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Internet Resources

- ◆ Business Interruption Insurance & Business Continuity Management, <http://www.thebci.org/BCAWKA11.htm>
- ◆ How Business Interruption Losses Stemming From September 11 Will Be Calculated, <http://www.pwcglobal.com/Extweb/pwcpublishations.nsf/docid/C78DAB445547620F85256B67004BF6EA>
- ◆ Business Interruption Handbook, <http://www.fema.gov/pdf/cerrogrande/handbook022801.pdf>
- ◆ World Trade Center Disaster Statistics, http://www.disasterinformation.org/wtc_stats.htm



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BUSINESS INTERRUPTION INSURANCE: A LESSON LEARNED AT GROUND ZERO

By Lee M. Epstein

Lesson Learned: The Words Matter

When the terrorists crashed into the World Trade Center, the Pentagon and a field in Western Pennsylvania, they set in motion a chain of events that drastically altered the world of property and business interruption insurance. One of the important lessons learned in the aftermath of 9/11 is that policy wording matters.

9/11: "The Perfect Storm"

The convergence of a soft insurance market with the catastrophic damage on September 11, 2001 created a "perfect business interruption storm." By now, most everyone is familiar with the physical damage caused by the September 11th terrorist attacks. World Trade Center buildings One through Seven were totally destroyed; major portions of lower Manhattan were closed by civil authorities; New York's transportation and utility infrastructure were severely damaged; and vast sections of the country came to a complete halt.

That physical damage, associated closures by civil authorities and other impairments of ingress and egress caused severe economic consequences. In the immediate aftermath of the attacks, major financial markets were closed, air travel was banned and the television broadcast networks lost significant advertising revenue as they went to 24/7 news coverage of the tragic events. Loss estimates range anywhere from 25 to 60 billion dollars. Our economy has yet to recover.

As policyholders and their insurance companies continue to work through adjustments of the business interruption losses resulting from the terrorist attacks, an important lesson concerning insurance policy language has been learned: The words do indeed matter.

For better or worse, the uniformity that exists in the wording of liability policies is lacking in first party property insurance. Aggressive policyholders were able to exploit that lack of uniformity in the soft market that preceded 9/11 by negotiating more expansive coverage provisions. Due to the unique nature of the September 11th catastrophe, those differences in policy wordings played a significant role during the adjustment process.

Nowhere did policy wording play a more crucial role than in the pending litigation between the insurers of the World Trade Center ("WTC") and their policyholders. A primary issue in the WTC cases concerns whether the terrorist attacks on the WTC consisted of one or two occurrences. Certain of the policy forms issued to the policyholders contained a definition of the term "occurrence," whereas other policy forms failed to contain such a definition.

In addressing the forms that included a definition of occurrence, the court concluded that the destruction of the WTC buildings was a result of one occurrence. With respect to those forms that did not define occurrence, however, the court concluded that the term was ambiguous and directed the parties to trial for an ultimate decision on whether there were one or two occurrences.

Another major area of contention between policyholders and insurers in the aftermath of September 11th, is whether the policyholder's business interruption loss was caused directly by physical damage arising from the attacks. Again, the varying forms of policy language play a major role in that dispute. For example, one miscellaneous form provides as follows:

Loss resulting from necessary interruption of business conducted by the Insured, whether total or partial, and caused by physical loss, damage, or destruction covered herein during the term of this Policy Section to real and personal property not otherwise excluded.

This Policy Section is extended to cover the loss during a period of time, not to exceed 8 weeks, when access to real or personal property is impaired by order or action of civil or military authority issued in connection with or following a peril insured against.

In contrast, a standard ISO Form provides as follows:

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 property at the premises described in the Declarations caused by or resulting from any Covered Cause of Loss.

As can be seen, coverage under the ISO Form is triggered only when an action by a civil authority "prohibits access." Under the more expansive miscellaneous form, the mere impairment of access will trigger coverage.

The overwhelming losses resulting from 9/11 also underscored the importance of a well worded Extended Period of Indemnity. As never before, risk managers are focusing on whether their companies have adequate protection for losses that extend beyond the Period of Interruption.

To be compensable under the standard ISO Form, the suspension of operations and the corresponding loss of business income must be caused by "direct" physical loss or damage to property at the described premises. In stark contrast, the miscellaneous form fails to require a direct link between physical loss, damage or destruction and the resulting business interruption loss. Moreover, the miscellaneous form does not limit coverage to business interruption losses resulting from the physical loss or damage to property either insured or described in the policy. Policyholders who held policies written on the more expansive form have been able to argue that the business interruption losses they suffered in the aftermath of 9/11 were compensable even though those losses were not caused by *direct* physical damage to the *policyholder's* property.

As policyholders and their insurance companies continue to work through adjustments of the business interruption losses resulting from reason of the terrorist attacks, an important lesson concerning insurance policy language has been learned: The words do indeed matter.

Aside from ensuring that coverage is secured for an appropriate extended period, risk managers need to focus on at least one major limitation that was included in a Standard ISO Form prior to 9/11 and which may now spread to other forms. The Extended Business Income provision of a Standard ISO Form materially limits coverage by setting forth the following proviso:

Extended 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.

Another coverage nuance is implicated by the differences in the above-two insuring agreements. The Standard ISO Form triggers coverage upon a "suspension" of the policyholder's operations, whereas, only an "interruption of operations" is required under the miscellaneous form. Some courts have denied policyholder's coverage under the Standard ISO Form unless they suffered a total shutdown of their business.

The impact of this limitation on 9/11 business interruption claims is readily apparent. The entire country (indeed, world) was rocked by the events of 9/11. To the extent that extended business income losses were caused by unfavorable business conditions in the impact area, coverage may not be available.

Conclusion

Differences in the wording of civil authority and ingress/egress provisions have also provided fodder for claim disputes. For example, a civil authority provision from a Standard ISO Form provides:

No doubt, many lessons have been learned in the aftermath of 9/11. In the world of business interruption there may be no more important lesson than "the words matter."

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 any Covered Cause of Loss.

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