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Lessons Learned from the Storms of 2017

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This article addresses the complexities in measuring lost business income post-hurricane based on lessons learned by hospitality industry insureds in storm-prone regions.

The 2017 hurricane season produced an estimated \$200 billion in economic losses.² In Texas, Hurricane Harvey generated about 670,000 insurance claims, including some 37,000 for damage to commercial property.³ In Florida, the total number of claims from Hurricane Irma currently exceeds 978,000, of which over 58,000 concern commercial property.⁴ And, in Puerto Rico, only about 40 percent of the expected insurance claims have been closed to date, with \$1.7 billion paid for residential and commercial property claims.⁵ A year later, claims disputes have erupted in coverage litigation.⁶

Hurricanes Harvey, Irma, and Maria not only caused widespread physical damage to building structures from Texas to Puerto Rico but also led to staggering business income losses for many businesses—even those that did not experience physical damage. Among other industries, the hospitality industry in Florida, the U.S. Virgin Islands, and Puerto Rico, was particularly hard-hit. However, measuring business income losses following widespread catastrophic events, such as hurricanes, is extremely difficult for this industry where insureds may experience an occupancy boom post-storm as emergency and construction workers flood operational hotels, while at the same time those same hotels continue to underperform. This article addresses the complexities in measuring lost business income post-hurricane based on lessons learned by hospitality industry insureds in storm-prone regions.

A Primer on Coverage for Lost Business Income

Business income or business interruption coverage is designed to cover lost income or profits caused by the interruption of business due to physical damage to covered property by a covered cause of loss. Commercial property insurance policies also may include related time-element coverages that cover lost business income due to certain other events that affect business operations. These include civil authority coverage—which “provides compensation for business interruption losses resulting when an civil authority enters an order that prevents access to the insured’s property, not because that property is physically damaged, but because other property is damaged.”⁷ Policies may also provide ingress/egress coverage to cover loss resulting from physical impediments to accessing the insured business, such as fallen trees or roads that have been washed away. Policies likewise typically afford contingent business interruption coverage for lost income due to, among other things, supply chain disruptions where property

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damage caused by a covered cause of loss affects a key supplier, vendor, or customer. Policies may likewise include coverage for extra expense incurred to keep the business operating, mitigation costs, food spoilage, and losses due to network or power interruption.

Despite these broad coverage grants, all commercial property forms are not created equal and some provide far more comprehensive time-element coverage than others. Consequently, many insureds may find themselves without full coverage following a major storm. This became immediately evident in South Florida following Hurricane Irma, where many businesses sustained little or no physical damage yet suffered significant income loss and insureds continue to submit business interruption claims to cover these losses. For example, in Florida alone, Florida's Office of Insurance reports that over 4,000 business interruption claims and over 58,000 commercial property claims have been filed. Further, insurers are already denying claims leading to costly coverage litigation for both parties. Out of the 4,000 business interruption claims filed in Florida, 1,783 were closed without payment, and 23,006 commercial property claims were closed without payment.

Business Interruption Coverage Issues

Typical business interruption coverage covers loss resulting from the necessary suspension or interruption of business caused by damage to covered property by a peril insured against.⁸ One of the most frequently and hotly contested issues is whether a complete or partial cessation of business is required to trigger this coverage, and courts typically rely on the specific policy language in making such determination.

For example, in *Aztar Corp. v. U.S. Fire Insurance Co.*, the Court of Appeals of Arizona considered whether Aztar's policy covered its loss of revenue and decreased patronage at its casino and hotel following the collapse of six floors during its expansion of the Tropicana Resort in Atlantic City, New Jersey.⁹ The collapse caused a seven-month delay in use of the expansion.¹⁰ In seeking coverage for lost income due to the collapse, Aztar's insurers argued that the business interruption coverage did not apply to cover decreased patronage for the expanded portion of the hotel that had never opened because the existing hotel was able to operate at its full capacity (although the planned expansion could not).¹¹ While the court disagreed with the insurers' argument that the policy required a full shut-down of the hotel and casino (as opposed to failure to open the expansion), the court nonetheless affirmed summary judgment for the insurers, finding that the expansion was not "contributing" property and thus contingent business interruption did not cover alleged contingent loss caused by unrealized profits.¹²

In *American Medical Imaging Corp. v. St. Paul Fire & Marine Insurance Co.*, the United States Court of Appeals for the Third Circuit reasoned that policy language requiring a "necessary or potential suspension" of business, which included a mitigation clause, probably did not require total cessation of business.¹³ In that case, the insured provider of ultrasound testing services experienced a fire at its headquarters and immediately rented space at an alternative site to continue operations.¹⁴ In reversing summary judgment for the insurer, the court reasoned that an insured would be unmotivated to mitigate losses if its policy was interpreted to require a total cessation for coverage to be triggered,¹⁵ given that a continuation of business at any level would bar recovery.¹⁶ For that reason, the court found that the insurer would need to indemnify the insured for lost earnings or extra expenses up to the day it resumed normal business operations at the covered location.¹⁷

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In contrast, in *Ramada Inn Ramogreen, Inc. v. Travelers Indemnity Co.*, the Eleventh Circuit interpreted a policy provision providing coverage for “loss of earnings resulting directly from the necessary interruption of the insured’s business” to require total cessation of the business.¹⁸ Accordingly, a hotel was unable to recover income loss after a fire destroyed its restaurant and reduced room occupancy because this was not a total cessation of all business operations.¹⁹

Other courts have also interpreted “necessary suspension of your ‘operations’” to require total cessation.²⁰ For example, in *Forestview the Beautiful, Inc. v. All Nation Insurance Co.*, the Court of Appeals of Minnesota considered a business interruption coverage grant that did not refer to “partial” suspension of business, and the appellate court affirmed the trial court’s ruling that “the plain language of the policy requires a complete stoppage or cessation of business activities in order to trigger [business-income] coverage.”²¹ These and other similar decisions suggest, therefore, that policy wording employing terms that encompass full or partial suspension of operations may afford broader coverage than wording tied only to a complete or total cessation of operations. Nevertheless, even without the benefit of such an express coverage grant, arguments remain that coverage should be available for business income losses resulting from a partial shutdown in business. In the hospitality industry, for instance, this may occur when a hotel’s on-site restaurant or spa is forced to close. Similarly, where business locations are scheduled separately, the insured may suffer a covered loss due to an interruption at one location while other locations remain unaffected. In that situation, the affected location should still be covered even if other scheduled locations remain open for business.

Contingent Business Interruption Coverage Issues

As discussed above, business interruption coverage generally requires that the interruption result from some direct physical loss or damage to covered property of the insured. But in the wake of Hurricane Irma, many Florida hospitality industry insureds suffered significant lost income without suffering any significant storm-related property damage.²²

Fortunately, many policies include contingent business interruption coverage, designed to cover lost business income due to property damage from a covered peril; however, the physical damage need not be to the insured property. Rather, this coverage applies where the property damage is to the property of some other party on which the insured’s business relies for its ordinary business operations, such as that of a key supplier, business partner, or customer. Indeed, as the Seventh Circuit Court of Appeals has explained, while “[r]egular business-interruption insurance replaces profits lost as a result of physical damage to the insured’s plant or other equipment; contingent business-interruption coverage goes further, protecting the insured against the consequences of suppliers’ problems.”²³

Contingent business interruption coverage is particularly important in areas and industries where widespread damage is likely to affect businesses on which the insured’s business relies. For example, in *Citadel Broadcasting Corp. v. Axis U.S. Insurance Co.*, the Louisiana Court of Appeals found that an insured that owned and operated several radio stations that suffered physical damage after Hurricane Katrina was entitled to contingent business interruption insurance after demonstrating that the hurricane had a direct impact on its customers and listeners.²⁴ Further, the court rejected the insurer’s argument that “Citadel needed to prove its loss on a customer-by-customer basis, presenting testimony from individual advertisers or listeners at trial to establish why each one did not advertise with Citadel, or listen to Citadel’s radio stations, in the aftermath of Katrina.”²⁵ The court explained that

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[s]uch a standard appears overly burdensome and is not what is required by the policy issued by AXIS to Citadel. The policy measures BI losses by probable projected experience, not customer-by-customer proof. BI losses are determined by giving due consideration to the experience of the business before the date of the loss or damage and to the probable experience thereafter had no loss occurred. In other words, Citadel's BI losses are to be determined based on the "actual loss sustained," by comparing Citadel's expected performance prior to Hurricane Katrina with its actual performance thereafter.²⁶

Accordingly, the court found in favor of coverage.²⁷

Nonetheless, it is important to consider the specific policy language at issue as courts will look to the specific coverage grant in determining the scope of available coverage. Following the terrorist attack on the World Trade Center, many businesses sought contingent business interruption coverage for their economic losses resulting from the loss of customers following the destruction of the World Trade Center complex. But not all policies provided coverage. In *Zurich American Insurance Co. v. ABM Industries, Inc.*, for example, the Second Circuit found no contingent business interruption coverage for an insured onsite janitorial/heating, ventilation, and air conditioning contractor that serviced the World Trade Center where the contingent business interruption provision of that policy applied only to covered damage to property "not operated by" the insured.²⁸ The court held the policy did not cover the loss, reasoning that because the insured was responsible for the maintenance and upkeep of the physical building, the insured "operated" the property.²⁹

Most companies in the hospitality industry that were affected by the 2017 hurricanes have experienced significant contingent business interruption losses. Many key supply chain parties such as vendors, distributors, and retailers suffered property damage that prevented the upstream insured from operating at normal capacity. Likewise, many downstream businesses suffered losses when their receipt of goods and materials on which they rely for normal operation were interrupted as a consequence of storm damage. For example, many restaurants did not have access to necessary food and beverage supplies in the wake of Hurricane Irma due to supply chain shortages that resulted directly from damage to the property of suppliers and their distribution channels. Likewise, many insured businesses lost access to essential supplies and services as a consequence of the numerous and lasting civil authority prohibitions enacted in the wake of the storms. Those prohibitions and their impact on coverage for hurricane losses are discussed below.

Civil Authority Coverage Issues

Civil authority coverage is intended to extend business interruption coverage to situations in which a covered peril does not cause any loss or damage to the insured's property but instead causes a civil authority to issue an order prohibiting access to the insured's property. A typical example is where a municipality issues an evacuation order in response to a hurricane. The evacuation order will prohibit access to the insured's business and therefore cause a business interruption even though the hurricane itself caused no damage to the insured's property.³⁰

Civil authority coverage was one of the most widely applied coverages in response to losses sustained by hospitality insureds in Florida, Texas, the U.S. Virgin Islands, and Puerto Rico during the 2017 hurricane season. In Florida alone, the governor ordered evacuations of residents in almost every county before,

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during, and after Irma and Maria made landfall. In fact, the media declared the effort likely the largest mass evacuation in United States history.

In response to these civil authority orders, insureds closed their businesses pre-storm, remained closed during the storm, and remained closed for variable periods following the storm. Affected insureds therefore experienced lost business income for an extended period of time that continued even after the evacuation orders had been lifted because it took days for residents (and tourists) to reenter previously evacuated areas. Other areas, such as Miami Beach and the Florida Keys in Florida, as well as Puerto Rico, remained closed to visitors and nonresidents (other than necessary disaster relief or emergency workers) for an extended period following the storms. Further, many areas in Florida, as well as Puerto Rico and the U.S. Virgin Islands, imposed strict curfews—another form of civil authority order—on residents and visitors alike post-storm.

While civil authority coverage is broad, it nonetheless requires a nexus between the civil authority action and a covered cause of loss. For example, in *Dickie Brennan & Co. v. Lexington Insurance Co.*, the Fifth Circuit Court of Appeals found that the insured restaurants were unable to recover income that they would otherwise have earned when a mandatory evacuation order forced them to temporarily shut down in anticipation of Hurricane Gustav.³¹ There, the Fifth Circuit held that the insured failed to establish a causal link between physical damage caused by the hurricane as it passed through the Caribbean en route to making landfall in Louisiana and the civil authority order that ultimately resulted in Dickie Brennan's lost profits.³² In reaching this decision, the court considered that the evacuation order failed to mention the earlier property damage in the Caribbean and that it had been issued before there was ever any damage to property in Louisiana.³³ Similarly, the Southern District of Texas held that an insured medical clinic failed to establish a causal link between property damage and an evacuation order issued in advance of Hurricane Rita.³⁴ The court stressed that the order was issued because of an anticipated threat of damage, not because of actual property damage that had occurred in Florida or the Gulf of Mexico.³⁵

Conversely, civil authority coverage did apply when an evacuation order issued after Hurricane Katrina made landfall in Louisiana prohibited access to a law firm.³⁶ However, the policy did not extend to the loss of income that resulted from a mandatory curfew, because access to the described premises was no longer prohibited.³⁷

Similarly, a restaurant's loss of business income was found to be covered when the loss resulted from an evacuation order given in advance of Hurricane Floyd.³⁸ Central to the Court of Appeals of Georgia's decision was that the government issued the order because the hurricane had already caused physical damage in the Caribbean and was forecast to be headed toward Florida.³⁹

Extended Period of Indemnity

The time needed to resume normal operations following a hurricane may far exceed the business interruption time limit in the policy (typically 90 days). Fortunately, many policies include additional coverage for that additional period of time necessary "to restore the insured's business to the condition that would have existed had no loss occurred."⁴⁰ This period, known as the extended period of indemnity, may be limited to a certain number of days, often between 90 days and one year, or longer, running from the time at which the affected business resumes operations. The purpose of the coverage is to indemnify the insured for loss of business during its post-loss efforts to resume operations at pre-loss levels. Nonetheless, while some courts interpreting this provision have found it to include ramp-up costs,

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including those for planned expansions, additional hiring, or the like,⁴¹ some policies still may still exclude coverage for “indirect, remote, or consequential loss or damage.”⁴²

The value in the extended period of reporting comes in the often prolonged period of time that it can take for an affected business or industry to fully recover from a severe storm. For example, the tourism commissioner of the U.S. Virgin Islands recently stated that as of June 1, 2018, only 40 percent of the accommodations inventory in the U.S. Virgin Islands were open and operable following Hurricanes Irma and Maria.⁴³ Further, hospitality economists note that after an initial bump in occupancy because of construction and emergency relief workers following a storm, the disaster markets tend to take several years to fully recover to pre-storm levels due to supply constraints, loss of convention and group bookings and stigma. Looking at the market data from catastrophic hurricanes—Hurricane Ivan in Grand Cayman; Hurricane Hugo in Charleston, South Carolina; Hurricane Andrew in Miami; and Hurricane Katrina in New Orleans—it appears that demand took between two and eight years to reach pre-hurricane levels.⁴⁴

Insureds and insurers alike should therefore ensure that their forensic accountants do not stop calculating lost business income when levels first purport to level off, as an initial surge is usually followed by a much longer slump and recovery period.

Notes

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² William Shaw, “Lloyd’s Calls for Private Sector Role in US Flood Insurance,” *Law360*, May 31, 2018.

³ Texas Department of Insurance, Hurricane Harvey Data Call. Presentation to the Senate Business and Commerce Committee (Jan. 23, 2018).

⁴ Florida Office of Insurance Regulation, Hurricane Irma Claims Data.

⁵ Arian Campo-Flores, “For Puerto Rico, the Return to Business as Usual Is Slow,” *Wall St. J.*, Mar. 19, 2018.

⁶ See, e.g., *C.H.O. Enters., Inc. v. Ironshore Specialty Ins. Co.*, No. CACE18009718 (Fla. Cir. Ct. Apr. 27, 2018) (filed breach of contract claim, settled June 22, 2018); *Aventura Note Holders, LLC*, No. CACE-18-010245 (Fla. Cir. Ct. Apr. 27, 2018) (breach of contract claim); *Suriname Inv. Grp., Inc. v. Scottsdale Ins. Co.* No. CACE-18-009045 (Fla. Cir. Ct. May 16, 2018) (breach of contract claim); *B.A.S.I.C. Eng’g, Inc. v. Certain Underwriters at Lloyd’s London*, No. 18-CA-003350 (Fla. Cir. Ct. Apr. 11, 2018) (breach of contract claim); *Meital 3, LLC v. Citizens Prop. Ins. Corp.*, No. CACE-18-005671 (Fla. Cir. Ct. Apr. 11, 2018) (breach of contract claim).

⁷ *S. Tex. Med. Clinics, P.A. v. CNA Fin. Corp.*, No. H-06-4041, 2008 U.S. Dist. LEXIS 11460, *1–2 (S.D. Tex. Feb. 15, 2008).

⁸ See, e.g., *Aztar Corp. v. U.S. Fire Ins. Co.*, 223 Ariz. 463, 224 P.3d 960, 965 (Ariz. Ct. App. 2010) (“This policy insures against loss resulting directly from necessary interruption of business, whether total or partial, caused by damage to or destruction of all real or personal property, manuscripts and watercraft,

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by the peril(s) insured against, during the term of this policy, on premises situate per the Territorial Limits in this policy.”).

⁹ *Aztar Corp.*, 224 P.3d at 962.

¹⁰ *Aztar Corp.*, 224 P.3d at 962.

¹¹ *Aztar Corp.*, 224 P.3d at 967.

¹² *Aztar Corp.*, 224 P.3d at 967.

¹³ *Am. Med. Imaging Corp. v. St. Paul Fire & Marine Ins. Co.*, 949 F.2d 690, 692–93 (3d Cir. 1991).

¹⁴ *American Medical Imaging Corp.*, 949 F.2d at 691.

¹⁵ *American Medical Imaging Corp.*, 949 F.2d at 692–93.

¹⁶ *American Medical Imaging Corp.*, 949 F.2d at 692.

¹⁷ *American Medical Imaging Corp.*, 949 F.2d at 692.

¹⁸ *Ramada Inn Ramogreen, Inc. v. Travelers Indem. Co.*, 835 F.2d 812, 813 (11th Cir. 1988).

¹⁹ *Ramada Inn Ramogreen, Inc.*, 835 F.2d at 814.

²⁰ See, e.g., *Keetch v. Mut. of Enumclaw Ins. Co.*, 831 P.2d 784, 786 (Wash. Ct. App. 1992) (citing cases from different jurisdictions).

²¹ *Forestview the Beautiful, Inc. v. All Nation Ins. Co.*, 704 N.W. 2d 773, 775–76 (Minn. Ct. App. 2005) (alterations in original) (further explaining that “[t]he business-income endorsement in Forestview’s policy provides that All Nation will pay for the actual loss of Business Income you sustain due to necessary suspension of your ‘operations’ during the ‘period of restoration. The policy defines ‘operations’ as ‘business activities occurring at the described premises.’ . . . We conclude that the plain and ordinary meaning of “suspension” in Forestview’s business-income endorsement does not include a partial suspension of business operations.”).

²² Courts have required that the business income loss bear relation to the property damage. For example, in *United Airlines, Inc. v. Insurance Co. of the State of Pennsylvania*, 385 F. Supp. 2d 343, 350 (S.D.N.Y. 2005), *aff’d*, 439 F.3d 128 (2d Cir. 2006), the Southern District of New York rejected United Airlines’ claim that the destruction of its ticket counter in the World Trade Center and/or the accumulation of ash at Reagan National Airport triggered coverage for its system-wide business interruption losses, explaining that United Airlines’ argument that “destruction of its ticket counter in the WTC and/or an ‘accumulation of ash’ at Reagan Airport triggers coverage for system-wide business interruption losses approaching \$1.2 billion is untenable because the amount of recovery sought bears no relation to the actual damage suffered at the WTC Insured Location.”

²³ *Archer Daniels Midland Co. v. Hartford Fire Ins. Co.*, 243 F.3d 369, 371 (7th Cir. 2001).

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²⁴ *Citadel Broad. Corp. v. Axis U.S. Ins. Co.*, 162 So. 3d 470, 475, 479 (La. Ct. App. 2015) , *writ denied*, 170 So. 3d 969, 2015 La. LEXIS 1174 (La. 2015).

²⁵ *Citadel Broadcasting Corp.*, 162 So. 3d at 475.

²⁶ *Citadel Broadcasting Corp.*, 162 So. 3d at 475.

²⁷ *Citadel Broadcasting Corp.*, 162 So. 3d at 475.

²⁸ *Zurich Am. Ins. Co. v. ABM Indus.*, 397 F.3d 158, 169 (2d Cir. 2005).

²⁹ *ABM Industries*, 397 F.3d at 169–70.

³⁰ *Manpower Inc. v. Ins. Co.*, No. 08C0085, 2009 U.S. Dist. LEXIS 108626, at *2 (E.D. Wis. Nov. 3, 2009).

³¹ *Dickie Brennan & Co. v. Lexington Ins. Co.*, 636 F.3d 683, 684 (5th Cir. 2011).

³² *Dickie Brennan & Co.*, 636 F.3d at 685.

³³ *Dickie Brennan & Co.*, 636 F.3d at 685–86.

³⁴ *S. Tex. Med. Clinics, P.A. v. CNA Fin. Corp.*, No. H-06-4041, 2008 U.S. Dist. LEXIS 11460, at *1–4 (S.D. Tex. Feb. 15, 2008).

³⁵ *South Texas Medical Clinics, P.A.*, 2008 U.S. Dist. LEXIS 11460, at *31–34.

³⁶ *William M. Magee, P.L.C. v. Nat'l Fire Ins. Co.*, 977 So. 2d 304, 16–17 (La. Ct. App. 2008).

³⁷ *William M. Magee, P.L.C.*, 977 So. 2d at 11–16.

³⁸ *Assurance Co. of Am. v. BBB Serv. Co.*, 265 Ga. App. 35, 35–37 (2003).

³⁹ *BBB Service Co.*, 265 Ga. App. at 36.

⁴⁰ *Ochsner Clinic Found. v. Lexington Ins. Co.*, 226 F. Supp. 3d 658, 679 (E.D. La. 2017).

⁴¹ *Ochsner Clinic Foundation*, 226 F. Supp. 3d at 679.

⁴² *Ochsner Clinic Foundation*, 226 F. Supp. 3d at 679.

⁴³ Sean McCracken, "How Caribbean Officials Expect Tourism to Bounce Back," *Hotel News Now*, June 1, 2018.

⁴⁴ Aaron Carone & Jamie Lane, "Predicting the Possible Hurricane Impact on Puerto Rico," *Hotel News Now*, Feb. 14, 2018.

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