Business Interruption

# A New Profit Center in the Economic Downturn

By John V. Garaffa

**Louisiana case leaves carriers wondering how they can protect themselves from the costs of defending similar claims.**

Litigation concerning benefits for business interruption is seldom an exciting spectator sport. However, *Safeguard Storage Properties LLC v. Donahue Favret Contractors, Inc.*, an ongoing case in the civil district court in New Orleans, has the potential to put Louisiana jurisprudence at the center of the legal map. The case illustrates many of the core principles governing the interpretation and application of business interruption coverage. Depending on the outcome, the decision in the case may fundamentally change the nature of business insurance. In the short term, a decision in favor of the plaintiffs' theories of coverage could render business interruption coverage prohibitively expensive or wholly unavailable. The potential consequences for an American economy already limping through the worst downturn in a generation make this a case well worth watching.

## Business Interruption Coverage

The purpose of business interruption insurance is to compensate an insured for losses stemming from an interruption of normal business operations due to damage or destruction of property from a covered peril. 11 Couch on Ins. §167:9 (3rd Ed. 2009); *Great Northern Oil Co. v. St. Paul Fire & Marine Ins. Co.*, 227 N.W.2d 789 (Minn. 1975); *Pacific Coast Engineering Co. v. St. Paul Fire & Marine Ins. Co.*, 88 Cal. Rptr. 122 (Cal. App. 1970). Covered losses may include lost earnings that the insured would have enjoyed had business not been interrupted and additional expenses incurred during the interruption period. *Lava Trading Inc. v. Hartford Fire Ins. Co.*, 365 F. Supp. 2d 434, 446 (S.D.N.Y. 2005); *Northwestern States Portland Cement Co. v. Hartford Fire Ins. Co.*, 360 F.2d 531, 534 (8th Cir. 1966); *Continental Ins. Co. v. DNE Corp.*, 834 S.W.2d 930, 934 (Tenn. 1992). However, a business interruption insurance policy is designed only to compensate a business in an amount equivalent to that to which it actually would have earned had no interruption occurred, and no more. *Dictiomatic, Inc. v. United States Fidelity & Guaranty Company*, 958 F. Supp 594 (S.D. Fla. 1997); *Northwestern States Portland Cement Co. v. Hartford Fire Ins.*, 360 F.2d 531 (8th Cir. 1966). This type of policy is not intended "to place the insured in a better position than it would have oc-

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cupied" if the loss had not occurred. *Continental, Inc. v. DNE Corp.*, 834 S.W.2d 930, 933 (Tenn. 1992) (citing *Supermarkets Operating Co. v. Arkwright Mutual Insurance Co.*, 257 F. Supp. 273, 277 (E.D. Penn. 1966).

Under most business interruption provisions, coverage is provided "only when loss results from the suspension of operations due to damage to, or destruction of, the business property by reason of a peril insured against." *Harry's Cadillac-Pontiac-GMC Truck Co., Inc. v. Motors Ins.*, 486 S.E.2d 249 (N.C. App. 1997). "Necessary suspension," as used in the typical business loss and extra expense provision, means a *total* cessation of business activity resulting from damage to covered property by a covered peril. *Home Indemnity Co. v. Hyplains Beef*, 893 F. Supp. 987 (D. Kan. 1995); *American States Ins. Co. v. Creative Walking*, 16 F. Supp. 2d 1062 (E.D. Mo. 1998). Once business cessation is established, coverage for an insured's loss is typically limited to the income that would have been earned during the period of the interruption, or the period of restoration, and those extra expenses that nonetheless continued through that period. *Pennbarr Corp. v. INA*, 976 F.2d 145 (3d Cir. 1992).

**This type of policy** is not intended "to place the insured in a better position than it would have occupied" if the loss had not occurred.

Questions frequently arise concerning businesses or operations of businesses that were not yet operational at the time of a loss. In general, a claim for lost business income can be made where it is shown that a business or a new facility of an existing business could have been made operational and would have produced income during the period of suspension. *General Ins. Co. v. Pathfinder Petroleum Co.*, 145 F.2d 368 (9th Cir. 1944); *Fidelity-Phenix Fire Ins. Co. v. Benedict Coal Corp.*, 64 F.2d 347 (4th Cir. 1933). The measure of a loss would be the income that would have been earned during the suspension period. In the case of a new business or facility, if an insured cannot show that the new facility would have become operational within the suspension period, a claim for "lost income" under the insured's business interruption coverage will fail when considered by a court. *Great Northern Oil Co. v. St. Paul Fire & Marine Ins. Co.*, 227 N.W.2d 789 (Minn. 1975).

## The Case—*Safeguard Storage Properties*

The *Safeguard Storage Properties* litigation stems from damage due to Hurricane Katrina in September 2005 to seven self-storage facilities. Each facility was owned by a limited liability company controlled by Safeguard Storage Properties LLC. Months before the hurricane, a 91 percent share in Safeguard had been purchased for more than $400 million by Prime Property Fund, a real estate investment trust managed Morgan Stanley Real Estate Advisor, Inc. At the time of Hurricane Katrina, Morgan Stanley had secured a blanket policy providing coverage for other real and personal property that it either owned or managed.

The damaged self-storage facilities were repaired and reopened by December 2005. Following Hurricane Katrina, Safeguard's management moved its call center to one of its facilities in Chicago, and in late 2006, it moved both the call center and its corporate offices from New Orleans to Atlanta. Suit was filed by Safeguard in September 2007. Each of Safeguard's 57 limited liability companies and the parent limited liability company were named as plaintiffs.

On January 31, 2008, the plaintiffs filed a supplemental and amended petition, seeking recovery for, *inter alia*, "loss of development properties and opportunities." On April 16, 2008, the plaintiffs produced a report from an accountant who purported to calculate Safeguard's "loss" at $170,787,502. Nonetheless, all the excess insurers that provided coverage under the blanket policies issued by Morgan Stanley were also named as defendants despite the fact that the coverage provided by some excess carriers did not attach below 200 or even 400 million dollars.

In his initial report, this plaintiffs' expert asserted that Safeguard was in the business of producing, rather than managing, self-storage facilities, and Hurricane Katrina had interrupted its production, resulting in a permanent loss of 39 "units." Referencing Safeguard's internal business development plans, the accountant determined the "loss" by subtracting the number of "planned" future facilities, which was 55, from the number of facilities actually built by Safeguard after the date of loss, which was 19. He concluded that Safeguard had "missed" the opportunity to build 37 new developments.

The plaintiffs' accountant hypothesized that each self-storage facility that had not been built represented a current "loss." Based on the current value of one existing facility, he calculated the value of the income that each future facility would have realized over its projected 39-year useful life as $4,262,894. The $170,787,502 claim in dispute represented the "present value" multiplied by 37 "missed opportunities," plus a claim for judicial interest. In a later report, in February 9, 2009, the accountant estimated that the present value of the lost of income from the facilities that had not been built was between $205,974,215 and $379,489,741.

## Business Interruption

The blanket policy issued to Morgan Stanley limited coverage for business interruption as follows:

B. Business Interruption

(1) Loss resulting from necessary interruption of business conducted by the Insured, caused by direct loss, damage, or destruction by any of the perils covered herein during the term of this policy to real or personal property as described in Clause 7.A. and subject to the Company's acceptance of coverage for that Damage.

(2) If such loss occurs during the term of this policy, it shall be adjusted on the basis of ACTUAL LOSS SUSTAINED by the Insured directly resulting from such interruption of business, consisting of the net profit which is thereby prevented from being earned and all charges and expenses only to the extent that these must necessarily continue during the

interruption of business and only to the extent to which such charges and expenses would have been earned had no loss occurred.

The blanket policy provided coverage for losses that resulted directly from the interruption of the insureds' business. As noted above, both state and federal courts addressing this limitation have held that, absent some extension within a policy, coverage is limited to losses sustained within the period in which the insureds experienced a total cessation of business. All the damaged New Orleans stores involved in *Safeguard Storage Properties* had reopened and exceeded their pre-Katrina occupancy rates by November 3, 2005. The plaintiffs' leased corporate offices were open and operating in their original location by November 22, 2005, terminating the period of actual business interruption.

Safeguard's assertion that it suffered years of business interruption, which served as the basis for its insurance claim, ignored the majority of decisions interpreting the boundaries of business interruption coverage. In *Broad Street, LLC v. Gulf Ins. Co.*, 37 A.D.3d 126 (N.Y. App. Div. 2006), the insured, an owner of an apartment building, had temporarily closed the building in aftermath of the terrorist attacks of September 11 and filed suit to obtain additional coverage for business interruption beyond an one-week period during which tenants had been barred from their apartments. The appellate court held that the insured's business interruption period was restricted to the period between the September 11 attack and September 18, when tenants were again allowed to reside in their apartments, and the insured could claim a business interruption loss only for that period.

The plaintiff in *Broad Street* contended that the insurer's policy should have covered the "'period of restoration,' which extended well beyond the one-week period its tenants were barred from their apartments." *Id.* at 134. The court disagreed. It found that the restoration period was linked to the requirement that there be a "necessary suspension of your operations," and thus "was only as long as necessary for plaintiff to resume operations." *Id.* (citing *Admiral Indem. Co. v. Bouley Intl. Holding, LLC*, 2003 WL 22682273, 2003 U.S. Dist. LEXIS 20324 (S.D.N.Y. 2003); *Streamline Capital, L.L.C. v. Hartford Cas. Ins. Co.*, 2003 WL 22004888 (S.D.N.Y. 2003); *accord Duane Reade, Inc. v. St. Paul Fire & Marine Ins. Co.*, 411 F.3d 384, 395–396 (2d Cir. 2005)).

Despite Safeguard's assertions in the lawsuit, the accountant's report showed that, following the loss, Safeguard continued to build new facilities on the property of other plaintiffs in August of 2005, albeit at a slower rate than planned. Under the plain language of the blanket policy, as interpreted by state and federal courts, any "interruption" in the development of Safeguard's business ended when the parent corporation resumed building new facilities in 2006.

## Period of Recovery

Safeguard attributed management's failure to meet its investor's expectations regarding new developments from 2006 through 2009 to Hurricane Katrina. However, the blanket policy issued to Morgan Stanley only provided coverage for the net profit that an insured could not have earned during a "period of recovery."

B. Provisions Applicable to Business Interruption, Extra Expense, and Rental Value
  (1) Period of Recovery: The length of time for which loss may be claimed:
    (a) shall not exceed such length of time as would be required with the exercise of due diligence and dispatch to rebuild, repair, or replace such part of the property as had been destroyed or damaged;
    (b) and, such additional length of time to restore the Insureds business to the condition that would have existed had no loss occurred, commencing with the later of the following dates:
      i. the date on which the liability of the Insurer for loss or damage would otherwise terminate; or
      ii. the date on which repair, replacement, or rebuilding of such part of the property as has been damaged is actually completed;

    but in no event for more than one year thereafter from said later commencement date;
      iii. with respect to alterations, additions, and property while in the course of construction, erection, installation, or assembly, shall be determined as provided in (a) above, but such determined length of time shall be applied to the experience of the business after the business has reached its planned level of production or level of business operation;
      iv. and shall commence with the date of such loss or damage and shall not be limited by the date of expiration of this policy.

To summarize, the period of recovery for business interruption losses under the blanket policy at issue is (1) the time needed, with due diligence and dispatch, to repair $3.6 million in covered property damage that the plaintiffs asserted was suffered in their Louisiana facilities and (2) a separate additional period of no more than one year starting on the later of two dates—either the date on which those covered repairs were completed, or when liability of the insurer for loss or damage would have otherwise terminated. As noted in the policy language, the insurer's liability for loss or damage sustained by the insured during the initial period of business interruption "will not exceed such length of time as would be required with the exercise of due diligence and dispatch to rebuild, repair, or replace such part of the property as had been destroyed or damaged." The applicable period of recovery expires once recovery-related activities have been completed.

In its lawsuit, Safeguard asserted in a four-year period of recovery—2005 through

mid-2009—and that all repairs to damaged property had still not been completed. Further, Safeguard asserted that the second period of recovery terminated with the end of the statutory period of limitations for actions against the insured for breach of contract and that it began on the date of loss. Safeguard argued that this period of recovery did not limit its claim for 39 years of lost income because the "business opportunities" were "lost" in the year in which the new facilities should have been built; therefore, all Safeguard's prospective income was actually "lost" in the year in which it "lost" the income opportunities.

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### Applying the Period of Recovery

Safeguard's calculation of its recovery period and that it was entitled to the present value of 39 years of income was not consistent with the way that courts have applied the period of recovery provisions in policies in other cases. As noted by one court that considered a business interruption claim presented by a bowling alley,

> Recovery must be restricted to the loss of income that would have been earned during the reconstruction period, even though there may have been a substantial additional, but uninsured, loss consisting of reduction in income subsequent to the date of full restoration. It is common knowledge that a business interruption for any extended period may, and often does, result in loss of customers, some for a short period, some for longer periods and some permanently. A "cut off" date is a necessity. Otherwise, claims would be opened to a degree of speculation which would be absurd. There would be no available method to determine with any degree of accuracy the amount of such losses.

*Rogers v. American Ins. Co.*, 338 F.2d 240, 243 (8th Cir. 1964); *see also Midland Broadcasters, Inc. v. Insurance Co. of North Am.*, 636 F. Supp. 165 (D. Kan. 1986) (quoting *Rogers*); *Pennbarr Corp. v. Insurance Co. of North Am.*, 976 F.2d 145, 155 (3d Cir. 1992) ("This type of policy is not designed to compensate for losses sustained beyond the period of restoration.").

### Exclusion for Indirect and Remote Losses

Safeguard asserted that if it had not been for the damage to the insured's property caused by Hurricane Katrina, management would have been able to focus its day-to-day attention on the developments that it had promised to its investors. Safeguard's claim contradicts the policy exclusion for indirect or remote loss issued to Morgan Stanley. The policy exclusion provides as follows:

> 9. Perils Excluded
> This policy does not insure:
> N. Against Indirect/remote loss

### Cases Applying Indirect and Remote Loss Exclusions

State and federal courts addressing similar indirect and remote loss exclusions have rejected attempts to recover indirect losses such as those that the plaintiffs have attempted to recover in the *Safeguard Storage Properties* case. In *Dictiomatic, Inc. v. U.S. Fidelity & Guar. Co.*, 958 F. Supp. 594 (S.D. Fla. 1997), the insured submitted a claim to its insurer for "lost income," asserting that the "loss of income" was associated with failing to produce and sell products—products that were not in existence at the time of the hurricane. In resolving the dispute between the insured and the insurer, the court noted that the "loss of income" was merely a potential, consequential loss and was not, even if proved by a preponderance of the evidence, compensable under the insurance contract. The court held that the insurance contract did not pay for and specifically excluded loss or damage caused by, or resulting from, consequential loss, delay, loss of use, or loss of market.

In *Parmet Homes, Inc. v. Republic Ins. Co.*, 314 N.W.2d 453 (Mich. Ct. App. 1981), the court addressed a dispute over a claim for lost profits due to a failed potential commercial relationship that the insured asserted was frustrated when the insurer refused to pay for a fire loss. In rejecting the insured's contention that the policy covered the claim, the court noted, "It is always true that nonpayment of insurance benefits will result in reduction of capital. However, it is also true that indemnity insurers do not contend to underwrite the claimant's future financial transactions by agreeing to pay an established amount for fire losses. In cases where loss of profits has been awarded, the loss resulted directly from the nonperformance of the contract between the parties, not from the failure of another venture unknown to the defendant." *Parmet Homes, Inc.*, at 457.

In *United Airlines, Inc. v. Insurance Co. of State of Pa.*, 385 F. Supp. 2d 343 (S.D.N.Y. 2005), the court addressed a dispute about a claim that was remarkably similar to Safeguard's claim. In *United Airlines, Inc.*, the insured suffered physical damage when one of its ticket offices was destroyed in a terrorist attack, and ash from fire caused by a second attack accumulated at insured's airport gate. The airline submitted a claim to its insurer for systemwide business interruption under its insurance policy. The airline asserted that it lost $1.2 billion in revenue due to the nationwide aviation shutdown in wake of the attacks. In rejecting the insured's argument, the court cited *Nat'l Union Fire Ins. Co. of Pittsburgh v. Am. Re-Ins. Co.*, 351 F. Supp. 2d 201, 210 (S.D.N.Y. 2005), for the principle that a court "must take the opportunity to prevent an absurd and unreasonable result—one that was never clearly intended by the parties."

### Undue Speculation

Insureds must prove with reasonable certainty that they lost profits, and courts usually will not allow insureds to recover lost profits based on pure conjecture. *Borden, Inc. v. Howard Trucking Co., Inc.*, 454 So. 2d 1081 (La. 1983) (citing *Koncinsky v. Smith*, 390 So. 2d 1377 (La. Ct. App. 1980) and *A.E. Landvoigt, Inc. v. Louisiana State Employees' Retirement System*, 337 So. 2d 881 (La. Ct. App.1976 ), *writs denied*, 339 So. 2d 852 (La. 1976)). In *Tidwell v. Meyer Bros.*, 160

La. 778 (La. 1926), the Supreme Court of Louisiana addressed a lawsuit in which, among others, tenants had sought damages for profit loss. The tenants sued their landlord when the building that the tenants leased was condemned, and the landlord failed to replace it. The tenants moved their business but alleged that they suffered profit loss because they lost a favorable location for their business and the extra floor space that the leased building would have afforded.

In rejecting the plaintiffs' argument that they were entitled to lost profits as an element of damages, the court held that the sued-for profits were "contingent and uncertain, and not susceptible of proof with reasonable certainty." *Id.* at 789. The court noted, "Whether plaintiffs would have succeeded better at the new stand than at the old, or the one which they later selected, and, if so, to what extent, are purely matters of conjecture. It is clear to us, therefore, that the profits sued for in this instance are too uncertain and conjectural to be susceptible of proof with reasonable certainty." *Id. See also Mabry v. Midland Valley Lumber Co.*, 217 La. 877, 47 So. 2d 673 (La. 1950) ("The general rule is that in cases where damages are claimed for having been deprived of profits, the contemplated profit must be proved to be certain and not merely conjectural or speculative.").

In *Dictiomatic, Inc. v. U.S. Fidelity & Guar. Co.*, 958 F. Supp. 594 (S.D. Fla. 1997), the court addressed a claim for loss of future profits in the context of business interruption insurance coverage. The insured, a developer of hand-held electronic translators, sued its insurer for breach of contract over the insured's rejected claim for business interruption coverage following a hurricane that forced the insured to close its Florida office for three weeks. The alleged losses were associated with the insured's failure to produce and sell the new version of a translator and a palmtop computer, products that did not exist when the hurricane struck. In rejecting the insured's argument that it was entitled to coverage for lost profits, the court found the alleged losses "are merely potential consequential losses and are not, even if proved by a preponderance of the evidence, compensable under the subject insurance contract." *Id.* at 605. The court further found that because the insured's business interruption insurance claim was speculative, it could not recover business interruption proceeds under the insurance policy. *Id.* (citing *Travelers Ins. Co. v. D & D Contracting*, 962 F.2d 971 (10th Cir. 1992); *Hampton Foods, Inc. v. Aetna Casualty & Surety Co.*, 601 F. Supp. 58 (E.D. Mo. 1984); *Fold-Pak Corp. v. Liberty Mut. Ins. Co.*, 784 F. Supp. 49 (W.D.N.Y. 1992).

## Disregard of Factors Affecting Income

As noted above, Safeguard's accountant projected an identical, uniform income stream over a 39-year period for each of the facilities that the plaintiffs might have built in the future. The accountant estimated that the present value of each of these identical future income streams was $4,262,894. The report, however, contained no indication that the accountant considered any of the many factors that could have impacted the income that each facility might have earned over each of the 39 years that the estimate covered. When deposed, the accountant admitted that he had made no attempt to consider these factors.

The report did not identify or consider any of the locations where the nascent facilities might have been built. The location of each store would dictate the initial cost of land, construction costs, and property taxes. It would also determine local governmental regulations, which would further impact construction and operation of these facilities, the market conditions that would drive even short-term revenue projections, and the local and regional demographics that would drive future consumer practices and market conditions, all of which would vary by location.

Safeguard's corporate representative conceded during the trial that the rental rate for the plaintiffs' respective self-storage facilities was highly volatile and had the potential to change from day-to-day, based on local market conditions. He further underscored the importance of the local market to each store, testifying that "Well, our business is a very local business, meaning that most of our tenants come within a very short distance from our storage facilities. Most of our tenants are within one to one and a half miles of our storage facility." Nonetheless, the accountant's report ignored the actual business experience described by the plaintiffs' corporate representative, instead predicting identical income for each store that might have been built without considering its prospective location.

The claim that Safeguard submitted was also unduly speculative because it purported to predict a certain 39-year income stream for a business that actually had experience that spanned a fraction of that time. The testimony of the plaintiffs' corporate representative established that the plaintiffs' parent company was approximately 15 years old. Many, if not all, of its subsidiary companies and their respective stores were significantly younger than that. At least another quarter century must pass before we will have any objective data from which to judge the accountant's guesses concerning the prospective life span of the oldest facilities and their income capabilities in later years.

**Courts addressing similar indirect and remote loss exclusions have rejected attempts to recover indirect losses.**

The basic assumption underpinning Safeguard's loss estimate is that all stores will earn identical income throughout their useful lives, regardless of when and where they are built. The experience of the plaintiffs, however, establishes, without dispute, that this basic assumption is false. To reach a decision on the plaintiffs' estimate would require the trier of fact to guess how each plaintiff's initial experience might influence the potential, future income of facilities that other subsidiaries would own at disparate unknown locations and that had not yet been built. The trier of fact would have to project market conditions and consumer preferences at each location over a period of 39 years based solely on guesswork. These guesses would have to encompass a period almost three times the actual experience of the oldest plaintiff.

### The Trial Court Ruling

On December 23, 2009, after more than two years of litigation, the trial court granted the defendant's motions for summary judgment, finding that Safeguard's business opportunity loss claim was much too speculative as a matter of law and did not fall within the business interruption provisions of the policy.

**Insureds must prove** with reasonable certainty that they lost profits.

In finding that the claim for projected lost income was unduly speculative, the court wrote that it "could not find a single case to support, even conceptually, plaintiff's novel claim: that it was going to develop 37 entities that would have operated successfully over 39 years, and therefore, the Court should compress all future income attributable to these entities into the year the business development opportunity was supposedly lost." The court noted that Safeguard would have to address a myriad of conditions before even beginning construction on any of the prospective storage facilities. The court also noted that all the projected sites had not been identified.

To support its decision, the court cited the decisions in *Walsh v. City Mortgage Services Inc.*, 102 B.R. 502, 508–09 (M.D. La. 1989), and *Target Market Publishing Co. Inc. v. ADVO Inc.*, 136 F.3d 1139, 1144–66 (7th Cir. 1998). In *Walsh*, the Middle District of Louisiana rejected a projection based on a document submitted for financing before a condominium was built, concluding that the projection was clearly "a piece of puff" or best-case scenario submitted with the loan application and was intended to convince the prospective lender to make the loan commitment. According to the court in *Walsh*, such a projection "amounts to nothing more than plaintiff's own estimate of lost profits and it thus is clearly inadmissible as evidence to establish the amount of lost profits." In *Target*, the plaintiff's expert based his projection on marketing plans, which, according to the court, were predicated on "certain assumptions that had not yet, and might never, come to pass." The trial court in *Safeguard Storage Properties* advised that he found the plaintiffs' arguments innovative and creative and noted that "Plaintiffs counsel was passionate about his viewpoint albeit not persuasive."

In deciding that the policy's business interruption provision did not provide coverage for the asserted loss, the *Safeguard Storage Properties* trial court found "that claiming damages for 37 non-existing, non-identified storage facilities across the country which were going to continuously operate successfully earning imagined, projected profits for 39 unelapsed, future years constitutes speculation not actual loss sustained." The court then advised that the period of recovery clause in the blanket policy was clear and unambiguous. Consistent with the interpretation provided by the insurers, the trial judge found that

> the Initial Period begins at the time of loss and ends when the damaged insured properties could have been repaired, replaced, or rebuilt if done with diligence and dispatch, or when the business reopens. Obviously, the Initial Period is meant to protect the insured from its loss income while it repairs its damaged property. Similarly, the Extended Period begins when the damaged properties are actually repaired (or when the insurers' liability for repairs would otherwise end) and ends when the business returns to pre-loss conditions, but in all events no more than one year in total. Plainly, this Extended Period protects the insured for a limited period of time after it restores its damaged property and needs to bring its business back up to pre-loss conditions.

The trial court noted that Safeguard's contention was that it was covered by both the initial period provision and the extended period provision simultaneously until it actually repaired or replaced its damaged property. Thereafter, Safeguard contended that it continued to be covered under the extended period provision until the applicable prescriptive period expired, which Safeguard argued was 10 years after the loss, or August 29, 2015, and for an additional year after that, through August 29, 2016. The trial court found "Safeguard's view to be a strained interpretation of the policies," inconsistent with the "clear and unambiguous" language of the policies. Following the trial court's ruling, Safeguard filed a motion to certify the trial court's judgment for immediate and expedited appeal. The Louisiana intermediate appellate court has not yet indicated whether it will hear the appeal.

### Conclusion

Safeguard asserted that it was entitled to the present value of 39 years of prospective income—revenue that Safeguard would have earned from facilities that it planned to build, that might have been owned by businesses that were never formed, based on projections that Safeguard made to a prospective investor. Safeguard never asserted that it even owned the locations where it anticipated building the planned facilities. Nor did it assert that any of these undeveloped locations were damaged or disrupted by Hurricane Katrina. The only connection drawn between the "loss" and the hurricane was damage to a small number of Safeguard's existing facilities and minor damage to its leased headquarters, which diverted the attention of management.

The insurers may have had faith that the conflict between the claim and the policy language, as well as the speculative nature of the indirect loss, would mean a quick dismissal. They may also have believed that the period of recovery provision in the policy would bring easy resolution of a claim for 39 years of future income from businesses that had never left the planning stage. Instead, it took two years and millions of dollars in combined defense costs to reach a summary judgment. Thankfully, the trial court found the claims barred by the plain language of the policy. But insurance carriers have been left wondering how they can protect themselves from the costs of defending such claims.

As for the *Safeguard* case, the insurance carriers still face the appellate court. Ultimately, should the appellate court rule in favor of Safeguard on any part of the suit concerning lost business opportunities, the decision would fundamentally change the scope of this type of coverage as it has been understood up to this time. This is a case that bears watching. FTD