

Business Income Coverage Issues Arising from Hurricane Katrina:

**The Effect of “Loss of Market” Exclusions, Assessing the Wider
Effects of the Catastrophe, Calculating the Period of Restoration
and Determining Loss During the Period of Restoration**

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- Prior to 9/11, there were comparatively few Time Element cases
- More than half of all such cases have been decided since 9/11
- Newer decisions vary wildly, because
 - There is no precedent to contain creative arguments
 - Those involved do not understand the nature of the coverage
- The guiding principle: Business Income insurance is designed to do for the policyholder what it would have done had the catastrophe not occurred

The Issues in Resolving Business Income Claims Arising from Catastrophes

1. Determining the effect of the “Loss of Market” exclusion
2. Establishing the rate of loss during the Period of Restoration
3. Fixing the length of the Period of Restoration and
4. Measuring the loss which occurs during the Period of Restoration

Loss of Market Exclusion

... Loss or Damage Excluded

This policy does not insure the following:

....K. Delay, loss of market, loss of use, interruption of business or any other consequential or indirect loss except as otherwise provided herein.

- Very little case law exists on the Loss of Market Exclusion
- In claims stemming from mass catastrophes, carriers argue that the policyholder's loss stems not from destruction of its property but from damage to surrounding property or population movement, which they term "loss of market"
- These arguments are in conflict with the nature and origin of the exclusion: the purpose of the exclusion is to prevent policyholders from recovering Business Income as a consequential Property Damage loss
- These arguments also ignore language in commercial use which would achieve the ends sought by the carriers

The Wider Effects of the Catastrophe

- This issue originally arose when policyholders, whose businesses were destroyed by storm, argued that the lost profit component of their Business Income claim should include the hypothetical increased sales levels they would have enjoyed had the storm at issue spared their business but still flattened neighboring property
- Not surprisingly, insurance companies resist such claims on the ground that a policyholder cannot reap a “windfall” by factoring in the wider effects of the same catastrophe which caused the loss

- *Prudential LMI Commercial Insurance Co. v. Colleton Enterprises, Inc.*
 - The limiting principle that we apply here is but a special application of the general no-windfall principle. It is that an insured under a business interruption provision such as that here in issue may not claim as a probable source of expected earnings (or operational expenses) a source that would not itself have come into being but for the interrupting peril's occurrence.
- *American Automobile Insurance Co. v. Fisherman's Paradise Boats, Inc.*

- *Stamen v. CIGNA Property & Casualty Co.*
 - In other words, the “occurrence” in this case was Hurricane Andrew while the “loss” was the property damage incurred by the [policyholders’] stores. If [the insurance company] had meant to preclude consideration of [the policyholders’] post-hurricane profits in the lost profits calculation, it should have substituted the word “occurrence” for the word “loss” in the clause describing how business interruption losses would be calculated. But [the insurance company] did not use that language. Hence, the policy language dictates the result that [the policyholders] urge[] on this Court.
- *Levitz Furniture Corp. v. Houston Casualty Co.*

Evaluation:

The result may depend upon a close reading of the language

- However, policyholders should base their arguments upon:
 - The nature and purpose of Business Income insurance
 - The existence and widespread commercial use of limiting language

The Period of Restoration and the Value of Location

- The importance of Location
 - Prior to 9/11
 - 9/11 – The Bad, The Ugly and the Good

Recap on 9/11 Cases

- Streamline
 1. “Property” means “Personal Property,” citing District Court’s narrow ruling in ABM – which was *overruled*
 2. It is unreasonable to base the Period of Restoration on something for which neither party has control
 3. Holding Limited to businesses run out of offices

Lava

1. “Property” means “Personal Property,” citing Streamline citing District Court’s narrow ruling in ABM – which was *overruled*
2. It is unreasonable to base the Period of Restoration on something for which neither party has control
3. Distinguished District Court ruling in Duane Reade on the importance of walk up business
4. Replace “property” not “operations” – *overruled* by Court of Appeals in Duane Reade

Duane Reade

1. “Property” means “Personal Property,” citing Streamline citing District Court in ABM – which the court *overruled*
2. It is unreasonable to base the Period of Restoration on something for which neither party has control
3. *Ignores* Streamline and Lava statements that their holdings did not apply to businesses for whom space was not fungible
4. *Overrules* Lava on the issue of whether “operations” or “property” must be replaced

What are we left with:

2. It is unreasonable to base the Period of Restoration on something for which neither party has control – but the Period of Restoration is *hypothetical*

So

- Argue for the rule in ABM and International Office Centers

Determining Loss During the Period of Restoration

- The Issue: whether the policyholder's loss of income must occur, or be fully realized, during the Period of Restoration
- Affected businesses: businesses for which there is a lag between the time they manufacture or sell goods, or provide services, and the time they are paid.
- *Pennbarr Corp. v. Insurance Co. of North America*
- *Rogers v. American Insurance Co.*
- *Midland Broadcasters, Inc. v. Insurance Co. of North America*

- *Vinyl-Tech Corp. v. Continental Casualty Co.*
- *Gates v. State Automobile Mutual Insurance Co.*
- *Fireman's Fund Insurance Co. v. Holland America Line-Westours, Inc.*
- *Finger Furniture Co. v. Commonwealth Insurance Co.*

Conclusion:

- Frame arguments in terms of the nature and purpose of the coverage