

## *The Key Bridge Tragedy: What Loss of Income Coverages will Apply?*

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At 1:29 am on March 26, 2024, a cargo ship collided (or, more accurately, allided) with the Francis Scott Key Bridge near Baltimore, Maryland. The bridge fell into the Patapsco River in a matter of seconds, immediately blocking all shipping traffic to and from the nearby Port of Baltimore and halting all travel across Interstate 695, which ran across the collapsed bridge. Within hours, Maryland Governor Wes Moore and Baltimore Mayor Brandon Scott each declared a state of emergency.<sup>1</sup> Authorities shut down the Port of Baltimore, and Interstate 695 is closed for the foreseeable future. It will take weeks to clear away the wreckage of the bridge to allow shipping traffic to resume. Rebuilding the bridge and resuming the flow of traffic across it will take many months, if not years.

What caused the ship to plow into the bridge remains under investigation. What was immediately clear is that rebuilding the bridge will cost hundreds of millions of dollars, and the economic disruption for businesses and individuals in the Baltimore area and in certain industries will be significant. The Port of Baltimore is the ninth largest port in the United States by trade volume.<sup>2</sup> More than 30,000 commuters and 4,900 trucks traverse Interstate 695 across the Key Bridge every day—\$28 billion in goods crossing every year.<sup>3</sup> The collapse has already affected the operations of importers, exporters, and other businesses that operate in and around the Baltimore port.<sup>4</sup>

The State of Maryland owns the Key Bridge. Presumably, its property insurance policy includes standard coverages for physical loss or damage, code upgrades, business income, extra expense, among others.<sup>5</sup> More broadly, businesses affected by the disruption in this major shipping and

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<sup>1</sup> Mayor Scott's order: <https://mayor.baltimorecity.gov/news/press-releases/2024-03-26-mayor-scott-issues-state-emergency>; Governor Moore's order: [https://governor.maryland.gov/Lists/ExecutiveOrders/Attachments/39/EO%2001.01.2024.09%20Declaration%20of%20a%20State%20of%20Emergency\\_Accessible.pdf](https://governor.maryland.gov/Lists/ExecutiveOrders/Attachments/39/EO%2001.01.2024.09%20Declaration%20of%20a%20State%20of%20Emergency_Accessible.pdf)

<sup>2</sup><https://www.wsj.com/livecoverage/stock-market-today-dow-jones-03-26-2024/card/here-s-how-baltimore-ranks-among-u-s-ports-GhJBis2HpJALb28ZjzQF>

<sup>3</sup> <https://www.nytimes.com/2024/03/26/us/i-695-baltimore-bridge-collapse-traffic.html>

<sup>4</sup> [https://www.wsj.com/finance/baltimore-bridge-economic-impact-0514d05a?st=22368hmko6dx8bd&reflink=article\\_email\\_share](https://www.wsj.com/finance/baltimore-bridge-economic-impact-0514d05a?st=22368hmko6dx8bd&reflink=article_email_share)

<sup>5</sup> Code upgrade coverage may be a particular issue for this bridge, which was originally constructed in 1977. When covered property has sustained covered direct physical damage, many commercial property insurance policies afford coverage for the “cost to demolish and clear, and the increased

transportation hub will undoubtedly turn to their insurance programs to recover losses. Several common time element coverages in commercial property insurance policies may be implicated, including contingent business interruption, ingress/egress, and civil authority.

Contingent business interruption (“CBI”) coverage is perhaps the most likely coverage to be implicated under these circumstances. This subset of business interruption coverage is designed to protect an insured against business losses suffered due to an interruption in its supply or customer chain from damage to property that is not insured property.<sup>6</sup> The coverage generally applies when there is damage to property of “the insured’s prime suppliers of materials, parts and services” that the insured depends on for supplies to conduct its business operations.<sup>7</sup> The coverage can also apply to property damage sustained by a “customer” of the insured.

Determining who constitutes a supplier or customer is critical.<sup>8</sup> When the policy does not restrict the terms “supplier” or “customer” to third parties with a direct relationship with the insured, a court may interpret the terms much more broadly. That is precisely what the court did in *Archer-Daniels-Midland Co. v. Phoenix Assurance Co.*, 936 F. Supp. 534 (S.D. Ill. 1996). There, ADM sought to recover lost income and extra expenses related to higher grain costs and transportation expenses following flooding of the Mississippi River. ADM argued that grain farmers whose farmland flooded and the U.S. Coast Guard and Army Corps of Engineers, which built and maintained the Mississippi River transportation system, were “suppliers” to ADM. The district court agreed, finding that the government entities did supply goods or services to ADM. The court observed that ADM paid a fuel tax used to fund the maintenance of the river transportation system that the government agencies “supplied” to ADM. The court also rejected the insurers’ argument that ADM had no contractual or other direct relationships with the agencies or the farmers, noting that the policy’s CBI provision referred to “interruption of business of the insured caused by damage to . . . property . . . of *any supplier* . . . which results in the inability of such supplier to supply an insured location” (emphasis added).

Even when a policy restricts these terms, courts have disagreed on whether third parties are direct or indirect suppliers. In *Millennium Inorganic Chemicals Ltd.*, the U.S. District Court for the District of Maryland concluded that a policy providing CBI coverage only for losses caused by

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cost to repair” undamaged parts of property when “such costs are incurred as a consequence of enforcement of an ordinance or law.” *Landmark Realty, Inc. v. Great Am. Ins. Co.*, No. CIV. JKS 10-278, 2010 WL 5055805, at \*5 (D. Md. Dec. 3, 2010). *See also First Centrum Corp. v. Landmark Am. Ins. Co.*, 237 F. App’x 799, 801 (4th Cir. 2007) (ordinance or law coverage is a sublimit of the occurrence liability limit that provides for the undamaged parts that an ordinance or law requires to be demolished).

<sup>6</sup> *Id.* § 167:14; *Millennium Inorganic Chemicals Ltd. v. Nat’l Union Fire Ins. Co. of Pittsburgh, PA*, 744 F.3d 279, 281 at n. 1, 286 (4th Cir. 2014) (applying New York and New Jersey law).

<sup>7</sup> *Id.* at n. 2; (holding that coverage is triggered only by damage to or destruction of direct contributing properties).

<sup>8</sup> For a more detailed examination of these and other issues concerning CBI coverage, see our colleague Dan Millea’s article, *Contingent Business Interruption: Limited Case Law and CBI Challenges*, <https://www.zellelaw.com/news-publications-434>

damage to “contributing properties,” defined only to include “direct supplier[s] of materials to the Insured’s locations,” was ambiguous. The district court construed the ambiguity against the insurers and held that a third-party natural gas producer with no contractual privity with the insured was a “direct supplier” of the insured because the insured powered its facility using that third party’s natural gas—notwithstanding that the insured purchased that natural gas from a retail gas supplier, not from the producer whose production facility suffered an explosion. On appeal, the Fourth Circuit Court of Appeals reversed the decision, finding the policy was unambiguous and the gas producer is not a “direct supplier” because it had no direct relationship with the insured and relinquished physical control of the gas to the intermediary retail gas supplier before the gas passed to the insured.

The debate reflected in these decisions may be especially significant for coverage relating to the Key Bridge. Insureds seeking coverage for business losses resulting from supply chain disruptions linked to the Key Bridge collapse may rely on the facts of *ADM* to argue that the State of Maryland or harbor authorities are “suppliers” that sustained physical damage when the Key Bridge collapsed, causing time element losses. The Fourth Circuit’s *Millennium Inorganic Chemicals* decision offers a counterpoint. As these cases demonstrate, the policy language is critical.

Other standard time element coverages, such as civil authority and ingress/egress, may come to mind. Ultimately, they may not apply under these circumstances.

Civil Authority coverage generally applies “when the authorities have prohibited access to the insured’s premises because of damage to nearby property.” *GPL Enter., LLC v. Certain Underwriters at Lloyd’s*, 254 Md. App. 638, 657 (2022), *cert. denied sub nom. GPL Enter. v. Certain Underwriters at London*, 482 Md. 538 (2023). Maryland courts have noted that a “necessary condition of that coverage is that the authorities are responding to dangerous physical conditions or securing their unimpeded access to the damaged property (as, for example, when firefighters are fighting a fire or the fire marshal is investigating the cause of a fire).” *Id.* In this instance, access is more likely prevented by the destruction of the bridge itself, not a government order. Also, the geographic restrictions generally included in Civil Authority coverage will limit their reach.

Ingress/Egress coverage commonly provides coverage for business interruption losses directly caused by physical loss or damage to property that prevents ingress to or egress from the insured’s premises, even if the insured property is not damaged. For example, the coverage has applied where flooding rendered the only road leading to the insured’s manufacturing plant nearly impassable. *See, e.g., Fountain Powerboat Indus., Inc. v. Reliance Ins. Co.*, 119 F. Supp. 2d 552, 554, 556-57 (E.D.N.C. 2000). However, ingress/egress provisions often require the insured to establish an inability to enter or leave *the insured premises*—not just the harbor itself. In this instance, federal, state, and local officials also provided direction for alternative vehicular routes, which may affect the nature and scope of available coverage.<sup>9</sup>

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<sup>9</sup> <https://mdta.maryland.gov/keybridgenews>, <https://transportation.baltimorecity.gov/>

As always, coverage is dependent upon the language of the applicable insurance policy. Every policy is different, and the language must be carefully reviewed and evaluated.<sup>10</sup> But with the tragic loss of the Key Bridge especially, Insurers should keep their own Contingent Business Interruption policy language front of mind.

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<sup>10</sup> This article has highlighted Maryland law, but many factors impact which jurisdiction's law will apply. The choice of law question is often determined by the language of the applicable policy.