

When Does it End? The Claim for Unlimited Business Interruption Coverage

By [John V. Garaffa](#)¹

In *CSX Corporation and CSX Insurance Co. v. North River Insurance Co. et al.* 2009 WL 1240136 (U.S. M.D. Fla 2009) the United States District Court for the Middle District of Florida, found in favor of Defendant insurers on CSX's claims that it was entitled to business interruption coverage for the continued income streams from particular customers. CSX asserted that, following Hurricane Katrina, coverage for income from specific customers continued until

those income streams returned to pre-loss levels. CSX argued the policies provided such coverage regardless of whether the income from the customers had ceased or diminished as the result of the bankruptcy or business decisions by those customers, so long as it followed Hurricane Katrina. The insurers asserted that the plain language of the policies barred those unlimited claims.

¹ [John V. Garaffa](#) is a Senior Associate in the Tampa Florida office of [Butler Pappas Weigmuller Katz Craig LLP](#) practicing primarily in defense of first party property insurance coverage.

Hurricane Katrina struck the Gulf coast in late August 2005, and caused damage to the property of two CSX subsidiaries - CSX Transportation, Inc. ("CSXT") and CSX Intermodal, Inc. ("CSXI"). As to CSXT, Hurricane Katrina damaged CSXT's rail yard in New Orleans, Louisiana, as well as certain sections of CSXT track, including six major bridges, between New Orleans, Louisiana and Mobile, Alabama. As to CSXI, Hurricane Katrina damaged CSXI facilities, track and equipment in New Orleans, Louisiana and Mobile, Alabama.

By February 2006, the major track repairs to CSXT had been completed sufficiently enough to allow it to conduct limited operations under restricted conditions on all relevant lines. In addition, by February 2006, major repairs to CSXI's property damage had been completed. CSX had represented that, as of April 1, 2006, both CSXT and CSXI had resumed unrestricted operations on all relevant lines.

CSX submitted an insurance claim to Insurer-Defendants for losses it asserted were sustained as a result of Hurricane Katrina. CSX's insurance claim sought recovery for both property damage and time element (business interruption) components. The insureds filed an amended complaint for declaratory relief on August 1, 2008. By agreement, the parties filed cross motions for summary judgment.

The motions by the Plaintiffs and Defendants addressed three aspects of the claim that were in dispute.² Those issues were (1) whether the insured was entitled to claim the replacement cost of two locomotives that insurers contended could have been repaired; (2) whether the Plaintiffs were entitled to claim the costs incurred for services by Price Waterhouse Coopers as "adjustment expenses"; and (3) whether

Plaintiffs were entitled to business interruption coverage for income "lost" from certain customers.

In its ruling, the Court found in favor of the Plaintiffs with respect to the claim for locomotives,³ for Defendants with respect to the costs claimed for the services provided by Price Waterhouse Coopers⁴ and, with one exception, for Defendants with respect to CSX's claims for business interruption.⁵

(A) Business Income

The Plaintiffs asserted that the policy permitted them to claim a loss of income until such time as it restored the pre-loss income streams from individual customers whose use of CSX services declined or ceased after Hurricane Katrina. The Plaintiffs' asserted their claim was based upon the plain reading of the policy which provides that the loss shall be computed for "for such additional time as may be required to restore revenue to the same level as would have existed had no loss occurred, not to be limited by the date of expiration named in the policy." The policy provides:

(B) Time Element

- (1) This policy insures loss resulting from partial, complete, or potential suspension of business conducted by the Insured (including research and development) caused by loss, damage, or destruction to:
 - (j) real or personal property of others upon whom the Insured may be dependent for continued supply (or purchase) of services (including but not limited to electronic data processing services), raw materials, component parts, merchandise, or finished products;
 - (k) real or personal property of a receiver of

² The parties motions and related memorandum are available on Westlaw as follows: Plaintiffs' Motion for Summary Judgment, Memorandum in Support and Request for Oral Argument 2009 WL 528045; Defendants' Motion for Summary Judgment and Memorandum of Law in Support As to All Counts of Plaintiffs' Amended Complaint 2009 WL 528046; Plaintiffs' memorandum in opposition to Defendants' Motion for Summary Judgment 2009 WL 1240136, Defendants' Reply Memorandum in Support of Their Motion for Summary Judgment as to All Counts of Plaintiffs' Amended Complaint and to Faraday and Aspen's Counterclaims 2009 WL 1240452, Plaintiffs' Reply Memorandum in Support of Plaintiffs' Motion for Summary Judgment 2009 WL 1240453, Defendants' Memorandum of Law in Opposition to Plaintiffs' Motion for Summary Judgment 2009 WL 1240660.

³ CSX interpreted the valuation clause in the policy to permit it to replace any damaged locomotive with a new unit. Defendants argued that Plaintiffs' assertion that the Defendants policy permits the replacement of any piece of damaged rolling stock, however minor the damage, required the Court to excise the "total loss" provision of the policy. Defendants also argued that an interpretation permitting full replacement without regard to the extent of the loss was inconsistent with the basic principles of indemnity. The Court disagreed and found in favor of Plaintiffs. In reaching its decision, the Court noted that Section 7)(AX3)(f)(i) contains only one reference to "total" loss or damage. The sentence that contains the reference states as follows: "Loss or damage to units will be considered as total when the cost of repair and/or replacement exceeds 80% of the replacement cost of that unit." The Court found that it was unclear how the cost of replacement could exceed 80% of the replacement cost, and construed the "ambiguity" in favor of the Insured.

⁴ The Insured submitted a claim for amounts it paid to Price Waterhouse Coopers ("PWC"). The Plaintiffs asserted that these amounts were due under policy provisions for "claim adjustment" expenses. Defendants asserted the costs associated with PWC were not covered under the terms of the policy as these costs relate to the Plaintiffs' preparation of their claim. The Court noted that, in the insurance industry, the phrase "loss adjustment expenses" generally means the expense incurred by insurers to investigate and settle a claim. However, citing Florida law, the Court held that a qualified person can be either a public adjuster performing services for an insured, or an independent adjuster or company employee adjuster performing work for the insurers. As the Stipulated Facts established that PWC was a consulting firm, not an adjuster, and that it was retained by CSX, Plaintiffs would have had to show that PWC was a public adjuster. As Plaintiffs failed to demonstrate that PWC was a public adjuster, they were not entitled to recover its expenses related to the work performed by PWC.

⁵ With respect to one customer, the Court found that there were factual questions regarding previous payments that precluded summary judgment on the issue of whether full payment had been made.

goods or services from the Insured.

(2) this policy does not insure against any increase in loss which may be occasioned by:

(a) The suspension, lapse or cancellation of any lease, license, contract or order unless such suspension, lapse or cancellation results directly from the interruption of business:

(3) Loss, if any, shall be adjusted on the basis of:

(a) the ACTUAL LOSS SUSTAINED by the Insured, consisting of the net profit which is thereby prevented from being earned and/or all charges and expenses only to the extent that they must necessarily continue during the partial, complete, or potential suspension of business, and only to the extent to which they would have been earned had no loss occurred;

(4) Loss shall be computed:

(a) from the time of the occurrence to the time when with due diligence and dispatch the property could be repaired and restored to normal operations not to be limited by the date of expiration named in this policy;

(b) for such additional time as may be required with the exercise of due diligence and dispatch to:

iii. repair or reconstruct in full conformity with any law(s) or ordinance(s) regulating the construction, repair or demolition of real property;

(e) for such additional time as may be required to restore revenue to the same level as would have existed had no loss occurred, not to be limited by the date of expiration named in the policy.

(8) PERILS EXCLUDED

This policy does not insure:

Delay, loss of market, bankruptcy, foreclosure.

Defendants asserted that the Plaintiffs' claim was inconsistent with that provision and other provisions of the policy. The policy provided coverage for loss resulting from partial, complete, or potential suspension of business conducted by the Plaintiffs **caused by** loss to the real or personal property of others upon whom the Insured may be dependent for continued supply (or purchase) of services, including a receiver of

goods or services from the Plaintiffs. The policy further provided that the loss will consist of the net profit which is **thereby prevented from being earned** to the extent that they must necessarily continue during the partial, complete, or potential suspension of business.

Under the policy, the period of the loss will run from the time of the occurrence to the time when, with due diligence and dispatch, the property could be repaired and restored to normal operations in conformance with any law(s) or ordinance(s) regulating the construction, repair or demolition of real property **AND for such additional time as may be required to restore revenue to the same level as would have existed had no loss occurred**, not to be limited by the date of expiration named in the policy.

Plaintiffs argued that the policy language provided coverage for "lost revenue" from the individual customers whose property was damaged until such time as the individual revenue streams were restored to "the same level as would have existed had no loss occurred," regardless of the reason such individual income streams had ceased or diminished. Defendants asserted that paragraph (2) under the Time Element provision excludes any increase in loss occasioned by the suspension, lapse or cancellation of any lease, license, contract or order unless such suspension, lapse or cancellation results directly from the interruption of business. Defendants noted that the extended loss claimed by Plaintiffs resulted from post-loss business decisions by the Insured's customers to alter their businesses, and in one case, to relocate to another state.

The parties' stipulated facts noted that portions of the extended loss claimed by Plaintiffs resulted from post-loss business decisions by the Insured's customers to alter their businesses, in one case, to relocate to another state. While they followed the storm, such decisions did not result directly from the interruption of business. Instead, they involved individual business decisions based upon the needs and resources of those customers. Defendants argued that such decisions, while they followed the storm, did not result directly from the interruption of business.

In addition, Defendants argued that Plaintiffs' claim for the loss of a specific income stream from former customers was merely a claim for lost market share. Defendants noted that some of the Plaintiffs' customers had, for their own reasons, made the decision not to make repairs and resume operations as they had existed before the storm. As a consequence, the Plaintiffs had lost that share of the market for its services to other

modes of transportation. Defendants also noted that the policy specifically excluded the “peril” of delay, loss of market, bankruptcy and foreclosure. Defendants also disputed portions of the Plaintiffs’ business interruption claim that were based on damage to property owned by customers of Plaintiffs’ customers rather than CSX or its customers.

The claims at issue involved fifteen customers. In rejecting a portion of the Plaintiffs’ claims, the court found that a number of losses attributed to Plaintiffs’ customers involved damage to properties that were not owned, used, or intended for use by the Plaintiffs, were not appurtenant to the premises of the Plaintiffs, or the property of the Plaintiffs’ customers. Claims related to such properties were not covered under the Time Element provision because they do not fall under Section (7)(B)(1)(a), (d), (j), or (k).

“to the extent Plaintiffs seek to recover for the lessened demand for CSXT's services, there could be no recovery under the Time Element provision because the lessened demand does not constitute a suspension of business.”

The Court also addressed the losses attributed to damage to “covered” property, requiring a showing that the suspension of business was “caused by loss, damage, or destruction to the customer’s property due to Hurricane Katrina as required by Section (7)(B). According to the Court, “to the extent Plaintiffs seek to recover for the lessened demand for CSXT’s services, there could be no recovery under the Time Element provision because the lessened demand does not constitute a suspension of business.”

Under the Court’s ruling, losses occasioned by damage to properties that:

(1) were not owned, used, or intended for use by the Plaintiffs

(2) were not appurtenant to the premises of the Plaintiffs

(3) were not the property of the Plaintiffs’ customers

did not trigger business interruption coverage because they do not fall under Section (7)(B)(1)(a), (d), (j), or (k).

Losses that were caused in part by suspension of business for reasons other than loss, damage, or destruction to covered property due to Hurricane Katrina (such as the breach of contract and the bankruptcy of a former customer, the business decisions of customers or lessened market demand) did not trigger business interruption coverage because they do not fall under Section (7)(B).

This case underlies a number of important issues with respect to business interruption coverage. First, policy language regarding continuing business interruption coverage that fails to provide a stated time limit for such coverage can tempt an insured to make the “unlimited coverage” argument made by CSX. While the issue was resolved on the basis of causation in this case, that was only accomplished because the decisions made by customers that resulted in lost or lessened demand for the Plaintiffs’ services were fairly clear. Second, the basis for extended coverage could have been clearer. Policy language that simply stated that extended coverage was contingent upon the insured’s inability to meet prior demand might have dissuaded the open ended claim made by CSX. Lastly, more specific policy language could have discouraged the claim that the policy was intended to cover specific income streams. 