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In Recovery: Business-Interruption Insurance

After the attacks on the World Trade Center, businesses located in the buildings will attempt the seemingly impossible task of recovering. Insurance is a good way to start, including business-interruption insurance, the scope of which is broader than one might think.

Business-interruption coverage is designed to protect a company's earnings when it cannot pursue normal operations because of physical loss or damage to the company's real or personal property.

Many policies require insureds to send in a signed and sworn proof of loss, typically within 60 days of the insurers' request or 60 days of the date of loss. If losses are not completely known within the 60 days, it is best to file the proof of loss within this time limit and amend it when more information is available.

Business-interruption coverage applies for as long as it takes to rebuild, repair or replace the operations with due diligence. The amount of the loss depends upon whether the policy is "valued," "open" or "actual loss" or "mixed."

e v. Fireman's Ins. Co. of Newark, 104 N.Y.S. 434 (1907).

The Insurance Services Office Business Income Coverage Form (CP 00321091) states the scope of coverage 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."

Insurance is generally thought of as restoring the insured to the same condition existing just prior to the insured loss. But business-interruption insurance is unique because it not only does that, but also compensates for profits anticipated to be earned during the period that the insured's operations were disrupted - generally, without any policy limits.

Courts have held that recovery of damages for the loss of prospective profits is permitted where this amount can be ascertained with reasonable certainty based on the experience of the company, the past volume of business and other data relevant to probable future sales. See, e.g., Fibreboard Paper Prods. Corp. v. East Bay Union of Machinists, 227 Cal.App.2d 675 (1964). An established sales record and proof of actual profits for a time prior to the date of loss may be required. See Dictiomatic Inc. v. U.S. Fid. & Guar. Co., 127 F. Supp.2d 1239 (S.D. Fla. 1999).

These profits, however, are net and not gross. The "actual loss sustained" has been held to be income, less continuing costs and expenses, including overhead. See Fireman's Fund Ins. Co. v. Mitchell-Peterson Inc., 578 N.E.2d 851 (Ohio App. 1991). As the 8th U.S. Circuit Court of Appeals put it, recoverable lost earnings are the difference between the net profit the insured would have earned without the business interruption and the net profit that the insured actually did earn (if anything) during the period of interruption. See Polytech Inc. v. Affiliated FM Ins. Co., 21 F.3d 271 (8th Cir. 1994).

If there was no profit prior to the loss, future profits may still be recovered if they are based on real circumstances rather than speculation. See Polytech; National Union Fire Ins. Co. v. Scandia of Hialeah Inc., 414 So.2d 533 (Fla. App. 1982). That is, profits never before earned, but yet anticipated, may be recoverable as long as the insured can prove that the profits would have been earned.

The 9th Circuit, applying California law, held that an insured can recover profits anticipated from a plant that had not yet been built, but the construction of which had been contracted for, at the time of the suspension. See *General Ins. Co. v Pathfinder Petroleum Co.*, 145 F.2d 368 (9th Cir. 1944), cert. denied, 324 U.S. 844 (1945). Similarly, the 4th Circuit, applying Virginia law, held that a policy obtained by a mining company intending to open a new seam of coal, which had never before been worked, covered the loss of increased profits from this new operation. See *Fidelity-Phoenix Fire Ins. Co. v Benedict Coal Corp.*, 64 F.2d 347 (4th Cir. 1933), cert. denied, 289 US 762 (1933).

Certainly for a business headquartered at the trade center, business-interruption coverage should be triggered. But is there coverage for losses suffered by companies with only a branch office located at the site? For example, is there coverage for a company headquartered in California that had a branch office or only leased property at the center?

Coverage typically protects against losses arising from the disruption of business activities due to the company's lost or damaged physical assets. See *Citizens Sav. & Loan Ass'n v. Proprietors Ins. Co.*, 435 N.Y.S.2d 303 (N.Y. 1981). If the policy lists the branch office as one of its business locations, then the entire company's losses, including lost profits, may be recovered if such losses were caused by the branch office's destruction.

Is there coverage for a company not located at the World Trade Center that simply did business with another company that was located there? Again, one must first read the policy to see if it is limited to damage to real or personal property owned by or on the premises occupied by the insured. If this language is contained in the policy, then there would appear to be no coverage.

But if there is no site-specific limitation, then it remains a question whether coverage would apply. Even losses sustained at business locations not identified in the policy - but still interrelated and interdependent with the identified one(s) - have been held in some cases to be covered.

As one court noted, "Where operations are found to be interrelated and interdependent, mutually dependent, or vertically integrated, courts have not confined the recoverable loss to the particular property that was damaged." *Wood Goods Galre Inc. v. Reins. Ass'n of Minn.*, 478 N.W.2d 205 (Minn. App. 1991); see also *Nat'l Union Fire Ins. Co. v. Anderson-Prichard Oil Corp.*, 141 F.2d 443 (10th Cir. 1944); *Studley Box & Lumber Co. v. Nat'l Fire Ins. Co.*, 154 A. 337 (N.H. 1931).

It is important for businesses not located at the trade center to examine the fine print of their policies. Businesses should look for extended or additional coverage provisions, which cover loss due to physical damage to the following: property within a certain distance from the property owned, leased or occupied by the insured; off-premises utility plants providing water, gas or electricity to the insured; and property of a supplier to or a receiver of the insured's goods, equipment or services.

What recovery is there for a company if it does not resume operations at all? The form adopted by many insurers states, "If you do not resume 'operations,' or do not resume 'operations' as quickly as possible, we will pay based on the time it would have taken to resume 'operations' as quickly as possible." The form defines "operations" as business activities "occurring at the described premises."

As a result, companies that had their operations terminated because of the attack likely will be entitled to recover for their loss for as long as it would have taken them to resume, as quickly as possible, the business activities they conducted.

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