

Preparing Your Katrina Business Interruption Claim: An Overview of the Issues and Immediate Steps to Be Taken

By Donald v. Jernberg, Jernberg Law Group, djernberg@jernberglaw

Given the magnitude of the human suffering and dislocation, it might seem hard-hearted, or even crass, to urge companies to begin immediately to focus on their business interruption insurance claims. However, we suggest that it is not. If business operations cannot be saved and companies do not have the funds to continue employee payments at some level, the human suffering will be magnified. If New Orleans and the neighboring Gulf Coast are to be successfully reborn as business centers, local business operations must be brought back to life as soon and as fully as possible. Obtaining the fair and full measure of available business interruption insurance coverage will be one critical component in achieving these goals. Thus, we make no apology for urging business management and owners to focus now on preserving, preparing and maximizing their business interruption insurance claim.

Overview of Basic Legal Coverage Issues

The scope of coverage for business interruption will depend on specific policy language, the specific facts of Katrina's impact on a given business, perhaps certain collateral matters such as insurer advertising and underwriting, and how these factors are integrated and molded into a policyholder coverage position and strategy. There are many potential legal and coverage issues that will emerge, a number of them likely raising novel questions. The following is a brief "checklist" of the legal and coverage issues that policyholders will need to consider:

- *"Suspension of Operations:"* Business interruption coverage pays for economic losses that result from a suspension of operations. Major questions regarding this aspect of coverage include whether a complete shutdown is required, when the suspension ends, and what steps are required to end the suspension.
- *"Covered Cause of Loss:"* Standard policy language provides that the of the property damage must be a result of a covered cause of loss. Since many policies exclude loss from flooding, there will be questions of whether wind, wind driven rain, or other covered causes of loss were responsible for the property damage. How multiple and concurrent contributing causes, in the context of the Katrina fact pattern, will be treated is an open question that is likely to be debated vigorously with respect to both property and business interruption coverage.
- *"Causal Connection:"* The point here is that the "covered cause of loss" must be shown to have caused the suspension of business not merely the property damage. In the context of Katrina, if wind can be shown to have caused substantial property damage but flooding is deemed to have caused the suspension of the business the insurer will likely deny coverage. Establishing the causal connection element may be one of the more challenging parts of the policyholder's claim.
- *"Loss of Income:"* Policyholder bear the burden of proving a loss of income. This may in many cases create a somewhat complex economic, accounting and legal question. For example, if the relevant economic sector was on an upswing at the time of Katrina, can the policyholder claim a loss of income even if it had a slight loss in the period immediately prior to Katrina?

- “*Triggered Coverage Period:*” If the other coverage requirements are met, the insurer’s obligation will cover the “period of restoration.” This is a very fluid concept not well defined under case law. Given the environmental contamination overlay in New Orleans, establishing the reasonable restoration period may be a difficult and contested issue.
- “*Restricted Access:*” Under some policies, business interruption coverage can be triggered by a lack of access to an otherwise operational property. Whether the access must be completely cutoff or merely significantly impaired may be a point of difference between the parties, and there is no definitive case law on the issue.
- “*Utility Outage:*” A lack of electricity can trigger coverage under some policies. In New Orleans, electricity may be spotty and unreliable for a period of time. This will raise the question of whether a lack of reliable power is sufficient to trigger coverage.
- “*Extra Expenses:*” Some policies pay for expenses incurred to either minimize the suspension of operations or to continue operations. Since there can be a broad grey area with regard to “extra expenses,” this is an issue where early negotiations with the insurer might be a good approach.
- “*Contingent Business Interruption:*” This coverage, if provided under the policy, pays the insured for loss caused by damage to a customer or supplier’s property that causes interruption of the insured’s business. All of the legal and coverage issues above can be relevant to a determination of whether or to what extent contingent business interruption coverage is triggered. The complicating factor is that the insured may have to prove what caused the closing of a third party’s business.

Immediate Steps to Be Taken

- “*Assemble Copies All Available Policies:*” Do not just get the current property policy. Get policies of all types and copies of policies in effect during the prior two or three years. These may all be relevant in the hands of an experienced coverage attorney.
- “*Assemble the “A” Team:*” There are going to be novel and difficult coverage and damage issues. Insurers are going to be backed by attorneys and damage experts with extensive experience. The policyholder team should include both a highly experienced coverage counsel and damage expert if the policyholder wants to maximize the chances for success in pursuing the business interruption claim.
- “*Obtain a Preliminary Coverage Analysis and Strategy:*” Every step taken by a policyholder from this moment on may impact its ability to recover under its business interruption insurance coverage. Actions should not be taken without an understanding of the issues and a preliminary strategy.
- “*Put the Insurer on Notice Now:*” Tight notice deadlines contained in policies are not likely to be enforced, but giving a preliminary notice at this time will open communications and give an indication of the insurer’s position, both of which are valuable.