

Multi-Faceted Time Element Loss Events: Identifying and Measuring the Loss

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FACULTY

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INTRODUCTION

Introduction: Program Overview

Time element losses can result from novel events such as the current COVID-19 pandemic. Regardless of the predicate physical loss or damage event, however, planning for and quantifying time element losses can be varied and challenging, particularly when claims involve multiple components of a covered insurance loss.

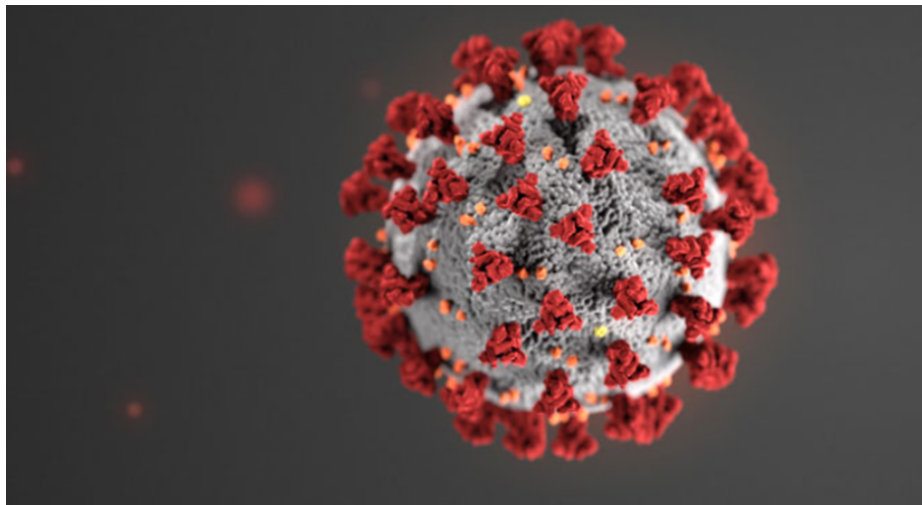
Today's presentation will address the following:

- Coverage and loss valuation issues based on policy wording
- Experience with broad-scale loss events, such as the 9/11 terrorist attacks and pending COVID-19 claims, where companies are forced to file suit to recover multifaceted time element losses under a variety of physical loss or damage scenarios.

Insurance Basics

Commercial Property Insurance

- **Commercial Property Insurance** – Covers physical damage to insured buildings and contents due to a covered cause of loss, and provides other time element coverages.



Commercial Property Insurance

- **Business Interruption** - Covers loss of income suffered by an insured when damages to its premises cause a slowdown or suspension of operations.



“Time Element” Coverages

- **Business Interruption**
- **Extra Expense** - Covers costs necessary to mitigate business- interruption loss
- **Preservation of Property**
- **Contingent Business Interruption (CBI)** - Covers losses resulting from an interruption of business at the premises of a customer or supplier (supply chain interruption)
- **Civil Authority** - Covers loss resulting from governmental orders due to property damage elsewhere
- **Ingress/Egress** - Covers loss due to blocked ingress to or egress from insured property
- **Service Interruption** - Covers loss due to lack of utilities, such as power, caused by damage from a covered cause of loss to property away from the insured’s premises
- **Communicable Disease Cover**
- **Contamination Coverage**

Key Considerations for Business Interruption Coverage

- Have government orders shut down your business (or part of it), or a nearby “attraction” property, due to the virus?
- Has there been a confirmed infection at your premises?
- Have your customers’ properties shut down and impacted your business as a result?
- Has you or your customers’ supply chain been disrupted because of COVID-19?
- Notice
- Documenting your loss
- Analyze your policies’ terms, conditions, and exclusions

Analysis of Policy Language

Insuring Agreement – Business Income (The Hartford)

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PROPERTY CHOICE



PROPERTY CHOICE - BUSINESS INCOME AND EXTRA EXPENSE COVERAGE FORM (BUSINESS INTERRUPTION)

Various provisions in this policy restrict coverage. Read the entire policy carefully to determine rights, duties and what is and is not covered.

Throughout this policy the words "you" and "your" refer to the Named Insured shown in the Declarations. The words "we", "us" and "our" refer to the Company providing this insurance.

Other words and phrases that appear in quotation marks have special meaning. Refer to Form PC 00 90 PROPERTY CHOICE CONDITIONS AND DEFINITIONS for definitions.

A. COVERAGE

We will pay up to the Business Income and Extra Expense Limit of Insurance stated in the Property Choice - Schedule of Premises and Coverages for the actual loss of Business Income you sustain and the actual, necessary and reasonable Extra Expense you incur due to the necessary interruption of your business operations during the Period of Restoration due to direct physical loss of or direct physical damage to property caused by or resulting from a Covered Cause of Loss at "Scheduled Premises" where a limit of insurance is shown for Business Income and Extra Expense. If you are a tenant, this Coverage applies to that portion of the building which you rent, lease or occupy, and extends to common service areas and access routes to your area.

Definitions

1. Business Income means:

- Net Income (Net Profit or Net Loss before income taxes), including Rental Income and Royalties, that would have been earned or incurred; and
- Continuing normal operating expenses incurred, including Payroll Expenses.
- For educational operations, Business Income also includes income from:
 - Tuition and related student fees including room, board, laboratories and other similar fees;
 - Bookstores;
 - Athletic events; or
 - Activity related to research grants.
- For manufacturing businesses, Net Income also includes the net sales value of production.

e. For research and development operations, Business Income also includes awarded contract revenues, ~~opening fees, consulting fees, funding,~~ grants and progress (milestone) payments.

f. As respects all insureds if you are operating at a Net Loss, continuing normal operating expenses will be offset by the Net Loss.

2. Extra Expense means the actual, necessary and reasonable expenses you incur during the Period of Restoration that you would not have incurred if there had been no direct physical loss of or direct physical damage to property caused by or resulting from a Covered Cause of Loss at "Scheduled Premises". We will pay Extra Expense (other than the expense to repair or replace property) to:

- Avoid or minimize the suspension of business and to continue operations at a "Scheduled Premises" or at replacement premises or temporary locations, including relocation expenses and costs to equip and operate the replacement location or temporary location.
- Minimize the suspension of business if you cannot continue operations. We will also pay Extra Expense to repair or replace property, but only to the extent it reduces the amount of loss that otherwise would have been payable under this Coverage Form.
- Extra Expense Coverage does not apply to any expense related to any recall of products you manufacture, handle or distribute.

We will pay up to the Business Income and Extra Expense Limit of Insurance stated in the Property Choice - Schedule of Premises and Coverages for the actual loss of Business Income you sustain and the actual, necessary and reasonable Extra Expense you incur due to the necessary interruption of your business operations during the Period of Restoration due to direct physical loss of or direct physical damage to property caused by or resulting from a Covered Cause of Loss at "Scheduled Premises" where a limit of insurance is shown for Business Income and Extra Expense. If you are a tenant, this Coverage applies to that portion of the building which you rent, lease or occupy, and extends to common service areas and access routes to your area.

3. Interruption means the slowdown or cessation of any part of your business activities or the partial or total untenability of the premises.

Form PC 00 20 01 18

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Page 1 of 4

What is “direct physical loss of or damage to property?”

The answer may depend on the jurisdiction, the policy language, and the emerging science on where, when, and how the virus spreads.

Compare:

- *Oregon Shakespeare Festival Ass’n v. Great Am. Ins. Co.*, 2016 WL 3267247 (D. Or. June 7, 2016) (insured sustained “physical loss or damage to property” when wildfire smoke rendered theater unusable for its intended purpose)
- *Gregory Packaging, Inc. v. Travelers Prop. Cas. Co.*, 2014 WL 6675934 (D.N.J. Nov. 25, 2014) (ammonia release “physically transformed” environment)
- *Motorists Mut. Ins. Co. v. Hardinger*, 131 F. App’x 823, 824-26 (3d Cir. 2005) (e. coli bacteria made home “useless or uninhabitable”)

With:

- *Mama Jo’s, Inc. v. Sparta Ins. Co.*, 2018 U.S. Dist. LEXIS 201852 (S.D. Fla. Jun. 11, 2018) (dust from roadwork did not cause direct physical loss or damage to the restaurant’s property because the dust could be cleaned and did not render the restaurant uninhabitable or unusable)
- *Mastellone v. Lightning Rod Mut. Ins. Co.*, 884 N.E.2d 1130 (Ohio Ct. App. 2008) (the presence of mold on a building’s siding did not constitute physical damage, because the mold could be removed by cleaning and did not alter or otherwise affect the structural integrity of the siding)

Potentially Relevant Exclusions

- ISO virus exclusion.
 - In 2006, ISO promulgated a virus exclusion for use in business-interruption policies:
“We will not pay for loss or damage caused by or resulting from any virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness or disease.”
 - Similar CGL exclusion: Communicable disease exclusion.
- Exclusions for particular viruses or diseases (for SARS, avian flu, etc.)
- Omnibus exclusions (for mold, fungus, bacteria, virus, etc.)
- Pollution exclusions
- Other exclusions

Exclusion – ISO 2006 Virus Exclusion

COMMERCIAL PROPERTY
CP 01 40 07 06

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

EXCLUSION OF LOSS DUE TO VIRUS OR BACTERIA

This endorsement modifies insurance provided under the following:

COMMERCIAL PROPERTY COVERAGE PART
STANDARD PROPERTY POLICY

- A. The exclusion set forth in Paragraph B, applies to all coverage under all forms and endorsements that comprise this Coverage Part or Policy, including but not limited to forms or endorsements that cover property damage to buildings or personal property and forms or endorsements that cover business income, extra expense or action of civil authority.
- B. We will not pay for loss or damage caused by or resulting from any virus, bacterium or other micro-organism that induces or is capable of inducing physical distress, illness or disease.
- However, this exclusion does not apply to loss or damage caused by or resulting from "fungus", wet rot or dry rot. Such loss or damage is addressed in a separate exclusion in this Coverage Part or Policy.
- C. With respect to any loss or damage subject to the exclusion in Paragraph B, such exclusion supersedes any exclusion relating to "pollutants".
- D. The following provisions in this Coverage Part or Policy are hereby amended to remove reference to bacteria:
1. Exclusion of "Fungus", Wet Rot, Dry Rot And Bacteria; and
 2. Additional Coverage – Limited Coverage for "Fungus", Wet Rot, Dry Rot And Bacteria, including any endorsement increasing the scope or amount of coverage.
- E. The terms of the exclusion in Paragraph B, as the inapplicability of this exclusion to a particular loss, do not serve to create coverage for any loss that would otherwise be excluded under this Coverage Part or Policy.

B. We will not pay for loss or damage caused by or resulting from any virus, bacterium or other micro-organism that induces or is capable of inducing physical distress, illness or disease.

Exclusion – Pollutants or Contaminants (AIG)

(2) By military, naval or air forces; or

(3) By an agent of any such government, power, authority or force;

ii. Any weapon employing atomic fission, fusion or radioactive force, or any weapon that disperses radioactive material or a directed-energy or electromagnetic weapon, whether in time of peace or war, whether or not its discharge was accidental; or

iii. Insurrection, rebellion, revolution, civil war, usurped power, seizure, destruction or any action taken by governmental authority in hindering, combating or defending against any action described in this Subparagraph b;

Including any consequence of Subparagraphs b.i., b.ii. or b.iii. above of this exclusion.

c. Loss or damage caused directly or indirectly by Terrorism, whether controlled or uncontrolled, proximate or remote, sudden or over any length of time, or which is contributed to or aggravated by any other cause or event. Such Terrorism is excluded regardless of any other cause or event occurring concurrently or in any sequence with such Terrorism.

d. Any fraudulent or dishonest act or acts committed alone or in collusion with others: by any proprietor, partner, director, trustee, officer or employee of the Insured, or by any party to whom the property may have been entrusted (other than a carrier for hire).

However, a willful act of destruction by an employee of the Insured, or other as listed above, without the knowledge of any of the Insured's proprietors, partners, directors, trustees or officers is covered.

e. Removal of asbestos material, except this exclusion does not apply to asbestos material when such material is part of Insured Property which sustains direct physical loss or damage caused by a Defined Peril at the Insured Location.

f. The actual, alleged or threatened release, discharge, escape or dispersal of Pollutants or Contaminants, all whether direct or indirect, proximate or remote or in whole or in part caused by, contributed to or aggravated by any Covered Cause of Loss under this Policy.

However, this exclusion shall not apply to direct physical loss or damage to Insured Property from Pollutants or Contaminants caused by a Defined Peril at the Insured Location, including the cost to clean-up Pollutants or Contaminants from Insured Property at the Insured Location, resulting from such loss or damage. No coverage is provided for testing or monitoring for Pollutants or Contaminants. For the purpose of the exception to this exclusion only, Pollutants or Contaminants do not include radioactive contaminants.

g. Lack of:

i. Incoming electricity, gas, fuel, steam, water or refrigeration;

ii. Cloud Computing Service or data, voice or video service; or

iii. Outgoing sewerage.

h. Costs, expenses, fines or penalties incurred or sustained by or imposed on the Insured at the order of any government agency, court or other authority arising from any cause whatsoever.

f. The actual, alleged or threatened release, discharge, escape or dispersal of Pollutants or Contaminants, all whether direct or indirect, proximate or remote or in whole or in part caused by, contributed to or aggravated by any Covered Cause of Loss under this Policy.

However, this exclusion shall not apply to direct physical loss or damage to Insured Property from Pollutants or Contaminants caused by a Defined Peril at the Insured Location, including the cost to clean-up Pollutants or Contaminants from Insured Property at the Insured Location, resulting from such loss or damage. No coverage is provided for testing or monitoring for Pollutants or Contaminants. For the purpose of the exception to this exclusion only, Pollutants or Contaminants do not include radioactive contaminants.

GG. Pollutants or Contaminants means any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste, which after its release can cause or threaten damage to human health or human welfare or causes or threatens damage, deterioration, loss of value, marketability or loss of use to property insured hereunder, including, but not limited to, bacteria, virus, or hazardous substances listed in applicable environmental state, federal or foreign law or regulation, or as designated by the U.S. Environmental Protection Agency or similar applicable state or foreign governmental authority. Waste includes materials to be recycled, reconditioned or reclaimed. Pollutants or Contaminants does not include Fungus, Mold or Spore.

Exclusion – Contamination (FM Global)



Member of the F&W Global Group

Except as provided by the Decontamination Costs and Demolition and Increased Cost of Construction coverages in this Policy.

7. Loss or damage resulting from the voluntary parting with title or possession of property if induced by any fraudulent act or by false pretense.

8. **Contamination**, and any cost due to **contamination** including the inability to use or occupy property or any cost of making property safe or suitable for use or occupancy. If **contamination** due only to the actual not suspected presence of **contaminant(s)** directly results from other physical damage not excluded by this Policy, then only physical damage caused by such **contamination** may be insured. This exclusion does not apply to radioactive contamination which is excluded elsewhere in this Policy.

9. Shrinkage, evaporation or loss of weight, unless directly resulting from other physical damage not excluded by this Policy.

10. Changes in color, flavor, texture or finish, unless directly resulting from other physical damage not excluded by this Policy.

D. ADDITIONAL COVERAGES

The Additional Coverages below are subject to all the terms and conditions of this Policy including, but not limited to, the limits of liability, deductibles and exclusions shown in the Declarations section.

1. Accounts Receivable

This Policy covers amounts which the Insured is unable to collect as a direct result of insured physical loss or damage to accounts receivable records at a **location**.

Coverage includes:

a) Interest charges on any loan to offset impaired collections pending repayment of sums that cannot be collected. Unearned interest charges and service charges on deferred payment accounts and normal credit losses on bad debts will be deducted.

b) Collection expenses in excess of normal collection costs.

c) Other reasonable expenses incurred by the Insured in recreating records of accounts receivable.

After payment of loss by this Company, all amounts recovered by the Insured on accounts receivable for which the Insured has been indemnified will belong to and be paid to this Company by the Insured up to the total amount of loss paid by this Company. All recoveries in excess of such amounts will belong to the Insured.

Accounts Receivable Exclusions: As respects Accounts Receivable, the following additional exclusions apply:

This Policy does not cover shortage resulting from:

a) Bookkeeping, accounting, or billing error or omission.

b) Alteration, falsification, manipulation, concealment, destruction or disposal of records of accounts receivable committed to conceal the wrongful giving, taking, obtaining or withholding of money, securities or other property.



8. **Contamination**, and any cost due to **contamination** including the inability to use or occupy property or any cost of making property safe or suitable for use or occupancy. If **contamination** due only to the actual not suspected presence of **contaminant(s)** directly results from other physical damage not excluded by this Policy, then only physical damage caused by such **contamination** may be insured. This exclusion does not apply to radioactive contamination which is excluded elsewhere in this Policy.

communicable disease means disease which is:

1. Transmissible from human to human by direct or indirect contact with an affected individual or the individual's discharges, or
2. Legionellosis.

contaminant means anything that causes **contamination**.

contamination means any condition of property due to the actual or suspected presence of any foreign substance, impurity, pollutant, hazardous material, poison, toxin, pathogen or pathogenic organism, bacteria, virus, disease causing or illness causing agent, fungus, mold or mildew.

Other Key Coverage Issues

- Civil Authority Coverage
 - Typically applies when a civil authority prohibits access to an insured premises as a result of a “Covered Cause of Loss” to other nearby property.
 - Must the insured show direct physical loss of or damage to property?
 - What about an order that discourages or limits access?
- Contingent Business Interruption Coverage
 - Who must be affected? Supplier? Customer?
- Civil Unrest Insurance Claims
 - Loss of business income and extra expense should be covered. Other coverages like Contingent Business Interruption may apply.
 - Issues:
 - Possible waiting periods, sublimits
 - Insurers may raise “terrorism exclusion”:

Valuation

COVID-19 – What We Know So Far

- Estimated \$350 Billion in COVID-19 Losses in US Alone; potentially \$80 Billion in Insurance Losses
- Estimated 30 Million Claims. Prior Largest—3 Million Claims for Hurricanes Katrina and Rita
- Highest Unemployment Rate in US Since the Great Depression

Gross Earnings versus Gross Profits

Gross Earnings – *“The recoverable Gross Earnings loss is the actual loss sustained by the Insured of Gross Earnings, less all charges and expenses that do not necessarily continue, plus all other earnings derived from the operations of the business, excluding loss covered under Rental Income, during the Period of Liability.”*

Gross Profits – *“The recoverable Gross Profits loss is the actual loss sustained by the Insured of the: a) Reduction in Sales; and the b) Increased Cost of Doing Business, Resulting from the necessary interruption of business during the Period of Liability.”*

Past is Prologue

- *SR International Business Insurance Co., Ltd. v. World Trade Center Properties LLC*, No. 01 Civ. 9291HB, 2007 WL 519245 (S.D.N.Y. Feb. 16, 2007) (holding that in determining the Period of Restoration, real world considerations, such as the inability to access the site, should be considered).
- *Duane Reade, Inc. v. St. Paul Fire & Marine Insurance Co.*, 279 F. Supp. 2d 235 (S.D.N.Y. 2003), aff'd in part, rev'd in part, 411 F.3d 384 (2d Cir. 2005) (holding that if the Period of Restoration went beyond the policyholder's existing lease, the policyholder would have to prove that the lease would have been renewed).

Past is Prologue (cont'd)

The decision for policyholders and insurance companies as to which “historical period of operations” to examine will depend on perceived advantages in demonstrating rates and trends in profit; further, for policyholders, the choice may depend on considerations of bearing its burden of proof to establish its loss.

- See e.g., *Schlamm Stone & Dolan, LLP v. Seneca Ins. Co.*, No. 603009/2002, 2005 WL 600021, at *1-*2 (N.Y. Sup. Mar. 16, 2005) (noting that policyholder law firm sought coverage for the difference between its average monthly billings for 2001 and its billings in September 2001 due to the WTC attacks).

SUBMITTING AN INSURANCE CLAIM

Claims Computation and Organization

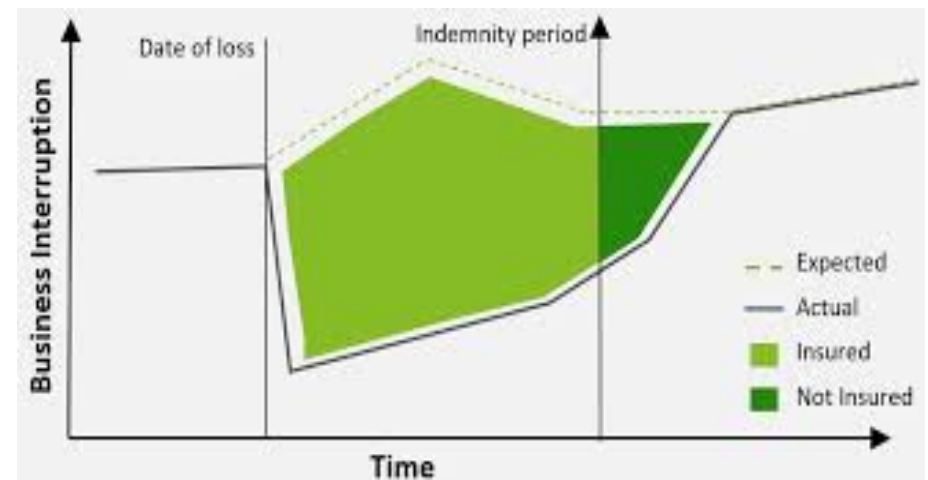
- Brokers, Forensic Accountants, and Insurance Coverage Counsel Work as a Team
- Accountant Can Assist In Gathering and Providing Important Information
 - Historical Financial Data
 - Profit & Loss Statements
 - Budgets
 - Payroll Information
 - General Ledgers
 - Sales Information
 - Contracts where necessary
 - Rent Rolls
 - Other Internal Documentation



Valuation of Business Income Loss (Actual Loss Sustained)

Expected Sales Revenue (if premises had not suffered damage/closure)

- Actual Sales Revenue
- = Reduction in Sales Revenue
- Cost of Sales
- = Reduction in Gross Profit
- /+ Costs Saved/Continuing
- + Additional Expenses
- + Claim Preparation Expense
- = Business Income Loss (ALS)



Valuation of Loss Considerations

- Language of Policy (Net Income and Gross Profit Methods)
- Period of Indemnity
- Business History
- Seasonality
- Company Specific Trends
- Market Trends
- Multiple Locations
- Mitigation of Loss
- Sub-limits



“Buckets” of Loss

- Accountant Can Assist in Creating “Buckets” of Loss To Maximize Coverage Under Different Coverage Parts
 - Business Interruption, Contingent Business Interruption
 - Extra Expenses, Preservation/Mitigation Costs
- Implement means of capturing all expenses as soon as possible
 - PPE costs
 - Excess operating costs – those to mitigate earnings loss and those to operate as normally as possible
 - Mitigation costs pre-loss
 - Contamination costs and other invoices

OTHER ISSUES

Engaging the Stakeholders

Communication with internal and external (brokers and Insurance Coverage Counsel) team to consider whether the consequences of any business interruption can be claimed under existing insurance policies – and how to address coverage gaps for potential future losses.

- Assessing a viable claim should encompass a broad discussion with all stakeholders within the organization – not just Legal.
- Depending on your organization the discussion should include Operations, Supply chain, Finance and Risk Management.
- Organizational “Buy-in” should be completed at early stage in the process to establish one or more strategic goals of filing claim.
- Companies can create a Claims Team or work together cross-functionally to maximize the claim.
- A strategic goal and unified process will speed up the claims process.

Insurance and Broad-Scale Losses

Some action items whether you have a Time Element Claim right now or not:

1. Review your insurance program – with your broker or agent, and also for yourself
2. Know your triggers and opportunities and follow notice provisions *precisely*
3. Maintain centralized records that might relate to claims or third-party claims
4. If you decide to make a claim, be transparent; act like you expect help and coverage
5. Make specific note of renewal dates – make use of “notice of circumstances” if need be; do not take renewal season or applications lightly

QUESTIONS?

THANK YOU

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