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## **Business Interruption Claims**

### **1. WHAT IS BUSINESS INTERRUPTION?**

Actual loss of business income arising directly from a specified peril that caused damage or destruction to the premises described in the policy.

#### **A. What Triggers Coverage?**

- a) suspension of business operation: cessation of business activities, untenable premises if "Rental Value" applies;

**“Business Operation”**—*Copes v. American Cent. Ins. Co.*, 2004 WL 75454, 85 Fed. Appx. 391 (5<sup>th</sup> Cir. 2004)

Insurance policy covering the actual loss of business income due to the necessary suspension of the insured's operation, defined as business activities occurring at the premises, did not cover losses for prosthetic manufacturing facilities nor physician training programs arising from a fire at premises housing multiple business entities; the policy's declarations page described the insured premises as a doctor's office and the generally prevailing meaning of doctor's office included neither prosthetic manufacturing nor physicians training.

**“Cessation/suspension of business activities”**—*54th Street Ltd. Partners, L.P. v. Fidelity and Guar. Ins. Co.*, 306 A.D.2d 67 (N.Y.A.D. 1 Dept., 2003). "Necessary suspension" of operations as used in policy covering loss of business income sustained due to business interruption referred to total cessation of business activity, and, thus, policy did not cover restaurant's loss of income caused by city's diversion of vehicular and pedestrian traffic in the area of the restaurant; access to the restaurant was not denied, but rather the restaurant was accessible to the public, employees, and its vendors. The language of the subject policy clearly and unambiguously provides that for business interruption coverage to be triggered, there must be a “necessary suspension,” i.e., a total interruption or cessation ( *see* 244 *Buxbaum v. Aetna Life & Cas. Co.*, 103 Cal. App.4th 434, 444, 126 Cal. Rptr.2d 682, *review denied* 2003 Cal LEXIS 225; *Keetch v. Mut. of Enumclaw Ins. Co.*, 66 Wash. App. 208, 831 P.2d 784; *Am. States Ins. Co. v. Creative Walking, Inc.*, 16 F Supp 2d 1062, *affd.* 175 F.3d 1023; *Royal Indem. Ins. Co. v. Mikob Props., Inc.*, 940 F.Supp. 155; *Home Indem. Co. v. Hyplains Beef*, 893 F.Supp. 987, 991-992, *affd.* 89 F.3d 850), of the insured's business operations.

- b) direct physical loss as a result of covered cause of loss;  
–if business is a tenant, "premises" is its leased portion of the building.

*United Airlines, Inc. v. Insurance Co. of State of Pa.*, 385 F. Supp.2d 343 (S.D.N.Y., 2005)  
Physical damage suffered by insured commercial airline when one of its ticket offices was destroyed in terrorist attack, and ash from fire caused by second attack accumulated at insured's airport gate, did not warrant systemwide business interruption coverage under property, terrorism and sabotage insurance policy for insured's loss of \$1.2 billion in revenue flowing from nationwide aviation shutdown in wake of attacks; policy specified that "[p]ayment will not exceed the amount actually spent to repair or replace," and amount of business interruption coverage sought bore no relation to physical damage suffered. The airport serviced by insured and government building that suffered terrorist attack were not "adjacent," within meaning of clause of property, terrorism and sabotage insurance policy extending business interruption coverage to "situation when access to the insured locations is prohibited by order of civil authority as a direct result of damage to adjacent premises"; attacked building was at least 3.4 miles away by car from airport, and facilities were separated by several intervening structures and properties.

- c) Damage to premises described in the policy, including all routes within the \_\_\_\_\_ building to gain access to the described premises.

*Gregory v. Continental Ins. Co.*, 575 So. 2d 534 (Miss. 1990). Country club sued the insurer after it refused to pay for business interruption loss caused by trees blowing onto golf course during hurricane. The court held that business interruption endorsement covered only business loss resulting from damage to building housing pro shop and restaurant, not loss from shutdown of entire golf course resulting from trees being blown onto course during hurricane.

D) extension of coverage to "newly acquired locations"—extending business income coverage to apply to property at any location the insured acquires; has limitations as to the maximum amount of coverage and period of coverage.

## B. Period of Coverage.

- a) "Period of restoration"—beginning with the date of a direct physical loss caused by covered cause of loss (or after an applicable waiting period), and ending with the date when the property should be repaired, rebuilt or replaced or when business is resumed at a new permanent location. Typically, a 72-hour waiting period applies.

***BUT SEE*** *United Land Investors, Inc. v. Northern Ins. Co. of America*, 476 So.2d 432 (La. App. 2 Cir. 1985). Insured was entitled to recover under business interruption clause in fire protection policy for loss of earnings from date of loss until repairs were completed 12 weeks after owner and insurer arrived at amount to be paid in settlement of structural damage claim, rather than only those losses which occurred during 12-week period beginning on date of loss, even though repairs only required 12 weeks and insurer made partial cash advance prior to settlement of structural damage claim, where owner could not commence repairs until he received full payment for structural damage.

- b) Increased period caused by enforcement of ordinances is not included.
- c) Policy expiration date does not "cut short" the period of restoration.

C. Covered Amount—ACTUAL LOSS OF BUSINESS INCOME

- a) Open policies--proof of actual loss is required
- b) Valued policies(value of loss is agreed in advance)

D. Standard Exclusions and Limitations

- a) power loss
- b) enforcement of ordinances or laws regulating use, construction, repair or demolition of the property
- c) suspension, lapse or cancellation of lease, contract or license
- d) limitations to the period of coverage for "ordinary payroll"
- e) destruction or loss of electronic data
- f) pollutants
- g) coinsurance

## 2. TYPES OF COVERAGE

A. Loss of Business Income

- a) net income (profit or loss before income taxes)
- b) continued expenses

B. Extra Expense—necessary expenses incurred during the period of restoration to avoid or minimize the suspension of business and to continue operations, or to minimize the suspension of business if operations cannot be continued.

C. Civil Authority and Ingress/Egress

- a) Civil Authority—loss caused by action of civil authority that prohibits access to the insured’s premises as a result of off-premises damages

*730 Bienville Partners Ltd. v. Assurance Co. of America*, 2002 WL 31996014 (E.D. La. 2002). Plaintiff sought loss of business income coverage pursuant to the civil authority, when the FAA’s closure of the airports and flight cancellation after 9/11 prevented people from arriving to Plaintiff’s hotels. The court reasoned that FAA did not “prohibit” access to the hotels.

- b) Prevention of ingress/egress as a result of physical damage; does not require an order of civil authority

*Fountain Powerboat Industries, Inc. v. Reliance Ins. Co.*, 119 F. Supp. 2d 552 (E.D.N.C. 2000). Closure of only access road to insured’s facility triggered coverage under ingress/egress clause where the policy did not require physical damage to the covered property to trigger coverage pursuant to ingress/egress clause or civil authority.

*Washington Mut. Bank v. Commonwealth Ins. Co.*, 133 Wash. App. 1031 (Wash. App.Div.1 2006). Bank’s losses from evacuation of bank building based on erroneous engineering report that building was in danger of collapse were not covered under property insurance policy’s ingress/egress provision, as that provision referred back to “perils insured against” clause and extended coverage only if the claimed expense resulted from a direct physical loss of or damage to insured property, but there was no actual physical loss to the property and no actual damage to the property and thus no peril insured against.

D. Extended Business Income—coverage for the actual loss of Business Income during the period beginning on the date the operations are resumed/property repaired or rebuilt and ending on the earlier of: a) the date the operations are restored to the level that would generate the business income that would have existed in no direct physical damage had occurred; or b)30 consecutive days. **DIRECT PHYSICAL LOSS MUST CAUSE THE LOSS OF BUSINESS INCOME.**

**Does not apply to loss of business income incurred as a result of unfavorable business conditions caused by the impact of the covered cause of loss in the area where the described premises are located.**

E. Contingent Business Interruption –policy protects the earnings of the insured following physical loss or damage to the **property of the insured’s suppliers or customers**, as opposed to its own property. Note that the insured’s suppliers or customers have no contractual relationship with the insurer.

*CII Carbon, L.L.C. v. National Union Fire Ins. Co. of Louisiana, Inc.*, 2005-0071 (La. App. 4 Cir. 8/17/05); 918 So.2d 1060. Losses suffered by insured/coke processor due to its inability to sell steam to adjacent bauxite processing plant, after insured's subleased equipment in power plant that was damaged by explosion at bauxite plant was repaired but before bauxite plant could accept steam from insured, were covered by contingent business interruption endorsement, which provided a maximum of \$500,000 for losses, rather than insurance policy's general business interruption provisions, which provided a greater amount of insurance; coverage under the general business interruption provisions terminated when damaged property was repaired, contingent business interruption endorsement provided coverage for losses sustained during the time required to rebuild or repair recipient property, bauxite plant was recipient property, and thus losses suffered by insured after equipment was repaired but before bauxite plant could accept steam were covered by contingent endorsement.

### **3. INSURED'S OBLIGATIONS**

- A. Claim Reporting
- B. Submission of Supporting Financial Documents
- C. Duty to Mitigate

### **4. COMPUTING THE LOSS**

- A. How Much Would the Business Have Earned Had the Insured Event Not Occurred?

*Finger Furniture Co. Inc. v. Commonwealth Ins. Co.*, 2005 WL 590831 (5<sup>th</sup> Cir. 2005) Insured's losses due to store closings were to be determined based on historical sales figures, and were not to be offset by profits stores made the following weekend when insured slashed its prices; contract did not suggest that insurer could look prospectively to what occurred after the loss to determine whether insured incurred business-interruption loss, rather, policy required due consideration of business's experience before date of loss and its probable experience had loss not occurred.

- B. Challenges Encountered When Computing Lost Income
  - a) new business with little financial history
  - b) contingencies in prior years that had negative impact on net income
  - c) extraordinary expenses in prior years
  - d) continued expenses
  - e) projected growth—choice of the appropriate multiplier

C. Beware of Coinsurance:

Coinsurance, a limitation on the liability of the insurance company (e.g. 12 Couch on Insurance [3rd Ed.], § 175:52), “has the effect of preventing one who is insured for a small part of actual value, and who has paid a correspondingly small premium, from collecting as much, in the event of loss, as one who has paid a correspondingly large premium.” 342 *New York Life Ins. Co. v. Glens Falls Ins. Co.*, 184 Misc. 846, 848, 55 N.Y.S.2d 176 (Sup. Ct., N.Y. Cty. 1945)

D. Basic Calculation of Lost Business Income

SEE EXHIBIT “A”–Loss of Business Income

**5. DISPUTING BUSINESS INTERRUPTION CLAIMS**

A. As typical with insurance litigation, the ambiguity in the policy language is construed in favor of the insured.

B. La. R.S. 22:658 and 22:1220 apply. The claimant has a burden of proving the insurer was arbitrary and capricious in paying or adjusting the claim.

*United Land Investors, Inc. v. The Northern Ins. Co. Of America*, 476 So.2d 432 (La. App. 2d 1985). No penalties or attorney fees awarded where the insurer made a timely unconditional tender of undisputed funds and made good faith efforts to bring the claim negotiations to a conclusion.

C. *B A Properties, Inc. v. Aetna Cas. & Sur. Co.*, 273 F. Supp. 2d 673 (D. Virgin Islands, 2003). Insured hotel owner's sale of hotel several months after it had been damaged in hurricane could not serve as basis to reduce amount that insured could recover for its business interruption losses under property insurance policy; loss that insurers contracted to pay to insured was the loss in its business income from business interruption, such loss could not be offset by insured's receipt of money from other sources, and policy did not restrict period that insured could recover its losses in event its interest in insured property was conveyed to third party.

**6. CONCLUSION**

**-READ AND REVIEW THE POLICY TO IDENTIFY COVERAGE PROVIDED.**

**-TALK TO YOUR CLIENT ABOUT THE SPECIFICS OF THE BUSINESS AND THE NATURE OF INTERRUPTION.**

**-CALCULATE THE LOSS: NET INCOME + CONTINUED EXPENSES.**

**-CALCULATE ANY OTHER APPLICABLE ITEMS: EXTRA EXPENSE, EXTENDED INCOME.**