EXCERPT

THE COMPREHENSIVE GUIDE TO ECONOMIC DAMAGES

Edited by

Nancy J. Fannon and Jonathan M. Dunitz

With Jimmy S. Pappas, William Scally, and Steven M. Veenema

BVR
What It's Worth

SIXTH EDITION

The Comprehensive Guide to Economic Damages

VOLUME ONE

Edited by

Nancy J. Fannon and Jonathan M. Dunitz

With Jimmy S. Pappas, William Scally, and Steven M. Veenema

BVR
What It's Worth

111 SW Columbia Street, Suite 750, Portland, OR 97201

(503) 479-8200 • www.bvresources.com

Managing Editor/Desktop Editor: Monique Nijhout-Rowe

Senior Copy Editor: David Solomon

Chair and CEO: David Foster

President/Publisher: Lucretia Lyons

Chief Revenue Officer: Lisa McInturff

PRINT ISBN: 978-1-62150-207-4
PDF ISBN: 978-1-62150-208-1
EPUB ISBN: 978-1-62150-209-8
PRINT ISSN: 2694-4863
PDF ISSN: 2694-4871

Chapter 44.
Business Interruption and Damage Claims

CONTENTS

Chapter 44.
Business Interruption and Damage Claims

By John Garaffa, Esq.

1.0 Introduction

Business interruption insurance coverage is intended to protect the business owner from potential income loss caused by damage to an insured property.[1] The income loss can result from damage to the insured's property, the property of others that have a direct connection to insured property (dependent property), or damage to the property of key suppliers or customers that, in turn, has a detrimental effect on the insured's business. "Extra expense" coverage is a subset of business interruption coverage. It protects the insured against increased expenses that can arise out of the insured's efforts to return to business after an interruption in operations caused by a covered property loss. These expenses can include costs that are incurred to retain personnel who might otherwise be lost during an interruption, speed the recovery of the business, or maintain operations in a different way, while critical property is repaired or replaced.

As in any insurance claim, the application of coverage under a particular policy depends on whether the protections provided under the policy have been triggered. Such coverage depends on the property that has been damaged, the cause of that damage, and the nature, extent, and cause of the interruption the insured asserted. Disputes over whether the factual circumstances of the loss implicate each of these triggers and their application to the loss form the basis for conflict between the insurer and the insured during the resolution of the insured's claim. If it is determined that coverage applies to some or all of the loss, the ultimate valuation of the loss will depend on additional factors, such as the nature of the business and its income stream, the measure of that income, the necessity of the expenses the insured incurred, and the appropriate period of recovery.

The purpose of this chapter is to outline the factors underlying business interruption losses and alert the practitioner to the circumstances that can and do cause conflict in the adjustment of claims asserted under these policy provisions. An understanding of the ways the courts understand and define these factors will serve to highlight the facts that the insured and insurer should examine and establish. It should also reduce errors that can compromise an otherwise valid claim. The goal of the practitioner will be to advance a position for the client that is based on a clear understanding of the scope and intent of policy language as the courts have interpreted it and to use that position to bring the claim to a final conclusion.

1 *Wilson & Toomer Fertilizer Co. v Automobile Ins. Co.,* 283 F 501 (D.C. Fla 1922) (*aff'd* 4 F.2d 835 (C.A. 5 (Fla) 1925) *cert. den.* 268 U.S. 704 (U.S.Fla.,1925)).

2.0 Business Interruption Insurance Policy Issues

The typical commercial policy will contain language that describes the type of damage that will give rise to business interruption coverage and further language that governs the manner in which a loss will be valued. The following sample provision illustrates such coverage language:

> B. Business Interruption
>
> 1) Loss resulting from necessary interruption of business conducted by the Insured, caused by direct physical 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 the 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.[2]

Damage to the insured's property does not give rise to business interruption coverage unless that property damage falls within the parameters of the contract. Similarly, damage to covered property does not give rise to time element/business interruption coverage unless the precise circumstances of the interruption fall within the terms and conditions of the contract. Without the circumstances that give rise to or "trigger" coverage, the insured's loss cannot be recovered under the policy.

2.1 Triggers of Coverage

2.1.1 Interruption

Damage to covered property can result in a pause or reduction in the insured's operations, resulting in a loss of income. The nature of the insured's coverage for such a loss in income depends on how the policy defines the necessary pause or reduction. Most commercial time element or business interruption coverage provisions contain a clause that is similar to this:

> Time Element
>
> (1) 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 the property … at premises which are described in the Declarations and for which a Business Income Limit of Insurance is shown in the Declarations. The loss or damage must be caused by or result from a covered cause of loss.[3]

Under the sample clause, there is a requirement that the insured's business be actually interrupted. Coverage is triggered only when an actual interruption occurs. However, while there may be measurable income loss both before and after the interruption that damage to covered property caused, such loss of income may fall outside the coverage the policy

2 *Safeguard Storage Props., L.L.C. v. Donahue Favret*, 60 So. 3d 110 (La. App. 4 Cir. 2011).
3 *Imperial Trading Co. v. Travelers Prop. Cas. Co.*, 2009 WL 2242380 (E.D. La. July 24, 2009).

provided.[4] The extent and period in which the insured may claim benefits for loss of income will depend on periods of recovery the policy specified. These periods of recovery will be addressed later in this chapter.

In the sample provision above, the policy provides coverage when the insured's business is suspended. Similar provisions use the term "interrupted." State and federal courts addressing this type of provision have held that, when coverage is limited to the suspension or interruption of business, an actual and total interruption of business must occur.[5] Such a provision does not cover a loss of income if the insured is only partially closed or is open but doing reduced business.[6] Thus, under such a clause, a slowdown or lessening of the insured's scope or pace of business operations resulting from damage to covered property will not give rise to coverage for the insured's loss of income.

For example, when an insured's motel was buried in six inches of ash following a volcanic eruption but remained open, it could not recover under its business interruption policy.[7] While the insured suffered a dramatic decrease in occupancy, the lack of an "interruption" barred its claim.[8] Similarly, when a law firm suffered water damage to its offices but counsel, who worked out of that office, continued to bill hours on its files, there was no suspension of operations to trigger the business interruption loss provisions of the policy.[9] The court held:

> [I]n order for business income coverage to apply, the Policy requires that there be a "necessary suspension" of operations. This term is not defined in the policy.… [¶] *Webster's Third New International Dictionary* defines "suspension" as "the act of suspending or the state or period of being suspended, interrupted, or abrogated." "Suspended" is defined as "temporarily debarred, inactive, inoperative." These definitions comport with what appears to be the common understanding of the term "suspension," that is, that it connotes a temporary, but *complete, cessation* of activity. Thus, if one were to apply the plain, ordinary meaning to the use of the phrase "necessary suspension" within the policy, in order for a claim to fall within the coverage provision it would require that any direct physical loss of or damage to property result in the cessation of [the insured's] operations.

Depending on the policy language, coverage for the insured's "interruption" loss will cease according to the policy's terms when the insured's business operations resume, whether at the same or a functionally equivalent location. This may be true even if the business is reopened only partially or is reopened but is doing a reduced amount of business.[10] Coverage for losses incurred when an insured returns to business during the period immediately following the interruption is the subject of a separate section below.

4 *Am. States Ins. Co. v. Creative Walking, Inc.*, 16 F. Supp. 2d 1062 (E.D.Miss.1998), (*aff'd*, 175 F.3d 1023 (8th Cir. 1999)) (the insured's claim for lost income was limited to the 13-day period in which the insured's business was suspended after a water main break, despite the longer-lasting slowdown in business).

5 *Pennbarr Corp. v. Ins. Co. of N. Am.*, 976 F.2d 145 (3rd Cir. 1992) (refusing to equate an "interruption of business" with an "interruption of sales"); *see also Coupled Prods., L.L.C. v. Harleysville Ins. Co.*, 2011 WL 3101357 (N.D. Ind. July 25, 2011) (the loss of a competitive advantage suffered as a result of a theft of intellectual property does not constitute business interruption). *But see Archer Daniels Midland Co. v. Aon Risk Services, Inc. of Minnesota*, 356 F.3d 850, 63 Fed. R. Evid. Serv. 444, (8th Cir. (Minn. 2004), in which the court held that, under Minnesota law, "interruption of business" triggering contingent business interruption and extra expense coverage of commercial property insurance policy did not require cessation of business at insured's plants but only harm to insured's business arising from damage to supplier's property. Critical to the court's decision was the policy definition of "extra expense." It included "expenses necessary to carry on business operations," which the court found would have been rendered nonsensical if contingent business interruption and extra expense coverage were triggered only by cessation of business.)

6 *Royal Indem. Ins. Co. v. Mikob Prop., Inc.*, 940 F. Supp. 155 (S.D. Tex. 1996)); *Quality Oilfield Prods., Inc. v. Mich. Mut. Ins. Co.*, 971 S.W.2d 635, 639 (Tex. App.-Houston [14th Dist.] 1998); *Home Indem. Co. v. Hyplains Beef, L.C.*, 893 F. Supp. 987, 991-93 (D. Kan. 1995), (*aff'd*, 89 F.3d 850 (10th Cir. 1996)); *Forestview The Beautiful, Inc. v. All Nation Ins. Co.*, 704 N.W.2d 773, 775 (Minn. Ct. App. 2005).

7 *Keetch v. Mut. of Enumclaw Ins. Co.*, 831 P.2d 784 (Wash. 1992).

8 *See also Apt. Movers of Am., Inc. v. One Beacon Lloyds of Tex.*, 170 F. App'x 901 (5th Cir. 2006) (Slowdown in business the insured experienced was not a "necessary suspension of your operations" so as to trigger coverage for loss of business income); *Madison Maidens, Inc. v. Am. Mfrs. Mut. Ins. Co.*, 2006 WL 1650689 (S.D.N.Y. June 15, 2006) (Plaintiff's offices sustained serious flood damage, uncontroverted evidence that at least two of the plaintiff's employees were able to perform their normal duties indicated that there was no cessation); *Am. States Ins. Co.*, 16 F. Supp. 2d 1062 (E.D.Miss.1998).

9 *Buxbaum v. Aetna Life & Cas. Co.*, 103 Cal. App. 4th 434 (2002).

10 *54th St. Ltd. Partners, L.P. v. Fid. & Guar. Ins. Co.*, 306 A.D.2d 67, 67-68 (N.Y. App. Div. 2003).

In contrast to the sample provision above, time element provisions can contain qualifiers that expand coverage. Such a provision might appear as follows:

> Time Element
>
> This policy insures against loss resulting directly from necessary interruption of business, whether total or partial, caused by damage to or destruction of all real or personal property, manuscripts and watercraft, by the peril(s) insured against, during the term of this policy, on premises situate per the Territorial Limits in this policy.[11]

Or as follows:

> Time Element
>
> We'll pay your actual loss of earnings as well as extra expenses that result from the necessary or potential suspension of your operation during the period of restoration caused by direct physical loss or damage to property at a covered location. The loss or damage must occur while this coverage is in effect and must be due to a covered cause of loss.[12]

Courts have construed policy provisions that state "necessary or potential suspension" of business operations or "necessary interruption of business, whether total or partial" to allow coverage for a partial cessation of business without requiring a total interruption or suspension of the insured's business.[13] For example, when one building of a casino collapsed, causing a decrease in patronage of the casino, but a portion of the casino remained open, the loss of income by the insured's casino was covered because the policy provided coverage for the loss of business income when the damage to covered property resulted in a "partial suspension" of the insured's business.[14] Similarly, policy language providing for loss of profits in case of fire damage "without total destruction" was construed to allow coverage for partial losses.[15]

2.1.2 Direct Physical Damage

The requirement that damage or loss be physical is central to the nature of coverage under first-party property policies. The party claiming the loss must first demonstrate that the insured property was physically damaged to trigger coverage.[16] The language of commercial property policies typically requires that such damage be the result of "direct physical damage." The term "direct," when used in insurance policies, is a synonym for "proximate" or "dominant."[17] The phrase "direct physical damage" contemplates an actual change in insured property caused by accident or other fortuitous event, causing it to become unsatisfactory for future use or requiring that repairs be made to make it so.[18] The change in the insured property must occur as a result of the action of the fortuitous event that triggers coverage.[19]

---

11 *Aztar Corp. v. U.S. Fire Ins. Co.*, 223 Ariz. 463, 224 P.3d 960, 966-67 (Ariz.Ct.App. 2010, rev. denied).

12 *Am. Med. Imaging Corp. v. St. Paul Fire & Marine Ins. Co.*, 949 F.2d 690, 692 (3rd Cir. 1991).

13 *See Am. Med. Imaging Corp. v. St. Paul Fire and Marine Ins. Co.*, 949 F.2d 690, 692 (3rd Cir. 1991) (holding that a hospital was covered under a policy that provided for coverage in the event of a "necessary or potential suspension" and allowed for coverage until the hospital resumed "normal operations," when the hospital shut down briefly the morning of a fire and quickly resumed scaled-down operations at an alternative site); *Studley Box & Lumber Co. v. Nat'l Fire Ins. Co.*, 85 N.H. 96, 154 A. 337, 338 (1931) (holding that the insured's business was covered as a whole when a fire destroyed a stable and horses used in operating the insured's sawmill business, when the policy expressly allowed for partial suspension of business operations).

14 *Aztar Corp. v. U.S. Fire Ins. Co.*, 223 Ariz. 463, 224 P.3d 960 (Ariz.App. Div. 1, 2010).

15 *Lite v. Fireman's Ins. Co.*, 119 A.D. 410, 412-13, 104 N.Y.S. 434 (N.Y. App. Div. 1907).

16 *Port Auth. of N.Y. & N.J. v. Affiliated FM Ins. Co.*, 245 F. Supp. 2d 563 (D.N.J. 2001).

17 *Fred Meyer, Inc. v. Cent. Mut. Ins. Co.*, 235 F. Supp. 540, 543 (D. Or. 1964).

18 *AFLAC Inc. v. Chubb & Sons*, 260 Ga. App. 306, 581 S.E.2d 317 (2003); *Simon Mktg. v. Gulf Ins. Co.*, 57 Cal. Rptr. 3d 49 (2.Dist., 2007); 10 *Couch on Insurance*, 3rd ed., West, 1998, § 148:46.

19 *See also Vasile v. Hartford Acc. & Indem. Co.*, 624 N.Y.S.2d 56 (N.Y. App. Div. 2. Dept. 1995) (Insurance policy was not shown to cover failure of artesian well to produce sufficient quantity of potable water after many years of use; the insureds failed to demonstrate fortuitous event causing claimed loss separate from nature and inherent qualities of well itself); *Witcher Const. Co. v. Saint Paul Fire & Marine Ins. Co.*, 550 N.W.2d 1 (Minn. Ct. App. 1996); *Allied Van Lines Intern. Corp. v. Centennial Ins. Co.*, 685 F. Supp. 344 (S.D.N.Y. 1988).

For example, when an insured sought coverage for the cost to remove lead from the structure, the court held that an internal defect in a building, such as bad title or bad paint, did not rise to the level of a "physical loss" covered under a property insurance policy.[20] Similarly, when an insured had 33 leaks from defective welds during the coverage period and made a claim to repair all welds, the court held there was no coverage for the intact, but defective, welds. The court reasoned that, "while the failure of a defective part qualifies as direct physical loss or damage, the defect itself, assuming the item has not yet failed, does not."[21]

Even when an event occurs and the resulting loss is "real" in the sense that the insured objectively suffers some financial impact as the result of the event, the policy's requirement that the loss result from direct physical damage may bar coverage.[22] For example, when the insured sought coverage for the cost of redesigning a hole on its golf course as result of the loss of a tree that had served as an obstacle on the hole, it argued that the cost of redesign was a covered loss because the loss of the tree resulted in a change in the hole's difficulty and diminished the value of the golf course. The court rejected the claim, holding coverage for "direct physical loss or damage" to golf course grounds caused by wind or hail did not extend to the intangible loss in value of the golf course because of the loss of the tree.[23] Similarly, the court found no coverage for the insured for losses incurred when data in the insured's computer were inadvertently deleted. The court held that the insured's loss of stored computer data due to the negligence of the operator, unaccompanied by loss or destruction of the storage medium, was not "direct physical loss" the commercial policy covered. According to the court, the information did not have material existence, was not formed out of tangible matter, and was not perceptible to the sense of touch.[24] However, the court in *Lambrecht & Assocs. v. State Farm Lloyds,* 119 S.W.3d 16 (Tex. App.-Tyler 2003), held that the insured business's main server for its computer system, prepackaged software, and data stored on the server were "physical" for purposes of coverage of accidental direct physical loss of business personal property after a hacker invaded the computer system and injected a virus that ultimately caused the system to fail and rendered the server useless. The definition of business personal property in the policy in *Lambrecht* included electronic media and records used to "store or process information" and for "data stored on such media" that provided coverage for loss of replacing papers with duplicates of like-kind, such as prepackaged software, and that provided coverage for loss not caused by "error in programming."

An interruption of the insured's business as the result of an honest, but erroneous, belief that the property had suffered damage will not create coverage when the property has not suffered direct physical damage. Thus, a bank's losses from the evacuation of the bank building based on an erroneous engineering report that the building was in danger of collapse were not covered under the property insurance policy's "perils insured against" clause because the clause required a direct physical loss of or damage to insured property. Even though the error in the engineering report was only discovered after the bank suffered a loss, there was no actual risk of collapse of the building, and, thus, actual facts and circumstances at the time of the loss did not support coverage.[25]

Direct physical damage may occur at the microscopic level. For example, coverage has been found when fabric, some of which had not been exposed directly to the rainwater, had a pervasive, persistent, or noxious odor. The fabric had been

20 *Pirie v. Fed. Ins. Co.*, 696 N.E.2d 553 (Mass. App. Ct. 1998), *but see Sentinel Mgmt. Co. v. N.H. Ins. Co.*, 563 N.W.2d 296 (Minn. App.,1997) where the court found that asbestos contamination of apartment buildings constituted "direct physical loss" under all-risk policy, even though asbestos contamination did not result in tangible injury to the physical structure of building itself.

21 *City of Burlington v. Indem. Ins. Co. of N. Am.*, 332 F.3d 38, 43-44 (2nd Cir. 2003); *see also Alex R. Thomas & Co. v. Pacific Indem. Co.*, 2002 WL 737478 (Cal.App.1.Dist. 2002).

22 *Flaum v. Great N. Ins. Co.*, 904 N.Y.S.2d 647 (Sup. Ct. 2010) (loss experienced by the insureds when an insured painting was revealed to be a forgery was not a physical loss under the terms of the property insurance policy).

23 *Crestview Country Club, Inc. v. St. Paul Guardian Ins. Co.*, 321 F. Supp. 2d 260 (D. Mass. 2004); *see also Leafland Group-II, Montgomery Towers Ltd. v. Ins. Co. of N. Am.*, 881 P.2d 26 (N.M. 1994) (Diminution in value of an apartment complex due to the presence of asbestos installed during construction was not a covered loss within the meaning of the comprehensive insurance policy insuring real property against direct loss or damage from cause of loss).

24 *Ward Gen. Ins. Servs., Inc. v. Employers Fire Ins. Co.*, 7 Cal. Rptr. 3d 844 (4 Dist. 2003).

25 *Wash. Mut. Bank v. Commonwealth Ins. Co.*, 133 Wash. App. 1031 (Div. 1, 2006).

exposed to rainwater and high humidity for a prolonged period, while salvage crews worked to dry out the building where it had been stored. The insurer filed a motion for summary judgment, arguing that fabric stored in the warehouse and not subjected to direct water intrusion was not covered under the property insurance policy. In rejecting the motion, the court held that fabrics and garments with increased microbial counts that will, as a result, develop either an odor, mold, or mildew may be physically damaged property pursuant to the plaintiff's policy and be covered under the policy's provision for loss due to direct physical damage.[26] Similarly, the court held that, when contamination rendered coats unusable, the insured was entitled to coverage for "direct physical loss or damage to property." The court found that "direct physical loss can exist without actual destruction of property or structural damage to property; it is sufficient to show that insured property is injured in some way."[27] In yet another case, evidence of the effect that the accidental release of ammonia gas at a warehouse had on an insured wholesaler's stored meat was sufficient to show "damage" within the commercial property insurance policy's coverage provision. The meat was not hermetically sealed, the insurance adjuster detected the odor of ammonia in areas where meat was stored three weeks after the accident, one sample tested in a laboratory showed ammonia content above the danger point, and discoloration was observed that ammonia may have caused.[28]

Even when there has been covered direct physical damage to the insured's property, a claim for lost income must bear some relationship to the direct physical damage the insured suffered.[29] For example, when a snowstorm struck the area of the insured's car dealership, the business was inaccessible for a week. The roof of the dealership sustained damage as a result of the storm; however, neither the roof damage nor the repairs caused the interruption of the insured's business. Nonetheless, the insured filed a claim to recover income lost during the storm, arguing that there was both an interruption in business and physical damage to the insured property as a result of the storm. In rejecting the insured's claim, the court held that there was coverage for lost income only when the loss results from the suspension of operations due to damage to, or destruction of, the business property by reason of a peril insured against.[30]

A similar decision was reached when the insured asserted a business interruption loss when one of its ticket offices was damaged when the ash from the fire the terrorist attack on the Pentagon caused accumulated at the insured's airport gate. Despite the relatively small claim for actual damage to covered property, the airline made a claim for systemwide business interruption coverage under its insurance policy, asserting a claim of $1.2 billion in revenue flowing from the nationwide aviation shutdown in the wake of the attack. The insured argued that the damage to one of its ticket booths constituted "damage or destruction" under the policy and nothing in the terrorism policy purported to require physical damage at each and every insured location when an interruption was related to the event resulting in property damage. The court rejected the claim, holding the amount of recovery sought bore no relation to the actual damage suffered at the location.[31]

The COVID-19 pandemic and the responses by civil authorities to stem the rate of infection have raised a number of coverage issues. Largely absent in these claims is any assertion that the virus has damaged covered property. Instead, the assertion is that the perceived or potential presence of the virus in the area of the business has resulted in a loss of business or that the actions of civil authorities have resulted in the closure of operations and a resulting loss of business income For example, Florida's Executive Order Number 20-68 suspended the sale of alcoholic beverages for any licensee authorized to sell alcoholic beverages for consumption on premises that derives more than 50% of its gross revenue from the sale of alcoholic beverages. The order was effective 30 days from the date of the order, March 17, 2020. Following

26 *Columbiaknit, Inc. v. Affiliated FM Ins. Co.*, 1999 WL 619100 (D. Or. Aug. 4, 1999).
27 *Gen. Mills, Inc. v. Gold Medal Ins. Co.*, 622 N.W.2d 147, 152 (Minn. Ct. App. 2001).
28 *S. Wallace Edwards & Sons v. Cincinnati Ins. Co.*, 353 F.3d 367 (4th Cir. 2003).
29 *Stores Corp. v. Foremost Ins. Co.*, 82 A.D.2d 398, 401 (N.Y. App. Div. 1981) (*aff'd*, 439 N.E.2d 397 (1982) ("Plainly the policy in suit was not intended to include business interruption, if any, to [two of the insured's] other stores where no physical damage occurred.").
30 *Harry's Cadillac-Pontiac-GMC Truck Co. v. Motors Ins. Corp.*, 126 N.C. App. 698, 486 S.E.2d 249, 251 (1997).
31 *United Airlines, Inc. v. Ins. Co. of State of Pa.*, 385 F. Supp. 2d 343 (S.D.N.Y. 2005).

that order, the governor issued a stay-at-home order for the entire state to address the rapidly spreading coronavirus outbreak (EO 2091). The purpose of both orders was to address the spread of the virus COVID-19. What appears to be absent is the required direct physical damage to covered property from a covered cause of loss.

On their face, the claims appear to be subject to a number of standard exclusions. The first, present in most commercial policies, is the standard pollution exclusion. Typically, such exclusions define "pollutant" as "any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste. Waste includes materials to be recycled, reconditioned or reclaimed." "Pollution and/or contamination" include the presence, existence, or release of anything that endangers or threatens to endanger the health, safety, or welfare of persons or the environment.

In the context of COVID-19, the question is whether the COVID-19 virus qualifies as "any kind of pollution and/or contamination" as that is described in the exclusion. Cases addressing pollution exclusions typically arise in the context of third-party disputes, but they are instructive. The term "contamination" is typically used as it is in the policy exclusion, and litigation has addressed the scope of the term.

In *Deni Assocs. of Fla., Inc. v. State Farm Fire & Cas. Ins. Co.*,[32] the Florida Supreme Court considered whether ammonia and certain pesticides qualified as "pollutants." (The court rejected arguments that the exclusion was ambiguous because the word "contaminant" was not defined). It then rejected the argument that the exclusion should be limited to "industrial" or "environmental" pollution, reasoning that, "[a]s a court, we cannot place limitations upon the plain language of a policy exclusion simply because we may think it should have been written that way."

The court concluded that the ammonia and pesticides at issue were "pollutants," as defined under the policies' pollutant exclusions. *Deni* supports the proposition that, where the contract defines "pollutant" as an "irritant or contaminant," the court should look to see whether the disputed substance is alleged to have had a particular effect commonly thought of as "irritation" or "contamination."[33] In reaching its decision, the court in *Deni* cited the decision of the appellate court in *American States Ins. v. Nethery*.[34] *Nethery* held that loss caused by paint and glue fumes were excluded from coverage, even though paint and glue do not normally inflict injury. The court held that "an irritant is a substance that produces a particular effect, not one that generally or probably causes such effects ... [a]s the paint and glue fumes that irritated Nethery satisfy both the dictionary definition and the policy exclusion of irritants." Similarly, the court in *Tech. Coating Applicators, Inc. v. U.S. Fidelity & Guaranty Co.*[35] found that the products' ability to produce an irritating effect place the products within the policies' definition of "irritant."

In *Nova Casualty Co. v. Waserstein*,[36] the court found that "living organisms," "microbial populations," "airborne and microbial contaminants," and "indoor allergens" fit the definition of "contaminant" and are excluded from coverage under the pollution exclusion clause. A similar result was reached by the court in *First Specialty Ins. Corp. v. GRS Mgmt. Assocs., Inc.*,[37] where the court found that injury caused by swimming pool water containing a viral contaminant and a harmful microbe was injury that a pollutant caused such that the pollution exclusion was applicable. However, the court in *Motorists Mutual Ins. v. Hardinger,*[38] found the exclusion did not apply to bacteria because, to the extent that

32 *Deni Assocs. of Fla., Inc. v. State Farm Fire & Cas. Ins. Co* , 711 So.2d 1135, 1139 (Fla. 1998).
33 *Nova Cas. Co. v. Waserstein*, 424 F.Supp.2nd 1325 (SD Fla. 2006).
34 *American States Ins. v. Nethery*, 79 F.3d 473, 476 (5th Cir.1996).
35 *Tech. Coating Applicators, Inc. v. U.S. Fidelity & Guaranty Co*., 157 F.3d 843, 845 (11th Cir.1998).
36 *Nova Casualty Co. v. Waserstein, supra*.
37 *First Specialty Ins. Corp. v. GRS Mgmt. Assocs., Inc.*, 2009 WL 2524613, *5 (S.D. Fla. Aug. 17, 2009).
38 *Motorists Mutual Ins. v. Hardinger,* 131 Fed.Appx. 823, 828 (3d Cir. 2005).

bacteria might be considered "irritants" or "contaminants," they are living, organic irritants or contaminants that defy description under the policy as "solid, liquid, gaseous, or thermal" pollutants.[39]

In *Mellin v. Northern Security Insurance Company, Inc.,*[40] the court found coverage for loss as a result of cat urine odor was possible despite the policy's requirement of direct physical loss and pollution exclusion. The insured asserted that their loss was not excluded by the pollution exclusion clause because such exclusions are intended to "exclude coverage for widespread environmental contamination" and "cat urine odor in a condominium unit does not constitute environmental contamination."

In reaching its decision to limit the pollution exclusion to environmental contamination, the court cited the decisions in *Nautilus Ins. Co. v. Jabar*[41] and *American States Ins. Co. v. Koloms*.[42] Those decisions found the terms "irritant" and "contaminant" are virtually boundless, for there is no substance or chemical in existence that would not irritate or damage some person or property. The court found that applying the dictionary definitions for "irritant" and "contaminant" in a "purely literal interpretation stretched the intended meaning of the policy exclusion and could lead to absurd results contrary to any reasonable policyholder's expectations. The court noted that, taken at face value, the policy's definition of a pollutant is broad enough that it could be read to include items such as soap, shampoo, rubbing alcohol, and bleach insofar as these items are capable of reasonably being classified as contaminants or irritants.

The language of the typical exclusion addresses the dichotomy of these cases. While the endorsement does not define "contamination," it provides two descriptions. The first description addresses the traditional industrial pollutant the court in *Mellin* favored. However, the endorsement specifically describes a second type of "seepage or any kind of pollution and/or contamination" as "the presence, existence, or release of anything which endangers or threatens to endanger the health, safety or welfare of persons or the environment." That separate description makes it clear that it is intended to describe something different than traditional industrial pollutants. It also appears to address the criticism by the courts in *Nautilus Ins. Co. v. Jabar* and *American States Ins. Co. v. Koloms* that the term "contaminant" was simply too broad. In the typical exclusion, the definition is limited to those things whose presence, existence, or release endangers or threatens to endanger the health, safety, or welfare of persons.

The provision does not name the substances that "endanger the health, safety or welfare of persons." However, the nature of viruses in general, and COVID-19 in particular, suggests that, as a scientific matter, they fall within the policy description. A review of the cases indicates viruses such as COVID-19 may well be found to fall within the endorsement's description of "contamination."

A second common exclusion is one that bars loss or damage due to biological hazards. The typical endorsement excludes loss or damage for biological hazards, including, but not limited to, any biological and/or poisonous or pathogenic agent, material, product, or substance, whether engineered or naturally occurring, that induces or is capable of inducing physical distress, illness, or disease.

The provision does not define "biological and/or poisonous or pathogenic agent." However, from a scientific perspective, a pathogen is an organism that causes disease. The four most common types are: viruses, bacteria, fungi, and parasites. Viruses such as COVID 19 are made up of a piece of genetic code, such as DNA or RNA, and protected by a coating

39 *But see Meyer Nat. Foods, LLC v. Liberty Mut. Fire Ins. Co.,* 218 F. Supp. 3d 1034, 1037 (D. Neb. 2016) where the court addressed the application of the pollution exclusion in conjunction with a number of exclusions in a case involving the denial of coverage for beef that was contaminated with the bacterium E. coli. However, the court found the claim was barred by the exclusion for contamination and therefore there was no need to address the applicability, if at all, of the remaining exclusions to the facts of the claim.

40 *Mellin v. Northern Security Insurance Company, Inc.,* 115 A.3d 799, (N.H. 2015).

41 *Nautilus Ins. Co. v. Jabar,* 188 F.3d 27, 30 (1st Cir. 1999).

42 *American States Ins. Co. v. Koloms*, 687 N.E.2d 72, 78 (1997).

of protein. Once the host is infected, viruses invade host cells within the body. They then use the components of the host cell to replicate, producing more viruses. After the replication cycle is complete, these new viruses are released from the host cell. This usually damages or destroys the infected cells. Many viruses cause diseases in humans, such as influenza, chicken pox, AIDS, the common cold, and rabies. The novel coronavirus (COVID-19) causes a respiratory disease that can result in serious illness or death. As a consequence, we believe that, under the plain language of the exclusion, COVID-19 falls within the exclusion for pathogenic agents that induce or are capable of inducing physical distress, illness, or disease. As such, the biological hazards exclusion would appear to apply to remove COVID-19 as a covered cause of loss.

It remains to be seen how the courts will address claims stemming from business interruption as the result of pandemics such as COVID-19. However, the lack of discernable damage to covered property and the apparent application of standard exclusions in commercial policies suggest that such claims will fall outside the coverage most commercial policies provide.

2.1.3 Covered Property

As noted in the previous sections, coverage for the loss of income depends both on the direct physical damage to property and an interruption in the insured's business that results from that damage. The practitioner must be careful not to assume that the damaged property claimed qualifies as insured property under the policy. Coverage for property may be established in a number ways. The property may be specifically named, or it may fall within a general description. It may also be the property of others who are themselves named or described in the policy.

(1) Specified Property

The typical commercial policy provides coverage for specific real property. Coverage for personal property is generally provided by description. The identification of real property can typically be found on the "Declarations" page of the policy, or, if the policy indicates, on a schedule of insured values attached to the policy or provided by the insured and maintained by the insurer. A coverage clause for a policy listing covered property might appear as follows:

> SECTION A. COVERAGE
>
> Covered property, as used in this Coverage Part, means the following types of property for which a Limit of Insurance is shown in the Declarations:
>
> a. Building, meaning the building or structure described in the Declarations, including
>
> (1) Completed additions;
>
> (2) Permanently installed:
>
> (a) Fixtures;
>
> (b) Machinery; and
>
> (c) Equipment.[43]

Litigation of whether a particular building is covered property will be rare because the property either will or will not be listed on the "Declarations" page. Practitioners are cautioned, however, to ensure they account for all endorsements listed on the "Declarations" page because an endorsement may delete or add properties. Such an endorsement might look something like this:

43 *PacTech, Inc. v. Auto-Owners Ins. Co.*, 292 S.W.3d 1 (Tenn. Ct. App. 2008).

> THIS ENDORSEMENT CHANGES THE POLICY.
> PLEASE READ IT CAREFULLY.
>
> The following locations are deleted from the locations on the Declarations page:
>
STREET ADDRESS	CITY	STATE	ZIP CODE
100 East Smith Lane	Smithsboro	CA	11111

> The following locations are added to the locations on the Declarations page:
>
STREET ADDRESS	CITY	STATE	ZIP CODE
200 West Jones Drive	Jonesboro	CA	11111
300 North Doe Lane	Doesboro	CA	11111

Coverage for real property listed on the "Declarations" page will generally depend on whether the date of loss is within the effective dates of the policy. However, when the policy contains an endorsement that adds or deletes properties, the date of the endorsement will determine coverage. If a property is added after the date of loss or is deleted before the date of loss, there will be no coverage for damage that property suffered. If the property itself is not covered, business interruption attributed to that property will also fall outside the coverage the policy provided.

(2) Property by Description

More complex commercial policies may simply describe real property in general terms. Such a clause may appear as follows:

> This Policy covers the Insured's interest in all real property owned, used, or intended for use by the Insured including property to be installed, erected or acquired, including during the course of construction, erection, assembly, alteration or repair, and including the Insured's interest in improvements or betterments to property not owned by the Insured. This policy also covers the Insured's interest in property of others in the Insured's care, custody or control, including the Insured's liability imposed by law or assumed by contract, for such property. This insurance shall cover properties which may be acquired or constructed by the Insured during the policy period, but the Insured agrees to report same to Insurers as promptly as possible.

As in the case of policies that identify each covered property, determining whether the date of the insured's interest falls before or after the date of loss will determine the existence of coverage. However, the date of an insured's interest in the property of another; whether such property was actually within the insured's care, custody, or control; or the nature of the liability for such property imposed by contract or law can prove problematic. Properties added or constructed after the policy period begins pose further challenges. If such a property suffers damage before the insurer was aware it had been added to the risks the policy imposed, the insurer may take the position that the insured's failure to report the acquisition takes the property outside the coverage the policy provided.

(3) Dependent Property

Entities that rely on the property of "third parties" sometimes purchase contingent business interruption coverage as a policy extension in case damage to third-party property disrupts their income. While regular business-interruption insurance replaces profits lost as a result of physical damage to the insured's plant or other equipment, contingent business-interruption coverage goes further.[44] It protects the insured by providing coverage for damage to enumerated

44 *Zurich v. ABM Indus.*, 397 F.3d 158 (2d Cir. 2005).

dependent properties owned or operated by those who supply materials for the insured, purchase the insured's goods,[45] or attract customers to the insured's business.[46]

The following example is typical of such clauses. Like business interruption coverage for the insured's own property, it requires direct physical loss to property before coverage for the loss of income is triggered.

> Dependent Properties—Business Income
>
> (1) We will pay for the actual loss of "business income" you sustain due to the necessary and unavoidable suspension of your "operations" during the "period of restoration." The suspension must be caused by direct physical loss of or damage to "dependent property" caused by or resulting from any Covered Cause of Loss.

Such policies will provide a definition of the property whose damage will trigger coverage. The following example illustrates such a definition:

> "Dependent property" means property owned or operated by others, not including any described premises, whom you depend on to:
>
> a. Deliver materials or services to you, or to others for your account. Services do not include water, steam, fuel, communication, or power supply services;
>
> b. Purchase your products or services;
>
> c. Manufacture products for delivery to your customers under contract of sale; and
>
> d. Attract customers to your business. But this does not include firms in the business of promoting or advertising your business.

Litigation of coverage for the loss of income attributed to dependent property generally centers on whether a covered peril damaged the dependent property and whether the damage claimed had a direct impact on the loss of income. For example, the court rejected the claim by an insured for lost income hotel operators suffered when customers were prevented from reaching hotels by air due to the Federal Aviation Administration's (FAA) order grounding all flights in the wake of the attack by terrorists on Sept. 11, 2001. The court found that the "dependent property" clause of the insurance policy did not cover the loss because, while customers did often arrive to the locality on aircraft, there was no proof of required physical loss or damage to a dependent property, which was defined as property others operated that the insured depended on for the delivery of materials or services.[47]

(4) Adjacent Property

Commercial policies may provide coverage for losses caused by covered perils to adjacent property. When undefined by the policy, courts have applied common language definitions. One court defined the term as "lying near, close or contiguous, neighboring, [or] bordering on."[48] Another court, citing Webster's *Third New International Dictionary* (1986, 26), defined the term as: "(a) not distant or far off: nearby but not touching; (b) relatively near and having nothing of the

45 *Carbon L.L.C. v. Nat'l Union Fire Ins. Co. of La.*, 918 So. 2d 1060 (La.4 Cir. 2005).
46 *Archer Daniels Midland Co. v. Hartford Fire Ins. Co.*, 243 F.3d 369, 371 (7th Cir. 2001); *see also* Paula B. Tarr, "Where Have All the Customers Gone? Business Interruption Coverage for Off-Premises Events," 30 *The Brief* 20, 29, Winter 2001.
47 *S. Hospitality, Inc. v. Zurich Am. Ins. Co.*, 393 F.3d 1137 (10 Cir. 2004) (applying Oklahoma law).
48 *Stanley Co. of Am. v. McLaughlin*, 195 F. Supp. 519, 522 (D.D.C. 1961).

same kind intervening: having a common border: abutting, touching: living nearby or sitting or standing relatively near or close together; and (c) immediately preceding or following with nothing of the same kind intervening."[49]

Using these definitions, a court rejected the claim of the insured for damage to its structure at Reagan National Airport as the result of the terrorist attack at the Pentagon on Sept. 11, 2001. The court examined the record as a whole, including maps, aerial photographs, affidavits, driving directions, and boundary information that both parties submitted. The court found it could not reasonably find that the Pentagon and Reagan Airport were "adjacent."[50] Similarly, the court rejected the claim of a movie theater chain, asserting business interruption losses associated with "dawn-to-dusk curfews imposed by several cities." The plaintiff argued that the word "adjacent" in the insurance policy was ambiguous and that "property damage occurring anywhere within the curfew zones was sufficiently 'adjacent' to the theaters for purposes of triggering coverage." In rejecting the claim, the court found the term "adjacent" unambiguous and stated that "the 'ordinary and popular' reading of the term 'adjacent' denotes a sense of physical proximity. Damage occurring in an unspecified area at least two blocks from a theater is clearly and plainly not 'adjacent' to the theater."[51]

2.1.4 Acts of Civil Authorities

Commercial policies can provide coverage for the effects on the insured's business income from actions by civil authorities that impede access to the insured's facilities. The following sample provision illustrates typical language for such a provision:

> We will pay for the actual loss of Business Income you sustain and necessary Extra Expense caused by action of civil authority that prohibits access to the described premises due to direct physical loss of, or damage to, property other than at the described premises, caused by or resulting from a Covered Cause of Loss.[52]

Litigation under such clauses can be expected to center on four issues: whether an action of civil authority caused the insured's loss of income, whether that action prohibited access to the insured's business, whether the direct physical loss of or damage to property other than at the described premises caused the action of civil authority, and whether the loss or damage to the property resulted from a covered cause of loss under the policy.[53]

Under such a clause, there is no requirement that civil authorities issue a formal order. For example, advisories given to the public to remain off of the streets before the landing of Hurricane Katrina could be considered an "action of civil authority." However, the critical question will be whether the action of the civil authorities actually prohibits access to the insured's premises. To trigger coverage, a direct connection must exist between the action of the civil authority and the actual impediment to access to the insured's premises.[54] Thus, when a civil authority prohibits access to the insured's premises for a period of days and, during subsequent days, other traffic restrictions make access to the premises more difficult, the insured would be entitled to recovery for the days in which access was actually prohibited.[55] However, when state authorities merely hamper access to the claimant's business, leaving it accessible in other ways, coverage is not triggered.[56] Thus, a dawn-to-dusk curfew imposed to reduce the possibility of rioting and looting was held not to constitute an order by civil authority specifically prohibiting access to a movie theater.[57]

49 *In re Needham*, 354 F.3d 340, 347 (5th Cir. 2003).
50 *United Airlines, Inc. v. Insurance Co. of State of Pa.*, 385 F. Supp. 2d 343 (S.D.N.Y., 2005).
51 *Syufy Enters. v. Home Ins. Co. of Ind.*, 1995 WL 129229 (N.D. Cal. March 21, 1995).
52 *Magee v. National Fire Ins. Co. of Hartford*, 2008 WL 426285 (La.App. 1 Cir. Feb. 8, 2008).
53 *Kean, Miller, Hawthorne, D'Armond McCowan & Jarman, L.L.P. v. Nat'l Fire Ins. Co.*, 2007 WL 2489711 (M.D. La. Aug. 29, 2007).
54 *Narricot Indus. v. Fireman's Fund Ins. Co.*, 2002 WL 31247972 (E.D. Pa. Sept. 30, 2002).
55 *Abner, Herrman & Brock, Inc. v. Great N. Ins. Co.*, 308 F. Supp. 2d 331, 336-37 (S.D.N.Y. 2004); *see also Dixson Produce, L.L.C. v. Nat'l Fire Ins. Co. of Hartford*, 99 P.3d 725, 729 (Okla. Ct. App. 2004); *54th St. Ltd. Partners, L.P. v. Fid. and Guar. Ins. Co.*, 306 A.D.2d 67, 763 N.Y.S.2d 243, 244 (1st Dep't 2003).
56 *St. Paul Mercury Ins. Co. v. Magnolia Lady, Inc.*, 1999 WL 33537191 (N.D. Miss. Nov. 4, 1999).
57 *Syufy Enterprises v. Home Insurance Co. of Indiana*, 1995 WL 129229 (N.D.Cal. March 21, 1995).

As noted above, the COVID-19 pandemic and the responses by civil authorities to stem the rate of infection have raised a number of coverage issues. Among those issues is the application of coverage for the loss of business income attributed to the responses of civil authorities. Coverage under the Civil Authority provision requires that the action of Civil Authority that prohibits access to the insured property be due to direct physical loss or damage to property other than property at a covered location. That damage must be due to a covered cause of loss. As discussed in section 2.1.2 above ("Direct Physical Damage"), it is unclear how a virus could damage property. Viruses are extremely fragile outside of their human hosts. As a consequence, potential "contamination" of surfaces outside the host would be of short duration that would likely not exceed the initial waiting period for business interruption claims. The other apparent impediment to claims for coverage under the civil authority provision is that the orders have been issued to stem the infection from spreading from person to person. They have not been issued in response to damage to property as the typical Civil Authority provision requires. Lastly, a covered cause of loss must cause the damage to property that is the subject of the order by civil authorities. As discussed above, loss or damage attributed to a virus such as COVID-19 appears subject to a number of common exclusions.

2.2 Covered Peril

As noted in the previous sections, damage to covered property must precede coverage under business interruption provisions. A covered peril must cause that damage.[58] Whether coverage exists depends on the nature of the policy. This section will explore the two types of policies: those that specify the causes of loss that can give rise to coverage and so-called "all-risk" policies that provide coverage for all damage to covered property except when perils specifically excluded under the policy cause it.

2.2.1 Specified Peril Policies

Like the parties to any contract, the parties to an insurance policy can tailor the terms of their agreement and, in the process, determine the premium required to meet the coverage the insured sought.[59] Under a "specified-peril" policy, only those perils or "risks" specifically named in the contract between the parties are covered.[60] In the case of a loss, the insured is required to prove that the property was lost or damaged due to a specified covered risk named in the policy.[61] To the extent the peril that has resulted in damage to the insured property is not a specified cause of loss under the contract between the parties, no coverage results.[62]

A "peril" in the context of an insurance policy is the physical force that brings about the loss.[63] Damage a covered peril caused makes the insurer liable for all known effects of the specified peril, including all loss or damage resulting as the direct and natural consequence of that peril. This is the case notwithstanding the fact that other incidental agencies might contribute to the loss or damage.[64] Thus, a policy insuring against all loss or damage by fire and lightning would provide coverage for all known effects of lightning and not merely those arising from combustion.[65]

2.2.2 'All-Risk' Policies

The label "all-risk policy" is a misnomer. An "all-risk policy" is not an all-loss policy, since an "all-risk policy" contains express written exclusions and implied exceptions that the courts have developed over the years.[66] One way to understand the "all-risk" policy is as the reverse of the specified-peril policy. The specified-peril policy covers no loss unless a specified

58 *Vision One, LLC v. Philadelphia Indemnity Ins. Co.*, 174 Wash.2d 501 (WA 2012).
59 Friedman, *Concurrent Causation: The Coverage Trap* (1985) 86 Best's Rev.: Prop./Casualty 50, 58.
60 *Freedman v. State Farm Ins. Co.*, 93 Cal.Rptr.3d 296 (Cal.App.2.Dist., 2009).
61 *Lambert v. State Farm Fire and Cas. Co.*, 568 F. Supp. 2d 698 (E.D.La. 2008).
62 *Poulton v. State Farm Fire and Cas. Companies*, 675 N.W.2d 665 (Neb. 2004).
63 *Fire Ins. Exchange v. Superior Court*, 10 Cal. Rptr. 3d 617 (Cal. App. 2.Dist. 2004); *Travelers Indem. Co. v. Jarrett*, 369 S.W.2d 653 (Tex.Civ.App.-Waco, 1963).
64 Ibid.
65 *Spensley v. Lancashire Ins. Co.*, 11 N.W. 894 (Wis., 1882).
66 *Standard Structural Steel Co. v. Bethlehem Steel Corp.*, 597 F.Supp. 164 (D.Conn.1984).

peril caused it. On the other hand, an "all-risk" policy provides coverage for all fortuitous losses unless a peril that the policy specifically excludes caused the loss.[67] Such a policy will contain language similar to the following example:

> A. PERILS INSURED This policy insures against all risks of direct physical loss or damage to insured property except as excluded under this policy.[68]

The insured bears the initial burden of proving that the loss is within the description of the risks covered.[69] Under most "all-risk" policies, the insured meets the initial burden by showing the property was covered under the insurer's policy and that the property suffered physical damage.[70] Once an insured establishes that a claim comes within the terms of coverage, the insurer carries the burden of proving the applicability of any exclusions or limitations on that coverage.[71]

An exclusion in a policy of insurance is a limitation of liability, excluding certain types of loss to which the coverage or protection of the policy does not apply.[72] Since they serve to limit coverage to the insured, exclusions from coverage are strictly construed.[73] If an insurer wishes to exclude certain coverage from its policy obligations, it must do so in clear and unmistakable language.[74] When there is any dispute as to the meaning or scope of an exclusion, the exclusion is interpreted against the insurer as the author of the policy[75] and in favor of the insured so as not to defeat any intended coverage or diminish the protection purchased.[76]

Exceptions to exclusions do not extend coverage beyond that which is otherwise provided.[77] Rather than constituting a grant of coverage under an insurance policy, exceptions to exclusions merely narrow the scope of the exclusion.[78] Because they serve to preserve coverage for an insured, exceptions to exclusions are broadly construed in favor of the insured.[79] For example, a policy may exclude damage water seepage caused over time except when it results from a plumbing system that is hidden. Such an exception does not create separate coverage for seepage resulting from a plumbing system that is hidden. It merely limits the application of the exclusion for loss seepage caused over time.

Commercial property policies can provide so called "all-risk" coverage for buildings and "named" or "specified peril" coverage for business personal property. When both types of coverage, "all-risk" and "named peril," appear in different sections of a single insurance policy, the reader cannot intermingle the terms because the contract's specific provisions govern coverage for each type of property.[80] Thus, when coverage for the business personal property is limited to that caused by specified perils, damage to the building may not result in coverage for business personal property when the peril that caused the damage to the structure is not one of the specified perils for business personal property.

67 *Garvey v. State Farm Fire & Casualty Co.*, 770 P.2d 704, (Cal. 1989); *Macheca Transport v. Philadelphia Indem. Ins. Co.*, 2011 WL 3444553 (C.A.8.Mo, 2011).
68 *HoneyBaked Foods, Inc. v. Affiliated FM Ins. Co.*, 757 F. Supp. 2d 738, (N.D. Ohio, 2010).
69 *Highlands Insurance Company v. Aerovox, Inc.*, 424 Mass. 226, 676 N.E.2d 801, 804 (1997).
70 *Watson v. Allstate Texas Lloyd's*, 224 F.App'x. 335 (C.A. 5. Tex., 2007).
71 *Dryden Oil Company of New England, Inc. v. Travelers Indemnity Company*, 91 F.3d 278, 282 (1st Cir. 1996) (interpreting Massachusetts law); *First Pa. Bank v. Nat'l Union Fire Ins. Co.*, 397 Pa.Super. 612, 580 A.2d 799, 802 (1990).
72 *Mundey v. Erie Ins. Group*, 893 A.2d 645 (Md.Ct. Spec.App., 2006).
73 *Quincy Mut. Fire Ins. Co. v. Abernathy*, 393 Mass. 81, 469 N.E.2d 797, 799 (1984).
74 *Wider v. Heritage Maint. Inc.*, 827 N.Y.S.2d 837 (Sup. Ct. 2007).
75 *Sate v. Metro. Life Ins. Co.*, 162 Misc.2d 513, 618 N.Y.S.2d 180 [Civ. Ct. N.Y. Cty 1994], *aff'd* 169 Misc.2d 363, 650 N.Y.S.2d 66 (App. Term 2nd Dept 1996); *see also Northville Industries Corp. v. National Union Fire Insurance Co. of Pittsburgh*, 89 N.Y.2d 621, 657 N.Y.S.2d 564, 679 N.E.2d 1044 (1997)).
76 *Camp Dresser & McKee, Inc. v. Home Insurance Company*, 30 Mass.App.Ct. 318, 324, 568 N.E.2d 631, 635 (1991); *Farm Mutual Automobile Insurance Co. v. Traylor*, 263 Ark. 92, 562 S.W.2d 595 (1978); *Security Ins. Co. v. Owen*, 252 Ark. 720, 480 S.W.2d 558 (1972); *Pennsylvania Bank v. Nat'l Union Fire Ins. Co.*, 397 Pa.Super. 612, 580 A.2d 799, 802 (1990). *See also* 1 Witkin Contracts § 699, 9th ed.,1987 (collecting cases and commentary).
77 *Kay v. United Pacific Ins. Co.*, 902 F.Supp. 656 (D. Md. 1995).
78 *Auto-Owners Ins. Co. v. Evergreen, Inc.*, 608 N.W.2d 900 (Minn. CT. App. 2000).
79 *E.M.M.I. Inc. v. Zurich American Ins. Co.*, 84 P.3d 385 (Cal. 2004).
80 *Fisher v. Certain Interested Underwriters at Lloyds Subscribing to Contract No. 242/99*, 930 So.2d 756 (Fla. 4 DCA 2006).

Litigation concerning the application of exclusions usually centers on the interpretation of the meaning and scope of the exclusions. Generally, policies must be given a reasonable interpretation, and the words used are to be given their common, ordinary, and customary meaning[81] unless the contract itself shows that particular definitions are used to replace that meaning.[82] Policy language must be interpreted in the same way that a reasonable layperson would read it, not as an attorney or insurance professional might analyze it.[83] Exclusionary clauses that meet the plain, clear, and conspicuous requirement will be given effect.[84] Courts will not construe exclusions strictly against the insurer absent some ambiguity.[85] A policy provision is ambiguous if it is susceptible to two reasonable constructions or more.[86] When there is no doubt in the meaning of the policy language, courts will not strain to find ambiguities.[87]

Over time, courts have fashioned rules regarding all-risk policies that govern coverage apart from stated exclusions. Implicit in the concept of insurance is that the loss occurred as a result of a fortuitous event, rather than a planned, intended, or anticipated event.[88] The exclusion of known risk, known loss, and a loss in progress are generally considered to be part of the "fortuity" requirement that runs throughout insurance law.[89] Under that requirement, the insurer will not and should not be asked to provide coverage for a loss that is reasonably certain or expected to occur within the policy period.[90] Another way to look at the fortuity principle is to say that an insurance policy provides coverage for the "risk" of loss,[91] not one the insured subjectively knew would occur at the time the insurance was purchased.[92]

Additional examples of losses that fall outside all-risk coverage because of the lack of fortuity are losses brought about by fraud or the willful act of the insured[93] and those almost certain to happen because of nature and inherent qualities of insured property.[94] These notions have found their way into specific exclusions within commercial policies. For example, when the floor in an insured building was supported by defective trusses that, left unrepaired, would eventually cause the building to collapse, the insurer was not required to provide coverage for the repair of those trusses. The insurance policy provided coverage for damage the collapse caused, but only if an "abrupt falling down, caving in or flattening of the insured property" caused the damage. Furthermore, the policy excluded coverage for any "latent defect in the property that caused it to damage or destroy itself," and the defective floor trusses fell under that exclusion.[95] Courts have also refused to enforce coverage when the risk insured against was unlawful.[96]

2.3 Policy Limits

Whether the policy provides coverage based on a specified or all-risk basis, the amount of risk the carrier has contracted to bear will limit coverage. These limits can be set a number of ways.

81 *United Servs. Auto. Ass'n. v. Warner*, 64 Cal. App.3d 957, 962, 135 Cal.Rptr. 34 (1976); *see also Perkins v. Fireman's Fund Indem. Co.*, 44 Cal.App.2d 427, 431, 112 P.2d 670 (1941).
82 *Greenwood Ins. Group, Inc. v. United States Liability Ins. Co.*, 157 S.W.3d 444, 448 (Tex.App.-Houston [1 Dist.] 2004) (citing *W. Reserve Life Ins. v. Meadows*, 152 Tex. 559, 261 S.W.2d 554, 557 (Tex.1953)).
83 *Crane v. State Farm Fire & Casualty Co.*, 5 Cal.3d 112, 115, 95 Cal.Rptr. 513, 485 P.2d 1129 (1971).
84 *Meritplan Ins. Co. v. Woollum*, 52 Cal.App. 3d 167, 170, 123 Cal. Rptr. 613 (1975).
85 *Allstate Ins. Co. v. Chinn*, 271 Cal. App. 2d 274, 279, 76 Cal. Rptr. 264. (1969).
86 *E.M.M.I., Inc. v. Zurich American Ins. Co.*, 32 Cal.4th 465, 470, 9 Cal.Rptr.3d 701, 84 P.3d 385 (2004).
87 *Hauser v. State Farm Mut. Auto. Ins. Co.*, 205 Cal.App.3d 843, 846, 252 Cal.Rptr. 569 (1988); *supra*, *Barrett v. Farmers Ins. Group*, 174 Cal. App. 3d 747, 752, 220 Cal. Rptr. 135. (1985).
88 Lee R. Russ and Thomas F. Segalla, 7 *Couch on Insurance* 3d § 101:2, at 101-8 (1997).
89 Ibid. § 102:9, at 102-24.
90 Eric Mills Holmes and Mark S. Rhodes, 1 *Appleman on Insurance* 2d § 1.4, at 26 (1996). *Aluminum Co. of America v. Aetna Cas. & Sur. Co.*, 140 Wash.2d 517, 998 P.2d 856 (Wash., 2000).
91 *Public Util. Dist. No. 1*, 124 Wash.2d at 808, 881 P.2d 1020 (1994).
92 *Hillhaven Properties Ltd. v. Sellen Constr. Co.*, 133 Wash.2d 751, 767, 948 P.2d 796 (1997).
93 *Plaza 61 v. North River Ins. Co.*, 446 F.Supp. 1168 (M.D.Pa.,1978).
94 *Glassner v. Detroit Fire & Marine Ins. Co.*, 127 N.W.2d 761 (Wis.,1964).
95 *Huntingdon Ridge Townhouse Homeowners Ass'n, Inc. v. QBE Ins. Corp.*, 2009 WL 4060458 (M.D.Tenn.Nashville.Div., 2009).
96 *Avis v. Hartford Fire Ins. Co.*, 195 S.E.2d 545 (N.C. 1973).

2.3.1 Designated Limits

The typical commercial policy contains provisions that set overall limits on the risks the carrier assumes. A sample clause could appear as follows:

> The maximum indemnity that the insurer may become obligated to pay under this Agreement for any one Insured Event under the applicable Coverage shall be the amount of the applicable per insured Event Limit of Liability stated in the Schedule, subject to and limited by the Aggregate Limit of Liability stated in the Schedule.

Under such a clause, available coverage will be subject to limits for both single events and aggregate limits. Such a schedule can appear as follows:

> LIMIT OF LIABILITY This policy is liable for up to:
>
> - $2,000,000 per Insured Event; and
> - $4,000,000 in the aggregate for the agreement period.

In evaluating available coverage for a loss under such a policy, the parties must consider both the designated limits and the amount of coverage that the insured might have exhausted during the policy period. For example, when the insured has already had two losses totaling $3 million in the policy period, a subsequent loss within that same policy period would have only the remainder of the aggregate limit—$1 million—for coverage.

2.3.2 Sublimits by Property/Schedules of Values

In complex property policies covering multiple properties, the amount of coverage for business interruption may be set by amounts attached to the property that cause the interruption. In addition, such policies may limit coverage for business interruption to those properties that list a limit for such coverage. A sample provision may appear as follows:

> The maximum indemnity that the insurer may become obligated to pay under this Agreement for any one Insured Event under the applicable Coverage shall be the amount of the applicable per insured Event Limit of Liability stated in the Schedule for that property and coverage, subject to and limited by the Aggregate Limit of Liability stated in the Schedule. A sample of such a schedule would be as follows:

Property	Address	Building Value	Income	Contents
Building 1	101 Smith St. Tampa, FL	$800,000	$350,000	$90,000
Building 2	105 Smith St. Tampa, FL	$400,000		$90,000

Under this policy, a loss to Building 1 would give rise to business income coverage because a limit is set for that loss in the schedule of values. A loss to Building 2 would not give rise to business income coverage because there is no value for such a loss under Building 2 in the schedule of values.

However, whether the listing of values operates as a limit for either the property or the subsequent business interruption that might result from damage to that property depends on the precise language of the policy. Under some policies, the values listed in the policy may not limit coverage. Under such a policy, counsel should expect to see language such as the following:

VALUES

The values declared to the Insurer at the inception of the policy and listed within the schedule of values are for premium purposes only and shall not limit the coverages provided by this policy.

Under such a provision, the specified values would merely act as a trigger or basis for coverage. The full limits of the policy coverage would be available to cover a loss by the insured, provided the insured had not exhausted the aggregate limits under the policy.[97]

2.3.3 Sublimits by Peril

Despite overall policy limits, coverage for a particular loss may depend on provisions that act as a limit for coverage available for losses due to that peril. Such limits may be stated in general policy provisions or provisions that exclude certain perils and, by endorsement, reestablish coverage for that peril but limit the amount that the insured can recover for damage or loss resulting from the specified peril. While not stated as specific limits, provisions that set a separate, greater deductible for particular perils also limit the amount available to the insured following a loss.

The following are examples of provisions limiting coverage by peril:

Example 1

This endorsement modifies insurance provided under the Insuring Agreements designated below:

Insuring Agreement	Limit of Insurance
Employee Theft - Per Loss Coverage	$100,000
Employee Theft - Per Employee Coverage	$50,000

Example 2

Limited coverage for loss or damage by "fungus," wet or dry rot, or bacteria is added. This Limited Coverage is limited to $15,000. Regardless of the number of claims, this limit is the most we will pay for the total of all loss or damage arising out of all occurrences which take place in a 12-month period (starting with the beginning of the present annual policy period). With respect to a particular occurrence of loss which results in "fungus," wet or dry rot, or bacteria, we will not pay more than a total of $15,000 even if the "fungus," wet or dry rot, or bacteria continues to be present or active, or recurs, in a later policy period.

2.3.4 Blanket Policies

The term "blanket policy" is a term of art.[98] A blanket policy is one in which the entire amount of the limits for property attaches to, and covers every item of, property described in the policy.[99] A blanket policy allows the insured to have a policy that covers a number of properties for something less than the full replacement value of the aggregate of those properties and is based upon the presumption that the risk that a loss would occur requiring replacement coverage for all properties is low.[100] When a loss occurs under a blanket policy, the limits for that loss will be the entire amount provided for all properties.[101]

A policy covering more than one property may list those properties on a schedule and list specified amounts for each property. When a policy provides an amount of coverage for multiple properties but specifies that coverage for the loss

97 *Reliance Ins. Co. v. Orleans Parish Sch. Bd.*, 322 F.2d 803, 806 (5th Cir. 1963) (*cert. denied*, 377 U.S. 916, 84 S. Ct. 1180, 12 L. Ed. 2d 186 (1964)).
98 Ibid.
99 Ibid.; *RSUI Indem. Co. v. Benderson Dev. Co.*, 2011 WL 32318 (M.D. Fla. Jan. 5, 2011) (citing 12 *Couch on Insurance* § 177.72).
100 *Gallenstein Bros. v. Gen. Acc. Ins. Co.*, 178 F. Supp. 2d 907 (S.D. Ohio, 2001).
101 *Cent. Nat. Ins. Co. of Omaha v. Devonshire Coverage Corp.*, 426 F. Supp. 7 (D. Neb. 1976).

of any property is limited to separate limits for each property stated on a schedule of values, the policy is a scheduled policy, and not a blanket policy.[102]

2.4 Coinsurance

Among the limits to coverage available to the insured is the limit posed by so-called "coinsurance" clauses. Such clauses provide a penalty if the insured fails to purchase coverage that is consistent with the actual risk of loss that damage from a covered peril might pose. A coinsurance clause in a property insurance contract requires the property owner to ensure that the property is insured for a minimum percentage of its total value. To the extent that the coverage the insured purchased falls below the specified percentage of the actual value of the property, a portion of the insured's loss will not be covered, making the insured a "coinsurer" to the extent that the coverage the insured purchased is less than the specified value of the property.[103] The following example provisions illustrate such a clause:

> Coinsurance
>
> If a Coinsurance percentage is shown in the Declarations, the following condition applies.
>
> a. We will not pay the full amount of any loss if the value of Covered Property at the time of loss times the Coinsurance percentage shown for it in the Declarations is greater than the Limit of Insurance for the property. Instead, we will determine the most we will pay using the following steps:
>
> (1) Multiply the value of Covered Property at the time of loss by the Coinsurance percentage;
>
> (2) Divide the Limit of Insurance of the property by the figure determined in Step (1);
>
> (3) Multiply the total amount of loss, before the application of any deductible, by the figure determined in Step (2); and
>
> (4) Subtract the deductible from the figure determined in Step (3).
>
> We will pay the amount determined in Step (4) or the limit of insurance, whichever is less. For the remainder, you will either have to rely on other insurance or absorb the loss yourself.

If the coinsurance clause is 80% and the actual value of the property falls below 80% of the coverage purchased by the insured, the operation of the sample coinsurance clause would be as follows:

The coinsurance percentage set by the policy	80%
The loss claimed by the insured	$250,000
The Limit of Insurance purchased by the insured	$100,000
The Deductible set by the policy	$250
The amount of loss is	$40,000

Step (1): Multiply the property value by the coinsurance percentage to determine the minimum amount of insurance the insured is required to meet the policy's coinsurance requirements.

$250,000 × 80% = $200,000

Step (2): Divide the limit of insurance purchased by the insured by the minimum amount of insurance the insured was required to purchase to meet the policy's coinsurance requirements to determine what percentage of the required insurance is represented by the policy limit purchased by the insured.

$100,000 ÷ $200,000 = 0.50

102 *Reliance Nat'l Indem. Co. v. Lexington Ins. Co.*, 2002 WL 31409576, at *8 (N.D. Ill. Oct 23, 2002); *Fair Grounds Corp. v. Travelers Indem. Co. of Ill.*, 742 So. 2d 1069, 1071 (La. Ct. App. 1999); *Anderson Mattress Co. v. First State Ins. Co.*, 617 N.E.2d 932, 935-38 (Ind. Ct. App. 1993).

103 *Maloney Cinque, L.L.C. v. Pac. Ins. Co.*, 2012 WL 234439 (La. App. 4 Cir. 2012) (citing *Couch on Insurance* § 1.3).

Step (3): Multiply the amount of the loss by the percentage of the required insurance represented by the policy limit purchased by the insured to determine the amount of the loss that will be covered by the policy.

$40,000 × 0.50 = $20,000

Step (4): Subtract the deductible from the amount of the loss that will be covered by the policy to determine the amount of the loss that is covered under the policy.

$20,000 - $250 = $19,750

In the example above, the insured purchased $100,000 worth of coverage for a property that was later determined to be worth $250,000. Thus, as the value of coverage the insured purchased was less than 80% of the property's actual value, the coinsurance clause was triggered. Determination of the amount of the loss that would be covered involved calculating the minimum amount of insurance that would have satisfied the coinsurance clause ($200,000) and the percentage of that minimum coverage the insured actually purchased (50%) and applying that to the amount of the loss. In this example, the insured is the coinsurer for 50% of the loss less the applicable deductible.

2.5 Period of Restoration

Business interruption coverage operates to compensate the insured both for losses during the period of actual business interruption and lost profits, loss of earnings, and continuing expenses during the period of repair or restoration of property damaged or destroyed by a covered peril.[104] Under typical provisions, the purpose of the period of restoration is to provide additional coverage to earnings lost after repairs are made during the period necessary to restore the business to its preloss condition.[105] As noted above, such provisions cover losses due to business interruption that result from physical loss or damage to covered property from a covered peril.[106]

Business interruption insurance is not intended to put an insured in a better position than it would have occupied without the interruption.[107] It is not to be interpreted as placing an insured in a better position than it would have been had the interruption not occurred by eliminating the risk of market variability.[108] Thus, the operation of a business interruption provision is not intended to serve to improve the insured's financial performance by guaranteeing a level of revenue in an otherwise competitive and variable industry.[109]

Such lost income coverage is unavailable to reimburse insureds for losses occurring outside the "restoration period" the parties agreed to in the insurance contract.[110] This limitation applies even though there may be a substantial additional, but uninsured, loss consisting of reduction in income subsequent to the date of full restoration.[111] When a claim is made for loss of income during a period of business interruption, the issue to be resolved is not whether the insured suffered a loss, but whether the insured suffered a loss the terms of the policies insure against.[112]

When there is no loss of earnings during the suspension period, there is generally no recovery for a business-interruption loss.[113] A sample provision could appear as follows:

104 *Buxbaum v. Aetna Life & Cas. Co.*, 126 Cal. Rptr. 2d 682, 687 (Cal. App. 2 Dist. 2002) (quoting 11 *Couch on Insurance* (3rd ed., 1998) § 167:9, p. 167-14).
105 *Great N. Oil Co. v. St. Paul Fire & Marine Ins. Co.*, 303 Minn. 267, 227 N.W.2d 789, 793 (Minn. 1975) (quoting *A & S Corp. v. Centennial Ins. Co.*, 242 F. Supp. 584, 589 (N.D. Ill. 1965)).
106 *Prot. Mut. Ins. Co. v. Mitsubishi Silicon Am. Corp.*, 992 P.2d 479 (Or. App. 1999).
107 *Dictiomatic, Inc. v. U.S. Fid. & Guar. Co.*, 127 F. Supp. 2d 1239, 1243 (S.D. Fla. 1999); 33 *Appleman on Insurance* 2d § 196.02[H] (2008).
108 *See Cotton Bros. Baking Co. v. Indus. Risk Insurers*, 941 F.2d 380, 385 (5th Cir. 1991).
109 *Ramada Inn Ramogreen, Inc. v. Travelers Indem. Co. of Am.*, 835 F.2d 812 (11th Cir. 1988) (interpreting Florida law).
110 *Rogers v. Am. Ins. Co.*, 338 F.2d 240, 243 (8th Cir. 1964).
111 Id. at 243.
112 *Rogers*, 338 F.2d at 241; *Nw. States Portland Cem. Co. v. Hartford Fire Ins. Co.*, 243 F. Supp. 386, 388 (D. Iowa 1965).
113 *Great N. Oil Co. v. St. Paul Fire & Marine Ins. Co.*, 227 N.W.2d 789, 793 (Minn. 1975).

(1) Period of Recovery: The length of time for which loss may be claimed:

(a) Shall commence 72 hours after the insured suffers destruction or damage to property for which coverage is provided by the property coverage form; and

(b) 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; and

(c) Such additional length of time to restore the Insured's 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.

(d) Shall not be limited by the date of the expiration of this policy.

2.5.1 Waiting Period

Instead of a deductible, most policies have a "waiting period" that must be satisfied before time element coverage is triggered.[114] An example of such a provision is set out in Paragraph (1)(a) of the example above. Such a clause operates as a deductible or self-insurance provision, leaving responsibility for losses shorter than the specified waiting period to the insured. Under such a clause, claims involving interruptions that are less than or equal to the designated waiting period do not give rise to business interruption coverage.[115] In claims involving interruptions that are more than the designated waiting period, that part of the insured's loss that occurs within the waiting period is not covered.

2.5.2 Initial Period of Restoration

The provision set out in Paragraph (1)(b) of the example above is a typical provision providing the measure of coverage for the initial period of restoration. Such a clause provides coverage for losses that occur from the end of the initial waiting period and extends until the expiration of the objective period measured by "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." Litigation concerning this portion of the period of restoration has addressed the goal and objective nature of the standard.

As noted in previous sections, the goal of business interruption insurance is to protect the business owner from financial loss that flows from damage to insured property.[116] In *Duane Reade, Inc. v. St. Paul Fire and Marine Ins. Co.*,[117] the insured argued that the initial period of recovery extended through the actual period that would be required to restore its operations to the kind, quality, and level that existed before the loss. The court rejected that claim because the policy provision measured the initial period of recovery in terms of the objective time it should take merely to "rebuild, repair, or replace such part of the property as had been destroyed or damaged."

In *Duane Reade*, the insured operated a drug store in the concourse of the World Trade Center. The store was destroyed in the September 2001 terrorist attacks. The policy provided that the initial period "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 property that

114 By *Dev., Inc. v. United Fire & Cas. Co.*, 2006 WL 694991 (D.S.D. March 14, 2006).
115 Ibid.
116 *Howard Stores Corp. v Foremost Ins. Co.*, 441 N.Y.S.2d 674, affd 56 N.Y.2d 991, 453 N.Y.S.2d 682, 439 N.E.2d 397 (1981 1st Dept).
117 *Duane Reade, Inc. v. St. Paul Fire & Marine Ins. Co.*, 411 F.3d 384 (2d Cir. 2004).

has been destroyed or damaged." Given that it would not be possible for the insured to restore its leased spaces within the Twin Towers complex, the insurer argued that the proper application of the initial period would be measured by the objective time it would take the insured to locate, furnish, and open a new drug store.[118] In other words, to determine the objective time for the person leasing retail space, the initial period is measured by the time that should be required to secure replacement retail space and replace the insured property that had been destroyed.[119]

Relying on the express language of the policy, the court in *Duane Reade* rejected the insured's contention that the initial period should be measured by the actual time for it to resume operations in a store located at its former World Trade Center site. Instead, the court held that the initial period covers only the hypothetical time it would reasonably take to repair, rebuild, or replace its store at a suitable location and begin operations,[120] not until "those operations became 'functionally equivalent' to the store's operations before the terrorist attack on September 11, 2001."[121]

Thus, under the typical business interruption provision, the initial period of business interruption coverage ends when the property necessary to resume operations should have been repaired, rebuilt, or replaced with reasonable speed and similar quality, and not when operations have been actually resumed, whether to their preloss levels or otherwise.[122] An assertion that the period of restoration should be measured by the time needed for the policyholder to actually resume functionally equivalent operations would render superfluous the provision for extended business income coverage, which explicitly provides coverage for the potentially longer period that it may take to restore the insured's operations to the condition that would have existed if no direct physical loss or damage occurred.[123]

The standard for the scope of coverage under the initial period of recovery is objective. Cases litigating the issue fall into two categories. One category involves cases where an insured has sought to enlarge the period of computation of reduced gross earnings, and the courts have limited it to the period of restoration.[124] When the premises are actually restored, the period for computation of reduced gross earnings ends with such restoration, unless that period exceeds the theoretical period of repair.[125] The second category involves cases where, for one reason or another, an insured does not repair, replace, or rebuild the insured premises. Under policies insuring against loss from interruption of business, the fact that the period required to rebuild or replace with due diligence and dispatch is entirely theoretical does not impede recovery.[126] In these cases, the courts have held that the reduced earnings computation is based on the theoretical period it would have taken to repair, replace, or rebuild the premises with due diligence.[127]

Generally, the theoretical restoration period serves as the outer limit for which compensation may be paid as to a property, regardless of the actual replacement time.[128] This restriction necessarily involves an inquiry into the reasonableness

118 Id. at 387.

119 *Schmidt v. Magnetic Head Corp.*, 97 A.D.2d 151, 468 N.Y.S.2d 649 (1983) (reading the period of liability provisions to be consistent with the time element description, "building and equipment" only refers to the insured's actual square footage of leased retail space and any business personal property located there); *Streamline Capital, L.L.C. v. Hartford Cas. Ins. Co.*, 2003 WL 22004888, at *8 (S.D.N.Y. Aug. 25, 2003) (the conclusion of the period of interruption "is dependent only on replacing what is necessary to resume those operations not a specific office at a specific location.").

120 *Duane Reade*, 411 F.3d at 398.

121 Id. at 384.

122 *Lava Trading Inc. v. Hartford Fire Ins. Co.*, 365 F. Supp. 2d 434, 442 (S.D.N.Y. Mar. 31, 2005).

123 Ibid. *See also CII Carbon, LLC v. National Union Fire Ins. Co. of Louisiana, Inc.*, 918 So.2d 1060 (La.App. 4 Cir. 2005).

124 *Pac. Coast Engineering Co. v. St. Paul Fire & Marine Ins. Co.*, 9 Cal. App. 3d 270, 274, 88 Cal. Rptr. 122 (1970); *Cong. Bar & Rest., Inc. v. Transamerica Ins. Co.*, 42 Wis. 2d 56, 165 N.W.2d 409 (1968).

125 *Eureka-Sec. Fire & Marine Ins. Co. v. Simon*, 1 Ariz. App. 274, 401 P.2d 759 (1965).

126 *DiLeo v. U.S. Fid. & Guar. Co.*, 248 N.E.2d 669 (Ill.App.1. Dist. 1969).

127 *Beautytuft, Inc. v. Factory Ins. Ass'n*, 431 F.2d 1122 (6th Cir. 1970) (insured rebuilt at another site); *Hawkinson Tread Tire Serv. Co. v. Ind. Lumbermans Mut. Ins. Co.*, 362 Mo. 823, 245 S.W.2d 24 (1951) (insured moved to a new site); *Grand Pac. Hotel Co. v. Mich. Commercial Ins. Co.*, 243 Ill. 110, 90 N.E. 244 (1909) (insured prevented by lease forfeiture from rebuilding insured premises); *Anchor Toy Corp. v. Am. Eagle Fire Ins.*, 4 Misc. 2d 364, 155 N.Y.S.2d 600, 603 (1956) (insured made no effort to rebuild at site of destruction but first attempted to lease other premises and later rebuilt at another site).

128 *SR Intern. Bus. Ins. Co. v. World Trade Ctr. Props., L.L.C.*, 2005 WL 827074, at *6 (S.D.N.Y. Feb. 15, 2005).

of the speed of the insured's efforts to fix the problems and is, therefore, a question reserved for trial.[129] However, the period for which interest charges are recoverable can extend beyond the theoretical period of restoration.[130] In some cases, courts have allowed a reasonable extension of that period when the restoration delay was due to actions of the insurance company.[131] However, the insurer is not responsible for any period of delay other obstacles to restoration caused, such as the insured's lack of due diligence or poor financial condition.[132]

2.5.3 Extended Period of Indemnity

The "Extended Period of Recovery" described in Paragraph (1)(c) of the example above is a typical provision providing the measure of coverage for the period after the initial period when the insured has or should have rebuilt, repaired, or replaced the damaged property. During the so-called "extended period," the insured is expected to "ramp up to full operations" following the restart of the business following the period of interruption.[133] The extended period covers the insured for lost profits if, after it has repaired or reopened its business locations, its business has not yet returned to preloss levels.[134]

The extended period does not necessarily begin at the end of the initial period. As noted above, that period ends at the conclusion of the time that would be required with the exercise of due diligence and dispatch to rebuild, repair, or replace the damaged property. Instead, the extended period generally does not begin until the later of the following dates: (1) the date on which the liability of the insurer for loss or damage would otherwise terminate; or (2) the date on which repair, replacement, or rebuilding of such part of the property that has been damaged is actually completed.[135] Given the objective nature of the initial period, the actual dates on which the initial period of recovery concluded and when the extended period of recovery began are questions of fact to be determined at trial.[136]

The effect of the language in the example above is to encourage the insured to complete the repairs within the objective time required to rebuild, repair, or replace the damaged property with the exercise of due diligence and dispatch. Once that period ends, the liability of the insurer for loss or damage under the business interruption provision terminates. If the initial period of the insurer's liability occurs before the property is actually repaired, payments for loss of income will cease. Since the extended period does not begin until the "later" of the two dates listed in the example clause, the insured who fails to repair the property within the objective period will experience a loss of business interruption coverage between the objective end of the initial period and the date the extended period begins.

This potential period without coverage is consistent with the goal of the extended period. As noted above, the goal is to provide coverage for the insured's lost profits *after* it has repaired or reopened its business locations and extend coverage until its business has returned to preloss levels, but for no more than 12 months.[137] Under the circumstances, starting the extended period *before* the insured has repaired or reopened its business would serve no purpose.

A business interruption for any extended period may, and often does, result in a loss of business, sometimes for a short period, sometimes for longer periods, and sometimes permanently. While it may seem harsh to terminate the extended period, a "cut-off" date is a necessity. Otherwise, claims for an unbounded period would be opened to a degree of speculation that would be unacceptable because there would be no method to determine, with any degree of accuracy,

129 *Davidson Hotel Co. v. St. Paul Fire & Marine Ins. Co.*, 136 F. Supp. 2d 901 (W.D. Tenn. W. Div., 2001).
130 *Omaha Paper Stock Co. v. Harbor Ins. Co.*, 445 F. Supp. 179 (D. Neb. 1978), (*aff'd*, 596 F.2d 283 (8th Cir. 1979)).
131 *Hampton Foods, Inc. v. Aetna Cas. & Sur. Co.*, 843 F.2d 1140 (8th Cir. 1988) (applying Missouri law).
132 *Omaha Paper Stock Co. v. Harbor Ins. Co.*, 596 F.2d 283, 290 (8th Cir. 1979).
133 *Anchor Toy Corp. v. Am. Eagle Fire Ins.*, 4 Misc. 2d 364, 155 N.Y.S.2d 600, 603 (1956).
134 *Duane Reade*, 411 F.3d 384 (2nd Cir. 2005) (applying New York law).
135 *Safeguard Storage Props.*, 60 So. 3d 110 (La.App. 4 Cir. 2011).
136 Ibid. (La.App. 4 Cir. 2011).
137 *Duane Reade*, 411 F.3d 384 (2nd Cir. 2005).

the amount of such losses.[138] Even when the business interruption clause does not include language expressly limiting the time for such coverage, the court will impose a limit because an unlimited award would lead to an unbounded and unduly speculative result.[139]

While business interruption coverage typically compensates the insured for the loss of profits from income streams existing on the date of the loss, that is not always the case. Courts have permitted claims when the insured could prove that facilities under construction on the date of loss would have earned income during the period of restoration. For example, in *General Ins. Co. v. Pathfinder Petroleum Co.*,[140] the insured was awarded the expected profits from the planned expansion of its production facility. The court noted that the insured was able to prove that the expansion could have been made operational within the suspension period and, had the accident not occurred, the new facility would have earned an expected profit during the suspension period. Similarly, in *Fidelity-Phenix Fire Ins. Co. v. Benedict Coal Corp.*,[141] the insured claimed expected profits from the mining of a new coal seam. The court allowed the recovery of these profits because the facts of the claim established that the new seam would have been operational during the suspension period.

2.6 Extra Expense

Extra expenses are the costs associated with the insured's efforts to continue, as best it can, the normal conduct of its business during the period of restoration.[142] In addition, where the policy provides, extra expense provisions include the insured's expenses to minimize or mitigate a covered business interruption loss.[143] The following example illustrates a typical extra expense clause:

> This policy provides coverage for Extra Expense as defined in this section
>
> (a) Extra Expense incurred directly resulting from physical loss, damage, or destruction covered herein to real or personal property as described in Clause 8.A. and not otherwise excluded.
>
> (b) "Extra Expense" means the reasonable and necessary expenses incurred during the Period of Recovery over and above the total expenses that would normally have been incurred to conduct the business had no loss or damage occurred and shall include the extra costs of temporarily using property or facilities of the Insured or others, less any value remaining at the end of the Period of Recovery for property obtained in connection herewith.
>
> In no event shall these expenses include: any loss of income; costs that normally would have been incurred in conducting the business during the same period had no physical loss or damage occurred; the cost of permanent repair or replacement of property that has been damaged or destroyed; or any expense recoverable elsewhere in this Policy.

Extra expense coverage is not intended to cover costs during a period of interruption that would normally have incurred to conduct the business during the same period had no loss occurred. Extra expense coverage applies only to the portion of the insured's operating expenses that exceed the insured's normal operating expenses.[144] Thus, normal expenses—including rent, salaries, telephone, and other fixed expense items—paid during the interruption are not within coverage of an extra expense endorsement.[145]

138 *Midland Broadcasters, Inc. v. Ins. Co. of N. Am.*, 636 F. Supp. 165 (D. Kan. 1986); *Great N. Oil Co. v. St. Paul Fire & Marine Ins. Co.*, 303 Minn. 267, 227 N.W.2d 789, 793 (Minn. 1975).

139 *Nassau Gallery, Inc. v. Nationwide Mut. Fire Ins. Co.*, 2003 WL 21223843 (Del.Super. 2003).

140 *Gen. Ins. Co. v. Pathfinder Petrol. Co.*, 145 F.2d 368 (9th Cir. 1944).

141 *Fidelity-Phenix Fire Ins. Co. v. Benedict Coal Corp.*, 64 F.2d 347 (4th Cir. 1933).

142 *Travelers Indem. Co. v. Pollard Friendly Ford Co.*, 512 S.W.2d 375, 377, 379 (Tex. Civ. App. 1974); *see also Port Murray Dairy Co. v. Providence Wash. Ins. Co.*, 52 N.J. Super. 350, 145 A.2d 504 (Super. Ct. Ch. Div. 1958) (discussing the difference between extra expense coverage and primary coverage).

143 *See* David A. Borghesi, "Business Interruption Insurance—A Business Perspective," 17 *Nova L. Rev.* 1147, 1159 (1993).

144 *See Formosa Plastics Corp., U.S.A. v. Ace American Insurance Co.*, 2010 WL 4687835 (D. N.J. Nov. 9, 2010) (citing Linda G. Robinson and Jack P. Gibson, *Commercial Property Insurance*, 4th ed., 1996, II.E. 13).

145 *Travelers Indem. Co.*, 512 S.W.2d 375.

2.7 Making a Business Interruption Claim

2.7.1 Duties After Loss

Counsel for insureds who have suffered an interruption in business can be instrumental in ensuring that the insured does not take actions that will compromise the claim. Those actions include the insured's compliance with the post-loss duties the contract imposes on the insured. Those obligations typically include the duty to promptly report the loss to the insurer; mitigate the loss; and provide the insurer access to the damaged property, records relevant to the claim, and, where required, a proof of loss and an examination under oath. Where the policy provides, the insured's compliance with its duties after loss are a condition precedent before the insurer's performance under the contract becomes due.[146] Thus, the failure of the insured to perform its duties after loss can result in a forfeiture of coverage.[147]

The following is a typical provision governing post-loss duties.[148]

> Duties in the Event of Loss or Damage
>
> a. You must see that the following are done in the event of loss or damage to Covered Property:
>
> (1) Notify the police if a law may have been broken.
>
> (2) Give us prompt notice of the loss or damage. Include a description of the property involved.
>
> (3) As soon as possible, give us a description of how, when and where the loss or damage occurred.
>
> (4) Take all reasonable steps to protect the Covered Property from further damage, and keep a record of your expenses necessary to protect the Covered Property, for consideration in the settlement of the claim. This will not increase the Limit of Insurance. However, we will not pay for any subsequent loss or damage resulting from a cause of loss that is not a Covered Cause of Loss. Also, if feasible, set the damaged property aside and in the best possible order for examination.
>
> (5) At our request, give us complete inventories of the damaged and undamaged property. Include quantities, costs, values and amount of loss claimed.
>
> (6) As often as may be reasonably required, permit us to inspect the property proving the loss or damage and examine your books and records. Also permit us to take samples of damaged and undamaged property for inspection, testing and analysis, and permit us to make copies from your books and records.
>
> (7) Send us a signed, sworn proof of loss containing the information we request to investigate the claim. You must do this within 60 days after our request. We will supply you with the necessary forms.
>
> (8) Cooperate with us in the investigation or settlement of the claim.
>
> b. We may examine any insured under oath, while not in the presence of any other insured and at such times as may be reasonably required, about any matter relating to this insurance or the claim, including an insured's books and records. In the event of an examination, an insured's answers must be signed.

2.8 Prompt Reporting

The purpose of a notice provision within an insurance policy is to notify the insurer of the occurrence of a potentially covered event and inform the insurer that a claim is being made under the policy.[149] The failure of an insured to comply

146 *Wright v. State Farm Mut. Auto. Ins. Co.*, 223 Or. App. 357, 196 P.3d 1000 (2008).
147 *Vision v. Fireman's Fund Ins. Cos.*, 304 Or. 301, 306, 744 P.2d 998, 1002 (1987).
148 *Ocean View Towers Ass'n v. QBE Ins. Corp.*, 2011 WL 6754063 (S.D. Fla. Dec. 26, 2011).
149 *Manzi v. Cotton States Mut. Ins. Co.*, 531 S.E.2d 164 (Ga. Ct. App. 2000); *Berglind v. Paintball Bus. Ass'n*, 930 N.E.2d 1036 (Ill. App. 1 Dist. 2010); *Arrowood Indem. Co. v. King*, 605 F.3d 62 (2nd Cir. 2010).

with the notice provisions in an insurance policy to give notice of an accident or occurrence can release the insurer from its obligations under the contract.[150] However, although prompt notice to the insurer is critical to the proper investigation of claims, delay in notice does not necessarily defeat coverage. Instead, the court must consider all facts and circumstances[151] to determine whether the insured's reason for the delay is justifiable under the circumstances.[152]

In most jurisdictions, absent prejudice to the insurer, there is no justification for excusing the insurer from its obligations under the policy, regardless of the reasons for the insured's delay in giving notice of claim.[153] However, the requirement that the insurer show prejudice depends upon state law. Under New York law, absent a valid excuse, an insured's failure to satisfy the requirement that it provide prompt notice of an occurrence vitiates the insurance policy, and the insurer need not show prejudice before it can assert defense of noncompliance.[154] In contrast, New Jersey requires showing of prejudice before the contract of insurance may be avoided.[155] A requirement that there be prejudice can also be different depending upon whether a primary or excess insurer raises the defense of lack of notice.[156]

When prejudice is required, two conditions must be satisfied before an insurer's duties can be discharged as the result of a violation of the "notice" provision of a policy: (1) an unexcused, unreasonable delay in notification by the insured; and (2) resulting material prejudice to the insurer.[157] Whether an insured's excuse or justification for failing to give timely notice of claim to the insurer was sufficient and whether the insured acted diligently in giving the notice are generally questions of fact, to be determined by the jury, according to the nature and circumstances of each individual case.[158]

2.9 Access to Damaged Property

Property policies generally require the insureds who sustain damage to property to keep the damaged property so that the insurer can inspect it.[159] Under the terms of the typical insurance policy, the insured has an obligation to show the damaged property as often as the insurer reasonably requires.[160] The insurer may waive the inspection provisions of the policy, and, when that is done, the insured's failure to store damaged property will not give rise to a defense to coverage by the insurer.[161] Similarly, the requirement that the insured separate damaged goods should receive reasonable interpretation and should not be used to relieve the insurer from liability for loss when literal compliance with requirements becomes impossible, or the insurer has induced the insured to believe that performance of conditions is not required.[162]

A policy requirement that the insured must resume its business as quickly as possible is consistent with the duty, in the event of loss, requiring the insured to set aside the damaged property for examination.[163] The insurer must make its demand and its inspection with reasonable promptness because the insured is not obliged to secure the property for an indefinite period.[164] Instead, the insured is only required to secure the insured premises for a reasonable length of time after the loss so that the insurer can check them.[165]

150 *Travelers Indem. Co. of Conn. v. Miller*, 2011 WL 6004619 (Ala. Dec. 2, 2011).
151 *Starks v. N.E. Ins. Co.*, 408 A.2d 980 (D.C. 1979).
152 *W. Am. Ins. Co. v. Yorkville Nat. Bank*, 2010 WL 3704985 (Ill. Sept. 23, 2010).
153 *Tush v. Pharr*, 68 P.3d 1239 (Alaska 2003).
154 *Am. Home Assur. Co. v. Int'l Ins. Co.*, 684 N.E.2d 14 (N.Y. 1997).
155 *Pfizer, Inc. v. Employers Ins. of Wausau*, 712 A.2d 634 (N.J. 1998).
156 *Midwest Employers Cas. Co. v. E. Ala. Health Care*, 695 So. 2d 1169 (Ala. 1997). *But see contra*: *American Home Assur. Co. v. Int'l Ins. Co.*, 90 N.Y.2d 433, 661 N.Y.S.2d 584, 684 N.E.2d 14 (1997) (excess insurers, like primary insurers, do not have to establish prejudice).
157 *Arrowood Indem. Co. v. King*, 304 Conn. 179 (2012).
158 *JNJ Found. Specialists, Inc. v. D.R. Horton, Inc.*, 2011 WL 3202307 (Ga. Ct. App. July 28, 2011).
159 *Herron v. Millers Nat. Ins. Co.*, 185 F. Supp. 851 (D. Or. 1960).
160 *Harris v. Am. Modern Home Ins. Co.*, 571 F. Supp. 2d 1066 (E.D. Mo. 2008).
161 *Commercial Union Assur. Co. v. Planters Co-op. Ass'n of Lone Wolf*, 252 P.2d 146 (Okla. 1952).
162 *Taubman v. Allied Fire Ins. Co. of Utica*, 160 F.2d 157 (4th Cir. 1947).
163 *Vill. Mkt., Inc. v. State Farm Gen. Ins. Co.*, 970 S.W.2d 243 (Ark. 1998).
164 *Isaac v. Donegal & Conoy Mut. Fire Ins. Co.*, 162 A. 300 (Pa. 1932); *Siegel v. Ins. Co. of N. Am.*, 219 N.W. 467 (N.D. 1928).
165 *Judge v. Celina Mut. Ins. Co.*, 449 A.2d 658 (Pa. Super. Ct. 1982).

The clause in a property insurance policy permitting the insurer to inspect damaged property is generally held to be a cooperation clause, rather than a condition precedent. Under such a clause, the insurer is required to prove a material breach of the clause and substantial prejudice to support denial of coverage. Such provisions are construed in favor of the insured[166] rather than used indiscriminately against the insured.[167] However, some courts have held that prejudice is not required when the insured has violated its obligation to show damaged property.[168] As in the case of alleged violations of the notice clause, the question of whether the insured has satisfied its duty to preserve the property for inspection by the insurer will be a question of fact for the jury.[169] When the damaged property is unavailable for inspection, but the insurer is afforded an opportunity to conduct a meaningful investigation and examination of an identical piece of equipment, the insurer has been found to have suffered no prejudice.[170]

Under the clause requiring the insured to provide access to damaged property, the insured is required to allow the insurer access to the insured property and cannot dictate whom the insurer may send. Thus, when the insurer sent a loss consultant, the insured could not demand that the insurer send an adjuster instead.[171] However, the policy provision requiring the insured to exhibit all that remains of any property to any person the insurer designated did not permit an attorney representing the insurer to enter the remains of the business without permission of the owner and without identifying himself or herself to the owner as the insurer's representative.[172]

When the policy requires the insured to provide access to damaged property, the insured's failure to properly store damaged property after its removal from the building has been held to be a breach of the provision of the business owner's policy requiring it to set damaged property aside for examination, barring recovery under policy.[173] When storage was feasible[174] and parties had agreed that the property would be stored to permit the insurer to make a final inspection to complete its investigation before the property was removed, the insured's contention that additional examination of the damaged property was not required was insufficient to avoid loss of the claim.[175] Destruction of the damaged property before it can be examined has been found to constitute prejudice to the property insurer as a matter of law.[176] Partial compliance by an insured who permits the inspection of some property and not others will not avoid a finding that the insured has breached the policy, voiding the claim.[177]

2.10 Access to Records

A property insurer is not required to simply take the owner's word for the value of the loss and can seek details concerning the loss as a condition to paying the claim.[178] When the insurer investigates a loss, the insured has a duty to cooperate by producing documents relevant to the claimed loss.[179] A clause in the policy that the insured, after a loss, shall produce to the insurer, when required for examination, books of account, bills, vouchers, and other papers is reasonable and valid.[180] An insurer's obligation to pay covered claims under a policy of insurance is not activated until the

166 *Coconut Key Homeowners Ass'n v. Lexington Ins. Co.*, 649 F. Supp. 2d 1363 (S.D. Fla. 2009)); *But see*: *Knowledge A-Z, Inc. v. Sentry Ins.*, 857 N.E.2d 411 (Ind. App. 2006) (Provision in the insurance policy that required the insured in the event of loss or damage to covered property to permit insurer to inspect property was not a cooperation clause, but rather was a clause that required the insured to perform specific duties, and, thus, compliance with the provision was not optional or subject to a trial court determination of reasonableness).
167 *L.D. Jennings Co. v. N. River Ins. Co.*, 172 S.E. 700 (S.C. 1934).
168 *Morris v. Econ. Fire & Cas. Co.*, 848 N.E.2d 663 (Ind. 2006).
169 Ibid., *Sunshine State Ins. Co. v. Corridori*, 28 So. 3d 129 (Fla. App. 4. Dist.2010).
170 *A & W Artesian Well Co. v. Aetna Cas. & Sur. Co.*, 463 A.2d 1381 (R.I. 1983).
171 *Citizens Prop. Ins. Corp. v. Galeria Villas Condo. Ass'n*, 48 So. 3d 188 (Fla. App. 3. Dist. 2010).
172 *An Att'y v. Miss. State Bar Ass'n*, 481 So. 2d 297 (Miss. 1985).
173 *I-Tell Publ'g v. Hartford Cas. Ins. Co.*, 24 F. App'x 723 (9th Cir. 2001); *Seaport Park Condo. v. Greater N.Y. Mut. Ins. Co.*, 828 N.Y.S.2d 381 (N.Y. App. Div. 1.Dept., 2007).
174 *Village Market, Inc. v. State Farm General Ins. Co.*, 333 Ark. 552, 970 S.W.2d 243 (Ark. June 11, 1998).
175 *Seaport Park Condo.*, 828 N.Y.S.2d 381 (N.Y. App. Div. 1. Dept., 2007).
176 *I-Tell Publ'g*, 24 F. App'x 723.
177 *Johnson v. Allstate Ins. Co.*, 2002 WL 31862234 (Ohio App. 11 Dist.Trumbull.Co.2002).
178 *Dixson Produce*, 99 P.3d 725 (Okla.Civ.App. Div.2, 2004).
179 *Miles v. Great N. Ins. Co.*, 671 F. Supp. 2d 231 (D. Mass. 2009).
180 *Simonetti v. Niagara Fire Ins. Co. of N.Y.*, 74 F. Supp. 726 (N.D. Ala. S. Div. 1947).

insured complies with reasonable requests for those documents pursuant to a duty after loss provision.[181] In the absence of proof of waiver or of the inability of the insured, without fault on his part, to comply,[182] the failure of the insured to make an effort to comply with the demands of the company will prevent a recovery on the policy.[183]

In most jurisdictions, the insurer may not deny an insured's claim for damages based upon the insured's failure to produce the records the insurer requested, absent a showing that the insurer was actually prejudiced as a result.[184] However, some courts have held that prejudice is not required when the insured has violated its obligation to show damaged property, provide records and documents, or submit to examination under oath.[185] When the facts of the claim demonstrate indicia of fraud that the requested records could have rebutted, the failure to produce such records has been found to result in prejudice as a matter of law.[186]

When the insured is found to have substantially complied with the insurer's request, the insurer may not deny the insured's claim on the grounds of noncompliance. For example, the court found that the insured substantially complied with its duty to cooperate with the insurer by providing authorizations to release its records and by providing numerous exhibits and photos; the insurer failed to show that certain documents and information regarding the insured's financial condition at the time of loss that were not produced were material and relevant to the investigation or settlement of the claim.[187] Similarly, the failure of an insured to fully cooperate with the production of documents did not permit an insurer under a comprehensive business property policy to assert that the policy was void. Although the insured's production was late and did not include all requested materials, the court found that the insured's response was not a flat refusal to comply without reasonable excuse.[188]

The insurer's request for documents must be reasonable[189] and relate to facts and issues relating to the claim if there is to be a finding that the insured's failure to provide certain documents prevented the insurer from completing its investigation of the claim.[190] However, that does not mean the insured may maintain that it is justified in withholding documents it believed to be confidential because the insurer did not explain why it needed the documents because the insurer is generally under no obligation to provide an explanation for its request for certain documents.[191] In some instances, the reason for, and the reasonableness of, the request is apparent. For example, the insurer's requests for documents concerning fraudulent behavior were reasonable when evidence was presented that the insured may have misrepresented material facts concerning discovery of the claim, such as whether any neighbors may have seen suspicious activity, whether she had spoken with any neighbors concerning alleged burglary, and whether evidence indicated that the insured's son may have taken at least some of the items that were claimed to have been stolen.[192]

Insurance companies are entitled to obtain relevant information from the insured while the information is still fresh.[193] For the insured to provide the information after significant delay is a material dilution of the insurer's rights.[194] Thus, the insured's failure, without excuse or explanation, to provide tax returns and credit history or authorization for those

181 *Caribbean I Owners' Ass'n v. Great Am. Ins. Co. of N.Y.*, 600 F. Supp. 2d 1228 (S.D. Ala. S. Div. 2009); *Hillery v. Allstate Indem. Co.*, 705 F. Supp. 2d 1343 (S.D. Ala. S. Div. 2010).
182 *Ward v. Nat'l Fire Ins. Co.*, 38 P. 1127 (Wash. 1894).
183 *Langan v. Royal Ins. Co. of Liverpool*, 29 A. 710 (Pa. 1894); *Cook v. Allstate Ins. Co.*, 337 F. Supp. 2d 1206 (C.D. Cal. 2004).
184 *Romano v. Arbella Mut. Ins. Co.*, 429 F. Supp. 2d 202 (D. Mass. 2006); *Oliff-Michael v. Mut. Benefit Ins. Co.*, 262 F. Supp. 2d 602 (D. Md. 2003).
185 *Morris v. Econ. Fire & Cas. Co.*, 848 N.E.2d 663 (Ind. 2006); *Miles v. Great Northern Ins. Co.*, 2011 WL 817368 (1st Cir. 2011).
186 *Martinez v. Infinity Ins. Co.*, 714 F. Supp. 2d 1057, 1062-63 (C.D. Cal. 2010).
187 *V.M.V. Mgmt. Co. v. Peerless Ins.*, 791 N.Y.S.2d 136 (N.Y. App. Div. 2. Dept. 2005).
188 *Fold-Pak Corp. v. Liberty Mut. Fire Ins. Co.*, 784 F. Supp. 49 (W.D. N.Y. 1992).
189 *Blinco v. Preferred Mut. Ins. Co.*, 11 A.D.3d 924, 782 N.Y.S.2d 483, 484-85 (4th Dep't 2004).
190 *Romano*, 429 F. Supp. 2d 202; *Citizens Prop. Ins. Corp.*, 48 So. 3d 188 (Fla.App.3.Dist.,2010).
191 *Southern Realty Management, Inc. v. Aspen Specialty Inc. Co.*, 2009 WL 1174661 (N.D. Ga. Atlanta Div., April 28, 2009).
192 *Allstate Ins. Co. v. Hamler*, 545 S.E.2d 12 (Ga. Ct. App. 2001).
193 *Dyno-Bite, Inc. v. Travelers Cos.*, 80 A.D.2d 471, 439 N.Y.S.2d 558 (N.Y. A.D. 1981).
194 *Markey v. La. Citizens Fair Plan*, 2009 WL 23858 (E.D. La. Jan. 5, 2009).

documents was a material breach of the policy precluding recovery for the loss.[195] Similarly, an insured's attempt to submit records after substantial delay was rejected because the court found the insured's persistent refusal to produce the records was a willful refusal to comply with the terms of the policy and the delay between the loss and the resolution of the issue materially diluted the insurer's rights to prompt disclosure of information concerning the claim.[196]

An insured may not challenge or seek to limit disclosure based upon objections that might be asserted during discovery in litigation. The insured's right under the insurance policy to examine both documents and the insured is much broader than the similar right that the insurer possessed under the applicable rule of civil procedure.[197] It is inherent in the nature of contracts that they create duties in parties that would not otherwise exist.

When an insured is asked to produce copies of the records it asserts have been destroyed, it has the burden to show that it had made a reasonable effort to obtain the duplicates and failed.[198] A claim that the records have been lost will not support the insured's claim that it is unable to produce those records if the records have been lost or destroyed by the negligence or the design of the insured.[199] However, the failure of an insured to furnish the requested information to the insurer will not bar the insured's right of recovery when it appears that such omission was occasioned by the innocent loss of the papers or by oversight, mistake, or accident and without fraudulent intention.[200] When an answer to a suit on a policy of insurance alleges a failure on the part of the insured to produce its books and bills of purchases, a showing that they were inadvertently destroyed will excuse the failure to produce them.[201] Similarly, the assertion of a defense based on nonproduction will depend upon the actions of the insurer as well. Thus, when the insurer's adjusters received and verified a copy of the requested inventory prepared from available information and did not request the insured to produce copies of destroyed invoices or designate a time or place for their production, the insured was not required to obtain or produce copies of invoices to supplement the documents already produced.[202] Whether it was impossible for the insured to produce the records will be a question for the jury.[203]

The clause requiring the insured to produce for examination its books of account at "such reasonable place as may be designated by the company" means a reasonable place in the locality where the insured property was situated.[204] Thus, a demand by the insurer that the insured produce for examination books of account or certified copies thereof at a city located 140 miles from the place where the insured goods were situated was held to be unreasonable as to place, and the failure of the insured to comply was found not to constitute a breach of the policy requiring it to produce all books of account at such reasonable place as the company may designate.[205]

2.11 Mitigation

The insured has a duty to take steps to minimize its loss.[206] Unless the policy provides otherwise, the requirement that an insured take all reasonable steps to limit a loss does not provide additional coverage, but rather, it imposes upon the insured the duty to mitigate its loss by protecting the covered property from further damage.[207] It is for the insurer to

195 *Buongiovanni v. Allstate Ins. Co.*, 658 N.Y.S.2d 431 (N.Y.App. Div. 2. Dept. 1997).
196 *DiFrancisco v. Chubb Ins. Co.*, 662 A.2d 1027 (N.J. Super. Ct. App. Div. 1995).
197 Id. at 474; *Williams v. Am. Home Assurance Co.*, 97 A.D.2d 707, 468 N.Y.S.2d 341 (1983).
198 *Langan v. Royal Ins. Co. of Liverpool*, 29 A. 710 (Pa. 1894).
199 *German Alliance Ins. Co. v. Newbern*, 106 P. 826 (Okla. 1910).
200 *Betts v. Franklin Fire Ins. Co.*, 3 F. Cas. 318 (C.C. Md.1851); *Coleman v. N.Y. Bowery Fire Ins. Co.*, 35 A. 729 (Pa. 1896).
201 *Aurora Fire Ins. Co. v. Johnson*, 46 Ind. 315 (1874).
202 *Taubman v. Allied Fire Ins. Co. of Utica*, 160 F.2d 157 (4th Cir. 1947).
203 *Coleman v. N.Y. Bowery Fire Ins. Co.*, 35 A. 729 (Pa. 1896).
204 *Tucker v. Colonial Fire Ins. Co.*, 51 S.E. 86 (W. Va. 1905).
205 Ibid.
206 *Maloney Cinque, L.L.C. v. Pac. Ins. Co.*, 2012 WL 234439 (La. App. 4 Cir. 2012); *Ross v. Employers' Liab. Assur. Corp.*, 290 F. Supp. 569 (N.D. Miss. 1968).
207 *Klein's Moving & Storage, Inc. v. Westport Ins. Corp.*, 766 N.Y.S.2d 495 (Sup. Ct. 2003); *Pa. Lumbermens Mut. Fire Ins. Co. v. Nicholas*, 296 F.2d 905 (5th Cir. 1961) (Insured retailer that the policy obligated to protect property from further damage was not entitled to recover any expenses in connection with the discharge of this obligation, in absence of a provision in the policy for such recovery).

prove that the insured failed to take adequate measures to protect the property from further damage and to separate damaged and undamaged property from the measure of additional damage that resulted from the insured's inaction.[208]

An insured's obligation to prevent or mitigate harm does not arise until the covered loss threatens the insured subject matter.[209] Thus, to be guilty of a failure to use all reasonable means to save and preserve property at and after the time of loss or when peril that is insured against endangers property, the insured must have knowledge of a readily identifiable, imminent, and real peril endangering the property.[210] The insured's compliance with the duty to preserve property from further damage or mitigate damages is not a condition precedent to recovery. Instead, a failure to mitigate is an offset to recovery.[211] Thus, if a building escalates into a total loss due, in part, to the insured's failure to mitigate, the insured is not entitled to receive full value of loss under policy limits or the increased loss due to business interruption. Instead, the loss will be reduced by the extent of damage attributable to the insured because of its failure to mitigate damages and prevent further decay of the building.[212]

The insured need not take actions that will not objectively lessen the loss.[213] For example, a meat wholesaler whose stored meat was contaminated by an accidental release of ammonia in the warehouse was under no duty to minimize damage by examining the meat piece by piece to determine which pieces were discolored or smelled of ammonia before destroying the meat and seeking coverage from a commercial property insurer. The evidence, including laboratory analysis, showed that covered "damage" had occurred within the meaning of the insurance policy due to contamination, and there was expert testimony that, if any of the meat had been released for consumption, the USDA would have recommended it for recall.[214]

When the policy specifically provides such coverage, the expenses the insured incurred to protect the property from further loss can be recovered from the insurer as long as they represent the reasonable cost for necessary repairs made solely to protect covered property from further damage following a covered loss.[215] When such actions are taken, the insurer's assertion that the insured's efforts were unnecessary because of the ultimate lack of subsequent damage to the property has been met with the observation that the lack of subsequent damage was evidence of the success of the insured's mitigation efforts, not an indictment of their validity.[216]

Such additional coverage does not apply to measures taken to prevent a risk that has been excluded from the policy.[217] Thus, an insured's costs to correct the year 2000 (Y2K) date recognition problem in computer software were not within the coverage for the insured's expenses to take reasonable and necessary actions for the temporary protection and preservation of insured property; the clause only applied to physical loss or damage of the type the policy insured against, and the policy excluded such coverage.[218] Similarly, coverage arising under the preservation clause of an all-risk property insurance policy did not provide coverage for the costs of renovating decayed wooden pilings to avoid possible collapse of the insured building because the preservation clause applied only when "covered cause of loss" was

208 *Kramnicz v. First Nat. Bank of Greene*, 302 N.Y.S.2d 22 (N.Y. App. Div. 3. Dept.1969).
209 *Witcher Const. Co. v. Saint Paul Fire & Marine Ins. Co.*, 550 N.W.2d 1 (Minn. Ct. App. 1996).
210 *Tuchman v. Aetna Casualty & Surety Co.*, 52 Cal.Rptr.2d (Cal. App. 2. Dist. 1996).
211 *Carrizales v. State Farm Lloyds*, 518 F.3d 343 (5th Cir. 2008); *United Fire & Cas. Co. v. Historic Pres. Trust*, 265 F.3d 722 (8th Cir. 2001); *Cox v. Sw. Elec. Power Co.*, 348 So. 2d 1252 (La. App. 2. Cir. 1977).
212 *Employer's Liab. Assur. Corp. v. Mid-State Homes, Inc.*, 467 S.W.2d 386 (Ark. 1971); *Real Asset Mgmt., Inc. v. Lloyd's of London*, 61 F.3d 1223 (5th 1995); *Cox v. Sw. Elec. Power Co.*, 348 So. 2d 1252 (La. App. 2. Cir. 1977).
213 *Wischan v. Brockhaus*, 163 So. 2d 572 (La. App. 2. Cir. 1964).
214 *S. Wallace Edwards & Sons v. Cincinnati Ins. Co.*, 353 F.3d 367 (4th Cir. 2003).
215 *Miller v. Safeco Ins. Co. of Am.*, 2010 WL 5437217 (E.D. Wis. Dec. 27, 2010).
216 *Demers Bros. Trucking, Inc. v. Certain Underwriters at Lloyd's, London, Subscribing to Certificate No. SRS IM MA 04-124*, 600 F. Supp. 2d 265 (D. Mass. 2009).
217 *State v. Allendale Mut. Ins. Co.*, 154 P.3d 1233 (Mont. 2007).
218 *GTE Corp. v. Allendale Mut. Ins. Co.*, 372 F.3d 598 (3d Cir. 2004).

implicated; pilings were not covered property under the policy, and their decayed situation posed no imminent risk of collapse within the policy's separate collapse peril.[219]

2.12 Proof of Loss

The purpose of a proof of loss is to advise the insurer of facts surrounding the loss for which a claim is being made and to afford the insurer an adequate opportunity to investigate, prevent fraud, and form an intelligent estimate of its rights and liabilities.[220] Provided they were made in good faith and without an intent or attempt to defraud the insurer, statements made in proofs of loss are not conclusive as to the claimant.[221] Provisions of a policy relative to proof of loss should be literally construed in aid of indemnity contemplated by the parties.[222] Thus, under most policies, substantial compliance with such proof of loss provisions, rather than strict literal compliance, is all that is required.[223]

If the insurance policy makes furnishing a proof of loss a condition precedent to an insured's suit for benefits under the policy, the insured's submission of a proof of loss or the insurer's waiver of the requirement[224] must be shown or the insured's suit will be not be allowed to proceed.[225] For example, when an insurance policy provides that proof of loss shall be furnished within 60 days after the submission of the claim, unless the company extends it, but there was no provision for forfeiture for failure to comply with the requirement,[226] the effect of such a provision is to postpone the insured's right of action until proof is furnished, but it did not destroy all right to recover.[227] When loss of the insured property is total, courts have held that the insured's claim is a liquidated demand, and the insured is not required to furnish proof of loss before suing on policy notwithstanding a policy provision requiring proof of loss.[228]

A clause in a policy that requires the insured to file a proof of loss within a certain time to entitle the insured to maintain an action will be liberally construed in favor of the insured.[229] For example, the insureds' failure to submit an additional proof of loss on blank forms the insurer supplied did not preclude it from maintaining action to recover for business interruption loss under the policy when the insureds had previously filed two proof of loss forms that the insurer accepted. The court held that neither statute or policy required another proof of loss.[230] If the failure of the insured to present a proof of loss is due to actions by the insurer or its agents, it will not bar the insured's suit.[231] When the insurer denies all liability without requesting a proof of loss, there is no requirement that the insured file a proof of loss to file suit to recover benefits under the policy.[232]

However, some courts have held that an insured's failure to file a proof of loss can result in a loss of coverage. For example, when the insurance policy unambiguously required the insured to submit a signed, sworn proof of loss before filing suit against the insurer, the court held that whether the insured's failure to do so constituted a material breach of the policy barring recovery was not a question for the jury, given the absence of any evidence that the insured cooperated

219 *Buczek v. Cont'l Cas. Ins. Co.*, 378 F.3d 284 (3rd Cir. 2004); *Nat'l Hous. Bldg. Corp. v. Acordia of Va. Ins. Agency, Inc.*, 591 S.E.2d 88 (Va. 2004).
220 *Burns v. Combined Ins. Co. of Am.*, 373 N.E.2d 1189 (Mass. App. Ct. 1978); *Albert v. Mut. Benefit Health & Accident Ass'n*, Omaha, 350 Pa. 268, 38 A.2d 321 (Pa. 1944).
221 *Balamotis v. Hyland*, 992 A.2d 548 (N.H. 2010).
222 *Fishel v. Yorktowne Mut. Ins. Co.*, 254 Pa. Super. 136, 385 A.2d 562 (1978).
223 *Perry v. Middle Atl. Lumbermens Ass'n*, 373 Pa. Super. 554, 542 A.2d 81 (1988); *King's Gym Complex, Inc. v. Phila. Indem. Ins. Co.*, 433 F. Supp. 2d 256 (N.D.N.Y. 2006); *see also* Lee R. Russ and Thomas F. Segalla, 13 *Couch on Insurance*, 3rd edition, § 186:33 (1999).
224 *Aetna Ins. Co. of Hartford, Conn. v. Powers*, 121 P.2d 599 (Okla. 1942); *Am. Home Fire Assur. Co. v. Hargrove*, 109 F.2d 86 (10th Cir. 1940).
225 *Aetna Cas. & Sur. Co. v. Harris*, 239 S.E.2d 84 (Va. 1977).
226 *Cotton States Mut. Ins. Co. v. Walker*, 500 S.E.2d 587 (Ga. Ct. App. 1998).
227 *S.M. Smith Ins. Agency v. Hamilton Fire Ins. Co.*, 71 S.E. 194 (W. Va. 1911).
228 *Westchester Fire Ins. Co. of N.Y. v. Cannon*, 79 S.W.2d 920 (Tex. Civ. App.-Fort Worth 1934).
229 *Dakin v. Queen City Fire Ins. Co. of Sioux Falls*, S.D., 117 P. 419 (Or. 1911).
230 *Charlton v. U.S. Fire Ins. Co.*, 627 N.Y.S.2d 221 (Sup. Ct. 1995).
231 *Walton v. Am. Cent. Ins. Co. of St. Louis*, 196 P. 588 (Wash. 1921).
232 *N. Assur. Co. v. Chi. Mut. Bldg. & Loan*, 98 Ill. App. 152 (Ill. App. 1. Dist. 1901); *Grider v. Travelers Indem. Co.*, 315 F. Supp. 616 (E.D. Tenn. Winchester. Div.,1969).

to some degree or provided an explanation for its noncompliance.[233] In an action on such a policy, the insured will have to prove submission of a proof of loss.[234] Once the insured has met that burden, the insurer will then have the burden of demonstrating that the statement was somehow insufficient.[235] When the insurer has rejected the proof of loss, the insured has the burden of proving that the insurer has wrongfully rejected the proof of loss form.[236]

Policy provisions can impose additional requirements that result in forfeiture of coverage. For example, when the policy requires a proof of loss and further requires the insured to institute the action within one year, the insured could not maintain action against the insurer when it failed to file a proof of loss and bring its action within the time the insurance contract required.[237] Similarly, in the case of claims made under flood insurance policies issued pursuant to the National Flood Insurance Program (NFIP), the requirement to file a proof of loss within the period regulations set is a precondition to coverage, and the regulatory provision is strictly construed.[238] Under the statute, an insured cannot bring an action against the insurer under the standard flood insurance policy arising from the insurer's denial of coverage if it has not filed a timely proof of loss or received a written waiver of the requirement from the Federal Insurance Administrator (FIA).[239] The statute does not permit the insured to overcome the failure to file the required timely sworn proof of loss by asserting that other submissions to the insurer constitute substantial compliance.[240]

2.13 Examination Under Oath

The underlying purpose of a clause permitting the insurer to subject the insured to an examination under oath (EUO) is to allow the insurer to pursue its right to determine whether a claim is legitimate and should be paid.[241] An EUO provision of a commercial property insurance policy typically gives the insurer the right to "examine any insured under oath at such times as may be reasonably required, about any matter relating to this insurance or the claim."[242] As part of its duty to submit to an EUO, the insured must produce information demanded when the demand is reasonably related to the genuineness of the claim.[243] The insurer's right to demand an examination does not survive the adjustment of the claim. Thus, when the insurer did not request an examination under oath until after litigation had been filed and the claim had been investigated and paid, the insurer's remedy was to take the insured's deposition pursuant to rules of civil procedure.[244]

The term "reasonably" does not permit the insured to impose its own "reasonableness" conditions as to the examination's scope or subject matter. Absent evidence of the insurer's intent to harass, the term "reasonably" refers to how often the insurer can require an EUO, not its subject matter or scope.[245] Thus, an insurer's request for a second EUO, following an initial seven-hour-to-eight-hour EUO, was not unreasonable, and, when both parties ended the first EUO with an understanding that there would be a second EUO, an insured was required to submit to it.[246]

233 *Swaebe v. Fed. Ins. Co.*, 374 F. App'x 855 (11th Cir. 2010).
234 *Aetna Cas. & Sur. Co. v. Harris*, 218 Va. 571, 239 S.E.2d 84, 88 (1977); *Auxo Med., L.L.C. v. Ohio Nat. Life Assur. Corp.*, 2011 WL 5549052 (E.D. Va. Nov. 15, 2011).
235 *Fishel v. Yorktowne Mut. Ins. Co.*, 385 A.2d 562, 566 (Pa. Super. 1978).
236 *Miles v. Iowa Nat. Mut. Ins. Co.*, 690 S.W.2d 138, 144 (Mo. App. W.D. 1984).
237 *Mason v. Agric. Ins. Co.*, 193 N.Y.S.2d 962 (Sup. Ct. 1959).
238 *Reeder v. Nationwide Mut. Fire Ins. Co.*, 419 F. Supp. 2d 750 (D. Md. 2006); *Rojek v. F.E.M.A.*, 234 F. Supp. 2d 999 (S.D. Iowa 2002); Housing and Urban Development Act of 1968 § 1302, 42 U.S.C.A. § 4001 (West 2003); 44 C.F.R. § 61.13.
239 *Eaker v. State Farm Fire & Cas. Ins. Co.*, 216 F. Supp. 2d 606 (S.D. Miss. 2001); 44 C.F.R. §§ 61.4, 61.13; Part 61 App. A(1).
240 *Richardson v. Am. Bankers Ins. Co. of Fla.*, 279 F. App'x 295 (5th Cir. 2008).
241 *DiFrancisco v. Chubb Ins. Co.*, 283 N.J. Super. 601, 662 A.2d 1027, 1033 (App. Div. 1995).
242 *Nat'l Athletic Sportswear, Inc. v. Westfield Ins. Co.*, 528 F.3d 508 (7th Cir. 2008).
243 *DiFrancisco*, 662 A.2d at 1032.
244 *In re Cypress Tex. Lloyds*, 2011 WL 3630515 (Tex. App.-Corpus Christi Aug. 15, 2011).
245 *Nat'l Athletic Sportswear*, 528 F.3d 508, at 519.
246 Id. at 521.

The insured's willful refusal to submit to an EUO is generally deemed to be a material breach of contract resulting in a loss of coverage.[247] Some jurisdictions have held that prejudice is not required before the insurer may deny a claim based on the insured's failure to comply with a demand for an examination under oath.[248] An insured's willful refusal to submit to an EUO provision has been held to significantly prejudice the insurer's right to promptly investigate the claim.[249] However, in some jurisdictions, the insurer must show that it has suffered prejudice before it may deny coverage on the basis of the insured's failure to comply with a demand to submit to an EUO.[250]

The timing of an insured's compliance with an insurer's demand for an EUO is significant. Thus, the insured's belated acquiescence to submit to the examination after suit was filed has been held to bar coverage because of the insured's failure to satisfy its contractual duty of cooperation.[251] Similarly, courts have held that the fact that the insured gave its deposition in the coverage litigation was irrelevant to whether it breached the contract's cooperation clause by refusing to submit to an EUO.[252] Other courts have held that the insured's duties after loss were not violations of cooperation clauses but rather affirmative duties, the violation of which is a breach of the contract. Among these duties is the insured's duty to submit to an EUO.[253]

As in the case of other duties after loss, an insured may not impose prerequisites to its duty to comply with the insurer's demands regarding an EUO.[254] Thus, when the insureds advised they would not submit to an examination until they were given their previous statements, their refusal was found to be a breach of the insurance contract as a matter of law.[255] The duty to submit to an examination includes the duty to answer the questions the insurer poses. As a consequence, while policy language may only require the insured to "submit" to an EUO, the willful refusal to answer material questions during an EUO has been held to be a breach of the insurance contract barring coverage.[256]

Whether an insured has satisfactorily complied with its duties to submit to an EUO is a question of fact for the jury that can preclude summary judgment for the insurer. For example, when the plaintiff submitted to an EUO, supplied documents and records, proffered what it believed were reasonable substitutes for discarded documents destroyed in the loss, and attempted to explain its position regarding those items it could not, or would not, produce, summary judgment for the insurer was denied.[257]

Whether the insured's failure to fully comply with its duty was "willful" can be an important factor in the court's determination of whether coverage for the insured's loss should be barred. For example, when the insured attempted to appear for an EUO of one of the insured's members and later repeatedly attempted to secure an additional examination, which the insurer refused, and the insurer failed to examine the insured's other members, the insured's alleged noncompliance

247 *Stringer v. Fireman's Fund Ins. Co.*, 622 So. 2d 145, 146 (Fla. 3d Dist. Ct. App 1993); *Somerstein Caterers of Lawrence, Inc. v. Ins. Co. of State of Pa.*, 262 A.D.2d 252, 692 N.Y.S.2d 369 (1st Dep't 1999).

248 *Morris v. Econ. Fire & Cas. Co.*, 848 N.E.2d 663 (Ind. 2006); *Miles v. Great Northern Ins. Co.*, 634 F.3d 61 (1st Cir. 2011).

249 *Krigsman v. Progressive N. Ins. Co.*, 151 N.H. 643, 864 A.2d 330, 335 (2005); *Laine v. Allstate Ins. Co.*, 355 F. Supp. 2d 1303 (N.D. Fla. 2005).

250 *Romano v. Arbella Mut. Ins. Co.*, 429 F. Supp. 2d 202 (D. Mass. 2006); *Oliff-Michael v. Mut. Benefit Ins. Co.*, 262 F. Supp. 2d 602 (D. Md. 2003).

251 *Azeem v. Colonial Assur. Co.*, 96 A.D.2d 123, 468 N.Y.S.2d 248, 249-50 (4th Dep't 1983), *order aff'd*, 62 N.Y.2d 951, 479 N.Y.S.2d 216, 468 N.E.2d 54 (1984); (court rejected the insured's untimely offer to submit to an examination under oath a year and a half after the examination was first scheduled and over two years after the occurrence when the insured had previously refused to submit to an examination under oath).

252 *Averbuch v. Home Ins. Co.*, 114 A.D.2d 827, 494 N.Y.S.2d 738, 739 (2d Dep't 1985); *Pizzirusso v. Allstate Ins. Co.*, 143 A.D.2d 340, 532 N.Y.S.2d 309, 310 (2d Dep't 1988); *DiFrancisco v. Chubb Ins. Co.*, 283 N.J. Super. 601, 662 A.2d 1027, 1033 (App. Div. 1995); *Rivera Fernandez v. Conn. Mut. Life Ins. Co.*, 917 F. Supp. 120, 124 (D.P.R. 1996); *Goldman v. State Farm Fire Gen. Ins. Co.*, 660 So. 2d 300, 305-06 (Fla. Ct. App. 4th Dist. 1995); *Harary v. Allstate Ins. Co.*, 988 F. Supp. 93, 106 (E.D.N.Y. 1997), *judgment aff'd*, 162 F.3d 1147 (2d Cir. 1998); *Monticello Ins. Co. v. Mooney*, 733 So. 2d 802, 808 (Miss. 1999); *Nationwide Ins. Co. v. Nilsen*, 745 So. 2d 264, 268 (Ala. 1998).

253 *Morris v. Econ. Fire & Cas. Co.*, 848 N.E.2d 663 (Ind. 2006).

254 Ibid.; citing *Conant v. Nat'l State Bank*, 121 Ind. 323, 325, 22 N.E. 250, 250 (1889).

255 Ibid.

256 *Phillips v. Allstate Indemn. Co.*, 156 Md. App. 729, 848 A.2d 681, 688-89 (2004).

257 *Ingarra v. Gen. Accident/PG Ins. Co. of N.Y.*, 710 N.Y.S.2d 168 (N.Y. App. Div. 3. Dept., 2000).

with the demand to submit to an EUO was not so willful as to warrant the extreme penalty of excusing the insurer from liability without giving the insured one last chance to perform in accordance with the policy's provisions.[258]

When the insured has failed to comply with the insurer's demand that it submit to an EUO, an insured may nevertheless be able to show that it had a sufficient legal excuse for its nonperformance. Thus, when the acts of the insurer induced the insured's failure to appear for examination, the obligation of the insured to appear was excused.[259] The insured's poor health has also been held to be a valid excuse for failure to submit to an EUO.[260] However, when the insured failed to produce the documents necessary to complete its EUO, the insured's noncompliance with the contract's express terms could not be justified by its concern that the one-year limitations period in its contract was about to expire, since it faced no such risk because the limitations period was two years and it never requested a tolling agreement.[261] Similarly, the insured's failure to submit to the insurer's requests for an EUO constituted willful noncompliance with policy conditions voiding coverage, even though the insured's refusal to submit to an EUO was based on the concern that statements made at an EUO might tend to incriminate the insured in possible future criminal proceedings.[262]

2.13.1 Independent and Public Adjusters

If a claim is particularly complex or concerns a loss in a region where the insurer does not maintain a branch claims office, the insurer may retain an independent adjuster to handle the claim.[263] Independent adjusters are independent contractors that an insurer, or multiple insurers, retain on a case-by-case basis.[264] The independent adjuster acts as a special agent of the insurer, whose powers are usually limited to the ascertainment and adjustment of an insured's loss or damage.[265] They respond to claims, advise the insurer whether the loss appears to come within the coverage under the applicable insurance policy, and, when authorized by the insurer, arrange for payment to the insured for the loss.[266] They must generally be licensed by the state where the loss occurred to adjust claims on behalf of an insurer.[267]

The insured, not the insurer, retains a public adjuster to help the insured submit its claim.[268] The public adjuster typically takes a percentage of the benefits paid to the insured as his or her fee.[269] The role of the public adjuster generally involves preparing and filing the insurance claim on behalf of the insured. He or she can also assist the insured in negotiations with the insurer to settle the claim.[270] Public adjusters must generally be licensed by the state where the loss occurred to administer and adjust claims when acting on behalf of an insured.[271]

2.14 Appraisal

An "appraisal" conducted under the provision of a property insurance policy is a relatively limited process distinct from arbitration and is primarily concerned with ascertaining the value of property or the amount of a loss.[272] It is a

258 *Erie Ins. Co. v. JMM Props., L.L.C.*, 888 N.Y.S.2d 642 (N.Y. App. Div. 3. Dept. 2009).
259 *Gruenberg v. Aetna Ins. Co.*, 510 P.2d 1032 (Cal. 1973).
260 *Blackburn v. State Farm Fire & Cas. Co.*, 174 Ga. App. 157, 329 S.E.2d 284, 286 (1985).
261 *Foster v. State Farm Fire and Cas. Co.*, 2012 WL 884,857 (7th Cir. 2012).
262 *Allen v. Mich. Basic Prop. Ins. Co.*, 640 N.W.2d 903 (Mich. Ct. App. 2001); *Allstate Ins. Co. v. Longwell*, 735 F. Supp. 1187 (S.D.N.Y. 1990).
263 *Hammill v. Pawtucket Mut. Ins. Co.*, 892 A.2d 226, 232 (Vt. 2005); *Benjamin v. Thomas Howell Group*, No. Civ.1996-071, 2002 WL 31573004, at *2 (D.V.I. April 22, 2002).
264 Stephen S. Ashley, *Bad Faith Actions Liability & Damages* § 1:5.
265 *See generally Amjur Insurance* § 1636-1638.
266 Jane Boisseau, Michael Byrne, and Rachel Berk, *Insurance Regulation Answer Book 2011*, 2011 edition, Practicing Law Institute, Chapter 6, "Licensing of Producers and Other Third Parties Adjusters."
267 *See N.Y. Ins. Law* § 2108(a) (3).
268 *Hammill v. Pawtucket Mut. Ins. Co.*, 892 A.2d 226, 232 (Vt. 2005); *Benjamin v. Thomas Howell Group*, No. Civ.1996-071, 2002 WL 31573004, at *2 (D.Virgin Islands April 22, 2002).
269 Stephen S. Ashley, *Bad Faith Actions Liability & Damages* § 1:5.
270 Jane Boisseau, Michael Byrne, and Rachel Berk, *Insurance Regulation Answer Book 2011*, 2011 Edition, Practicing Law Institute, Chapter 6, "Licensing of Producers and Other Third Parties Adjusters."
271 *See, e.g., N.Y. Ins. Law* § 2101(g) (2); Cal. Ins. Code § 15007; Fla. Ins. Code § 626.854.
272 *FTI Intern., Inc. v. Cincinnati Ins. Co.*, 790 N.E.2d 908 (Ill. App. 2. Dist., 2003).

nonjudicial method to resolve disputes between the insurer and the insured over the amount of a loss.[273] Where the policy provides, the decision of the appraiser or appraisal panel is binding on the parties.

Under such a clause, the determination of the appraisers is limited to factual disputes over the amount of loss for which an insurer is liable, while the scope of coverage an insurance policy provides is a purely legal issue for the court.[274] Under such clauses, if the insurer and insured fail to agree as to cash value or amount of loss, appraisal is appropriate.[275] Generally, determination of the cause of loss for damage is considered to be an amount-of-loss question for the appraisal panel, not a coverage question the trial court will decide.[276] When the provisions of the insurance policy require appraisal and preclude suit against the insurer without compliance with the policy provisions, courts have abated the insureds' lawsuit until the completion of the appraisal.[277] When the insurer has denied the claim due to its determination that the loss falls outside the coverage the policy provides, the dispute is not subject to appraisal.[278]

2.15 Arbitration

Both appraisal and arbitration are procedures designed to resolve disputes in lieu of judicial proceedings.[279] The distinction between arbitration and appraisal clauses in an insurance policy is the form of the proceeding and the scope of issues subject to resolution under the clause. An agreement to submit disputes under the policy to appraisal is limited to the narrow issue of the amount of loss, while arbitration is a quasi-judicial proceeding that ordinarily will decide the entire controversy.[280]

The Federal Arbitration Act[281] confers the right to make and enforce arbitration agreements on all persons and businesses participating in transactions involving interstate commerce. In enacting the FAA, Congress declared a national policy favoring arbitration.[282] Section 2 of the act has the effect of preempting conflicting state law, thereby making enforceable a predispute arbitration agreement in a contract evidencing a transaction that involves interstate commerce.[283] However, state law adhesion contract principles may be relied upon to preclude enforcement of arbitration contracts without violating the FAA.[284]

The party seeking to compel arbitration has the burden of proving the existence of a contract calling for arbitration and proving that the contract evidences a transaction affecting interstate commerce.[285] After a motion to compel arbitration has been made and supported, the burden is on the nonmovant to present evidence that the supposed arbitration agreement is not valid or does not apply to the dispute in question.[286] Generally, a party can be forced to arbitrate only those issues it specifically has agreed to submit to arbitration.[287]

273 *Johnson v. Mut. Serv. Cas. Ins. Co.*, 732 N.W.2d 340 (Minn. Ct. App. 2007).
274 *Duane Reade, Inc. v. St. Paul Fire & Marine Ins. Co.*, 503 F. Supp. 2d 699 (S.D.N.Y. 2007); *Yaldo v. Allstate Prop. & Cas. Ins. Co.*, 641 F. Supp. 2d 644 (E.D. Mich. 2009); *Sunshine State Ins. Co.*, 28 So. 3d 129 (Fla. App. 4. Dist. 2010); *QBE Ins. Corp. v. Twin Homes of French Ridge Homeowners Ass'n*, 778 N.W.2d 393 (Minn. Ct. App. 2010).
275 *Cmty. Assisting Recovery, Inc. v. Aegis Sec. Ins. Co.*, 112 Cal. Rptr. 2d 304 (Cal. App. 2. Dist. 2001).
276 *Kendall Lakes Townhomes Developers, Inc. v. Agric. Excess & Surplus Lines Ins. Co.*, 916 So. 2d 12 (Fla. App. 3. Dist. 2005).
277 *Vanguard Underwriters Ins. Co. v. Smith*, 999 S.W.2d 448 (Tex. App.-Amarillo 1999); *Terra Indus. v. Commonwealth Ins. Co. of Am.*, 981 F. Supp. 581 (N.D. Iowa. 1997).
278 *HHC Assocs. v. Assurance Co. of Am.*, 256 F. Supp. 2d 505 (E.D. Va. 2003).
279 *Minot Town & Country v. Fireman's Fund Ins. Co.*, 587 N.W.2d 189 (N.D. 1998).
280 Ibid.; *Rastelli Bros. v. Neth. Ins. Co.*, 68 F. Supp. 2d 440 (D.N.J. 1999).
281 9 U.S.C. § 1, et seq.
282 *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 226 (1987); *Prima Paint Co. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 400, 87 S.Ct. 1801, 1804, 18 L.Ed.2d 1270 (1967).
283 *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 115, 834, 130 L. Ed. 2d 753 (1995).
284 Thomas H. Oehmke, "Arbitration Highways to the Courthouse—A Litigator's Roadmap," 86 *Amjur Trials* 111 (2002).
285 *Brumley v. Commonwealth Bus. Coll. Educ. Corp.*, 945 N.E.2d 770 (Ind. App. 2011).
286 Ibid.
287 *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 945 (1995); *see also AT & T Tech., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 648-49 (1986).

A motion to compel arbitration should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible to an interpretation that covers the asserted dispute.[288] In interpreting an arbitration provision, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of a defense to arbitrability, such as a waiver or delay.[289] When the parties have agreed to arbitration in their contract, a party may not avoid broad language in an arbitration clause by attempting to cast its complaint in tort, rather than contract.[290]

The parties to a contract that provides for arbitration of their disputes may agree that the decision of the arbitrator is nonbinding. Under such a clause, if the parties do not voluntarily comply with the award or otherwise settle their dispute, litigation may proceed as if no arbitration proceedings had occurred.[291] Absent language that indicates that arbitration proceedings should be final and binding, an arbitration clause will not bind the parties to the decision of the arbitrator.[292]

2.15.1 Choice of Law and Forum Clauses

The parties to a contract may expressly agree on the law to be applied to disputes under that contract.[293] The following is a sample choice-of-law clause:

> Law of Construction and Interpretation
>
> This Agreement and any dispute, controversy or claim arising out of or relating to this Agreement, shall be governed by and construed in accordance with the substantive internal law (i.e., excepting procedural and choice-of-law rules) of the State of Delaware.

An express choice-of-law clause in a contract will be given effect as expressing the intent of the parties as long as the application of the chosen law does not violate the fundamental public policy of the forum state.[294] In the absence of a contrary intent, a choice-of-law clause refers only to the local law of the state, not to the conflict's rules.[295]

3.0 Valuing Business Interruption

3.1 History of the Business

The insured bears the burden of proving its entitlement to insurance proceeds under the business interruption provisions of the insurance policy and the amount of that entitlement.[296] In determining what, if any, amount is due under the business interruption provisions, the court will examine the previous experience of the insured before the property damage occurred as well as its probable future experience.[297] A typical policy provision might appear as follows:

> Experience of the Business:
>
> (a) In determining the amount of net profit, charges, and expenses covered under this policy form for the purposes of ascertaining the amount of loss sustained, due consideration shall be given to the experience

288 *United Steelworkers of Am. v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 582-83, 80 S. Ct. 1347, 4 L. Ed. 2d 1409 (1960).
289 *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25, 103 S. Ct. 927, 74 L. Ed. 2d 765 (1983).
290 *Beaver Constr. Co. v. Lakehouse, L.L.C.*, 742 So. 2d 159, 165 (Ala. 1999); *Acevedo Maldonado v. PPG Indus., Inc.*, 514 F.2d 614 (1st Cir.1975).
291 Steven C. Bennett, *Arbitration: Essential Concepts*, ALM, 2002, page 81.
292 *Wolsey, Ltd. v. Foodmaker, Inc.*, 144 F.3d 1205, 1209 (9th Cir. 1998); *Orlando v. Interstate Container Corp.*, 100 F.3d 296, 300 (3rd Cir. 1996).
293 *McGill v. Hill*, 31 Wash. App. 542, 547, 644 P.2d 680, 683 (1982); *S.A. Empressa De Viacao Aerea Rio Grandense (Varig Airlines) v. The Boeing Co.*, 641 F.2d 746, 751 (9th Cir. 1981); *Nedlloyd Lines B.V. v. Super. Ct.*, 834 P.3d 1148, 1154 n.7 (Cal. 1992).
294 *Whitaker v. Spiegel, Inc.*, 95 Wash. 2d 408, 623 P.2d 1147 as amended 95 Wash.2d 661, 637 P.2d 235 (1981).
295 Restatement (Second) of Conflict of Laws (1971), Sec. 187(3) (1971).
296 *Royal Indem. Co. v. Little Joe's Catfish, Inc.*, 636 S.W.2d 530 (Tex. App. 1982); *Stores Corp.*, 82 A.D.2d 398, 441 N.Y.S.2d 674 (S.Ct.App.Div.1981); *Nat'l Fire Ins. Co. of Hartford v. Hutton*, 396 S.W.2d 53 (Ky. 1965); *Cora Pub. Inc. v. Cont'l Cas. Co.*, 619 F.2d 482 (5th Cir. 1980).
297 *Supermarkets Operating Co. v. Arkwright Mut. Ins. Co.*, 257 F. Supp. 273, 277 (E.D. Pa. 1966); *Manduca Datsun, Inc. v. Universal Underwriters Ins. Co.*, 106 Idaho 163, 676 P.2d 1274 (Ct. App. 1984); *Berkeley Inn, Inc. v. Centennial Ins. Co.*, 282 Pa. Super. 207, 422 A.2d 1078 (1980); *Nw. States Portland Cement Co. v. Hartford Fire Ins. Co.*, 360 F.2d 531 (8th Cir. 1966); *Cont'l Ins. Co. v. DNE Corp.*, 834 S.W.2d 930 (Tenn. 1992); *Great N. Oil Co. v. St. Paul Fire & Marine Ins. Co.*, 303 Minn. 267, 227 N.W.2d 789, 793 (Minn. 1975).

of the business before the date of damage or destruction and to the probable experience therefore had no loss occurred.

(b) With respect to alterations, additions, and property while in the course of construction, erection, installation, or assembly, due consideration shall be given to the available experience of the business after completion of the construction, erection, installation, or assembly.

Under such a clause, when records indicate that the business was not earning income before the loss, or its income equals or exceeds its preloss income, there can generally be no "recovery" of lost profits under a business interruption clause.[298]

3.1.1 Facts Versus Speculation

The profits claimed during the period of recovery cannot be unduly speculative. The decision in *Dictiomatic, Inc. v. U.S. Fidelity & Guar. Co.*[299] is instructive. There, the insured, a developer of hand-held electronic translators, sued its business interruption insurer when it was forced to close its Florida office for three weeks following the hurricane. The alleged losses were associated with the insured's inability to produce and sell the new version of a translator and a palm-top computer, products that still were not ready for sale when the hurricane hit.[300] The court rejected the insured's claim because, among other reasons, the insured failed to prove its alleged future lost profits with reasonable certainly.[301] In particular, the court noted that "[a]nalysis of lost profits must be based on sufficiently similar business operations and comparable markets." While the insured did show a history of successful sales for one of its products, the court held that the successful sale of that product did not establish lost sales for the two products in question because "the latter products were not sufficiently similar and did not attract a comparable market."[302]

(1) Projections and Business Plans

When damages are claimed for lost profits, the contemplated profit must be proved to be reasonably certain and not merely conjectural, speculative, or an estimate.[303] Thus, when the evidence of lost profits consists of merely business projections, such as those intended to convince a prospective lender to make the loan commitment, the "projection" amounts to nothing more than the plaintiff's own estimate of lost profits and is insufficient to establish the amount of the loss.[304]

(2) Income Trends

As noted in previous sections, the court will necessarily look to the business's historical performance to determine the projected profits that an insured might have earned during a period of interruption. The calculations can consider sales performance record as a gauge, including trends in that data. Thus, when sales records in the 12 months immediately preceding the suspension period[305] reveal a rate of growth in sales, the calculation of the lost income within the period of interruption can reflect that trend.[306]

298 *Manduca Datsun, Inc. v. Universal Underwriters Ins. Co.*, 676 P.2d 1274 (Idaho Ct. App.1984).
299 *Dictiomatic, Inc. v. U.S. Fid. & Guar. Co.*, 958 F. Supp. 594, 605-06 (S.D. Fla. 1997).
300 Id. at 605.
301 Id. at 605-06.
302 Id. at 606.
303 *Autrey v. Williams & Dunlap*, 343 F.2d 730, 742 (5th Cir. 1965).
304 *Walsh v. City Mortg. Servs., Inc.*, 102 B.R. 502 (M.D. La. 1989).
305 *Standard Printing & Pub. Co. v. Bothwell*, 143 Md. 303, 122 A. 195 (1923) (selection of the 12 months just preceding the strike as the period for estimate of average daily net profits was proper).
306 *W.S. Shamban & Co. v. Commerce & Indus. Ins. Co.*, 475 F.2d 34 (9th Cir. 1973).

3.1.2 New Businesses

Despite the caution against speculative losses, some courts have held that a new business without a history of income may still recover loss of future profits if those losses can be proved with a reasonable certainty.[307] In such cases, once the fact of covered damage resulting in business interruption has been established, the actual amount of lost profits may be estimated from the facts in evidence, such as expert testimony, economic and financial data, market surveys and analyses, business records of similar enterprises, and any other relevant facts, including the inferences to be drawn from them and the probabilities they suggest.[308]

3.1.3 New Facilities or Product Lines

When the insured seeks to recover lost profits from a new facility or product line that it asserts was delayed as the result of an interruption in its existing business, the question will be whether the new facility or product line would have been operational and earning profits within the suspension period. If the answer to the question is no, there will be no recovery for the projected income of the new facility.[309] If the facility would have been operational during the period of interruption, the insured may claim the lost profits expected during that period. For example, when an insured has planned an expansion of its production facility and the insured is able to prove that the expansion could have been made operational within the suspension period, the insured can recover the money the new facility would have earned during the suspension period had the interruption not occurred.[310] Similarly, when a mining company was able to prove that a new coal seam would have been operational during the suspension period had the interruption not occurred, the insured could recover expected profits from the mining of a new coal seam.[311]

3.2 Market Forces

A business interruption provision does not improve the insured's financial performance by guaranteeing a level of revenue in an otherwise competitive and variable industry.[312] It is also not intended to place an insured in a better position than it would have been had the interruption not occurred by eliminating the risk of such market variability.[313]

3.2.1 Loss of Market

Business interruption coverage generally excludes coverage for consequential losses that might result from the suspension of the insured's business. A typical provision excluding such losses could read:

> This section of policy does not insure against any increase of loss that may be occasioned by the suspension, lapse, or cancellation of any lease, license, contract, or order.

Such excluded consequential losses can include lost opportunity sales[314] and a loss of market share following a period of interruption.[315]

307 *See Ochsner Clinic Foundation v. Lexington Insurance Company,* 226 F. Supp. 3d 658 (E.D. La. 2017) (applying Louisiana law); *Bobb Forest Prods., Inc. v. Morbark Indus.*, 783 N.E.2d 560 (Ohio App. 7 Dist. 2002); *Cell, Inc. v. Ranson Investors*, 427 S.E.2d 447 (W. Va. 1992); *but see Berlin Dev. Corp. v. Vt. Structural Steel Corp.*, 250 A.2d 189 (Vt. 1968) (Generally, evidence of expected profits from a new business is too speculative, uncertain, and remote to be considered; does not meet the legal standard of reasonable certainty and recovery for lost profits; and is not generally allowed for injury to a new business with no history of profits.) and *Vill. of Elbow Lake v. Otter Tail Power Co.*, 160 N.W.2d 571 (Minn. 1968) (Generally, proof of loss of profits in a new business is too speculative to be the basis for recovery of damages). *See also* 55 A.L.R.4th 507 (This annotation collects and discusses modern state and federal cases in which the courts have considered whether a new or unestablished business may recover damages for loss of business income..

308 *Gardner v. The Calvert*, 253 F.2d 395, 399-400 (3d Cir), *cert. denied*, 356 U.S. 960, 78 S. Ct. 997, 2 L. Ed. 2d 1067 (1958); *Int'l Telepassport Corp. v. USFI, Inc.*, 89 F.3d 82 (2d Cir. 1996).

309 *Great N. Oil Co. v. St. Paul Fire & Marine Ins. Co.*, 303 Minn. 267, 227 N.W.2d 789, 793 (Minn. 1975).

310 *Gen. Ins. Co. v. Pathfinder Petrol. Co.*, 145 F.2d 368 (9th Cir. 1944).

311 *Fid.-Phenix Fire Ins. Co. v. Benedict Coal Corp.*, 64 F.2d 347 (4th Cir. 1933).

312 *Ramada Inn Ramogreen*, 835 F.2d 812 (11th Cir. 1988).

313 *Cotton Bros. Baking Co. v. Indus. Risk Insurers*, 941 F.2d 380, 385 (5th Cir. 1991).

314 *City of Burlington v. Hartford Steam Boiler Inspection & Ins. Co.*, 190 F. Supp. 2d 663 n.9 (D. Vt. 2002) (citing *Riefflin v. Hartford Steam Boiler Inspection & Ins. Co.*, 164 Mont. 287, 521 P.2d 675, 677-78 (1974)); *Twin City Hide v. Transamerica Ins. Co.*, 358 N.W.2d 90, 92 (Minn. Ct. App. 1984).

315 *Dictiomatic, Inc. v. U.S. Fid. & Guar. Co.*, 127 F. Supp. 2d 1239, 1243 (S.D. Fla. 1999).

3.2.2 Post-Loss Declines and Windfalls

Following a catastrophic event, such as a hurricane, an insured can experience a change in profits following the period of interruption. In such cases, insurers and insureds have argued the proper measure of the loss should incorporate post-lost market conditions. For the insurer, the argument has been that the market for the insured's business would have been depressed had the insured's business not been damaged in the event, and, thus, the lost income during the period of interruption should reflect the actual market conditions for the insured following the catastrophic event. For example, if the insured operated a tourist hotel in an area a severe storm struck, the falloff in tourism to the afflicted area would have meant the insured's business during the period following the storm would have been negligible. Thus, according to the insurer, the loss of income the insured claimed should be reduced to reflect the actual income it would have made if the insured had escaped the damage others in the area suffered.

The corollary argument from the insured is that the market for its goods and services would have soared if its business had not been damaged during the catastrophic event, and, thus, its actual loss during the period of interruption would have been much higher than one calculated on the basis of their pre-loss profits. For example, if the insured operated a hardware store and lumberyard and escaped the widespread damage from a storm, it would have been in a position to significantly raise prices due to the increased demand for its products caused by the devastation its prospective customers suffered.

Courts have found that the proper method for determining loss under the business-interruption provision is to look at sales before the interruption, rather than sales after the interruption.[316] An insured under a business interruption provision may not claim as a probable source of expected earnings a source that would not itself have come into being but for the interrupting peril's occurrence.[317] In other words, had no hurricane occurred (the policy's built-in premise for assessing profit expectancies during business interruption), then neither would the insured's claimed source of increased earnings.[318] Similarly, the insured's increased profits following the period of interruption as the result of changed market conditions do not lessen its claim for the normally expected profits that would have been earned during the period of interruption.[319]

316 *Finger Furniture Co. v. Commonwealth Ins. Co.*, 404 F.3d 312 (5th Cir. 2005).

317 *Prudential LMI Commercial Ins. Co. v. Colleton Enters Inc.*, No. 91-1757, 1992 WL 252507, at *4 (4th Cir. Oct. 5, 1992).

318 *Am. Auto. Ins. Co. v. Fisherman's Paradise Boats, Inc.*, No. 93-2349, 1994 WL 1720238, at *4 (S.D. Fla. Oct. 3, 1994); *but see Colleton Enters., Inc., supra*, 1992 WL 252507, at *4 (4th Cir. 1992) ("Had no loss occurred" does not refer to the overall loss in the surrounding area; rather, it clearly refers only to the loss the insured incurred).

319 *Catlin Syndicate v. Imperial Palace of Miss., Inc.*, 600 F.3d 511 (5th Cir. 2010).

Business intelligence at your fingertips.

About Business Valuation Resources

Every informed stakeholder in business valuation, performance benchmarking, or risk assessment turns to Business Valuation Resources (BVR) for authoritative deal and market data, news and research, training, and expert opinion. Trust BVR for unimpeachable business valuation intelligence. BVR's data, publications, and analysis have won in the boardroom and the courtroom for over two decades.

Deal & Market Data

- DealStats
- Cost of Capital Professional
- Valuation Benchmarking Platform
- Guideline Public Company Comps Tool
- BIZCOMPS
- Economic Outlook Update
- FactSet Mergerstat/BVR Control Premium Study
- Stout Restricted Stock Study™
- Valuation Advisors Discount for Lack of Marketability Study
- ktMINE Royalty Rate Data & License Agreements
- First Research Industry, State & Province Profiles
- BizMiner Industry Financial Reports
- Mergerstat Review & Mergerstat Review Monthly
- Butler Pinkerton Calculator – Total Cost of Equity and Public Company Specific Risk Calculator
- Vertical IQ - U.S. and Canada Industry Profiles
- RCReports

Guides, Books & Reports

- Digital Library
- Guides & Books
- Special Reports
- Legal Compendiums
- Yearbooks

Training & CPE

- Webinars
- Web Workshops & Special Series
- Desktop Learning Centers
- Self-study CPE
- eLearning courses

News & Research

- BVResearch Pro
- Business Valuation Update
- BVLaw
- Economic Outlook Update
- Business Reference Guide Online

Learn more about all of our offerings at:
bvresources.com