

Insurance Coverage & BAD FAITH LITIGATION



When The Lights Go Down In The City

COMMERCIAL PROPERTY INSURANCE MAY COVER POWER OUTAGE-RELATED DAMAGES

By GREGORY D. PODOLAK and
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In the past three months Connecticut has suffered two widespread power outages due to inclement weather. The first came in late August with Tropical Storm Irene. Approximately 700,000 residents were left in the dark, some for almost a week. More recently, the state was hit by a rare October snowstorm, and power was knocked out for 830,000 residents and businesses, in some cases for a full week.

Many businesses — ranging from small, family-owned bakeries to multi-location car dealerships — lost inventory or were forced to shut down while the power was out and suffered staggering financial losses. Naturally, these businesses turned to their first-party property insurers to absorb these losses, but many have been greeted with coverage denials. Insurers contend that, because the origination of the power loss occurred away from the policyholder's property, there was no "direct physical loss" sufficient to satisfy the insuring agreement. The analysis is not always so straightforward, however, and in many instances coverage may exist for these claims.

The main purpose of commercial property insurance is to protect businesses from damage to buildings and their contents, which occurs because of a covered cause of loss. In general, there are two different types of commercial property insurance available to businesses: (1) "all risk," which provides coverage for "all risk of direct physical loss or damage to Covered Property" (with the additional caveat, on occasion, that the direct physical loss be at an "Insured Location"); and (2) "named perils," which limits coverage to "direct physical loss of or dam-

age to Covered Property resulting from" specifically defined "Covered Causes of Loss." This article focuses on the scope and application of "all risk" policies, which are broader than named perils policies; however, policyholders and their counsel should consider the possibility that similar concepts and arguments may also apply in the "named perils" setting.

Risks Not Contemplated

Under Connecticut law, "all risk" policies are broadly construed as "creating a special type of insurance extending to risks not usually contemplated, and recovery will usually be allowed, at least for all losses of a fortuitous nature . . . unless the policy contains a specific provision expressly excluding the loss from coverage." *Yale Univ. v. Cigna Ins. Co.*, 224 F. Supp. 2d 402, 411 (D. Conn. 2002). "The language of all-risk policies is not to be given a restrictive meaning," *Costabile v. Metropolitan Prop. & Cas. Ins. Co.*, 193 F. Supp. 2d 465, 477 (D. Conn. 2002), and, as such, the all risk policyholder is not required to prove precisely what caused the loss but only that a fortuitous loss took place. *Std. Structural Steel Co. v. Bethlehem Steel Corp.*, 597 F. Supp. 164, 192 (D. Conn. 1984).

Other states that recognize a similarly broad definition of "all risk" coverage have further explained that such policies do not require any actual physical damage or change in material composition in order to trigger coverage. See *Customized Distribution Services v. Zurich Ins. Co.*, 862 A.2d 560, 565 (N.J. Super. Ct. App. Div. 2004) ("Since 'physical' can mean more than material alteration or damage, it was incumbent on the insurer to clearly and specifically rule out coverage in the circumstances where it was not to be provided, something that did not occur here."). Moreover, the term "physical damage" can include a "loss of



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access, loss of use and loss of functionality" even if the affected property otherwise remains intact. *Am. Guar. & Liab. Ins. Co. v. Ingram Micro, Inc.*, 2000 WL 726789 (D. Ariz. Apr. 18, 2000).

In the context of a power loss, "physical damage" can occur when electrical components are "physically incapable of performing their essential function of providing electricity" due to a physical incident. *Wakefern Food Corp. v. Liberty Mut. Fire Ins. Co.*, 968 A.2d 724, 734 (N.J. Super. Ct. App. Div. 2009); see also *Dundee Mutual Insurance Co. v. Marifjeren*, 587 N.W.2d 191 (N.D. 1998) (potato storage facilities were "damaged" by power outage "in the sense they no longer performed the function for which they were designed. In other words, the interruption of electrical power 'damaged' the storage facilities by impairing their value or usefulness").

Perishable Baked Goods

The damages resulting from the recent Connecticut power outages generally fall into two categories: (1) damage to, or loss of, inventory or product; or (2) interruption of business. For example, one bakery in West Hartford suffered a loss of \$10,000 of perishable baked goods due to lack of refrigeration. Other businesses, like automobile

dealerships and retail stores, suffered losses from their inability to open their doors to customers.

In the first situation, physical injury is clear: the loss of the baked goods, which is itself physical property, is a "direct physical loss." Under the broad "all risk" insuring agreement, the cause is irrelevant (as is the issue of whether loss of power from an offsite location is a "direct physical loss"). As long as the policyholder can establish that its property (here, the baked goods) was damaged, coverage should apply.

In the second situation (i.e., the retail store that was unable to conduct normal business but suffered no readily identifiable damage to inventory or property) the loss implicates business interruption insurance coverage, a separate line of coverage purchased in tandem with the property insurance. "The essential purpose of business interruption insurance is to place the insured in the position it would have occupied if the interruption had not occurred." 46 C.J.S. Insurance § 1531 (2011). Thus, standard business interruption coverage forms provide insurance for loss of income or increased expenses resulting from physical damage: "We will pay for the actual loss of Business Income you sustain due to the necessary suspension of your operations . . . caused by direct physical loss of or damage to property."

For businesses whose losses mostly consist of lost sales due to the power outage, the required "direct physical loss" initially seems less than clear. However, the breadth of the "all risk" language (which has been construed as not requiring actual, physical damage) and relevant case-law (interpreting "physical damage" to include loss of functionality) suggest that the loss of power itself at the insured's business may be a "direct physical loss."

Consider, for example, the court's analysis in *Wakefern Food Corp.*, where it ultimately concluded that there was "physical damage" to an electrical grid because it was physically incapable of providing electricity: "[I]n concluding that the

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Recouping Costs For Claims Not Covered By Policy

ONE OPTION FOR INSURERS IS TO ISSUE RESERVATION OF RIGHTS LETTER

By ASSAF Z. BEN-ATAR and
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More and more insurers are threatening to, or actually filing, claims to recover defense costs expended on "non-covered claims." But where does Connecticut law stand on this issue? Whether an insurer is entitled to recoup defense costs for claims that are not covered by the policy varies from state to state, and many jurisdictions have not yet ruled on the question. The seminal case on this subject comes from the California Supreme Court, which recognized that an "insurer's duty to defend runs to claims that are merely potentially covered..." and that in

a "mixed" action, the insurer has a duty to defend the action in its entirety, even if some of the claims are not covered. *Buss v. Superior Court*, 16 Cal. 4th 35, 46-48 (1997).

The *Buss* Court further held that the insurer cannot recoup defense costs for claims at least potentially covered where the insurer has a duty to defend those claims under the policy and the policy does not expressly provide for reimbursement. The Court noted that the insurer may not create a right of reimbursement merely by issuing a reservation letter asserting such a "right." This would contradict the policy and cannot be done without a separate contract supported by consideration. The Court recognized that the insurer can,



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there are variations on whether the policy must expressly provide for reimbursement, whether the insurer must expressly reserve its rights to recoup defense costs, and whether an insured's objection to such a reservation minimizes its effect. Where reimbursement is allowed, the burden is on the insurer to prove allocability. "Bruner & O'Connor on Construction Law," § 11:46; *Buss* at 56-60; *Jostens Inc. v. CNA Ins. Continental Cas. Co.*, 336 N.W.2d 544, 545 (Minn. 1983).

In some jurisdictions, for example, an insurer cannot recover defense costs unless the policy specifically provides for reimbursement in the event a court determines that the insurer owes no duty to defend. See *St. Paul Fire & Marine Insurance Co. v. Holland Realty Inc.*, No. CV07-390-S-EJL, 2008 WL 3255645 (D. Idaho Aug. 6,

however, recoup defense costs for claims that are not even potentially covered.

In other states that have considered this is-

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Liquor Liability Coverage Can Be Confusing

PLAINTIFFS, DEFENSE SHOULD BOTH CHECK PROVISIONS OF 'OTHER POLICY'

By JAN C. TRENDOWSKI

Liquor liability insurance policies are unique creations and are usually separate from a standard commercial liability policy. They were created for a specific, narrow purpose and vary in their language and coverage much more than other types of policies.

Further, liquor liability policies contain exclusions and coverage limitations specific to the liquor industry which can create surprising uninsured and underinsured situations regardless of what the insured thought when the policy was purchased.

By way of background, a Connecticut liquor establishment would traditionally buy a "restaurant package" of policies, which consisted of a commercial general liability policy (CGL) to cover mishaps and a "dram shop policy" to cover liquor-related liability. The CGL excluded all alcohol-related claims and the dram shop policy specifically covered liability pursuant to Connecticut General Statute 30-102, the Dram Shop Act.

The insuring agreement in the dram shop policy expressly stated that it covered all liability resulting from a violation of C.G.S. 30-102. As the Dram Shop Act created a liability where none had existed under the common law, the dram shop policy covered any and all possible liquor-related claims. The combination of the two policies was essentially a seamless web covering all possible liquor-related and non liquor-related claims.

The two-policy approach is very significant from a practical perspective. We recently had a case where the defense counsel for a bar sent over a copy of the CGL policy with a letter stating that as the CGL excluded liquor-related claims, there was no coverage. My first question was, "Where is the other policy?" On further re-

view of her file, the defense counsel realized that the CGL was not the only coverage and that the "other policy" from her client's restaurant package had \$300,000 in liquor liability coverage.

Reckless Service

The seamless web of coverage under the restaurant package was breached in the 1970s with the pivotal decision of *Kowal vs. Hofher*, 181 Conn. 355 (1980), which established a common law cause of action for reckless service of alcohol. *Kowal* was followed by *Ely vs. Murphy*, 207 Conn. 88 (1988), which created a common law claim for negligent provision of alcohol to a minor, and later by *Craig vs. Driscoll*, 262 Conn. 312 (2003), which did away with all restrictions by creating a claim for simple negligent service of alcohol.

Although the generic negligent service of alcohol cause of action was legislatively overruled by an amendment to C.G.S. 30-102, the Dram Shop Act cap was increased from \$20,000 per person and \$50,000 per occurrence to \$250,000 per occurrence effective upon the governor's signature. The unforeseen result was that almost every liquor establishment in the state was left severely underinsured for dram shop claims and uninsured for recklessness and negligent sale to minors. As the "bad act" in the sale to a minor is sale to an underage rather than intoxicated person, there were claims for sales to sober minors to which the dram shop policy didn't even apply.

The response by the insurance industry was to create a "liquor liability" rather than dram shop policy. The new policy had an insuring agreement which covered all injuries caused by the sale of alcohol rather than restricting itself to the Dram Shop Act. The policy limits were typically either \$300,000 or \$1 million rather than the statutory \$20,000 per person/\$50,000

per occurrence. The policy still stands separate from the CGL policy, but provides both increased limits and broader coverage than the old dram shop policy. As a practical matter, the policy does not require a sale to an "intoxicated" person, so it goes much farther than the Dram Shop Act. While it took some months for the shift to occur, the dust finally settled and it appeared that proper coverage was finally available.

The liquor liability policy had one restriction, however, which was quite rare in the old dram shop policies, an assault and battery exclusion. For the most part, the exclusion was inserted into policies without much fanfare and insureds generally learned of the exclusion when they received a letter from the carrier denying coverage for a claim. The A&B exclusion is quite broad and has been uniformly enforced by Connecticut courts. See *Kelly vs. Figueiredo*, 223 Conn. 31 (1992), *Harris vs. Hermitage Ins. Co.*, No. CV-08-5021329S (Oct. 13, 2009), and *Clinch v. Generali-U.S. Branch*, 110 Conn. App. 29 (2008).

Notably, the same exclusion was also inserted into the CGL policies which left the liquor seller without coverage regardless of whether alcohol was involved or not. As an alternative to a broad exclusion, some carriers did include coverage for assaults, but at a reduced limit. For example, although the overall liquor liability coverage was \$1 million, the coverage for assault and battery might be \$50,000 or \$100,000. Depending on the policy, the assault and battery coverage might also be reduced by defense costs. Like a



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CGL policy, the liquor liability policy is an "occurrence" policy, which means that the policy in place on the date of the occurrence is exposed.

Drafted By Carriers

The ultimate result is that a liquor liability policy may or may not have an assault and battery exclusion, may have lower limits for assault and battery, and may even have variations in the exclusion language that make it inapplicable to particular circumstances.

Unlike auto policies, which are taken from a template and have statutorily required conditions, the assault and battery exclusions are often drafted by the carriers themselves and may be broader or narrower than the drafters intended. Take a look at this exclusion from a liquor liability policy:

"We have no duty to defend or indemnify any insured or any other person against any claim or suit for bodily injury, property damage, personal injury, or advertising injury, including claims or suits in negligence arising out of or related to any:

- 1) Assault
- 2) Battery
- 3) Harmful or offensive contact
- 4) Threat

Can you see the error? By leaving out a comma between "negligence" and "arising," the policy either excludes negligent assault only, or all claims regardless of type. No court would endorse an exclusion of all claims, and "negligent assault" is very limited if it exists at all.

While I assume that the carrier corrected the error by now, they wound up providing coverage on two assault cases once the error was pointed out to them (pointed out forcefully and repeatedly, I might add).

In short, assessing the scope of the coverage and the limits is critically important both for plaintiffs' attorneys and the insureds alike. Although plaintiffs and defendants may be adversarial in court, neither wants to find out post-trial that the liquor liability coverage they had both counted on doesn't exist. ■

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2008) (recognizing that Idaho law requires the policy to contain a reimbursement provision); *General Agents Ins. Co. of Am. v. Midwest Sporting Goods Co.*, 215 Ill.2d 146, 293 (Ill. 2005) (refusing to permit insurer to recover defense costs pursuant to a reservation of rights where no right to recoupment existed under the policy); *American and Foreign Ins. v. Jerry's Sport Center Inc.*, 606 Pa. 584 (Pa. 2010) (holding that insurer cannot recoup defense costs where policy does not provide for recoupment merely by issuing a letter reserving the right to recoup defense costs).

In other jurisdictions, it has been held that an insurer may recoup defense costs where it explicitly reserves its right to do so and the insured does not expressly object to the insurer's reservation of rights. See *Gotham Ins. Co. v. GLNX Inc.*, 1993 WL 312243, at *4 (S.D.N.Y. 1993); *Knapp v. Commonwealth Land Title Ins. Co. Inc.*, 932 F. Supp. 1169 (D. Minn. 1996).

In still others, an insurer may be entitled

to reimbursement of defense costs based on a reservation of rights letter even if the insured objects to the reservation. See *Forum Ins. Co. v. County of Nye, Nev.*, 26 F.3d 130 (9th Cir. 1994). Within some jurisdictions, such as New York, the courts have varied in their rulings on this issue. Compare *Gotham Ins. Co. v. American Guarantee and Liability Ins. Co. v. CNA Reinsurance Co.*, 16 A.D.3d 154 (1st Dep't 2005) (allowing recoupment where there was no indication that the insurer had expressly reserved the right to recoup defense costs) and *Fieldston Property Owners Assn. Inc. v. Hermitage Ins. Co.*, 2011 NY Slip Op 01361 (Feb. 24, 2011) (concluding no right to recoupment for uncovered claims).

In those jurisdictions recognizing a right to recoup defense costs upon a reservation of rights, the content of the reservation is critical. "Where the insurer's reservation of rights letter recounts all the claims and expresses why each claim is not potentially covered and expressly reserves the right to recoup defense costs, it

will be deemed sufficient in those jurisdictions permitting recoupment." *Bruner & O'Connor*, § 11:46; *Colony Ins. Co. v. G&E Tires & Service Inc.*, 777 So. 2d 1034 (Fla. Dist. Ct. App. 1st Dist. 2000); *Jim Black & Associates, Inc. v. Transcontinental Ins. Co.*, 932 So. 2d 516 (Fla. Dist. Ct. App. 2d Dist. 2006).

Recoupment jurisprudence in Connecticut is only now beginning to develop.

Reservation Of Rights

In 2003, the Connecticut Supreme Court adopted the general principals of *Buss*, ruling that an insurer can maintain an action against its insured for reimbursement of defense costs for claims that are not even potentially covered. *Security Ins. Co. of Hartford v. Lumbermans Mut. Cas. Co.*, 264 Conn. 688, 716-18 (2003).

This year, the U.S. District Court of Connecticut has faced this issue twice. In July, the court refused to allow an insurer to recoup its defense costs for claims that were potentially covered, and determined that a reservation of rights letter

does not create a separate contract between the parties. *Nationwide Mut. Ins. Co. v. Mortensen*, No. 3:00-CV-1180(CFD), 2011 WL 2881314 (D. Conn. July 18, 2011). In August, the court allowed an insurer to recoup its defense costs relating to certain claims that the court decided in an earlier declaratory judgment action the insurer had no duty to defend. *Scottsdale Ins. Co. v. R.I. Pools Inc.*, No. 3:09CV01319(AWT), 2011 WL 3563169 (D. Conn. Aug 15, 2011). In *Scottsdale*, expenses associated with settlements and claims investigations were excluded from such reimbursement.

In states like Connecticut that have not ruled definitively on this issue, insurers should protect themselves by issuing a detailed reservation of rights letter reserving the right to recoup defense costs even where the policy does not expressly provide for it. Insureds should timely object to an insurer's reservation of rights letter to preserve the argument that any acceptance of a defense does not constitute an agreement by the insured that the insurer has a right to recoupment. ■

A Potent Tool In Litigating Against Unlicensed Insurers

PRE-PLEADING SECURITY REQUIREMENT SPARKS CONSTITUTIONAL DEBATES

By DANIEL P. ELLIOTT

For a certain class of defendants in Connecticut civil actions, the mere right to file a responsive pleading to a complaint comes with a — potentially massive — price tag.

An insurer who is not licensed to do business in Connecticut, and who is sued in Connecticut on the basis of insurance business transacted in the state, is required by Section 38a-27 of the General Statutes to post security in an amount sufficient to satisfy a judgment before filing a responsive pleading and defending itself in the suit. While the statute does not explicitly so provide, courts have interpreted it to afford a hearing before security is ordered. The scope of that hearing, however, is limited. If the insurer files a pleading before complying with the statute, the pleading may be stricken, and a default judgment may ultimately enter.

History And Operation

Section 38a-27 was first enacted in 1969 as part of Connecticut's Unauthorized Insurers Act. The law was aimed at protecting consumers from "fly-by-night" insurers who, although unlicensed as insurers in Connecticut, nonetheless solicited business in the state through the mails. The practice was particularly prevalent in the life, accident and health insurance fields.

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It was feared that, in the absence of regulation, consumers were unprotected from "financially unsound or irresponsible" insurers.

The pre-pleading security provision of the act, in particular, was "intended to ensure that any insurer, domestic or foreign, selling insurance or reinsurance to a person in [Connecticut] will have sufficient assets in [Connecticut] to satisfy any judgment." See *Hartford Accident & Indem. Co. v. ACE Am. Reinsurance Co.*, No. X02CV030178122S, 2008 Conn. Super. LEXIS 2470, at *2 (Conn. Super. Ct. Sept. 19, 2008). This mechanism is not unique to Connecticut; at the present, more than 40 states have adopted identical or similar statutory pre-pleading security provisions. (See Walter W. Heiser, "Due Process Limitations on Pre-Answer Security Requirements for Nonresident Unlicensed Insurers," 88 Neb. L. Rev. 494 (2010)).

Section 38a-27 requires that before filing "any pleading" in any court action or proceeding, the unauthorized insurer must deposit with the clerk of the court "cash or securities or a bond with good and sufficient sureties to be approved by the court ... in an amount to be fixed by the court ... sufficient to secure the payment of any final judgment which may be rendered in the action." This requirement applies in federal diversity actions, as well as state court actions. See *Arrowood Surplus Lines Ins. Co. v. Gettysburg Nat'l Indem. Co.*, No. 3:09-CV-972 (JCH), 2010 U.S. Dist. LEXIS 34498, at *4 (D. Conn. Feb. 19, 2010). The statute also reaches administrative proceedings before the Insurance Commissioner.

The court is given the discretion to dispense with the requirement if the insurer satisfies the court that it maintains sufficient funds in Connecticut to satisfy any final judgment that may be rendered in the action. Conn. Gen. Stat. § 38a-27(a). As an alternative to the pre-pleading security requirement, the statute allows the insurer to obtain authorization to conduct insurance business in Connecticut. Additionally, the court may order a postponement to give the insurer a "reasonable opportunity" to either post security, or procure authorization. Conn. Gen. Stat. § 38a-27(b). The statute does not prevent the defendant from filing a motion to quash a writ or to set aside service on the ground that the defendant has not acted as an "insurer," as that term is defined in Section 38a-271 of the General Statutes.

If a defendant files a responsive pleading without complying with Section 38a-27, the pleading may be stricken. See *Arrowood Surplus*, 2010 U.S. Dist. LEXIS 34498; *Sec. Ins. Co. of Hartford v. Universal Reinsurance Co. Ltd.*, No. 3:06CV158, 2007 U.S. Dist. LEXIS 5694 (D. Conn. Jan. 26, 2007).

Section 38a-271 of the General Statutes exempts certain categories of insurance from the pre-pleading security requirement. Included in these exemptions are surplus lines insurance; transactions written and delivered outside of Connecticut covering only subjects of insurance not located in Connecticut; transactions in Connecticut involving any insurance or annuity pol-

icy, other than a reinsurance contract, issued prior to Jan. 1, 1970; and transactions in Connecticut involving contracts of insurance issued to an "industrial insured." See Conn. Gen. Stat. 38a-271(c). "Industrial insured" is defined by the statute as an insured that (a) procures the insurance of any risk by the use of the services of a full-time employee; and (b) whose aggregate annual premiums for insurance, excluding life, accident and health insurance, total at least \$50,000.

Section 38a-271(b) lists categories of insurance to which these exemptions do not apply. The pre-pleading security requirement has been held to apply to contracts of reinsurance. See *Sec. Ins. Co.*, 2007 U.S. Dist. LEXIS 5694.

Constitutional Challenges

On their face, Section 38a-27 and similar statutes in other states countenance a deprivation of property without any form of hearing. This fact has raised constitutional eyebrows in numerous decisions, both in Connecticut and elsewhere. The argument against the constitutionality of pre-pleading security statutes sometimes rests on the U.S. Supreme Court's decision in *Connecticut v. Doe*, 501 U.S. 1 (1991).

In *Doe*, the Court struck down as unconstitutional the prior incarnation of Connecticut's prejudgment remedy statute, which allowed a prejudgment attachment of real property without notice or a hearing. The statutes have also been charged with restricting access to the courts, and thus violating a defendant's right to equal protection. These challenges, however, have been rejected by the courts. See *British Int'l Ins. Co. Ltd. v. Seguros La Republica, S.A.*, 212 F.3d 138 (2d Cir. 2000); *Curiale v. Ardra Ins. Co.*, 667 N.E. 2d 313 (N.Y. 1996); *Mid-Am. Indem. Ins. Co. v. King*, 22 S.W. 3d 321 (Tex. 1995).

Notably, the 2nd Circuit Court of Appeals upheld the constitutionality of New York's pre-pleading security statute, a statute which is similar to Connecticut's. In *British Int'l*, the 2nd Circuit had no qualm with the proposition that a pre-pleading security requirement constitutes an "attachment" of the insurer's property; indeed, it held that any due process analysis of the statute must proceed on that understanding. See also *Stephens v. Nat'l Distillers & Chem. Corp.*, 69 F.3d 1126, 1129 (2d Cir. 1996). The 2nd Circuit engaged in that analysis, and found that New York's



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statute passed constitutional muster.

The appellate court noted that New York and its citizens have a "significant interest in ensuring businesses in the heavily regulated insurance industry have sufficient funds within the state where they conduct business to fulfill each individual insurance claim." Additionally, it noted that insurers subject to the act are afforded an alternative means by which to protect their property: they may obtain a license to conduct insurance business in the state. Finally, the court found "little risk" of an erroneous deprivation of property because the defendant is, indeed, entitled to "an opportunity to be heard" (even though the statute does not explicitly say so) before being subjected to a pre-pleading security requirement.

Scope Of Hearing

In *Hartford Accident & Indemnity Co. v. ACE Am. Reinsurance Co.*, 103 Conn. App. 319 (2007), the Connecticut Appellate Court was guided by *British Int'l* when it decided that Section 38a-27 affords the defendant an evidentiary hearing before compliance with the section is mandated. The Appellate Court discussed *Doe* before observing that "it is difficult to find a persuasive distinction between a statute authorizing a court to order a prejudgment attachment of a defendant's property and a statute authorizing a court to order the defendant to deposit prepleading security to secure a remedy for a successful plaintiff."

The Appellate Court accordingly noted that Section 38a-27, which does not explicitly provide the defendant with an opportunity to be heard, is,

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facially, "in constitutional jeopardy." It held that in order to uphold the statute's constitutionality, the defendant must be afforded the "hearing to which [it is] constitutionally entitled."

On remand in that case, the Superior Court was called upon to determine the scope of the hearing that had been ordered by the Appellate Court. See *Hartford Accident & Indemnity*, 2008 Conn. Super. LEXIS 2470. The defendant argued for a full hearing on the merits in which it could present evidence of its defenses. The plaintiff objected, noting that while Connecticut's prejudgment remedy statute requires a finding of probable cause, Section 38a-27 does not.

The court agreed with the plaintiff. It held that due process was satisfied where the plaintiff presented proof (1) of the existence of the insurance contracts at issue; (2) that bills were made under the auspices of those contracts; and (3) that the bills remain unpaid. The defendants were allowed to present the "nature of their defenses," and were also allowed to cross-examine the presented witnesses. ■

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term 'physical damage' is ambiguous, we consider the context, including the identity of the parties. These were not two electric utilities contracting about the technical aspects of the grid. Rather, the parties are an insurance company... and a group of supermarkets that paid for what they believed was protection against a very serious risk—the loss of electric power to refrigerate their food. The average policyholder in plaintiffs' position would not be expected to understand the arcane functioning of the power grid, or the narrowly-parsed definition of 'physical damage' which the insurer urges us to adopt. In this con-

text, we conclude that if Liberty intended that its policy would provide no coverage for an electrical blackout, it was obligated to define its policy exclusion more clearly."

Moreover, according to the court, if the insuring agreement requires only "direct physical loss to Covered Property" and not "direct physical loss to Covered Property at an Insured Location," the policyholder may reasonably argue that any physical loss that results in damage to the policyholder's business — even physical loss at the power grid or to a downed power line away from the business site — satisfies the insuring agreement.

In the wake of the Connecticut storms, various parties have asserted that commercial prop-

erty insurance is not intended to cover loss due to failure of power or other utility services and that denials based on this assumption are standard.

At the end of the day, however, the terms of the insurance policy alone control the available coverage; terms that, if reasonably susceptible of two meanings, will be construed against the party that drafted them — the insurance company. Thus, it is imperative that policyholders faced with denials for these claims carefully scrutinize 1) the precise terms of their policies and 2) the nature of the losses resulting from these power outages in order to independently assess, and take appropriate steps to preserve, their rights. ■