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Business Interruption Insurance

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Basics of Business Insurance


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- Purpose is to protect the earnings or the profits of a business, but it is not a profit guarantee.
- Coverage is triggered by damage from a covered cause of loss to covered property of the insured business that causes a "necessary suspension" of business operations.
- Contingent business interruption is triggered by damage to a supplier or customer from a cause of loss that would be covered if it had occurred to property that would be covered if it belonged to an insured.
- Limited coverage provided for certain situations (ingress/egress, civil authority)

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How Measured



- Gross earnings or gross profits less non-continuing expenses.
- Plus extra expenses incurred to reduce business loss
 - In most policies must reduce loss dollar for dollar.
 - Some pure extra expense might be provided.
- Calculated for period of restoration: the hypothetical period of time during which, with due diligence and dispatch, the damage that gave rise to the business interruption can be repaired.

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Current Areas of Controversy



- Measure of damages when revenue is delayed but not lost:
 - Legal work
 - Routine medical care by physician or dentist
 - Loss of market vs. contingent business interruption
- Measure of damages where catastrophe would have provided revenue in excess of that normally achieved.
- How far does contingent BI go – to a physical loss to your supplier only? What about a loss to your supplier's supplier?
- Does business need to be merely impeded or must there be a cessation?

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Recent Catastrophic Events



- **Volcano**
Recent volcanic eruption in Iceland forced cancellation of hundreds of flights and closure of airports.

Questions

1. Was there a covered cause of loss?
2. Was there physical damage to covered property?
3. Was there physical damage to a supplier?

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Volcano, cont.



Potential Impact

- Loss of revenue to airlines and airports.
- Loss of revenue to stores, hotels and restaurants within the airports.
- Loss of revenue to business that depends on travelers.
- Shipping delays
- Cost to house stranded travelers, to reschedule flights once travel resumes.
- Damage to airplanes.

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Volcano, cont.



Covered cause of loss:

- Excluded under standard policies, but tends to be covered under policies for large accounts

Damage:

- Was there damage to airports?
- Was there damage to airplanes?
- Was there fear of damage to airplanes?

Covered property:

- Airports
- Airplanes

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Recent Catastrophic Events, cont.



Oil Spill

- Explosion destroyed off-shore well and caused massive release of oil into the Gulf of Mexico.

Questions

1. Was there a covered cause of loss?
2. Was there physical damage to covered property?
3. Was there physical damage to a supplier?


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Oil Spill, cont.



- **Potential Impact**
 - Loss of revenue from well
 - Loss of revenue to fishing industry
 - Loss of revenue to tourist industry

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Oil Spill, cont.



- **Covered cause of loss**
 - Explosion?
 - Pollution?
- **Covered property**
 - Oil well?
 - Boats and marinas?
 - Ocean?
 - Shrimp and fish?
 - Beach?

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Recent Catastrophic Events, cont.



- **Flood**
 - Storms caused massive flooding in Tennessee, including inundating downtown Nashville.

Questions

1. Was there a covered cause of loss?
2. Was there physical damage to covered property?
3. Was there physical damage to a supplier?

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Flood, cont.



- Potential Impact
 - Loss of revenue to every business in the flooded area.
 - Loss of revenue to hotels, restaurants and others who rely upon business and tourist travel.
 - Loss of revenue to out-of-area suppliers to businesses within the flooded area.

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Flood, cont.



- Covered Cause of Loss
 - Flood is excluded under standard policies.
 - Larger insureds may purchase broader coverage.
- Covered Property
 - Buildings
 - Roadways and parking lots
 - Electrical systems
 - Landscaping

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Ingress/Egress and Civil Authority



- Access to insured location is precluded or hindered because of:
 - An order from Civil Authority that prevents people coming into a specific area.
 - An order from Civil Authority that establishes curfews.
 - Damage to property in the vicinity of an insured location that prevents an insured business from operating.

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Ingress/Egress, Civil Authority, cont.



- Policy language is key:
 - "Prohibit", "prevent", "interfere", "hinder", "affect"
 - Proximity to triggering event: "adjacent", "in vicinity", "within 2 miles"
 - Triggering event must be caused by a peril that is a covered cause of loss under the insured's own policy.
 - Coverage is usually of short duration, under 30 days.

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Emerging Measurement of Loss Issue



- Should loss of revenue be measured by historical standard or by enhanced revenue that would have been enjoyed had insured property not been damaged?
 - "In determining the amount of the Time Element loss as insured against by this policy, due consideration shall be given to experience of the business before the loss and the probably experience thereafter had no loss occurred."
- Does this mean:
 - No catastrophic loss in this area?
 - A catastrophic loss in this area, but no loss to this insured location?

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Cases



- **Buxbaum v. Aetna Life and Casualty**, 103 Cal. App. 4th 444 (2002)
 - "Necessary suspension of operations" under Business Interruption coverage means cessation of business operations, not a slow-down.
- **Zurich American Insurance Co. v. ABM**, (SD NY, 2006) after remand from 397 F.3d 158 (2nd Cir. 2005)
 - Period of recovery was the hypothetical period of time it would take to rebuild the WTC, and not the time it would take for the insured's customers to relocate their businesses to other locations.
- **Duane Reade, Inc. v. St. Paul Fire & Marine Insurance Co.**, 600 F.3d 190 (2d Cir., 2010)
 - Period of restoration was the 21 months it would have taken to rebuild a retail outlet, not the time period required to rebuild the WTC.

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Cases, cont.



- **Pentair, Inc. v. American Guarantee and Liability Ins. Co.**, 400 F.3d 613 (8th Cir., 2005)
 - Contingent business interruption coverage was not triggered by damage to an electrical substation that provided electricity to the insured's suppliers. Substation was not a supplier of goods or services to the insured. Loss of electrical power to the insured's suppliers did not constitute "direct physical loss or damage" to the supplier's property.
- **Arthur Andersen, LLP v. Federal Insurance Co.**, 2010 NJ Super Lexis 195, ___ A3d ___ (NJ Super. AD, 2010)
 - CBI not triggered when insured could not identify any property damage suffered by any receiver of goods, services or information that caused its loss of business income. There must be an interruption, not merely decline in business income. (AA did not own or lease space in WTC).

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Cases, cont.



- **730 Bienville Partners, Ltd v. Assurance Co. of America**, 67 Fed. Appx. 258 (5th Cir., 2003)
 - "Prohibit" in Civil Authority clause means to forbid by force of authority; airport shutdown did not prohibit persons for reaching hotel, just made it more difficult.
- **Kean, Miller, Hawthorne, D'Armond, McCowan & Jarman LLP v. National Fire Insurance Company of Hartford**, 2007 US Dist Lexis 64849 (DC La., 2007)
 - Civil authority coverage did not apply when local officials issued advisory in anticipation of Hurricane Katrina. No evidence that access to the insured premises was prohibited.

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Cases, cont.



- **Syfy Enterprises v. Home Insurance Co.**, 1995 US Dist Lexis 3771 (ND Cal, 1995)
 - Civil authority not triggered when there was no physical damage adjacent to insured premises that prohibited access to insured premises. Unspecified damage that was at least two blocks away from the theater was not "adjacent".
- **Prudential LMI Commercial Insurance Co. v. Colleton Enterprises, Inc.**, 1992 US App Lexis 25719 (4th Cir. 1992)
 - Motel had not had a profit for 32 months preceding Hurricane Hugo. Business income to be determined based on income stream if no loss had occurred, meaning no hurricane, not no loss to this motel during the hurricane. BI is not intended to provide such windfall coverage.

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Cases, cont.



- **Sher v. Lafayette Insurance Co.**, 973 So.2d 39 (La. Ct. of App., 2007, appealed on other grounds)
 - "Actual loss of business income" included loss of \$1,400/month rent per apartments that had rented for \$700/month pre-Katrina.
- **American Automobile Insurance Co. v. Fishermans' Paradise Boats, Inc.**, 1994 US Dist Lexis 21068 (SD Fla, 1994)
 - Windfall profits, i.e., profits that the insured lost because it did not have an opportunity to take advantage of the increased economic opportunities afforded after the windstorm, were not within the scope of the policy.

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Cases, cont.



- **Stamen v. CIGNA Property and Casualty Co.**, 1995 US Dist Lexis 22481 (SD Fla, 1995)
 - In measuring lost profits of convenience store, court allowed consideration of the increased business that would have been earned if the hurricane had not destroyed this particular store.
- **Orient-Express Hotels, Ltd v. Assicurazioni Generali SpA**, 2010 EWHC 1186 (Comm) (May 27, 2010)
 - Policy contained a Trend clause, so that BI recovery would represent as nearly as practicable the results which but for the Damage would have been obtained. English High Court differentiated between losses directly attributable to damage to the hotel, and losses suffered because of economic downturn in the New Orleans area.

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Key Points



- Business Interruption and Contingent Business Interruption coverages depend upon:
 - Covered Property
 - Covered Cause of Loss
 - Showing of Damages
- The specific policy language is key.

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