37-FALL Brief 32

Brief
Fall, 2007

TIME ELEMENT COVERAGES IN BUSINESS INTERRUPTION INSURANCE

Clark Schirle [a1]

Generally, business interruption insurance is designed to compensate an insured for its actual business interruption losses resulting directly from physical damage by a peril insured against to the insured's covered property. [1] Business interruption insurance is tied directly to a first-party property policy's coverage for physical damage to the insured's property. It is not stand-alone coverage and its purpose is not to compensate the insured for any and all negative effects on its business that may result from a covered peril.

Time element coverages consist of business interruption coverage as well as extensions of that coverage that may or may not be in a policy. Extensions of coverage may include contingent business interruption coverage, coverage for civil authority or ingress/egress, or coverage for extra expenses, expediting expenses, or expenses to reduce the loss.

This article will first discuss business interruption coverage elements. It will then address certain elements and coverages in light of recent case law. [2]

Elements of Business Interruption Coverage

Business interruption clauses may be contained in the body of the policy or added by an endorsement. Typically, business interruption clauses have titles like “Actual Loss,” “Business Interruption,” “Business Income,” “Gross Earnings,” “Time Element Gross Earnings,” or something similar. A business interruption clause, may, for example, contain the following type of language:
This policy insures against loss resulting directly from the necessary interruption of business caused by physical damage to real or personal property insured under this policy, by perils insured against, during the term of this policy.

Recovery in the event of loss hereunder shall be the ACTUAL LOSS SUSTAINED by the insured resulting directly from such interruption of business, but not exceeding the reduction in gross earnings less charges and expenses which do not necessarily continue during the interruption of business, for only such length of time as would be required with the exercise of due diligence and dispatch to rebuild, repair or replace such described property as had been damaged, commencing with the date of such damage and not limited by the date of expiration of this policy. [3]

As this clause illustrates, there are certain fundamental principles of business interruption coverage: (1) there must be physical damage caused by a peril insured against to covered property; (2) there must be an actual and necessary interruption of the insured's business caused by the physical damage to the covered property; (3) the insured must suffer an actual loss resulting directly from the covered interruption of business; and (4) the insured is only entitled to recover its actual loss sustained during a certain period of time, often referred to as the due diligence and dispatch period, period of indemnity, or period of restoration. [4] Case law illustrates these fundamental principles.

Physical damage by an insured peril to covered property. Under the first element, if there is no physical damage to covered property, there is no coverage under the business interruption clause. [5] Further, if there is physical damage to one property that ultimately results in a loss of earnings to another business that did not suffer physical damage, the loss is not covered under the business interruption clause. For example, in *Howard Stores Corp. v. Foremost Insurance Co.*, [6] after water damage to a ***34** retail clothing store, a company diverted inventory meant for two other stores to the store that was damaged, thus impacting sales at the two stores that were not damaged; the loss of projected sales at the two stores was not covered: "A business judgment was made to divert the merchandise intended for these stores. Plainly the policy in suit was not intended to include business interruption, if any, to these other stores where no physical damage occurred."

Complete cessation of operations. Under the second element, courts overwhelmingly require a complete cessation of operations to trigger business interruption coverage. [7] "Interruption of business" means "cessation or suspension of business" and does not include slowdowns. [8] Nor does a decrease in income satisfy the interruption requirement. See *Royal Indemnity Insurance Co. v. Mikob Properties, Inc.*, [9] where fire destroyed one building in an apartment complex, but reduction in occupancy and resulting loss of rental income were not covered because the other buildings did not experience an actual suspension of operations.

Further, if there is direct physical damage to property but the loss of earnings is caused by another factor (and not the property damage), the loss is not covered under the business interruption clause. See *Harry's Cadillac-Pontiac-GMC Truck Co., Inc. v. Motors Insurance Co.*, [10] in which lost profits due to inaccessibility to a car dealership were not covered where the loss was not caused by direct physical damage to the dealership but rather by the inability to gain access to it during a storm.

Actual loss sustained. Under the third element, if there is direct physical damage to property and a loss of production without a loss of earnings (no actual loss sustained), there is no recoverable business interruption. See *Lyon Metal Products, Inc. v. Protection Mutual Insurance Co.*: [11] "In numerous cases it has been stated, and we think correctly, that when there is a loss of production capacity without a loss of earnings there is no recoverable business interruption except the extra expense necessary to prevent loss of earnings." See also *Fold-Pak Corp. v. Liberty Mutual Fire Insurance Co.*, [12] in which an insured failed to show a loss of income after a fire in a facility that made food pails for Chinese restaurants, because after the fire the insured used a more expensive and less efficient process to make pails and was able to produce a sufficient quantity to meet customer demand.

Actual loss for defined period. Under the fourth element, the insured is entitled to recover its actual loss sustained for only a certain period of time. In the example above, the period is "for only such length of time as would be required with the exercise of due diligence and dispatch to rebuild, repair or replace such described property as had been damaged, commencing with the date of such damage and not limited by the date of expiration of this policy." This period is sometimes referred to as the due diligence and dispatch period, the period of indemnity, or the period of restoration. Courts have analyzed the concept of the period of indemnity or restoration in great detail over the last few years, particularly in the context of the September 11 tragedy. [13]

Advanced Coverage Issues in Light of Recent Case Law

Actual loss sustained. Business interruption insurance covers the insured's actual loss sustained. Recent cases have analyzed whether an insured has sustained an actual loss, particularly in the context of postloss recoveries or "makeup" sales.

In *Baxter International Inc. v. American Guarantee and Liability Insurance Co.*, [14] Baxter sought coverage for its property and business interruption losses when its Puerto Rican facilities were damaged by Hurricane George. The insurer paid Baxter for its property damage portion of the claim, including losses to its damaged finished goods inventory at an amount Baxter would have received had it been able to sell the inventory. The amount paid for Baxter's inventory was $30.7 million, about $15 million of which accounted for lost profit.

Baxter did not claim business interruption losses resulting from the damaged inventory. Baxter did, however, claim it suffered business interruption losses from damage to other property and sought recovery from the insurer. The insurer contended that the profit component of the damaged inventory payment must be considered in calculating Baxter's actual loss sustained during the period of interruption, i.e., the profit Baxter realized from the "sale" of its damaged inventory to the insurer decreased Baxter's total actual loss.

The Illinois Appellate Court, reversing the trial court's decision to the contrary, held that the insurer's indemnification payment for the damaged inventory was a "sale" and can be considered in calculating the lost profit or the "reduction in gross ***35** earnings" under the policy. The court, relying on *Lyon Metal Products L.L.C. v. Protection Mutual Insurance Co.*,[15] and *Northwestern States Portland Cement Co. v. Hartford Fire Insurance Co.*,[16] stated an insured cannot recover for lost profit due to a business interruption where there has been no actual loss. Further, "[a]n actual loss occurs only where the insured is unable to reduce or eliminate lost profit caused by the interruption." In this case, Baxter was, in fact, able to reduce its lost profits by selling its damaged inventory to the insurer. The court was not persuaded by Baxter's argument that it was not seeking lost profits based on its inability to sell the damaged inventory but, rather, lost profits resulting from damage to other property.[17]

In *Finger Furniture Co., Inc. v. Commonwealth Insurance Co.*,[18] the insured, which operated furniture stores, was unable to get access to its store that housed the company's central computer system due to heavy rains and flooding from a tropical storm on June 8 and 9, 2001. Accordingly, the insured could not operate any of its stores on Saturday, June 9, and made no sales on that day. All of the insured's stores opened at various times on Sunday, June 10. The following weekend, however, the insured's sales soared as it slashed its prices and customers purchased furniture at heavy discounts.

The insured filed a claim for sales lost on June 9-10, 2001, and a suit commenced. The insured and insurer stipulated that the insured's gross earnings loss for June 9-10 was $325,402.86. The insurer argued, however, that the insured did not sustain an actual loss because the insured made up the sales that it lost on June 9-10 with the sales on the following weekend.

Both the trial court and appellate court rejected the insurer's arguments. In particular, the court of appeals stated that the policy language indicates that the business interruption loss will be based on historical sales figures, and that the strongest and most reliable evidence of what a business would have done had the event not occurred is what it had been doing in the period just before the interruption.[19] The court of appeals discounted the insurer's contention that it was not taking into account the insured's profits from the following weekend: "The business-loss provision says nothing about taking into account actual post-damage sales to determine what the insured would have experienced had the storm not occurred. The contract language does not suggest that the insurer can look prospectively to what occurred after the loss to determine whether its insured incurred a business-interruption loss."[20]

Cases besides *Finger Furniture* have addressed the concept that an insured's actual loss was eliminated or reduced through "makeup" sales. For example, in *Admiral Indemnity Co. v. Bouley International Holding, LLC*,[21] the insureds owned two restaurants in downtown Manhattan that were forced to close for a certain period of time following the events of September 11. One restaurant reopened on September 28, 2001. In early October 2001, one of the insureds entered into a contract with the Red Cross to feed workers and ultimately earned over $5.8 million. The other restaurant reopened on February 9, 2002. The insureds submitted a claim for business interruption and extra expenses in excess of $2.2 million for the two restaurants. Among other things, the insurer contended no actual loss of income was incurred beyond a certain date because the loss of business income was "dwarfed" by the amount the insureds received from the Red Cross.[22] The court agreed with the insurer, holding that the insureds did not incur an actual loss of business income from the point the Red Cross contract went into effect on October 1, 2001, because the money received from the contract was well in excess of the claimed business income loss.[23]

In *Fireman's Fund Insurance Co. v. Holland America Line—Westours, Inc.*,[24] a cruise line lost revenue when it was unable to book reservations during a power outage caused by a storm. The cruise line was not entitled to recover the full amount of its loss and expenses incurred during the outage; when makeup reservations were taken into account, the insured's actual loss was significantly less.

Physical damage caused by an insured peril to covered property. Physical damage caused by an insured peril to covered property is required to trigger business interruption coverage. Courts have recently addressed components of this element.

***36** First, courts have addressed the physical damage requirement, usually examining whether there was physical loss or damage under the facts of a particular case. For example, in *Source Food Technology, Inc. v. United States Fidelity and Guaranty Co.*,[25] the insured sought business interruption coverage when its beef products were prohibited from entering the United States due to a USDA embargo imposed after a cow in Canada was found to have "mad cow" disease. The insured's beef products were not physically contaminated or damaged. The insured sought coverage for its business income losses resulting from the embargo. The policy required "direct physical loss" to property. The insured argued that the closing of the border caused direct physical loss to its beef products, as the beef products were treated as though they were physically contaminated by mad cow disease.[26] The court rejected the insured's argument and held that the insured could not recover because it did not suffer any direct physical loss to its property.[27]

The court in *Southeast Mental Health Center, Inc. v. Pacific Insurance Co., Ltd.*,[28] finding the court's reasoning in *American Guarantee & Liability Insurance Co. v. Ingram Micro, Inc.*,[29] to be persuasive, held that corruption of a pharmacy computer as a result of a storm and power outage constituted direct physical loss of or damage to property as required under business interruption coverage. In *United Airlines, Inc. v. Insurance Co. of the State of Pennsylvania*,[30] the court, examining the policy as a whole, held that "physical" damage is required under the business interruption clause, even though the insuring agreement used only the word "damage" without any adjective. The court rejected the insured's argument that the word "damage" was intended to include economic as well as physical damage.

Second, one recent case has examined the requirement that, to trigger business interruption coverage, the physical damage has to result from a covered peril. In *National Union Fire Insurance Co. of Pittsburgh, Pennsylvania v. Texpak Group, N.V.*,[31] an insured discovered serious defects in the design and installation of an upgrade to one end of its facility soon after the project was completed. After months of attempting to resolve the deficiencies, the insured shut down the plant.

The insured did not seek to recover the costs to repair or replace the upgrade, conceding those costs were not covered because of the design defect exclusion in the policy. The insured did, however, seek to recover its business interruption and extra expenses from the plant shutdown. The insured contended it was entitled to recover its economic loss based on the language in the design defect exclusion that the exclusion shall not apply to loss or damage resulting from such defective design or specifications.

The court of appeals rejected the insured's arguments and held there was no coverage for business interruption or extra expenses. The court stated that "[t]ypically, business interruption and related coverage in a property insurance policy limits protection to interruption of business 'which is caused by property loss or damage which was itself produced by a peril covered in the property protection provisions.'"[32] The court stated that in the insured's policy, business interruption and extra expense losses are covered only if "resulting from" damage or destruction of real or personal property caused by a covered peril.[33] "Since defective design or specifications are not perils covered by this policy, economic damage or loss resulting from these causes are excluded from coverage as well."[34] The court also held that the resulting loss exception to the design defect exclusion was not applicable because the business interruption and extra expense for which the insured was seeking recovery were directly related to the design defect and thus directly stemmed from the excluded risk.[35]

Complete cessation. Business interruption clauses require that the loss result from the necessary interruption or suspension of the business or operations. Courts historically have overwhelmingly required a complete cessation of operations to trigger business interruption coverage. Courts that have recently considered this element have confirmed this principle.

In *Broad Street, LLC v. Gulf Insurance Co.*,[36] the insured owned and operated a building three blocks from the World Trade Center that contained 345 residential units and three commercial spaces. After the events of September 11, 2001, the building was completely shut down until September 18, 2001, the date when tenants were permitted back into their units. The insured ***37** sought business interruption coverage for the period after September 17, 2001, contending its business interruption losses were ongoing after that date. The insured stated that while some tenants had returned, others had not. The insured stated that the building sustained smoke and soot damage; utilities, including phone and cable, to the building continued to be interrupted; and there were ongoing transportation limitations, street closures, and limited deliveries, as well as public health warnings relating to the air quality. The insured stated that all of these conditions were disruptive to its existing tenancy and affected its ability to rent vacant apartments and retail space. The insured argued it had not resumed normal operations after September 17, 2001, and that the meaning of the term "necessary suspension" should be interpreted to mean the suspension of "normal business activities." The court disagreed. Relying on a number of cases, the court held that the phrase "necessary suspension" requires a complete interruption or cessation of operations, and that the insured's business interruption loss was restricted to the period between September 11 and September 18, when tenants were again allowed to reside in their apartments.

In *Forestview the Beautiful Inc. v. All Nation Insurance Co.*,[37] the insured owned a resort with 20 cabins and a lodge. On July 4, a severe storm damaged four cabins and, because they were unrentable, they were closed for the remainder of the summer. The insured continued to rent the other cabins and operate the resort despite the storm damage. The insured argued that under the policy, which required a "necessary suspension of operations," it was entitled to business interruption coverage resulting from the closure of the four cabins. The court disagreed, holding that the partial suspension of operations, the closure of the four cabins, did not trigger coverage. "The plain and ordinary meaning of 'suspension' requires a complete cessation and does not support coverage when only a partial suspension occurs."[38]

Contingent business interruption. Generally, contingent business interruption clauses cover the interruption of the insured's business or operations caused by physical damage from an insured peril to property of another business upon which the insured directly depends, such as the premises of a large supplier. See *CII Carbon, L.L.C. v. National Union Fire Insurance Co. of Louisiana, Inc.*:[39] "Contingent business interruption insurance protects against the loss of prospective earnings because of the interruption of the insured's business caused by an insured peril to property that the insured does not own, operate or control."[40] Courts over the last few years have had the occasion to consider contingent business interruption issues. Courts in the near future will certainly have more opportunities to consider this type of coverage in the context of hurricane claims.

The case of *CII Carbon* provides a good illustration of the difference between business interruption coverage and contingent business interruption coverage. CII Carbon, the insured, owned a coke plant that processed coke it sold to customers. CII Carbon captured the heat generated during the process and used that heat to operate a boiler to generate steam. Kaiser owned and operated a Bayer plant and a powerhouse, both of which were in the same location as the CII Carbon coke plant. CII Carbon sold the steam it generated to Kaiser for use in the Bayer plant. CII Carbon subleased equipment at the Kaiser powerhouse that was necessary for CII Carbon to operate its steam-generating boiler. The CII Carbon boiler was located on the grounds of the coke plant; however, the boiler could not operate unless the subleased equipment at the powerhouse supplied water to the boiler and accepted the generated steam.

In July 1999, a massive explosion at the Kaiser Bayer plant caused major damage, including some damage to the powerhouse equipment that was subleased to CII Carbon. The powerhouse equipment that CII Carbon subleased was repaired by November 15, 1999. However, the Bayer plant did not resume operations until December 31, 2000, and CII Carbon was unable to sell steam to Kaiser until that time.

The insurer paid CII Carbon for its loss of steam sales from the time of the explosion through November 1999 (when the subleased equipment was repaired) under the business interruption clause of the policy. The insurer, however, took the position that CII Carbon's loss of steam sales for the period November 1999 through December 2000 was covered solely by the contingent business interruption clause of the policy. The insured contended that the loss of steam sales for the period November 1999 through December 2000 should be covered under both the business interruption clause and the contingent business interruption clause. The contingent business interruption coverage had a limit of $500,000. The business interruption coverage provided a greater amount of insurance.

The trial court held that CII Carbon sustained (a) a business interruption loss from the date of the explosion until November 15, 1999, when the repairs to the subleased equipment were completed and the equipment could have been operational; and (b) a contingent business interruption loss after November 15, 1999, until December 31, 2000, when the Kaiser Bayer plant resumed its normal operations, subject to the $500,000 limit.

***38** The Louisiana Court of Appeals affirmed. The court, analyzing the policy language and facts, determined that coverage under the business interruption clause terminated at the time repairs to the subleased powerhouse equipment were completed. Coverage after that time for loss of steam sales was governed by the contingent business interruption coverage. As the court explained:

> The loss suffered by CII Carbon after the subleased powerhouse equipment was repaired is exactly the type of loss that contingent business interruption insurance is designed to cover. Damage to the subleased powerhouse equipment was not responsible for CII Carbon's losses after the equipment was repaired as of November 15, 1999. Instead, the damage to the Kaiser Bayer plant, which was neither owned nor operated by CII Carbon, was responsible for the losses suffered by CII Carbon thereafter. [41]

Pentair, Inc. v. American Guarantee and Liability Insurance Co. [42] is another case that addressed contingent business interruption coverage. In *Pentair*, an earthquake struck Taiwan, disabling a substation that provided power to two Taiwanese factories. The two factories, without power, could not manufacture products that they supplied to a subsidiary of Pentair, the insured. Pentair sought to recover under the contingent business interruption clause of its policy. The trial court held there was no coverage, and the court of appeals affirmed.

First, although the two factories were suppliers of Pentair, the substation that was physically damaged was not a supplier of Pentair. The court of appeals explained that although the substation provided power to the two factories, it did not provide a product or service ultimately used by Pentair. [43] The court did not find analogous two cases holding that Midwest farmers who sold grain to a licensed grain dealer, which in turn resold grain to the insured, were suppliers of the insured for purposes of the policy's business interruption coverage. [44]

Second, the court rejected Pentair's argument that the power outage caused direct physical loss or damage to the two factories because the factories were unable to perform or produce products. [45] The court held that mere loss or use of function does not constitute direct physical loss or damage. As the court explained, if Pentair's argument were adopted, it "would mean that direct physical loss or damage is established *whenever* property cannot be used for its intended purpose." [46]

Finally, in *Royal Indemnity Co. v. Retail Brand Alliance, Inc.*, [47] the court ruled that the insured, which owned a Brooks Brothers store near the World Trade Center, could not recover contingent business interruption coverage. The court held that although Brooks Brothers contended it depended on the World Trade Center for its income stream, it was not a "dependent" property because the businesses in the World Trade Center did not supply or receive merchandise from Brooks Brothers. As the court summarized, "[t]he fact that individuals that worked in the WTC also purchased clothing at Brooks Brothers does not render the WTC a 'dependent' property."

Civil authority and ingress/egress. Generally, civil authority coverage is intended to apply to situations where access to an insured's property is prevented or prohibited by an order of civil authority issued as a direct result of physical damage to other premises in the proximity of the insured's property. [48] Although almost all of the case law involves policy provisions that require an order of civil authority, some policies may contain separate ingress/egress coverage that does not require an act of civil authority to trigger. [49]

Civil authority cases have arisen in a number of contexts over the past 50 or so years. As early as 1958, the Pennsylvania Supreme Court issued two opinions arising out of rainfall and flooding in the aftermath of a hurricane. [50] In the early 1970s, courts issued a number of opinions arising out of curfews issued due to rioting after Martin Luther King's death. [51] There is also one California case that arose out of the riots in Los Angeles after the Rodney King verdict. [52] Civil authority cases in the late 1990s and first few years of this century arose out of events like Hurricane Floyd, [53] the closure of a bridge over a river after a barge collided with it, [54] and the police's closure of Santa Monica ***39** Pier to apprehend a suspect who had barricaded himself with hostages in an arcade. [55] As discussed below, the events of September 11, 2001, generated a significant number of civil authority cases. The recent hurricanes will no doubt generate even more case law.

United Airlines, Inc. v. Insurance Co. of the State of Pennsylvania [56] is one recent case arising out of the attacks of September 11. *United* relates to the FAA ground stop orders halting airline traffic. United sought coverage under the civil authority clause of its policy that provided coverage where access to United's properties is "prohibited by order of civil authority as a direct result of damage to adjacent premises...." United contended it was entitled to its loss of earnings arising from the shutdown of Reagan National Airport, because the closure was a direct result of physical damage to the Pentagon, which it claimed was on "adjacent premises." The district court rejected United's arguments. [57] The court of appeals affirmed.

The district court ruled that the airport and the Pentagon were not "adjacent" within the meaning of the policy. The Pentagon was at least 3.4 miles away by car from the airport and the two facilities were separated by several intervening structures and properties. [58] The district court also held that even if they were "adjacent," United's access to the airport was barred as a result of the FAA's shutdown orders, not as a result of the physical damage to the Pentagon. Instead, the record supported the conclusion that access to the airport was barred to prevent further attacks and as a matter of national security. [59] The court of appeals, in affirming the trial court's decision, concluded that even if the Pentagon were "adjacent" to the airport, United cannot show that the airport was shut down "as a direct result of damage to" the Pentagon. [60] The court stated that there apparently was a temporary halt of flights into and out of the airport before the Pentagon was struck and that the government's decision to halt operations at the airport was based on fears of future attacks. [61]

United Airlines is the latest in the line of airline/airport-type cases that have rejected arguments that the FAA ground stop orders and/or damage to the World Trade Center and Pentagon triggered civil authority coverage. [62] However, one court ruled in favor of the insured as to civil authority coverage based on the FAA ground stop orders. [63]

Penton Media, Inc. v. Affiliated FM Insurance Co. [64] is another recent civil authority case arising out of the events of September 11. In *Penton*, the insured postponed a trade show set for October 2001 at the Javits Center in New York due to the events of September 11. The Javits Center itself was not damaged or destroyed by the attacks on September 11. The insured claimed its losses due to the postponement were covered by the civil authority clause, arguing that such coverage extended to supplier and customer locations such as the Javits Center.

First, the court ruled that the contingent business interruption coverage applied to the insured's customer and supplier locations, if the insured sustained an actual loss as a direct result of direct physical damage to the insured's customers and suppliers. [65]

However, the court held that coverage under the civil authority clause did not extend to the insured's customers and suppliers, i.e., it did not cover losses at the supplier and customer locations where access to those locations was prohibited by order of civil authority. [66]

Second, the court ruled that even if the civil authority coverage applied to the events at the Javits Center, no order of civil authority prohibited access to the Javits Center. [67] The court stated there was no evidence that any specific order of civil authority mentioned the Javits Center or ordered it closed. Instead, there was a lease agreement between FEMA and the Javits Center. FEMA and the City of New York went to the Javits Center management and said, in effect, "We need emergency use of your facility." However, they did not issue any formal order of civil authority. [68]

Other recent civil authority cases arising out of the events of September 11, 2001, include *Royal Indemnity Co. v. Retail Brand Alliance, Inc.*, [69] in which it was found that destruction of the World Trade Center did not "prevent" the use of or access to the Brooks Brothers store located nearby after the store reopened; further, use or access was not "hindered" even though one entrance remained closed and there was scaffolding, as there was no proof that the entrance that was open was insufficient to accommodate all customer needs; *Abner, Herrman & Brock, Inc. v. Great Northern Insurance Co.*, [70] in which it was found that there was no civil authority coverage once access to the insured's building was restored, even though traffic restrictions in the area continued; and *54th Street Ltd. Partners, L.P. v. Fidelity and Guarantee Insurance Co.*, [71] which held that there was no civil authority coverage for a restaurant's loss of income once access to the restaurant was restored; though vehicular and pedestrian traffic in the area was diverted, the restaurant was accessible to the public, employees, and vendors. [72]

Conclusion

Time element coverages can raise interesting and complicated legal and factual issues, particularly in the context of a large loss. The business interruption coverage elements and cases discussed in this article will hopefully serve as a guide for any analysis. Of course, each loss should ***40** be evaluated separately given the specific policy language involved and the particular facts and circumstances of each loss.

Footnotes

a1 **Clark Schirle** *is a partner in the Chicago office of Clausen Miller, P.C., in the first-party property group. His practice areas include large property losses, business interruption, insurance coverage, and international insurance disputes. Schirle has extensive experience litigating complex multimillion-dollar first-party insurance disputes arising out of major property losses and industrial catastrophes. He is chair-elect of the TIPS Property Insurance Law Committee and can be reached at cschirle@clausen.com.*

1 *See, e.g.*, 11 COUCH ON INSURANCE § 167:9 (3d ed. 2006) ("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 hazard, thus preserving the continuity of the insured's business earnings by placing the insured in the position that it would have occupied if there had been no interruption."); Nw. States Portland Cement Co. v. Hartford Fire Ins. Co., 360 F.2d 531, 534 (8th Cir. 1966) ("the essential nature and purpose of business interruption insurance generally is to protect the earnings which the insured would have enjoyed had there been no interruption of business.").

2 The period of indemnity or restoration, as well as coverages for extra expense, expediting expense, and expense to reduce the loss, are not addressed in this article.

3 The structure of the business interruption clause may vary from policy to policy, but the essential elements remain the same. *See, e.g.*, Broad Street, LLC v. Gulf Ins. Co., 832 N.Y.S.2d 1 (App. Div., 1st Dep't, 2006) (The policy stated: "We will pay for the actual loss of Business Income you sustain due to the necessary suspension of your 'operations' during the 'period of restoration.' The

suspension must be caused by direct physical loss of or damage to property at the premises described in the Declarations ... caused by or resulting from any Covered Cause of Loss.")

4 *See, e.g.*, Dictiomatic Inc. v. U. S. Fid. & Guar. Co., 958 F. Supp. 594, 602 (S.D. Fla. 1997) (citing numerous cases).

5 *See, e.g.*, Roundabout Theatre Co., Inc. v. Continental Cas. Co., 751 N.Y.S.2d 4, 8 (2002).

6 441 N.Y.S.2d 674 (1981), *aff'd*, 453 N.Y.S.2d 682, 439 N.E.2d 397 (1982).

7 *See, e.g.*, Home Indem. Co. v. Hyplains Beef, 893 F. Supp. 987, 991-92 (D. Kan. 1995); Buxbaum v. Aetna Life & Cas. Co., 103 Cal. App. 4th 434, 444; 126 Cal. Rptr. 2d 683 (2002); 54th St. Ltd. Partners v. Fid. & Guar. Ins. Co., 763 N.Y.S.2d 243, 243 (App. Div., 1st Dep't 2003); Keetch v. Mut. of Enumclaw Ins. Co., 831 P.2d 784, 786 (Wash. Ct. App. 1992).

8 Quality Oilfield Products, Inc. v. Mich. Mut. Ins. Co., 971 S.W.2d 635, 639 (Tex. App. 1998).

9 940 F. Supp. 155, 160 (S.D. Tex. 1996).

10 486 S.E.2d 249 (N.C. Ct. App. 1997).

11 747 N.E.2d 495, 505 (Ill. App. Ct. 2001).

12 784 F. Supp. 49 (W.D.N.Y. 1992).

13 *See, e.g.*, Duane Reade, Inc. v. St. Paul Fire and Marine Ins. Co., 411 F.3d 384 (2d Cir. 2005); Retail Brand Alliance, Inc. v. Factory Mut. Ins. Co., 489 F. Supp. 2d 326 (S.D.N.Y. 2007); Lava Trading Inc. v. Hartford Fire Ins. Co., 365 F. Supp. 2d 434 (S.D.N.Y. 2005). A discussion of these and other cases addressing the period of restoration is beyond the scope of this article.

14 861 N.E.2d 263 (Ill. App. Ct. 2006).

15 747 N.E.2d 495 (Ill. App. Ct. 2001).

16 360 F.2d 531 (8th Cir. 1966).

17 *See also* J & R Elecs. Inc. v. OneBeacon Ins. Co., 824 N.Y.S.2d 763 (N.Y. Sup. Ct. 2005), *aff'd*, 825 N.Y.S.2d 462 (App. Div., 1st Dep't, 2006) (in calculating insured's actual loss under the business interruption clause, insurer was entitled to deduct payment made to insured for its damaged merchandise at the selling price of the merchandise, which included loss of profits on the goods).

18 404 F.3d 312 (5th Cir. 2005).

19 *Id*. The policy stated: "In determining the amount of gross earnings covered hereunder for the purposes of ascertaining the amount of loss sustained, due consideration shall be given to the experience of the business before the date of the damage or destruction and to the probable experience thereafter had no loss occurred."

20 *Id*.

21 2003 WL 22682273 (S.D.N.Y. 2003).

22 *Id*. at *6, 9.

23 *Id*. at *13-14.

24 25 Fed. Appx. 602, 603 (9th Cir. 2002).

25 465 F.3d 834 (8th Cir. 2006).

26 *Id*. at 836.

27 *Id*. at 838.

28 439 F. Supp. 2d 831, 837-38 (W.D. Tenn. 2006).

29 2000 WL 726789 (D. Ariz. 2006).

30 385 F. Supp. 2d 343, 348-49 (S.D.N.Y. 2005), *aff'd*, 439 F.3d 128 (2d Cir. 2006).

31 906 So. 2d 300 (Fla. Dist. Ct. App. 2005).

32 *Id*. at 301-02, quoting 11 COUCH ON INSURANCE § 167:12 (3d ed. 2006).

33 *Id*. at 302.

34 *Id*.

35 *Id*.

36 832 N.Y.S.2d 1 (App. Div., 1st Dep't 2006).

37 704 N.W.2d 773 (Minn. Ct. App. 2005).

38 *Id*. at 775. *See also* Brand Mgmt., Inc. v. Maryland Cas. Co., 2007 WL 1772063 (D. Colo. June 18, 2007) (no business interruption coverage for period after sushi-making business was reopened and operating after being closed for 15 days due to listeria contamination, even though insured's largest customer refused to purchase product from it until it relocated to a new facility); Better Imaging Facilitators, Inc. v. St. Paul Fire and Marine Ins. Co., 2006 WL 3187150 *5 (Cal. Ct. App. Nov. 6, 2006) (no business interruption coverage for lost income resulting from problems with MRI machine because no complete cessation of business, only downtime for repairs); Madison Maidens, Inc. v. Am. Mfrs. Mut. Ins. Co., 2006 WL 1650689 (S.D.N.Y. June 15, 2006) (after a leak damaged office and equipment on a Friday evening, no total cessation of business operations where, even though some employees worked to clean and salvage on the following Monday and for some time thereafter, two employees testified they were able to perform their jobs as usual on Monday); Apartment Movers of Am., Inc. v. OneBeacon Lloyd's of Texas, 2005 WL 106477 *3 (N.D. Tex. Jan. 19, 2005), *aff'd*, 170 Fed. Appx. 901 (5th Cir. 2006) (no business interruption coverage where insureds experienced a slowdown in business and there was no evidence that they were prevented from carrying on operations: the necessary suspension of operations "must come, not from a lack of customer demand, but of an inability to meet customer demand. In other words, if Plaintiffs are able to fully perform their operations, there is no 'necessary suspension' simply because they do not have as much business as they once did.").

39 918 So. 2d 1060, 1061 n.1 (La. Ct. App. 2005).

40 For example, in the *CII Carbon* case the contingent business interruption clause provided coverage for "loss directly resulting from the necessary interruption of business conducted on the premises occupied by the Insured, caused by damage to or destruction of any real or personal property, not otherwise excluded by this policy, and referred to as CONTRIBUTING PROPERTY(IES) and/or RECIPIENT PROPERTY(IES) and which is not operated by the Insured, by peril(s) insured against during the term of this Policy, which wholly or partially prevents delivery of materials to the Insured or to others for the account of the Insured and results directly in the necessary interruption of the Insured's business, and/or which wholly or partially prevents the acceptance of product(s) produced by the Insured and results directly in the necessary business interruption of the Insured's business." *Id*. at 1064.

41 *Id*. at 1068.

42 400 F.3d 613 (8th Cir. 2005).

43 *Id*. at 615.

44 *Id*. The court was referring to Archer Daniels Midland Co. v. Phoenix Assurance Co. of N.Y., 936 F. Supp. 534 (S.D. Ill. 1996) and Archer Daniels Midland Co. v. Aon Risk Services, Inc. of Minn., 2002 WL 31185884 (D. Minn. 2002), *aff'd*, 356 F.3d 850 (8th Cir. 2004).

45 *Id*. at 616.

46 *Id*. (emphasis in original).

47 Index No. 601164/04, N.Y. Sup. Ct. (Freedman, J.), Feb. 23, 2006, *aff'd*, 33 A.D.3d 392 (N.Y. 2006).

48 For example, the civil authority clause in the case of Penton Media, Inc. v. Affiliated FM Ins. Co., 2006 WL 2504907 (N.D. Ohio Aug. 29, 2006), *aff'd*, 2007 WL 2332323 (6th Cir. Aug. 15, 2007) stated: "Coverage is provided when access to the described location is prohibited by order of civil authority. This order must be given as a direct result of physical loss or damage from a peril of the type insured by this policy. The company will be liable for the actual amount of loss sustained at such location for a period of up to 30 consecutive days from the date of this action."

49 *See, e.g.*, Fountain Powerboat Indus., Inc. v. Reliance Ins. Co., 119 F. Supp. 2d 552, 555-56 (E.D.N.C. 2000) (coverage for loss under ingress/egress clause where hurricane-related flooding cut off access to an insured manufacturing facility).

50 *See* Cleland Simpson Co. v. Firemen's Ins. Co. of Newark, N.J., 140 A.2d 41 (Pa. 1958); Simpson Real Estate Corp. v. Firemen's Ins. Co. of Newark, N.J., 140 A.2d 47 (Pa. 1958).

51 *See, e.g.*, Sloan v. Phoenix of Hartford Ins. Co., 207 N.W.2d 434 (Mich. Ct. App. 1973); Allen Park Theatre Co., Inc. v. Michigan Millers Mut. Ins. Co., 210 N.W.2d 402 (Mich. Ct. App. 1973); Southlanes Bowl, Inc. v. Lumbermen's Mut. Ins. Co., 208 N.W.2d 569 (Mich. Ct. App. 1973); Brothers, Inc. v. Liberty Mut. Fire Ins. Co., 268 A.2d 611 (D.C. 1970); Two Caesars Corp. v. Jefferson Ins. Co., 280 A.2d 305 (D.C. 1971); Mac's Pipe & Drum, Inc. v. N. Ins. Co., 280 A.2d 308 (D.C. 1971); Adelman Laundry & Cleaners, Inc. v. Factory Ins. Ass'n, 207 N.W. 2d 646 (Wis. 1973).

52 *See* Syufy Enters. v. Home Ins. Co. of Ind., 1995 WL 129229 (N.D. Cal. Mar. 21, 1995).

53 *See, e.g.*, Assurance Co. of Am. v. BBB Service Co., Inc., 593 S.E.2d 7 (Ga. Ct. App. 2003); Narricot Indus., Inc. v. Fireman's Fund Ins. Co., 2002 WL 31247972 (E.D. Pa. 2002).

54 *See, e.g.*, St. Paul Mercury Ins. Co. v. Magnolia Lady, Inc., 1999 WL 33537191 (N.D. Miss. 1999).

55 *See, e.g.*, Santa Monica Amusements, LLC v. Royal Indemnity Co., 2002 WL 31429795 (Cal. Ct. App. 2002).

56 439 F.3d 128 (2d Cir. 2006).

57 385 F. Supp. 2d 343 (S.D.N.Y. 2005).

58 *Id*. at 352.

59 *Id*. at 353-54.

60 439 F.3d at 134.

61 *Id*.

62 *See, e.g.*, City of Chicago v. Factory Mut. Ins. Co., 2004 WL 549447 (N.D. Ill. Mar. 18, 2004); Philadelphia Parking Auth. v. Fed. Ins. Co., 385 F. Supp. 2d 280, 289-90 (S.D.N.Y 2005); Paradise Shops, Inc. v. Hartford Fire Ins. Co., Civ. Act. No. 1:03-CV-3154, 2004 U.S. Dist. LEXIS 30124 (N.D. Ga. Dec. 15, 2004). *See also* S. Hospitality, Inc. v. Zurich Am. Ins. Co., 393 F.3d 1137, 1139-41 (10th Cir. 2004) (no civil authority coverage for hotels for business losses when customers were prevented from reaching hotels by air due to FAA's suspension of flights; FAA order prohibited access to flights, rather than access to hotels and did not close the hotels); *accord* 730 Bienville Partners, Ltd. v. Assurance Co. of Am., 2002 WL 31996014 (E.D. La. Sept. 30, 2002), *aff'd*, 67 Fed. Appx. 248, 2003 WL 21145725 (5th Cir. 2003).

63 *See* U.S. Airways, Inc. v. Commonwealth Ins. Co., 2004 WL 1094684 (Va. Cir. Ct. May 14, 2004) and 2004 WL 1637139 (Va. Cir. Ct. July 23, 2004).

64 2006 WL 2504907 (N.D. Ohio Aug. 29, 2006), *aff'd*, 2007 WL 2332323 (6th Cir. Aug. 15, 2007).

65 *Id*. at *5.

66 *Id*.

67 *Id*. at *7.

68 *Id.*

69 822 N.Y.S.2d 268, 270 (App. Div., 1st Dep't 2006).

70 308 F. Supp. 2d 331, 336-37 (S.D.N.Y. 2004).

71 763 N.Y.S.2d 243, 244 (App. Div., 1st Dep't 2003).

72 *See also* Kean, Miller, Hawthorne, D'Armond McCowan & Jarmar, LLP v. Nat'l Fire Ins. Co. of Hartford, 2007 WL 248971 (M.D. La. Aug. 29, 2007) (no civil authority coverage where insured closed its Baton Rouge office for one day in response to civil authority advisories to stay off the streets in light of Hurricane Katrina; no evidence that the authorities formally forbade or prevented the insured's employees from approaching, reaching, or entering the business or that there were any roadblocks or street closures that prevented access); TMC Stores, Inc. v. Federated Mut. Ins. Co., 2005 WL 1331700 *4 (Minn. Ct. App. June 7, 2005) (no civil authority coverage where construction on property adjacent to insured's store did not prohibit access to the store; the store remained open throughout the construction; and customers were able to enter the store even though access was diminished); Dixon Produce, LLC v. Nat'l Fire Ins. Co. of Hartford, 99 P.3d 725, 729 (Okla. Ct. App. 2004) (no coverage for insured's business after tornado hit city; even though some streets were closed and travel to the business was not as convenient as it had been before the tornado, civil authority in the city did not prohibit access to the insured's business).

37-FALL BRIEF 32

End of Document