

April 2010, Vol. 4

Contacts

Walter J. Andrews

(703) 714-7642
wandrews@hunton.com

Lon A. Berk

(703) 714-7555
lberk@hunton.com

Neil K. Gilman

(202) 955-1674
ngilman@hunton.com

John W. Woods

(202) 955-1513
jwoods@hunton.com

Lawrence J. Bracken II

(404) 888-4035
lbracken@hunton.com

Robert J. Morrow

(212) 309-1275
rmorrow@hunton.com

Dana C. Lumsden

(704) 378-4711
dlumsden@hunton.com

Michael S. Levine

(703) 714-7602
mlevine@hunton.com

Sergio F. Oehninger

(703) 714-7552
soehninger@hunton.com

*Kristina Longo of the firm's
McLean office authored this Alert.*

Fifth Circuit Holds That Proper Measure of Business Income Loss Under A First-Party Property Policy Requires Analysis of Insured's Profits Before the Interruption, Rather Than After

The United States Court of Appeals for the Fifth Circuit held in *Catlin Syndicate Limited v. Imperial Palace of Mississippi, Inc.*, No. 09-60209 (5th Cir. Mar. 15, 2010), that under a property policy's business interruption provision the amount of business income loss would be based upon pre-loss sales and that post-reopening sales figures would not be considered. The court rejected the insured's argument that it should be compensated as though it were the only business left open while its competitors and other businesses were closed as a result of a hurricane.

In *Catlin*, the insured, Imperial Palace, submitted a claim to its insurer, Catlin, for loss of income sustained following Hurricane Katrina. Catlin agreed to pay the claim but disputed the amount of the loss. The largest amount in dispute involved Imperial Palace's claimed business interruption loss. The dispute focused on the method by which Imperial Palace's business income loss should be determined.

The policy's business interruption provision provides:

Experience of the business — In determining the amount of the Time Element loss as insured

against by this policy, due consideration shall be given to experience of the business before the loss and the probable experience thereafter had no loss occurred.

Imperial Palace sustained significant property damage from the storm, as did most of its competitors. Upon reopening, Imperial Palace enjoyed a significant increase in revenue since many of its competitors had not yet reopened. As a result, Imperial Palace sought to measure its business income loss utilizing its larger post-loss sales. According to the court, Imperial Palace argued that the "correct hypothetical ... was one in which Hurricane Katrina struck but did not damage Imperial Place's facilities." In support of that position, Imperial Palace argued that the business interruption provision of the Catlin policy was ambiguous and, thus, it should be interpreted in favor of Imperial Palace to permit consideration of Imperial Palace's post-loss sales figures. Catlin, on the other hand, argued that the provision was plain and unambiguous, and that the policy language permitted consideration of only historical sales figures. Imperial Palace's estimate of its business

interruption loss, which considered post-loss sales data, was \$73.5 million higher than Catlin's estimate.

The parties cross moved for summary judgment. The United States District Court for the Southern District of Mississippi denied Imperial Palace's motion and granted summary judgment in favor of Catlin. The district court held that, based on the language of the policy, post-reopening profits should not be taken into account in determining business interruption loss.

On appeal, Imperial Palace argued that Catlin's interpretation of the business interruption provision conflated the terms "loss" and "occurrence." Imperial Palace argued that the occurrence, Hurricane Katrina, should be distinguished from the loss, the damage to Imperial Palace's facilities, and that such a distinction supported consideration of Imperial Palace's post-loss profits, since those profits would most closely represent the profits Imperial Palace would have enjoyed had there been no damage to its property.

The Fifth Circuit rejected Imperial Palace's argument and held that the

proper method for determining loss under the business interruption provision was to look at sales before the interruption, rather than after. The court reasoned that the policy language specifically required consideration of the insured's historical sales figures, since they reflect the insured's business before the loss occurred and most accurately predict how the insured's business would have performed had no loss occurred. In addition, the court expressly rejected consideration of the insured's post-loss sales, noting that nothing in the pertinent policy language suggests that the court should consider the actual post-loss sales.

Central to the Fifth Circuit's decision was its earlier decision in *Finger Furniture Co. v. Commonwealth Insurance Co.*, 404 F.3d 312 (5th Cir. 2005), where the court interpreted a similar business interruption provision to require consideration of only historical sales figures. In *Finger Furniture*, the insured's store was forced to close due to a tropical storm. After reopening, the store cut prices and its sales increased. Commonwealth, Finger Furniture's insurer, denied

the claim for lost sales under the business interruption provision, arguing that the increased sales upon reopening made up for any sales lost while the store was closed. In that case, like here, the Fifth Circuit refused to consider post-interruption sales because the business loss provision, which was nearly identical to the provision at issue here, did not make reference to post-loss sales.

Implications

Catlin confirms that the purpose of business income coverage is to place the insured in the same position it would have been in had no loss occurred. The provision is not designed to afford the insured a windfall, or permit the insured to reap excess profit based on theoretical earnings that might have occurred had the insured not sustained damage despite widespread damage around it. *Catlin* also reinforces the general principle that courts will reject arguments that a policy provision is ambiguous when doing so may lead to absurd results.