problem involves defining what constitutes an "interruption away from the described premises," which terms are not defined in the standard policy. This problem begins with the recognition that, unlike most other commodities, electricity, as a form of energy, is characterized by motion through a conduit. This fact coupled with the fact that a power interruption, once it begins at a certain point, continues down the rest of the line to the intended user, makes it difficult to define in a meaningful way whether a power failure occurred "away from the premises." Accordingly, courts have often applied a flexible interpretation of where the interruption took place to find for coverage, presumably in part because of this reality.

However, several opinions also express concerns, directly and indirectly, that a rigid construction of the exclusion would tend to violate various public policy concerns. For example, some cases found that its rigid application would frustrate the reasonable expectations of the insured. Several cases have also found that the exclusion is ambiguous, that its rigid interpretation would be unconscionable or that it is against public policy. Thus, whether invoking the *contra proferentem* doctrine, interpretations of policy terms, implied or explicit public policy concerns or prior judicial precedent, courts have often refused to allow the presumptive application of this exclusion to deny coverage.

In *Pressman v. Aetna Casualty & Surety Co.*, Dr. Pressman was a sole proprietor and psychologist who had purchased a "Business Owner's Policy (Deluxe)" to cover loss or damage to the property as well as any loss of earnings directly resulting from interruptions to his business.[16] The policy contained a utility services failure exclusion for "interruption of power or other utility service furnished to the described premises if the interruption takes place away from the described premises."[17] However, the policy further stipulated: "If a peril not otherwise excluded results on the described premises, we cover the resulting loss."[18]

In 1985, Dr. Pressman's business was closed for five days due to a power outage after a tree on the adjacent property split in half and collapsed onto the power line that ran to his building. Dr. Pressman was unable to see patients or perform computerized diagnostic testing during the outage. After power was restored, he discovered that one of his computers had been damaged by the outage and no longer functioned.

The insurers argued that Dr. Pressman's losses were excluded on the grounds that the power outage occurred "away from the described premises." The trial court defined the insured premises as the interior of Dr. Pressman's office building. The court then found that the tree's collapse on adjacent property, severing the power line, constituted an interruption of power "away from the described premises." Therefore, the lower court found the exclusion applied and granted summary judgment to the insurer.

The Rhode Island Supreme Court reversed on appeal. The court first rejected the lower court's narrow interpretation of the insured "premises," noting that the policy stated that coverage applied to "the building at the premises," thus implying that the insured premises included more than the building and its contents alone.[19] More importantly, the court found "it is against public policy to apply such a narrow definition of the term 'premises' to the facts of this case because an application of this definition renders the power-interruption coverage illusory."[20] The court explained that adopting the trial court's narrow definition of "premises" would make the exclusion "preclude coverage in almost any circumstance unless the insured had his own generator located inside the building. We believe this result is unconscionable."[21] This left the court with "the task of interpreting the obviously ambiguous phrase 'away from the described premises.'"[22] Finding the phrase ambiguous, the court construed it strictly against the insurer, applying the *contra proferentem* doctrine.[23] The court also noted that it was reasonable for Dr. Pressman to believe that his losses would be covered.[24] The case was remanded for trial on the merits, and the opinion noted in passing that lost earnings attributable to Pressman's inability to use his computer fell within the coverage.

Pressman was later invoked in *Jerry's Supermarkets v. Rumford Property & Liability Ins. Co.*[25] *Jerry's Supermarkets* involved an insured's claim for food spoilage losses resulting from widespread power outages caused by Hurricane Gloria in 1985. The multiperil policy at issue contained the following exclusion:

> This policy does not insure . . . against loss caused directly or indirectly by the interruption of power or other utility service furnished to the designated premises if the interruption takes place away from the designated premises. If a peril insured against ensues on the designated premises, this Company will pay only for loss caused by the ensuing peril.[26]

In this case, the court did not attempt to determine whether or not the interruption occurred "away from the designated premises." Instead, the court relied on *Pressman* to find that the exclusion was ambiguous, construing it against the insurer, and invoking the *contra proferentem* doctrine. The court then observed:

> Jerry's Supermarkets had reason to believe that it was purchasing a multiperil contract of insurance that would cover the contents of its buildings in the event of a hurricane or severe windstorm. There is no question that the interruption of power for several days was caused by Hurricane Gloria . . . . If the power-interruption clause were to be

> construed as applicable only to interruption caused on the premises insured, this would bring us to the same result condemned in *Pressman.*[27]

Thus, the court effectively refused to enforce the exclusion. The court further noted that the policy at issue provided coverage for an "ensuing peril," construed an "ensuing peril" as "one that occurs subsequent to a momentary power interruption," and found that the food spoilage in the instant case was "caused not by a momentary interruption in power but by the protracted inability to restore power due to the severity of the hurricane damage."[28] The court concluded, "in accordance with *Pressman,* we believe that the ordinary reader and purchaser of a policy would interpret the entire contract and this exclusion to mean that it would be covered against the type of loss encountered here."[29] Hence, the court confirmed summary judgment for the insured.

In another case, a mall tenant sought to recover lost business income after two days' interruption of power to the tenant's store resulting from a fire in the mall.[30] The landlord in that case purchased bulk electricity from a utility and resold it to the tenants. However, since the landlord was not a utility authorized to sell power, the electricity charges were designated in the lease as "rent." The tenant's store was not directly damaged by the fire although the "common areas" containing the mall's electrical equipment suffered smoke damage.[31]

The tenant's insurance included business interruption coverage. It apparently took the form of an endorsement attached to the landlord's policy, describing the "Designation of Premises [Part Leased to You]" as a rental unit in the mall.[32] The policy excluded "[t]he failure of power or other utility services supplied to the described premises, however caused, if the failure occurs away from the described premises."[33]

The parties disagreed on whether the power outage occurred away from described premises. The court noted, "[A]ll of the case law to which the Court has been referred supports the plaintiff's position."[34] The court then adopted an expansive interpretation of the insured "premises" which included the common areas, noting that the tenant paid "rent" for the common areas and that they housed the affected electrical equipment. Thus, the court found the exclusion did not preclude coverage in this case and granted summary judgment to the insured.

Finally, in *Brooklyn Bridge, Inc. v. South Carolina Ins. Co.,* the South Carolina Court of Appeals considered the exclusion after Hurricane Hugo caused a general power outage and a loss of refrigeration and resulting spoilage in the insured's restaurant.[35] The insurer denied coverage based on the off-premises power exclusion in the insured's business property damage policy. The controversy focused on the language of the clause in the exclusion restoring coverage where "loss or damage by a Covered Cause of Loss results."[36] The trial court had construed this language to mean that the loss was covered because "it was undisputed that business personal property was lost, and, although the failure of power occurred away from the premises, the loss resulted from Hurricane Hugo and Hurricane Hugo was a covered cause of loss."[37] The appeals court found the lower court's interpretation was as reasonable as the insurers' reading that the "covered cause

of loss" must result from the power failure itself, and ruled that such ambiguous clauses are to be construed against the insurer.[38] The appellate court further observed that the clause restoring coverage, under either interpretation, was inconsistent with the policy's concurrent clause exclusion "which basically says that an exclusion is an exclusion regardless of any other cause or event that contributes concurrently or in any sequence to the loss."[39] Due to these internal inconsistencies and ambiguities in the policy, the court ruled that "coverage must be found as a matter of law."[40]

A few courts have also denied coverage in cases involving the utility service failure exclusion. Interestingly, these cases often highlight the same problems as were encountered above. The different results in these cases illustrate how the same language can be interpreted differently, indirectly reinforcing the ambiguity argument.

In a couple of unreported cases, the court did not rely on the power failure exclusion alone as the sole basis for denying coverage. For example, *Noonan, Astley & Pearce, Inc. v. INA* involved a power outage that lasted four days after a utility station fire.[41] The insured was a brokerage business dependent on its telecommunications system and computer network. Its commercial property policy covered "lost income and losses to personal property" resulting from covered causes.[42] The policy excluded losses from power interruptions occurring "away from a 'covered location'" or at a 'covered location' except when a building or equipment at a 'covered location' is damaged by a covered cause of loss."[43]

An initial dispute in *Noonan* erupted over whether the losses were caused by the fire or the power outage.[44] The parties hotly disputed this issue because the policy exclusion included coverage for fire, but precluded coverage for losses resulting from power interruptions away from the covered location, unless the building or equipment was damaged by "resulting fire or explosion."[45] However, this same provision also contained a concurrent cause exclusion precluding recovery if an excluded cause contributed to the loss, whether or not a covered cause might have served as catalyst.[46] Because the court found the fire and the power outage were factually intertwined and that the policy excluded 'damages caused by or resulting indirectly or indirectly' from a power interruption,' the court found the losses were excluded.[47]

Another unreported case in which the court relied on another basis for applying the power failure exclusion is *Pruett Enterprises, Inc. v. The Hartford Steam Boiler Inspection and Insurance Co.*[48] In that case, a grocery chain sued for losses of perishable items at two sites caused by a power outage resulting from a heavy snow blizzard in 1993. The policy at issue appears to have been a boiler and machinery policy without business interruption coverage.[49] The utility service failure exclusion was incorporated into the policy's provision for covered "accidents" as follows:

> We will pay for loss of perishable goods due to spoilage resulting from lack of power, light, heat, steam or refrigeration caused solely by an "accident," including an "accident" to any transformer, electrical apparatus, or any covered equipment that is:

> a. Located on or within 500 feet of your "location;"
>
> b. Owned by the building owner at your "location" or owned by a public utility company; and
>
> c. Used to supply telephone, electricity, air conditioning, heating, gas, water or steam to your "location."
>
> DEFINITIONS
>
> "Accident" means a sudden and accidental breakdown of the following covered equipment: * * * (5) Any mechanical or electrical machine or apparatus used for the generation, transmission or utilization of mechanical or electrical power.[50]

Of note, the policy also required: "[A]t the time the breakdown occurs, it must become apparent by physical damage that requires repair or replacement of the covered equipment or part thereof."[51]

Looking initially at the premises issue, the *Pruett* court first addressed whether the power outage had occurred within 500 feet of the covered property.[52] However, the parties' stipulation that the "accident" in this case—the power outage--was not complete until its effects had been "felt" within 500 feet of Pruett's locations, ended the court's inquiry on this point. Although it became a moot point in this case, the parties' stipulation illustrates a potentially useful approach to the problem of determining where the "interruption" takes place.

The court then turned to the deciding issue--whether there had been covered "damage." The location of the outage again came into play. The parties stipulated that the affected power lines were more than 500 feet away from the location, that equipment within 500 feet of the location was not damaged and that it did not require any replacement or repair. The parties' stipulation thus became the critical factor in the court's finding for the insurer based on the policy's physical damage requirement.

Two jurisdictions were discovered to have reported decisions ruling that the utility service failure exclusion precluded coverage for power outage-related claims. This approach apparently originated in Ohio with South Dakota joining in Ohio's approach. Ohio's approach was set forth in *Mapletown Foods Inc. v. Motorists Mutual Insurance Co.*[53] It involved grocery stores' claims after severe storms tripped some breakers in the stores' substations, causing a loss of refrigeration and resulting food spoilage. The insured argued that the power failure exclusion in its property policy was ambiguous, but the trial court disagreed and concluded that "the power loss occurred unquestionably away from the stores' premises."[54] The appellate court affirmed after briefly considering and rejecting *Pressman* and *Brooklyn, supra.* After citing the Ohio Insurance Code and prior state precedent, the court rested its opinion primarily on the grounds that it must give meaning to every provision in the policy if at all possible.[55]

The Ohio approach was later cited with approval by the South Dakota Supreme Court in *Lakes Byron Store, Inc. v. Auto-Owners Insurance Co.*[56] In that case, a severe

winter storm broke power poles and lines in the area of Lakes' hunting resort. Lakes submitted a claim for food spoilage and business interruption under its business interruption policy, which was denied because the insurer argued the power failure occurred away from the insured premises. After a complaint was filed, the trial court granted summary judgment for the insurer, noting that none of the power poles or lines were broken within the boundaries of the lot which it found constituted the "described premises," but rather on the grounds the lodge leased for hunting. On appeal, the policyholder argued that the power failure exclusion was ambiguous, but the court rejected this contention, citing *Mapletown,* and concluding that the exclusion precluded coverage.

In summary, relatively few cases involving the utility service failure exclusion have been reported to date. Of these, a slim majority of courts have refused to apply the exclusion as the sole basis for denying coverage. Judicial discomfiture with this exclusion ranges from concerns about its ambiguities and inconsistency with other policy provisions to more public policy-based concerns. A couple of unreported decisions denying coverage under this exclusion have relied on additional considerations in reaching their conclusion. It appears that only two jurisdictions have denied coverage relying on this exclusion alone, reciting the premise that all policy provisions must be given force and effect. Even in these jurisdictions, however, when power-failure exclusions are accompanied by concurrent cause exclusions, their inconsistency might be asserted for the benefit of policyholders.[57]

ii. Exclusion for Damage to Overhead Electrical Lines

Toledo Edison Co. v. Underwriters at Lloyds, an unpublished opinion, concerned the attempt of a public utility to recover losses incurred after a static wire broke due to heavy snowfall and fell into substation equipment, causing a short circuit which, in turn, caused a transformer to fail.[58] The transformer was shut down for seven months.

Toledo Edison had a business interruption policy which excluded "any loss from an occurrence caused directly or indirectly by . . . ice or windstorm damage to overhead electrical transmission lines." The plaintiff argued that the weight of accumulated snow broke the wire. The insurer argued that the wind had blown partially melted snow onto the line and the melted water then froze to form ice. The court rejected Lloyd's analysis, and concluded that the insurer was responsible for the actual costs incurred during the interruption period. It defined actual costs as the additional costs incurred to maintain normal output while the transformer was down.

iii. Electrical Arcing Exclusion

The electrical arcing exclusion has played a role in a couple of reported cases. Concerning this exclusion, the Stemple treatise comments, "Although this [arcing exclusion] is in the ISO Commercial Property form, its rationale is not obvious as with the other exclusions."[59] Like other issues related to coverage for power outages, this

exclusion is closely tied to causation analysis, which can create problems and opportunities for courts and parties alike.[60]

United Department Stores Co. No 1 v. Continental Casualty Co. involved losses resulting from a power failure during an electrical storm, after which an apartment's air conditioners would not start.[61] The policy contained an "arcing exclusion" for "any electrical injury or disturbance to electrical appliances, devices, fixtures or wiring caused by electrical arcing." However, the appellate court found the arcing exclusion was ambiguous since it could apply to describe arcing caused by either electrical current or lightening. Accordingly, the court reversed the lower court's directed verdict on this exclusion, remanding the case for further findings.

The electrical arcing exclusion was also at issue in *Quadrangle Development Corp. v. Hartford Insurance Co.*[62] This case involved a claim for losses resulting after extensive damage to hotel switchboards necessitated the suspension of electric power to the hotel for twelve hours while repairs were made. The parties agreed that a pringle switch had failed, which should have operated to cut off the electrical current when the arcing reached a certain intensity. The trial court found the losses were excluded because the damage was proximately caused by electric arcing, an excluded cause of loss.

On appeal, the insured argued that damage was caused by fire, which constituted an exception to the electric arcing exclusion. Quadrangle argued that the failure of the pringle switch was a concurrent or subsequent cause of the resulting "fire" which led to the damage at issue. Although the presence of smoke had been established, the court disagreed with the old adage, "where there's smoke, there's fire," finding instead that, in its ordinary and common usage, "fire" indicates the presence of a flame."[63] None of the incident reports or expert witnesses introduced into evidence suggested that a flame had been present.

The court further found that Quadrangle's explanation would make every instance of electrical arcing an instance of "fire," thus rendering the arcing exclusion meaningless. The court reasoned that the failed pringle switch did not produce the damage independently of the electric arcing, which was the proximate cause of the damage.[64] Differentiating the proximate cause analysis applied in tort from that applied in insurance cases, the court found the losses fell within the arcing exclusion.

C. *Other FormsOof Coverage For Power Outages*

The cases also identify situations where other forms of coverage come into play for power outage-related losses and damages. These actions often involve policies designed to protect stock in trade or specialized equipment. This section briefly discusses several examples of such forms of coverage that may cover losses resulting from the reduction or loss of electrical power.

Dundee Mutual Ins. Co. v. Marifjeren concerned losses after severe winds from Blizzard Hannah in 1997 downed power lines, interrupting power to most of the Red

River Valley for three days.[65] During that time, the potatoes stored on the Marifjeren farm froze when the storage facility, designed to be heated by electric heaters and fans, was unheated.

The farm fire and extended coverage policy in *Dundee* covered "direct physical loss to covered property." The named perils included windstorm or hail, but excluded "loss to the interior of a building or the property contained in a building . . . unless the direct force of wind or hail damages the building causing an opening . . . and the rain, snow, sleet, sand or dust enters through this opening." However, an endorsement to the policy covered damage to potatoes in storage "caused by freezing as a direct or indirect result of fire damage, wind damage, roof collapse from weight of snow or ice and vandalism."

The insurance adjuster rejected Marifjeren's claim on the grounds that the policy required "physical damage to the structure or at least physical damage to the transmission line somewhere on the insured's premises." The trial court granted summary judgment for the insured. On appeal, the insurer again argued that the perils section precluded coverage because the blizzard did not cause "direct physical loss" to the storage facility.

However, the court noted that the stored potato endorsement covered "damage caused by freezing as a direct or indirect result of wind damage."[66] The term "wind damage" was not defined in the policy. Turning to dictionary definitions, the court found that "damage" meant "injury or harm that reduces value or usefulness" and defined as "every loss or diminution" of property.[67] The court concluded: "Clearly, without qualification, the term 'damage' encompasses more than physical or tangible damage."[68]

Thus, the *Dundee* court found that, since the purpose of the storage facilities was to protect potato crops from the elements, the facilities were "damaged" by the interruption of electric power because the loss of electric power impaired their value or usefulness. Even though the loss of electricity was the immediate cause of the heating failure, an uncovered cause, the court found coverage for the losses under the "wind damage" provisions in the policy. The court's flexible approach is reminiscent of the progressive approaches taken in *Ingram* and *Jerry's Supermarket* and suggests there may be ways in certain circumstances to counter such cases as *Pruett* (all cases *supra*).

In several cases, courts held brokers, agents or insurers responsible for the lack of coverage for losses related to power-outages. In one such case, several grocery stores filed claims after a hurricane interrupted power service for several days.[69] Like *Dundee*, the claimed loss was for food spoiled in storage. Also like *Dundee,* the insurers denied the claims on the basis that the policy limited coverage to situations where there was damage to the insured's buildings or equipment. The insureds filed a complaint asserting that they had relied on the expertise of the insurer's agent, who had assured them that they would be "fully covered [for such a contingency] and did not need any other coverage."[70] The trial court granted summary judgment to the insurers. However, the appellate court found that the record supported the insured's claims that they had asked to be fully insured, had questioned whether "everything" was covered, and had specifically asked about coverage for "acts of God," and that the agent had repeatedly assured them

that the insurance proposal contained all the coverage they needed.[71] Furthermore, the court found: "[W]hen an insured reasonably relies upon an agent's claimed expertise and advice, liability may be based upon the agent's negligent failure to properly advise the insured as to coverage."[72] Accordingly, the court reversed the decision and remanded the case.

Similarly, in *Polly Drummond Thriftway v. W.S. Borden Co.*, a grocery store filed an action against its insurer claiming that, through the insurance agent's negligence, the insured did not have coverage for perishable inventory.[73] In that case, the insured had purchased a boiler and machinery policy. Its prior policy had included coverage for off-premises power outages and resulting food spoilage. The insurance agent had issued the policy without reviewing it to make sure the necessary coverage was included. Although the insurer argued that the insured had a duty to read the policy, the court found, "No Delaware court has held that an insured's failure to read the policy precludes a negligence action against the insured's broker for procuring inadequate insurance coverage." Accordingly, the court awarded the insured with the damages for inventory lost due to the power outage.

Most recently, in *Westchester Fire Insurance Co. v. Johnson*, an insured shopping center lost power during an electrical ice storm.[74] The insured called an electrician to restore power, which caused a fire in a circuit panel, damaging it. The insured then rented a generator that was inadequate to heat the facility. Eventually, the insurer paid the cost to rebuild the damaged circuit panel. However, by that time, many tenants had vacated and so the owner decided not to reopen the center.

The insured had business interruption coverage and filed a claim for lost business income and fair market value, which exceeded the policy limits. The owner sought to recover damages resulting from and including "direct physical loss to the electrical system and equipment including switchgear, boilers and piping vessels, heating, air conditioning, sprinkler system and plumbing system."[75] The insurer filed suit and a subsequent motion for summary judgment, alleging among other things that the policy covered only direct physical loss. The insured countersued, alleging material misrepresentation and violation of North Carolina's unfair trade practices law. The district court granted the insurer's motion for partial summary judgment on the insured's unfair trade practice and misrepresentation counterclaims.

On appeal, the Fourth Circuit reversed, based in large part on an intervening case from the North Carolina Supreme Court dealing with the State's unfair trade practices law. The court remanded the case for reconsideration of these claims in light of the new precedent, noting that the insured must show that the insurer violated these laws with a frequency indicating a general business practice.

III. Claims Involving Utilities

Cases involving utilities' liability for losses and damages related to power-outages and their insurers can take a number of forms. Such cases include direct and subrogation

actions involving utilities' insurers, brought by the utilities themselves or other parties. Other cases involve ratepayers' direct actions against utilities, for which damages CGL insurers may ultimately be accountable. Finally, there is at least one example in the case law where a black-out gave rise to both direct actions and insurers' recovery actions against utilities for losses paid to policyholders.[76] This section reviews various forms of action involving utilities, their insurers, and other responsible entities, and certain key issues that have arisen in these power-outage related cases.

A. *Insurers' Actions Against Utilities And Other Entities For Power Outage-Related Losses And Damages*

Certain cases involve insurers' actions against utilities and other responsible entities to recover moneys paid to cover policyholders' losses and damages associated with power outages. For example, one recent case overturned a summary judgment for a utility in an insurer's suit against the utility to recover insurance proceeds it paid for business losses incurred during a windstorm-related power interruption.[77] The court ruled that the utility's "community-of-service" tariff under Washington law did not confer immunity for the utility's alleged negligence, and remanded the case for trial. Another case, *Beacon Bowl, Inc. v. Wisconsin Electric Power Co.*, was a complicated subrogation action brought by a bowling alley and its insurer against a utility and its electric contractor after a power outage led to an electrical fire, for which the utility was found to be partially responsible.[78] In another case, *Commerce & Industry Ins. Co. of Canada v. Norfolk & Western RW Co.*, a utility was found not to be liable in a action to recover losses a company and its subrogated insurer had incurred due to a power outage.[79]

One interesting subrogation case involved the insurer's defense duty. In *DeTienne Associates Ltd. Partnership v. Farmers Union Mutual Ins. Co.*, an insurer (FUMI) sought to bring a subrogation action against Montana Rail Link (MRL), a third-party tortfeasor.[80] MRL had damaged the Park Plaza Hotel when a train wrecked in sub-zero temperatures in 1989, causing an explosion and a four-hour power outage in the area around Helena. The hotel was insured by FUMI. When the hotel was not made completely whole by FUMI's policy payment, the hotel sued MRL for the excess damages. FUMI joined in that litigation and claimed a right of subrogation against MRL.

The lower court found that FUMI should pay Park Plaza's attorney fees and costs (plus interest) incurred in the joint litigation against MRL before FUMI could assert its right of subrogation against MRL. The Montana Supreme Court affirmed, relying primarily on Montana precedent holding that when an insured has suffered a loss "in excess of the reimbursement by the insurer, the insured is entitled to be made whole for its entire loss and any costs of recovery, including attorney fees, before the insurer can assert its right of legal subrogation."[81]

B. *Direct Actions Against Utilities*

National Food Stores, Inc. v. Union Electric Co was a direct action against a utility for losses and damages related to food spoilage after a record-breaking heat wave

forced the utility to cut power to the service area.[82] The court first noted that those who suffer a power interruption may sue in tort as well as for breach of contract.[83] This indication invites wider considerations of differences between the causation theory applied in first- and third-party contracts, and in corresponding theories of contract law and tort, that are cursorily addressed in the final section of this paper.

The court next observed that utilities' liability in negligence for unintended consequences may be excused where the interruption resulted from an "act of God" or circumstances beyond their control.[84] Nonetheless, the court found the utility still had a "general duty to exercise reasonable care to avoid undue harm to its consumers where the harm is reasonably foreseeable."[85]

The utility in this case had not provided prior notice of the outage to the company, although it had ample warning of the impending power shortage and had informed other customers.[86] The court found that the critical issue in this case was not the utility's failure to provide service but its failure to provide notice or warning of the impending power interruption. The court remanded the case to determine whether the utility's failure to give reasonable notice or warning of the outage was reasonably likely to cause harm or property loss to utility customers so that the failure to give notice was a breach of that duty.[87] The court noted that damages flowing from a breach of this duty might include loss of products, excess labor costs, and the estimated loss of sales if the store was forced to close.[88]

C. *Multiple Actions Against Utilities And Other Responsible Entities*

Interestingly, one situation was found in which a 1983 power outage in New York City gave rise to both direct actions and insurers' recovery actions against the utility and New York City. *Alouette Fashions, Inc. v. Consolidated Edison Co.* represented a class action filed on behalf of over 100 parties against the utility and the City of New York alleging "property damage" after a water main broke, leading to an electrical fire at a ConEd substation and a resulting three-day blackout in the city's "garment center" during a marketing event.[89] *Arkwright-Boston Manufacturers Mutual Insurance Co. v. City of New York* represented an action brought by policyholders' insurers against the utility and New York City to recover business interruption losses paid in connection with this power outage.[90]

Both cases dealt with procedural preliminaries rather than substantive issues. However, the fact that the insurers bringing the action in *Arkwright-Boston* had already paid policyholders' business interruption claims in connection with the power outage speaks for itself.

D. *Utility Recovery Actions Against Insurers*

In *Doswell v. Virginia Electric & Power Co.* a utility sought to recover losses incurred after a generating plant explosion left it out of service for four months.[91] The defendant customer (VEPCO) had withheld payments, claiming the loss of power

constituted an "unexcused" power outage under their supply contract. Doswell also named Zurich Insurance company as defendant in the case, seeking defense and indemnity obligations owed it under its insurance policy. The court ruled that the withheld payments constituted a "loss" under the policy. The opinion did not rule on whether the insurer also owed a defense obligation to the policyholder, since Doswell and VEPCO had already settled their dispute.

IV. Additional Issues And Considerations

The extant cases reveal important aspects of the law pertaining to power outage coverage. However, due to the relative sparse treatment of these issues in case law generated before the energy crisis, certain issues apparently have not been resolved by the courts. This section first briefly considers certain unanswered questions that may affect a policyholder's recovery under business interruption policies. It then addresses certain underlying themes and problems related to causation that are implicated in the existing case law involving power outage coverage.

A. *Unanswered Questions In The Case Law On Business Interruption Policies*

A few remaining issues related to business interruption coverage for utility failures should perhaps be noted, although no cases were found expressly relating to these matters. First, most business interruption policies impose on the insured an obligation to reduce losses and provide the insured corresponding coverage for the expenditures incurred in mitigating losses, up to the amount of loss.[92] This provision might allow recovery of the cost of installing and operating generators and other backup equipment, as well as other measures undertaken to deal with energy shortages.

Secondly, minimum time periods for coverage of periods of power interruptions are a part of many business interruption endorsements. Many business interruption endorsements require an interruption of at least twelve hours.[93] Thus, in cases of rolling blackouts lasting an hour or so, some business interruption policies may not be triggered.

However, there may be "loss of use" coverage for power outage losses resulting when a business cannot operate because of damage to someone else's property.[94] According to Robert Hartwig, chief economist of the New York-based Insurance Information Institute, "loss-of-use provisions theoretically do apply to companies that were unable to operate during sporadic power outages."[95]

B. *Underlying Issues And Themes: Causation Analysis*

Causation analysis can pose problems in the context of power-outage coverage, as elsewhere: "Causation has always been a troublesome concept for lawyers."[96] This problem is illustrated by cases above involving the arcing exclusion, concurrent cause exceptions and named peril analysis. It also underlies disputes over where the interruption occurred, and, ultimately, whether recoverable losses resulted.

Some older cases take a practical view of causation which can be instructive in cutting through undue complexities of modern causation analysis in the power-outage arena. For example, in *Lynn Gas and Electric Co. v. Meriden Fire Ins. Co.*, the high court of Massachusetts considered whether coverage was available for losses resulting after a fire in an electrical supply tower, caused a power outage and electrical disruption in certain pieces of machinery with considerable resulting damage.[97] The court rejected the insurers' argument that electricity rather than fire was the cause of the loss, observing that "electricity was one of the forces of nature, -- a passive agent working under natural law, -- whose existence was known when the insurance policies were issued.", finding instead that the fire was "the direct and proximate cause of the damage," and that "[n]o new cause acting from an independent source intervened."[98] *Lynn Gas* has been cited without negative treatment in more than 52 cases since this 1893 ruling was issued.

Similarly, in *Lipshultz v. General Insurance Co. of America*, the Minnesota Supreme Court considered a case involving coverage for spoilage resulting after a windstorm caused a power outage lasting 36 hours.[99] The insurer argued that this did not constitute a "direct loss" under the coverage for windstorm damage to the policyholder's stock in trade. The court reasoned that interruption of electricity was foreseeable at the time the contract was entered, and that this contingency was thus an element of risk covered by the insurance policies issued. In its reasoning, the court noted that the "proximate cause" of damage for insurance coverage does not necessarily mean the cause which is nearest in time, but rather the "efficient" or "direct" cause of the loss, as opposed to the "remote" cause of loss. The court noted that Minnesota courts have "refused to restrict coverage in situations where the peril insured against sets in motion a chain of events originating on the premises of the insured or on premises immediately adjoining."[100]

The analysis in modern cases can be complicated by the confluence of insurance exclusions that arguably restrict coverage with causation theory under tort and contract law, since "insurance law is something of a hybrid of tort and contract concepts and concerns."[101] Furthermore, the type of causation analysis applied under first-party policies often differs from that applied under third-party policies.[102] Given that multiple elements that can influence causation analysis, different outcomes in power outage coverage cases are perhaps not surprising; indeed, "[m]ultiple causation insurance cases present a legal issue that has troubled courts in virtually every jurisdiction."[103] It should be noted, however, that the cases also suggest how causation analysis can be applied flexibly and creatively to find for coverage under certain circumstances.

Causation analysis can assume additional dimensions when both covered and excluded causes of loss contribute to the ultimate losses. For example, the *Noonan* court found that, due to a concurrent cause exclusion, the losses were not covered since a named peril (fire) and excluded peril (power outage) were factually intertwined.[104] However, in another case, the insured argued that the losses were covered because an excluded cause was conjoined with a covered cause of loss, attempting to invoke the efficient proximate cause doctrine for coverage of the losses.[105] Finally, in *Brooklyn Bridge,* the concurrent cause exclusion was found to be inconsistent with the limitation on the power-failure exclusion, and invalidated.[106] Indeed, the *Brooklyn Bridge* ruling was consistent with the "black-letter rule of law . . . [that] coverage is afforded if one of the concurring causes is a covered peril."[107]

It is clear that the efficient proximate cause doctrine can sometimes override concurrent cause exclusions.[108] To some extent, the enforcement of concurrent clause exclusions depends on the particular language used in conjunction with other policy provisions. However, the possible interaction of concurrent cause exclusions in policies, legal theories such as the efficient proximate cause doctrines, and public policy concerns is a matter of considerable complexity, which is beyond the scope of this analysis. Nonetheless, it may be worth noting that some experts suggest there are actually two types of concurrent cause exclusions, which differ in their impact on efficient proximate cause analysis:

> Causation problems can become particularly vexing when the concepts of efficient proximate cause, remoteness, and dominance are placed at issue not only because insurance policies require that covered perils cause a loss but also because an exclusion to the policy may prevent an otherwise direct cause of loss from giving rise to a right of indemnity. Keeton and Widiss have divided exclusions into two broad types: conclusive and inconclusive. A conclusive exclusion is one that expressly provides that a policy will not cover certain losses flowing from the excluded clause even if other causes concur to produce a loss. Where the exclusion is this plain, courts tend to enforce it. However, when the insurer's drafting has been less than airtight, policyholders may obtain coverage by arguing that the exclusion bars coverage only when there are no covered perils joining to cause the loss.[109]

Still others argue that "the doctrine of concurrent causation should not be applied to first-party policies and the doctrine of efficient proximate cause is likewise inapplicable to third-party policies."[110]

It is important for policyholders to avoid traps caused by inappropriate or inept causation analysis. Regardless of the particular exclusions and complexity of factual scenarios encountered in a given case, one thing is clear: the preclusive effect of concurrent cause exclusions is far from absolute. The result in particular cases may

depend on the particular concurrent clause and other exclusions at issue, the jurisdiction involved, and any public policy concerns that may affect the determination. Policyholders would be well advised to seek the assistance of qualified professionals to assist in avoiding claim denials premised on faulty causation analysis. The existence of risk of coverage for carriers is very real notwithstanding apparent causation issues.

V. Conclusion

Although the effects of a power interruption may be widespread and varied, many pertinent insurance coverages are available to respond to losses and damages. Different situations will, obviously, invoke different coverages. Insurers have generally been unsuccessful in defeating coverage, even where unique exclusions are apparent. Any enterprise which is impacted by power interruptions would do well to thoroughly review its available coverage. Based upon existing case law and predictable coverage language, it is possible, perhaps probable, that usual business coverages will provide indemnity for power-interruption damages.

The stakes may ultimately be very large in this regard. Businesses should begin now to prepare for claims which may arise in the coming months. A list of steps to take now is attached to the end of this article.

STEPS TO TAKE NOW

Companies with potential power interruption losses should impacts take the following steps as expeditiously as possible:

1. INTEGRATE **ASSET RECOVERY STRATEGY** TO COMPLEMENT LIABILITY MANAGEMENT PROGRAM.
   - ✓ Insurance Inventory and Recovery
   - ✓ Warranty Inventory and Recovery

2. GIVE **NOTICE OF CLAIMS** TO INSURERS WITH RESPECT TO CLAIMS FOR BUSINESS INTERRUPTION OR PROPERTY DAMAGE AS SOON AS POSSIBLE.

3. CONDUCT **INVENTORY OF INSURANCE** THAT MAY RELATE TO POWER INTERRUPTION PROBLEMS. DO NOT WAIT TO REVIEW COVERAGE LATER AND DO NOT RISK DESTRUCTION OF COVERAGE EVIDENCE.
   - ✓ Assemble Proof of Coverage
     - Business Interruption
     - 1st party Property (Personal)
     - 3rd party Liability (Property)
     - Directors and Officers Liability
     - Errors and Omission Coverage
     - General Liability

- ✓ Analyze all policies to Understand available coverage and key terms relating to power interruption
- ✓ Management awareness of coverage issues

4. CREATE **ACCOUNTING SYSTEM** TO TRACK POWER INTERRUPTION COSTS. PRESERVE COMPLETE PROOF OF DAMAGES FOR INSURANCE CLAIMS.
   - ✓ Forward looking accounting
   - ✓ Capture undocumented past costs NOW before more time goes by.

5. DOCUMENT **LOSS MITIGATION EFFORTS** CAREFULLY. PREPARE NOW FOR "EXPECTED AND INTENDED," "FORTUITY," AND OTHER COVERAGE DEFENSES
   - ✓ Implement State of the Art Mitigation Program
   - ✓ Board Level and Senior Executive Management Support and Mandate
   - ✓ Document carefully all aspects of the Mitigation as pertaining to covered property losses
   - ✓ Document carefully all aspects of expectation and intent
   - ✓ Integrate all pertinent Corporate Perspectives in the Program
     - IT
     - Legal
     - Operations
     - Financial & Accounting
     - Marketing
     - Procurement
     - HSEQ
     - Risk Management
     - Stakeholder and Client

6. IMPLEMENT A CAREFUL **PROGRAM TO REPORT AND DOCUMENT** EFFECTS OF POWER INTERRUPTION
   - ✓ Employee Awareness of Claims Potential
   - ✓ Reporting and Documentation Structure to capture all potential claims
     - Property Damage Claims
     - Business Interruption Claims
     - Third-Party Claims

7. CONSIDER **EARLY NOTICE OF CLAIM** TO CARRIERS. TYPICAL "ALL-RISK" AND BUSINESS INTERRUPTION PROPERTY POLICIES MAY REQUIRE THAT A SUIT BE FILED EARLIER THAN YOU WOULD EXPECT; FAILURE TO COMPLY CAN RISK COVERAGE.
   - ✓ Understand the Notice and Suit provision of coverage
   - ✓ Make knowledgeable decisions about early lawsuits
   - ✓ Consider a tolling agreement

TABLE OF CASES

America Online, Inc. v. National Health Care Discount, Inc., 121 F. Supp. 2d 1255 (N.D. Iowa 2000)
American Guarantee & Liability Ins. Co. v. Ingram Micro, Inc., 2000 US Dist. LEXIS 7299 (D. Ariz. 2000)
Arkwright-Boston Mfrs. Mut. Ins. Co. v. City of New York, 1984 U.S. Dist. LEXIS 21807 (S.D.N.Y., Nov. 21, 1984)
Beacon Bowl, Inc. v. Wisconsin Electric Power Co., 501 N.W.2d 788 (Wis. 1993)
Brooklyn Bridge, Inc. v. South Carolina Ins. Co., 420 S.E.2d 511 (S.C. Ct. App. 1992)
Charlton v. United States Fire Ins. Co., 627 N.Y.S.2d 221 (Sup. Ct. 1995)
Commerce & Indus. Ins. Co. of Canada v. Norfolk & Western RW Co., 1990 Ohio App. LEXIS 2979 (July 18, 1990)
DeTienne Associates Ltd. Partnership v. Farmers Union Mut. Ins. Co., 879 P.2d 704 (Mont. 1994)
Doswell v. Virginia Electric & Power Co., 1996 Va. Cir. LEXIS 155 (1998)
Dundee Mutual Ins. Co. v. Marifjeren, 587 N.W.2d 191 (N.D. 1998)
Ellyson v. Missouri Power & Light Co., 59 S.W.2d 714 (Mo. Ct. App. 1933)
Howell v. State Farm Fire & Cas. Co., 218 Cal. App. 3d 1446 (1st Dist. 1999)
Jerry's Supermarkets v. Rumford Property & Liability Ins. Co., 586 A.2d 539 (R.I. 1991)
Lakes Byron Store, Inc. v. Auto-Owners Ins. Co., 589 N.W.2d 608 (S.D. 1999)
Lipshultz v. General Insurance Co. of America, 96 N.W.2d 880 (Minn. 1959)
Lynn Gas and Elec. Co. v. Meriden Fire Ins. Co., 33 N.E. 690 (Mass. 1893)
Manufacturers Mut. Fire Ins. Co. v. Royal Indem. Co., 501 F.2d 299 (9th Cir. 1974)
Mapletown Foods Inc. v. Motorists Mutual Ins. Co., 662 N.E.2d 48 (Ohio Ct. App. 1995)
McMahon Books v. Nationwide Property & Cas. Ins. Co., 1993 Del. C.P. LEXIS 16 (June 9, 1993)
National Food Stores, Inc. v. Union Elec. Co., 494 S.W.2d 379 (Mo. Ct. App. 1973)
National Union Ins. Co. of Pittsburgh v. Puget Sound Power & Light, 972 P.2d 481 (Wash. Ct. App. 1999)
Noonan, Astley & Pearce, Inc. v. INA, 1994 U.S. Dist. LEXIS 3803 (S.D.N.Y., March 31, 1994)
Polly Drummond Thriftway v. W.S. Borden Co., 95 F. Supp. 2d 212 (D. Del. 2000)
Pressman v. Aetna Casualty & Surety Co., 574 A.2d 757 (R.I. 1990)
Pruett Enters., Inc. v. The Hartford Steam Boiler Inspection and Ins. Co., 1997 Tenn. App. LEXIS 243 (April 11, 1997)
Quadrangle Development Corp. v. Hartford Insurance Co., 645 A.2d 1074 (D.C. Ct. App. 1994)
Shark Info. Servs. Corp. v. Crum & Forster Commercial Ins., 627 N.Y.S.2d 221 (Sup. Ct. 1995)
Skauge v. Mountain States Tel. & Tel. Co., 565 P.2d 628 (Mont 1977)
Toledo Edison Co. v. Underwriters at Lloyds, 1980 Ohio App. LEXIS 11636 (Feb. 1, 1980)
United Dep't Stores Co. No 1 v. Continental Cas. Co., 534 N.E.2d 878 (Ohio Ct. App. 1987)
Warehouse Foods Inc. v. Corporate Risk Mgmt. Servs., 530 So.2d 422 (Fla. Ct. App. 1988)

Endnotes

[1] Energy experts are forecasting more than 260 hours of blackouts this summer for California. Laura L. Holson, *Blackouts Spur a Search for Home Remedies*, N. Y.TIMES, May 31, 2001. The economic impacts will be severe, with experts estimating the energy crisis will conservatively cost California businesses $2.1 billion in lost productivity. *California Economy Faces $21.8 Billion Hit, 135,000 Lost Jobs from Summer Blackouts; New Study Also Shows Potential Loss of $4.5 Billion in Personal Income,* PR NEWSWIRE, May 9, 2001.
[2] 501 F.2d 299 (9th Cir. 1974).
[3] In May of 2001, the Bonneville Power Administration asked ten aluminum smelters in the Pacific Northwest to close for two years, to reduce electricity consumption in the area. Reported in *The Outlook,* WALL ST. J ONLINE, May 21, 2001.
[4] *Id.* at 300.
[5] 627 N.Y.S.2d 221 (Sup. Ct. 1995). Restaurants in California have already suffered considerable losses as a result of the energy crisis. *See, e.g.*,Cathleen Ferraro, *Soaring energy bills hurt eateries*, SACRAMENTO BEE, May 1, 2001. However, the foods industry generally has been heavily impacted by the California energy crisis, and more extensive problems are predicted. California's $4.3 billion dairy industry has been forced to dump thousands of gallons of milk because their plants didn't have electricity to process it. Fruit packing plants in the $653 million citrus industry had to reduce operations from twelve to four hours a day because of the energy shortage. Lori Aratani, *Farmers fight to keep crops, profits safe during power crisis*, SAN JOSE MERCURY NEWS, Feb. 17, 2001. Costs of food processing in California are experiencing increases from 4% to 35%, which will force many to curtain or cut operations. *Crunch time comes for California processors,* FOOD ENG'G, March 1, 2001.
[6] 634 N.Y.S.2d 700 (App. Div. 1995).
[7] 2000 US Dist. LEXIS 7299 (D. Ariz. 2000).
[8] *Id.* at *2.
[9] *Id.* at *6. The court cites, for example, "the federal computer fraud statute, 18 U.S.C. § 1030 (West. 1999) which makes it an offense to cause damage to a protected computer, [and] defines damage as 'any impairment to the integrity or availability of data, a program, a system, or information.'" *Id.*
[10] *Id.*
[11] *Id* at *6-7.
[12] The order denying permission to appeal was entered August 14, 2000 (Docket No. 00-80193). However, a subsequent appeal entered January 29, 2001 is still open before the Ninth Circuit (Docket No. 01-15173). *Cf.* Noonan, Astley & Pearce, Inc. v. INA (*infra)* (finding similar damages excluded under a power interruption exclusion).
[13] America Online, Inc. v. National Health Care Discount, Inc., 121 F. Supp. 2d 1255, 1274 (N.D. Iowa 2000).
[14] JEFFREY W. STEMPLE, LAW OF INSURANCE CONTRACT DISPUTES § 15.02 at 15-12 (3d ed. 2001).
[15] *Id.*
[16] 574 A.2d 757 (R.I. 1990).
[17] *Id.* at 758.
[18] *Id.*
[19] *Id.* at 759.
[20] *Id.*
[21] *Id.*
[22] *Id.*
[23] *Id.*
[24] *Id.* at 760.
[25] 586 A.2d 539 (R.I. 1991).
[26] Cited *id.* at 540.
[27] *Id.*

[28] *Id*.
[29] *Id.*
[30] McMahon Books v. Nationwide Property & Cas. Ins. Co., 1993 Del. C.P. LEXIS 16 (June 9, 1993).
[31] The fee the landlord charged for maintenance of the "common areas," where the electrical equipment was housed, was also designated as "rent."
[32] *Id.* at *3.
[33] *Id.*
[34] *Id.* at *5 (citing *Pressman* and *Jerry's Supermarket*, *supra*).
[35] 420 S.E.2d 511 (S.C. Ct. App. 1992).
[36] Quoted *id.* at 512.
[37] *Id.*
[38] *Id.*
[39] *Id.* at 513.
[40] *Id.*
[41] 1994 U.S. Dist. LEXIS 3803 (S.D.N.Y., March 31, 1994).
[42] *Id.* at *1.
[43] *Id.* at *8.
[44] The court's discussion of other contractual elements irrelevant to this discussion is omitted here.
[45] *Id.* at *8.
[46] The clause stated, in relevant part: "your protection does not include coverage for loss or damage caused by or resulting directly or indirectly from the following causes, or occurring in the following situations. Such loss or damage is excluded regardless of any other cause or event that contributes concurrently with or before, during or after a loss." Quoted *id.* at *8.
[47] *Id.* at *18. It should be noted that the language of this exclusion was less ambiguous than the language of the exclusion encountered in *Brooklyn Bridge, supra.* It should also perhaps be noted that the insured in this case compromised its litigation position somewhat by other actions. For example, the employees entered the premises to resume operations, even though the company claimed in court that it has been prohibited access by government agencies, in an effort to bring the losses under the policy's coverage for a government agency's prohibition of access. *Id.* at *22-23. However, although the court recited these facts, it apparently did not rest its decision on these findings.
[48] 1997 Tenn. App. LEXIS 243 (April 11, 1997).
[49] The policy was called an "'All Systems Go' Business Equipment Protection" policy. 1997 Tenn. App. LEXIS 243, *2 (April 11, 1997).
[50] *Id.* at *14.
[51] *Id.* at *18.
[52] Only one of the covered sites was at issue in *Pruett.*
[53] 662 N.E.2d 48 (Ohio Ct. App. 1995).
[54] *Id.* at 50.
[55] *Id.*
[56] 589 N.W.2d 608 (S.D. 1999).
[57] For further discussion of the concurrent cause exclusion, *see* part IV.
[58] 1980 Ohio App. LEXIS 11636 (Feb. 1, 1980).
[59] LAW OF INSURANCE CONTRACT DISPUTES, *supra*, § 15.02 at 15-12.
[60] Arcing played a major role in a complicated subrogation action brought by a bowling alley and its insurer against an electric utility and an electrician. Beacon Bowl v. Wisconsin Electric Power Co., 501 N.W.2d 788 (Wis. 1993). In that case, a power outage occurred on a "feeder" line, a high voltage primary electrical line that "feeds" a large area. The outage affected Beacon bowl and several other locations. Although the outage lasted only a few seconds, smoke was soon observed pouring out of two automatic ball returns in the bowling alley. An employee discovered that the main electrical distribution panel in the basement was making a hissing sound and emitting flames and sparks, but it was beyond the reach of the fire extinguisher. Hot molten particles fell from the electrical panel and Beacon Bowl caught fire. Witnesses testified that at about the time the outage occurred, they saw a blue puff of smoke near the feeder line, a flash of light coming from the electrical wires, and electrical arcing. Utility witnesses also observed evidence of arcing damage on the feeder line, that trees had been touching the wires, and found evidence of

arcing between the trees and lines. To complicate the causation analysis, the electrical system at Beacon Bowl had been installed by Pinky, an electrician who admitted that the PVC pipe used to connect the main disconnect to the main distribution panel was a nonconductor and failed to provide a proper ground. After this electrical system had been installed, the bowling alley had experienced problems with its electricity, at which time a utility tree trimmer had noticed that trees had contacted the wires across the street, causing several short power outages and one "lock out." One electrical line had burned completely down because of the tree contact.

The owners and the insurers filed a complaint against the utility company WEPCO and Pinky. Pinky filed a cross complaint against WEPCO and a third-party complaint against the City of New Berlin and its electrical inspector Steinbach, alleging that they had been negligent in failing to properly ground the connection between the main disconnect and the main distribution panels.

Each party called expert witnesses to testify about causation. Dr. Szews, who testified for the insurers, argued that both high-voltage spikes from WEPCO lines and the lack of proper grounding on the main distribution panel were "substantial factors" or "causes" of the fire. He explained that when trees contacted the primary lines, arcing faults occurred, causing a series of high voltage spikes to travel along the line and through the transformers, which finally damaged insulation in the circuit breaker box. Arcing then occurred where the insulation was damaged, melting the circuit breaker box and giving off molten particles and sparks which ignited nearby combustibles. Pinky's expert corroborated this evidence. WEPCO's expert testified, however, that a loose connection in one circuit breaker and an overcurrent caused arcing in that circuit breaker, followed by arcing at the bottom of the main distribution panel. Prior to trial, Pinky settled its claims against the city and Steinback, agreeing to release the city and indemnify it in the event judgment was obtained against the city. The appeals court upheld the jury verdict for Beacon Bowl and its insurers, finding that WEPCO was 85% negligent, Pinky was 10% negligent, and the city of New Berlin 5% negligent. The insurance policy at issue was not discussed, but the insurer's award for treble damages and claims for preverdict interest were rejected.

[61] 534 N.E.2d 878 (Ohio Ct. App. 1987).
[62] 645 A.2d 1074 (D.C. Ct. App. 1994).
[63] *Id.* at 1075.
[64] *Id.* at 1077.
[65] 587 N.W.2d 191 (N.D. 1998).
[66] Quoted *id.* at 194.
[67] *Id.*
[68] *Id.*
[69] Warehouse Foods Inc. v. Corporate Risk Mgmt. Services, 530 So.2d 422 (Fla. Ct. App. 1988).
[70] Quoted *id.* at 423.
[71] *Id.* at 424.
[72] *Id.*
[73] 95 F. Supp. 2d 212 (D. Del. 2000).
[74] 2001 U.S. App. LEXIS 2942 (4th Cir., Feb. 28, 2001).
[75] *Id.* at *4.
[76] In this context, it perhaps bears mentioning that some insurers have stated there may be increased liability exposure if the major utilities go into bankruptcy. *California Insurers Say Power Crisis Is Not Yet a Threat*, BESTWIRE, Jan. 22, 2001, available in LEXIS, News Group File PG&E announced it was filing for Chapter 11 on April 6, 2001. *See, e.g., PG&E Unit Seeks Chapter 11, Snarling Efforts to Ease Crisis* WALL ST. J. ONLINE, April 6, 2001.
[77] National Union Ins. Co. of Pittsburgh v. Puget Sound Power & Light, 972 P.2d 481 (Wash. Ct. App. 1999).
[78] 501 N.W.2d 788 (Wis. 1993) For a discussion of factual issues in that case, *see supra* n. 60.
[79] 1990 Ohio App. LEXIS 2979 (July 18, 1990).
[80] 879 P.2d 704 (Mont. 1994).
[81] *Id.* at 708 (citing Skauge v. Mountain States Tel. & Tel. Co., 565 P.2d 628 (Mont 1977)).
[82] 494 S.W.2d 379 (Mo. Ct. App. 1973).
[83] *Id.* at 381 (citing Ellyson v. Missouri Power & Light Co., 59 S.W.2d 714 (Mo. Ct. App. 1933)).
[84] *Id.*
[85] *Id.* at 382.

[86] *Id.* at 384.
[87] *Id.*
[88] *Id.* at 385.
[89] 505 N.E.2d 624 (N.Y. App. Div. 1987) and 501 N.Y.S.2d 23 (Sup. Ct. 1986).
[90] 1984 U.S. Dist. LEXIS 21807 (S.D.N.Y., Nov. 21, 1984).
[91] 1996 Va. Cir. LEXIS 155 (1998).
[92] KALIS ET AL., POLICYHOLDER'S GUIDE TO INSURANCE COVERAGE § 16.01[H] (5th ed. 2001).
[93] *Few insured losses; Companies cope with outage risk*, BUSINESS INSURANCE, Jan. 29, 2001 at 1.
[94] *See* Joyce M. Rosenberg, *Insurance available to help when business is interrupted*, Associated Press, Feb. 14, 2001, *available in* LEXIS, News Library.
[95] *Id.*
[96] Banks McDowell, *Causation in Contracts and Insurance*, 20 CONN. L. REV. 569 (1988). An insurance treatise concurs: "[T]he language of causation is simple, but it disguises extremely complex and difficult legal questions." JEFFREY W. STEMPLE, LAW OF INSURANCE CONTRACT DISPUTES §7.02 at 7-5 (3d. ed. 2001) (citing, e.g., Howell v. State Farm Fire & Cas. Co., 218 Cal. App. 3d 1446 (1st Dist. 1999)).

[97] 33 N.E. 690 (Mass. 1893).
[98] *Id.* at 692.
[99] 96 N.W.2d 880 (Minn. 1959).
[100] *Id.* at 885.
[101] STEMPLE, *supra* at 7-14.
[102] As one treatise explains:

> While most courts will label insurance and insurance causation as a matter of contract, this works only as a crude classification device and does not automatically lead to correct resolutions of coverage disputes. Recently, courts have begun to recognize this more explicitly and have established different causation rules for first-party property insurance (which is closer to the pure contract model) and third-party liability insurance (which is closer to the pure tort model).

Id, at 7-5.
[103] Lawrence Alan Wans, Comment, *Washington's Judicial Invalidation of Unambiguous Exclusion Clauses in Multiple Causation Insurance Cases*, 67 WASH. L. REV. 215 (1992).
[104] See Noonan, Astley & Pearce, Inc. v. INA, *infra.*
[105] *See* Quadrangle Development Corp. v. Hartford Insurance Co., *infra.*
[106] Brooklyn Bridge, Inc. v. South Carolina Ins. Co., 420 S.E.2d 511 (S.C. Ct. App. 1992).
[107] PETER J. KALIS ET AL., POLICYHOLDER'S GUIDE TO THE LAW OF INSURANCE COVERAGE § 13.05[B] at 13-24 (5th ed. 2001).
[108] The "efficient proximate cause" doctrine is sometimes referred to as the "concurrent cause" doctrine. However, some label this latter terminology a "misnomer", because it suggests that the causes must occur simultaneously. *See* Scott G. Johnson, *The Efficient Proximate Cause Doctrine in California: Ten Years After Garvey*, 2 J. INS. COVERAGE 1 at n.3 (Autumn 1999). Nonetheless, the terminology persists in many quarters. *See, e.g.*, Davidson Hotel Co. v. St. Paul Fire & Marine Ins. Co., No 99-2355 MI/Bre, W.D. Tenn. (reported in *Mealey's Litigation Report: Insurance*, April 3, 2001 at 3) (holding that hotel damage caused by water was covered because it was caused by a covered peril under the concurrent causation doctrine).
[109] STEMPLE, *supra* n. 14, § 7.04 at 7-13 n. 44 and text *(*citing Keeton & Alan § 5.5(a)(4); *accord*, KENNETH S. ABRAHAM, INSURANCE LAW AND REGULATION 237-38 (2d ed. 1995)).
[110] PETER J. KALIS, *supra* n.7, , *id.* at 13-24.