

BUSINESS INTERRUPTION BASICS

David J. Maldoff
Butler Pappas Weihmuller Katz Craig LLP



WHAT IS BUSINESS INTERRUPTION INSURANCE?

- Intended to protect an insured business owner from potential income loss that can flow from damage to property.
- Property can be directly insured or be "dependent property."
- Business interruption coverage may not be used to put an insured in a better position than it would have occupied had there been no interruption.
Dictomatic, Inc. v. USF&G, 958 F. Supp. 594, 603 (S.D. Fla. 1997)



VARIABLES TO CONSIDER

- The policy must include coverage for business interruption proceeds;
- There must be a loss due to a "covered peril";
- An applicable "Period of Restoration" as provided by the policy; and
- Amount of "actual loss sustained" during the proven "Period of Restoration" per the formula set forth in the policy.



PERIOD OF RESTORATION

- The time necessary to repair or replace the damaged or destroyed property to the same condition it was in prior to the loss.
- Repair or replacement must be done by the insured with "due diligence."



AMOUNT OF LOSS SUSTAINED

- Typically expressed as gross earnings less non-continuing expenses; or
- Net profit (or loss) plus continuing expenses.





**PERIOD OF
RESTORATION**

PERIOD OF RESTORATION

- Purpose
 - To restrict coverage to earnings lost during the period of time "necessary to restore the business to its pre-accident condition."

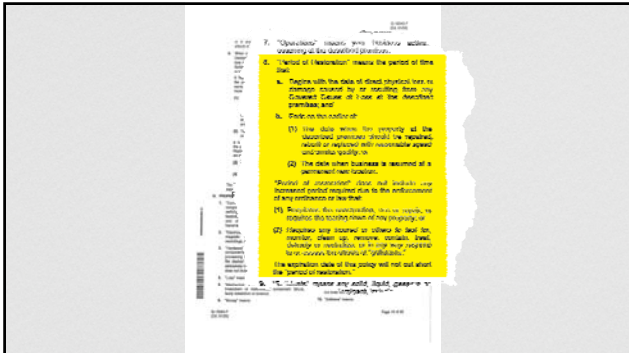
American Guarantee and Liability Insurance Company v. Southern Minnesota Beet Sugar Cooperative, 320 F.Supp.2d 879 (D. Minn. 2004) (quoting Great N. Oil Co., 227 N.W.2d 789, 793 (Minn. 1975))

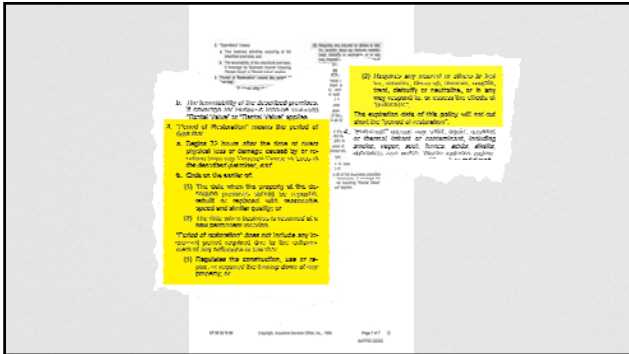


PERIOD OF RESTORATION

- What is it?
- The period of time that begins:
 1. on the date a risk suffers accidental direct physical loss or damage due to covered cause of loss
 - or
 2. within a specified period of time after the accidental direct physical loss occurs.







AMERICAN GUARANTEE AND LIABILITY INS. CO. V. SOUTHERN MINNESOTA BEET SUGAR COOPERATIVE, 320 F.SUPP.2D. 870 (D. MINN. 2004)

- The insured's evaporators suffered a structural collapse on August 27, 2001, rendering them unusable.
- After the loss, the insured began using older, less efficient evaporators.
- The collapsed evaporators were repaired and returned to service on November 5, 2001.



FACTS

- Insured filed a claim for loss of business income.
- Insurer denied the business income claim and filed a declaratory judgment action.
- Insurer sought partial summary judgment seeking, among other things, a declaration at the period of restoration ended November 5, 2001 (date evaporators were turned to service).



THE POLICY

- The policy provided coverage for
 - “actual loss of Business Income and insured sustained from the necessary suspension of its operations due to direct physical loss or damage during the period of restoration. The suspension must be caused by Covered Causes of Loss to Covered Property...”



'PERIOD OF RESTORATION' (POLICY DEFINITION)

- The period of time that:
 1. Begins with the date of direct physical loss or damage Covered Causes Loss at the Described Premises; and
 2. Ends on the date when the property at the Described Premises should be repaired, rebuilt or replaced with due diligence and similar quality.



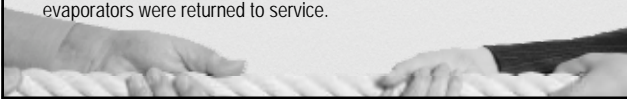
INSURED'S ARGUMENT

- At the time of loss, the evaporators were relatively new, but needed to be cleaned due to prior use of the machines.
- But for the collapse, it would have had time to clean the evaporators before the next use.
- The period of restoration did not end on November 5, 2001, because the repaired evaporators, still dirty, were not of “similar quality” to hypothetical clean evaporators that would have existed had no collapse occurred.



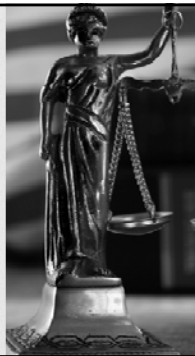
INSURANCE COMPANY'S ARGUMENT

- The quality of the repaired evaporators must be compared to the quality of the evaporators immediately before the collapse.
- Because the evaporators were dirty before the collapse, cleaning of the evaporators was not necessary to trigger the end of the period of restoration.
- The period of restoration ended on November 5, 2001, when the evaporators were returned to service.

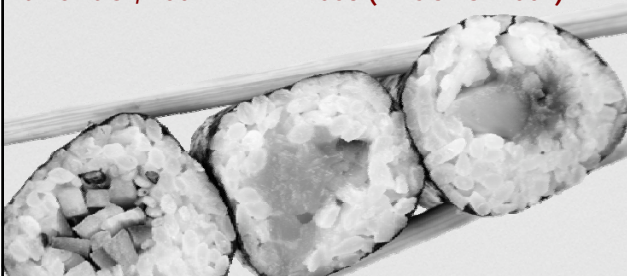


COURT'S DECISION

- Insured's interpretation of the phrase 'similar quality' would render the policy's Extended Business Income Coverage redundant.
- Insurer's interpretation of the phrase 'similar quality' was correct.
- The period of restoration ended on November 5, 2001, when the collapsed, dirty evaporators were replaced with rebuilt, dirty evaporators.



BRAND MANAGEMENT, INC. V. MARYLAND CAS. CO., 2007 WL 1772063 (D. COLO. 2007)



FACTS

- Insureds' facility was shut down on June 3, 2003, due to a listeria contamination.
- After being cleaned and sanitized, the facility reopened on January 18, 2003 (free of listeria).
- Insurer paid insureds for loss of business income due to loss suffered during the "necessary suspension of 'operations' during the 'period of restoration' (i.e., January 3 through January 18)".
- Insured believed the period of restoration ended on June 7, 2003, the date it relocated to a new facility.

THE POLICY

- The policy's business interruption provision provided coverage for:
 - the actual loss of 'business income [the insured] sustain[s] due to the necessary suspension of 'operations' during the 'period of restoration', but not to exceed 12 consecutive months. The suspension must be caused by direct physical loss of or damage to property at the 'described premises'.



'PERIOD OF RESTORATION' (POLICY DEFINITION)

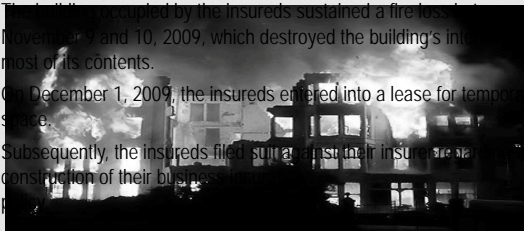
- Period of Restoration means the period of time that:
 1. Begins with the date of direct physical loss or damage caused by or resulting from any Covered Cause of Loss at the "described premises"; and
 2. Ends on the earlier of:
 - a. The date when the property at the 'described premises should be repaired, rebuilt or replaced with reasonable speed and similar quality; or
 - b. The date when business is resumed at a new permanent location.

COURT'S DECISION

- Rejected insured's interpretation of the policy, and granted summary judgment for insurer.
- Found the policy unambiguously required that the claimed business income loss be 1) causally linked to the 'necessary suspension of operations' and 2) sustained during the 'period of restoration'.
- Determined that insured was able to resume full operations at the subject facility on January 18.
- Determined that the business interruption clause did not provide coverage for business losses after January 18.

EIDELMAN V. STATE FARM AND CASUALTY CO., 2011 WL 198501 (E.D. PA. 2011)

- The building owned by the insureds sustained a fire loss on November 7 and 10, 2009, which destroyed the building's interior and most of its contents.
- On December 1, 2009, the insureds entered into a lease for temporary space.
- Subsequently, the insureds filed suit against their insurer seeking the construction of their business interruption clause.



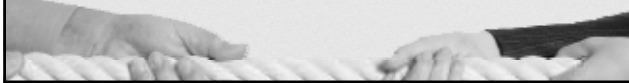
THE DISPUTE

- The extent to which the insurer was required to insure losses arising from the destruction of the building and insured's resulting business losses.



INSURED'S ARGUMENT

- They were entitled to continuing normal operating expenses (including payroll) from November 10, 2009 until the property was repaired, rebuilt or replaced with reasonable speed and similar quality to its pre-loss condition.
- They began conducting business at a temporary location, but were entitled to 100% of the pre-loss business income they received, as if their entire operations were ceased throughout the period of restoration.



INSURANCE COMPANY'S ARGUMENT

- The insureds were owed:
- Business income they would have earned if the loss had not occurred.
- Business income they actually earned after the loss (during period of restoration).
- Any extra expense that exceeded their normal operating expenses.



THE POLICY

- Provided coverage for the actual loss of business income insured sustained due to the necessary suspension of its operations during the period of restoration.



'PERIOD OF RESTORATION' (POLICY DEFINITION)

- The period of time that:
 - a. Begins with the date of accidental direct physical loss caused by an insured loss at the described premises; and
 - b. Ends on the date when the property at the described premises should be repaired, rebuilt, or replaced with reasonable speed and similar quality.



'PERIOD OF RESTORATION' (POLICY DEFINITION)

- When construing the relevant definitions in the policy, the court noted that the insurer is to pay:
 - for the actual loss of [net income ... that would have been earned or incurred and continuing normal operating expenses, including payroll] you sustain due to the necessary suspension of your [normal business activities] during the period that
 - a. begins with the date of accidental direct physical loss caused by an insured loss at the described premises; and
 - b. on the date when the property at the described premises should be repaired, rebuilt, or replaced with reasonable speed and similar quality for up to 12 consecutive months after the date of accidental direct physical loss.

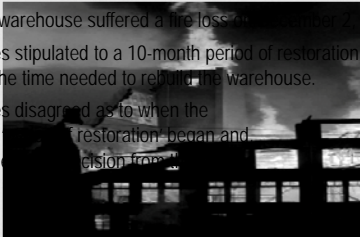
COURT'S DECISION

- Insureds' position was contrary to the clear intent of the policy.
- Applying insureds' interpretation of the provision would nullify the 1) clear intent of the policy and 2) broader purpose of business interruption insurance.
- Policy was not intended to place insureds in a better position than they would have absent the business interruption.



BRETON, LLC V. GRAPHIC ARTS MUTAL INSURANCE CO., 2010 WL 678128 (E.D. VA. 2010)

- Insureds' warehouse suffered a fire loss on January 1, 2007.
- The parties stipulated to a 10-month period of restoration, which included the time needed to rebuild the warehouse.
- The parties disagreed as to when the 10-month period of restoration began and thus, required the decision from the



'PERIOD OF RESTORATION' (POLICY DEFINITION)

- 'Period of Restoration' means the period of time that:
 - Begins with the date of direct physical loss or damage caused by or resulting from any Covered Cause of Loss at the described premises; and
 - Ends on the date when the property at the described premises should be repaired, rebuilt or replaced with reasonable speed and similar quality.



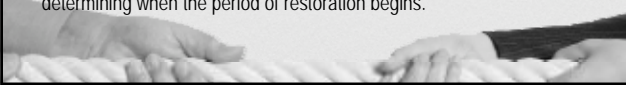
INSUREDS' ARGUMENT

- They could not begin reconstruction until:
 1. after they received payment under the policy, or
 2. insurer and fire officials completed their investigation and released the property.
 - Period of restoration did not begin until after one of those events.



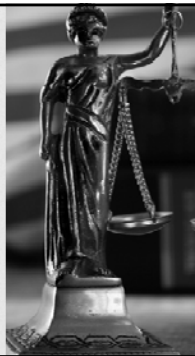
INSURANCE COMPANY'S ARGUMENT

- The policy was unambiguous as to the start date of the period of restoration.
- The period of restoration began on December 2, 2007 (the date of the fire).
- The period of restoration is not extended merely because an insurer fails to pay its insured for a claimed loss due to a coverage dispute.
- Delays in the release of an insured's property is immaterial when determining when the period of restoration begins.



COURT'S DECISION

- The date on which the period of restoration begins is not postponed, delayed or tolled by:
 1. an insurer's non-payment, or
 2. an insured's lack of access to its property.



THE CASE FOR EXTENDING THE PERIOD OF RESTORATION



- "Period of Restoration" as defined by ISO Business Income Coverage Forms (CP 00 30 and CP 00 32) ends on the earlier of:
 1. the date when the property at the described premises should be repaired, rebuilt, or replaced with reasonable speed and similar quality;
or
 2. the date when business is resumed at a new permanent location.



- In some "manuscript" Forms, "period of restoration" ends when, with the exercise of due diligence and dispatch, the insured restores normal operation to its business.
 - *Gus Meat Co. Inc. v. Hartford Steam Boiler Insp. and Ins. Co.*, 1992 WL 107313 (N.D. Ill. 1992)
- "Should" language (or "would" language in previous ISO Forms) has been interpreted by courts to mean a "theoretical" restoration period.



- "Theoretical" restoration period applied in following situations:
 1. when the property is not actually repaired or the business is not resumed at a new permanent location; or
 2. when the property is actually repaired or the business is resumed at a new permanent location, but the insurer claims the policyholder failed to move with reasonable speed or to exercise due diligence and dispatch.



- Insurers commonly argue that the restoration period is always the "theoretical" time it ought to take to complete repairs/resume business, with this theoretical view divorced from any of the actual facts.
- Can "real-world" circumstances faced by policyholders be considered in calculating the period of restoration, whether it be "theoretical" or "actual"?
 - Adjustment delays
 - Third-party delays
 - Ordinance or law issues



- Common thread running through the case law: restoration period cannot be computed in a vacuum; the end of the restoration period must be calculated based on the specific factual circumstances of the case; and insureds will not be penalized where the delay in rebuilding/returning to business was occasioned by events beyond its control.



1. ADJUSTMENT DELAYS

- Courts have extended the restoration period because of insurer delays, either in payment or in adjustment activity
 - *Vermont Mut. Ins. Co. v. Petit*, 613 F. Supp. 2d 154 (D. Mass. 2009) ("The period of restoration is a 'theoretical replacement time,' which a court may extend to account for an insurer's 'failure to adjust [a] loss within a reasonable time.' A reasonable extension in the adjustment period may include foreseeable delays in negotiating losses.")
 - *Pontchartrain Gardens, Inc. v. State Farm Gen. Ins. Co.*, 2009 WL 86674 (E.D. La. 2009) ("Because State Farm's delay in payment may have caused any untimely repairs, the Court finds that factual issues preclude summary judgment on this matter.")

1. ADJUSTMENT DELAYS CONT'D

- *Streamline Capital, LLC v. Hartford Cas. Ins. Co.*, 2003 U.S. Dist. Lexis 14677, (S.D. N.Y. 2003) (Whether Hartford's delay in payment caused a delay in the insured's ability to reestablish its operations was an issue of fact)
- *Western American, Inc. v. Aetna Casualty & Surety Co.*, 915 F.2d 1181 (8th Cir. 1990) ("[T]he insurance company should be liable for business interruption coverage for the reasonable time needed for the insured to reenter business plus any delay attributable to the insurance company's failure to perform its duties under the policy.")
- *Bard's Apparel Mfrg., Inc. v. Bituminous Fire and Mar. Ins. Co.*, 849 F.2d 245 (6th Cir. 1988) ("Bard's is still entitled to dispute the estimate by objective evidence of a need for a longer period of time for repair. This longer period of time may include consideration of the effect of Bituminous's failure to adjust the loss within a reasonable time, coupled with an appropriate instruction."

1. ADJUSTMENT DELAYS CONT'D

- *Hampton Foods, Inc. v. Aetna Casualty & Surety Co.*, 843 F.2d 1140 (8th Cir. 1988) (8th Circuit agreed with district court finding that but for Aetna's refusal to pay the amount it owed the insured under the policy, the insured could have promptly restored its business and, therefore, the delay in restoration was attributable to Aetna)
- *Constitution State Ins. Co. v. Werner Enterprises, Inc.*, 1987 U.S. Dis. Lexis 6023 (E.D. La. 1987) (Disputed issue of fact whether, although initial payments were made to the contractor, due to financial difficulties and the failure of constitution to pay, the insured was unable to secure the contractor's services to perform the repairs)

1. ADJUSTMENT DELAYS CONT'D

- *Arnold v. Liberty Mut. Ins. Co.*, 469 So.2d 1155 (La. App. 1985) (Restoration period extended 4 months where it was estimated that it would take 10 to 12 weeks to complete necessary repairs to building, it would take at least a month for owner to secure estimate and properly file satisfactory proof of loss, and it took insurer two months to pay owner anything after he filed satisfactory proof of loss)
- *United Land Investors, Inc. v. Northern Ins. Co. of Am.*, 476 So.2d 432 (La. App.1985) (Restoration period included delay in making payment for structural damage which was caused by a combination of factors, including the time necessary for the insured to furnish adequate proofs of loss, submission of accurate estimates for repairs by building contractors, and the time required for both parties to engage in the negotiations over the amount to be paid)

1. ADJUSTMENT DELAYS CONT'D

- *Thico Plan Inc. v. Ashkouti*, 320 S.E.2d 604 (Ga. App. 1984) (Evidence that delay in rebuilding apartments damaged by fire was due to insurer's bad-faith refusal to make payment under fire policy precluded limiting insureds' recovery of damages for lost rental income pursuant to policy provision limiting insurer's liability for lost rent to period of time reasonably required to rebuild the damaged apartments.)
- *Omaha Paper Stock Co. Inc. v. Harbor Ins. Co.*, 445 F. Supp. 179 (D. Neb. 1978) (Much of the delay in resuming insured's operations after a fire was attributable to decisions made by Harbor and its adjusters. Thus, Harbor was precluded from arguing that its liability is limited to the theoretical time for replacement)

1. ADJUSTMENT DELAYS CONT'D

- *A&S Corp. v. Centennial Ins. Co.*, 242 F. Supp. 584 (N.D. Ill. 1965) ("The fire insurance adjusting representatives of defendants held in abeyance lessor's restoration of the damaged premises pending adjustment of its fire loss claim. Plaintiff, therefore, was unable to commence reconstruction of the bowling alley facilities on the leased premises until after the fire damage claims were adjusted.")
- *Eureka-Security Fire & Marine Ins. Co. v. Simon*, 401 P.2d 759 (Az. App. 1965) ("The court could well find that the delay in negotiating the other two losses with the adjusting company that represented the other two insurance companies, as well as Defendant, was a reasonable delay to be anticipated by the Defendant's insurance company in writing its policy.")

1. ADJUSTMENT DELAYS CONT'D

- *Saperston v. American & Foreign Ins. Co.*, 255 N.Y.S. 405 (N.Y. Sup. Ct. 1932) (Evidence existed which warranted a jury finding that a delay was caused by the acts and conduct of the insurer, thus estopping the insurer from claiming that insured did not exercise reasonable diligence and dispatch in rendering the insured property tenantable again).



2. CONSTRUCTION DELAYS

- Rebuilding rarely goes according to plan.
- Delays may be caused neither by policyholder nor insurer, but by a third-party.
- Courts have extended restoration period to include additional time where delay caused by third-parties.
 - *United Nuclear Corp. v. Allendale Mutual Ins. Co.*, 709 P.2d 649 (N.M. 1985) (“[T]he overall repair delay was complicated by conflicts among the engineers regarding making repairs before design, engineering and construction plans had been fully examined and proven. If those delays occasioned by principles of engineering prudence overlapped the same delay period imposed by standards of a regulatory body that had to be met before production could be restarted, it cannot be said that delay was due only to the law and ordinance regulation of reconstruction and repairs.”).

2. CONSTRUCTION DELAYS CONT'D

- *Eureka Security Fire & Marine Ins. Co. v. Simon*, 401 P.2d 759 (Ariz. App. 1965) (The court below could find “that the delay of the landlord in repairing the building and insisting upon the rebuilding of the market first is a normal hazard or risk which an insurance company may expect in writing a policy of this kind.”).
- *Anchor Toy Corp. v. American Eagle Ins. Co.*, 155 N.Y.S.2d 600 (N.Y. Sup. Ct. 1956) (38 weeks “is the time it would take to replace the structure providing the building was put up by the experts in the courtroom. But buildings seldom are. In the field it snows, and men fall off girders, and the wrong size window glass is delivered. An estimate of eight weeks for these contingencies is not believed to be excessive.”).



1. WHAT IS EXTENDED BUSINESS INCOME?

- Arriving at the end of the defined "Period of Restoration" does not generally trigger the insured's immediate return to pre-loss "operational income" levels.
- The ability to generate revenues at the same level enjoyed prior to the suspension of operations may actually require several weeks or months following the insured's returns to "operational capability."



1. WHAT IS EXTENDED BUSINESS INCOME? CONT'D

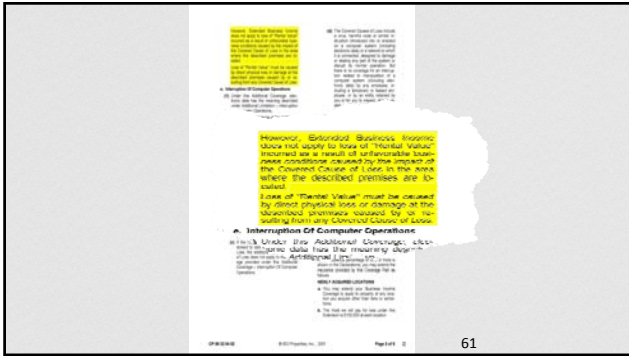
- During the "period of restoration," the insured's customers and clients may find alternate sources for the goods, services, or products the insured provides.
- In so doing, they may have developed new buying habits or entered into a replacement contractual relationship with another entity.
- Regaining these customers and the revenue they represent takes time. Replacing these customers and clients with new buyers requires even more time.



1. WHAT IS EXTENDED BUSINESS INCOME? CONT'D

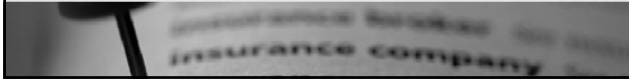
- Both ISO Business Income Coverage Forms (CP 00 30 and CP 00 32) provide a small amount of "automatic" coverage to indemnify the insured for the income/revenue "lag" experienced once operations are resumed.
- Additional Coverages "Extended Business Income" provides up to 30 days of "difference in income" coverage following the insured's return to "operational capability."





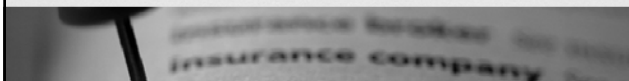
2. HOW DOES THE COVERAGE EXTENSION APPLY?

- "Extended Business Income" protection is divided into two parts.
- One part extends business income to policies covering "Business Income Other Than Rental Value."
- The other part provides the same protection but to policies protecting against the loss of "Rental Value." "Rental Value" is covered whether it is included as a part of the business income protection or provided on a stand-alone basis.



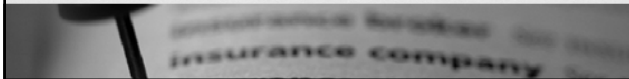
2. HOW DOES THE COVERAGE EXTENSION APPLY? CONT'D

- Coverage for "Business Income Other Than Rental Value" begins on the date property is actually repaired, rebuilt, or replaced and "operations" are resumed.
- Coverage ends: (1) when the insured could restore its operations, with reasonable speed, to the level which would generate the business income amount that would have existed if no direct physical loss or damage loss had occurred; or (2) in 30 consecutive days; whichever occurs first.



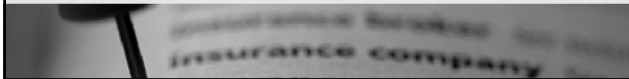
**2. HOW DOES THE COVERAGE EXTENSION APPLY?
CONT'D**

- Likewise, "Rental Value" coverage commences on the date property is actually repaired, rebuilt or replaced and tenant occupancy is restored.
- Coverage ceases: (1) when the tenant occupancy could be restored, with reasonable speed, to the level which would generate the rental value that would have existed if no direct physical loss or damage had occurred; or (2) in 30 consecutive days; whichever occurs first.



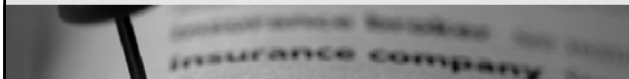
**3. DOES THE COVERAGE EXTENSION INCLUDE THE LOSS OF
INCOME ATTRIBUTED TO A NEGATIVE BUSINESS CLIMATE?**

- "Extended Business Income" protection will not allow the insured to recover income lost due to externally poor economic conditions present following the insured's return to operations.
- If the insured's ability to return to pre-loss income levels is stunted by the surrounding community's economic condition, then the coverage extension does not apply.



**3. DOES THE COVERAGE EXTENSION INCLUDE THE LOSS OF
INCOME ATTRIBUTED TO A NEGATIVE BUSINESS CLIMATE?**

- For example, assume an insured is located in an area devastated by a hurricane. Six months following the damage, the insured is able to resume "operations". However, the remainder of the business community and its residents are unable to return for several more months, causing the insured major income loss. The loss of income attributable to this lack of customer base does not qualify as a "business income loss" under this coverage extension.

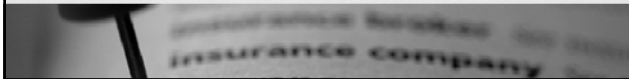


4. DOES THE COVERAGE EXTENSION INCLUDE EXTRA EXPENSES?

- "Extra Expenses" are defined in the ISO Business Income Coverage Forms and the ISO Extra Expense Coverage Form (CP 00 50) as necessary expenses incurred during the "period of restoration" that would not have been incurred had no loss occurred.
- Extended Business Income covers the actual loss of business income incurred during the extended period of restoration.
- Business Income is defined as net income (net profit or loss before income taxes) that would have been earned or incurred plus continuing normal operating expenses.

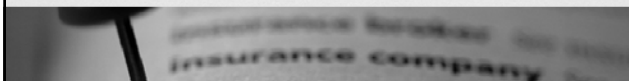
4. DOES THE COVERAGE EXTENSION INCLUDE EXTRA EXPENSES? CONT'D

- Issue: Are pre-opening expenses (advertising, public relations, locating and hiring new personnel, etc.) extra expenses?
- Above policy language would support no coverage for extra expenses incurred during extended period of restoration as the period of restoration has ended. But, these expenses could reduce the loss within the extended period of restoration.



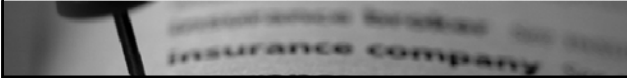
5. DOES THE INSURED NEED TO INCREASE THE BUSINESS INCOME LIMIT TO COVER THIS COVERAGE EXTENSION?

- "Extended business income" limits are not in addition to the limit of business income coverage purchased; the income lost during this extended period is paid out of the business income limit.



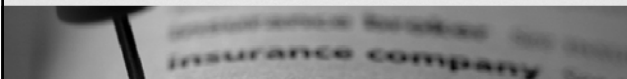
6. WHAT IF 30 DAYS IS NOT ENOUGH?

- Insureds have the option to increase the limit of extended business income coverage if the automatic 30-day extension is insufficient.
- By activating the "Extended Period of Indemnity" optional coverage on the declaration page and paying an additional premium, the insured can increase the time limit in 30 and 90-day increments up to a maximum of 720 days.



6. ARE THERE REPORTED CASES ADDRESSING EXTENDED BUSINESS INCOME?

- *Duane Reade, Inc. v. St. Paul Fire & Marine Ins. Co.*, 600 F.3d 190 (2d Cir. 2010) ("Extended recovery period" triggered by the commencement of the later of two events (a) the end of the policy's restoration period or (b) the date on which the store is actually replaced. Extended recovery period inapplicable because insured's store had not yet been actually replaced and because the restoration period had not ended.)



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David J. Maldoff

Butler Pappas Wehmuller Katz Craig LLP