Problem 1:

A casino was damaged by a hurricane, forcing it to close for several months. When it reopened, its revenues were much greater than before the hurricane because many nearby casinos remained closed, and people who wanted to gamble had few choices. The casino estimated its business income losses at $80 million, based on its post-hurricane revenues. Its insurer estimated business income losses at $6 million, based on the previous year's profit. The policy's business-interruption provision stated:

> 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.

Question: Can the increased post-loss revenue be considered in the business income calculation?

No. In *Catlin Syndicate Ltd. v. Imperial Palace of Mississippi, Inc.*,[1] the court rejected the insured casino's argument that its business income loss should be based on a hypothetical in which Hurricane Katrina hit Mississippi, damaged all of the casino's competitors, but left the casino intact. Though the Court agreed the loss is distinct from the occurrence in theory, it held the two were "inextricably intertwined under the language of the business-interruption provision." Because no policy language specifically instructed that the loss (damage to the casino) caused by Hurricane Katrina could be distinguished from the occurrence of Hurricane Katrina itself, the court rejected Imperial Palace's argument that its actual post-loss revenues should determine the business interruption benefits.

Problem 2:

After a calamitous 15 months, during which an apartment building was hit by a tornado, a hurricane, a fire, and an out-of-control vehicle, it filed a business interruption claim. The policy provided lost income includes "[t]he likely Net Income of the business if no physical loss or damage had occurred, but not any Net Income that would likely have been earned as a result of ... favorable business conditions caused by the impact of the Covered Cause of Loss ...." Wind was a covered cause of loss; flood was not.

Question: Can post-loss revenue be considered in the business income calculation?

Yes, to an extent. In *Berk-Cohen Associates, LLC v. Landmark American Insurance Company*,[2] the same Court that decided *Catlin* held the post-loss economy could be considered in determining business interruption losses. But this opinion hinged on the specific policy provision. Stimulated demand or reduction in competitor supply resulting from wind damage to competitors' property could not be considered in the insured's business interruption calculation. But any increase in demand or reduction in competitors'

[1] 600 F.3d 511 (5th Cir. 2010)
[2] No. 10-30916, 2011 WL 2893019 (5th Cir. July 20, 2011)

supply due to flood at other properties could be considered in calculating lost business income because flood was not a covered cause of loss.

Problem 3:

The insured developer of hand-held electronic translators sought business interruption benefits after a hurricane forced it to close its Florida office for three weeks. Prior to the hurricane, the insured operated at a loss. Less than a month and a half after the hurricane, the insured was back in operation with a new marketing scheme in full force, but it sold few products through the end of the year. The insured claimed $1,360,747 for lost sales over four months.

Question: Can the insured recover for lost business income and operating expenses?

No. In *Dictiomatic, Inc. v. Mercury Cas. Co.*,[3] the court held that because the insured suffered income losses throughout the period of operation prior to the hurricane and after it resumed operations, there was no proof it would have earned a profit during the period of interruption, and it would have been unprofitable even without the interruption. Because "business interruption insurance may not be used to put the insured in a better position than it would have occupied without the interruption, to deny or offset recovery for operating costs if the business was not doing so well prior to the loss," the court held the insured was not entitled to recover its claimed losses.

Problem 4:

The insured printing and graphics design company that did well financially from 1997 to 2000. Business declined sharply after the September 11, 2001 attacks, and 2002 was a particularly bad year. Its office flooded in April 2003, causing extensive damage to the building and machinery. The insured had a standard business interruption policy which provided coverage for (i) net income, and (ii) continuing normal expenses.

Question: Is the insured entitled to benefits for ongoing operating expenses, even though it operated at a loss prior to the flood?

Yes. In *Amerigraphics v. Mercury Casualty Company*,[4] a California court specifically declined to follow the reasoning in *Dictiomatic*. The court explained that if a catastrophic event damages an insured's business premises and prevents the insured from being able to operate, the business would face two distinct problems: (1) a loss of money coming into the business (loss of income), and (2) payment of ongoing fixed expenses, even though no money is coming in. A reasonable insured would see the definition of "Business Income" has two distinct components: (i) net income, *and* (ii) continuing normal expenses. Because the policy definition provided that "Business Income" includes both items, an insured relying on the plain language of the clause would reasonably conclude the policy covers both.

[3] 958 F.Supp. 594 (S.D. Fla. 1997)
[4] 182 Cal. App. 4th 1538 (March 23, 2010)

Notably, the facts in *Dictiomatic* and *Amerigraphics* were vastly different. In *Dictiomatic*, there was no evidence the insured ever did or could make a profit, and the evidence showed it was not successful after its operations resumed a month after the loss. Yet, the policyholder sought more than $1 million in lost income benefits for four months of loss. And, importantly, the insurer seemed to treat the insured with good faith. In *Amerigraphics*, the insurer's actions could be described as negligent, at best. And the insured sought coverage for continuing operating expenses during a delay largely caused by the insurer, not speculative lost profits.

Problem 5:

The insured operated its most profitable retail clothing store in the main concourse of the World Trade Center ("WTC"), where it rented space. Its Business Interruption policy defined the period of restoration as the amount of time it would take for the policyholder's building and equipment to be replaced and made ready for operations "under the same or equivalent physical and operating conditions."

Question: Is the period of restoration the hypothetical time it would take to replace the insured's stores in a rebuilt World Trade Center complex?

No. In *Retail Brand Alliance, Inc. v. Factory Mut. Ins. Co.*, [5] the court held the phrase "under the same or equivalent physical and operating conditions" explicitly modified "building and equipment" and did not create a requirement for an equivalent flow of foot traffic. The period of restoration was the amount of time reasonably necessary for the insured to relocate its store and resume operations.

Problem 6:

The insured was a facility services contractor providing janitorial, lighting, and engineering services in the common areas of the WTC, provided janitorial services for virtually all of the tenants in the WTC, and operated a call desk through which it provided engineering and lighting services to the WTC tenants. It filed a claim for business interruption losses following 9/11. The policy had a standard period of restoration provision, providing the period would not exceed the time "required with the exercise of due diligence and dispatch to rebuild, repair, or replace the property that had been destroyed or damaged."

Question: Is the period of restoration the hypothetical time it would take to replace the business' operations in a rebuilt World Trade Center complex?

Yes. In *Zurich American Insurance Co. v. ABM Industries, Inc.*,[6] the court explained ABM could not simply relocate to another building and carry on business like other WTC tenants because ABM's business was fundamentally connected to its use of the common spaces at the World Trade Center. Accordingly, the court held "restoration of the World Trade Center itself [was] necessary for ABM to resume its operations."

[5] 489 F.Supp.2d 326 (S.D.N.Y. 2007)
[6] 2006 WL 1293360 (S.D.N.Y. 2006)

600 F.3d 511
(Cite as: 600 F.3d 511)

Briefs and Other Related Documents

Judges and Attorneys

United States Court of Appeals,
Fifth Circuit.
CATLIN SYNDICATE LIMITED, Plaintiff-Appellee,
v.
IMPERIAL PALACE OF MISSISSIPPI, INC.; Imperial Palace of Mississippi, LLC, Defendants-Appellants.

No. 09-60209.
March 15, 2010.

Background: Insurer brought action against insured casino operator for declaration as to amount of business interruption losses owed under policy as a result of a hurricane. Insured filed counterclaims for breach of contract, negligence, and other claims. The United States District Court for the Southern District of Mississippi, Halil S. Ozerden, J., 2008 WL 5235888, denied summary judgment to insured and granted in part summary judgment to insurer. Insured appealed.

Holding: The Court of Appeals, Prado, Circuit Judge, held that insured's business losses were to be determined using only historical sales figures and not sales figures after reopening.

Affirmed.

West Headnotes

[1] Federal Courts 170B 776

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(K) Scope, Standards, and Extent
170BVIII(K)1 In General
170Bk776 k. Trial de novo. Most Cited Cases

Court of Appeals reviews the legal determinations in a district court's decision to grant summary judgment *de novo*, applying the same legal standards as the district court to determine whether summary judgment was appropriate.

[2] Contracts 95 176(1)

95 Contracts
95II Construction and Operation
95II(A) General Rules of Construction
95k176 Questions for Jury
95k176(1) k. In general. Most Cited Cases

Interpretation of a contract is a purely legal matter.

[3] Federal Courts 170B 776

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(K) Scope, Standards, and Extent
170BVIII(K)1 In General
170Bk776 k. Trial de novo. Most Cited Cases

Court of Appeals reviews the district court's construction of insurance policy *de novo*.

[4] Insurance 217 1809

217 Insurance
217XIII Contracts and Policies
217XIII(G) Rules of Construction
217k1809 k. Construction or enforcement as written. Most Cited Cases

Under Mississippi law, if an insurance policy is worded so that it can be given only one reasonable construction, a court must enforce the policy as written.

[5] Insurance 217 2179(1)

217 Insurance
217XVI Coverage--Property Insurance
217XVI(A) In General

217k2173 Amount of Damage or Loss
217k2179 Business Interruption; Lost Profits
217k2179(1) k. In general. Most Cited Cases

Under Mississippi law, casino operator's loss as a result of hurricane under business-interruption provision of operator's insurance policy, which provided that in determining the amount of the loss, due consideration shall be given to experience of the business before the loss and the probable experience thereafter had no loss occurred, were to be determined using only historical sales figures, and sales figures after reopening were not to be taken into account.

***512** Kyle Stuart Moran, Mark Vincent Watts, Phelps Dunbar, L.L.P., Gulfport, MS, Kenneth W. Erickson (argued), Seth Carlton Harrington, Ropes & Gray, L.L.P., Boston, MA, for Plaintiff-Appellee.

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Appeal from the United States District Court for the Southern District of Mississippi.

Before JONES, Chief Judge, and BENAVIDES and PRADO, Circuit Judges.

PRADO, Circuit Judge:

Insurer Catlin Syndicate and casino operator Imperial Palace disagree about how to determine loss under the business-interruption provision of the insurance policy that Catlin issued to Imperial Palace. Catlin argues that the business-interruption provision unambiguously indicates that only historical sales figures should be considered when determining loss. Imperial Palace argues that the provision is ambiguous, and therefore sales figures after reopening should also be taken into account. FN1

FN1. This issue has caused debate among courts and commentators. *See, e.g.*, H. Richard Chattman & Gregory D. Miller, *Measuring Business Interruption Loss in Wide-Impact Catastrophes: Insurance Against Catastrophes or Only Against Insured Damage from Catastrophes?*, 19 COVERAGE 1 (Jul./Aug. 2009).

We addressed the definition of "loss" under a materially identical business-interruption provision in *Finger Furniture Co. v. Commonwealth Insurance Co.*, 404 F.3d 312 (5th Cir.2005). *Finger Furniture* does not control this case because it dealt with a question of Texas law, while this case deals with a question of Mississippi law. However, there is no significant difference between Texas and Mississippi law on this issue. Accordingly, we find that Mississippi courts would apply the law in the same way as Texas courts, and we AFFIRM.

I.

Hurricane Katrina damaged Imperial Palace, forcing it to shut down for several months. When Imperial Palace reopened, its revenues were much greater than before the hurricane; many nearby casinos remained closed, and people who wanted to gamble had few choices. Imperial Palace submitted a claim to its insurers, including Catlin. Catlin agreed to pay the claim, but the parties disputed Imperial Palace's losses. Imperial Palace stated that its losses were approximately $165 million, while Catlin believed the losses were closer to $65 million. The largest discrepancy was in the amount of business-interruption loss: Imperial Palace put this amount at about $80 million, while Catlin put it at about $6.5 million. This discrepancy resulted from the parties' different interpretations of the policy's business-interruption***513** provision, which states, in pertinent part:

> 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.

Catlin filed a complaint in federal district court, seeking declaratory relief. Imperial Palace counterclaimed for breach of contract and negligence, among other claims. The parties filed cross-motions for summary judgment. Catlin argued that under the business-interruption provision, Imperial Palace's recovery should be based on net profits Imperial Palace would probably have earned if Hurricane Katrina had not struck the Mississippi Gulf Coast and damaged its facilities. Thus, Catlin stated that Imperial Palace's loss should be determined by looking solely at pre-hurricane sales. Imperial Palace argued that the correct hypothetical was not one in which Hurricane Katrina did not strike at all; it was one in which Hurricane Katrina struck but did not damage Imperial Palace's facilities. Accordingly, Imperial Palace averred that its recovery should be based in part on the amount it actually earned when it reopened after Katrina.

After considering the parties' arguments, the district court denied Imperial Palace's motion in its entirety, and granted Catlin's motion "to the extent that Catlin [sought] a partial summary judgment that [Imperial Palace's] profits upon reopening after Hurricane Katrina should not be taken into account to determine what [Imperial Palace] would have experienced had the storm not occurred." *Catlin Syndicate Ltd. v. Imperial Palace of Miss., Inc.*, No. 1:08-CV-97, 2008 WL 5235888, at *1, *8 (S.D.Miss. Dec. 15, 2008). We granted leave to appeal the district court's interlocutory order solely as to this ruling.

II.

The district court has diversity jurisdiction over this case under 28 U.S.C. § 1332. We have jurisdiction over Imperial Palace's interlocutory appeal under 28 U.S.C. § 1292(b).

[1][2][3][4] We review the "legal determinations in a district court's decision to grant summary judgment *de novo*, applying the same legal standards as the district court to determine whether summary judgment was appropriate." *Gonzalez v. Denning*, 394 F.3d 388, 391 (5th Cir.2004) (citations omitted). "Summary judgment is proper where, after viewing the evidence in the light most favorable to the nonmovant, the record indicates that no genuine issue of material fact exists." *Finger Furniture*, 404 F.3d at 313 (citing *Denning*, 394 F.3d at 391). Interpretation of a contract is a purely legal matter; therefore, we review the district court's construction of Imperial Palace's policy *de novo*. *See id.* (citing *Sentry Ins. v. R.J. Weber Co.*, 2 F.3d 554, 556 (5th Cir.1993)). Because this is a diversity case involving a Mississippi contract, we apply Mississippi contract law to interpret the policy. *See Ideal Mut. Ins. Co. v. Last Days Evangelical Ass'n*, 783 F.2d 1234, 1240 (5th Cir.1986) (stating that a federal court applies the substantive law of the forum state in a diversity action). Under Mississippi law, if a policy is worded so that it can be given only one reasonable construction, a court must enforce the policy as written. *See U.S. Fid. & Guar. Co. of Miss. v. Martin*, 998 So.2d 956, 963 (Miss.2008).

III.

In *Finger Furniture*, a tropical storm caused Finger's stores to close for one to ***514** two days. 404 F.3d at 313. A week after reopening, Finger slashed prices, and sales soared. *Id.* Finger filed a claim for lost sales under the business-interruption provision of its insurance contract with Commonwealth. *Id.* The business-interruption provision stated, in pertinent part:

> In determining the amount of gross earnings covered hereunder for the purposes of ascertaining the amount of loss sustained, due consideration shall be given to the experience of the business before the date of the damage or destruction and to the probable experience thereafter had no loss occurred.
>
> *Id.* at 314.

Commonwealth denied the claim, arguing that Finger's increased sales the following week made up for the sales that it did not make while closed. *Id.* at 314. Commonwealth filed a declaratory judgment action. *Id.* at 313. The district court granted Finger's motion for summary judgment, and Commonwealth appealed. *Id.*

In affirming, we explained that the proper method for determining loss under the business-interruption provision was to look at sales before the interruption rather than sales after the interruption. *Id.* at 314. We noted that "the policy requires due consideration of the business's experience before the date of the loss and the business's probable experience had the loss not occurred," and that this language should be interpreted as meaning "that a business-interruption loss will be based on historical sales figures." *Id.* We stated that "[h]istorical sales figures reflect a business's experience before the date of the damage or destruction and predict a company's probable experience had the loss not occurred," and that "[t]he strongest and most reliable evidence of what a business would have done had the catastrophe not occurred is what it had been doing in the period just before the interruption." *Id.*

We declined to consider post-interruption sales, noting that "the business-loss provision says nothing about taking into account actual post-damage sales to determine what the insured would have experienced had the storm not occurred." *Id.* Further, we stated that "[t]he contract language does not suggest that the insurer can look prospectively to what occurred after the loss to determine whether its insured incurred a business-interruption loss." *Id.*

[5] The language in the business-interruption provision of Imperial Palace's insurance policy with Catlin mirrors the language in *Finger Furniture,* with one minor distinction. In *Finger Furniture,* the provision said, "In determining the amount of ... loss ..., due consideration shall be given to the experience of the business before the ... *damage or destruction* and to the probable experience thereafter had no loss occurred." Here, the provision says, "In determining the amount of the ... loss ..., due consideration shall be given to experience of the business before the *loss* and the probable experience thereafter had no loss occurred." Imperial Palace urges us to distinguish *Finger Furniture* on this basis. But this is a distinction without a difference; in the context of these business-interruption provisions, the terms "damage or destruction" and "loss" are functionally equivalent.[FN2] Indeed, in common usage "damage" and "destruction" are two definitions of "loss." RANDOM HOUSE WEBSTER'S***515** UNABRIDGED DICTIONARY 1137 (2d ed. 2001). Likewise, "loss" is a synonym for "damage." *Id.* at 504.

> FN2. Imperial Palace also argues that in *Finger Furniture* we used loss as a descriptive term and did not intend to equate it with damage or destruction. Nowhere in *Finger Furniture* do we find support for this argument.

In addition, Imperial Palace tries to distinguish *Finger Furniture* on its facts. In *Finger Furniture,* the insurer argued that post-storm sales should be taken into account to show that the insured did not actually incur any losses. Here, the insured-not the insurer-argues that post-hurricane sales should be taken into account to show that losses were much greater than pre-hurricane figures would indicate. But our determination in *Finger Furniture,* like our determination here, was based on a legal analysis of the business-interruption provision and did not depend on the facts that Imperial Palace highlights. The language in the two provisions is materially identical, so the analysis is the same despite the factual dissimilarities.

Imperial Palace also argues that *Finger Furniture* is distinguishable because a "favorable conditions clause" might have existed in that case, but none exists in the instant case. A favorable conditions clause prohibits consideration of post-loss business increases when determining the amount of business-interruption losses. If a favorable condi-

tions clause existed in *Finger Furniture,* it did not impact the analysis. Accordingly, it is not a valid basis on which to distinguish *Finger Furniture* from the instant case.

Finally, Imperial Palace argues that Catlin's interpretation of the business-interruption provision conflates the term "loss" with the idea of an "occurrence." In this case, Hurricane Katrina was the "occurrence", which inflicted "losses" on many victims, one of which was Imperial Palace. Imperial Palace asserts that Catlin asks us to interpret the business-interruption provision in such a way that the phrase "had no loss occurred" morphs into "had no occurrence occurred." Imperial Palace argues that instead, we should disentangle the loss from the occurrence and determine loss based on a hypothetical in which Hurricane Katrina hit Mississippi, damaged all of Imperial Palace's competitors, but left Imperial Palace intact: the occurrence occurred, but the loss did not. While we agree with Imperial Palace that the loss is distinct from the occurrence-at least in theory-we also believe that the two are inextricably intertwined under the language of the business-interruption provision. Without language in the policy instructing us to do so, we decline to interpret the business-interruption provision in such a way that the loss caused by Hurricane Katrina can be distinguished from the occurrence of Hurricane Katrina itself.[FN3]

> FN3. Courts interpreting similar business-interruption provisions have generally reached the same conclusion. *See, e.g., Finger Furniture,* 404 F.3d at 314 ("[T]he business-loss provision says nothing about taking into account actual post-damage sales to determine what the insured would have experienced had the storm not occurred."); *Prudential LMI Commercial Ins. Co. v. Colleton Enters., Inc.,* No. 91-1757, 1992 WL 252507, at *4 (4th Cir. Oct. 5, 1992) ("[A]n insured under a business interruption provision such as that here in issue may not claim as a probable source of expected earnings ... a source that would not itself have come into being but for the interrupting peril's occurrence."); *Am. Auto. Ins. Co. v. Fisherman's Paradise Boats, Inc.,* No. 93-2349, 1994 WL 1720238, at *4 (S.D.Fla. Oct. 3, 1994) ("[H]ad no hurricane occurred (the policy's built in premise for assessing profit expectancies during business interruption), [then] neither would the claimed earnings source.") (quotation omitted). *But see Colleton Enters., Inc.,* 1992 WL 252507, at *4 (Hall, J., dissenting) (" 'Had no loss occurred' does not refer to the overall loss in the surrounding area; rather, it clearly refers only to the loss incurred by the insured."); *Stamen v. Cigna Prop. & Cas. Ins. Co.,* No. 93-1005, slip op. at 6 (S.D. Fla. June 10, 1994) (order granting summary judgment) ("If Cigna had meant to preclude consideration of Food Spot's post-hurricane profits in the lost profits calculation, it should have substituted the word 'occurrence' for the word 'loss' in the clause describing how business interruption losses would be calculated.").

***516** Because "loss" and "damage or destruction" are equivalent terms, the business-interruption provision in *Finger Furniture* is materially identical to the provision in this case, and our interpretation of the provision in *Finger Furniture* guides us now. *Finger Furniture* tells us "that a business-interruption loss will be based on historical sales figures," and that we should not "look prospectively to what occurred after the loss." 404 F.3d at 314. Thus, in the business-interruption provision at hand, only historical sales figures should be considered when determining loss, and sales figures after reopening should not be taken into account.

Finger Furniture does not control this case because it dealt with a question of Texas law, while this case deals with a question of Mississippi law. However, there is no material difference between

Texas and Mississippi law on this issue. *Compare Puckett v. U.S. Fire Ins. Co.*, 678 S.W.2d 936, 938 (Tex.1984) ("When there is no ambiguity [in an insurance contract], it is the court's duty to give the words used their plain meaning."), *with Martin*, 998 So.2d at 963 ("[I]f [an insurance policy] is clear and unambiguous, then it must be interpreted as written."). Accordingly, we find that Mississippi courts would apply the law in the same way as Texas courts.

IV.

We AFFIRM.

C.A.5 (Miss.),2010.
Catlin Syndicate Ltd. v. Imperial Palace of Mississippi, Inc.
600 F.3d 511

Briefs and Other Related Documents (Back to top)

• 2009 WL 6297507 (Appellate Brief) Reply Brief of Appellants Imperial Palace of Mississippi, Inc. And Imperial Palace of Mississippi, LLC (Aug. 28, 2009) Original Image of this Document (PDF)
• 2009 WL 6297506 (Appellate Brief) Brief of Plaintiff-Appellee Catlin Syndicate Limited (Aug. 14, 2009) Original Image of this Document (PDF)
• 2009 WL 6297505 (Appellate Brief) Brief of Appellants Imperial Palace of Mississippi, Inc., Imperial Palace of Mississippi, LLC (Jun. 22, 2009) Original Image of this Document (PDF)
• 09-60209 (Docket) (Mar. 26, 2009)

Judges and Attorneys(Back to top)

Judges | Attorneys

Judges

• Benavides, Hon. Fortunato Pedro
United States Court of Appeals, Fifth Circuit
New Orleans, Louisiana 70130
Litigation History Report | Judicial Reversal Report | Judicial Expert Challenge Report | Profiler

• Jones, Hon. Edith Hollan
United States Court of Appeals, Fifth Circuit
New Orleans, Louisiana 70130
Litigation History Report | Judicial Reversal Report | Judicial Expert Challenge Report | Profiler

• Ozerden, Hon. Halil Suleyman
United States District Court, Southern Mississippi
Gulfport, Mississippi 39501
Litigation History Report | Judicial Motion Report | Judicial Reversal Report | Judicial Expert Challenge Report | Profiler

• Prado, Hon. Edward Charles
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Litigation History Report | Judicial Motion Report | Judicial Reversal Report | Judicial Expert Challenge Report | Profiler

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433 Fed.Appx. 268, 2011 WL 2893019 (C.A.5 (La.))
(Not Selected for publication in the Federal Reporter)
(Cite as: 433 Fed.Appx. 268, 2011 WL 2893019 (C.A.5 (La.)))

Briefs and Other Related Documents

Judges, Attorneys and Experts

This case was not selected for publication in the Federal Reporter.

Not for Publication in West's Federal Reporter See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also Fifth Circuit Rules 28.7, 47.5.3, 47.5.4. (Find CTA5 Rule 28 and Find CTA5 Rule 47)

United States Court of Appeals,
Fifth Circuit.
BERK–COHEN ASSOCIATES, L.L.C.,
Plaintiff—Appellee
v.
LANDMARK AMERICAN INSURANCE COMPANY, Defendant—Appellant.

No. 10–30916.
July 20, 2011.

Background: Insured whose apartment complex suffered wind damage brought action against insurer to recover lost business income. The United States District Court for the Eastern District of Louisiana, Block, Senior District Judge, awarded additional lost business income and statutory penalties, 2010 WL 3522959, and insurer appealed.

Holdings: The Court of Appeals held that:
(1) under Louisiana law, policy covering permitted recovery for lost business income due to the favorable business conditions in the wake of Hurricane Katrina, but
(2) insurer was not subject to statutory penalties.

Affirmed in part and reversed in part.

West Headnotes

[1] Insurance 217 ⚿2179(1)

217 Insurance
217XVI Coverage—Property Insurance
217XVI(A) In General
217k2173 Amount of Damage or Loss
217k2179 Business Interruption; Lost Profits
217k2179(1) k. In general. Most Cited Cases

Under Louisiana law, insurance policy covering apartment complex that suffered wind damage permitted recovery for lost business income due to the favorable business conditions in the wake of Hurricane Katrina; although policy excluded flood-related damages to complex, stimulated demand as a result of flood damage to other structures was a proper consideration in calculating lost income. LSA–C.C. art. 2050.

[2] Insurance 217 ⚿3360

217 Insurance
217XXVII Claims and Settlement Practices
217XXVII(C) Settlement Duties; Bad Faith
217k3358 Settlement by First-Party Insurer
217k3360 k. Duty to settle or pay. Most Cited Cases

Under Louisiana law, insurer was not subject to statutory penalties for its refusal to consider favorable business conditions attributable to flooding in other buildings in computing the business income that insured lost as a result of the wind damage to its apartment complex during Hurricane Katrina; scope of policy's flood exclusion, with its reference to all damage “caused directly or indirectly” by flooding, was susceptible to different interpretations. LSA–R.S. § 22:1892(B)(1).

***268** Loretta Gallaher Mince, Esq., Daniel John Carr, James Richard Swanson, Fishman, Haygood, Phelps, Walmsley, Willis & Swanson, L.L.C., New Orleans, LA, for Plaintiff–Appellee.

Louis C. Lacour, Jr., Adams & Reese, L.L.P.,

433 Fed.Appx. 268, 2011 WL 2893019 (C.A.5 (La.))
(Not Selected for publication in the Federal Reporter)
(Cite as: 433 Fed.Appx. 268, 2011 WL 2893019 (C.A.5 (La.)))

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***269** Judy Y. Barrasso, Barrasso, Usdin, Kupperman, Freeman & Sarver, L.L.C., New Orleans, LA, for Amicus Curiae.

Appeal from the United States District Court for the Eastern District of Louisiana, USDC No. 2:07–CV–9205.

Before JONES, Chief Judge, and KING and BARKSDALE, Circuit Judges.

PER CURIAM: FN*

FN* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

****1** This insurance case asks the court to determine the extent of coverage available following a calamitous 15 months, during which an apartment building was hit by a tornado, a hurricane, a fire, and an out-of-control vehicle. Interpreting the contract in question, we affirm the district court's calculation of lost business income but reverse its imposition of a statutory penalty for bad faith.

Background

Berk–Cohen Associates, L.L.C. ("Berk–Cohen") owns a number of properties, among them the Forest Isle apartment complex. Between August 2005 and October 2006, Forest Isle suffered damage from a tornado, Hurricane Katrina, a fire on the property, and a motorist's collision with a transformer that supplied power to the building. Berk–Cohen submitted claims to its insurer, Landmark American Insurance Company ("Landmark"), following each of these misfortunes. Landmark paid over $20 million to cover the cost of repairs and to compensate Berk–Cohen for lost business income.

The insurance policy in effect between Berk–Cohen and Landmark did not cover losses at Forest Isle "caused directly or indirectly by Flood." The policy did, however, extend to losses resulting from wind damage. In the case of a covered cause of loss (*e.g.*, wind damage), Landmark insured Berk–Cohen against both property damage and lost business income. According to the policy, the latter is a product of several factors, among them "[t]he likely Net Income of the business if no physical loss or damage had occurred...." The policy then narrows the scope of lost business income by excluding "any Net Income that would likely have been earned as a result of ... favorable business conditions caused by the impact of the Covered Cause of Loss on customers or on other businesses." Invoking this restriction, Landmark refused Berk–Cohen's demand for additional lost income due to increased rents following Hurricane Katrina. Landmark reasoned that the increased rents resulted from flooding around New Orleans and that damage caused "directly or indirectly" by floods was excluded under the policy. As a result, Landmark declined to increase its calculation of lost business income to the extent that any foregone income arose from flooding.

Berk–Cohen responded with this lawsuit. Following a bench trial, the district court held that favorable business conditions attributable to flooding in other buildings were nevertheless appropriate considerations in computing the business income that Berk–Cohen lost as a result of the wind damage to its own building. Additionally, the district court found that Landmark's misinterpretation of its policy entitled Berk–Cohen to statutory damages and attorney's fees. Landmark appeals.

Discussion

This court reviews the district court's interpretation of an insurance policy *de* ****270*** *novo*. *Old Republic Ins. Co. v. Comprehensive Health Care Assoc.*, 2 F.3d 105, 107 (5th Cir.1993). The district court's interpretation of state law is likewise subject

to *de novo* review, but we review the findings of fact during a bench trial for clear error. *Water Craft Mgmt. LLC v. Mercury Marine*, 457 F.3d 484, 488 (5th Cir.2006).

A. Calculation of Loss

****2** [1] The district court correctly held that the insurance policy between Berk–Cohen and Landmark permits recovery for lost business income due to the favorable business conditions in the wake of Hurricane Katrina. Although flood-related damages to Forest Isle are themselves excluded, stimulated demand as a result of flood damage to other structures is a proper consideration in calculating lost income.

Under Louisiana law, "[a]n insurance policy is a contract between the parties and should be construed using the general rules of interpretation of contracts set forth in the Civil Code." *Huggins v. Gerry Lane Enters.*, 957 So.2d 127, 129 (La.2007). As such, each provision "must be interpreted in light of the other provisions so that each is given the meaning suggested by the contract as a whole." LA. CIV.CODE art.2050. Any ambiguity that remains after applying normal cannons of contract interpretation "is to be construed against the insurer and in favor of coverage." *Huggins*, 957 So.2d at 129.

At the heart of the present case is the contractual provision allowing Berk–Cohen to recover its lost business income. Under the policy, lost income includes "[t]he likely Net Income of the business if no physical loss or damage had occurred, *but not* any Net Income that would likely have been earned as a result of ... favorable business conditions caused by the impact of the Covered Cause of Loss ...." (emphasis added). The "Covered Cause of Loss" in this case is wind. Consequently, Berk–Cohen may not recover for lost business income as a result of wind damage suffered by customers and competing businesses. On the other hand, any increase in customers' demand or reduction in competitors' supply due to flooding at other properties is a permissible factor in calculating lost business income.

Landmark would employ the policy's flood exclusion, which bars recovery for "damage caused directly or indirectly by Flood," to reach the opposite conclusion. But this reading extends the flood exclusion beyond its function. By its own terms, the flood exclusion applies to "all coverage parts" of the policy. If coverage is permissible—and Landmark does not deny that the policy covers wind damage—then the flood exclusion has nothing further to say, and the only remaining issue is calculation of damages. The policy expressly permits that calculation to consider favorable business conditions. We decline to use a limitation on coverage to alter the calculation of damages for a covered loss.

The district court's reading of the insurance policy harmonizes the two contested provisions—*i.e.*, coverage for lost business income and the flood exclusion—and honors the *Huggins* rule favoring broad coverage.

B. Statutory Penalties

[2] Louisiana law authorizes penalties against an insurer that fails to pay claims within 30 days of a demand letter and written proof of loss, "when such failure is found to be arbitrary, capricious, or without probable cause...." LA.REV.STAT. ANN. § 22:1892(B)(1) (2009). The penalty is "fifty percent of the difference between the amount paid or tendered and the amount found to be due as well as reasonable ***271** attorney fees and costs." [FN1] *Id.* This is a penalty statute which, according to Louisiana law, must be "strictly construed." *La. Bag Co. v. Audubon Indem. Co.*, 999 So.2d 1104, 1120 (La.2008). The penalty does not apply "when there is a reasonable and legitimate question as to the extent and causation of a claim...." *Id.* at 1114. In *Louisiana Bag*, the Louisiana Supreme Court assessed penalties against an insurer that refused to pay the uncontested portion of a claim and refused coverage for lost inventory. On both issues, the court held that no reasonable uncertainty existed as to the insurer's obligation to pay, making its refusal arbitrary and without probable cause. *Id.* at 1116.

FN1. An earlier version of the statute fixed damages at 25% of the unpaid amount and did not allow a plaintiff to recover attorney's fees. LA.REV.STAT. ANN. § 22:658 (B)(1) (2004). Landmark argues that the earlier version of the statute should control this case. Because we find no bad faith in Landmark's interpretation of its policy, we need not reach the issue whether the earlier or later version of the statute applies.

****3** The present case is unlike *Louisiana Bag.* The scope of the flood exclusion, with its reference to all damage "caused directly or indirectly" by flooding, is susceptible to different interpretations. Landmark was therefore neither arbitrary nor capricious in refusing to compensate Berk–Cohen based on favorable business conditions arising from post-Katrina flooding. Landmark also distanced itself from the insurer in *Louisiana Bag* by paying over $20 million on the undisputed portions of Berk–Cohen's claims. *See French v. Allstate Indem. Co.*, 637 F.3d 571, 585 (5th Cir.2011) (interpreting *Louisiana Bag* as creating a rule in favor of penalties when an insurer fails to pay the undisputed amount due). Because this case is distinguishable from *Louisiana Bag,* we follow our long line of precedent refusing to assess statutory penalties where an insurer makes a good-faith error in interpreting its policy. *Morey v. W. Am. Specialized Transp. Servs.*, 968 F.2d 494, 499 (5th Cir.1992) ("This Court, however, has taken the position that an unfavorable judgment does not automatically subject an insurer to penalties under La.R.S. § 22:658."); *Saavedra v. Murphy Oil U.S.A., Inc.*, 930 F.2d 1104, 1111 (5th Cir.1991) ("Even though we disagree with the district court ..., we conclude that [the insurer's] denial was nevertheless not 'arbitrary or capricious.' "); *Woods v. Dravo Basic Materials Co.*, 887 F.2d 618, 623 (5th Cir.1989) ("[I]t is not apparent from the statute that the Louisiana legislature intended insurers to pay penalties whenever they err in their interpretation of coverage."). Following *Louisiana Bag,* this court has reaffirmed this view on similar facts. *Seacor Holdings, Inc. v. Commonwealth Ins. Co.*, 635 F.3d 675 (5th Cir.2011). Penalties were unwarranted in *Seacor* because the insurer "promptly paid ... over $4 million to cover undisputed damages and looked to judicial assistance to resolve disputes that bore on [other policy provisions]." *Id.* at 685. The same pattern of payment followed by good-faith litigation has unfolded in this case. We therefore follow this court's precedent in refusing to impose penalties based on interpretive error alone.

Because Landmark was not arbitrary or lacking probable cause to believe that its contract with Berk–Cohen excluded lost income resulting from flooding in other buildings, the district court should not have assessed statutory penalties against Landmark.[FN2]

FN2. Landmark argues in its briefs that the district court erred in imposing prejudgment interest on the penalties assessed. Because we hold that penalties are inappropriate in this case, the question of how to calculate interest on the same is moot. In all other respects, the district court's calculation of damages is correct.

***272 Conclusion**

The insurance policy between Berk–Cohen and Landmark excludes coverage for flood damages at the Forest Isle property. The flood exclusion does not, however, prevent Berk–Cohen from recovering lost business income due to the favorable business conditions arising from flood damage to other buildings. On this issue, we AFFIRM the district court. We REVERSE, however, on the assessment of statutory damages against Landmark.

AFFIRMED IN PART AND REVERSED IN PART.

C.A.5 (La.),2011.
Berk-Cohen Associates, L.L.C. v. Landmark American Ins. Co.
433 Fed.Appx. 268, 2011 WL 2893019 (C.A.5 (La.))

Briefs and Other Related Documents (Back to top)

• 2011 WL 286275 (Appellate Brief) Reply Brief on Behalf of Appellant Landmark American Insurance Company (Jan. 10, 2011) Original Image of this Document (PDF)
• 2011 WL 494434 (Appellate Brief) Reply Brief on Behalf of Appellant Landmark American Insurance Company (Jan. 10, 2011) Original Image of this Document (PDF)
• 2010 WL 5649276 (Appellate Brief) American Insurance Association's Amicus Curiae Brief in Support of Defendant-Appellant Landmark American Insurance Company and in Support of Reversal of the District Court's Judgment Awarding Bad Faith Penalties (Dec. 29, 2010) Original Image of this Document (PDF)
• 2010 WL 5649278 (Appellate Brief) Original Brief on Behalf of Appellee Berk-Cohen Associates, L.L.C. (Dec. 23, 2010) Original Image of this Document (PDF)
• 2010 WL 5778068 (Appellate Brief) Original Brief on Behalf of Appellee Berk-Cohen Associates, L.L.C. (Dec. 23, 2010) Original Image of this Document (PDF)
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• 2010 WL 5778066 (Appellate Brief) Original Brief on Behalf of Appellant Landmark American Insurance Company (Nov. 22, 2010) Original Image of this Document (PDF)
• 10-30916 (Docket) (Sep. 24, 2010)

Judges, Attorneys and Experts(Back to top)

Judges | Attorneys | Experts

Judges

• Barksdale, Hon. Rhesa Hawkins
United States Court of Appeals, Fifth Circuit
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• Block, Hon. Frederic
United States District Court, Eastern New York
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Litigation History Report | Judicial Motion Report | Judicial Reversal Report | Judicial Expert Challenge Report | Profiler

• Jones, Hon. Edith Hollan
United States Court of Appeals, Fifth Circuit
New Orleans, Louisiana 70130
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• King, Hon. Carolyn Dineen
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958 F.Supp. 594
(Cite as: 958 F.Supp. 594)

Motions, Pleadings and Filings

Judges and Attorneys

United States District Court,
S.D. Florida,

West Palm Beach Division.

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DICTIOMATIC, INC., a Florida corporation, and Domingo Linale, an individual, Plaintiffs,
v.
UNITED STATES FIDELITY & GUARANTY COMPANY, a Maryland corporation, Defendant.

Nos. 93–2123–CIV, 94–1692–Civ.
Jan. 21, 1997.

Insured developer of hand-held electronic translators sued its insurer for breach of contract in connection with insured's claim for business interruption coverage following hurricane that forced insured to close its Florida office for three weeks. Insurer brought declaratory judgment action against insured. Following consolidation of actions and trial, the District Court, Paine, J., held that since evidence established that insured's lack of sales resulted from factors other than hurricane, insured was not entitled to business interruption coverage.

Ordered accordingly.

West Headnotes

[1] Insurance 217 ⚿2163(1)

217 Insurance
217XVI Coverage—Property Insurance
217XVI(A) In General
217k2139 Risks or Losses Covered and Exclusions
217k2163 Business Interruption; Lost Profits
217k2163(1) k. In General. Most Cited Cases
(Formerly 217k177)

"Period of restoration" applicable to insured's post-hurricane claim for business interruption coverage began on date of direct physical loss or damage caused by the hurricane and ended 21 days later when insured was back on premises and was "up and running."

[2] Insurance 217 ⚿2201

217 Insurance
217XVI Coverage—Property Insurance
217XVI(A) In General
217k2196 Evidence
217k2201 k. Weight and Sufficiency. Most Cited Cases
(Formerly 217k508.1(3))

Evidence established that insured's lack of sales of hand-held electronic translators resulted from factors other than the hurricane that forced it to close its Florida office for three weeks, and thus insured was not entitled to business interruption coverage; evidence showed that insured suffered losses before hurricane and that insured's projections for future income were contradictory, often inflated, and not reasonably certain.

[3] Insurance 217 ⚿2199

217 Insurance
217XVI Coverage—Property Insurance
217XVI(A) In General
217k2196 Evidence
217k2199 k. Burden of Proof. Most Cited Cases
(Formerly 217k508.1(1))

Insured had burden to prove entitlement to business interruption coverage and amount of such entitlement.

[4] Insurance 217 ⚿2179(1)

217 Insurance
217XVI Coverage—Property Insurance

217XVI(A) In General
217k2173 Amount of Damage or Loss
217k2179 Business Interruption; Lost Profits
217k2179(1) k. In General. Most Cited Cases
(Formerly 217k507)

Insured could recover on claim for business interruption coverage only to extent that it actually lost sales or business during periods when business premises and business property were not functioning.

[5] Insurance 217 ⚿2163(1)

217 Insurance
217XVI Coverage—Property Insurance
217XVI(A) In General
217k2139 Risks or Losses Covered and Exclusions
217k2163 Business Interruption; Lost Profits
217k2163(1) k. In General. Most Cited Cases
(Formerly 217k507)

Business interruption insurance is intended to return to insured's business the amount of profit it would have earned had there been no interruption of business or suspension of operations.

[6] Insurance 217 ⚿2179(1)

217 Insurance
217XVI Coverage—Property Insurance
217XVI(A) In General
217k2173 Amount of Damage or Loss
217k2179 Business Interruption; Lost Profits
217k2179(1) k. In General. Most Cited Cases
(Formerly 217k507)

Business interruption insurance may not be used to put insured in better position than it would have occupied without interruption.

[7] Insurance 217 ⚿2179(1)

217 Insurance
217XVI Coverage—Property Insurance
217XVI(A) In General
217k2173 Amount of Damage or Loss
217k2179 Business Interruption; Lost Profits
217k2179(1) k. In General. Most Cited Cases
(Formerly 217k508.1(3))

Insured's failure to prove actual monetary loss as result of suspensions of operations due to hurricane constituted failure to prove prerequisite to recovery on its claim for business interruption coverage.

[8] Insurance 217 ⚿2163(1)

217 Insurance
217XVI Coverage—Property Insurance
217XVI(A) In General
217k2139 Risks or Losses Covered and Exclusions
217k2163 Business Interruption; Lost Profits
217k2163(1) k. In General. Most Cited Cases
(Formerly 217k507)

Alleged losses associated with insured's failure to produce and sell products that were not even in existence at time of hurricane were merely potential consequential losses and were not, even if proved by preponderance of evidence, compensable under policy's business interruption coverage.

[9] Insurance 217 ⚿2163(1)

217 Insurance
217XVI Coverage—Property Insurance
217XVI(A) In General
217k2139 Risks or Losses Covered and Exclusions
217k2163 Business Interruption; Lost Profits
217k2163(1) k. In General. Most Cited Cases
(Formerly 217k507)

Speculative claim was not within insurance policy's business interruption coverage.

[10] Insurance 217 2163(1)

217 Insurance
217XVI Coverage—Property Insurance
217XVI(A) In General
217k2139 Risks or Losses Covered and Exclusions
217k2163 Business Interruption; Lost Profits
217k2163(1) k. In General. Most Cited Cases
(Formerly 217k507)

If amount of net loss that insured would have incurred had there been no business interruption exceeds amount of normal operating expenses actually incurred, there can be no business interruption coverage.

[11] Insurance 217 2199

217 Insurance
217XVI Coverage—Property Insurance
217XVI(A) In General
217k2196 Evidence
217k2199 k. Burden of Proof. Most Cited Cases
(Formerly 217k508.1(1))

Insured seeking business interruption coverage had burden of proving all continuing normal operating expenses incurred, as well as its expected income during period of restoration.

[12] Damages 115 190

115 Damages
115IX Evidence
115k183 Weight and Sufficiency
115k190 k. Loss of Profits. Most Cited Cases

Under Florida law, although general rule is that anticipated profits of business are too speculative and dependent upon changing circumstances to warrant judgment for their loss, lost profits may be recovered if shown with reasonable degree of certainty.

[13] Damages 115 190

115 Damages
115IX Evidence
115k183 Weight and Sufficiency
115k190 k. Loss of Profits. Most Cited Cases

Under Florida law, satisfactory analysis of lost profits cannot use figures which result in too many variables.

[14] Damages 115 190

115 Damages
115IX Evidence
115k183 Weight and Sufficiency
115k190 k. Loss of Profits. Most Cited Cases

Under Florida law, analysis of lost profits must be based on sufficiently similar business operations and comparable markets.

[15] Damages 115 190

115 Damages
115IX Evidence
115k183 Weight and Sufficiency
115k190 k. Loss of Profits. Most Cited Cases

To recover lost profits under Florida law, there must be ongoing business with established sales record and proven ability to realize profits at established rate.

[16] Damages 115 190

115 Damages
115IX Evidence
115k183 Weight and Sufficiency
115k190 k. Loss of Profits. Most Cited Cases

Under Florida law, proof of actual profits for reasonable time prior to breach is required to establish lost profits.

***595** John J. Pappas, Butler, Burnette & Pappas, Tampa, FL, for defendant.

Joseph R. Buchanan, Wampler, Buchanan & Breen, Miami, FL, for plaintiff.

***596** *FINDINGS OF FACT AND CONCLUSIONS OF LAW*

PAINE, District Judge.

Jurisdiction

This court has jurisdiction over this matter pursuant to 28 U.S.C. § 1332 and 28 U.S.C. § 2201.

Background

Prior to trial, this court bifurcated the bad faith and fraud claims from the breach of contract claims. Thereafter, Dictiomatic's Breach of Contract claims in Case No. 93–2123 (Count I and II) and USF & G's Declaratory Judgment Action in Case No. 94–1692 were tried before the court from December 2, 1996 through December 13, 1996. Upon consideration of all of the evidence presented in the Plaintiff's case in chief, as well as the applicable authority, pursuant to Federal Rule of Civil Procedure 52(c), the court concluded at the end of Plaintiff's case in chief that the Plaintiff failed to carry its burden of proof by a preponderance of the evidence that Dictiomatic incurred expenses or suffered actual loss of business income during any of the proposed restoration periods [FN1] as a result of the suspension of operations due to Hurricane Andrew. Pursuant to Rule 52(c), the court enters the following Findings of Fact and Conclusions of Law in support of its *ore tenus* ruling. Because the court found that Plaintiff failed to carry its burden of proof, the court makes no further findings of fact as to any of the Defendant's affirmative defenses, including the defense of fraud.

FN1. At trial, the Plaintiff contended that the restoration period began on August 24, 1992, the date of the hurricane and ended in December, 1993, thirty days plus twelve months after Plaintiff regained possession of the damaged premises. The Defendant contended that the restoration period began on August 24, 1992 and ended, at the latest, on October 15, 1992, thirty days after Plaintiff regained access to the damaged premises, providing Plaintiff could prove loss of business income during the thirty days immediately following the date Plaintiff regained possession of the damaged premises.

FINDINGS OF FACT

1. Dictiomatic, which was incorporated in 1987, was a developer of consumer electronic products. Domingo Linale ("Linale") was the founder, president and sole shareholder of the company.

2. From June, 1989 to 1991, Dictiomatic enjoyed economic success with the development and sale of its Hexaglot T–427 translator product, a hand held unit that offered cross translation of words into six different languages. From 1989–1991, over 120,000 T–427 units were sold through distributors in markets outside of the United States, mostly in Europe.

3. In 1990, Dictiomatic began developing its second generation of hand-held multilingual electronic translators, the Hexaglot T–150. The T–150 offered translation of five basic languages (English, Spanish, French, German, and Italian) and one additional language as selected by distributors to open up new markets, from among Turkish, Icelandic, Portuguese, Swedish or Hungarian. Approximately 80,000 T–150 units were sold in 1990 and 1991. [FN2]

FN2. The court makes these approximate findings in light of the fact that the Plaintiff's record keeping for 1989–1992 did not reveal accurate, reliable figures for sales, income and expenses.

4. In late 1990 and early 1991, Dictiomatic began development of its third generation of hand-held electronic translators, the T–1200 and T–1500.

Because Dictiomatic sold the right to use the name "Hexaglot," the T–1200 and T–1500 products did not carry the same name as Dictiomatic's prior successful products. Further unlike the prior products, the T–1200 and T–1500 were the first generation of talking translators. In addition to providing translation of a word in writing, the user heard the word or phrase pronounced via a built in speaker. The in-court demonstration of the product revealed that the sound quality of the speaker was poor and that the pronunciation was not clearly discernible. The T–1200 was an English to Japanese translator. The T–1500 series contained the T–1501 which included English, French, and Spanish; the T–1502 which included English, French and Italian, and the T–1503 which included English, French and ***597** German. These products had a retail list price of $199. Like the prior Dictiomatic products, the T–1200 and T–1500 products were manufactured by Singatronics, Ltd. of Singapore. In the Fall of 1991, Singatronics manufactured 20,000 of these products.

5. At a consumer electronics show in the Fall of 1991, Linale learned that the distributors to whom he presented the T–1200 and T–1500 series product for sale in Europe and Latin America were unhappy with it. It was not a six language translator as Linale had promised when he presented a preliminary proof of concept at a prior show in January, 1990. The distributors also concluded that the product, which contained only 2,700 words per language, was not sufficient to serve educational needs. Because the buyers had no confidence in their ability to sell the T–1200 and T–1500 products, they did not want to buy the product which Dictiomatic had already developed and manufactured. Accordingly, the method of distribution and sale previously employed by Dictiomatic to sell its Hexaglot T–427 and T–150 products was not successful. By mid–1992, Dictiomatic had approximately 17,000 T–1200 and T–1500 units stored at Singatronics and was incurring monthly interest charges thereon. All of Dictiomatic's projections of sales for the T–1200 and T–1500 from the time it was introduced through August, 1992, were wrong and, due solely to the lack of demand for the product at the stated price, the anticipated sales of this product were never realized during the period through August 24, 1992.

6. Due to only minimal sales of the T–1200 and T–1500 and the debt from the product development and storage of the unsold products, by mid–1992, Dictiomatic was not receiving any business income and only minimal revenue from sales. In fact, in order to pay operating expenses and overhead, Dictiomatic was relying on capital investments from Warren M. Ross, a business man from New Jersey who, in reliance upon Linale's projections of sales, invested $100,000 in Dictiomatic through August, 1992 in order to keep Dictiomatic operating.

7. Dictiomatic admits that there was never a proven successful market for the T–1200/1500. It had more than 17,000 T–1200/1500 talking translators in inventory and ready for sale for more than ten (10) months before Hurricane Andrew occurred, and Dictiomatic admits that its sales prior to August 24, 1992 were minimal; supply outweighed demand for the product. Dictiomatic admits that the market simply was not interested in purchasing its T–1200/1500 talking translators from October 1991 through August 23, 1992 (the day before Hurricane Andrew hit). In the summer of 1992, in an attempt to move the T–1200 and T–1500 products which were largely rejected by the intended European market, from Singatronics, Dictiomatic decided to target the sale of this disappointing product to American overseas travelers at the time they purchased their ticket to travel. Having decided that the most direct form of marketing the product to this consumer market was through travel agencies and computer on-line reservation systems, Dictiomatic was, at the time of the Hurricane, implementing a new way of marketing its only product, the T–1200/1500 talking translators. Dictiomatic hoped that the new marketing system would have resulted in substantial sales before December 31, 1992. Dictiomatic's new marketing plan consisted of a com-

bination of advertisements in newspapers, trade journals, an endorsement by the American Society of Travel Agents (ASTA), and a program instituted with travel agencies and their travel agents throughout the United States where these agents could receive a $40 commission for each sale of a T–1200/1500 talking translator to a traveler they persuaded to buy over the telephone, and an on-line computer reservation system where such sales could be communicated to Dictiomatic. Additionally, prior to the Hurricane, Dictiomatic sought and ultimately received the endorsement of ASTA, another element in its planned implementation of the new marketing scheme. There was no evidence presented that such an endorsement indicated any kind of quality evaluation of the product or any kind of prediction of likelihood of sales. In preparation for the ASTA convention in September, 1992, Dictiomatic had prepared artwork for display at the convention in an attempt to decorate its display booth and attract people to examine ***598** the product. Although Dictiomatic hoped and projected that the new marketing system would create sales of the T–1200 and T–1500 products, there was no competent corroborative evidence presented that this type of telephone marketing system was ever successful in selling high-priced electronic products. On August 10, 1992, the first of these reservation systems was installed. The second reservation system was to be installed on August 24, 1992.

8. While the Plaintiff presented evidence through Linale that Dictiomatic's future research and development of new products was dependant upon the revenue expected to be realized from the sales of the T–1200 and T–1500 products to the newly targeted American overseas traveler, the court finds that such profits were far too speculative and not sufficiently established to make this a reasonable expectation. First of all, at the time the new marketing strategy was implemented, the T–1200 and T–1500 products were not new products. The Plaintiff's own evidence established that the shelf-life of even new technology is limited. Second, this product was proven to be a poor seller even at the time of its advent. Third, although the exact cost of the product was between $91 and $150,[FN3] in order to effect the new promotional scheme, Dictiomatic was selling many of the few products it actually sold at an amount at or under the actual cost of the product, with the hope that this loss-leader would generate future sales. In addition, the payment of commission to the selling agent further eroded the expected profits from the T–1200 and T–1500 products, thereby making it less likely that Dictiomatic would realize significant profits, even in the event this alternate marketing scheme was successful. Accordingly, to the extent that Dictiomatic's future and its claim of loss of business income and profits relied upon the sale of the T–1200 and T–1500 products through the new marketing system, the court finds that Dictiomatic failed to prove by a preponderance of the evidence that the T–1200 and T–1500 products would have sold after August 24, 1992, if only the hurricane and USF & G's subsequent denial of its claim had not occurred.

FN3. Because of inconsistencies in Plaintiff's proof and sloppy financial records, the court is unable to determine the exact cost of the product. However, testimony from Plaintiff's own witnesses and documents reveal varying determinations of cost somewhere in this monetary range.

9. The evidence establishes that on August 23, 1992, Dictiomatic was a company in debt with *de minimis* business income, with an overstocked inventory of undesirable products located in Singapore, attempting to posture to sell these products through a speculative marketing scheme that had never proved to be successful in selling electronic products. Further, it had no more than $5,000 cash on hand and was carrying substantial debt in excess of one million dollars[FN4] as a result of its investment in the development and manufacture of the T–1200 and T–1500 products and the subsequent lackluster sales thereof.

FN4. Again, due to inconsistencies in

> Plaintiff's proof and sloppy record keeping, the court is unable to determine the exact amount of debt. The evidence is clear and consistent, however, that at the time of the Hurricane the Plaintiff's debt was substantial and was in an amount in excess of $1,000,000.

10. Meanwhile, in response to the negative reaction of his European and Latin American distributors to the limited language and vocabulary of the T–1200 and T–1500 products, in 1991 Dictiomatic began research and development of the T–3000, a talking translator with a 6,000 word vocabulary. Linale believed but did not prove through corroborative, objective evidence, that if he could present a prototype product to distributors by mid–October, they would contract through letters of credit for the purchase of the T–3000 for Christmas season sales in 1992. Dictiomatic failed to produce any contract or letter of intent, or witness or other competent evidence to corroborate Linale's belief that these distributors would finance the production of the T–3000 units through letters of credit. Additionally, the evidence is clear that prior to August 24, 1992, Dictiomatic did not have sufficient capital available to it to finance the continuing development, manufacture, or marketing of the T–3000.

***599** 11. On or about August 24, 1992, Hurricane Andrew damaged the Datran Center in South Miami, Florida, thereby denying Dictiomatic access to its leasehold office space, located on the fourth floor, until September 4, 1992. The insured premises had phones, fax machine, and a single on-line travel reservation computer system. Dictiomatic was not a manufacturer of its products and neither its production facilities, which were independently contracted out to Singatronics in Singapore, nor its inventory, which was also located in Singapore, was damaged or interrupted by Hurricane Andrew.

12. By September 14, 1992, Dictiomatic was back in operation at the described insured premises. By October, 1992, Dictiomatic had all five reservation systems on line and operating. Notwithstanding the fact that Dictiomatic was back in operation and on-line with the new marketing scheme, the implementation of which was delayed only 1 month by the Hurricane, Dictiomatic sold *de minimis* numbers of the T–1200 and T–1500 through the end of the year. Dictiomatic's original business interruption claim included alleged lost sales of the T–1200/1500 from August 24 through December 31, 1992. Dictiomatic claims that but for Hurricane Andrew, it would have sold more than 7,250 T–1200/1500 talking translators resulting in sales of $1,266,791 during these four (4) months. Dictiomatic failed to prove that it would have realized these sales or any profits sufficient to fund the production of the T–3000. The court finds that Dictiomatic's failure to sell the T–1200 and T–1500 products after August 24, 1992, was not the result of Hurricane Andrew. Rather, the lack of sales was due to the fact that, just as before the Hurricane, these products were not in demand and the telephone marketing scheme was not an efficient way to sell high priced electronic products.[FN5]

> FN5. Dictiomatic itself contends in this law suit that the unavailability of artwork at a convention booth hampered its ability to motivate sales of these products even though the targeted convention group was otherwise able to see, hold, and operate the product itself. At the same time, Dictiomatic contends that but for the Hurricane which caused only a one-month delay in getting started with its new marketing scheme, it would have sold the T–1200 and T–1500 products over the telephone when the potential buyer cannot even see the product itself. These contentions are essentially at odds with one another and reflect negatively upon Dictiomatic's overall credibility in this law suit.

13. Notwithstanding the hurricane, Linale attended the ASTA convention in Cairo, Egypt in September, 1992, as previously planned, to present

the T–1200 and T–1500 products to travel agents to motivate them to sell the product over the telephone. Dictiomatic contends that the absence of the artwork, which was prepared to decorate its booth at the ASTA convention and destroyed in the hurricane, hindered Dictiomatic's ability to create excitement among the travel agents to sell the T–1200 and T–1500 products. The court finds that Dictiomatic had the actual product at the convention and could have demonstrated the product itself, and that the lack of sales after the convention was not due to the loss of the artwork but, rather, was due to the poor quality, high price, and ongoing lack of demand for these products, all of which predated the hurricane. Specifically, the court finds that the loss of the artwork as a result of the hurricane did not cause Dictiomatic loss of business income for purposes of entitlement to compensation under the insurance contract with USF & G; the Plaintiff simply did not prove that but/for the loss of the artwork at the convention, it would have enjoyed sales of the T–1200 and T–1500 which it had not experienced in the entire time the products were on the market before the hurricane. Dictiomatic admitted at trial that during October, November, December 1992, and January, February, and March 1993, telephone lines were up, advertisements were out, numerous travel agencies and travel agents were aware of the new marketing program with product in hand, and, as before, there were more than 17,000 of the T–1200/1500 talking translators in inventory, and sales were minimal.

14. Before the end of September, USF & G paid Dictiomatic its business personal property limits of $50,000.

15. Although Dictiomatic contends that its business personal property damages actually***600** exceeded $100,000, it admitted at trial that it never repaired or replaced any of its business personal property for which the insurance contract limits were tendered.

16. At trial, Dictiomatic claimed that but/for hurricane Andrew, it would have sold 30,000 T–3000 “talking translators” resulting in $3,450,000 in sales before December 31, 1992. The court finds that the Plaintiff has failed to establish by a preponderance of the evidence that but/for hurricane Andrew, the T–3000 would have been completed, manufactured, advertised, and sold prior to the end of the year. The evidence falls woefully short of establishing with any requisite preponderance of proof, that but/for hurricane Andrew, sales of the T–3000, a product that did not exist on August 24, 1992, would have reached 30,000 product sales in the short four months following the hurricane.

17. It is undisputed that at the time hurricane Andrew hit South Florida, the T–3000 did not exist. It is further undisputed that after hurricane Andrew, neither Dictiomatic nor anyone else ever manufactured the T–3000 or made any further effort to manufacture this product which, Dictiomatic contends but/for hurricane Andrew, was to be a source of great revenue for this fledgling company. Dictiomatic also contended at trial, but failed to prove, that the loss of 150 reel-to-reel tapes with English and other languages in a cardboard box on the floor in it's office at The Datran Center during hurricane Andrew, caused delay in development and production of the T–3000 which resulted in loss of sales and business income which is compensable under the business interruption insurance contract. Dictiomatic alleges that these tapes, which allegedly had been in production for months and were an early step in the manufacturing of the T–3000, were damaged by the windblown rain from hurricane Andrew. However, although Dictiomatic alleges that by August 24, 1992, approximately 150 reel to reel tapes had been recorded in French, Spanish and English, and had been edited and ready for delivery to Singatronics to commence the electronic digitization and compression process, there was no competent, objective, corroborative evidence presented to prove this allegation. The tapes themselves, which survived the hurricane and remained on Dictiomatic's premises immediately thereafter, were discarded by the Plaintiff, thereby considerably

handicapping its ability to prove the existence and completion of these tapes on August 24, 1992. Aside from an invoice from a single recording studio which itself is questionable in light of the lack of sufficient identifying address and phone number thereon, there was no direct evidence presented by any sufficiently credible document or non-biased witness who might have participated in the recording of the tapes or any witness from any of the recording studios. The Plaintiff failed to establish by requisite proof that the tapes which were located on the premises of its Dade County office in 1992 were complete and ready for delivery to Singatronics in early September, 1992. Further, although Dictiomatic had projected that Singatronics could accomplish the manufacture of these products in time for delivery for the Christmas season, the court finds that this projection was speculative in light of the fact that Dictiomatic's projected time equation had not afforded any time for delay. It was unreasonable and speculative for Dictiomatic to assume that Singatronics could manufacture this sophisticated product in time for worldwide distribution and sale in advance of the Christmas holiday when in the past the manufacture of such sophisticated talking translators had been handicapped by delay. Furthermore, despite Dictiomatic's contention that it expected the T–3000 to be on sale for the Christmas season in 1992, as of August 24, 1992, Dictiomatic had not placed any advertisement for sale or evidence of any marketing plan for sale of the T–3000 which was to take place before the end of the year. Finally, if in fact the 150 tapes were complete and essential to the future success of the company, it was unreasonable for the Plaintiff to dispose of the tapes prior to seeking any expert examination of the tapes and conclusion that the tapes were, in fact, rendered unusable by hurricane damage. Without such evidence, it is impossible for the Plaintiff to carry its burden and, in fact, the court finds that it did not carry its burden of proof that the hurricane caused damage to the tapes which in turn caused loss of business***601** income to Dictiomatic from sales of the never-produced T–3000.

18. Although Dictiomatic contends these tapes would have taken no more than two months to recreate, at no more than a cost of $60,000, and although after the hurricane Dictiomatic received $50,000 from USF & G, $100,000 in loans, and more than $300,000 from the Small Business Administration, it never even attempted to repair or replace any of these tapes in order to proceed with the production of the T–3000. This is true although Dictiomatic was fully operational in September and did not cease doing business until June 1993.

19. The Plaintiff failed to prove that prior to hurricane Andrew, it had taken any action which thereafter was hindered by hurricane Andrew, to produce yet another non-existent product, the palm top computer. The court finds that Plaintiff's projection of sales of the palm top are far too speculative to establish that Plaintiff lost any business income from the lack of development, production, and sales, as a result of hurricane Andrew.

20. In October, 1992 Dictiomatic submitted a written claim to USF & G for business interruption loss of $1,360,747 for alleged lost profits and earned continuing expenses incurred from August 24 through December 31, 1992. It later supplemented its claim to account for alleged loss of business income through June, 1993, when it went out of business.

21. At Defendant's request, during the processing of the claim the Plaintiff provided information in the form of summaries of projected sales and sworn statements under oath. However, the information provided was later supplemented and even completely altered from time to time during the processing of the claim, which delayed USF & G's decision as to whether a valid business interruption claim existed. Additionally, the evidence shows that the summaries of past profits the Plaintiff provided to the Defendant in support of its claims of past sales were not accurate inasmuch as bookkeeping journals and ledgers to support the summaries were not diligently kept current on a regular basis. In sum, during processing of the claim, Dic-

tiomatic never provided USF & G with consistent, reliable information which might have supported its claim for loss of business income. The court finds that the Defendant USF & G acted timely and reasonably in reaching its decision in June, 1993, to deny Plaintiff's claim for this classification of contractual benefits under the policy.

Conclusions of Law

1. The insurance contract at issue between the parties states in pertinent part:

> 5. Business Income and Extra Expense.
>
> a. Business Income. We will pay the actual loss of "business income" you sustain due to the necessary suspension of your "operations" during the "period of restoration." The suspension must be caused by direct physical loss of or damage to Covered Property described in paragraph 1. above and result from any Covered Cause of Loss.
>
> We will also pay for loss of "business income" sustained immediately after the "period of restoration" but not to exceed 30 consecutive days.
>
> We will only pay for loss of "business income" that occurs within 12 consecutive months after the date of direct physical loss or damage.
>
> C. Exclusions
>
> * * * * * *
>
> 2. We will not pay for loss or damages caused by or resulting from any of the following:
>
> * * * * * *
>
> c. Consequential Loss. Delay, loss of use or loss of market.
>
> * * * * * *
>
> Section V—Definitions
>
> 1. "Business income" means:
>
> a. Net income (net profit or loss before income taxes) that would have been earned or incurred; and
>
> b. Continuing normal operating expenses incurred, including payroll.
>
> * * * * * *
>
> ***602** 3. "Operations" means your business activities occurring at the described premises.
>
> 4. "Period of restoration" means the period of time that:
>
> a. Begins with the date of direct physical loss or damage caused by or resulting from any Covered Cause of Loss at the described premises; and
>
> b. Ends on the day the property at the described premises could be repaired, rebuilt or replaced with reasonable speed and similar quality.

[1] 2. Under the terms of the policy, Dictiomatic is entitled to recover its actual loss of business income during the period of time necessary to restore the business operation. The insurance policy defines the period of restoration as beginning on the date of the direct physical damage to the business premises and ending on the date when the business premises should have been repaired, rebuilt or replaced with reasonable speed and similar quality. Therefore, Dictiomatic is only entitled to its loss of business income for the period of time beginning on the date of the occurrence of the physical damage to its property (August 24, 1992) and ending on the date when the business was back in operation (no later than September 14, 1992). *Manduca Datsun Inc. v. Universal Underwriters Ins. Co.*, 106 Idaho 163, 676 P.2d 1274 (Ct.App.1984); *Berkeley Inn, Inc. v. Centennial Ins. Co.*, 282 Pa.Super. 207, 422 A.2d 1078 (1980); *Hampton Foods, Inc. v. Aetna Casualty and Surety*, 787 F.2d 349 (8th

Cir.1986); *Goetz v. Hartford Fire Ins. Co.,* 193 Wis. 638, 215 N.W. 440 (1927); *Steel Products Co., Inc. v. Millers National Ins. Co.,* 209 N.W.2d 32 (Iowa 1973); *Congress Bar & Restaurant, Inc. v. Transamerica Ins. Co.,* 42 Wis.2d 56, 165 N.W.2d 409 (1968); *Dileo v. United States Fidelity & Guaranty Company,* 109 Ill.App.2d 28, 248 N.E.2d 669, 675 (1969). In light of the findings of fact and the language of the applicable contract, the court concludes as a matter of law that the period of restoration began on August 24, 1992, the date of the direct physical loss or damage caused by hurricane Andrew, and ended on September 14, 1992, the date on which Dictiomatic was back on the premises and "up and running." Further, under the terms of the contract, the restoration period may be extended for a time up to 30 days if Dictiomatic proved that it actually sustained loss of business income as a result of the hurricane, during the time immediately after the period of restoration ended. Because Dictiomatic failed to establish loss of business income for any time immediately after September 14, 1992, the date it was again operational at its Miami office, the could concludes as a matter of law that the restoration period as defined in the contract should not be extended beyond September 14, 1992, the date the business was fully back in operation.

[2] 3. To recover under the business interruption policy in this case, Dictiomatic must prove that it sustained damage to property that is covered under the policy and that the damage was caused by a covered cause of loss, that there was an interruption to the business ("suspension of operations") which was caused by the property damage, and that there was an actual loss of business income during the period of time necessary to restore the business and that the loss of income was caused by the interruption of the business and not by some other factor or factors. *Ramada Inn Ramogreen, Inc. v. Travelers Indemnity Co.,* 835 F.2d 812 (11th Cir.1988); *Supermarkets Operating Company v. Arkwright Mutual Ins. Co.,* 257 F.Supp. 273, 277 (E.Dist.Penn.1966); *Manduca Datsun, Inc. v. Universal Underwriters Ins. Co.,* 106 Idaho 163, 676 P.2d 1274 (Ct. of Appeal 1984); *Berkeley Inn, Inc. v. Centennial Ins. Co.,* 282 Pa.Super. 207, 422 A.2d 1078 (1980); *Royal Indemnity Co. v. Little Joe's Catfish Inn, Inc.,* 636 S.W.2d 530 (Texas Ct. of App.1982); *Northwestern States Portland Cement Co. v. Hartford Fire Ins. Co.,* 360 F.2d 531 (8th Cir.1966); *Continental Ins. Co. v. DNE Corp.,* 834 S.W.2d 930 (Tenn.1992); *Great Northern Oil Co. v. St. Paul Fire & Marine Ins. Co.,* 303 Minn. 267, 227 N.W.2d 789 (1975). In the present case, Dictiomatic proved that it sustained property damage from hurricane Andrew, and that the damage caused suspension of operations for 20 days. However, Dictiomatic failed to prove that but/for the 20 day suspension of operations, ***603** it sustained an actual loss of business income which was caused solely by the hurricane and not by other factors. The evidence establishes that the lack of sales resulted from factors other than the hurricane, or the damage therefrom.

4. If Dictiomatic either did not suffer a loss of business income during the period of interruption or if the loss was due to some reason other than the interruption, USF & G is not liable for business interruption proceeds under the insurance policy because its duty to pay never arose. *Ramada Inn Ramogreen, Inc. v. Travelers Indemnity Co.,* 835 F.2d 812 (11th Cir.1988); *Supermarkets Operating Company v. Arkwright Mutual Ins. Co.,* 257 F.Supp. 273, 277 (E.Dist.Penn.1966); *Manduca Datsun, Inc. v. Universal Underwriters Ins. Co.,* 106 Idaho 163, 676 P.2d 1274 (Ct. of Appeal 1984) ; *Berkeley Inn, Inc. v. Centennial Ins. Co.,* 282 Pa.Super. 207, 422 A.2d 1078 (1980); *Royal Indemnity Co. v. Little Joe's Catfish Inn, Inc.,* 636 S.W.2d 530 (Texas Ct. of App.1982); *Northwestern States Portland Cement Co. v. Hartford Fire Ins. Co.,* 360 F.2d 531 (8th Cir.1966); *Continental Ins. Co. v. DNE Corp.,* 834 S.W.2d 930 (Tenn.1992); *Great Northern Oil Co. v. St. Paul Fire & Marine Ins. Co.,* 303 Minn. 267, 227 N.W.2d 789 (1975).

[3][4] 5. It is Dictiomatic's burden to prove

Dictiomatic's entitlement to business interruption insurance proceeds under the insurance policy and the amount of such entitlement. *Royal Indemnity Co. v. Little Joe's Catfish, Inc.*, 636 S.W.2d 530 (Tex.App.1982); *Howard Stores Court v. Foremost Insurance Company*, 82 A.D.2d 398, 441 N.Y.S.2d 674 (S.Ct.App.Div.1981); *National Fire Ins. Co. of Hartford v. Hutton*, 396 S.W.2d 53 (Ky.1965); *Cora Pub. Inc. v. Continental Casualty Co.*, 619 F.2d 482 (5th Cir.1980). Dictiomatic 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. *Pennbarr Corp. v. INA*, 976 F.2d 145 (3rd Cir.1992); *Rogers v. American Ins. Co.*, 338 F.2d 240 (8th Cir.1964); *Boyd Motors, Inc. v. Employers Ins. of Wausau*, 880 F.2d 270 (10th Cir.); *Metalmasters of Minneapolis, Inc. v. Liberty Mut. Ins.*, 461 N.W.2d 496 (Minn.App.1990); *Howard Stores Corp. v. Foremost Ins. Co.*, 56 N.Y.2d 991, 453 N.Y.S.2d 682, 439 N.E.2d 397 (1982); *Rothenberg v. Liberty Mut. Ins. Co.*, 115 Ga.App. 26, 153 S.E.2d 447 (1967); *Pacific Coast Engineering Co. v. St. Paul Fire & Marine Ins. Co.*, 9 Cal.App.3d 270, 88 Cal.Rptr. 122 (Cal.Ct.App.1970). Because the Plaintiff presented various, often inflated and contradictory projections of the amount due it under the insurance contract, the Plaintiff failed to prove that it actually lost sales or that it is entitled to a specific sum under the contract, either at trial or to USF & G while it was attempting to process the claim.

[5] 6. Business interruption insurance is intended to return to the insured's business the amount of profit it would have earned had there been no interruption of the business ("suspension of operations"). *Supermarkets Operating Company v. Arkwright Mutual Ins. Co.*, 257 F.Supp. 273, 277 (E.Dist.Penn.1966); *Manduca Datsun, Inc. v. Universal Underwriters Ins. Co.*, 106 Idaho 163, 676 P.2d 1274 (Ct. of Appeal 1984); *Berkeley Inn, Inc. v. Centennial Ins. Co.*, 282 Pa.Super. 207, 422 A.2d 1078 (1980); *Royal Indemnity Co. v. Little Joe's Catfish Inn, Inc.*, 636 S.W.2d 530 (Texas Ct.App.1982); *Northwestern States Portland Cement Co. v. Hartford Fire Ins. Co.*, 360 F.2d 531 (8th Cir.1966); *Continental Ins. Co. v. DNE Corp.*, 834 S.W.2d 930 (Tenn.1992); *Great Northern Oil Co. v. St. Paul Fire & Marine Ins. Co.*, 227 N.W.2d 789 (1975). As one treatise summarizes, "Generally business interruption endorsements are designed to do for the insured what the business itself would have done had no interruption occurred and the interest protected is the right to income generated by an operating business enterprise. 4 Appleman Ins.L. and P. Section 2329. In this case, Dictiomatic failed to prove that but/for hurricane Andrew it would have realized business income which was lost solely as a result of the hurricane. Because Dictiomatic failed to establish that it would have enjoyed income during the time of restoration or immediately thereafter, sufficient to pay normal operating expenses or to generate profits, its claim for compensation under***604** the subject policy must fail as a matter of law.

[6] 7. Business interruption insurance may not be used to put Dictiomatic in a better position than it would have occupied without the interruption. *Supermarkets Operating Company v. Arkwright Mutual Ins. Co.*, 257 F.Supp. 273, 277 (E.Dist.Penn.1966); *Manduca Datsun, Inc. v. Universal Underwriters Ins. Co.*, 106 Idaho 163, 676 P.2d 1274 (Ct. of Appeal 1984); *Berkeley Inn, Inc. v. Centennial Ins. Co.*, 282 Pa.Super. 207, 422 A.2d 1078 (1980); *Royal Indemnity Co. v. Little Joe's Catfish Inn, Inc.*, 636 S.W.2d 530 (Texas Ct. of App.1982); *Northwestern States Portland Cement Co. v. Hartford Fire Ins. Co.*, 360 F.2d 531 (8th Cir.1966); *Continental Ins. Co. v. DNE Corp.*, 834 S.W.2d 930 (Tenn.1992); *Great Northern Oil Co. v. St. Paul Fire & Marine Ins. Co.*, 303 Minn. 267, 227 N.W.2d 789 (1975).

[7] 8. In determining that Dictiomatic failed to prove the amount of the business interruption loss, this Court has considered the previous experience of Dictiomatic before the property damage occurred, as well as its probable future experience and

finds that Dictiomatic's failure to prove an actual monetary loss as a result of the suspensions of operations due to hurricane Andrew constitutes a failure to prove a prerequisite to recovery on its business interruption claim. *Supermarkets Operating Company v. Arkwright Mutual Ins. Co.,* 257 F.Supp. 273, 277 (E.Dist.Penn.1966); *Manduca Datsun, Inc. v. Universal Underwriters Ins. Co.,* 106 Idaho 163, 676 P.2d 1274 (Ct. Appeal 1984); *Berkeley Inn, Inc. v. Centennial Ins. Co.,* 282 Pa.Super. 207, 422 A.2d 1078 (1980); *Royal Indemnity Co. v. Little Joe's Catfish Inn, Inc.,* 636 S.W.2d 530 (Texas Ct.App.1982); *Northwestern States Portland Cement Co. v. Hartford Fire Ins. Co.,* 360 F.2d 531 (8th Cir.1966); *Continental Ins. Co. v. DNE Corp.,* 834 S.W.2d 930 (Tenn.1992); *Great Northern Oil Co. v. St. Paul Fire & Marine Ins. Co.,* 303 Minn. 267, 227 N.W.2d 789 (1975).

9. The court finds that Dictiomatic suffered income losses throughout its entire period of operation immediately prior to the hurricane, and further that there is inadequate proof that Dictiomatic would have achieved profitability during the period of business interruption or immediately thereafter and further that Dictiomatic would have been unprofitable even without the business interruption. Accordingly, as a matter of law, Dictiomatic is not entitled to recover business interruption insurance proceeds under the insurance policy. *Supermarkets Operating Company v. Arkwright Mutual Ins. Co.,* 257 F.Supp. 273, 277 (E.Dist.Penn.1966); *Manduca Datsun, Inc. v. Universal Underwriters Ins. Co.,* 106 Idaho 163, 676 P.2d 1274 (Ct. of Appeal 1984) ; *Berkeley Inn, Inc. v. Centennial Ins. Co.,* 282 Pa.Super. 207, 422 A.2d 1078 (1980); *Royal Indemnity Co. v. Little Joe's Catfish Inn, Inc.,* 636 S.W.2d 530 (Texas Ct.App.1982); *Northwestern States Portland Cement Co. v. Hartford Fire Ins. Co.,* 360 F.2d 531 (8th Cir.1966); *Continental Ins. Co. v. DNE Corp.,* 834 S.W.2d 930 (Tenn.1992); *Great Northern Oil Co. v. St. Paul Fire & Marine Ins. Co.,* 303 Minn. 267, 227 N.W.2d 789 (1975).

[8] 10. The subject contract of insurance does not pay for and specifically excludes loss or damage caused by or resulting from consequential loss, delay, loss of use, or loss of market. *Twin City Hide v. Transamerica Ins. Co.,* 358 N.W.2d 90 (Minn.Ct.App.1984); *Witcher Construction Company v. St. Paul Fire and Marine Ins. Co.,* 550 N.W.2d 1 (Ct.App.Minn.1996); *Blaine Richards & Co., Inc. v. Marine Indemnity Ins. Co. of America,* 635 F.2d 1051 (2d Cir.1980); *Boyd Motors, Inc. v. Employers Ins. of Wausau,* 880 F.2d 270 (10th Cir.1989); *Interpetrol Bermuda, Ltd., v. Lloyd's Underwriters,* 588 F.Supp. 1199 (S.D.N.Y.1984). Therefore, to the extent any loss claimed to be a loss of business income by Dictiomatic was not lost as a direct result of hurricane Andrew but rather as a consequence of any other reason, then such loss is excluded from coverage and there can be no recovery by Dictiomatic for such loss. *Rogers v. American Ins. Co.,* 338 F.2d 240 (8th Cir.1964); *Swedish Crucible Steel Co. v. Travelers Indemnity Co.,* 387 F.Supp. 231 (E.D.Mich.1974); *Pacific Coast Engineering Co. v. St. Paul Fire & Marine Ins. Co.,* 9 Cal.App.3d 270, 88 Cal.Rptr. 122 (Cal.Ct.App.1970); ***605***Pennbarr Corp. v. INA,* 976 F.2d 145 (3rd Cir.1992); *Midland Broadcasters v. INA,* 636 F.Supp. 165 (D.Kan.1986). The court finds that all alleged losses associated with the failure to produce and sell the T–3000 and the palm top computer, products that were not even in existence at the time of the hurricane, are merely potential consequential losses and are not, even if proved by a preponderance of the evidence, compensable under the subject insurance contract.

[9] 11. Because Dictiomatic's business interruption insurance claim is speculative, Dictiomatic cannot recover business interruption proceeds under the insurance policy. *Travelers Ins. Co. v. D & D Contracting,* 962 F.2d 971 (10th Cir.1992); *Hampton Foods, Inc. v. Aetna Casualty & Surety Co.,* 601 F.Supp. 58 (E.D.Mo.1984); *Fold–Pak Corp. v. Liberty Mut. Ins. Co.,* 784 F.Supp. 49 (W.D.N.Y., 1992).

[10] 12. Further, under the terms of the policy,

Dictiomatic is entitled to recover only if it sustained an actual loss of "business income" defined as net income, either net profit or net loss, that Dictiomatic would have earned had the business not been interrupted, plus continuing normal operating expenses that were actually incurred during the interruption of business. If the amount of the net loss that would have been incurred had there been no business interruption exceeds the amount of normal operating expenses actually incurred, the resulting number is a negative number and there can be no recovery for an "actual loss of business income." *Continental Ins. Co. v. DNE Corp.*, 834 S.W.2d 930 (Tenn.1992); *Liberty Mutual Ins. Co. v. Sexton Foods Co., Inc.*, 42 Ark.App. 102, 854 S.W.2d 365 (Ct.App.1993); *Eisenson v. County Fire Ins. Co.*, 84 F.Supp. 41 (N.D.Fla.1949); *A & S Corporation v. Centennial Insurance Company*, 242 F.Supp. 584 (N.D.Ill.1965).

[11] 13. Dictiomatic has the burden of proving all the "continuing normal operating expenses incurred", as well as its expected income during the period of restoration. *Continental Ins. Co. v. DNE Corp.*, 834 S.W.2d 930 (Tenn.1992); *Liberty Mutual Ins. Co. v. Sexton Foods Co., Inc.*, 42 Ark.App. 102, 854 S.W.2d 365 (Ct.App.1993); *Eisenson v. County Fire Ins. Co.*, 84 F.Supp. 41 (N.D.Fla.1949) ; *A & S Corporation v. Centennial Insurance Company*, 242 F.Supp. 584 (N.D.Ill.1965).

[12][13] 14. The general law in Florida regarding recovery of anticipated profits was first stated by the Florida Supreme Court in *New Amsterdam Casualty Co. v. Utility Battery Manufacturing Co.*, 122 Fla. 718, 166 So. 856 (1936). The general rule is that the anticipated profits of a business are too speculative and dependent upon changing circumstances to warrant a judgment for their loss. *Diane Manufacturing Co. v. Sheffield Industries, Inc.*, 514 F.Supp. 185 (S.D.Fla.1981). There is an exception to the rule, however, to the effect that the loss of profit from the interruption of a business may be recovered where the Plaintiff makes it reasonably certain by competent proof what the amount of his actual loss was. *Id.* Proof of the income and of the expenses of the business for a reasonable time prior to the interruption is required. *Id.* Accordingly, in Florida a claim for lost profits must be shown with a reasonable degree of certainty. *Crain Automotive Group, Inc. v. J & M Graphics, Inc.*, 427 So.2d 300 (Fla. 3rd DCA 1983); *Beverage Canners, Inc. v. Cott Corporation*, 372 So.2d 954 (Fla. 3rd DCA 1979); *Royal Typewriter Company v. Xerographic Supplies Corporation*, 719 F.2d 1092 (11th Cir.1983). In this regard, a satisfactory analysis of lost profits cannot use figures which result in too many variables. *Royal Typewriter Company v. Xerographic Supplies Corporation*, 719 F.2d 1092 (11th Cir.1983); *Beverage Canners, Inc. v. Cott Corporation*, 372 So.2d 954 (Fla. 3rd DCA 1979). In the present case, Dictiomatic has not made it reasonably certain from competent proof that it would have realized profits from the sale of its products and, therefore, has not established that it was entitled to payment from USF & G for lost profits under the business interruption policy.

[14][15][16] 15. Analysis of lost profits must be based on sufficiently similar business operations and comparable markets. *Royal Typewriter Company v. Xerographic Supplies Corporation*, 719 F.2d 1092 (11th Cir.1983); ***606***Belcher v. Import Cars, Ltd.*, 246 So.2d 584 (Fla. 3rd DCA 1971); *TK–7 Corp. v. Barbouti*, 993 F.2d 722 (10th Cir.1993); *Trademark Research Corp. v. Maxwell Online, Inc.*, 995 F.2d 326 (2d Cir.1993). In order to recover lost profits, there must be an on-going business with an established sales record and proven ability to realize profits at the established rate. *Daytona Migi of Jacksonville, Inc. v. Daytona Automotive Fiberglass, Inc.*, 388 So.2d 228 (Fla. 5th DCA 1980); *Conner v. Atlas Aircraft Corp.*, 310 So.2d 352 (Fla. DCA 1975); *Belcher v. Import Cars, Ltd.*, 246 So.2d 584 (Fla. 3d DCA 1971). Proof of actual profits for a reasonable time prior to the breach is required to establish lost profits. *Wash–Bowl, Inc. v. Wroton*, 432 So.2d 766 (Fla. 2d DCA 1983); *A & P Bakery Supply & Equipment v. Hawatmeh*, 388 So.2d 1071 (Fla. 3rd DCA 1980).

In the present case, the history of successful sales of the Hexaglot T–427 and T–150 is not sufficient to establish Dictiomatic's lost profits from the T–1200, T–1500 or T–3000 products because the latter products were not sufficiently similar and did not attract a comparable market. Accordingly, the Plaintiff has failed to establish that for a reasonable time prior to hurricane Andrew Dictiomatic enjoyed profits from similar products in a similar market, thereby making it more likely than not that it would have realized profits from the next generations of products which were not similar to the earlier generations of products.

16. USF & G's duty to pay Dictiomatic's business interruption claim never arose because Dictiomatic never established the amount of such claim with credible, reliable or consistent testimony or documentation. USF & G could not have breached a contractual duty to pay which never arose. Accordingly, the court finds that the Plaintiff failed to establish its breach of contract claims against USF & G and further the court adjudicates that under the terms of the subject contract and the facts of this case, USF & G has no obligation to pay Dictiomatic's unsupported claim.

In view of all of the foregoing Findings of Fact and Conclusions of Law, it is

ORDERED and ADJUDGED that the Plaintiff Dictiomatic's claims for Breach of Contract alleged in Counts I and II of the Complaint in Case No. 93–2123 be dismissed with prejudice pursuant to Federal Rule of Civil Procedure 52(c) for failure of the Plaintiff to carry its burden of proof by a preponderance of the evidence. It is further

ORDERED and ADJUDGED that declaratory judgment in favor of the Plaintiff USF & G in Case No. 94–1692 be entered pursuant to 28 U.S.C. § 2201, declaring that under the terms of the applicable contract, USF & G had no duty to pay the business interruption claim presented to it by Dictiomatic Inc. for business income losses because Dictiomatic failed to establish that it sustained any unpaid covered losses under the insurance contract.

The Clerk of the court shall enter judgment in favor of USF & G in both consolidated cases and against Dictiomatic in accordance with this opinion.

S.D.Fla.,1997.
Dictiomatic, Inc. v. U.S. Fidelity & Guar. Co.
958 F.Supp. 594

Motions, Pleadings and Filings (Back to top)

• 1:94cv01692 (Docket) (Aug. 17, 1994)
• 1:93cv02123 (Docket) (Oct. 26, 1993)

Judges and Attorneys(Back to top)

Judges | Attorneys

Judges

• **Paine, Hon. James Carriger**
United States District Court, Southern Florida
West Palm Beach, Florida 33401
Litigation History Report | Judicial Motion Report | Judicial Reversal Report | Profiler

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END OF DOCUMENT

182 Cal.App.4th 1538, 107 Cal.Rptr.3d 307, 10 Cal. Daily Op. Serv. 3574, 10 Cal. Daily Op. Serv. 3633, 2010 Daily Journal D.A.R. 4326
(Cite as: 182 Cal.App.4th 1538, 107 Cal.Rptr.3d 307)

Briefs and Other Related Documents

Oral Argument Transcripts with Streaming Media

Judges, Attorneys and Experts

Court of Appeal, Second District, Division 2, California.
AMERIGRAPHICS, INC., Plaintiff and Respondent,
v.
MERCURY CASUALTY COMPANY, Defendant and Appellant.

No. B208654.
March 23, 2010.

Background: Insured under commercial property policy brought action against insurer for breach of contract and bad faith. The Superior Court, Los Angeles County, No. BC331524,Mary Ann Murphy, J., entered judgment on special jury verdict for insured, but reduced jury's punitive damages award from $3 million to $1.7 million. Insurer appealed.

Holdings: The Court of Appeal, Doi Todd, J., held that:
(1) insured's coverage for operating expenses was not offset by its projected net loss; but
(2) insurer's expert witness declaration provided sufficient notice of testimony about industry standards in interpretation of coverage provision;
(3) proffered testimony about industry standards in interpretation of coverage provision was relevant to bad faith;
(4) potential confusion of jury did not justify exclusion of testimony about industry standards in interpretation of coverage provision; but
(5) exclusion of testimony about industry standards in interpretation of coverage provision was harmless;
(6) jury's failure to separately award damages for bad faith did not preclude award of punitive damages;
(7) insurer acted with "oppression, fraud, or malice"; but
(8) maximum punitive damages award consistent with due process was $500,000.

Affirmed in part, reversed in part, and remanded with directions.

West Headnotes

[1] Insurance 217 1805

217 Insurance
217XIII Contracts and Policies
217XIII(G) Rules of Construction
217k1805 k. In general. Most Cited Cases

Insurance 217 1822

217 Insurance
217XIII Contracts and Policies
217XIII(G) Rules of Construction
217k1822 k. Plain, ordinary or popular sense of language. Most Cited Cases

The clear and explicit meaning of insurance contract provisions, interpreted in their ordinary and popular sense, unless used by the parties in a technical sense or a special meaning is given to them by usage, controls judicial interpretation. West's Ann.Cal.Civ.Code §§ 1638, 1644.

[2] Insurance 217 1808

217 Insurance
217XIII Contracts and Policies
217XIII(G) Rules of Construction
217k1808 k. Ambiguity in general. Most Cited Cases

An insurance policy provision will be considered ambiguous when it is capable of two or more constructions, both of which are reasonable.

[3] Insurance 217 1808

217 Insurance
217XIII Contracts and Policies
217XIII(G) Rules of Construction
217k1808 k. Ambiguity in general. Most Cited

Cases

Insurance 217 ⚿1817

217 Insurance
217XIII Contracts and Policies
217XIII(G) Rules of Construction
217k1815 Reasonableness
217k1817 k. Reasonable expectations. Most Cited Cases

Insurance 217 ⚿2090

217 Insurance
217XV Coverage—in General
217k2090 k. In general. Most Cited Cases

If there is ambiguity in insurance policy provisions, it is resolved by interpreting the ambiguous provisions in the sense the insurer believed the insured understood them when the contract was made, which means the court must first attempt to determine whether coverage is consistent with the insured's objectively reasonable expectations.

[4] Insurance 217 ⚿1810

217 Insurance
217XIII Contracts and Policies
217XIII(G) Rules of Construction
217k1810 k. Construction as a whole. Most Cited Cases

Insurance 217 ⚿1817

217 Insurance
217XIII Contracts and Policies
217XIII(G) Rules of Construction
217k1815 Reasonableness
217k1817 k. Reasonable expectations. Most Cited Cases

Insurance 217 ⚿2090

217 Insurance
217XV Coverage—in General
217k2090 k. In general. Most Cited Cases

In determining whether coverage is consistent with the insured's objectively reasonable expectations, the court must interpret insurance policy language in the context of the policy as a whole, and in the circumstances of the case.

[5] Insurance 217 ⚿1832(1)

217 Insurance
217XIII Contracts and Policies
217XIII(G) Rules of Construction
217k1830 Favoring Insureds or Beneficiaries; Disfavoring Insurers
217k1832 Ambiguity, Uncertainty or Conflict
217k1832(1) k. In general. Most Cited Cases

If ambiguity in insurance policy language cannot be resolved, it is construed against the party who caused it to exist.

[6] Insurance 217 ⚿2090

217 Insurance
217XV Coverage—in General
217k2090 k. In general. Most Cited Cases

Insurance 217 ⚿2098

217 Insurance
217XV Coverage—in General
217k2096 Risks Covered and Exclusions
217k2098 k. Exclusions and limitations in general. Most Cited Cases

In an insurance policy, coverage provisions are interpreted broadly so as to afford the greatest possible protection to the insured, whereas exclusionary clauses are interpreted narrowly.

[7] Insurance 217 ⚿2179(1)

217 Insurance
217XVI Coverage—Property Insurance
217XVI(A) In General
217k2173 Amount of Damage or Loss
217k2179 Business Interruption; Lost Profits
217k2179(1) k. In general. Most Cited

Cases

Under "Business Income" coverage in commercial property policy, stating that insurer would pay an insured during its period of suspended business operation the "(i) Net Income (Net Profit or Loss before income taxes) that would have been earned or incurred if no physical loss or damage had occurred; and (ii) Continuing normal operating expenses incurred, including payroll"? to the extent there was no lost income the amount paid as "Net Income" would be zero, but the net loss that would have been incurred would not offset the amount payable as operating expenses.

See Croskey et al., Cal. Practice Guide: Insurance Litigation (The Rutter Group 2009) ¶ 6:289 (CAINSL Ch. 6B-D); Annot., Business interruption insurance (1996) 37 A.L.R.5th 41; Cal. Jur. 3d, Insurance Contracts, § 348; 2 Witkin, Summary of Cal. Law (10th ed. 2005) Insurance, § 131.

[8] Pretrial Procedure 307A 39

307A Pretrial Procedure
307AII Depositions and Discovery
307AII(A) Discovery in General
307Ak36 Particular Subjects of Disclosure
307Ak39 k. Facts known and opinions held by experts. Most Cited Cases

Insurer's expert witness declaration provided sufficient notice that insurer's expert would testify about industry standards relating to the issue of bad faith in insurer's interpretation of a commercial property policy's business-income coverage provision, in trial for breach of contract and bad faith, even though the declaration did not specifically mention custom and practice in the industry regarding interpretation of the particular provision at issue, where the declaration stated that insurer's expert would testify as to whether insurer's "actions were consistent with standards in the insurance industry and as that conduct relates to the bilateral duties of good faith and fair dealing."

[9] Evidence 157 516

157 Evidence
157XII Opinion Evidence
157XII(B) Subjects of Expert Testimony
157k516 k. Custom or usage. Most Cited Cases

Insurer's proffered testimony of claims handling expert, about industry standards relating to the issue of bad faith in insurer's interpretation of a commercial property policy's business-income coverage provision, was relevant to the issue of bad faith, in insured's action for breach of contract and bad faith, because it would have provided evidence that insurer's incorrect interpretation of the provision was at least reasonable under industry standards.

[10] Evidence 157 518

157 Evidence
157XII Opinion Evidence
157XII(B) Subjects of Expert Testimony
157k518 k. Construction of written instruments. Most Cited Cases

Trial court erred in excluding commercial property insurer's proffered testimony of claims handling expert that insurer's interpretation of a business-income coverage provision was reasonable, in trial for breach of contract and bad faith, since, to the extent there was any legitimate concern that the jury might be confused into thinking that insurer's expert knew more than the trial judge about the interpretation of the provision, that concern could have been remedied with a cautionary instruction that the expert's testimony was being admitted solely on the issue of the reasonableness of insurer's conduct, not on the correct construction of the policy.

[11] Appeal and Error 30 1056.1(11)

30 Appeal and Error
30XVI Review
30XVI(J) Harmless Error
30XVI(J)11 Exclusion of Evidence
30k1056 Prejudicial Effect
30k1056.1 In General
30k1056.1(11) k. Particular types of evidence. Most Cited Cases

Trial court's error, in excluding commercial property insurer's proffered testimony of claims handling expert that insurer's interpretation of a business-income coverage provision was reasonable, was harmless to jury verdict finding breach of contract and bad faith and

awarding prejudgment interest and $3 million in punitive damages to insured, where the evidence supported a finding that insurer unreasonably delayed payment and failed to properly investigate the loss, as well as unreasonably failing to pay.

[12] Appeal and Error 30 1026

30 Appeal and Error
30XVI Review
30XVI(J) Harmless Error
30XVI(J)1 In General
30k1025 Prejudice to Rights of Party as Ground of Review
30k1026 k. In general. Most Cited Cases

Trial error is usually deemed harmless in California unless there is a reasonable probability that it affected the verdict.

[13] Insurance 217 3580

217 Insurance
217XXXI Civil Practice and Procedure
217k3580 k. Verdict and findings. Most Cited Cases

Jury's failure to separately award damages for bad faith, on a special verdict form for both breach of a commercial property insurance contract and bad faith, did not preclude jury's award of punitive damages, where the jury was instructed on the elements that had to be proven to establish bad faith, including proof that insured was harmed by insurer's bad faith conduct, and insured's attorney argued that the same evidence that supported a finding of breach of contract also supported a finding of bad faith; jury's finding that insurer breached its obligation of good faith and fair dealing necessarily included the finding that insured had been damaged by insurer's conduct.

[14] Appeal and Error 30 218.2(1)

30 Appeal and Error
30V Presentation and Reservation in Lower Court of Grounds of Review
30V(B) Objections and Motions, and Rulings Thereon
30k218 Verdict and Findings by Jury
30k218.2 Special Interrogatories and Findings
30k218.2(1) k. In general. Most Cited Cases

Insurer's failure to object to the special verdict form, in trial for breach of contract and bad faith, did not waive insurer's argument on appeal that the punitive damages were not supported by the findings on the special verdict and should be stricken from the judgment because the jury did not separately award damages for bad faith.

[15] Appeal and Error 30 882(17)

30 Appeal and Error
30XVI Review
30XVI(C) Parties Entitled to Allege Error
30k881 Estoppel to Allege Error
30k882 Error Committed or Invited by Party Complaining
30k882(17) k. Verdict or findings. Most Cited Cases

The party attempting to enforce a judgment based on a special verdict must bear the responsibility for a special verdict submitted to the jury on its own case.

[16] Appeal and Error 30 238(2)

30 Appeal and Error
30V Presentation and Reservation in Lower Court of Grounds of Review
30V(B) Objections and Motions, and Rulings Thereon
30k234 Necessity of Motion Presenting Objection
30k238 As to Judgment, or Modification or Vacation of Judgment
30k238(2) k. Motion for judgment notwithstanding verdict. Most Cited Cases

By raising the issue in a judgment notwithstanding the verdict (JNOV) motion, insurer preserved the argument for appeal that punitive damages were not supported by the findings on the special verdict and should be stricken from the judgment because the jury did not sep-

arately award damages for bad faith, in insured's action for breach of contract and bad faith.

[17] Damages 115 87(2)

115 Damages
115V Exemplary Damages
115k87 Nature and Theory of Damages Additional to Compensation
115k87(2) k. Necessity of actual damage. Most Cited Cases

Actual damages, even nominal damages, are an absolute predicate for an award of punitive damages.

[18] Appeal and Error 30 930(3)

30 Appeal and Error
30XVI Review
30XVI(G) Presumptions
30k930 Verdict
30k930(3) k. Interrogatories and special verdicts. Most Cited Cases

Court of Appeal does not imply findings on all issues in favor of the prevailing party with a special verdict, as it does with a general verdict.

[19] Damages 115 189.5

115 Damages
115IX Evidence
115k183 Weight and Sufficiency
115k189.5 k. Punitive damages. Most Cited Cases

The clear and convincing standard for findings of oppression, fraud, or malice supporting punitive damages requires that the evidence be so clear as to leave no substantial doubt; sufficiently strong to command the unhesitating assent of every reasonable mind. West's Ann.Cal.Civ.Code § 3294(a).

[20] Insurance 217 3376

217 Insurance
217XXVII Claims and Settlement Practices
217XXVII(C) Settlement Duties; Bad Faith
217k3373 Amount and Items Recoverable
217k3376 k. Punitive damages. Most Cited Cases

Insurance 217 3381(5)

217 Insurance
217XXVII Claims and Settlement Practices
217XXVII(C) Settlement Duties; Bad Faith
217k3378 Actions
217k3381 Evidence
217k3381(5) k. Weight and sufficiency. Most Cited Cases

Jury's finding that commercial property insurer acted with “oppression, fraud, or malice” in its handling of claim for flooding of business premises was supported by substantial evidence, in awarding punitive damages on insured's claim of bad faith, including evidence that insurer never advised insured about the available coverages, insurer twice immediately told insured that certain coverages were unavailable and only looked into the matter when insured pressed the issue and pointed out the applicable policy provisions, insurer expressly denied coverage for a tenant-improvements claim and stated that its investigation showed that no tenant improvements had been damaged when in reality no such investigation had been undertaken, and insurer effectively put insured out of business by failing for two years to replace a printer and scanner which were the key pieces of equipment insured needed to run its business. West's Ann.Cal.Civ.Code § 3294.

[21] Constitutional Law 92 4427

92 Constitutional Law
92XXVII Due Process
92XXVII(G) Particular Issues and Applications
92XXVII(G)19 Tort or Financial Liabilities
92k4427 k. Punitive damages. Most Cited Cases

Under the due process clause of the Fourteenth Amendment to the United States Constitution, the imposition of grossly excessive or arbitrary state court punitive damages awards is constitutionally prohibited, for due process entitles a tortfeasor to fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a state may impose. U.S.C.A. Const.Amend. 14.

[22] Damages 115 91.5(1)

115 Damages
115V Exemplary Damages
115k91.5 Grounds for Exemplary Damages
115k91.5(1) k. In general. Most Cited Cases

Damages 115 163(1)

115 Damages
115IX Evidence
115k163 Presumptions and Burden of Proof
115k163(1) k. Necessity of proof as to damages in general. Most Cited Cases

Courts presume that a plaintiff has been made whole for his injuries by compensatory damages, so punitive damages should only be awarded if the defendant's culpability, after having paid compensatory damages, is so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence.

[23] Constitutional Law 92 4427

92 Constitutional Law
92XXVII Due Process
92XXVII(G) Particular Issues and Applications
92XXVII(G)19 Tort or Financial Liabilities
92k4427 k. Punitive damages. Most Cited Cases

In deciding whether an award of punitive damages is constitutionally excessive under federal due process clause, reviewing courts are to review the award de novo, making an independent assessment of the reprehensibility of the defendant's conduct, the relationship between the award and the harm done to the plaintiff, and the relationship between the award and civil penalties authorized for comparable conduct. U.S.C.A. Const.Amend. 14.

[24] Constitutional Law 92 4427

92 Constitutional Law
92XXVII Due Process
92XXVII(G) Particular Issues and Applications
92XXVII(G)19 Tort or Financial Liabilities
92k4427 k. Punitive damages. Most Cited Cases

The existence of any one of five reprehensibility factors weighing in favor of a plaintiff may not be sufficient to sustain a punitive damages award under the federal due process clause, and the absence of all of them renders any award suspect: (1) the harm caused was physical as opposed to economic; (2) the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; (3) the target of the conduct had financial vulnerability; (4) the conduct involved repeated actions or was an isolated incident; and (5) the harm was the result of intentional malice, trickery, or deceit. U.S.C.A. Const.Amend. 14.

[25] Constitutional Law 92 4427

92 Constitutional Law
92XXVII Due Process
92XXVII(G) Particular Issues and Applications
92XXVII(G)19 Tort or Financial Liabilities
92k4427 k. Punitive damages. Most Cited Cases

Insurance 217 3376

217 Insurance
217XXVII Claims and Settlement Practices
217XXVII(C) Settlement Duties; Bad Faith
217k3373 Amount and Items Recoverable
217k3376 k. Punitive damages. Most Cited Cases

Jury's award of $3 million in punitive damages for insured, based on commercial property insurer's handling of claim for flooding of business premises, was excessive in violation of federal due process clause to the extent it exceeded $500,000, even though insurer removed equipment insured needed to keep its business going and never replaced it, and insured's letters to insurer clearly explained that insured needed the money to survive, where insured's compensatory damages were only $130,000, insurer's conduct did not cause physical harm and did not show a disregard for health or safety, and the evidence fell short of demonstrating that insurer's conduct constituted intentional malice; although evidence showed several discrete acts of misconduct involving insured's claim for coverage under various policy provisions, insurer's conduct ultimately involved

only one insured and one claim. U.S.C.A. Const.Amend. 14; West's Ann.Cal.Civ.Code § 3294.

[26] Constitutional Law 92 ⚿4427

92 Constitutional Law
92XXVII Due Process
92XXVII(G) Particular Issues and Applications
92XXVII(G)19 Tort or Financial Liabilities
92k4427 k. Punitive damages. Most Cited Cases

Insurance 217 ⚿3376

217 Insurance
217XXVII Claims and Settlement Practices
217XXVII(C) Settlement Duties; Bad Faith
217k3373 Amount and Items Recoverable
217k3376 k. Punitive damages. Most Cited Cases

Trial court properly excluded the amount of *Brandt* damages awarded to insured for attorney fees incurred in obtaining benefits due under insurance policy in determining the compensatory damages award in action for breach of contract and bad faith, for purposes of determining whether the ratio of compensatory damages to punitive damages was excessive in violation of the federal due process clause, since the *Brandt* fees were awarded by the court after the jury had already returned its verdict on the punitive damages. U.S.C.A. Const.Amend. 14.

[27] Constitutional Law 92 ⚿4427

92 Constitutional Law
92XXVII Due Process
92XXVII(G) Particular Issues and Applications
92XXVII(G)19 Tort or Financial Liabilities
92k4427 k. Punitive damages. Most Cited Cases

Insurance 217 ⚿3376

217 Insurance
217XXVII Claims and Settlement Practices
217XXVII(C) Settlement Duties; Bad Faith
217k3373 Amount and Items Recoverable
217k3376 k. Punitive damages. Most Cited Cases

Trial court properly excluded the amount of pre-judgment interest awarded to insured in determining the compensatory damages award in action for breach of contract and bad faith, for purposes of determining whether the ratio of compensatory damages to punitive damages was excessive in violation of the federal due process clause. U.S.C.A. Const.Amend. 14.

[28] Constitutional Law 92 ⚿4427

92 Constitutional Law
92XXVII Due Process
92XXVII(G) Particular Issues and Applications
92XXVII(G)19 Tort or Financial Liabilities
92k4427 k. Punitive damages. Most Cited Cases

An assessment of previously avoided losses may not be considered in assessing the ratio of punitive damages to harm, in determining whether a punitive damages award is excessive in violation of the federal due process clause. U.S.C.A. Const.Amend. 14.

[29] Constitutional Law 92 ⚿4427

92 Constitutional Law
92XXVII Due Process
92XXVII(G) Particular Issues and Applications
92XXVII(G)19 Tort or Financial Liabilities
92k4427 k. Punitive damages. Most Cited Cases

Only prospective injuries that are foreseeable from the defendant's conduct may be considered in assessing the ratio of punitive damages to harm, in determining whether a punitive damages award is excessive in violation of the federal due process clause. U.S.C.A. Const.Amend. 14.

[30] Constitutional Law 92 ⚿4427

92 Constitutional Law
92XXVII Due Process
92XXVII(G) Particular Issues and Applications
92XXVII(G)19 Tort or Financial Liabilities
92k4427 k. Punitive damages. Most Cited

Cases

Insurance 217 ⚿3376

217 Insurance
217XXVII Claims and Settlement Practices
217XXVII(C) Settlement Duties; Bad Faith
217k3373 Amount and Items Recoverable
217k3376 k. Punitive damages. Most Cited Cases

In considering the disparity between punitive damages award in insured's action for breach of contract and bad faith and the civil penalties authorized or imposed in comparable cases, in determining whether punitive damages award was excessive in violation of the federal due process clause, the statute imposing a civil penalty against an insurance company of $10,000 for each willful, unfair, or deceptive act or practice was not particularly useful, and thus could be properly excluded from the calculus of the constitutional maximum of punitive damages, where insurer engaged in a course of conduct that involved many prohibited acts, although no findings were made as to the exact number of those acts. U.S.C.A. Const.Amend. 14; West's Ann.Cal.Ins.Code § 790.035.

[31] Appeal and Error 30 ⚿1151(2)

30 Appeal and Error
30XVII Determination and Disposition of Cause
30XVII(C) Modification
30k1151 Modification as to Amount of Recovery
30k1151(2) k. Reducing amount of recovery. Most Cited Cases

An appellate panel, convinced it must reduce an award of punitive damages under federal due process clause, must rely on its combined experience and judgment. U.S.C.A. Const.Amend. 14.

[32] Constitutional Law 92 ⚿4427

92 Constitutional Law
92XXVII Due Process
92XXVII(G) Particular Issues and Applications
92XXVII(G)19 Tort or Financial Liabilities
92k4427 k. Punitive damages. Most Cited Cases

A party's consent is irrelevant to the determination of whether an award of punitive damages is excessive in violation of the federal due process clause. U.S.C.A. Const.Amend. 14.

****312** Horvitz & Levy, Lisa Perrochet, Andrea M. Gauthier, Encino; Hager & Dowling, Thomas J. Dowling and Holly C. Blackwell, Santa Barbara, for Defendant and Appellant.

Osborne and Associates, William J. Osborne, Sherman Oaks; The Ehrlich Law Firm and Jeffrey Isaac Ehrlich for Plaintiff and Respondent.

DOI TODD, J.

***1543** In this insurance bad faith case, respondent Amerigraphics, Inc. (Amerigraphics) sued its insurer, appellant Mercury Casualty Company (Mercury), after Amerigraphics's business premises were flooded, and Mercury denied full coverage under the policy. There are two primary issues on appeal.

First, what is the meaning of the "Business Income" coverage in the policy which states that Mercury will pay an insured during its period of suspended business operation the "(i) Net Income (Net Profit or Loss before income taxes) that would have been earned or incurred if no physical loss or damage had occurred ...; and [¶] (ii) Continuing normal operating expenses incurred, including payroll"? We agree with the trial court that under the plain meaning of this policy, an insured is entitled to be paid under both subparts without having to offset the two amounts in the event operating expenses exceed net income.

Second, we consider whether an award of punitive damages that is ten times the amount of compensatory damages and prejudgment interest was correctly calculated and comports with due process. We are satisfied that substantial evidence supports an award of punitive damages, that the amount of compensatory damages should not include prejudgment interest, and that under the circumstances of this case the amount of punitive

damages should not exceed compensatory damages by more than a 3.8–to–one ratio.

FACTUAL AND PROCEDURAL BACKGROUND

The Insured, the Loss, and the Policy

Amerigraphics is a printing and graphics design company. It was founded in 1997 as a close corporation by Mark Volper and Boris and Marina Smordinsky. The company leased the first floor of an office building on Ventura Boulevard in Sherman Oaks, California. Before moving in, Volper and the Smordinskys made several tenant improvements, including repairing doors and windows, upgrading the electrical and plumbing systems, and installing modern electrical fixtures, tiles and a new ceiling, at a total cost of about $53,000. After moving in, they made additional tenant improvements between 2001 and 2002 totaling $20,133. The company did well financially ***1544** from 1997 to 2000, but business fell off sharply after the September 11, 2001 attacks, and 2002 was a particularly "bad" year.

On Monday, April 14, 2003, Volper discovered that the company's premises were completely flooded. Water was cascading ****313** from the ceiling and leaking down the walls, leaving two inches of standing water. Volper and the landlord discovered that the source of the water was a broken water heater in a second-floor restroom. The water damaged all of Amerigraphics's electrical equipment, including a printer that Amerigraphics had purchased for $11,995, and a scanner that had cost $5,176.

Volper called RM Consulting, the company that had sold and serviced the equipment, to evaluate the damage. RM Consulting spent four hours working on the printer and scanner, and determined that both pieces of equipment had been irreparably water damaged.

Amerigraphics was insured under a "California Special Multi–Peril Policy" issued by Mercury in 1999 that covered damage to business personal property, which includes property used in the business and tenant improvements, and loss of business income due to business suspension. The policy had been renewed for a three-year term from October 9, 2002 to October 9, 2005, and the annual premium was $1,516. The business-interruption coverage, titled "Business Income," provides in relevant part: "We will pay for the actual loss of Business Income you sustain due to the necessary suspension of your 'operations' during the 'period of restoration.' ... [¶] ... [¶] We will only pay for loss of Business Income that you sustain during the 'period of restoration' and that occurs within 12 consecutive months after the date of direct physical loss or damage.... [¶] Business Income means the: [¶] (i) Net Income (Net Profit or Loss before income taxes) that would have been earned or incurred if no physical loss or damage had occurred ....; and [¶] (ii) Continuing normal operating expenses incurred, including payroll."

After learning that his insurance broker had failed to immediately report the loss, Volper telephoned Mercury on Friday, April 18, 2003, and reported the loss himself. Mercury assigned the claim to adjuster Ken Brown, who called Volper the following week. Brown admitted at trial that he never discussed the available coverages under the policy with Volper, nor did he fill out Mercury's "coverage checklist" that required the adjuster to discuss the various coverages and to check off the coverages discussed and the date of the conversation.

***1545** Because the water damage had created mold and asbestos, Amerigraphics was forced to find a temporary location until the remediation was completed. Volper was unable to find any property on Ventura Boulevard available on a short-term lease, but he did find space on the second floor in a building in Hollywood. Amerigraphics relocated on May 20, 2003, and Mercury paid the relocation expenses and the rent for the new premises. The same month, Volper provided Mercury with a preliminary loss evaluation listing items of business personal property worth approximately $43,000. Mercury paid $10,000 toward the business property loss.

The Investigation Relating to the Printer and Scanner

Because adjuster Brown was located in Mercury's San Diego office, Mercury hired an independent local adjusting company, Cunningham Lindsey (C–L), to investigate the claim. Volper gave C–L the report from

RM Consulting stating that the printer and scanner had been irreparably damaged. C–L recommended an examination by an equipment refurbishing company. Under the policy, Mercury had the option of repairing or replacing damaged equipment. Brown's supervisor, Chris Boedecker, did not consult RM Consulting and ****314** decided that it would be "worthwhile" for Mercury to get a second opinion on the condition of the printer and scanner.

On May 20, 2003, 38 days after the loss, Mercury had a salvage company remove all the damaged equipment from Amerigraphics's premises, including the printer and scanner. The printer and scanner were then sent to Hi Tech Restoration (Hi Tech), a company which locates vendors to evaluate and repair equipment.

On June 10, 2003, Hi Tech arranged for another company, Advanced Data Products, to evaluate the printer. The report from Advanced Data Products erroneously stated that the printer had been in a fire, that its technician had installed a part provided by "the customer" (though Amerigraphics had not provided any parts), and that the technician tested the unit and found it to be "okay." Hi Tech itself tested the scanner and reported on June 10, 2003 that an "O.K. Function light test" was performed, and that the unit needed software to be tested. Amerigraphics had no software that could be used to test the scanner. Hi Tech later admitted that it was unable to perform a "complete functional test of the scanner."

Although the tests were performed in June 2003, Mercury did not advise Volper of the results until September 2003, when it provided him with the reports. At that time, Mercury took the position that the equipment had been restored to its pre-loss condition, and requested that Volper retake the equipment. Volper found the reports to be unprofessional and inaccurate, and ***1546** refused to accept the equipment until Mercury could provide samples created on the machines demonstrating that they functioned properly. Volper later received unidentified copies of black and white images that were claimed to have been made on the scanner. Volper called Mercury and complained to Boedecker that "there is nothing here which indicates who, when, on which equipment" the samples were made. Boedecker agreed that this information was necessary, but Mercury was unable to obtain the information.

Ultimately, at Volper's urging, Mercury had the equipment reexamined in June 2004, more than a year after the loss. The testing report on the scanner stated that "we find the unit unable to calibrate and come to the ready state. An internal inspection and diagnostic test revealed that both the Mainboard and connecting CCD boards are defective." The report indicated that repairs would cost about $434. The printer was also found not to print properly, and its magenta ink system was not working and had to be replaced, which would cost $156.

The "Business Income" Claim

In August 2003, frustrated and concerned that he had not heard from Mercury about the status of the machines, Volper called his insurance broker, who advised him that the policy might provide coverage for Amerigraphics's "normal operating expenses" during the period the business's operations had been interrupted. Volper called Brown and told him he wanted to make a claim for normal operating expenses. Brown responded that there was no such coverage. Volper then sent Brown a letter enclosing a copy of the relevant policy page with the relevant provision circled. Brown then requested that Volper provide him with a list of the normal operating expenses Amerigraphics had incurred.

On September 17, 2003, Volper sent Brown a list of $59,467.16 in expenses incurred between April 10 and September 12, 2003. Volper's enclosure letter stated that he could provide copies of checks to document each item he had listed, and ended with the plea: "Please, review this ****315** part of the claim as soon as possible, because we need the funds just to stay alive." Volper got no response for several months.

In January 2004, Mercury hired a forensic accounting firm to investigate the loss of income claim, but did not notify Volper that it had done so until late March or April. At the end of April, Volper spoke with the accountant, who requested certain information about Amerigraphics, including two years of monthly sales re-

cords, one year of operating expenses, and an income tax statement for 2002. It took Volper several weeks to gather the information, which he provided to the accountant by late May 2004.

***1547** By letter dated September 15, 2004, Mercury informed Amerigraphics that it was denying the loss of business income claim. Mercury explained its decision as follows: "[The accountant] determined that you incurred a $0 loss in business. Projected expenses of $311,842.40 exceeded projected income of $154,932.65 resulting in a projected loss of $156,909.75. Actual expenses of $76,636.62 exceeded the actual income of $29,259.94, resulting in an operating loss of $47,376.68. During the loss period you had an actual operating loss of only $47,376.68, compared to a projected operating loss of $159,909.75. These results indicate that you did not sustain additional operating losses during the loss period and therefore did not sustain a business income loss."

The Tenant–Improvements Claim

In June 2004, out of frustration with Mercury's handling of the claim, Volper once again called his broker. The broker suggested that Amerigraphics might have a claim for damage to the tenant improvements it had made. Although Boedecker, the Mercury claim supervisor, had identified tenant improvements as an issue to be addressed, Brown never pointed out the coverage provision to Volper, and did not instruct C–L to investigate tenant improvements. By this time, Brown had been replaced on the file by adjuster Rome Oliver. Volper called Oliver to make a claim for tenant-improvement losses, and Oliver immediately told Volper there was no such coverage.

Once again, Volper sent Oliver a copy of the relevant policy page, with the tenant-improvements provision circled. In response to Oliver's subsequent request, Volper sent a letter on June 14, 2004 identifying the $73,000 in tenant improvements Amerigraphics had made. Mercury replied on August 16, 2004 denying the claim for tenant improvements, stating: "Our investigation revealed no damage to the Tenant Improvements as a result of this covered water loss. Since there was not any physical damage to the tenant improvements, your claim for these items is not covered."

After the denial letter had been sent, Mercury instructed C–L to reopen its file on the case, which had been closed for about eight months, and to inspect the premises to determine whether there had been any damage to Amerigraphics's tenant improvements. Between September and December 2004, C–L sent Oliver four supplemental reports, explaining that it was trying to find out from the landlord's insurer, State Farm, whether it had paid the landlord for tenant improvements and that State Farm was not cooperating. C–L's second supplemental report identified an estimated loss by Amerigraphics of $45,000, which C–L calculated by taking the $73,000 figure submitted by Volper and prorating it over the life of the lease.

***1548** On December 14, 2004, Volper wrote to Oliver complaining about the delay in paying the claim and asked for $23,000, which he said "we dearly need to survive." Then "out of absolute desperation," Volper ****316** sent two or three letters to Mercury's president, asking him to intervene to get the claim paid. At least one of Volper's letters to Mercury's president was routed to Mercury's senior vice-president in charge of claims, who in turn routed it to Boedecker's supervisor, but she never followed up to see how the claim was handled.

In February 2005, Mercury decided to give Amerigraphics the "benefit of the doubt," and on February 3, 2005 (693 days after the loss), sent Amerigraphics $23,000 as "payment in full" for its tenant-improvements claim.

The Litigation

In April 2005, Amerigraphics sued Mercury for breach of contract and bad faith. Prior to trial, Amerigraphics sought a judicial interpretation of the policy's "Business Income" provision, known more commonly in the industry as a business-interruption clause. The trial court held multiple hearings on this issue following multiple rounds of briefing. The court ultimately concluded that the plain language of the policy provided coverage for *both* elements stated in the definition, i.e., an insured was entitled to recover both net income and

continuing normal operating expenses without having to offset one against the other.

The case then proceeded to the first phase of trial before the jury on the issue of liability. Volper testified that by September 2003, he and the Smordinskys were borrowing money to keep Amerigraphics afloat. By June 2004, the company was completely out of money. Volper testified that if Mercury had provided a working scanner and printer and had paid the company's claims by November 2003, he believed he could have kept the business going, and that although Amerigraphics continued to pay the fees necessary to maintain its right to do business, it no longer functions as a going concern.

Boedecker conceded that a company in the printing and scanning business, like Amerigraphics, could not function without a printer and scanner. He also admitted that Mercury made no attempt to provide Amerigraphics with a replacement printer and scanner while Mercury was adjusting the claim. And he conceded that nothing in the claim file, which was approximately 1,000 pages long, reflected any concern that Amerigraphics would go out of business due to the delays in handling the claim. Boedecker also confirmed that he communicated by e-mail with his unit, that e-mail pertaining to a particular claim was required to be kept in the file, and that six to seven ***1549** people within Mercury worked on the claim, as well as eight outside entities. Yet when Mercury produced the claim file, it contained only two e-mails.

After the presentation of evidence by both sides, including expert witness testimony, Mercury moved for nonsuit on the issue of punitive damages, arguing that there was insufficient evidence of malice, fraud or oppression. The court denied the motion and stated that there was more than enough evidence for the issue to go to the jury. The parties agreed that Amerigraphics's claim for attorney fees as tort damages under *Brandt v. Superior Court* (1985) 37 Cal.3d 813, 210 Cal.Rptr. 211, 693 P.2d 796 (*Brandt*) would be decided by the court in a posttrial motion. The parties also agreed on the form of the special verdict to be presented to the jury, which consisted of four questions. The jury responded to those questions as follows:

"We, the jury, answer the questions submitted to us as follows:

"1. Did Mercury Casualty Company breach its contract of insurance with Amerigraphics?

" X Yes _____ No

****317** "*If your answer to question 1 is 'yes,' then answer question 2 ....*

"2. What damages did Amerigraphics sustain?

"Printer/Scanner/Normal Operating Expenses/Tenant Improvements

"$130,000.[FN1]

FN1. The parties presume that the damage amount of $130,000 found by the jury was based on Volper's testimony that Amerigraphics was still owed $17,000 for the printer and scanner, $22,000 in tenant improvements, and $91,000 in normal operating expenses.

"*If your answer to question 2 is in the affirmative, then answer question 3 ....*

"3. Did Mercury Casualty Company breach the obligation of good faith and fair dealing by unreasonably failing to pay OR unreasonably delaying payment of insurance benefits OR failing to properly investigate the loss?

" X Yes _____ No

"*If your answer to question 3 is 'yes,' then answer question 4 ....*

***1550** "4. Has Amerigraphics proved by clear and convincing evidence that an agent or employee of Mercury Casualty Company engaged in the conduct with malice, fraud, or oppression?

" X Yes

No."

For the second phase of trial to determine the amount of punitive damages, the only additional evidence was the parties' stipulation that Mercury's net worth was $679 million. The jury awarded Amerigraphics $3 million in punitive damages, plus $40,000 in prejudgment interest at 7 percent from February 1, 2004.

Mercury moved for a partial judgment notwithstanding the verdict (JNOV), asking the trial court to strike the punitive damages and the prejudgment interest awards. Mercury also moved for a new trial on the punitive damages award, arguing, among other things, that the amount of punitive damages was grossly excessive. The trial court denied the JNOV motion, but conditionally granted the new trial motion unless Amerigraphics consented to a remittitur of the punitive damages award from $3 million to $1.7 million. The court concluded that the compensatory damages of $130,000 awarded by the jury were the same damages for both breach of contract and bad faith, and that together with the $40,000 prejudgment interest award, totaled $170,000 in compensatory damages. The court believed that the punitive damages award should be reduced to ten times the compensatory damages. In concluding that the evidence supported an award of punitive damages of $1.7 million, the court repeatedly stated that the handling of the claim was "really terrible," "really, really bad," "a disaster," "total disaster," and that this "was a very, very, very solid case for punitive damages, as solid as I have ever seen in my time on the bench."

Amerigraphics's motion for an award of *Brandt* fees was heard after the new trial motion. The court awarded Amerigraphics attorney fees of $346,541.25, plus costs of $31,490.97. Amerigraphics accepted the remittitur of the punitive damages award, and judgment was entered against Mercury based on the reduced award, the compensatory damages, the prejudgment interest, and the court's award of fees and costs. This appeal followed.

DISCUSSION

I. The "Business Income" Provision

A. Standard of Review and Contract Interpretation

[1] The interpretation of an insurance contract is an issue of law, which is reviewed de novo under well-settled rules of contract law. ***1551**318**(*E.M.M.I. Inc. v. Zurich American Ins. Co.* (2004) 32 Cal.4th 465, 470, 9 Cal.Rptr.3d 701, 84 P.3d 385.) The fundamental rule of contract interpretation is that a contract should be construed to give effect to the mutual intention of the contracting parties at the time the contract was formed. (Civ.Code, § 1636; *Palmer v. Truck Ins. Exchange* (1999) 21 Cal.4th 1109, 1115, 90 Cal.Rptr.2d 647, 988 P.2d 568.) Such intent is to be inferred, if possible, solely from the written provisions of the contract. (Civ.Code, § 1639.) " ' "The 'clear and explicit' meaning of these provisions, interpreted in their 'ordinary and popular sense,' unless 'used by the parties in a technical sense or a special meaning is given to them by usage' ([Civ.Code], § 1644), controls judicial interpretation. ([Civ.Code], § 1638.)" ' " (*E.M.M.I., supra*, at p. 470, 9 Cal.Rptr.3d 701, 84 P.3d 385.)

[2][3][4][5][6] A policy provision will be considered ambiguous when it is capable of two or more constructions, both of which are reasonable. (*MacKinnon v. Truck Ins. Exchange* (2003) 31 Cal.4th 635, 648, 3 Cal.Rptr.3d 228, 73 P.3d 1205.) If there is ambiguity, it is resolved by interpreting the ambiguous provisions in the sense the insurer believed the insured understood them when the contract was made. (*Jordan v. Allstate Ins. Co.* (2004) 116 Cal.App.4th 1206, 1213, 11

Cal.Rptr.3d 169.) This means the court must first attempt to determine whether coverage is consistent with the insured's objectively reasonable expectations. (*Ibid.*) In doing so, the court must interpret the language in the context of the policy as a whole, and in the circumstances of the case. (*Ibid.; Waller v. Truck Ins. Exchange, Inc.* (1995) 11 Cal.4th 1, 18, 44 Cal.Rptr.2d 370, 900 P.2d 619.) If the ambiguity cannot be resolved, it is construed against the party who caused it to exist. (*Jordan v. Allstate Ins. Co., supra,* at p. 1213, 11 Cal.Rptr.3d 169.) In an insurance policy, coverage provisions are interpreted broadly so as to afford the greatest possible protection to the insured, whereas exclusionary clauses are interpreted narrowly. (*MacKinnon v. Truck Ins. Exchange, supra,* at p. 648, 3 Cal.Rptr.3d 228, 73 P.3d 1205.)

B. The Trial Court Properly Interpreted the "Business Income" Provision

[7] Amerigraphics argues that the language used in the business-income provision is clear, based on the meaning of the word "and" used between subparts (i) and (ii) in the definition of "Business Income." As Amerigraphics points out, the word "and," used in its ordinary and popular sense, is a conjunction used to indicate "an additional thing, situation, or fact." (Citing to Encarta Dictionary of the English Language, www. encarta. com.) Thus, under the plain language of the policy, the business-income provision should be interpreted to mean that Mercury will pay an insured for any lost income *and* will pay an insured its continuing normal business expenses during the period of business suspension. To the extent there is no lost income (i.e, there is only a net loss), the amount paid under subpart (i) would be zero, but the insured would still be paid under subpart (ii) for its operating expenses.

***1552** Mercury, on the other hand, argues that the use of the word "and" means that subparts (i) and (ii) must be read together, rather than as two distinct components, and that "and" is the equivalent of the mathematical operator "plus." Under Mercury's interpretation, if the insured's net income during the period before the covered loss is a net loss (i.e., a negative number) that is greater than its operating expenses, the insured will be paid nothing under the provision. Only if the insured's ****319** net income is a positive number will it be added to the operating costs so that the insured will be paid under both subparts. But the policy does not use the words "plus," "offset," "subtract," "minus," or the like. It uses the word "and." The plain meaning of "and" is consistent with Amerigraphics's and the trial court's interpretation.

We are not persuaded by the two out-of-state cases on which Mercury relies to support its position. Mercury cites to *Continental Ins. Co. v. DNE Corp.* (1992) 834 S.W.2d 930, decided under Tennessee law, and *Dictiomatic, Inc. v. U.S. Fid. & Guar. Co.* (S.D.Fla.1997) 958 F.Supp. 594. In those cases, the courts construed the identical business-income provision at issue here in the same manner as Mercury.[FN2] The courts concluded that any other interpretation would put the insured in a better position than it would have been without the business interruption in any case where there is a net loss, because the insured would still be paid its operating expenses, rather than having to suffer that loss. As the cases noted, the purpose of business interruption insurance is to protect the insured against losses that occur when its operations are unexpectedly interrupted, and to place it in the same position it would have occupied if the interruption had not occurred.

> FN2. Mercury never cited these cases to the trial court, despite the court's continuance of a hearing on the matter so that Mercury could conduct more thorough research on the interpretation of the policy language.

The *Continental* court thus concluded that "the amount of 'business income' under the insurance policy provision involved in this case should be determined by adding the amount of 'net income' and the amount of 'continuing normal operating expenses.' Under this approach, if 'net income' is a positive number (which will occur whenever there are net profits), the amount of 'business income' will be the sum of two positive numbers, and the insured will be entitled to recover that amount. If, however, 'net income' is a negative number (which will occur whenever there is a net loss), the

amount of 'business income' will be the amount of 'continuing normal operating expenses' reduced by the amount of the net loss. If, as under the facts of this case, the amount of the net loss that would have been incurred had there been no business interruption *exceeds* the amount of normal operating expenses actually incurred, the resulting number is a negative number, and there can be no recovery for an 'actual loss of business income.' " ***1553**(*Continental Insurance Co. v. DNE Corp., supra,* 834 S.W.2d at p. 934.) We disagree with the *Continental* court that this conclusion is "obvious ... from the wording of the policy." (*Id.* at p. 932.) In any event, we are not bound by out-of-state authorities. (*In re Establishment of Eureka Reporter* (2008) 165 Cal.App.4th 891, 899, 81 Cal.Rptr.3d 497.)

Mercury also argues that the trial court's interpretation reads the "Net Loss" language out of the policy's definition of "Business Income" because the insurer would owe no benefits under subpart (i) if the business had been operating at a loss prior to its suspension. Here, again, we disagree. The trial court's construction of the coverage does not render the term "Net Loss" superfluous. Rather, in the event that there is a net loss, the insured's entitlement to benefits for loss of "net income" is zero. Construing the two subparts as operating independently is far more consistent with the plain meaning of the policy language than Mercury's suggested definition.

****320** Even if we assumed Mercury's interpretation of the policy language is reasonable, we would have to conclude that an ambiguity exists. We resolve an ambiguity by interpreting the ambiguous provision in the sense the insurer believed the insured understood it when the contract was made (i.e., we must determine whether coverage is consistent with the insured's objectively reasonable expectations). (*Jordan v. Allstate Ins. Co., supra,* 116 Cal.App.4th at p. 1213, 11 Cal.Rptr.3d 169.)

As Amerigraphics points out, if a catastrophic event damages an insured's business premises and prevents the insured from being able to operate, any business in that situation would face two distinct problems: (1) a loss of money coming into the business (loss of income), *and* (2) payment of ongoing fixed expenses, even though no money is coming in. A reasonable insured would see that the definition of "Business Income" has two distinct components: (i) net income, and (ii) continuing normal expenses. Because the definition provides that "Business Income" includes both items, a reasonable insured relying on the plain language of the clause would reasonably conclude that the policy covers both items. Indeed, we note that the "Business Income" provision appears in the policy under the preceding heading of "Additional Coverages." Given its placement in the policy and the plain language of the provision, it would be objectively reasonable for an insured purchasing the policy to construe it as protecting both its lost income stream and as defraying the costs of ongoing expenses until operations were restored.

Under both parties' interpretation, an insured business will be paid if the business were operating at a profit prior to the covered loss. It is only when a business was operating at a net loss greater than its operating costs that it would not be paid at all under Mercury's interpretation. But there is nothing in the policy language to suggest to an insured that if a business is not ***1554** earning a profit it should not expect coverage for its continuing expenses during the period it cannot operate. It is not unusual for business income to fluctuate from year to year. A business should not have to be concerned that if it does poorly for one or two years and a covered catastrophic loss occurs during that time frame, then the business will not be paid anything under the "Business Income" provision. In essence, Mercury's interpretation relies on the implied assumption that only a profitable business would be protected by the provision. A business that is just starting out may operate at a temporary loss until it becomes established and secures a customer base. If that business knew that there would be no coverage under the "Business Income" provision of the policy for ongoing expenses if it suffered a catastrophic loss under the policy, there would be no point for that business to purchase the additional coverage.

As drafted, the plain meaning of the language in this Mercury policy would lead an ordinary insured to conclude that, in the event of a covered loss that forced

the complete suspension of its business operations, the policy would provide coverage for any lost profits, and even if there were no lost profits, for ongoing expenses incurred during the period of suspension. We are satisfied that the trial court correctly construed the policy.

C. Error in Exclusion of Expert Evidence Was Harmless

Mercury next argues that even if the trial court's policy interpretation was correct, the court erred in excluding evidence from Mercury's claims handling expert that Mercury's interpretation was reasonable.

****321** At trial, Mercury asked its expert witness if she was able to figure out why Mercury had not paid Amerigraphics any money under the "Business Income" provision of the policy. After she answered "yes," Amerigraphics's attorney objected and a lengthy sidebar ensued. Mercury's offer of proof was that its expert would testify that Mercury's interpretation of the provision was a reasonable one that she had used many times and that had been utilized many times in the industry. The trial court ultimately excluded the testimony, finding that "[t]here was nothing in the papers about custom and practice in the industry," that Amerigraphics's expert had already testified based on the court's interpretation of the policy provision, and that "we're not going to do sua sponte reconsideration or a motion for reconsideration in the middle of the trial."

[8] Contrary to the trial court's recollection, Mercury's expert witness declaration had stated that Mercury's expert would testify as to whether Mercury's actions "were consistent with standards in the insurance industry and as that conduct relates to the bilateral duties of good faith and fair dealing." ***1555** Although this description did not specifically mention custom and practice in the industry regarding interpretation of the particular business-income provision at issue here, it did provide sufficient notice that Mercury's expert would testify about industry standards relating to the issue of bad faith. (See *Bonds v. Roy* (1999) 20 Cal.4th 140, 146, 149, 83 Cal.Rptr.2d 289, 973 P.2d 66 [statutory discovery scheme requires parties to give "fair notice of what an expert will say at trial" by providing " '[a] brief narrative statement of the general substance of the testimony that the expert is expected to give' "].) Thus, the trial court's exclusion of the testimony on the basis that custom and practice in the industry were not previously mentioned was incorrect.

[9] Mercury argues that the testimony should have been admitted because it was relevant to the issue of bad faith. As Mercury points out, "an insurer's denial of or delay in paying benefits gives rise to tort damages only if the insured shows the denial or delay was unreasonable." (*Wilson v. 21st Century Ins. Co.* (2007) 42 Cal.4th 713, 723, 68 Cal.Rptr.3d 746, 171 P.3d 1082.) Mercury argues that its expert's proffered testimony was relevant to counter Amerigraphics's argument that Mercury had acted unreasonably (i.e., in bad faith) in denying payment under the business-income provision. We agree that the testimony was relevant to the issue of bad faith, because it would have provided evidence that Mercury's incorrect interpretation of the business-income provision was at least reasonable under industry standards.

Amerigraphics, on the other hand, argues that custom and usage are admissible only as an instrument of interpretation and not to vary the express terms of a contract (*C.J. Wood, Inc. v. Sequoia Union High School Dist.* (1962) 199 Cal.App.2d 433, 436, 18 Cal.Rptr. 647), and that "Mercury's proffered testimony would have been an improper back-door attempt to circumvent the court's ruling on the proper construction of the policy." But Mercury's expert was not going to testify that the trial court's contractual interpretation was wrong, only that the provision had been interpreted differently in the insurance industry, for the purpose of assisting the jury in determining whether Mercury's conduct in denying payment under the business-income provision was reasonable.

[10] To the extent there was any legitimate concern that the jury might be confused into thinking that Mercury's expert knew more than the trial judge, that concern****322** could have been remedied with a cautionary instruction that the expert's testimony was being admitted solely on the issue of the reasonableness of Mercury's conduct, not on the correct construction of the policy. (See *Higgins v. L.A. Gas & Electric Co.* (1911)

159 Cal. 651, 660, 115 P. 313 [new trial proper when court failed to give limiting instructions regarding jury's examination of exhibit]; *Shade Foods, Inc. v. Innovative Products Sales & Marketing, Inc.* (2000) 78 Cal.App.4th 847, 913, 93 Cal.Rptr.2d 364 ***1556** [court did not abuse its discretion "in ordering a consolidated trial before the same jury with an appropriate cautionary instruction"].) Thus, exclusion of the expert's testimony was error.

[11][12] But we conclude that the error was harmless. "[T]rial error is usually deemed harmless in California unless there is a 'reasonabl[e] probab [ility]' that it affected the verdict." (*College Hospital Inc. v. Superior Court* (1994) 8 Cal.4th 704, 715, 34 Cal.Rptr.2d 898, 882 P.2d 894 citing *People v. Watson* (1956) 46 Cal.2d 818, 836, 299 P.2d 243.) Mercury asserts that both testimony and arguments at trial placed great emphasis on Mercury's decision to investigate lost profits and to deny benefits under the business-income provision. Mercury argues that testimony from its expert that other insurers interpreted the business-income provision the same way Mercury did would have been compelling evidence that Mercury's interpretation was at least reasonable. Mercury also argues that had the jury been allowed to hear such evidence, there is more than a reasonable chance the jury would have returned a more favorable verdict on bad faith, punitive damages, or prejudgment interest.

But Mercury's argument ignores that Amerigraphics's bad faith claim was not limited to the denial of payment under the business-income provision. The jury was instructed that it could find Mercury liable for bad faith if it found that Mercury unreasonably failed to pay *or* unreasonably delayed payment *or* failed to properly investigate the loss. Here, the evidence supported a finding under all three factors. While Mercury's expert testified that Mercury did nothing wrong in the way it handled the claim—that its investigation was fair, balanced, and prompt; that there were no regulatory violations; and that Mercury's adjustment of the claim was, in all respects, reasonable—Amerigraphics's expert testified to the contrary. He testified that Mercury did violate California's regulatory standards. He also testified that Mercury's entire handling of the claim was unreasonable: Mercury never advised Amerigraphics about potential available coverage; Mercury failed to investigate promptly once a claim was made; Mercury twice told Amerigraphics that there was no coverage without even checking the policy provisions; and Mercury failed to provide an explanation or refer to the relevant policy provisions when denying a claim. Amerigraphics's expert also pointed out that there was no indication in the claim file that Mercury had any concern about the impact on Amerigraphics of being without its printer and scanner, and Mercury's failure to provide Amerigraphics with a printer and scanner essentially put Amerigraphics out of business. Amerigraphics's expert was critical of the fact that Mercury delayed payment of the tenant-improvements claim for months while it waited for State Farm to provide information, and then paid only $23,000 on that claim even though ***1557** Amerigraphics had provided documentation that its loss exceeded $73,000. He was also critical of the one-year delay in processing the claim for business-income coverage.

In light of the testimony by Amerigraphics's expert and the other evidence ****323** presented at trial, there was substantial evidence on which the jury could base findings that not only did Mercury engage in bad faith, it did so with malice, fraud or oppression. Indeed, the vote on each question was 12–0. It is simply not reasonably probable that had Mercury's expert been permitted to testify that Mercury's conduct was reasonable with respect to its interpretation of the business-income provision, which was merely *one* part of the overall claim for coverage, that the jury would have reached a different verdict on the bad faith, punitive damages, and prejudgment interest claims.

II. Punitive Damages

A. Special Verdict Findings

[13] Mercury contends that the punitive damages should be stricken from the judgment because they were not supported by the findings on the special verdict. It argues that because the jury did not separately award damages for bad faith, there was no predicate for an

award of punitive damages.

[14][15][16] As an initial matter, we reject Amerigraphics's claim that Mercury has waived this argument by not objecting below to the special verdict form. It was not Mercury's responsibility to obtain special verdict findings on Amerigraphics's tort cause of action. Rather, the party attempting to enforce the judgment based on the special verdict must bear the responsibility for a special verdict submitted to the jury on its own case. (*Myers Building Industries, Ltd. v. Interface Technology, Inc.* (1993) 13 Cal.App.4th 949, 961–962, 17 Cal.Rptr.2d 242.) In any event, Mercury preserved the issue by raising it in its JNOV motion. (*All–West Design, Inc. v. Boozer* (1986) 183 Cal.App.3d 1212, 1220, 228 Cal.Rptr. 736.)

[17][18] Mercury is correct that the jury made no separate factual finding on the special verdict form as to the amount of compensatory damages for the bad faith cause of action, and that actual damages, even nominal damages, are an absolute predicate for an award of punitive damages. (*Kizer v. County of San Mateo* (1991) 53 Cal.3d 139, 147, 279 Cal.Rptr. 318, 806 P.2d 1353.) Mercury is also correct that we do not imply findings on all issues in favor of the prevailing party with a special verdict, as we do with a general verdict. (*Trujillo v. North County Transit Dist.* (1998) 63 Cal.App.4th 280, 285, 73 Cal.Rptr.2d 596.) But the special verdict form here did not *preclude* a finding of punitive damages.

***1558** The jury was instructed on the elements that had to be proven to establish bad faith. These included the instruction that in order for Amerigraphics to establish that Mercury had breached the implied covenant of good faith and fair dealing, Amerigraphics had to prove that it was harmed by Mercury's bad faith conduct. The jury's finding that Mercury breached its obligation of good faith and fair dealing to Amerigraphics therefore necessarily included the finding that Amerigraphics had been damaged by Mercury's conduct.

With respect to the amount of damages suffered by Amerigraphics as a result of Mercury's bad faith, Amerigraphics's attorney repeatedly argued to the jury that the same evidence that supported a finding of breach of contract also supported a finding of bad faith. He then set forth the testimony given at trial as to the amount of Amerigraphics's damages, which included the printer, scanner, normal operating expenses, and tenant improvements, which totaled $130,000—the amount ultimately awarded by the jury in response to question No. 2 on the special verdict form. Mercury's attorney, in his own closing argument,****324** never disputed that the amount of damages caused by any bad faith conduct was the same as those caused by the breach of contract. Nor did he argue that the bad faith damages could be more or less than the contract damages or any other amount. Indeed, his minimal discussion on bad faith was limited to asking the jury to weigh each expert's testimony.

In sum, on the basis of the evidence offered at trial, the jury instructions, and counsel's closing argument, it is clear that the jury intended to find that Amerigraphics had been harmed by Mercury's bad faith in the same amount that it had been harmed by Mercury's breach of contract. In other words, Amerigraphics suffered damage in the amount of $130,000, which could have been awarded for either breach of contract or bad faith. As such, we find Mercury's argument to be without merit.

B. Substantial Evidence

Mercury next argues that the punitive damages should still be stricken from the judgment because they are not supported by substantial evidence of malice, oppression or fraud.

[19] Civil Code section 3294, subdivision (a) provides: “In an action for the breach of an obligation not arising from contract, where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant.” The clear and convincing standard “require[s] that the evidence be ‘ “so clear as to leave no substantial doubt”; “sufficiently strong to command the unhesitating assent of every reasonable mind.” ’ ” (*In re Angelia P.* (1981) 28 Cal.3d 908, 919, 171 Cal.Rptr. 637, 623 P.2d 198.)

***1559** The statute defines "malice" as "conduct which is intended by the defendant to cause injury to the plaintiff or despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others." (Civ.Code, § 3294, subd. (c)(1).) "Oppression" means "despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person's rights." (Civ.Code, § 3294, subd. (c)(2).) And finally, "fraud" means "an intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the intention on the part of the defendant of thereby depriving a person of property or legal rights or otherwise causing injury." (Civ.Code, § 3294, subd. (c)(3).)

[20] We have little trouble in this case concluding that there was more than substantial evidence to support an award of punitive damages. The evidence showed that Mercury was intentionally dishonest and showed a conscious disregard of Amerigraphics's rights. Not only did Mercury never advise Amerigraphics about the available coverages, on at least two occasions Mercury immediately told Amerigraphics that there was no coverage (for "business income" and tenant improvements), and only looked into the matter when Volper pressed the issue and pointed out the applicable policy provisions. Mercury expressly denied coverage for the tenant-improvements claim, stating that its investigation showed that none of the tenant improvements made by Amerigraphics had been damaged. In reality no such investigation had been undertaken, and no such investigation even occurred until *after* the denial letter had been sent.

Having denied the tenant-improvements claim based on an investigation that never took place, once it reopened its file on this claim, Mercury allowed the claim to languish****325** for months while it attempted to get information from State Farm as to whether it had paid the landlord for Amerigraphics's tenant improvements. Mercury finally paid on the claim, and then only a fraction of the amount Amerigraphics was seeking, when Volper "out of absolute desperation" wrote multiple letters to Mercury's president "begging" for help.

Mercury's handling of the printer and scanner was similarly despicable. It is undisputed that the printer and scanner were the key pieces of equipment Amerigraphics needed to run its business. By the time Mercury began its investigation of the damage to the printer and scanner, RM Consulting had already evaluated the equipment and found both pieces were beyond repair. Yet, no one at Mercury ever contacted RM Consulting to discuss its findings. Mercury did not have the equipment tested by Hi Tech until nearly 60 days after the loss. Then, Mercury did nothing for another three months, until it falsely informed Volper that the equipment was in pre-loss condition or better, despite the fact that none of the reports from Hi Tech or ***1560** its subvendors supported such a position. Mercury could not produce a single test page produced on either machine to support its finding. And even after Volper pointed out the problems with the information supplied by Hi Tech, Mercury persisted in its view that the equipment had been repaired and that Amerigraphics should take it back. Ultimately, the evaluation of the equipment performed more than a year after the loss showed that it was not working, and confirmed that the equipment had not been repaired. Throughout the two years Amerigraphics's claim was pending, Mercury never offered to provide Amerigraphics with replacement equipment, and, as the trial court aptly noted, effectively put Amerigraphics out of business.

Mercury's investigation of the business-income claim also proceeded at a snail's pace. Although Volper sent Mercury the information it requested to process the claim in September 2003, Mercury never informed Volper until late March or April 2004 that it had hired a forensic accountant to examine his claim. Volper quickly sent a substantial packet of financial information as requested by the accountant. Mercury denied the claim on September 15, 2004, 552 days after the loss.

Although Mercury tries to spin the facts as evidencing nothing more than negligence or incompetence, an insurance company can always make that argument when charged with mishandling a claim. As the court explained in *George F. Hillenbrand, Inc. v. Insurance Co. of North America* (2002) 104 Cal.App.4th 784, 816, 128 Cal.Rptr.2d 586: "Jurors, not appellate justices,

hear the evidence and determine the facts. Properly instructed, they are the primary arbiters of acceptable behavior between an insurer and its insured. It is they, with their collective understanding of the limits of what decent citizens ought to have to tolerate, who are charged with assessing the degree of reprehensibility and meting out an appropriate financial disincentive for untoward claims practices. Their authority is not unbridled. However, our role in reviewing the jury's work is a deferential one."

We note that Mercury does not claim that the jury was improperly instructed, and the jury unanimously found that Mercury acted with malice, oppression, or fraud. We are satisfied that the evidence in the record amply supports this finding.[FN3]

> FN3. Mercury argues that if we find insufficient evidence to support an award of punitive damages or that the trial court erred in construing the "Business Income" provision, then we must reverse the jury's award of prejudgment interest. Because we find no error and that punitive damages are supported by the evidence, there is no basis for reversing the award of prejudgment interest.

****326 *1561 *C. Amount of Punitive Damages***

Mercury argues that the punitive damages should be reversed or reduced as constitutionally excessive. The jury awarded $3 million in punitive damages, which the trial court later reduced to $1.7 million. This amounted to ten times the total of $130,000 in compensatory damages, plus $40,000 in prejudgment interest.

[21][22] "The due process clause of the Fourteenth Amendment to the United States Constitution places constraints on state court awards of punitive damages." (*Roby v. McKesson Corp.* (2009) 47 Cal.4th 686, 712, 101 Cal.Rptr.3d 773, 219 P.3d 749 (*Roby*) (citing to *State Farm Mut. Automobile Ins. Co. v. Campbell* (2003) 538 U.S. 408, 416–418, 123 S.Ct. 1513, 155 L.Ed.2d 585 (*State Farm*) and *BMW of North America, Inc. v. Gore* (1996) 517 U.S. 559, 568, 116 S.Ct. 1589, 134 L.Ed.2d 809 (*BMW*)).) "The imposition of 'grossly excessive or arbitrary' awards is constitutionally prohibited, for due process entitles a tortfeasor to ' "fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose." ' [Citations.]" (*Simon v. San Paolo U.S. Holding Co., Inc.* (2005) 35 Cal.4th 1159, 1171, 29 Cal.Rptr.3d 379, 113 P.3d 63 (*Simon*).) A further overarching consideration is that courts presume that " 'a plaintiff has been made whole for his injuries by compensatory damages, so punitive damages should only be awarded if the defendant's culpability, after having paid compensatory damages, is so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence. [Citation.]' " (*Jet Source Charter, Inc. v. Doherty* (2007) 148 Cal.App.4th 1, 9, 55 Cal.Rptr.3d 176.)

[23] In *State Farm,* the high court articulated "three guideposts" for courts reviewing punitive damages: "(1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases." (*State Farm, supra,* 538 U.S. at p. 418, 123 S.Ct. 1513; see also *BMW, supra,* 517 U.S. at p. 575, 116 S.Ct. 1589.) "In deciding whether an award of punitive damages is constitutionally excessive under *State Farm* and its predecessors, we are to review the award de novo, making an independent assessment of the reprehensibility of the defendant's conduct, the relationship between the award and the harm done to the plaintiff, and the relationship between the award and civil penalties authorized for comparable conduct." (*Simon, supra,* 35 Cal.4th at p. 1172, 29 Cal.Rptr.3d 379, 113 P.3d 63.)

***1562 1. Reprehensibility Factors**

[24] "Of the three guideposts that the high court outlined in *State Farm, supra,* 538 U.S. at page 418 [123 S.Ct. 1513], the most important is the degree of reprehensibility of the defendant's conduct. On this question, the high court instructed courts to consider whether '[1] the harm caused was physical as opposed to economic; [2] the tortious conduct evinced an indifference to or a reckless disregard of the health or safety

of others; [3] the target of the conduct had financial vulnerability; [4] the conduct involved repeated actions or was an isolated incident; and [5] the harm was the result of intentional malice, trickery,****327** or deceit, or mere accident.' (*Id.* at p. 419 [123 S.Ct. 1513].) " (*Roby, supra*, 47 Cal.4th at p. 713, 101 Cal.Rptr.3d 773, 219 P.3d 749; *Simon, supra*, 35 Cal.4th at p. 1180, 29 Cal.Rptr.3d 379, 113 P.3d 63.) "The existence of any one of these factors weighing in favor of a plaintiff may not be sufficient to sustain a punitive damages award; and the absence of all of them renders any award suspect." (*State Farm, supra*, 538 U.S. at p. 419, 123 S.Ct. 1513.)

[25] Applying these factors here, there is no dispute as to the first two reprehensibility factors articulated by *State Farm.* The harm caused by Mercury was economic and not physical, and there was no showing of a disregard for the health or safety of others.

Mercury disputes the third factor of Amerigraphics's financial vulnerability, but we find this factor to weigh in favor of a finding of reprehensibility. The evidence showed that Amerigraphics was losing money even before its premises were flooded, that Mercury removed the equipment Amerigraphics needed to keep its business going and never replaced it, and that Volper's letters to Mercury clearly explained that Amerigraphics needed the money to survive. Moreover, the relationship between an insurer and its insured is unique, in that an insured like Amerigraphics purchases insurance precisely to buy peace of mind and security. (See *Egan v. Mutual of Omaha Ins. Co.* (1979) 24 Cal.3d 809, 819, 169 Cal.Rptr. 691, 620 P.2d 141.) "A fundamental disparity exists between the insured, which performs its basic duty of paying the policy premium at the outset, and the insurer, which, depending on a number of factors, may or may not have to perform its basic duties of defense and indemnification under the policy. (See *Foley* [*v. Interactive Data Corp.* (1988)] 47 Cal.3d [654,] 693 [254 Cal.Rptr. 211, 765 P.2d 373] [noting the 'insurer's and insured's interest are financially at odds'].) An insured is thus not on equal footing with its insurer—the relationship between insured and insurer is inherently unequal, the inequality resting on contractual asymmetry. An insurer's tort liability for breach of the covenant is thus predicated upon special policy factors inapplicable to the insured. [Citation.]" (*Kransco v. American Empire Surplus Lines Ins. Co.* (2000) 23 Cal.4th 390, 404–405, 97 Cal.Rptr.2d 151, 2 P.3d 1.)

***1563** Regarding the fourth reprehensibility factor of whether the conduct involved repeated actions or was an isolated incident, again the parties disagree. Although Mercury's conduct could be characterized as more than a single isolated incident, as the evidence showed several discrete acts of misconduct involving Amerigraphics's claim for coverage under various policy provisions, the conduct at issue ultimately involved only one insured and one claim. There was no evidence presented that Mercury acted similarly toward other insureds in similar circumstances. Thus, on the evidence before us we cannot conclude that Mercury was a "repeat offender." (*Simon*, 35 Cal.4th at p. 1180, 29 Cal.Rptr.3d 379, 113 P.3d 63.)

As to the fifth reprehensibility factor, whether Mercury acted with intentional malice, trickery or deceit, "the jury here necessarily determined that [the defendant] acted with 'conscious disregard' of the rights of others (Civ.Code, § 3294, subd. (c)(1), (2)); therefore, the conduct at issue was certainly not 'mere accident' (*State Farm, supra*, 538 U.S. at p. 419 [123 S.Ct. 1513]). " (*Roby, supra*, 47 Cal.4th at pp. 715–716, 101 Cal.Rptr.3d 773, 219 P.3d 749.) Nevertheless, the evidence falls short of demonstrating that Mercury's conduct constituted "intentional malice." Although the end result of Mercury's egregious mishandling of the claim was that ****328** Amerigraphics went out of business, the evidence does not suggest that Mercury was guided by this goal from the outset.

We therefore conclude that of the five reprehensibility factors, only financial vulnerability weighs in favor of Amerigraphics.

2. Ratio of Punitive Damages to Actual Harm

In *State Farm,* the court stated that "few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process." (*State Farm, supra*, 538 U.S. at p. 425,

123 S.Ct. 1513.) "The court also explained that past decisions and statutory penalties approving ratios of 3 or 4 to 1 were 'instructive' as to the due process norm, and that while relatively high ratios could be justified when " 'a particularly egregious act has resulted in only a small amount of economic damages" [citation] ... [t]he converse is also true.... When compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee.' " (*Simon, supra,* 35 Cal.4th at p. 1182, 29 Cal.Rptr.3d 379, 113 P.3d 63.)

The Supreme Court in *Exxon Shipping Co. v. Baker* (2008) 554 U.S. 471, 128 S.Ct. 2605, 171 L.Ed.2d 570, reviewed studies evaluating the median ratio of punitive to compensatory verdicts, which "put the median ratio for the entire gamut of circumstances at less than 1:1 [citation], meaning that the compensatory award exceeds the punitive award in most cases." ***1564** 128 S.Ct. at p. 2633.) The Court noted that it "has long held that '[p]unitive damages by definition are not intended to compensate the injured party, but rather to punish the tortfeasor ... and to deter him and others from similar extreme conduct.' [Citations.]" (128 S.Ct. at p. 2633, fn. 27.)

The trial court here relied on *Simon* in reducing the award of punitive damages to a ten-to-one ratio, the same ratio found by the *Simon* court to comport with due process. The plaintiff's claim in *Simon* arose from a failed attempt to purchase an office building from the defendant. Although the jury found the parties never reached a binding contract, the jury did find that the defendant had committed promissory fraud, and awarded compensatory damages of $5,000 and punitive damages of $1.7 million (a 340–to–one ratio). (*Simon, supra,* 35 Cal.4th at p. 1166, 29 Cal.Rptr.3d 379, 113 P.3d 63.) The *Simon* court noted that only one of the five reprehensibility factors weighed in favor of the plaintiff, but relied on *State Farm* for the position that "due process permits a higher ratio between punitive damages and a small compensatory award for purely economic damages containing no punitive element." (*Simon, supra,* at p. 1189, 29 Cal.Rptr.3d 379, 113 P.3d 63.)

Roby, supra, 47 Cal.4th 686, 101 Cal.Rptr.3d 773, 219 P.3d 749, an employment discrimination and harassment case, was issued by our high court subsequent to the trial court's ruling here. There, the jury awarded more than $3 million in compensatory damages and $15 million in punitive damages to the plaintiff, who suffered from panic attacks and whose employer treated her poorly as a consequence. (*Id.* at p. 692, 101 Cal.Rptr.3d 773, 219 P.3d 749.) The high court reduced the compensatory damages award to $1,905,000, noting that of this sum $605,000 was for the plaintiff's economic losses and the remaining $1.3 million was for her "physical and emotional distress and may have reflected the jury's indignation at [the employer's] conduct, thus including a punitive component." (*Id.* at p. 718, 101 Cal.Rptr.3d 773, 219 P.3d 749.) Despite finding that three of the five *State Farm* reprehensibility ****329** factors were present, the court nevertheless concluded that the employer had a "relatively low degree of reprehensibility." (*Roby, supra,* at p. 719, 101 Cal.Rptr.3d 773, 219 P.3d 749.) Because the court also found that the compensatory damages award was "substantial" and included a "substantial" award of noneconomic damages, the court concluded that a one-to-one ratio was the federal constitutional limit, and reduced the punitive damages award accordingly. (*Ibid.;* dissent and concurring opinion concluded that conduct was sufficiently reprehensible to permit a two-to-one ratio of punitive damages.)

Mercury cites to other California appellate cases indicating that a one-to-one limit is appropriate in most cases, especially those involving purely economic loss. In *Jet Source Charter, Inc. v. Doherty, supra,* 148 Cal.App.4th 1, 55 Cal.Rptr.3d 176, where the compensatory damages and prejudgment award was $6.5 million and the punitive damages award was $26 million, the appellate court concluded that the punitive damages award should be reduced to the amount of ***1565** compensatory damages, noting that the compensatory damages award was "substantial," did not seem to involve a punitive element, and the plaintiff was not vulnerable. Similarly, in *Walker v. Farmers Ins. Exchange* (2007) 153 Cal.App.4th 965, 63 Cal.Rptr.3d 507, the appellate court affirmed a remitted punitive damages judgment against an insurer, which was reduced from $8.3 million

to $1.5 million, or a one-to-one ratio. There, an evaluation of the reprehensibility factors showed a relatively low level of reprehensibility on the part of the insurer, given that the insurer's denial of a defense involved only economic harm and emotional distress, the denial was an isolated incident that resulted from a mistake rather than intentional malice or deceit, and the compensatory damages, which were "substantial," included a punitive element. (*Id.* at pp. 973–975, 63 Cal.Rptr.3d 507.)

[26][27][28][29] Amerigraphics attempts to alter the ratio by arguing that its total compensatory damages was $516,541 (jury verdict plus *Brandt* fees), and therefore as remitted, the punitive damages award is only 3.2 times the compensatory damages award. But contrary to Amerigraphics's argument, the trial court properly excluded the amount of *Brandt* fees in determining the compensatory damages award, since the *Brandt* fees were awarded by the court after the jury had already returned its verdict on the punitive damages. Amerigraphics also claims that prejudgment interest should be included in the ratio calculation. But we are aware of no authority supporting this contention. To the contrary, the court in *Bardis v. Oates* (2004) 119 Cal.App.4th 1, 18–19, 14 Cal.Rptr.3d 89, found that the actual damages as determined by the jury should be used as the base figure for calculating the punitive damages ratio. Finally, Amerigraphics also attempts to alter the ratio by referring to the "potential injury" that was avoided by its actions in vigilantly pursuing its right to coverage under the policy. But an assessment of previously avoided losses may not be considered in assessing the ratio of punitive damages to harm. (*Simon, supra,* 35 Cal.4th at p. 1177, 29 Cal.Rptr.3d 379, 113 P.3d 63.) Only prospective injuries that are foreseeable from the defendant's conduct may be considered. "The potential harm that is properly included in the due process analysis is " 'harm *that is likely to occur from the defendant's conduct.*' " [Citation.]" (*Ibid.*)

3. Comparable Civil Penalties

[30] We briefly address the third guidepost courts consider when evaluating a punitive damages award, which is the disparity between the punitive damages ****330** award and the civil penalties authorized or imposed in comparable cases. (*Jet Source Charter, Inc. v. Doherty, supra,* 148 Cal.App.4th at p. 8, 55 Cal.Rptr.3d 176.) In this regard, Mercury merely cites to Insurance Code section 790.035, which imposes a civil penalty against an insurance company of $10,000 for each willful, unfair or deceptive act or practice defined in Insurance Code section 790.03. We agree with the court in ***1566***Century Surety Co. v. Polisso* (2006) 139 Cal.App.4th 922, 43 Cal.Rptr.3d 468 that "[t]his provision [Insurance Code section 790.035] is not particularly useful where as here [the insurer] engaged in a course of conduct over a five year period that involved many prohibited acts, although no findings were made as to the exact number of those acts." (*Id.* at p. 967, 43 Cal.Rptr.3d 468.) Thus, this factor can be properly excluded from the calculus of the constitutional maximum of punitive damages.

4. Maximum Constitutional Award

[31] Based on the authorities and the facts of this case, we are convinced that the trial court's remittitur of punitive damages to $1.7 million is constitutionally excessive. "To state a particular level beyond which punitive damages in a given case would be grossly excessive, and hence unconstitutionally arbitrary, " 'is not an enviable task.... In the last analysis, an appellate panel, convinced it must reduce an award of punitive damages, must rely on its combined experience and judgment.' " [Citation.]" (*Simon, supra,* 35 Cal.4th at p. 1188, 29 Cal.Rptr.3d 379, 113 P.3d 63.) Here, neither the interest in deterrence nor Mercury's substantial wealth can justify a punitive damages award of 10 times the amount of compensatory damages.

[32] The $130,000 awarded by the jury in compensatory damages is the precise amount of damages that Amerigraphics sought. In light of the amount, there does not appear to be a punitive element to the compensatory damages award. In response to Amerigraphics's request for punitive damages in the amount of $3.4 million, Mercury's attorney argued in closing that a ratio of two-to-one, or even $500,000, might be appropriate as punitive damages, and would bear a reasonable relationship to the harm caused by Mercury. It is our

task to determine independently whether an award is constitutionally excessive, and a party's consent is therefore irrelevant. (*Simon, supra*, 35 Cal.4th at pp. 1187–1188, 29 Cal.Rptr.3d 379, 113 P.3d 63.) Still, we agree that $500,000 is an appropriate amount of punitive damages in this case, and is not constitutionally excessive. Amerigraphics, which thought it had insured itself against catastrophic loss, and faithfully paid its premium to Mercury, ultimately became a particularly vulnerable victim. Put simply, Mercury's egregious conduct put Amerigraphics out of business.

We therefore conclude that based upon the circumstances of this case, the maximum award of punitive damages consistent with due process is $500,000, an award based on a 3.8–to–one ratio of compensatory damages.

***1567 DISPOSITION**

The judgment is reversed insofar as it awards punitive damages of $1.7 million. The matter is remanded to the trial court with directions to modify the judgment by reducing the award of punitive damages to $500,000. In all other respects, the judgment is affirmed. Each party to bear its own costs on appeal.

We concur: BOREN, P.J., and CHAVEZ, J.

Cal.App. 2 Dist.,2010.
Amerigraphics, Inc. v. Mercury Cas. Co.
182 Cal.App.4th 1538, 107 Cal.Rptr.3d 307, 10 Cal. Daily Op. Serv. 3574, 10 Cal. Daily Op. Serv. 3633, 2010 Daily Journal D.A.R. 4326

Briefs and Other Related Documents (Back to top)

• 2009 WL 5427017 (Appellate Brief) Appellant's Reply Brief (Dec. 10, 2009) Original Image of this Document (PDF)
• 2009 WL 1833766 (Appellate Brief) Appellant's Opening Brief (Jun. 9, 2009) Original Image of this Document (PDF)
• 2008 WL 6898162 (Appellate Brief) Respondent's Brief (Sep. 18, 2008) Original Image of this Document (PDF)
• B208654 (Docket) (Jun. 12, 2008)

Oral Argument Transcripts with Streaming Media (Back to top)

• 2010 WL 2481890 (Oral Argument) Oral Argument (Feb. 26, 2010)

Judges, Attorneys and Experts(Back to top)

Judges | Attorneys | Experts

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• Boren, Hon. Roger W.
State of California Court of Appeal, 2nd Appellate District
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Litigation History Report | Judicial Reversal Report | Judicial Expert Challenge Report | Profiler

• Chavez, Hon. Victoria Marie
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Litigation History Report | Judicial Reversal Report | Judicial Expert Challenge Report | Profiler

• Murphy, Hon. Mary Ann
State of California Superior Court, Los Angeles County
Los Angeles, California 90012
Litigation History Report | Judicial Motion Report | Judicial Reversal Report | Judicial Expert Challenge Report | Profiler

• Todd, Hon. Kathryn Doi
State of California Court of Appeal, 2nd Appellate District
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Litigation History Report | Judicial Reversal Report | Judicial Expert Challenge Report | Profiler

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182 Cal.App.4th 1538, 107 Cal.Rptr.3d 307, 10 Cal. Daily Op. Serv. 3574, 10 Cal. Daily Op. Serv. 3633, 2010 Daily Journal D.A.R. 4326
(Cite as: 182 Cal.App.4th 1538, 107 Cal.Rptr.3d 307)

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END OF DOCUMENT

Motions, Pleadings and Filings

Court-Filed Expert Resumes filed in this case

Judges, Attorneys and Experts

United States District Court,
S.D. New York.
RETAIL BRAND ALLIANCE, INC., Plaintiff,
v.
FACTORY MUTUAL INSURANCE CO., Defendant.

No. 05 Civ. 1031(RJH).
May 30, 2007.

Background: Insured sued insurer, seeking in part a declaratory judgment as to business income coverage regarding three stores destroyed in a terrorist attack. The parties cross-moved for partial summary judgment.

Holding: The District Court, Holwell, J., held that the period of liability for business interruption coverage was tied to the condition of the insured's building and equipment, and not to the condition of its business.

Defendant's motion granted.

West Headnotes

[1] Federal Civil Procedure 170A 2492

170A Federal Civil Procedure
170AXVII Judgment
170AXVII(C) Summary Judgment
170AXVII(C)2 Particular Cases
170Ak2492 k. Contract Cases in General. Most Cited Cases

With respect to a contract claim, a court may construe the contract and grant summary judgment when the contractual language is plain and unambiguous.

[2] Insurance 217 1863

217 Insurance
217XIII Contracts and Policies
217XIII(G) Rules of Construction
217k1863 k. Questions of Law or Fact. Most Cited Cases

Question of ambiguity in an insurance contract is a question of law to be decided by the Court.

[3] Evidence 157 448

157 Evidence
157XI Parol or Extrinsic Evidence Affecting Writings
157XI(D) Construction or Application of Language of Written Instrument
157k448 k. Grounds for Admission of Extrinsic Evidence. Most Cited Cases

Insurance 217 1822

217 Insurance
217XIII Contracts and Policies
217XIII(G) Rules of Construction
217k1822 k. Plain, Ordinary or Popular Sense of Language. Most Cited Cases

Absent ambiguity in an insurance policy, the court will not look to extrinsic evidence, but will interpret the contract on its face, giving the words their ordinary meaning.

[4] Insurance 217 1816

217 Insurance
217XIII Contracts and Policies
217XIII(G) Rules of Construction
217k1815 Reasonableness
217k1816 k. In General. Most Cited Cases

Insurance 217 1822

217 Insurance
217XIII Contracts and Policies

217XIII(G) Rules of Construction
217k1822 k. Plain, Ordinary or Popular Sense of Language. Most Cited Cases

Each word in an insurance contract should be given the meaning ordinarily ascribed to it, and absurd results should be avoided.

[5] Insurance 217 ⚿2179(1)

217 Insurance
217XVI Coverage--Property Insurance
217XVI(A) In General
217k2173 Amount of Damage or Loss
217k2179 Business Interruption; Lost Profits
217k2179(1) k. In General. Most Cited Cases

Under an insurance policy providing that the period of liability for business interruption coverage ended when the insured's building and equipment could be replaced and made ready for operations "under the same or equivalent physical and operating conditions," the period of liability was tied to the condition of the insured's building and equipment, and not to the condition of its business; thus, the period of liability extended until the insured could build reasonably equivalent stores in a reasonably equivalent location, but not for the hypothetical time that it would take to rebuild its stores in a rebuilt world trade center complex following the destruction of the original in a terrorist attack.

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MEMORANDUM OPINION AND ORDER

HOLWELL, District Judge.

This case concerns business interruption coverage for three stores destroyed in the terrorist attack on the World Trade Center on September 11, 2001 ("9/11"). On January 31, 2005, plaintiff Retail Brand Alliance Inc. ("RBA") filed a complaint against its insurer, Factory Mutual Insurance Co. ("FM Global"), seeking in part a declaratory judgment that RBA is entitled to coverage for business income for the period of time it reasonably would take to replace its stores in a rebuilt World Trade Center complex. (Compl.34-39.) FM Global denied RBA's allegations, stating that it had already paid a total of $3,886,940 for RBA's property damage and time element claim.[FN1] (Answer 6.) Following discovery, the parties moved for partial summary judgment, each side seeking a ruling in favor of its preferred interpretation of the Policy. For the reasons stated herein, the Court denies plaintiff's motion for partial summary judgment [27] and grants defendant's motion for partial summary judgment [21].

FN1. Time element coverage reimburses the insured for losses directly related to the period of time necessary to restore the damaged property to its normal condition. Examples of time element coverage include business interruption insurance, contingent business interruption insurance, and extra expense insurance. *See* Stephen A. Cozen, *Insuring Real Property* § 3.01 (2005).

***328 BACKGROUND**

Prior to September 11, 2001, RBA operated three retail stores (the "Stores") in the World Trade Center in New York. Those three stores-Casual Corner, Petite Sophisticate, and August Max-were part of a chain of approximately 650 women's clothing stores spread across the United States. The three stores at issue here were in the multilevel underground mall in the WTC complex. Each day, tens of thousands of workers and other commuters walked through the enclosed mall past the Stores on

their way to and from work and the subway and PATH trains. Because a large percentage of those who worked in the World Trade Center were young career women, RBA's primary target consumers, RBA's stores in the World Trade Center were significantly more profitable than any of its other stores.

RBA purchased property and business interruption insurance for the Casual Corner, Petite Sophisticate, and August Max Woman brand stores nationwide through FM Global, under policy number NB334 (the "Policy"). (*See* Hennen Decl. Ex. A.) The Policy also covers a variety of other properties as well, including other retail brand stores, warehouses, storage facilities, factories, and corporate centers. (*See* Policy, App. A; Def.'s Mem. in Support of Its Motion for Partial Summ. J. ("Def.'s Mot.") 1-2.) A list of specific locations covered by the Policy are included in Appendix A, titled "Schedule of Locations." Although the Casual Corner, Petite Sophisticate, and August Max Woman brand stores are not explicitly described in the Policy, Appendix A notes that coverage is provided for a "Schedule of Retail Stores on file with this Company" ("Schedule"). (*See* Policy, App. A (Revised), at 1.) The Schedule, which constantly changed as RBA opened and closed stores, listed the Stores at issue here, as well as the hundreds of other retail stores operated by RBA under the Casual Corner, Petite Sophisticate, and August Max Woman brands. (See Schedule, Hennen Decl. Ex. C; Def.'s Mot. 2.)

The Policy covers property and business interruption losses at all RBA stores for the period between February 1, 2001, and February 1, 2002, and has a blanket limit of $647 million for property and business interruption losses. The policy provides "TIME ELEMENT" coverage as follows:

> 1. LOSS INSURED
>
> A. This Policy insures TIME ELEMENT loss, as provided in the TIME ELEMENT COVERAGES, directly resulting from physical loss or damage of the type insured by this Policy:
>
> 1) to property described elsewhere in this Policy and not otherwise excluded by this Policy or otherwise limited in the TIME ELEMENT COVERAGES below;
>
> 2) used by the Insured, or for which the Insured has contracted use;
>
> 3) located at an Insured Location; and
>
> 4) during the Periods of Liability described in this section.
>
> B. This Policy insures TIME ELEMENT loss only to the extent it cannot be reduced through:
>
> 1) the use of any property or service owned or controlled by the Insured;
>
> 2) the use of any property or service obtainable from other sources;
>
> 3) working extra time or overtime; and
>
> 4) the use of inventory
>
> ***329** all whether at an Insured Location or at any other location. The Company reserves the right to take into consideration the combined operating results of all associated, affiliated, or subsidiary companies of the Insured in determining the TIME ELEMENT loss.
>
> ....

(Policy § C.1, at 25.) The provision dealing with business interruption losses extends coverage to "the recoverable GROSS EARNINGS loss," which the Policy defines as "Gross Earnings; less all charges and expenses that do not necessarily continue during the interruption of production or suspension of business operations or services; less Ordinary Payroll; plus all other earnings derived from the operation of the business." (Policy § C.2.A.1.a, at 25-26.) The Policy also extends coverage for certain "EXTRA EXPENSE" incurred as a result of physical loss or damage insured by the

Policy. (Policy § C.2.B, at 26-27.) Gross earnings and extra expense coverage do not extend into the indefinite future but are limited by the Period of Liability clause, which provides in relevant part as follows:

> 4. PERIOD OF LIABILITY
>
> A. The PERIOD OF LIABILITY applying to all TIME ELEMENT COVERAGES, except LEASEHOLD INTEREST and as shown below, or if otherwise provided under the TIME ELEMENT COVERAGE EXTENSIONS, is as follows:
>
> 1) For building and equipment, the period:
>
> a) starting from the time of physical loss or damage of the type insured against; and
>
> b) ending when with due diligence and dispatch the building and equipment could be:
>
> (i) repaired or replaced; and
>
> (ii) made ready for operations,
>
> under the same or equivalent physical and operating conditions that existed prior to the damage.
>
> c) not to be limited by the expiration of this Policy.
>
> ....
>
> (Policy § C.4, at 34.)

The principal coverage issue presented by the instant motions concerns how these clauses should be interpreted in determining the length of the Period of Liability applicable to RBA's World Trade Center stores. Specifically, RBA seeks partial summary judgment that the Period of Liability is "the theoretical period of time reasonably necessary, with due diligence and dispatch, to replace the Stores and make them ready for operations at a location with a sales environment that is comparable to the one which existed at the WTC shopping mall before 9/11." (Pl.'s Mem. in Support of Cross-Motion for Partial Summ. J. and Opp'n ("Pl.'s Opp'n") 2; *see also* Oral Argument Tr. 10, 13, 19 (May 2, 2007) ("Tr.") ("[W]hat we're saying is we are entitled to get a period of time in order to reconstitute these stores at a commercially comparable location," that is, a location with approximately the same "flow of foot traffic by the door.").) RBA further seeks a ruling that if no such comparable alternative location exists, as it indeed contends, it is entitled to business interruption coverage for the hypothetical time necessary to rebuild the World Trade Center. (Pl.'s Opp'n 2; Tr. 22.) FM Global, by contrast, seeks partial summary judgment that the Period of Liability is the hypothetical period of time in which RBA would be able to replace its World Trade Center stores with "reasonably equivalent store[s] ***330** in a reasonably equivalent location." [FN2] (Def.'s Mot. 12; Tr. 28, 32, 33, 34, 41); *see Duane Reade, Inc. v. St. Paul Fire & Marine Ins. Co.*, 411 F.3d 384, 393 (2d Cir.2005).

> FN2. The parties agree that the Period of Liability is the hypothetical (as opposed to actual) time frame for rebuilding the stores. (*See* Def.'s Mot. 12; Pl.'s Opp'n 2.)

DISCUSSION

I. Legal Standard

Under Federal Rule of Civil Procedure 56(c), the burden is on the party moving for summary judgment to establish that there are no genuine issues of material fact in dispute and that it is entitled to judgment as a matter of law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); *White v. ABCO Engineering Corp.*, 221 F.3d 293, 300 (2d Cir.2000). Once the moving party has met its burden, to defeat the motion the nonmoving party must "set forth specific facts showing that there is a genuine issue for trial." *Anderson*, 477 U.S. at 255, 106 S.Ct. 2505. "The plain language of Rule 56(c) mandates the entry of summary judgment ... against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on

which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 321, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); *see also Distasio v. Perkin Elmer Corp.*, 157 F.3d 55, 61 (2d Cir.1998); *Conway v. Microsoft Corp.*, 414 F.Supp.2d 450, 458 (S.D.N.Y.2006).

[1][2][3][4] "With respect to a contract claim, a court may construe the contract and grant summary judgment when the contractual language is 'plain and unambiguous.' " *Zurich Am. Ins. Co. v. ABM Indus., Inc.*, 397 F.3d 158, 164 (2d Cir.2005) (quoting *Brass v. Am. Film Techs., Inc.*, 987 F.2d 142, 148-49 (2d Cir.1993)). The Second Circuit has held that

> an ambiguity exists where the terms of an insurance contract could suggest more than one meaning when viewed objectively by a reasonably intelligent person who has examined the context of the entire integrated agreement and who is cognizant of the customs, practices, usages and terminology as generally understood in the particular trade or business.

Id. (quoting *Morgan Stanley Group Inc. v. New England Ins. Co.*, 225 F.3d 270, 275 (2d Cir.2000)). The question of ambiguity is a question of law to be decided by the Court. *See Collins v. Harrison-Bode*, 303 F.3d 429, 433 (2d Cir.2002); *Readco v. Marine Midland Bank*, 81 F.3d 295, 299 (2d Cir.1996). Absent ambiguity in the policy, the Court will not look to extrinsic evidence, but will interpret the contract on its face, giving the words their ordinary meaning. *See Kinek v. Paramount Communications, Inc.*, 22 F.3d 503, 509 (2d Cir.1994). Each word should be given the meaning ordinarily ascribed to it, and "absurd results should be avoided." *World Trade Ctr. Props., L.L.C. v. Hartford Fire Ins. Co.*, 345 F.3d 154, 166 (2d Cir.2003).

II. Textual Analysis

[5] As noted, the Period of Liability for business interruption coverage ends when RBA's building and equipment could be replaced and made ready for operations "under the same or equivalent physical and operating conditions." (Policy § C.4.A.1.b, at 34.) The entire dispute between the parties turns on the interpretation of the quoted phrase, or, more precisely, the last two words of the phrase. RBA contends that the relevant "operating conditions" include "the location of the ***331** store, in particular, the access to a certain flow of foot traffic by the door." (Tr. 10.) Since RBA further contends that the foot traffic past its stores in the World Trade Center concourse was unique, RBA argues that the Period of Liability would be the hypothetical time it would take to replace its stores in a rebuilt World Trade Center complex. (*See* Tr. 12-13; Pl.'s Opp'n 3-4.) RBA argues that, because the Time Element coverage protects loss to its *business*, as opposed to its *property*, the phrase "under the same or equivalent physical and operating conditions" refers to the operating conditions of its business, not merely the operating conditions of its building and equipment. (Tr. 9-10.)

The Court finds that the unambiguous language of the Period of Liability clause precludes RBA's interpretation. The phrase "under the same or equivalent physical and operating conditions" explicitly modifies "building and equipment"; the word "business" does not even appear in that part of the Period of Liability clause at dispute here. (*See* Policy § C.4.A.1, at 34.) RBA argues that if the word "business" is not read into the clause, then the phrase "under the same or equivalent physical and operating conditions" becomes superfluous because the clause already states that coverage extends until the repaired or replaced "building and equipment" are "made ready for operations." (Tr. 38; Pl.'s Opp'n 17.) However, replacing and making a building and equipment ready for operations and ensuring that the building and equipment operate in a manner equivalent to their operation prior to their loss are two different things. The equivalent operating condition provision explicitly requires that repaired or replaced facilities have the same capacities as the damaged facilities. Moreover, even after a store and its systems are rebuilt with the same oper-

ating capacities, it may take time to adjust, for example, the heating, ventilation, and air conditioning system so that it works correctly in the new building. It would be nonsensical to interpret the Period of Liability as extending until the building and equipment are restored to the same "sales environment" or "profit-earning potential," as these conditions are irrelevant to the operation of building and equipment. Instead, the Policy reimburses the insured for Gross Earnings and Extra Expenses during the period in which the building and equipment are being made ready to operate in the same manner that they did prior to the damage that triggered coverage. Once the building and equipment are restored to that state, the Period of Liability ends.

Because the Period of Liability is tied to the condition of the insured's building and equipment, and not to the condition of its business, the Period of Liability may terminate while the insured is still losing sales. In such cases, the Extended Period of Liability in RBA's policy provides additional coverage to the insured. Under this provision, "The GROSS EARNINGS coverage is extended to cover the reduction in sales ... for such additional length of time as would be required with the exercise of due diligence and dispatch to restore the Insured's *business* [as opposed to the Insured's building and equipment] to the condition that would have existed had no loss occurred." (Policy § C.3.C.1-2, at 30 (emphasis added).) Thus, the Period of Liability is concerned with the condition of the "building and equipment," while the Extended Period of Liability is concerned with the condition of the business.[FN3]

> FN3. Further support for the Court's interpretation of the Period of Liability clause is found in the Contingent Time Element-Anchor Stores clause. (*See* Policy 30.) The Anchor Stores clause provides contingent business interruption coverage during the Period of Liability when an anchor store, whose business is necessary to attract customer traffic to the insured's establishment, suffers physical damage. Anchor Store coverage is capped at twelve months and twenty percent of normal sales. *Id.* If, as RBA argues, the Period of Liability extends until the sales environment that existed prior to the loss is restored, then in a situation in which the insured's property and the anchor store are simultaneously destroyed and the anchor store is not rebuilt, business interruption coverage might extend until the hypothetical time it would take to rebuilt the anchor store. This result is plainly absurd because it would vitiate the twelve-month, twenty-percent cap on Anchor Store coverage dictated by the Policy. RBA's interpretation of the phrase "operating conditions" to include the sales environment (i.e., foot traffic) thus conflicts with the Anchor Store clause.

***332 III. Relevant Case Law**

Although no other case involving World Trade Center tenants has analyzed precisely the same language at issue here, the cases generally support the conclusion reached by the Court, that the Period of Liability is tied to the restoration of the insured's building and equipment, and not to the original location of that building or the surrounding sales environment. Other cases in which the insured operated a retail store damaged or destroyed on 9/11 have uniformly rejected attempts to tie the period of liability to rebuilding of the World Trade Center. *See Duane Reade,* 411 F.3d 384 (drugstore in World Trade Center's main concourse); *Children's Place Retail Stores v. Fed. Ins. Co.,* 37 A.D.3d 243, 829 N.Y.S.2d 500 (N.Y.App.Div.2007) (clothing store in World Trade Center's main concourse); *Royal Indemnity Co. v. Retail Brand Alliance,* 33 A.D.3d 392, 822 N.Y.S.2d 268 (N.Y.App.Div.2006) (Brooks Brothers clothing store at One Liberty Plaza). Courts also have rejected similar attempts by non-retail businesses where the purpose of the business was not tied to the real property at the World Trade Center. *See Lava Trading Inc. v. Hartford Fire Ins. Co.,* 365 F.Supp.2d 434 (business sold software for equities trading);

Streamline Capital, LLC v. Hartford Cas. Ins. Co., 2003 WL 22004888 (business provided securities traders, brokers, and dealers with technological and computer management facilities in the World Trade Center). Indeed, in each of the three cases in which courts held that the scope of business interruption coverage *was* tied to the rebuilding of the World Trade Center, the insured's business depended on the existence of the real property at the World Trade Center. *See Zurich Amer. Ins. Co. v. ABM Indus., Inc.*, No. 01 Civ. 11200(JSR), 2006 WL 1293360, at *2, 2006 U.S. Dist. LEXIS 28249 (S.D.N.Y. May 11, 2006) (business provided janitorial, lighting and engineering services throughout the World Trade Center complex); *Int'l Office Ctrs. Corp. v. Providence Washington Ins. Co.*, No. 04 Civ. 990(JCH), 2005 WL 2258531, 2005 U.S. Dist. LEXIS 20494 (D.Conn. Sept. 16, 2005) (business provided temporary executive office space in the World Trade Center); *SR Int'l Bus. Ins. Co. v. World Trade Ctr. Props.*, No. 01 Civ. 9291(MBM), 2005 WL 827074, 2005 U.S. Dist. LEXIS 13001 (S.D.N.Y. Feb. 15, 2005) (business owned 99-year leases with the Port Authority of New York and New Jersey for the commercial space in the World Trade Center complex). Here, RBA's business was clearly not dependent on the existence of the World Trade Center complex, as demonstrated by the hundreds of stores it operated across the country.

The case that is most similar to RBA's situation is *Duane Reade*, 411 F.3d at 389-90. Duane Reade, which owns more than 200 drugstores in and around New York City, operated its most profitable store in ***333** the World Trade Center concourse, on the same floor as RBA's stores. The time period clause limiting business interruption insurance under its policy provided that recovery of business interruption losses "shall not exceed such length of time as would be required with the exercise of due diligence and dispatch to rebuild, repair, or replace such property that has been destroyed or damaged...." *Id.* at 387. At the Second Circuit, Duane Reade defended the district court's conclusion that the period of liability for its business interruption coverage was to be measured by the hypothetical time frame for the rebuilding of the WTC store itself, although not the entire complex, on the ground that "the parties intended to protect Duane Reade's interest in the specific location of its valuable WTC store." *Id.* at 394. The court found, however, that to the extent that Duane Reade had a site-specific property interest in the World Trade Center complex, that property interest was protected by the leasehold interest clause in Duane Reade's policy. *Id.* at 397-98. The leasehold interest clause in Duane Reade's policy-like the leasehold interest in RBA's policy-entitled Duane Reade, in the event that its leasehold interest was terminated as a result of the destruction of its leased premises in the World Trade Center by a covered peril, to reimbursement for the loss of the site's "actual rental value (i.e., its intrinsic value) less the rents and expenses Duane Reade would have had to pay, but only until the lease would have expired of its own accord." *Id.* at 397. Once Duane Reade's business had resumed in a "reasonably equivalent building in a reasonably equivalent location," the Second Circuit said, "any discrepancies between the new building and the WTC in terms of benefits and advantages [of the site itself] are exclusively accounted for under the Leasehold Interest clause," if at all. *Id.* at 394, 398. The Second Circuit also rejected Duane Reade's claim that the business interruption clause provided site-specific coverage because the site that Duane Reade occupied in the World Trade Center "was neither the subject of the insurance policy nor expressly provided for in the calculus set forth in the Restoration Period," *id.* at 396, "as might be expected had the parties intended to single out the WTC store in a policy that covered all of Duane Reade's 200 stores," *id.* at 395.

The Court finds that the Second Circuit's reasoning in *Duane Reade* applies in the present case. The Court notes that the language of the Period of Liability for business interruption under RBA's policy is identical to that in Duane Reade, except for the provision that the building and equipment be repaired or replaced under the "same or equivalent

physical and operating conditions." As the Court has found, this phrase does not create a requirement for an equivalent flow of foot traffic. Accordingly, any interest RBA has in the "increased foot traffic, entrenched customer base, or superior location" enjoyed by its Stores at the World Trade Center was not protected by the business interruption clause. *Id*. at 397-98. Like Duane Reade, RBA's interest in the unique location of its Stores was protected, if at all, by the Leasehold Interest clause in its Policy, which is identical in scope to the leasehold interest clause in Duane Reade's policy. (*Compare* Policy § C.2.C, at 27 *with Duane Reade, Inc. v. St. Paul Fire & Marine Ins. Co.*, No. 02 Civ. 7676(JSR), Pl.'s Mot. for Summ. J., Benkard Aff. [56] Ex. A (Policy), at 17.)

Although RBA's World Trade Center stores are listed on a schedule that is referred to in Appendix A of the Policy, RBA concedes that the Stores are not "specifically named" in the policy. (See Pl.'s Letter, Jan. 19, 2007, at 1.) RBA argues that the only reason for their omission***334** from the Policy itself is that the list of insured locations is too long to be included in the Policy's declaration page. Even if this is true, and the Court assumes that it is, it does not support RBA's proposition that the Policy extends business interruption coverage until the time when its Stores are rebuilt on their original location. As the Court has already found, the Period of Liability clause does not tie coverage to the site-specific restoration of each of RBA's 650 store locations. Thus, despite the fact that RBA's policy, unlike Duane Reade's policy, refers explicitly to a list of insured locations in a Schedule filed with FM Global, nothing in the Policy suggests that RBA sought to single out the World Trade Center Stores, or indeed any of its stores, for site-specific coverage. Rather, like the policy in *Duane Reade*, the Policy is a general one that covers hundreds of retail stores and contemplates the possibility that stores will be rebuilt in new locations.

The Court notes, however, that business interruption coverage does not terminate under RBA's policy when its Stores are rebuilt in any generic location. The Second Circuit has found implicit in provisions similar to that here a requirement that coverage continue until the insured can build a "reasonably equivalent store in a reasonably equivalent location." *Duane Reade*, 411 F.3d at 393 (citing *Beautytuft, Inc. v. Factory Ins. Ass'n*, 431 F.2d 1122, 1128 (6th Cir.1970); *Anchor Toy Corp. v. Am. Eagle Fire Ins. Co.*, 4 Misc.2d 364, 155 N.Y.S.2d 600, 603 (N.Y.Sup.Ct.1956)). "The rationale behind such holdings has generally been that insureds would lack any incentive to resume partial operations in temporary locations or under other inferior circumstances in order to mitigate damages if such actions would terminate their [business interruption] coverage." *Id*. Moreover, FM Global agreed at oral argument that, at least in this Circuit, coverage under the Policy extends until RBA can build a "reasonably equivalent store in a reasonably equivalent location." (Tr. 28, 32, 33, 34, 41.) While RBA contends that the Second Circuit's definition of the period of coverage in *Duane Reade* is not applicable to the instant policy, RBA has at times advocated a similar approach. Thus, at argument RBA contended that coverage should extend for "a period of time in order to reconstitute these stores at a commercially comparable location, where there is a comparable access to potential clients." (Tr. 13.) Without attempting to define the precise difference between a "commercially comparable" location and a "reasonably equivalent" one, the Court adheres to the Circuit's definition of the period of liability. FN4

FN4. Having found that the Policy language is unambiguous and is supported by case law, the Court need not consider extrinsic evidence submitted by the parties. *See Lava Trading*, 365 F.Supp.2d at 440.

CONCLUSION

In accordance with the foregoing, the Court holds that the Period of Liability extends time element coverage under the Gross Earnings and Extra Expense clauses until RBA can build reasonably

equivalent stores in a reasonably equivalent location, but that this period is not tied to the hypothetical time that it would take to rebuild its Stores in a rebuilt World Trade Center complex. Accordingly, the Court denies plaintiff's motion for partial summary judgment [27] and grants defendant's motion for partial summary judgment [21].

SO ORDERED.

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(Cite as: 2006 WL 1293360 (S.D.N.Y.))

Motions, Pleadings and Filings

Judges, Attorneys and Experts

Only the Westlaw citation is currently available.

United States District Court,
S.D. New York.
ZURICH AMERICAN INSURANCE CO.,
Plaintiff,
v.
ABM INDUSTRIES, INC., Defendant.

No. 01 Civ. 11200(JSR).
May 11, 2006.

MEMORANDUM ORDER

RAKOFF, J.

***1** Plaintiff Zurich American Insurance Co. ("Zurich") brought this declaratory action to determine the extent of its liability to ABM Industries, Inc. ("ABM"), an engineering and janitorial services contractor, for losses and expenses incurred as a result of the destruction of the World Trade Center ("WTC") on September 11, 2001. Presently pending before the Court are the parties' respective cross-motions for partial summary judgment as to the applicable period of recovery and as to ABM's claims for coverage under the insurance contract's "extra expenses" provision, as well as ABM's motion for partial summary judgment on the issue of civil authority coverage.

Familiarity with the facts and prior proceedings in this case is here assumed. *See, e.g.*, *Zurich Am. Ins. Co. v. ABM Indus., Inc.*, 265 F.Supp.2d 302 (S.D.N.Y.2003), *aff'd in part, rev'd in part, vacated and remanded, in part*, 397 F.3d 158 (2d Cir.2005). To recapitulate briefly, ABM is a facility services contractor that provided janitorial, lighting, and engineering services in the common areas of the WTC; provided janitorial services for virtually all of the tenants in the WTC; and operated a call desk through which it provided engineering and lighting services to the WTC tenants. The parties do not dispute that a significant amount of ABM's profits were derived from work it performed for the WTC tenants, or that its servicing of the common areas enabled it to procure those contracts.

Pursuant to insurance policy number MLP 8339383-05 (the "Policy"), purchased by ABM from Zurich at an annual premium of $224,591, Zurich agreed to insure ABM for the period from February 1, 2001 through February 1, 2002. The Policy provided coverage to ABM for, *inter alia*, "loss resulting directly from the necessary interruption of [ABM's] business caused by direct physical loss or damage ... to insured property at an insured location," § 7(B)(1); "[e]xtra [e]xpense incurred" by ABM as a result of "loss, damage, or destruction ... to [ABM's] real or personal property," § 7(C)(1); and losses related to "[i]nterruption by [c]ivil or [m]ilitary [a]uthority," § 7(F)(5).

On the parties' prior cross-motions for partial summary judgment, the Court concluded, *inter alia*, that ABM could not recover under the aforementioned provisions because its loss resulted from the destruction of property that was not "owned, controlled, used, leased or intended for use" by ABM. *Zurich Am. Ins. Co. v. ABM Indus., Inc.*, 265 F.Supp.2d 302 (S.D.N.Y.2003). The Court of Appeals reversed, finding that ABM "used" the property within the meaning of the insurance contract, and remanded for a determination of ABM's damages under the Business Interruption provision, as well as whether the losses claimed under the extra expenses and civil authority provisions resulted from the insured peril. *Zurich Am. Ins. Co. v. ABM Indus., Inc.*, 397 F.3d 158, 164, 170-71 (2d Cir.2005). Following remand, the parties engaged in additional discovery, and then brought these cross-motions for partial summary judgment.

***2** As a preliminary matter, the Court rejects ABM's claim that Zurich has waived the arguments it now raises because it did not take these positions

at earlier stages in this litigation. The issues that are the subject of the instant motions did not become relevant until the Court of Appeals rejected Zurich's position that ABM was only entitled to coverage under the contract's Contingent Business Interruption provision and, in any event, an insurer's defense based on a lack of coverage cannot be waived, *see, e.g .*, *Burt Rigid Box v. Travelers Prop. Cas. Corp.*, 302 F.3d 83, 96 (2d Cir.2002). Further, following remand, the parties were provided with approximately five months of additional discovery, so ABM has had ample opportunity to engage in discovery on these issues.

Turning to the parties' motions on the applicable period of recovery, the Policy provides that "[t]he length of time for which loss may be claimed ... shall not exceed such length of time as would be required with the exercise of due diligence and dispatch to rebuild, repair, or replace the property that has been destroyed or damaged." Policy § 7(G)(1). While ABM argues that the "property that has been destroyed or damaged" refers to the World Trade Center itself, Zurich argues that the Period of Recovery should end when ABM's customers, *i.e.*, the WTC tenants, have relocated their businesses. Zurich premises this argument, in large part, on the Court of Appeal's holding that "[t]he insurable interest requirement ... protect[s] only that in which ABM has a financial stake-its future stream of income." *Zurich*, 397 F.3d at 168. However, that language means only that, in determining the amount of ABM's damages, ABM can be compensated only for loss related to "its future stream of income." FN1 The language says nothing about the length of time for which ABM can claim coverage for its loss. Furthermore, Zurich's position fails to take account of the unambiguous meaning of the term "property" as it is used in the relevant provisions of the Policy. As the Court of Appeals previously determined, the phrase "insured property" in the Business Interruption provision refers not only to the spaces occupied by the tenants, but also, *inter alia*, to the public common areas; and there is no reason to believe that the term "property" has any different meaning in the Policy provision here relevant. *See, e.g., Streamline Capital, L.L.C. v. Hartford Casualty Ins. Co.*, No. 02 Civ. 8123, 2003 U.S. Dist. LEXIS 14677, *25 (S.D.N.Y. Aug. 25, 2003).

> FN1. By contrast, ABM could not claim damages for the value of the physical property destroyed at the World Trade Center, even though it "used" that property in the meaning of the Policy.

Thus, the instant case is different from *Duane Reade, Inc. v. St. Paul Fire & Marine Ins. Co.*, 411 F.3d 384 (2d Cir.2005), and *Streamline Capital, L.L.C. v. Hartford Casualty Ins. Co.*, No. 02 Civ 8123, 2003 U.S. Dist. LEXIS 14677 (S.D.N.Y. Aug. 25, 2003), on which Zurich principally relies, where the courts concluded that the insured property was the plaintiffs' personal property at the World Trade Center, *Duane Reade, Inc.*, 411 F.3d at 396; *Streamline Capital, L.L.C.*, 2003 U.S. Dist. LEXIS 14677, at *25-26. Likewise, the nature of ABM's business is fundamentally different from that of either of the plaintiffs in those cases. Unlike Duane Reade and Streamline Capital, ABM cannot simply relocate to another building and carry on its business. To the contrary, ABM's business was, as the Court of Appeals recognized, fundamentally connected to its use of the common spaces at the World Trade Center. *See Zurich Am. Ins. Co.*, 397 F.3d at 165-66. Thus, in contrast to the position of Duane Reade and Streamline Capital, restoration of the World Trade Center itself is "necessary [for] ABM to resume" its operations. *See, e.g., Streamline Capital, L.L.C.*, 2003 U.S. Dist. LEXIS 14677, at *31 (distinguishing cases where the "operations are less easily transferable, and thus tying the period of restoration in such cases to the time necessary to rebuild at the original site is more reasonable").

***3** Furthermore, a primary concern of the *Duane Reade* and *Streamline* courts was that tying the recovery period to the rebuilding of the World Trade Center would tie the recovery period to a process over which neither insurer nor insured had control. Here, however, the nature of ABM's busi-

ness is such that it is impossible to tie the recovery period to a process over which the parties themselves have control. Moreover, under Zurich's theory, if all of the WTC tenants immediately relocated to other buildings that ABM did not service, ABM's business would remain interrupted, but it would be unable to recover damages under the Business Interruption provision of the Policy, a result the parties could hardly have intended. In addition, construing the Business Interruption provision to provide coverage until the WTC is rebuilt does not, as Zurich argues, render meaningless the Policy's Extended Recovery provision, which provides that loss may be claimed for "such additional length of time [which is necessary] to restore the Insured's business to the condition that would have existed had no loss occurred." Policy § 7(G)(1)(b). Even after the WTC is rebuilt, it is possible that fewer tenants will move back into the building, in which case ABM will continue to experience a loss even after it can no longer recover under the Business Interruption provision.

Accordingly, the Court grants that portion of ABM's summary judgment motion seeking a declaration that the appropriate period of recovery is the hypothetical length of time required to rebuild the WTC. Genuine disputed issues of fact remain, however, as to what that length of time is, as well as whether ABM would necessarily have incurred loss throughout that entire period. For example, ABM's contract to service the WTC was due to expire in mid-January 2004. At trial, to recover for loss incurred after that date, ABM will have to establish that it was more probable than not that the contract would have been renewed and, thus, that ABM would have continued to experience loss after January 2004.

As to whether the destruction of the WTC was the proximate cause of ABM's claimed "extra expenses," the Policy covers "[e]xtra [e]xpense incurred resulting from loss, damage, or destruction ... to [ABM's] real or personal property," § 7(C)(1), and it defines extra expense as "the excess of the total cost chargeable to the operation of the Insured's business over and above the total cost that would normally have been incurred to conduct the business had no loss or damage occurred," *id.* § 7(C)(2). ABM claims that certain expenses it incurred following the 9/11 attacks should be covered under this provision. Specifically, ABM seeks coverage for, *first*, increased salary costs that resulted because ABM's contracts with its union required it to "bump" junior employees at other locations with senior employees who lost their positions at the World Trade Center; *second*, an increase in ABM's unemployment insurance rate that resulted when ABM employees who previously worked at the World Trade Center went on unemployment, thereby putting ABM's unemployment insurance fund for New York into a deficit position; and, *third*, costs related to terminating engineers who had to be fired when the previously planned transfer of its engineering contract to Silverstein Properties was cancelled following the destruction of the WTC.

***4** Under New York law, which the parties agree governs, courts look for the "dominant and efficient" cause in determining whether a particular event was the cause of the claimed damages. *Throgs Neck Bagels v. GA Ins. Co.*, 671 N.Y.S.2d 66, 68 (N.Y.App.Div.1998). In determining whether a covered event is the "dominant and efficient" cause, the "scope of causation ... is largely a question of fact depending on the reasonable expectations of businessmen." *Pan Am. World Airways, Inc. v. Aetna Casualty & Surety Co.*, 505 F.2d 989, 1006 (2d Cir.1974); *see also, e.g.*, *Bird v. St. Paul Fire & Marine Ins. Co.*, 120 N.E. 86, 87 (N.Y.Ct.App.1918) ("There are times when the law permits us to go far back in tracing events to causes. The inquiry for us is how far the parties to this contract intended us to go. The causes within their contemplation are the only causes that concern us."). Here, genuinely disputed issues of fact remain as to whether the various claimed extra expenses resulted from the destruction of the WTC within the meaning of the Policy, or whether they

resulted from various other factors, such as ABM's contract with its union, general economic conditions in New York following the 9/11 attacks, and Silverstein's cancellation of ABM's engineering contract. Accordingly, summary judgment is inappropriate on this issue.

Finally, as to ABM's motion for partial summary judgment on its claim for civil authority coverage, ABM argues that it is irrelevant that there they may have been multiple causes for its lack of access to buildings it serviced in lower Manhattan, so long as a civil authority order was one such cause. However, the Court of Appeals specifically remanded to this Court to determine "whether the civil orders or ABM's own company policies impaired its access to the properties it serviced," *Zurich Am. Ins. Co.*, 397 F.3d at 171, and genuinely disputed issues of fact remain with respect to that issue. Consequently, summary judgment is inappropriate on this issue.

Accordingly, for the foregoing reasons, the Court hereby grants that portion of ABM's motion that seeks a declaration that the applicable period of recovery is the hypothetical period of time required to rebuild the World Trade Center, and denies the parties' motions in all other respects. The Court reconfirms that the trial of this matter will commence at 9 a.m. on August 14, 2006.

SO ORDERED.

S.D.N.Y.,2006.
Zurich American Ins. Co. v. ABM Industries, Inc.
Not Reported in F.Supp.2d, 2006 WL 1293360 (S.D.N.Y.)

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