# THE AUGUST 2003 BLACKOUT AND INSURANCE COVERAGE FOR POWER OUTAGE LOSSES

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*The August 2003 power blackout in the Midwest and Northeastern United States was devastating, the largest in history. And the official report on the August 2003 blackout predicts more such outages if significant changes are not made to the North American power system.*

*This article provides a valuable guide to insurance coverage for power outages large and small. It discusses claims for such losses under property and business interruption policies as well as boiler and machinery insurance, and reviews the case law arising from previous blackouts, brownouts, and other-outs. The requisites to coverage in the first instance, as well as potentially applicable exclusions and specialized coverages and riders, are all addressed.*

## I. INTRODUCTION

On August 14, 2003, large areas of the Midwest and Northeast United States and Canada experienced a power blackout. More than fifty million people in eight states and the Canadian province of Ontario lost electrical power for all or part of two days. It was the largest power failure ever to occur in North America. The massive blackout shut down more than one hundred power plants, including twenty-two nuclear plants in the United States and Canada, and ten major airports, and caused the cancellation of seven hundred flights nationwide.[1]

This blackout was hardly the first major power failure. Indeed, during the famous November 9, 1965, blackout, thirty million people in eight

1. *See generally* Nancy Gibbs, *Lights Out*, TIME, Aug. 25, 2003, at 30, 34–35; Michael Hirsh & Daniel Klaidman, *What Went Wrong*, NEWSWEEK, Aug. 25, 2003, at 32, 34.

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states in the Northeast lost power for an average of twelve hours.[2] The August 10, 1996, Western Power Grid blackout affected fifteen Western states and millions of people, lasting up to six hours.[3] And on July 14, 1997, some nine million New Yorkers lost power for fifteen hours or more.[4]

The August 2003 blackout likely will not be the last large-scale blackout either: it highlighted weaknesses in North America's electricity system that could produce similar power failures.[5] The official report on the August 2003 blackout concluded that the North American power system is being operated closer to the edge of reliability than it was a few years ago and is fragile with respect to multiple contingency events.[6] The report concluded that if no changes are made to the system, we can expect an increased frequency of large-scale power failures.[7]

When power outages such as the August 14, 2003, blackout occur, loss or damage inevitably results: perishable goods spoil; production and computer equipment shut down; and business income is lost. In fact, according to early reports, the August 2003 blackout caused $6 billion in business

2. *'65 Northeast Power Loss Was Shorter, But Bigger*, WASH. POST, July 15, 1977, at A10.

3. Mark Genrich, *What's Behind 2 Major Outages and What's to Prevent Another?* PHOENIX GAZETTE, Aug. 28, 1996, at B5; *Power and the Gory: A Pair of Blackouts Across Large Areas of the Western U.S. Could Signal Problems in Deregulation of Electric Utilities*, S.F. EXAMINER, Aug. 22, 1996, at A16.

4. Power failures also can occur on a smaller scale from any number of causes. Wind, snow, or ice storms, for instance, can knock down transmission lines. Lightning strikes or earthquakes can damage transformers. Equipment failure on a regional system or locally can cause power failures. For example, the famous November 9, 1965, blackout of the Northeast was caused by a failure of an interconnect relay system. *See, e.g.*, *'65 Northeast Power Loss Was Shorter*, *supra* note 2, at A10. Power outages have occurred when utility companies have shut off power to rotating areas when the demand for electricity exceeded the supply—so-called rolling blackouts. Rolling blackouts are controlled events where utilities, which divide their millions of customers into "blocks," shut down power to the blocks one by one, usually for one or two hours. *See, e.g.*, Susan Massman, *California Blackouts Leave Insureds in the Dark*, NAT'L UNDERWRITER, Apr. 9, 2001, at 6; Dan Morain & Nancy Rivera Brooks, *Rolling Blackouts Hit Southland for First Time as Production Falls*, L.A. TIMES, Mar. 20, 2001, at A18. California experienced a number of these rolling blackouts in 2001. *See* John Greenwald, *The New Energy Crunch*, TIME, Jan. 29, 2001, at 37; Mitchell Landsberg & Eric Bailey, *Second Day of Blackouts Disrupts 500,000 Homes and Businesses*, L.A. TIMES, Mar. 21, 2001, at A1; Morain & Brooks, *supra*, at A1.

5. *See, e.g.*, Rebecca Smith, *Blackout Signals Major Weaknesses in U.S. Power Grid*, WALL ST. J., Aug. 18, 2003, at A1.

6. *See* U.S.-CANADA POWER SYSTEM OUTAGE TASK FORCE, INTERIM REPORT: CAUSES OF THE AUGUST 14TH BLACKOUT IN THE UNITED STATES AND CANADA 67 (Nov. 2003) [hereinafter INTERIM REPORT]. The official report concluded that the blackout started because of deficiencies in specific practices, equipment, and human decisions that coincided that afternoon. *Id.* at 23. As the lines tripped out, it increased the loading and decreased voltage on other lines, pushing them into overload. *Id.* at 43. The power failure cascaded when there was a sequential tripping of numerous transmission lines and generators throughout the other areas affected by the blackout. *Id.* at 49–64.

7. *Id.* at 67.

income losses.[8] As a result, business owners may look to their property insurance or boiler and machinery insurance policies to recover for their power outage losses.

This article analyzes coverage under property insurance and boiler and machinery insurance policies for power outage losses like those sustained during the August 14th blackout. It addresses the prerequisites to coverage under both types of policies and discusses policy exclusions that may apply to power outage losses. Finally, this article discusses the special coverages that are available to insure against power outage losses.

## II. PROPERTY AND BUSINESS INTERRUPTION COVERAGE

### A. *The Direct Physical Loss or Damage Requirement*

The first step in analyzing property insurance coverage for power outage losses is to determine whether there has been direct physical loss or damage to property covered by the policy. Property insurance policies insure only against risks of direct physical loss or damage to property insured under the policy, as this common policy form, promulgated by the Insurance Services Office, Inc. (ISO), states:

> We will pay for direct physical loss of or damage to Covered Property at the premises described in the Declarations caused by or resulting from any Covered Cause of Loss.[9]

Similarly, direct physical loss or damage to the insured's property is a prerequisite to business interruption coverage.[10]

The direct physical loss or damage requirement means that there must be some physical change to the property's condition or structure; economic loss alone is not enough, as *Great Northern Insurance Co. v. The Benjamin Franklin Federal Savings & Loan Ass'n*[11] illustrates. There, Benjamin Frank-

8. Jon E. Hilsenrath, *Upswing Won't Likely Be Derailed: Cost Could Hit $6 Billion as Some Important Sectors of Economy Are Hurt*, Wall St. J., Aug. 18, 2003, at A6; Daniel McGinn & Keith Naughton, *The Price of Darkness*, Newsweek, Aug. 25, 2003, at 42. Some estimated that as much as $3 billion could be covered by insurance. Joanne Wojcik, *Cause of Power Failure May Determine Cover*, Bus. Ins., Aug. 18, 2003.

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

10. For example, ISO's Business Income form provides:

> We will pay for the actual loss of Business Income you sustain due to the necessary suspension of your "operations" during the "period of restoration." The suspension must be caused by direct physical loss or damage to property, including personal property in the open (or in a vehicle) within 100 feet, at premises which are described in the Declarations and for which a Business Income Limit of Insurance is shown in the Declarations. The loss or damage must be caused by or result from a Covered Cause of Loss.

ISO Business Income (and Extra Expense) Coverage Form (CP 00 30 06 95) at 1; ISO Business Income (without Extra Expense) Coverage Form (CP 00 32 06 95) at 1.

11. 793 F. Supp. 259 (D. Ore. 1990), *aff'd*, 953 F.2d 1387 (9th Cir. 1992).

lin removed asbestos from a commercial building that it owned. It then sought to recover these costs from its property insurer, Great Northern.[12] The court found no coverage because there was no direct physical loss or damage:

> There is no evidence here of physical loss, direct or otherwise. The building has remained physically intact and undamaged. The only loss is economic. The policy, by its terms, covers only direct physical loss. The inclusion of the terms "direct" and "physical" could only have been intended to exclude indirect, non-physical losses.[13]

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

Recently, courts have confirmed that the loss of electronically stored data alone does not constitute physical loss or damage. In *America Online, Inc. v. St. Paul Mercury Insurance Co.*,[19] a federal district court applied the plain meaning of the word "physical" in determining that the loss of computer use was not "physical damage" within the meaning of the insurance policy.[20] Similarly, the California Court of Appeal in *Ward General Services, Inc. v. Employers Fire Insurance Co.*[21] recently followed *America Online* and held that the loss of the insured's electronically stored data,

12. *Id.* at 261.
13. *Id.* at 263.
14. The New Mexico Supreme Court reached the same conclusion as the court in *Great Northern* did in a factually similar case involving the presence of asbestos in a building. *See* Leafland Group-II, Montgomery Towers Ltd. P'ship v. Ins. Co. of N. Am., 881 P.2d 26, 27 (N.M. 1994).
15. 696 N.E.2d 553 (Mass. Ct. App. 1998).
16. *Id.* at 555. In *Pirie*, the levels of lead paint were many times the legal limit. As a result, the governmental authorities required deleading. *Id.* at 554. The insureds sought coverage under their property policy, which covered "all risk of physical loss." *Id.*
17. 526 S.W.2d 222 (Tex. Ct. App. 1975).
18. *Id.* at 222–23. The units were sealed, so they could not be inspected for internal damage. The appellate court relied on the absence of any proof that the units were in fact damaged. *Id.*
19. 207 F. Supp. 2d 459 (E.D. Va. 2002), *aff'd*, 347 F.3d 89 (4th Cir. 2003).
20. *Id.* at 469–70.
21. 7 Cal. Rptr. 3d 844 (Ct. App. 2003).

which occurred when human error caused the database system to crash, did not constitute physical loss or damage within the meaning of a property insurance policy.[22]

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

With some insureds, the August 14th power failure did cause physical loss or damage. For example, food producers and retailers reported claims involving spoiled inventory.[23] But in most instances, the August 14th blackout only impaired the insured's ability to continue to do business by shutting down the insured's computers or production equipment.[24] In these instances, and as demonstrated in the *Great Northern*, *Pirie*, and *Glens Falls* cases, the insured's loss is purely economic, and the absence of any direct physical loss or damage will preclude coverage.

### B. *The Covered Property Requirement*

The next step in analyzing property insurance coverage for a power outage loss is to determine whether the required direct physical loss or damage occurred to insured property.[25] Typically, the policy will describe the insured property. This is accomplished through a variety of formats, some very general, such as "all real property" or "all personal property" or both, and some specific, setting forth the locations and specific property types that will be insured. Some policies extend coverage not only for direct physical loss or damage to the insured's property, but also to an insured's loss resulting from damage to, or destruction of, property of an insured's supplier of goods and services.

Of course, there are exclusions to the covered classes of property, just as there are exclusions to the covered perils. The insured has the initial burden of proving that the damaged property falls within the class of property covered.[26] As in the case of perils, the insurer has the burden of proving that an exclusion for property applies.[27]

In short, direct physical loss or damage to insured property is a prerequisite to insurance coverage for losses caused by a power outage. If there

22. *Id.* at 851.
23. *See* Michael Prince & Allison Reynolds, *Big Outage but Small Insured Losses*, Bus. Ins., Aug. 25, 2003.
24. *Id.*
25. *See supra* note 9 and accompanying text.
26. *See, e.g.*, Pan Am. World Airways, Inc. v. Aetna Cas. & Sur. Co., 505 F.2d 989, 999 (2d Cir. 1974); Great N. Ins. Co. v. Dayco Corp., 620 F. Supp. 346, 351 (S.D.N.Y. 1985).
27. *See, e.g.*, Strubble v. United Servs. Auto. Ass'n, 110 Cal. Rptr. 828, 831–32 (Ct. App. 1973).

is no physical loss or damage to covered property, there can be no coverage for that item of property. Similarly, if no covered property is damaged, no business interruption coverage applies.[28]

### C. *The Covered Cause of Loss Requirement*

Assuming that there is the required direct physical loss or damage to covered property, the final step in analyzing property insurance coverage for power outage losses is to determine whether the loss or damage was caused by a peril or risk covered by the policy.[29] If the policy is written on an "all-risk" basis, there is coverage for all fortuitous losses involving the insured property unless the policy contains a specific provision expressly excluding the loss from coverage.[30] But if the policy provides "named-perils" coverage, there is coverage only if a fortuitous loss was caused by one of the specific perils identified and is not thereafter excluded.[31] Named-peril policies typically cover only losses caused by limited perils, such as fire, lightning, explosion, windstorm, smoke, aircraft or vehicles, riot, vandalism, sprinkler leakage, sinkhole collapse, and volcanic action.[32] Today, most commercial property insurance policies provide all-risk coverage.

Courts have found coverage where a covered peril causes a power outage that, in turn, results in direct physical loss or damage to covered property. In *Lipshultz v. General Insurance Co. of America*,[33] for example, the court found coverage where a strong windstorm caused a two-day power outage to the insured's grocery store, and food spoiled. There, the wind caused a break in the 13.8-kilovolt supply lines supplying the power company's substation located about one-half mile from the insured's store. The policy covered direct loss by windstorm, and the court held that the spoilage loss constituted just such a loss.[34]

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

29. *See supra* note 9 and accompanying text. In most jurisdictions, causation questions are resolved by reference to the "efficient proximate cause" of the loss. *See generally* Peter J. Kalis et al., Policyholder's Guide to the Law of Insurance Coverage § 13.05, at 13–19 through 13–20 (2001); Robert H. Jerry II, *Causation*, *in* 3 Insuring Real Property § 48.03[2], at 48–20 (Stephen A. Cozen ed. 2003). Under this approach, if the "efficient proximate cause" of the loss is a covered peril, there is coverage; if it is an excluded peril, there is not. *See* Kalis, *supra*, § 13.05 at 13–19 through 13–20; Jerry, *supra*, § 48.03[2] at 48–20. Courts generally define "efficient proximate cause" to mean the "predominating" or most important cause. *See, e.g.*, Garvey v. State Farm Fire & Cas. Co., 770 P.2d 704, 708 (Cal. 1989).

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

31. *See, e.g.*, IBM World Trade Corp. v. Granite State Ins. Co., 455 N.Y.S.2d 914, 917 (N.Y. Sup. Ct. 1982); Ellis v. N.H. Ins. Co., 279 S.E.2d 417, 418 (W. Va. 1981).

32. *See, e.g.*, ISO Causes of Loss—Basic Form (CP 10 10 06 95) at 1–2.

33. 96 N.W.2d 880 (Minn. 1959).

34. *Id.* at 881. The court also noted the absence of an exclusion that would address coverage for these types of losses. *Id.* at 885–86.

The court in *Fred Meyer, Inc. v. Central Mutual Insurance Co.*[35] reached the same conclusion. There, a windstorm destroyed electrical power lines supplying the insured's refrigeration facilities, and, as a result, food spoiled. By endorsement, the insurance policy provided coverage for "direct loss by windstorm."[36] Relying on *Lipshultz*, the court found that there was a direct loss caused by windstorm even though the winds did not physically strike the insured's foodstuffs.[37]

According to the official report, the "initiation of the August 14, 2003, blackout was caused by deficiencies in specific practices, equipment, and human decisions that coincided that afternoon."[38] Specifically, the official report cites inadequate situational awareness at First Energy Corporation, First Energy's failure to adequately manage tree growth in its transmission right-of-way, and the failure of the interconnected grid's reliability organizations to provide effective diagnostic support.[39] The power failure cascaded when there was a sequential tripping of numerous transmission lines and generators throughout the other areas affected by the blackout.[40]

If insureds affected by the August 14th blackout had named-perils coverage, any direct physical loss or damage to covered property likely would not satisfy the insuring clause because most named-peril policies cover only losses caused by fire, lightning, explosion, windstorm, smoke, aircraft or vehicles, riot, vandalism, sprinkler leakage, sinkhole collapse, or volcanic action.[41] But if an insured had all-risk coverage, there may be coverage for any direct physical loss or damage to the insured's covered property caused by the August 14th power failure.

Even if the loss does fall within the policy's insuring clause, the next question is whether any exclusion applies. A clear and unambiguous applicable exclusion will override the insuring clause and eliminate coverage a policy might otherwise afford.[42] As discussed below, there are several exclusions that may apply to the August 14th power outage losses.

35. 235 F. Supp. 540 (D. Or. 1964).
36. *Id.* at 542.
37. *Id.* at 543–44.
38. Interim Report, *supra* note 6, at 23.
39. *Id.*
40. *Id.* at 49–64.
41. *See* ISO Causes of Loss—Basic Form (CP 10 10 06 95) at 1–2.
42. *See, e.g.*, Am. Star Ins. Co. v. Ins. Co. of the W., 284 Cal. Rptr. 45, 47 (Ct. App. 1991). In the all-risk format, the burden of proof largely falls upon the insurer in a coverage dispute because it must prove that a specified exclusion applies to avoid coverage. *See, e.g.*, Strubble v. United Servs. Auto. Ass'n, 110 Cal. Rptr. 828, 831–32 (Ct. App. 1973). In the named-perils format, on the other hand, the insured has the burden of proving that the loss was caused by one of the named perils, while the insurer still has the burden of proving that an exclusion applies. *Id.* at 831.

## D. *Exclusions*

### 1. Off-Premises Services Exclusion

Many policies specifically exclude coverage for losses caused by power outages stemming from off-premises damage, except for a covered resulting loss. For example, ISO's Standard Property Policy and all of the ISO Causes of Loss forms contain this exclusion, commonly referred to as the "off premises services" exclusion:

> 1. We will not pay for loss or damage caused directly or indirectly by any of the following. . . .
>
> * * * *
>
> 5. Utility Services
>
> The failure of power or other utility service supplied to the described premises, however caused, if the failure occurs away from the described premises. But if the failure of power or other utility service results in a Covered Cause of Loss, we will pay for the loss or damage caused by that Covered Cause of Loss.[43]

This exclusion applies to spoilage and other property damage caused by utility service interruption originating off-premises. The exclusion operates regardless of the power failure's cause. Thus, if a lightning strike away from the insured premises causes a power failure at the premises, the consequential property damage on the premises—such as spoilage of perishable products—is not covered.[44] But if damage to insured property on the premises from a covered cause of loss results from the power failure, the resulting damage is covered; for example, if the power interruption causes a fire, there would be coverage for any fire damage.

Notably, the ISO business interruption forms are exempt from the off-premises services exclusion and subject to a more restrictive exclusion that eliminates coverage for time element losses if the failure occurs "outside of a covered building."[45] Hence, if a windstorm damages transmission lines on the insured's premises, resulting in a power failure, any direct physical loss or damage to the insured's property would be covered because the loss originated on the premises. But the business income and extra expense loss resulting from the damage would not be covered because the utility service failure occurred outside the building.

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43. ISO Standard Property Policy (CP 00 99 06 95) at 5; ISO Causes of Loss—Basic Form (CP 10 10 06 95) at 3; ISO Causes of Loss—Broad Form (CP 10 20 06 95) at 3; ISO Causes of Loss—Special Form (CP 10 30 06 95) at 2. Coverage under the ISO business income forms is determined by whichever Causes of Loss form the policy includes. *See* ISO Business Income (and Extra Expense) Coverage Form (CP 00 30 06 95) at 1; ISO Business Income (without Extra Expense) Coverage Form (CP 00 30 06 95) at 1.

44. *See* Fire, Casualty & Surety Bulletins, Commercial Property at D.1–8 (2001).

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

Judicial interpretations of the off-premises services exclusion are not uniform. The Rhode Island Supreme Court, for instance, found the off-premises services exclusion to be ambiguous and illusory in two cases, *Pressman v. Aetna Casualty & Surety Co.*[46] and *Jerry's Supermarkets, Inc. v. Rumford Property & Liability Insurance Co.*[47] In *Pressman*, a sole-proprietor psychologist's office was closed for business for six days because of a power failure that occurred when a tree adjacent to his property fell onto the power line running to his building.[48] Pressman was unable to see his scheduled patients and could not do computerized diagnostic testing. Also, after power was restored, one of his two computers was down because a ROM chip was not functioning.[49] The appellate court found the off-premises exclusion to be ambiguous and illusory because it would preclude coverage in almost any circumstances unless the insured had his or its own generator located inside the building.[50] Similarly, in *Jerry's Supermarkets*, the insured suffered food spoilage caused by the power loss due to a windstorm generated by Hurricane Gloria.[51] Relying on *Pressman* and the insured's reasonable expectation of coverage for losses caused by hurricanes, the court again found coverage.[52]

This reasoning has not found acceptance outside of Rhode Island. More recently, courts have found the exclusion to clearly and unambiguously preclude coverage for off-premises power failures.[53] One such example is *Mapletown Foods, Inc. v. Motorists Mutual Insurance Co.*[54] There, high winds and severe storms struck the northeast Ohio area, causing power outages and food spoilage at two Mapletown grocery stores. Distinguishing *Pressman*, the court held that the off-premises services exclusion precluded coverage for Mapletown Foods' loss:

> If the power failure in instant case does not fall within the meaning of a power failure "away from the premises" then the phrase is bereft of meaning. . . . We

46. 574 A.2d 757 (R.I. 1990).

47. 586 A.2d 539 (R.I. 1991). The court in Brooklyn Bridge, Inc. v. S. Carolina Ins. Co., 420 S.E.2d 511 (S.C. Ct. App. 1992), found an earlier version of the same exclusion to be ambiguous. There, the court said that the "simple addition of these four words"—"*from a power failure*"—would make the intent "clear and unambiguous." *Id.* at 512–13. These four words were in fact added to and are now a part of the off-premises services exclusion. *See* ISO Standard Property Policy (CP 00 99 06 95) at 5; ISO Causes of Loss—Basic Form (CP 10 10 06 95) at 3; ISO Causes of Loss—Broad Form (CP 10 20 06 95) at 3; ISO Causes of Loss—Special Form (CP 10 30 06 95) at 2.

48. 574 A.2d at 758.

49. *Id.*

50. *Id.* at 759.

51. 586 A.2d at 540.

52. *Id.*

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

54. 662 N.E.2d 48 (Ohio Ct. App. 1995).

> must give meaning to the exclusion if we reasonably can. Its ordinary meaning is that there is no coverage when the power failure occurs away from the premises, *i.e.*, at the utility power station or somewhere off the plaintiff's premises. That is a reasonable construction and the one applicable to the instant case.[55]

The South Dakota Supreme Court reached the same conclusion in *Lakes' Byron Store, Inc. v. Auto-Owners Insurance Co.*[56] There, a severe snow and ice storm knocked out power poles and lines, and the insured's hunting resort lost power for nine days.[57] None of the power poles or lines located on the insured premises were damaged. Auto-Owners denied Lakes' claim for food spoilage and business interruption because the power failure occurred away from the premises.[58] The appellate court found that there was no coverage because "the power failure occurred away from the described premises and the exclusion precluded coverage."[59]

Further, at least one court has extended the scope of the off-premises services exclusion to situations not only where the utility service stops, but also where there is damage caused by too little power. In *Red Bird Egg Farms, Inc. v. Pennsylvania Manufacturers Indemnity Co.*,[60] lightning struck outside of the insured's property, causing a power loss that interrupted the power supply to the ventilation fans in the insured's chicken coops.[61] When the local power company restored power, it improperly restored only single-phase, not the required three-phase, power, which in turn burned out the motors in the ventilation fans.[62] Without the fans, the chickens died and the insured sought business interruption coverage from its insurer.[63] Despite the insured's arguments to the contrary, the court found that the introduction of single-phase power into a system that was designed for three-phase power was a "failure of power" within the meaning of the off-premises services exclusion.[64] The court explained that the single-phase power was too little power, and that too little power was the equivalent of no power in this case.[65]

In short, the off-premises services exclusion precludes coverage for property damage caused by failure of, or possibly even shortage of, power or other utility services originating off-premises. This exclusion would pre-

55. *Id.* at 50.
56. 589 N.W.2d 608 (S.D. 1999).
57. *Id.* at 608.
58. *Id.*
59. *Id.* at 610.
60. No. 00–1149, 2001 WL 878321 (4th Cir. Aug. 3, 2001).
61. *Id.* at *4.
62. *Id.* at *5.
63. *Id.*
64. *Id.* at *12.
65. *Id.*

clude coverage for many August 14th losses. But if damage to insured property on the premises from a covered cause of loss results from the power failure, the resulting damage would be covered.

2. Acts or Decisions Exclusion

Many policies exclude loss or damage caused by "Acts or decisions, including the failure to act or decide, of any person, group, organization or governmental body."[66] But if this excluded cause results in a covered cause of loss, the insurer will pay for the loss or damage caused by the covered cause of loss.[67]

The few courts that have interpreted this exclusion have interpreted it narrowly. For instance, in *Jussim v. Massachusetts Bay Insurance Co.*,[68] the court held that the acts or decisions exclusion did not apply to preclude coverage in a case where negligent acts caused five hundred gallons of fuel oil to be pumped through a disconnected fuel delivery line into the insured's basement.[69] The court there reasoned that the exclusion could not be read literally.[70]

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

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

66. *See*, *e.g.*, ISO Causes of Loss—Special Form (CP 10 30 06 95) at 3.
67. *Id.*
68. 597 N.E.2d 1379 (Mass. Ct. App. 1992), *aff'd*, 610 N.E.2d 954 (Mass. 1993).
69. *Id.* at 1382.
70. *Id.*
71. 604 N.W.2d 504 (S.D. 2000).
72. *Id.* at 508.
73. *Id.*
74. *Id.* at 512.

To summarize, the acts or decisions exclusion precludes coverage where a loss is caused by any person's or entity's deliberate decision. This exclusion could apply to August 14th blackout losses as well. Indeed, and as noted previously, the official report cited deficiencies in specific practices and human decisions as causes of the blackout, which could be considered "acts or decisions" within the meaning of the exclusion.

### 3. Idle Periods Exclusion

Some business interruption coverage forms include an "idle periods" exclusion that may apply to some power outage losses. Under this exclusion, the time period when business operations would have been suspended for reasons other than the direct physical loss or damage is an "idle period," and business interruption losses attributable to that idle period are excluded.[75]

*Manufacturers Mutual Fire Insurance Co. v. Royal Indemnity Co.*[76] illustrates the application of an idle periods exclusion to a power failure loss. There, Hurricane Betsy struck the New Orleans area.[77] One of Kaiser's aluminum plants suffered on-premises damage to electrical transmission lines and distribution equipment that resulted in a total shutdown of Kaiser's on-premises power plant and total power interruption for thirty-seven hours.[78] With the absence of electrical power, molten metal solidified, and the plant was shut down for several days, which, in turn, resulted in $4 million profit loss.[79]

Kaiser had two insurance coverages: property and business interruption through Manufacturers and boiler and machinery from Royal. Both policies provided coverage for on-premises physical damage and contained idle periods clauses.[80] In addition, Endorsement 8 in Royal's policy provided coverage for business interruption losses arising out of a power loss when caused by an off-premises occurrence. The issue before the court was the manner in which liability for the loss should be apportioned between Manufacturers and Royal. The Ninth Circuit Court of Appeals reasoned that application of the idle periods exclusion required the court to engage in hypotheses:

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

76. 501 F.2d 299 (9th Cir. 1974).

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

78. *Id.* at 300.

79. *Id.*

80. *Id.*

> It is this [idle periods] clause that required the court to indulge in hypotheses. Under the clause the court was required to hypothesize a situation in which no damage had been suffered by on-premises facilities. If, in that hypothetical situation, there was a period when (for reasons other than on-premises damage) goods would not have been produced or operations and services maintained, then, as to that hypothetically "idle" period there was no liability. The court found that there was such a period and that the exemption accordingly became effective.[81]

Under this analysis, the court apportioned the loss to Royal because the off-premises damage "idled" the Kaiser plant, so Royal was entirely liable because its Endorsement 8 covered losses caused by off-premises occurrences.[82]

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

Not all business interruption forms include an idle periods exclusion. The ISO forms, for example, do not.[83] But because almost all gross earnings business interruption forms provide coverage for the actual loss sustained, there likely would not be coverage for any time period during which the insured's business operations would have been suspended even if no loss had occurred, with or without an idle periods exclusion.[84]

There may be other exclusions that apply to power outage losses as well. Each policy should be carefully reviewed to determine the applicability of other exclusions.

### E. *Sue and Labor Coverage*

Insureds may have incurred expenses to prevent or minimize power outage losses, such as those occurring on August 14th. For example, an insured

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81. *Id.* at 301.

82. *Id.* The court reasoned:

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

*Id.*

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

84. *See* 1 Robinson & Gibson, *supra* note 28, at II.F.11.

may have purchased and installed an on-site emergency generator to supply power in the event of a power failure, or software to prevent loss or damage to property, or may have taken other measures to reduce the impact of a power outage.

Some insureds may seek to recover the costs of these measures as a "sue and labor" expense. A sue and labor clause allows an insured to recover expenses incurred to minimize or prevent loss or damage to covered property due to an actual or imminent covered cause of loss.[85] A typical sue and labor clause reads:

> SUE AND LABOR: In case of actual or imminent loss or damage it shall be lawful and necessary for the Insured, their factors, servants or assigns, to sue, labor and travel for, in and about the defense, safeguard and recovery of property insured hereunder, or any part thereof, without prejudice to this insurance; . . . to the charges whereof, this Company will contribute according to its proportion to the sum hereby insured.[86]

Sue and labor coverage is available only in limited circumstances. To be recoverable under a sue and labor clause, expenses must have been incurred to avert or minimize an actual or imminent loss that would be covered under the policy.[87] Also, the expenses must be incurred primarily for the insurer's benefit.[88] Thus, there is no coverage for expenses incurred to prevent a loss that would be excluded from policy coverage.[89]

Stated differently, coverage for sue and labor expenses is tied directly to the policy's insuring provisions.[90] Hence, one must determine whether the insured's actions correlate to an excluded loss (in which case the sue and labor expenses do not benefit the insurer because the loss would not be

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

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

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

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

89. *See, e.g.*, *Young's Mkt.*, 481 P.2d at 820–21 (holding that there was no recovery under a sue and labor clause for the costs incurred to secure the release of liquor seized by governmental authorities where the policy contained a governmental seizure exclusion).

90. *E.g.*, Swire Pac. Holdings, Inc. v. Zurich Ins. Co., 139 F. Supp. 2d 1374, 1383 (S.D. Fla. 2001).

covered) or to a covered loss (in which case the actions benefit the insurer by reducing or eliminating a loss for which the insurer would be liable).[91]

Expenses incurred to prevent or minimize the impact of a power outage loss would be recoverable under a sue and labor clause only if the insured satisfied the criteria outlined above. Of those criteria, the actual or imminent loss requirement may be the most problematic. "Imminent" means "likely to occur at any moment"[92] and "ready to take place; near at hand; impending."[93] In most cases, an insured has little or no warning of a power failure, so it is unlikely that an insured could ever meet the imminent loss requirement. But measures taken after a power failure occurs, such as purchasing and installing a backup generator, may meet this threshold requirement.

Even so, the insured also must demonstrate that the expenses were incurred to avert or minimize a loss for which the insurer would have been liable under the policy. If the loss sought to be prevented or minimized would be excluded by the policy, there can be no sue and labor coverage. Similarly, if the expenses were not incurred to avoid direct physical loss or damage to the insured's property, there would be no sue and labor coverage. As a result, expenses incurred to prevent or minimize purely economic losses would not be recoverable.

### F. *Contingent Time Element Coverage*

As noted previously, business interruption provisions generally provide coverage only for those business interruption losses caused by direct physical loss or damage to the *insured's* property.[94] In many instances, power failures such as the August 14th blackout simply impaired the insured's ability to continue to do business by shutting down the insured's computers or production equipment without any attendant physical loss or damage. In these instances, there would be no business interruption coverage because of the absence of the requisite physical loss or damage to the insured's own property.

Some property insurance policies, however, provide contingent time element coverage. This coverage allows an insured to get coverage for time element losses (business interruption and extra expense) caused by physical loss or damage to a *third-party* supplier's property.[95] But the ISO forms, however, specifically exempt power supply service providers from the scope

91. *Id.*

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

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

94. *See supra* note 10.

95. *See generally* James R. Robie et al., *Business Interruption and Indirect Loss*, *in* 1 Insuring Real Property § 3.03, at 3–72.2 (Stephen A. Cozen ed. 2003).

of contingent time element coverage.[96] As discussed below, there are special ISO endorsements available for utility service interruption coverage.[97]

Some non-ISO forms are broader in scope and likely would include utility suppliers, as in the following example:

> This policy covers against loss of earnings and necessary extra expense resulting from necessary interruption of business of the insured caused by damage to or destruction of real or personal property, by the perils insured against under this policy, of any supplier of goods or services which results in the inability of such supplier to supply an insured locations [*sic*].[98]

The court in *Archer-Daniels-Midland Co. v. Phoenix Assurance Co. of New York*[99] held that the language "any supplier of goods or services" in this provision included "an unrestricted group of those who furnish what is needed or desired" by the insured.[100] In *Archer*, the insured, a grain processor, sought coverage for increased transportation and raw material costs arising out of the catastrophic 1993 flooding of the Mississippi River.[101] The court found that U.S. Army Corps of Engineers, which developed a flood control system on the river and constructed improvements (locks and dams) that were damaged by the flood, was a supplier of transportation services and individual farmers, whose property was flooded, were suppliers of raw materials.[102]

Of course, even policy provisions such as that in *Archer* require that the service interruption be caused by physical damage to the supplier's property. For most, if not all, of the business owners affected by the August 14, 2003, blackout, there was no physical damage to their electrical service provider's property. Indeed, most, if not all, electrical service providers failed to provide power on August 14th because their equipment automatically tripped off-line to protect the equipment from damage in the face of a large power surge.[103] The possible exception is First Energy, which had three transmission lines come into contact with trees. But it is unclear whether these transmission lines were physically damaged as a result or whether any such damage caused the interruption of service provided by First Energy.

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96. *See* ISO Business Income from Dependent Properties—Broad Form (CP 15 08 04 02); ISO Business Income from Dependent Properties—Limited Form (CP 15 09 04 02).

97. *See infra* notes 114 and 118 and accompanying text.

98. This is taken from the policy at issue in Archer-Daniels-Midland Co. v. Phoenix Assur. Co. of N.Y., 936 F. Supp. 534, 540 (S.D. Ill. 1996).

99. 936 F. Supp. 534 (S.D. Ill. 1996).

100. *Id.* at 541.

101. *Id.* at 536.

102. *Id.* at 541, 544.

103. *See, e.g.*, Interim Report, *supra* note 6, at 49–50.

## G. *Special Power Outage Coverages*

### 1. Spoilage Coverage

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

> 2. Covered Causes of Loss
>
> * * *
>
> b. Power Outage, meaning change in temperature or humidity resulting from complete or partial interruption of electrical power, either on or off the described premises, due to conditions beyond your control.[104]

The spoilage coverage is very broad because it applies whether the power interruption occurs on or off premises, and there is no requirement that the power outage be the result of a covered cause of loss. Furthermore, the coverage is subject to few exclusions. For one, coverage is excluded when the power outage is caused by the "inability of a power source at the described premises to provide sufficient power due to lack of generating capacity to meet demand."[105] And any losses caused by a utility company's inability to provide sufficient power due to lack of fuel or governmental order also are excluded.[106] Thus, spoilage coverage would provide coverage for losses caused by most power outages, including those caused by the August 14th blackout.

### 2. Utility Service Interruption Coverage

Another type of coverage available for certain power outage losses is utility service interruption coverage. The ISO Utility Service—Direct Damage endorsement, for instance, adds coverage for damage to the insured's property resulting from an interruption of any of the utility services identified—water, communication, and power—in the endorsement schedule as covered:

> A. Coverage
>
> We will pay for loss of or damage to Covered Property described in the Schedule, caused by an interruption in utility service to the described premises. The interruption in utility service must result from direct physical loss or damage by a Covered Cause of Loss (as indicated in the Schedule) to the property

104. ISO Spoilage Coverage (CP 04 40 06 95) at 2.
105. *Id.*
106. *Id.*

> described in Paragraph C. if such property is indicated by an "X" in the Schedule and is located off the described premises.[107]

Thus, for coverage to apply, the service interruption must be caused by a covered cause of loss, such as a windstorm.[108] Hence, there is no coverage if the service interruption is caused by a noncovered peril, such as mechanical breakdown. For example, there would be no coverage for power failure losses where the power failure was caused by mechanical breakdown of the utility's equipment.[109] Nor would there be coverage for rolling blackout losses because the power failure results from a voluntary decision to shut off power and not as a result of direct physical loss or damage by a covered cause of loss to the utility's property.

As noted previously, the August 14th blackout was caused by deficiencies in specific practices, equipment, and human decisions that coincided that afternoon.[110] Whether the August 14th blackout was caused by a covered cause of loss depends on whether that particular cause falls within the scope of a "covered cause of loss" in the insured's particular policy. As explained above, there may be policy exclusions that apply that would take it outside the scope of a covered cause of loss.

The ISO Utility Service—Time Element endorsement is similar; it adds coverage for an insured's business income and extra expense loss caused by a utility service interruption:

> A. Coverage
>
> Your coverage for Business Income and/or Extra Expense, as provided and limited in the applicable Coverage Form, is extended to apply to a "suspension" of "operations" at the described premises caused by an interruption in utility service to that premises. The interruption in utility services must result from direct physical loss or damage by a Covered Cause of Loss (as indicated in the Schedule) to the property described in Paragraph C. if such property is indicated by an "X" in the Schedule and is located outside of a covered building described in the Declarations.[111]

Paragraph C lists water supply services, communication supply services, and power supply services.

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107. ISO Utility Service—Direct Damage (CP 04 17 04 02) at 1. The 2002 edition of the endorsement also includes a new provision establishing that loss or damage to electronic data is not covered. *Id.*

108. *Id.*

109. *See* 3 Robinson & Gibson, *supra* note 28, at VI.F.16.

110. Interim Report, *supra* note 6, at 23.

111. ISO Utility Services—Time Element (CP 15 45 04 02) at 1. The 2002 edition of the endorsement also includes a new provision establishing that there is no coverage for time element losses associated with loss or damage to electronic data due to an interruption in utility service. *Id.*

Coverage can be obtained for one, two, or all three—indicated by an "X" on the endorsement's schedule.[112]

As with the direct damage endorsement, the time element endorsement requires that the service interruption result from direct physical loss or damage by a covered cause of loss to the types of utility services identified in the endorsement schedule.[113] As noted previously, the ISO business interruption forms are subject to a more restrictive exclusion that eliminates coverage for time element losses if the failure occurs "outside of a covered building."[114] The Utility Service—Time Element endorsement adds back this coverage; it applies not only to service interruption originating off the insured's premises, but to service interruption originating outside of a covered building.[115] Accordingly, loss or damage to transmission lines located on the insured's premises would be covered, assuming, of course, that transmission lines are selected on the endorsement's schedule.

Finally, business interruption policies either have a deductible expressed in dollars or a waiting period of a certain duration. The ISO forms, for example, have a 72-hour waiting period.[116] In many cases, like the August 14th blackout, power outages are too brief or the losses too small to exceed the applicable deductible or waiting period.

## III. BOILER AND MACHINERY COVERAGE

Boiler and machinery insurance is a specialized type of property insurance. This insurance generally covers boilers, pressure vessels, and production machinery and equipment, coverage for which typically is excluded in most commercial property insurance policies.[117] Notably, boiler and machinery policies do not cover electronic data processing equipment or any recording or storage media used in connection with an electronic computer or electronic data processing equipment.[118]

Boiler and machinery policies generally cover losses caused by an acci-

112. *Id.*
113. *Id.*
114. *See* ISO Causes of Loss—Basic Form (CP 10 10 06 95) at 3; ISO Causes of Loss—Broad Form (CP 10 20 06 95) at 3–4; ISO Causes of Loss—Special Form (CP 10 30 06 95) at 2, 4.
115. ISO Utility Services—Time Element (CP 15 45 06 95) at 1.
116. The ISO Business Income Coverage Form defines "period of restoration" to mean "the period of time that begins 72-hours after the time of direct physical loss or damage for Business Income coverage. . . ." *See* ISO Business Income (and Extra Expense) Coverage Form (CP 00 30 06 95) at 8; ISO Business Income (without Extra Expense) Coverage Form (CP 0032 06 95) at 7.
117. *See generally* Kalis, *supra* note 29, § 14.01, at 14–3; Jeffrey W. Stempel, Law of Insurance Contract Disputes § 22.04, at 22–26 through 22–27 (2d ed. 2001).
118. *Id.*

dent to a covered object.[119] The ISO boiler and machinery policy, as one example, defines "accident" as "a sudden and accidental breakdown of the 'object' or a part of the 'object.'"[120] Courts generally apply dictionary definitions of "sudden"—"happening unexpectedly"—and "accidental"—occurring by "chance or unexpectedly."[121] Also, to be covered, there must be physical damage to the object that requires repair or replacement.[122] "Object" is defined to mean the equipment shown in the declarations.[123] "Objects" can be expressed as classes of property as well as individual items. A full description of the specific object categories is often found in the object definition endorsements for the various classes of objects covered by the policy.[124]

An unendorsed boiler and machinery policy will not provide coverage for power outage losses such as those occurring during the August 14th blackout because boiler and machinery policies typically exclude damage caused directly or indirectly by "lack of power, light, heat, steam or refrigeration."[125] This exclusion is even broader than the off-premises power exclusion found in commercial property policies because it eliminates coverage for both off-premises and on-premises utility service interruptions.[126]

In *Sawyer Fruit & Vegetable Cooperative Corp. v. Lumbermens Mutual Casualty Co.*,[127] the court found the lack of power exclusion to be unambiguous and, thus, precluded coverage where a four-hour power failure caused snow and freezing weather conditions to damage refrigeration compressors:

> The contract plainly, clearly, and unambiguously states that loss caused indirectly by wind or from loss of power and heat is not covered by the policy. When plaintiff contracted to exclude damage from loss of power and heat, we may reasonably assume that they also contracted with reference to what would follow if power and heat were lost in freezing weather. We cannot ignore the language in and the purpose of the policy and impose liability for a loss not contemplated by the parties.[128]

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119. *See, e.g.*, ISO Boiler and Machinery Coverage Form (BM 00 25 06 95) at 1 ("A Covered Cause of Loss is an 'accident' to an 'object' shown in the Declarations.")

120. *Id.* at 7.

121. *E.g.*, Cyclops Corp. v. Home Ins. Co., 352 F. Supp. 931, 934–35 (W.D. Pa. 1973).

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

123. *Id.*

124. *Id.* There are six ISO object definitions. *See* ISO Object Definition No. 1—Pressure and Refrigeration Objects (BM 00 26 06 95); ISO Object Definition No. 2—Mechanical Objects (BM 00 27 06 95); ISO Object Definition No. 3—Electrical Objects (BM 00 28 06 95); ISO Object Definition No. 4—Turbine Objects (BM 00 29 06 95); ISO Object Definition No. 5—Comprehensive Coverage (Excluding Production Machines) (BM 00 30 06 95); and ISO Object Definition No. 6—Comprehensive Coverage (Including Production Machines) (BM 00 31 06 95).

125. *Id.*

126. *See* 3 Robinson & Gibson, *supra* note 28, at XI.G.21.

127. 453 N.E.2d 826 (Ill. Ct. App. 1983).

128. *Id.* at 827.

But as with commercial property insurance, insureds can purchase several boiler and machinery endorsements that do provide coverage for certain power outage losses. A business interruption endorsement is one such coverage. The ISO Business Interruption Endorsement, for instance, provides coverage for business interruption losses sustained as a result of direct physical damage to covered property caused solely by an accident to an object listed in the business interruption schedule.[129] The "lack of power" exclusion does not apply to business interruption losses.[130] Thus, this endorsement has the effect of providing coverage for the business income loss resulting from spoilage of perishable goods from a covered accident to a covered object.[131]

Additionally, ISO has a Utility Interruption Endorsement that provides coverage for time element losses caused by a service interruption resulting from accidental damage to the utility supplier's equipment.[132] Unlike the Business Interruption Endorsement, the Utility Interruption coverage applies when there is off-premises damage to an object owned by the utility.[133] The endorsement has a schedule to list the utility services, the suppliers, and a waiting period that applies.[134]

Finally, the ISO Consequential Damage endorsement covers loss due to spoilage from lack of power.[135] The lack of power must result from an accident to an insured object. Further, the object that has the accident must be specified as covered in the Consequential Damage schedule, at a location specified in the Consequential Damage schedule, and in use or connected ready for use.[136]

All three of these endorsements require an accident to a covered object to trigger coverage. If there is no accident, there is no coverage, as *Pruett Enterprises, Inc. v. The Hartford Steam Boiler Inspection & Insurance Co.*[137] illustrates. There, a snowstorm disrupted electrical power, and Pruett suffered food spoilage at two grocery stores. Pruett sought coverage under its boiler and machinery policy, and the issue before the court was whether the loss was caused by an accident, as that term was defined in the policy.[138]

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129. *See, e.g.*, ISO Business Interruption—Valued Coverage Endorsement (BM 15 25 06 95) at 1–2.
130. *Id.* at 2.
131. *See* 3 Robinson & Gibson, *supra* note 28, at XI.H.6.
132. *See* ISO Utility Interruption Endorsement (BM 15 35 02 91).
133. *See* 3 Robinson & Gibson, *supra* note 28, at XI.H.6.
134. *See* ISO Utility Interruption Endorsement (BM 15 35 02 91) at 1.
135. *See* ISO Consequential Loss Endorsement (BM 15 28 06 95) at 2.
136. *See id.*
137. No 03A01–9609-CH-00309, 1997 WL 170302 (Tenn. Ct. App. Apr. 11, 1997).
138. *Id.* at *1. The policy defined "accident" to mean "a sudden and accidental breakdown of . . . [a]ny mechanical or electrical machine or apparatus used for the generation, transmission or utilization of mechanical or electrical power. At the time the breakdown occurs, it must become apparent by physical damage that requires repair or replacement of the covered equipment or part thereof." *Id.* at *3.

Lightning caused a blown fuse at one store, and a tree fell on the power lines at the other store. The court found coverage for the losses caused by lightning, concluding that there was an accident because there was physical damage that required repair or replacement.[139] But where the trees fell on power lines, the court found that there was no accident because there was no physical damage and because the power lines were not covered equipment.[140]

In sum, a standard unendorsed boiler and machinery policy will not provide coverage for loss or damage caused by a power outage if the policy includes the typical "lack of power" exclusion. There are, however, several endorsements that provide coverage for certain power outage losses.

But all of these endorsements require an accident to a covered object to trigger coverage. In other words, there must be a sudden and accidental breakdown of the covered object that causes physical damage to the object that requires repair or replacement. This is akin to the direct physical loss or damage requirement under property insurance policies. Thus, a boiler and machinery policy will not provide coverage for losses where a power outage only shuts down the covered boilers and equipment; there must be physical damage necessitating repair or replacement.

With the August 14th blackout, most industrial insureds' machinery and equipment simply went off-line automatically to protect the equipment or the insureds' operations.[141] The mere activation of safety devices that trip equipment off-line as intended would not constitute an accident within the meaning of a boiler and machinery policy because of the absence of any physical damage to the equipment.

## IV. CONCLUSION

Obviously, insureds must review their own specific policy to determine whether there may be coverage for their August 14, 2003, power outage losses. Some policy forms may provide broader coverage than standard ISO policy forms.

But generally, property insurance policies will provide coverage for power outage losses like those that occurred during the August 2003 blackout only where a covered cause of loss causes direct physical loss or damage to covered property. There would be no coverage where the power outage merely shut down the insured's computers or production equipment or kept the insured's business from operating. Unendorsed boiler and machinery policies likely will not provide coverage for power outage losses

139. *Id.* at *6.
140. *Id.* at *7.
141. *See* Interim Report, *supra* note 6, at 43.

because of the "lack of power" exclusion. There are several boiler and machinery endorsements that provide coverage for certain power outage losses, but all of these require an accident to a covered object to trigger coverage. As with a property policy, a boiler and machinery policy will not provide coverage for losses where a power outage only shuts down the insured's covered boilers and equipment.

Finally, if a loss is covered, the amount of the loss must exceed the applicable deductible or waiting period. Property damage deductibles are typically a specific dollar amount. Business interruption policies either have a deductible expressed in dollars or a waiting period of a certain duration. In many cases, like the August 14th blackout, power outages are too brief or the losses too small to exceed the applicable deductible or waiting period.