



## Getting back to business: Coverage and claim concerns related to commercial insurance

NCOIL 2019 SPRING MEETING  
Nashville, Tennessee



# Business owners' reasonable expectations of coverage and claim service after a loss interrupts operations

Amy Bach, Esq. – Co-founder, Executive Director

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Spring Meeting 2019

Nashville, TN

# United Policyholders

- A respected voice and trusted source of help for individual and business insurance consumers in the United States since 1991. [www.uphelp.org](http://www.uphelp.org)
  - Roadmap to Recovery™  
*Helping people and businesses solve insurance problems.*
  - Roadmap to Preparedness  
*Increasing insurance literacy, disaster preparedness and resiliency*
  - Advocacy and Action  
*Standing up for consumers in courts of law, legislative and other public policy forums, and in the media.*
- Engaging with regulators via the NAIC since 2008
- Engaging with state lawmakers since 1992
  - Legislation, Essential Protections Project
  - District office coordination on post-disaster insurance matters

Amy Bach, Esq.: Former Legislative Director; NYS Assembly, Special Counsel to CA Senate, Member; FACL, NAIC Consumer Rep

# Business interruption coverage basics

- A Business Owners Insurance Policy (“BOP”) *should* cover repairs and replacement of buildings, equipment, inventory, vehicles *and* income, but doesn’t always
- A Business Interruption policy can be labeled Business Income Protection, Profit Protection or Out-of-Business coverage

## Common definition of a Business Income loss

The sum of “Net Income (Net Profit or Loss pre-tax) that would have been earned or incurred” plus continuing normal operating expenses incurred, including payroll, ***but for*** the loss.

# Business interruption losses:

Contingent (includes income loss resulting from property damage to a supplier or customer location)

Civil Authority (losses due to mandatory closures, evacs, curfews or other official shutdowns preventing access to business)

Service interruption (losses due to disruption of utilities or equipment breakdown/power surges/outages)

Extra expense (temporary rent, moving, temp staff or expediting replacement equipment/supplies)

Key employee can't work due to an accident or injury

# Common coverage gaps in a BOP

- Ordinary payroll limited (60 days is common)
- Bus. Interruption coverage limit of 12 months
- Extended business income limited to 60 days

Similar to the post-disaster home insurance context, this causes problems when large events make it harder to repair/replace in a timely manner

# Common claim issues:

- Projected revenues had loss not occurred, “likely net income”
  - Need only be proven w/in “Reasonably certainty”
  - Historical sales data, present business conditions
- Length of restoration period
- Excluded perils (cyber, water, earthquake)
- Materiality of non compliance w/pre-loss inventory, loss control requirements





# Business Interruption

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**Ted Brown**

Wiley Rein LLP



# Business Interruption

- “Generally, business interruption insurance is intended to return to the insured the amount of profit it would have earned had the event insured against not intervened.”
- “In assessing liability for a business interruption loss, the previous experience of the business before the fire as well as its probable future experience thereafter must be considered, and as a prerequisite to recovery, the claimant must show an actual monetary loss.”
  - *Berkeley Inn, Inc. v. Centennial Ins. Co.*, 282 Pa. Super. 207 (Pa. Super. Ct. 1980).

# Business Interruption

- Common components include:
  - Loss of Earnings
    - Net Income
    - Fixed (Continuing) Operating Expenses
  - Extra Expense
  - Preparation Fees
  - Other Amounts

# Business Interruption

- Insured has burden of showing link between covered event and loss, as well as quantum of loss.
  - *Howard Stores Corp. v. Foremost Ins. Co.*, 82 A.D.2d 398, 401 (N.Y. App. Div. 1981) (“Why the sales at Newman Bros. were lower than projected and why the sales at the other two stores were lower than projected is pure speculation. Whatever the computations and projections made by plaintiff, there is simply no evidence that any failure to meet the projected increases was directly attributable to the water damage at Newman Bros. or the diversion of the suits.”).

# Business Interruption

- Actual loss is required.
  - *Royal Indem. Co. v. Little Joe's Catfish Inn, Inc.*, 636 S.W.2d 530, 535 (Tex. App. Ct. 1982) (“These salaries were never paid after the fire and there is no evidence that Little Joe's Catfish Inn made any payroll payments after the fire to anyone. It is our opinion that in order for there to be a liability for business interruption loss, the claimant must show an actual monetary loss.”).
  - *A&S Corp. v. Centennial Ins. Co.*, 242 F. Supp. 584, 589 (N.D. Ill. 1965) (“The insured is not entitled, under the terms of the policy, to treat the sum of \$1,000.00 per month for officers' salaries as a continuing expense, inasmuch as this sum was never paid to Mr. John Podney, president of the plaintiff corporation.”).

# Business Interruption

- Policies cover loss of earnings, not loss of production.
  - *Lyon Metal Prods., LLC v. Protection Mut. Ins. Co.*, 747 N.E.2d 495, 506-07 (Ill. App. Ct. 2001) (“Lyon's argument underscores its misunderstanding of the business interruption coverage it purchased. The business interruption endorsement covers a loss of earnings due to a loss of production, not just a loss of production. [...] Moreover, business interruption insurance, like all insurance, should comport with Illinois public policy indemnifying the insured for the loss but not providing a windfall profit.”) (internal citations omitted).
  - *Northwestern States Portland Cement Co. v. Hartford Fire Ins. Co.*, 360 F.2d 531, 533 (8th Cir. 1966) (rejecting insured's claim for “lost production” and concluding that the court was “persuaded that the district court did not err in finding that the purpose and intent of the policy provisions are to insure against loss of earnings, and that if there is no loss of earnings, liability is limited to the extra expense necessary to prevent loss of earnings”);


# Business Interruption

- Policies cover loss of earnings, not loss of production.
  - *Dictiomatic, Inc. v. U.S. Fid. & Guar. Co.*, 958 F. Supp. 594, 603 (S.D. Fla. 1997) (“[The insured] can recover only to the extent that it actually lost sales or business during the periods when the business premises and business property were not functioning.”).
  - *Cont’l Ins. Co. v. DNE Corp.*, 834 S.W.2d 930, 934 (Tenn. 1992) (holding that the insured’s interpretation was “contrary to the general rule” and would put the insured in a better economic position than it would have been in had the business not been interrupted).
  - *Metalmasters of Minneapolis, Inc. v. Liberty Mut. Ins. Co.*, 461 N.W.2d 496, 500 (Minn. App. Ct. 1990) (rejecting claim for “value” of president’s services on the basis that because there was no actual loss of sales, and thus no coverage for earnings of president).

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# Insurance for Business Income Losses

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Lorelie S. Masters  
Hunton Andrews Kurth LLP  
Washington, DC  
[lmasters@huntonak.com](mailto:lmasters@huntonak.com)



# Importance of Insurance for Business-Income Losses

- Texas Governor estimates damage from **Hurricane Harvey** at **\$150 to \$180 billion**

Source: Reuters. <https://www.reuters.com/article/us-storm-harvey/funding-battle-looms-as-texas-sees-harvey-damage-at-up-to-180-billion-idUSKCN1BE0TL>



<http://www.financialexpress.com/world-news/hurricane-harvey-texas-governor-says-damage-could-reach-180-bn/839720/>

- **Irma Claims Data:**
  - Over 710,000 residential property claims filed
  - Over 51,000 commercial property claims filed
  - Over 3,600 business interruption claims filed
- Total estimated Insured Losses (*so far*): **\$6,296,953,891**

Data from: <http://www.floir.com/Office/HurricaneSeason/HurricaneIrmaClaimsData.aspx>

- **Maria:** The Insurance Journal reports that insured losses for Hurricane Maria in the Caribbean will be **between \$27 billion and \$48 billion**

<https://www.insurancejournal.com/news/national/2017/12/07/473392.htm>

# Hurricane Irma's Impact on Tourism

*According to the Miami Herald:*

- Airlines and cruise lines estimated to have lost millions because of canceled flights, closed airports and sea ports, and relief efforts
- Ex. Hurricane Harvey cost United Airlines \$150 million
- Zoo Miami, Jungle Island, Miami Seaquarium closed



C.M. GUERRERO. - cmguerrero@elnuevoherald.com

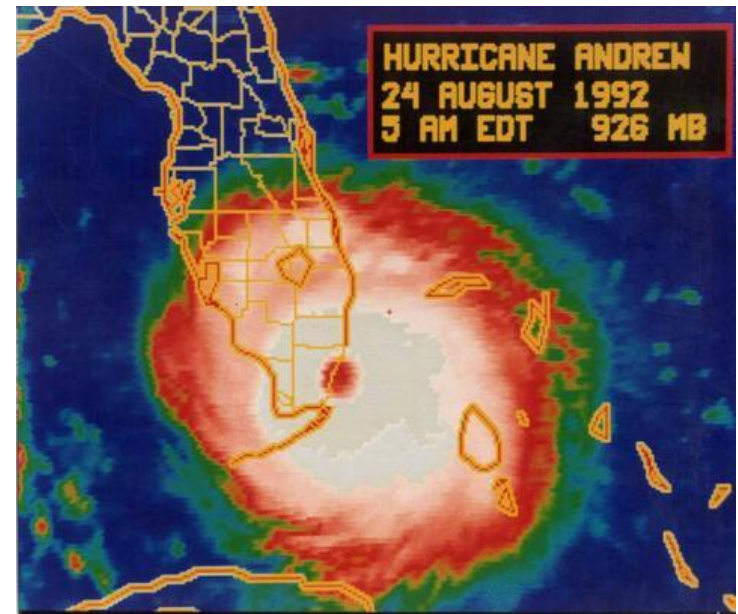
HURRICANE

Tourism industry to visitors: Don't  
#prayforMiami. We're fine.

<http://www.miamiherald.com/news/weather/hurricane/article175062166.html>

# Coverage Issues: Business Interruption Coverage

- Typical business interruption provisions state:
  - insurer “will pay for the actual loss of Business Income you sustain due to the necessary suspension of your operations during the period of restoration.”
  - Typical concerns:
    - Income history of business
    - Comparables– what if no adequate comparison? i.e. World Trade Center example
- What level of interruption is needed to trigger coverage under the particular policy at issue?
  - Total cessation or partial?
  - How do you account for partial suspension of business?



- Contingent Business Interruption / Dependent Properties Coverage
  - Covers loss of income caused by the interruption of another business that you rely on, such as a supplier, customer, shipping company or other properties that attract business
- Typical language:
  - “We will pay for the actual loss of Business Income you sustain due to direct physical loss or damage at the premises of a “dependent property” not described in the Schedule (miscellaneous location) caused by or resulting from any Covered Cause of Loss.”
  - Requires Property Damage to the dependent property, but not to your business
  - “Dependent Property” means property operated by others whom you depend on to:
    - a. Deliver materials or services to you, or to others for your account (Contributing Locations). But any property which delivers any of the following services is not a Contributing Location with respect to such services: (1) Water supply services; (2) Power supply services; (3) Communication supply services, including services relating to Internet access or access to any electronic network;
    - b. Accept your products or services (Recipient Locations);
    - c. Manufacture products for delivery to your customers under contract of sale (Manufacturing Locations); or
    - d. ***Attract customers to your business (Leader Locations).***

- Accountant Can Assist in Creating “Buckets” of Loss To Maximize Coverage Under Different Coverage Parts
  - Property Damage, Personal Property, Debris Removal, Mitigation Costs
  - Business Interruption, Contingent Business Interruption, Law & Ordinance, Utility outage coverage
- Implement means of capturing all expenses ASAP post-storm
  - Clean-up costs
  - Debris Removal
  - Excess operating costs – those to mitigate earnings loss and those to operate as normally as possible
  - Mitigation costs pre-storm
  - Repair costs and invoices

- Definition of Perils
  - Named Windstorm
  - Flood v. Wind
  - Storm Surge
- Definition of Occurrence
- Deductibles/Retentions
  - Does the policy have a blanket \$ deductible or are there percentages and waiting periods?
  - If on a percentage basis, what is that percent applied towards? Reported values? Values at the time of the loss? Is there a separate application for Property Damage and Time Element?
- Sublimits
- Deadlines
  - Proof of Loss
  - Debris Removal
- History/Documents

- Lorelie S. Masters
  - Partner, Hunton Andrews Kurth LLP's Insurance Coverage Practice Group, Washington, DC
  - More than 30 years of experience managing insurance-related issues, including counseling, negotiation of policy terms and settlements, and litigation and arbitration of disputes on behalf of policyholders for business-income and a variety of losses.
  - Author, two treatises on insurance, *Insurance Coverage Litigation* and *liability insurance in International Arbitration: The Bermuda Form*
  - Founder, former President, American College of Coverage Counsel
  - Adviser, *Restatement of the Law, Liability Insurance*