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AN OVERVIEW OF BUSINESS INTERRUPTION INSURANCE

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***234 I. INTRODUCTION**

Legal records show that Business Interruption (“BI”) policies were first introduced in the late 1700s to account for the fact that standard fire policies would not pay for consequential lost income or profits. Even then, courts differentiated between the direct property loss typically covered by fire policies and the subsequent, consequential loss of income that could result. At first, BI insurance only applied in circumstances involving physical damage to insured property that directly affected business operations. However, BI insurance--commonly referred to as contingent business interruption insurance or “dependent properties insurance”--may be obtained in circumstances where physical damage is at a third-party location such as a supplier, customer, or even an attraction property. BI insurance can similarly be obtained to cover instances where access to insured property is prevented because of physical damage elsewhere. These types of coverages are often referred to as ingress/egress and civil authority coverage.

BI coverage provisions can vary substantially. It is, therefore, extremely important to look to the specific policy's language, which may contain elements of many or few of the above-described types of coverage. In many instances, manuscript policies

are commonly employed, especially in the case of larger business enterprises, and there is often little guidance in the way of authorities and references interpreting those policies.

While most time element/BI coverages originated in non-standardized markets, they are now more traditionally addressed in standard forms such as ISO forms. While most of this article focuses, by way of example, on ISO form language, it is strongly cautioned that there is great variance in available BI insurance coverage.¹

II. WHAT IS BUSINESS INTERRUPTION INSURANCE?

A. Overview

BI coverage is fundamentally designed to protect a business against its inability to continue normal operations and/or occupy its premises in the event of a property loss. More specifically, BI policies provide coverage for necessary continuing expenses and net profit lost during the period the business cannot operate due to insured property damage. It has often been said that business interruption insurance is intended to ***235** put the policyholder back in the same position they would have been in had no interruption in business occurred.²

Business interruption coverage is most commonly found in first-party commercial property insurance policies and business owner's policies. The following is a typical example of an ISO Business Interruption Coverage Clause:

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”. The “suspension” must be caused by direct physical loss of or damage to property at premises which are described in the Declarations and for which a Business Income Limit of Insurance is shown in the Declarations. The loss or damage must be caused by or result from a Covered Cause of Loss.³

As can be seen, several points are essential to obtaining coverage under a BI policy. These include the requirement that there be physical damage to property; that the loss arise from an insured peril; that the loss actually prevent, suspend, or reduce the ability of the business to operate; and that coverage continues only for the necessary (theoretical) time period required to repair the property. Each of these requirements will be addressed in more detail in this article.

B. The “Period of Restoration”

As noted above, BI provisions generally provide coverage for losses during the time frame defined as the “period of restoration.”⁴ Our example ISO form defines “period of restoration” as follows:

“Period of Restoration” means the period of time that:

***236** a. Begins:

(1) 72 hours after the time of direct physical loss or damage for Business Income coverage; or

(2) Immediately after the time of direct physical loss or damage for Extra Expense coverage;

caused by or resulting from any Covered Cause of Loss at the described premises; and

b. Ends on the earlier of:

- (1) The date when the property at the described premises should be repaired, rebuilt or replaced with reasonable speed and similar quality; or
- (2) The date when business is resumed at a new permanent location.

“Period of restoration” does not include any increased period required due to the enforcement of any ordinance or law that:

- (1) Regulates the construction, use or repair, or requires the tearing down of any property; or
- (2) Requires any insured or others to test for, monitor, clean up, remove, contain, treat, detoxify or neutralize, or in any way respond to, or assess the effects of “pollutants”.

The expiration date of this policy will not cut short the “period of restoration.”⁵

As the above definition suggests, the period of restoration typically begins after the related property loss (plus a waiting period) and ceases when the described property “should be repaired, rebuilt or replaced with *reasonable speed* and similar quality.”⁶ Courts have defined “reasonable *speed*” to mean the time period beginning with the physical loss or damage (plus the waiting period, if applicable) and extending until the business “could be” repaired “to the same or equivalent operating conditions that existed prior to the loss.”⁷ Thus, the “period of restoration” is not the actual time it takes to rebuild an affected property, but instead a “theoretical” time period based upon a hypothetical rebuild.

Disputes consistently arise in the context of calculating the theoretical amount of time in which the business “could be” repaired. An early Texas case that addressed the issue is *Beautytuft Inc. v. Factory Insurance Association*.⁸ In *Beautytuft, Inc.*, three manufacturing facilities were destroyed by fire.⁹ Instead of immediately rebuilding the facilities, however, the policyholders identified an off-site, secondary, location and quickly began to reassemble the machinery necessary for their operations at that new location.¹⁰

The insurer contended that the loss extended from the time of the destruction at the original facility until such time that the policyholder resumed operations at the second facility (approximately 3½ months).¹¹ The policyholders, on the other hand, contended they were entitled to business interruption damages for the entire theoretical time it would have taken to rebuild the initial facility.¹²

It was undisputed that the time it would have taken to rebuild the original, destroyed facility was twelve-and-a-half months.¹³ While other issues were considered in the case, the court ultimately agreed with the policyholder and found that the contract “provides a theoretical as opposed to an actual replacement time as the basic time standard for computation of business interruption loss” and that “[a]lthough a substitute plant of potentially equivalent capacity was promptly obtained, appellees’

actual losses as shown by the proofs continued beyond that date; and appellees were entitled to reimbursement for such *238 losses for the term of the theoretical replacement period as provided by the contract.”¹⁴

Concepts relating to the “Period of Restoration” have evolved over time. One such evolution is presented in *Duane Reade, Inc. v. St. Paul Fire & Marine Insurance Co.*¹⁵ In that case, the policyholder (Duane Reade) claimed it was entitled to recovery for losses it incurred during the hypothetical time required to actually rebuild the World Trade Center Complex.¹⁶ The insurer (St. Paul) alternatively contended that Duane Reade’s recoverable losses were limited to damages sustained in the twenty-one months following the attack on the world trade center--the amount of time it calculated as “reasonably necessary for Duane Reade to relocate its store to ... [another] location and resume operations.”¹⁷

The court first agreed with Duane Reade, that many cases support the proposition that the “Period of Indemnity” will include the time it takes to rebuild a specific store at a specific location.¹⁸ However, the court distinguished between the policies in those cited cases and Duane Reade’s policy.¹⁹ The court reasoned that Duane Reade’s policy was general, “covering all 200 Duane Reade stores,” and that the policy “ma[de] no reference to the WTC store or ... any specific property other than Duane Reade’s main headquarters”²⁰ Seizing upon this distinction, the court reasoned that “the St. Paul policy says nothing about the specific location of the interrupted business” and that the policy, therefore, “simply provides coverage until Duane Reade can ‘repair, rebuild, or replace’ the property that was damaged and resume operations.”²¹ Accordingly, the court found that Period of Restoration extended only for the hypothetical time it would reasonably take Duane Reade to “repair, rebuild, or replace” its WTC store at another suitable location.²² It is worth noting that with respect to businesses directly *239 related to the servicing of the towers, the court has held that the period of restoration will be the theoretical time to rebuild the towers.²³

While the above examples provide some of the issues that arise in ascertaining the period of liability, there are many other scenarios that give rise to disputes. For instance, there will often be issues when a carrier’s denial of payments delays the time period it takes to rebuild or restore the premises at issue--which in turn frustrates the policyholder’s ability to perform. On the other side of the coin, issues can arise when policyholders take covered losses as an opportunity to upgrade facilities--*i.e.* how long would it have taken to rebuild or repair the facilities in the absence of the policyholder’s making the upgrades.

C. Losses Covered

BI coverage typically “will pay for the actual loss of Business Income” sustained in connection with a covered loss. The example ISO form uses the following language to explain how “Business Income” is to be calculated:

a. The amount of Business Income loss will be determined based on:

(1) The Net Income of the business before the direct physical loss or damage occurred;

(2) The likely Net Income of the business if no physical loss or damage had occurred, but not including any Net Income that would likely have been earned as a result of an increase in the volume of business due to favorable business conditions caused by the impact of the Covered Cause of Loss on customers or on other businesses;

(3) The operating expenses, including payroll expenses, necessary to resume “operations” with the same quality of *240 service that existed just before the direct physical loss or damage; and

(4) Other relevant sources of information, including:

(a) Your financial records and accounting procedures;

(b) Bills, invoices and other vouchers; and

(c) Deeds, liens or contracts.²⁴

Accordingly, business interruption is essentially intended to indemnify an insured for the operating income lost and the necessary continuing fixed costs and expenses incurred over the period that the business is being restored.

1. Calculating Damages

In most BI policies, an insured is entitled to recover its “gross earnings” in connection with the loss. The underlying principle is that coverage will be provided for expenses that necessarily continued and net profit lost during the period when the business could not be operated because of physical damage to property.²⁵

Measuring business interruption losses can be challenging, and the methods for doing so will vary depending upon the situation. In general, a party seeking damages for property loss, business interruption, or other loss, must prove those damages to a “reasonable certainty.”²⁶ Generally, to meet this obligation, the insured must provide “summaries” of calculations to support its contentions regarding business income loss.²⁷ Moreover, policyholders and insurers will often employ the services of *241 forensic accountants to assist and support the measurement of BI losses.²⁸

Proving damages for a BI loss pursuant to this standard can be problematic. Particularly, insureds and their experts are often required to calculate their losses based upon a fictional universe in which the loss did not occur.²⁹ In order to calculate the loss, the policyholder must project income, estimate earnings, and estimate or justify soft costs such as payroll for employees. These calculations may be further complicated in situations in which widespread natural disasters--hurricanes, earthquakes, floods, etc.--cause losses to the overall economy.³⁰

2. Sub-Limits, Deductibles, and Waiting Periods

BI policies contain many variations of sub-limits and deductibles. These types of deductibles and sub-limits may be based upon specific dollar amounts, waiting periods, percentage deductibles, or deductibles based on time-element values. It is important to analyze these provisions at an early stage of a claim, as these provisions will often give rise to disputes.

For example, in *Bexar County Hospital District v. Factory Mutual Insurance Co.*,³¹ the policyholder disputed the insurer's application of a deductible provision limiting a time element loss.³² The provision at issue specified that the deductible relating to the loss would be “1 Day Equivalent Time Element, subject to a minimum of 25,000.”³³ The dispute centered around the meaning of the phrase “Time Element Value.”³⁴ The policyholder argued that the “1 Day Equivalent Time Element” equaled “the total loss divided by the number of days for which *242 that loss continued.”³⁵ The insurer argued that the deductible should be calculated as 1/365th (one day's worth) of the policyholder's total projected annual revenue.³⁶ While the outcome of *Bexar* is not necessarily important for this analysis (the insurer prevailed), the case serves as a good example of the complications that can arise in interpreting deductible provisions in BI policies.³⁷

Sub-limits in BI policies can also create issues. For example, sub-limits may apply to coverage for extra expenses, utilities, and other extraneous coverages.³⁸ Moreover, separate sub-limits may also apply with respect to each insured property, which can become an issue when multiple insured locations are damaged by a widespread event. The important issue to keep in mind

when dealing with sub-limits is that the amount the policyholder may recover will often be affected by how one classifies the property damage at issue.

Further, there are almost always waiting periods applicable to BI claims.³⁹ Waiting period provisions require that BI losses are not recoverable until after a specified time (can be hours, days, or weeks) after the event giving rise to the loss has passed. An example of an ISO waiting period provision follows:

Period of Restoration means the period of time that:

a. Begins:

(1) 72 hours after the time of direct physical loss or damage for Business Income coverage; or

(2) Immediately after the time of direct physical loss or damage for Extra Expense coverage;

**243 caused by or resulting from any covered cause of loss at the described premises⁴⁰*

While waiting periods and “time deductibles” are commonly used in BI coverage, it is not always clear how a particular waiting period is to be applied. For instance, some policies could specify several “business days” while others will be silent on the issue of whether one should count “calendar” or “normal” days. Further, depending on the language of the policy, there can be multiple different scenarios that give rise to how you apply a waiting period.

The interactions between waiting periods and deductibles can also be complicated, and it may be prudent to obtain an accounting or mathematical expert to assist in understanding their application. For instance, as in the example provided above, a waiting period may serve simply as an exclusionary/deductible period. In those cases, the covered loss is calculated from the moment the waiting period *ends*, and an additional deductible (or deductibles) may then apply to further reduce a carrier's obligation to pay the loss. In other instances, time element damages will be calculated from the *beginning* of when the loss occurs, just as long as the required waiting period has passed.

Given the differences in these types of provisions from policy to policy, it is important to obtain an understanding of these provisions early in a claim.

3. Actual Loss and Post-Loss Sales Increases

Another issue concerns the question of whether the policyholder suffered an “actual loss” due to the suspension of business operations. This issue often arises in the context of post-loss sales increases.

The Fifth Circuit addressed the question of whether post-loss sales increases could operate to reduce a BI loss in *Finger Furniture Co. v. Commonwealth Insurance Co.*⁴¹ In that case, Finger Furniture (“Finger”) “own[ed] seven furniture stores in Houston, Texas.”⁴² As a result of tropical storm Allison, the store which housed Finger's central computer system was closed due to flooding.⁴³ As a result of the employees' inability to access the computer system, all of Finger's stores were prevented from opening and making sales over the course of a weekend.⁴⁴ In order to *244 compensate for lost sales, “Finger slashed its prices” and ran sales the following weekend.⁴⁵ Due to the decrease in prices (and the demand for furniture after a hurricane), Finger's “sales soared” that following weekend.⁴⁶

“After the flooding, Finger filed a claim for sales lost” during the time they were unable to open their stores due to the flood, under the BI provisions of its insurance policy with Commonwealth Insurance Company (“Commonwealth”).⁴⁷ “Commonwealth denied the claim,” and Finger filed suit.⁴⁸ Both parties moved for summary judgment, and Finger prevailed in the district court.⁴⁹

On appeal to the Fifth Circuit, “Commonwealth claim[ed] that Finger did not sustain an actual loss under ... [the BI policy] because Finger made up [its] sales” the following weekend.⁵⁰ Given the particular policy language at issue, the Fifth Circuit disagreed:

The policy language indicates that a business-interruption loss will be based on historical sales figures. Specifically, the policy states that “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.” Historical 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. The 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.

Commonwealth complains that this interpretation does not account for Finger's profits on June 16-17, 2001 [the second weekend], but 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. The 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. Instead, the policy requires due consideration *245 of the business's experience before the date of the loss and the business's probable experience had the loss not occurred. Finger's historical sales figures reflect that consideration.

The parties do not dispute that Finger would have earned \$325,402.86 on June 9-10, 2001 if it had been able to open its stores. No evidence indicates that any of the sales expected for June 9-10, 2001 [the first weekend] were made up on June 16-17, 2001 [the second weekend]. In addition, no evidence indicates that Finger would have cut its prices for June 16-17, 2001 had the loss not occurred. The district court did not err in calculating Finger's loss.⁵¹

Courts interpreting different policy language relating to the calculation of “actual loss” (or an equivalent concept) have found differently. For instance, in *Rimkus Consulting Group, Inc. v. Hartford Casualty Insurance Co.*,⁵² Rimkus' office building was damaged and forced to close as a result of Hurricane Katrina.⁵³ After the hurricane, Rimkus “continued to provide services” and saw its revenues increase substantially after the storm hit.⁵⁴ However, to continue providing services, Rimkus was forced to relocate to temporary offices in other cities and to provide hotels and rooms for its employees.⁵⁵ To recover these costs and others, “Rimkus filed several claims with Hartford.”⁵⁶ After Hartford denied some of the claims, Rimkus filed suit.⁵⁷

Like the insurers in *Finger Furniture*,⁵⁸ Hartford argued that Rimkus had suffered no loss of business income but rather experienced an increase in business after the storm.⁵⁹ Relying on a specific provision *246 in the policy that accounted for business earned “from other income channels,” the court agreed with Hartford's position:

According to the policy's terms, the amount to be paid out is equal to business income loss (taking into consideration net income before the storm and the likely net income if no interruption had occurred) less the amount of income earned from other sources. Because it earned more income from “post-storm” business than it lost in “pre-storm” business, Rimkus is not entitled to any payment for loss of business income.

In sum, Hartford properly denied Rimkus' claim for business interruption losses because Rimkus suffered no actual loss that triggered coverage. Even if such coverage was triggered, the amount of "pre-storm" business income loss was properly offset by income generated by "post-storm" business operations, which indisputably exceeded any loss of "pre-storm" business income. Rimkus' argument is also belied by its claims for extra expenses, i.e., for those costs associated with resuming its operations in order to "[a]void or minimize the interruption of business."⁶⁰

4. Expenses to Reduce Loss vs. Extra Expenses

It is often a condition of a BI policy that if an insured can resume operations in whole or in part by using damaged or undamaged property at the described premises or elsewhere to reduce losses, it must do so. In order to comply with these requirements, it often becomes necessary for policyholders to incur "expenses to reduce loss" or to "mitigate" the damages.⁶¹ Expenses to reduce loss essentially fall into two categories: (1) "expenses that allow the insured to continue operations (sales and production); and [(2)] expenses that shorten the period of restoration."⁶² Examples of these types of costs may include costs to rent new facilities to continue operations while old facilities are being repaired or increased costs to expedite shipping or building and premium costs of overtime in order to repair the damaged property more quickly. Expenses to reduce *247 losses are, at their core, the spending of money to reduce BI losses payable under the policy.⁶³

Extra expense coverage, as opposed to "expenses to reduce," is a broader category of coverage that is often separately added to enhance BI coverage. It serves to reimburse the policyholder for reasonable and necessary operating expenses--in excess of normal operating expenses--it would not have incurred but for the loss.⁶⁴ One of the most important differences between extra expense coverage and "expense to reduce" is that extra expenses do not have to reduce BI losses otherwise payable under the policy. Extra expenses must nonetheless be reasonable, necessary, and spent to continue operations. Accordingly, the categories of losses that may be covered by extra expense coverage can be broad. Costs such as outsourcing finished production, increased cost of raw materials, rental housing for contractors repairing property, driving longer routes to get around disasters, additional fuel, additional pay to obtain workers, outsourcing or production to sister operations, rental of additional offices for employees, advertising for reopening a business after it has been shuttered, and a variety of other costs may all fall within the definition of extra expenses.

The distinction between expenses to reduce loss and extra expenses can be important. Expenses to reduce loss are generally part of the BI coverage and are generally subject to larger BI coverage limits or property blanket limits (depending on the structure of the policy). Extra Expenses coverage, which is essentially additional coverage added to the BI policy, is often subject to separate, smaller sub-limits. Further, in some circumstances, extra expense coverage may not even be included in a BI policy. As a result, understanding distinctions between "extra expenses" and "expenses to reduce" may directly affect the amount of coverage available to a policyholder and serve to reduce disputes in connection with the claim.⁶⁵

D. Loss or Damage to Insured Property by an Insured Peril

As noted above, BI or time element coverage is fundamentally tied to the policy within which the coverage is included. More particularly, *248 the cause or nexus of the business interruption loss must arise from a loss that would likewise be covered in the policy providing the BI coverage.⁶⁶

1. "Direct Physical Loss"

As can be seen in the example coverage provision above, BI coverage provisions typically require "direct physical loss of or damage to property" as a precondition for coverage.⁶⁷

In most policies, "direct physical loss" is not defined. However, courts have defined "direct physical loss" to mean the existence of "some physical change" to the character of the property.⁶⁸

Determining whether there has been physical change is easily done in the case of peril such as a building fire, where physical damage to the property can be easily demonstrated. However, in other instances, where the damage is not as apparent, it can be much more difficult. For example, in *National Children's Exposition Corp. v. Anchor Insurance Co.*,⁶⁹ the Second Circuit addressed a claim for loss of business income relating to lack of attendance at an exhibition due to a snowstorm.⁷⁰ In finding that there was no coverage under the policy, the court remarked,

At no time ... was there any physical damage to Grand Central Palace or the premises therein occupied by appellant. At all scheduled times the exposition was open to all customers who appeared, and all persons who came to Grand Central Palace for the purpose of attending the exposition were able to do so.⁷¹

***249 2. The Damage Must Be of the Type Insured Under the Policy**

The physical damage at issue must also be “caused by or result from a *Covered Cause of Loss*” (emphasis added).⁷² In other words, the physical damage leading to the business interruption must be caused by an insured peril. Courts have periodically denied policyholders the right to business interruption coverage when no insured peril is demonstrated.⁷³

Moreover, BI insurance typically requires that “[t]he loss or damage must be *caused by or result from* a Covered Cause of Loss.”⁷⁴ Thus, in addition to demonstrating that a covered loss occurred, the policyholder must also show a causal nexus between the business interruption loss and the specific property damage suffered.⁷⁵

This “causal connection” requirement was addressed in *Southern Hotels Limited Partnership v. Lloyd's Underwriters at London*.⁷⁶ In that case, an insured hotel owner made a claim for loss of income and “for damage[] to air conditioning units, to a pool pump, and to ... [a] telephone system” after Hurricane Andrew caused damage to the policyholder's community.⁷⁷ The policyholder claimed that the damage to the hotel caused the rooms to be unavailable for occupation by customers.⁷⁸

The court disagreed.⁷⁹ The court first reasoned that in order “[t]o state a triable issue for business interruption damages, the plaintiff must show that it lost revenue as a result of damages caused by Hurricane ***250** Andrew.”⁸⁰ Applying this standard, the court could find no evidence that “causally connect[ed] the damage in the rooms to the loss of revenue.”⁸¹ Put another way, while the hurricane very likely caused the decline in customers, the court could not link that decline to actual damages covered by the policy.⁸²

The causal connection requirement was also addressed in *Keetch v. Mutual of Enumclaw Insurance Co.*⁸³ In *Keetch*, the policyholders owned and operated a hotel in Ritzville, Washington.⁸⁴ “On May 18, 1980, Mount St. Helens erupted and released volcanic ash into the atmosphere,” which resulted in the motel and Ritzville being “buried in 6 inches of ash.”⁸⁵ Although the court acknowledged that there was damage to the landscape, the court refused to extend coverage for business interruption losses.⁸⁶ As part of its reasoning, the court stated,

The policy, however, is clear--it “insure[s] against loss of earnings resulting *directly* from necessary interruption of business caused by the perils insured against ...”. [sic] (Italics ours.) The damage to landscape or shrubbery did not directly result in a business interruption loss. The motel had the same number of rooms available both before and after the eruption; none of the motel rooms were unavailable because of ash damage.⁸⁷

E. Suspension of Operations

Another requirement needed to trigger BI coverage is that there must be a “suspension” of the policyholder's operations.⁸⁸ Several courts have examined what constitutes a “suspension” of operations.

In *Ramada Inn Ramogreen, Inc. v. Travelers Indemnity Co.*,⁸⁹ a fire destroyed a restaurant within a hotel.⁹⁰ The policyholder claimed that the loss of the restaurant resulted in a loss of hotel earnings covered *251 under the business interruption provisions in its policy.⁹¹ The court disagreed, reasoning that

recovery is intended when the loss is due to inability to use the premises where the damage occurs [T]he hotel operation was able to accommodate the same number of patrons, albeit their actual number of customers may have been reduced.⁹²

This case does not present a situation ... where fire in one building caused an actual cessation of operations in another building.⁹³

Another example relating to the “suspension of operations” issue can be found in *Royal Indemnity Insurance Co. v. Mikob Properties, Inc.*⁹⁴ In *Mikob Properties*, the policyholder “own[ed] and manag[ed] an apartment complex containing three separate ... buildings.”⁹⁵ After a fire, tenants in the two remaining buildings were unable to use amenities near the damaged building.⁹⁶ After a decrease in occupancy in the remaining buildings, the policyholder sued under BI provisions for lost rental income, arguing that the complex, as a whole, was “mutually dependent” on the burned amenities.⁹⁷ The court disagreed and was unwilling to extend coverage.⁹⁸ Following *Ramogreen*⁹⁹ and *Keetch*,¹⁰⁰ the court reasoned,

In the present case, Mikob argues that the physical damage to Building C and the complex amenities caused a reduction in the marketability of the complex, which caused a decrease in occupancy of Buildings A and B. This is very similar to the argument rejected in *Keetch*. As in *Keetch*, the physical damage to part of the insured's premises did not cause a necessary suspension of operations or tenancy in the other, undamaged units. A reduction in the “quality of life” in the undamaged *252 parts of the premises does not trigger the business interruption clause.¹⁰¹

Damage to the amenities at Mikob's apartment complex, like the damage to the hotel restaurant in *Ramogreen* and to the motel in *Keetch*, did not cause “an inability to continue to use specified premises or [an] inability to keep the premises occupied by a tenant.” Even if the character of the apartment complex was adversely impacted by the fire, there was no “necessary suspension of operations or tenancy” in Buildings A and B. As in *Ramogreen* and *Keetch*, the amenities which attract customers may be affected by a covered loss, but if the insured premises are still operating, the business interruption clause does not cover a decrease in income.¹⁰²

Disputes also arise in circumstances where the loss giving rise to the BI claim only results in a “partial” suspension of operations.¹⁰³ In some cases, courts hold that a “complete” cessation of operations is necessary in order to trigger the BI coverage.¹⁰⁴ In other instances, courts find that only a partial suspension of operations will trigger BI coverage.¹⁰⁵

III. EXTENDED PERIOD OF INDEMNITY

In many circumstances, the policyholder sustains losses beyond the period of restoration. Given that the “Period of Indemnity” ends when the property can be restored or repaired, a gap in coverage may arise. Extended Period of Indemnity (“EPI”) coverage

is often available to fill *253 this gap. The Second Circuit gave a decent general explanation of EPI coverage in *Duane Reade, Inc. v. St. Paul Fire & Marine Insurance Co.*¹⁰⁶ The court stated,

The purpose of the Extended Recovery Period is to provide additional coverage for the likely event that [the policyholder] will continue to suffer losses due to its business interruption after it reopens the [business]. The Extended Recovery Period guarantees [the policyholder] its [pre-loss] profits until the earlier of when [the policyholder] can restore business at its [business location] to the condition it would have been in had the [business location] not been destroyed¹⁰⁷

An example EPI clause follows:

Extended Business Income

(1) Business Income Other Than “Rental Value”

If the necessary “suspension” of your “operations” produces a Business Income loss payable under this policy, we will pay for the actual loss of Business Income you incur during the period that:

(a) Begins on the date property (except “finished stock”) is actually repaired, rebuilt, or replaced and “operations” are resumed; and

(b) Ends on the earlier of:

(i) The date you could restore your “operations”, with reasonable speed, to the level which would generate the business income amount that would have existed if no direct physical loss or damage had occurred; or

*254 (ii) 30 consecutive days after the date determined in (1)(a) above.

However, Extended Business Income does not apply to loss of Business Income incurred as a result of unfavorable business conditions caused by the impact of the Covered Cause of Loss in the area where the described premises are located.

Loss of Business Income must be caused by direct physical loss or damage at the described premises caused by or resulting from any Covered Cause of Loss.¹⁰⁸

EPI provisions can vary greatly, and those variances can give rise to differing results in the courts. An example can be found in *Ochsner Clinic Foundation v. Lexington Insurance Co.*¹⁰⁹ In that case, Ochsner Clinic Foundation (“Ochsner”) filed an action against Lexington Insurance Company (“Lexington”) to recover amounts owed to Ochsner for losses it incurred in connection with a roof collapse of a building it was renovating/repurposing to serve as an expanded internal medicine practice.¹¹⁰ Lexington sought summary judgment seeking dismissal of Ochsner's claims under EPI provisions in Lexington's policy.¹¹¹

In its opinion, the court addressed the legal meaning of an insurer's obligation to provide coverage for the time required “to restore the insured's business to the condition that would have existed had no loss occurred” (language commonly used in EPI provisions).¹¹² The debate between the parties primarily focused on the meaning of the term “restore.”¹¹³ Ochsner contended that “restore” meant it was entitled to recover for losses and costs resulting from a 17-month delay in opening their business after the collapse.¹¹⁴ Lexington, on the other hand, contended that “restore” meant placing Ochsner back in the position it was in prior to the time the loss occurred—a business that was not yet operating, with no revenue.¹¹⁵ The court responded as follows:

***255** Pursuant to Section V(C)(8) of Ochsner's insurance policy, the “Extended Period of Indemnity” provision at issue here, Lexington is obligated to provide coverage “for such additional length of time as is required to restore the insured's business to the condition that would have existed had no loss occurred” The insurance policy clarifies that the extended period of indemnity lasts for 90 days, and both parties appear to agree that the extended indemnity provision was triggered on the day Ochsner's clinic opened following the roof collapse. The insurance policy also excludes from all coverage any “[i]ndirect, remote, or consequential loss or damage.”

While the parties dispute whether or not the extended period of indemnity applies in this instance to Ochsner's new clinic, the Court finds that the provision is not ambiguous, and thus will apply the ordinary meaning of the contractual language. Lexington primarily focuses on the term “restore,” and argues that “restore” is defined as putting something back into existence or returning something “to an *earlier* or *original* condition by repairing it, cleaning it, etc.” However, such an interpretation ignores the rest of the clause. The “Extended Period of Indemnity” provision explicitly covers losses needed to “restore” a business “to the condition that would have existed had no loss occurred,” and not, as Lexington suggests, to “restore” a business back to its pre-loss condition or to allow a business “to get back to its prior level of production.” Lexington's interpretation misconstrues the unambiguous contractual language and interprets part of the extended period of indemnity clause in a way that would disregard the rest of the provision.

Ochsner's interpretation, by contrast, properly comports with the language of the provision. Ochsner's “ramp up” cost damages claim seeks to put Ochsner in the position that would have existed had no loss occurred, *i.e.* opening the clinic in September 2012 and being fully operational by February 2014. In addition, the Court notes that Ochsner's interpretation is consistent with the plain meaning of “restore,” which the Supreme Court has recognized means to “give back (as something lost or taken away)” and “bring back into existence or use; reestablish.” Thus, the contractual provision requires Lexington to restore to Ochsner what was lost by the roof collapse, *i.e.* Ochsner's condition that would have existed had ***256** the roof not collapsed, rather than restore its business to its pre-loss condition as Lexington avers.¹¹⁶

While some commentators may disagree with the reasoning in *Ochsner*, it illustrates the importance of particular contractual language in EPI coverage issues.¹¹⁷

IV. EXTENSIONS TO BUSINESS INTERRUPTION COVERAGE

While many of the concepts discussed above address situations involving losses to the policyholder arising specifically from damages to the policyholder's property, additional endorsements can provide insurance for BI losses resulting from a variety of extraneous causes. Some of the more common extensions to BI coverage are discussed below.

A. Contingent Business Interruption

Contingent Business Interruption (“CBI”) is an extension of coverage in a BI policy that protects a policyholder from income losses that result from damage to property owned by third parties. CBI has evolved to cover the risk for businesses that rely

upon outside suppliers, vendors, or critical customers.¹¹⁸ For example, CBI allows recovery for a business when “dependent properties” suffer some form of physical damage that prohibits the policyholder from being able to secure its supplies or sell its goods.¹¹⁹ Generally, CBI coverage will have many of the same requirements as ordinary business interruption coverage discussed above--e.g., the cause of damage and type of damage must be covered under the policyholder's policy and the period of restoration will often operate as in the general BI coverage.¹²⁰

There are commonly four types of “dependent property” subject to contingent business interruption insurance: (1) contributing locations; (2) recipient locations; (3) manufacturing locations; and (4) leader *257 locations.¹²¹ Contributing locations are generally referred to as upstream suppliers--parties that “deliver materials or provide services to the insured.”¹²² Recipient locations are downstream buyers--“customers of the insured” in the insured's operational chain.¹²³ Manufacturing locations “are ... companies [that] ... deliver products to the insured's customers under a contract of sale.”¹²⁴ Finally, leader or “attraction” locations are properties that “attract customers to the insured's business.”¹²⁵ Attraction locations may be small in scope, such as anchor stores in malls that attract customers to policyholder's local businesses, or larger “attractions,” such as Disney World, which attract customers to a larger geographical area.¹²⁶ This coverage becomes applicable when a policyholder sustains income losses in connection with damage or destruction to an attraction property.¹²⁷

Disputes relating to CBI will often revolve around the meaning of the term “supplier” as is commonly used in CBI provisions. One of the earliest decisions addressing contingent business interruption coverage is *Archer-Daniels-Midland Co. v. Phoenix Assurance Co.*¹²⁸ After flooding in the Midwest-- including around the Mississippi River--the insured made claims for contingent business interruption coverage for losses resulting from increased transportation and raw materials costs.¹²⁹ The CBI provision in the policy at issue provided as follows:

This policy covers against loss of earnings and necessary extra expense resulting from necessary interruption of business of the insured caused by damage to or destruction of real or personal property, by the perils insured against under this policy, of *any supplier* of goods or services which results in the inability of such supplier to supply an insured location.¹³⁰

The insured contended that the Army Corps of Engineers, which operated and maintained the Mississippi River system, and the U.S. Coast Guard were “suppliers of goods and services” under the CBI *258 provision.¹³¹ Interpreting the provision broadly, the court agreed.¹³² The court also agreed (much more readily) that the Midwest farmers who grew crops that were ultimately sold to the insured were “suppliers” of goods and services under the policy.¹³³

Another decision addressing contingent business interruption coverage can be found in *Pentair, Inc. v. American Guarantee & Liability Insurance Co.*¹³⁴ In *Pentair*, the Eighth circuit took a more restrictive view of the term “supplier.”¹³⁵ In that case, an earthquake struck Taiwan, damaging an electrical substation that supplied power to two manufacturing facilities, which, in turn, supplied the insured with battery products.¹³⁶ The court noted that the “Contingent Time Element” extended business interruption coverages “to include losses incurred by Pentair as the result of ‘damage’ to ‘property of a supplier of goods and/or services to the Insured’ that is caused by a covered peril, here, an earthquake.”¹³⁷ Interpreting this provision strictly, the court found that because the electrical substation--as opposed to the two manufacturing facilities that relied on the electrical substation--did not directly supply the insured with the good or service at issue, there was no coverage.¹³⁸

B. Civil Authority Coverage

A civil authority extension will provide business interruption coverage when access to the insured's property is impaired or prohibited due to an order of civil authority.¹³⁹ Situations that trigger this type of coverage are evacuations, curfews, roadblocks, or other government-initiated actions that prohibit and prevent access to the insured's property.¹⁴⁰ A common expectation in

this type of coverage is that” actions by civil authorities ... apply to relatively discrete geographical *259 areas.”¹⁴¹ However, there have been multiple instances where actions of civil authorities have produced more widespread effects.¹⁴²

Civil authority coverage is often limited to a relatively short time period-- usually between one week and 30 days.¹⁴³ A common (ISO) civil authority provision reads as follows:

Civil Authority

We will pay for the actual loss of Business Income you sustain and necessary Extra Expense caused by action of civil authority that prohibits access to the described premises due to direct physical loss of or damage to property, other than at the described premises, caused by or resulting from any Covered Cause of Loss.

The coverage for Business Income will begin 72 hours after the time of that action and will apply for a period of up to three consecutive weeks after coverage begins.

The coverage for Extra Expense will begin immediately after the time of that action and will end:

(1) 3 consecutive weeks after the time of that action; or

(2) When your Business Income coverage ends;

whichever is later.¹⁴⁴

In line with the above provision, the Fifth Circuit (applying Louisiana law) has held that a policyholder seeking to establish coverage under a civil authority provision must demonstrate that (1) the loss was

caused by an action of civil authority; (2) the action of civil authority ... prohibited access to the described premises of the insured; (3) the action of civil authority prohibiting access to the described premises ... [was caused] by direct physical loss *260 of or damage to property other than at the described premises; and (4) the loss or damage to property other than the described premises ... [was] caused by or resulted from a covered cause of loss as set forth in the policy.¹⁴⁵

Disputes often arise between policyholders and carriers with respect to each of these elements.¹⁴⁶

1. Caused by an Action of Civil Authority?

A question sometimes arises relating to whether the loss of business income results from an “action” of civil authority.

For example, in *Penton Media, Inc. v. Affiliated FM Insurance Co.*,¹⁴⁷ the policyholder scheduled a tradeshow to be held at New York City's Javits Center.¹⁴⁸ After the terrorist attacks on September 11th, the Javits Center canceled the trade show

upon entering into a lease agreement with FEMA and the City of New York to use the center as a base of operations.¹⁴⁹ The policyholder brought claims under the civil authority provisions in its policy.¹⁵⁰ After looking to the dictionary definition, the court was unable to find an “order”:

The court has neither read extra-contractual requirements into the insurance policy nor ignored genuine issues of material fact. The policy unambiguously requires an order of civil authority. An order could be oral or written. It could be formal or informal, as long as it comes from a civil authority. It could mention the Javits Center by name, or it could not, so long as the scope of the order clearly encompassed the Javits Center. However, the policy does not provide that a voluntary (or involuntary) lease agreement is an order of civil authority. It also does not indicate, or imply, that activities taken out of concern that the government might act is sufficient.¹⁵¹

*261 Since the policyholder could not supply any proof that the Javits Center was closed by virtue of a “command or mandate,” the court found in favor of the insurer.¹⁵²

2. “Prohibits Access”

Furthermore, the civil authority order at issue must be one that “prohibits access to the described premises” in order for losses to be covered under a civil authority provision.¹⁵³ This “prohibition requirement” was discussed in *730 Bienville Partners, Ltd. v. Assurance Co. of America*.¹⁵⁴ In *730 Bienville Partners*, the policyholder sought coverage for business interruption losses relating to two hotels it owned.¹⁵⁵ The policyholder contended that it suffered losses due to the Federal Aviation Administration's closure of the nation's airports after September 11, 2001.¹⁵⁶ The “Civil Authority” clause at issue stated,

We will pay for the actual loss of “business income” you sustain and necessary “extra expense” caused by action of civil authority that prohibits access to your premises due to direct physical loss of or damage to property, other than at the “covered premises,” caused by or resulting from any Covered Cause of Loss. This coverage will apply for a period of up to 4 consecutive weeks from the date of that action.¹⁵⁷

The policyholder argued that because the FAA prevented anyone from flying during the days immediately following the World Trade Center attacks, guests were unable to travel to New Orleans and stay in its hotels.¹⁵⁸ The court rejected the policyholder's argument.¹⁵⁹ The court reasoned that “[w]hile the FAA's closure of the airports and cancellation of flights may have prevented many guests from getting to New Orleans and ultimately to plaintiff's hotels, the FAA hardly ‘prohibited’ access to the hotels.”¹⁶⁰

*262 Focusing on the “prohibits access to your premises” language in the policy, the court reasoned that despite the FAA's shutting down all flights, customers could still access the Plaintiff's property (by car).¹⁶¹

It should be noted that some policies may not contain the same “prohibition” language described in the ISO civil authority provision above. For example, some policies may require that access to the premises be “impaired or prohibited,” which could result in different applications of this type of coverage.

3. The Intent of the Prohibition

Another dispute that arises in connection with civil authority coverage revolves around the question of whether the civil authority action is initiated as a response to “property damage.” These types of issues commonly arise in situations in which civil authority orders are issued in connection with approaching hurricanes.

For example, in *South Texas Medical Clinics, P.A. v. CNA Financial Corp.*,¹⁶² a judge ordered the “evacuation of Wharton County, Texas ... ‘due to’ his fear that Hurricane Rita would strike nearby.”¹⁶³ While the fear was based

on the fact that Hurricane Rita had previously damaged property thousands of miles to the east as it crossed Florida and entered the Gulf of Mexico, the order was not issued “due to” the actual physical damage that occurred in Florida and on oil rigs in the Gulf.¹⁶⁴

The court seized upon this distinction and found that no coverage was provided under the civil authority provision.¹⁶⁵ The court reasoned,

***263** The record shows that Judge Murrile's decision to evacuate was based on the anticipated threat of damage to Wharton County. The only significance of the prior damage to property outside Wharton County was as an indication of the harm that could result if Hurricane Rita made landfall near Wharton County. Judge Murrile's mandatory evacuation order was not “due to direct physical loss of or damage to property, other than at the described premises.” Because the mandatory evacuation order for Wharton County was issued due to the *anticipated threat of damage* to the county and not *due to property damage that had occurred in Florida and the Gulf of Mexico*, South Texas's business interruption losses are not covered by its policy with Valley Forge.¹⁶⁶

Other courts have found that pre-evacuation civil authority orders were sufficient to trigger civil authority provisions.¹⁶⁷

4. Loss or Damage to Property Must Be Caused by or Result from a Covered Loss

As with other extensions to BI coverage, civil authority provisions almost uniformly require physical damage to an outside location that is caused by or results from a covered loss.¹⁶⁸ For example, if damage to bridges, tiers, and wharfs is excluded by the encompassing policy, then an order of civil authority resulting from damages to those types of property may not be covered.

C. Ingress/Egress

Ingress/Egress provisions provide coverage for economic losses sustained when access to an insured property is impaired.¹⁶⁹ In essence, ***264** it operates somewhat like civil authority coverage but does not require an order of civil authority.¹⁷⁰ A typical ingress/egress provision provides as follows:

Loss of Ingress or Egress: This policy covers loss sustained during the period of time when, as a direct result of a peril not excluded, ingress to or egress from real and personal property not excluded hereunder, is thereby prevented.¹⁷¹

The Eastern District of North Carolina provided analysis of an ingress/egress provision in *Fountain Powerboat v. Reliance Insurance Co.*¹⁷² In that case, Fountain (the policyholder) manufactured and sold boats and related equipment from a facility in Washington, N.C.¹⁷³ In 1999 Hurricane Floyd caused heavy rainfall over the eastern part of North Carolina.¹⁷⁴ After the hurricane, the only roads leading to Fountain's facility were closed for several days.¹⁷⁵ For a time period after the hurricane, Fountain picked up workers in large trucks and transported them to the facility.¹⁷⁶ Moreover, given the displacement caused by flooding, the production at the Fountain facility dropped by sixty-six percent.¹⁷⁷

Although Reliance (the insurer) paid nearly \$1,000,000 for certain claims under the policy, it partially denied the claim for ingress/egress coverage.¹⁷⁸ Reliance argued that, without property damage to the insured premises, the insured could not recover under the ingress/egress provisions.¹⁷⁹ The court rejected Reliance's argument and reasoned,

The plain meaning of this language indicates an agreement between the parties that the contract for insurance cover any business interruption caused by loss by any peril not excluded. A “loss” is not predicated on physical damage but is one category of recovery along with damage and destruction as indicated by the use of the alternative coordinating conjunction *265 “or.” Flooding due to Hurricane Floyd is exactly the type of peril this business interruption loss was drafted to insure against.

Furthermore, Reliance was aware of the location of the Fountain facility and was aware that the facility had a limited access. The court can only conclude that the parties intended that the policy would provide coverage not only when the property itself was inaccessible, but also when the only route to the Facility caused the property to be inaccessible Therefore, the court finds that no requirement for physical loss to the property is required under the contract of insurance in order to trigger business interruption coverage under the ingress/egress clause.¹⁸⁰

D. Service Interruption (Utility)

Another form of business interruption coverage relating to third-party damage is off-premises utility service interruption.¹⁸¹ This coverage buys back, at least in part, the exclusion for utility service interruption that is typical in most property policies.¹⁸² A common (ISO) provision for off-premises utility services follows:

Your coverage for Business Income and/or Extra Expense, as provided and limited in the applicable Coverage Form, is extended to apply to a “suspension” of “operations” at the described premises caused by an interruption in utility service to that premises. The interruption in utility service must result from direct physical loss or damage by a Covered Cause of Loss (as indicated in the Schedule) to the property described in Paragraph C. if such property is indicated by an “X” in the Schedule and is located outside of a covered building described in the Declarations.¹⁸³

Under these types of provisions, there will be coverage if a covered peril causes an interruption in utility services that results in an interruption to the policyholder's business.¹⁸⁴

*266 Disputes often arise relating to whether the disruption in utility service was caused by a “covered” peril.¹⁸⁵ For instance, in *Bagelman's Best, Inc. v. Nationwide Mutual Insurance Co.*,¹⁸⁶ a question arose as to whether the service interruption was “accidental” as was required by the definition of “Covered Cause of Loss” under the subject policy.¹⁸⁷ That case concerned several hurricanes that subjected eastern North Carolina to rising floodwaters.¹⁸⁸ As a result of these rising floodwaters, the policyholder's electricity company elected to cease power transmission from their main power distribution center.¹⁸⁹ The policyholders “made claims under their insurance policies ... [due to] loss of business income and food spoilage” resulting from the power outage.¹⁹⁰

The defendant insurer in *Bagelman's* refused to pay the policyholder's loss, contending that there was no coverage because the event that precipitated the loss was not an “accident” as required by the policy.¹⁹¹ The plaintiff policyholder contended that the loss of power was inevitable, as not shutting down the power transmission would have caused substantial damage to the transmission equipment.¹⁹² The policyholder reasoned that had the power company chosen not to voluntarily shut down the transmission equipment-- and allowed damage to be the cause of the shut down--there would have clearly been an “accident”

as defined by the policy.¹⁹³ The policyholder further argued that the insurer should not be allowed to avoid coverage because the power company took steps to mitigate the accident rather than allow damage to occur.¹⁹⁴

The court disagreed. Taking a simple approach, the court reasoned, “We cannot conclude that the cessation of the transmission of electricity happened unexpectedly. For this reason, we conclude that the cessation of the transmission of electricity was not an accident as defined in the insurance policies.”¹⁹⁵

***267** As may be guessed, service interruption coverage disputes can also arise if interruptions are arguably caused by perils that are not covered. An example can be seen in numerous utility interruptions that were caused by flooding during Hurricane Harvey.

Finally, it is worth noting that this coverage often contains a separate initial “waiting period.”¹⁹⁶ Only service interruptions that exceed this waiting period will give rise to coverage. In the event the service interruption exceeds the “waiting period,” the policy may or may not provide coverage for the loss back to the inception of the interruption.¹⁹⁷

E. Rental Value & Rental Income

Rental value coverage provides insurance for the policyholder’s recovery of anticipated rental income and charges legally required to be paid by tenants.¹⁹⁸ The coverage also includes payroll and other charges that would normally be paid by the tenant, less expenses that are reduced.¹⁹⁹ A common (ISO) rental value coverage provision is as follows:

If the necessary “suspension” of your “operations” produces a “Rental Value” loss payable under this policy, we will pay for the actual loss of “Rental Value” you incur during the period that:

(a) Begins on the date property is actually repaired, rebuilt or replaced and tenantability is restored; and

(b) Ends on the earlier of:

(i) The date you could restore tenant occupancy, with reasonable speed, to the level which would generate the “Rental Value” that would have existed if no direct physical loss or damage had occurred;

(ii) 30 consecutive days after the date determined in (2)(a) above.

***268** However, Extended Business Income does not apply to loss of “Rental Value” incurred as a result of unfavorable business conditions caused by the impact of the Covered Cause of Loss in the area where the described premises are located.

Loss of “Rental Value” must be caused by direct physical loss or damage at the described premises caused by or resulting from any Covered Cause of Loss.²⁰⁰

5. “Rental Value” means Business Income that consists of:

a. Net Income (Net Profit or Loss before income taxes) that would have been earned or incurred as rental income from tenant occupancy of the premises described in the Declarations as furnished and equipped by you, including fair rental value of any portion of the described premises which is occupied by you; and

b. Continuing normal operating expenses incurred in connection with that premises, including:

(1) Payroll; and

(2) The amount of charges which are the legal obligation of the tenant(s) but would otherwise be your obligations.²⁰¹

In *Celebrations Caterers, Inc. v. Netherlands Insurance Co.*,²⁰² Bensalem Landmark Plaza Assoc. (“Bensalem”) sought coverage for losses due to “slow down or cessation ... of business activity,” following a fire loss.²⁰³ The policy held by Bensalem and issued by The Netherlands Insurance Company (“Netherlands”) contained “coverage for damage to the building for loss of rental income.”²⁰⁴ However, the insurer rejected the insured's claims for rental value losses on the basis that Bensalem had failed to “demonstrate[] loss of tenant occupancy of the insured *269 premises.”²⁰⁵ Upon review of the policy, the court noted that “[t]he plain language of the policy states that where ‘rental value’ applies, the suspension occurs when that part or all of the described premises is rendered *untenantable*.”²⁰⁶ Based upon this specific language in the policy, the court ruled in favor of the insurer:

Pursuant to the policy, where coverage for “rental value” applies, Netherlands is liable to Bensalem for payment under this provision only where the premises is rendered untenantable. Neither party contends that the premises was at any time untenantable [sic]; therefore the policy requirement of “suspension” has not been triggered and Netherlands is not liable for compensation.²⁰⁷

A rental income coverage was addressed in *Broad Street v. Gulf Insurance Co.*,²⁰⁸ another case arising out of the September 11, 2001 attacks.²⁰⁹ In that case, the insured owned a building “located approximately three blocks from the World Trade Center site, consist[ing] of 345 residential units and three commercial spaces.”²¹⁰ After the attack, “the building was completely shut down from ... [September 11, 2001] to September 18, 2001.”²¹¹ After the shutdown, tenants were allowed to return, but there remained smoke and soot damages in the common areas to the property and losses of public services.²¹² Despite these issues, many of the tenants returned to the premises when the building reopened.²¹³

In order to keep the tenants satisfied, the insured gave rent reductions and made concessions to its tenants to account for the damaged property.²¹⁴ The insured filed an action against the insurer, claiming it was entitled to recover losses for the reductions and concessions it had granted to its tenants.²¹⁵ The court disagreed and found there was no coverage under the rental provisions of the policy.²¹⁶ *270 The court reasoned that despite the poor condition of the property, there was not a “total” interruption and cessation of operations essential to establish coverage under the provision.²¹⁷

V. CONCLUSION

Business Interruption coverage is currently an integral part of first-party insurance and is expected to increase market presence in the future. Nonetheless, court guidance relating to the types of disputes that may arise in connection with this type of insurance is limited, and it is advisable to seek guidance early in the process in the event this type of loss occurs.

Footnotes

- a1 Mr. McLaurin is the founder of McLaurin Law, PLLC in Houston. He received his J.D. *cum laude* from Loyola University, New Orleans, and a B.A. *with honors* from the University of Texas at Austin. He is the Managing Editor of the Journal of Texas Insurance Law.
- 1 *See Prot. Mut. Ins. Co. v. Mitsubishi Silicon Am. Corp.*, 992 P.2d 479, 481 (Or. Ct. App. 1999) (acknowledging that business interruption insurance is intended “to do for the business what the business would have done for itself had no loss occurred,” while noting that the specific language of the policy is paramount).
- 2 *A & S Corp. v. Centennial Ins. Co.*, 242 F. Supp. 584, 589 (N.D. Ill. 1965) (“[Business interruption insurance] is designed to do for the business what the business would have done for itself had no loss occurred.”); *Royal Indem. Ins. Co. v. Mikob Props., Inc.*, 940 F. Supp. 155, 157 (S.D. Tex. 1996) (“The purpose of a business interruption clause is to preserve the continuity of the insured’s earnings.”); *Keetch v. Mut. of Enumclaw Ins. Co.*, 831 P.2d 784, 786 (Wash. Ct. App. 1992) (“The essential nature and purpose of a business interruption policy is to protect the earnings which an insured would have enjoyed had there been no interruption of business.”).
- 3 ISO Business Income (and Extra Expense) Coverage Form (CP 00 30 04 02) at 1 (2001).
- 4 *Id.* at 8. Some forms define this time frame as the “period of liability,” “period of recovery,” or “period of restoration.”
- 5 *Id.*
- 6 *Id.* (emphasis added). Note that many BI policies limit the maximum time frame of the “period of restoration” and extra expenses:
- b. The most we will pay for the total of Business Income loss and Extra Expense is the lesser of:
- (1) The amount of loss sustained and expenses incurred during the 120 days immediately following the beginning of the “period of restoration”; or
- (2) The Limit of Insurance shown in the Declarations.
- ISO Business Income (and Extra Expense) Coverage Form (CP 00 30 10 00), at 6 (1999).
- 7 *See Lava Trading Inc. v. Hartford Fire Ins. Co.*, 365 F. Supp. 2d 434, 440 (S.D.N.Y. 2005).
- 8 431 F.2d 1122 (6th Cir. 1970).
- 9 *See id.* at 1123.
- 10 *Id.*
- 11 *Id.*

- 12 *Id.*
- 13 *Id.* at 1123-24.
- 14 *Id.* at 1124-25. It is important to note that the court in *Beautytuft, Inc.* appeared to acknowledge that the substitute plant location was both temporary and inferior to the facility that caught on fire. *See Beautytuft, Inc.*, 431 F.2d at 1125.
- 15 411 F.3d 384 (2d Cir. 2005).
- 16 *Id.* at 387.
- 17 *Id.*
- 18 *Id.* at 393.
- 19 *Id.* at 395.
- 20 *Id.*
- 21 *Id.* at 396.
- 22 *Id.* at 398 (The court also noted that Duane Reade's lost profits claims would fall under the Leasehold Interest clause of the Policy rather than the Business Interruption Clause: "To be sure, there are few if any locations in New York City comparable to the WTC, and Duane Reade will most likely not be able to recreate the profit stream it once enjoyed there. But any discrepancies between the new building and WTC in terms of benefits and advantages are exclusively accounted for under the Leasehold Interest clause."); *see also Retail Brand Alliance, Inc. v. Factory Mut. Ins. Co.*, 489 F. Supp. 2d 326, 330-34 (S.D.N.Y. 2007) (applying similar reasoning to a retail clothing store); *Streamline Capital, L.L.C. v. Hartford Cas. Ins. Co.*, No. 02 CIV 81232003(NRB), 2003 WL 22004888, at *7-10 (S.D.N.Y. Aug. 25, 2003) (applying similar reasoning to a technology company); *Lava Trading Inc. v. Hartford Fire Ins. Co.*, 365 F. Supp. 2d 434 (S.D.N.Y. 2005) (applying similar reasoning to a securities firm).
- 23 *See Zurich Am. Ins. Co. v. ABM Indus., Inc.*, No. 01 Civ. 11200, 2006 WL 1293360, at *7 (S.D.N.Y. May 11, 2006).
- 24 ISO Business Income (and Extra Expense) Coverage Form (CP 00 30 10 00), at 4 (1999).
- 25 As noted below, there are many extensions to time element coverages that are often added to BI policies.
- 26 *See, e.g., Albany Ins. Co. v. Bengal Marine, Inc.*, 857 F.2d 250, 253 (5th Cir. 1988) ("It suffices if a state of facts is shown from which a court or jury can find with reasonable certainty that the damages claimed were actually or may be reasonably inferred to have been incurred." (quoting *Mitsui O.S.K. Lines, K.K. v. Horton & Horton, Inc.*, 480 F.2d 1104, 1106 (5th Cir. 1973))).
- 27 *See, e.g., Diamond Shamrock Corp. v. Lumbermens Mut. Cas. Co.*, 466 F.2d 722, 728 (7th Cir. 1972).

- 28 See, e.g., *Maier v. Cont'l Cas. Co.*, 76 F.3d 535, 541 (4th Cir. 1996) (“[E]vidence such as economic and financial data, market surveys and analyses, business records of similar enterprises, and--of course--expert testimony” all can be used to establish lost profits.); *Presbyterian Manors, Inc. v. SimplexGrinnell, L.P.*, No. 09-2656, 2011 WL 3241454, at *11 (D. Kan. July 29, 2011) (holding “spreadsheets setting forth information regarding damages, but not a calculation of lost profits,” sufficient to avoid summary judgment).
- 29 See, e.g., *Polytech, Inc. v. Affiliated FM Ins. Co.*, 21 F.3d 271 (8th Cir. 1994); *Blis Day Spa, LLC v. Hartford Ins. Grp.*, 427 F. Supp. 2d 621 (W.D.N.C. 2006).
- 30 See, e.g., *Duane Reade, Inc. v. St. Paul Fire & Marine Ins. Co.*, 411 F.3d 384 (2d Cir. 2005); *Retail Brand Alliance, Inc. v. Factory Mut. Ins. Co.*, 489 F. Supp. 2d 326 (S.D.N.Y. 2007).
- 31 475 F.3d 274 (5th Cir. 2007).
- 32 *Id.* at 276.
- 33 *Id.* at 277.
- 34 *Id.*
- 35 *Id.* at 278.
- 36 *Id.*
- 37 *Id.* at 281. As is evidenced in *Bexar* and other cases relating to BI deductibles, the disputes usually center around the ambiguity of the deductible provision at issue. See *Tex. Indus., Inc. v. Factory Mut. Ins. Co.*, 486 F.3d 844, 848 (5th Cir. 2007) (“Unfortunately, the contract language is ambiguous as to the proper calculation of the [deductible provision].”).
- 38 A description of these coverages is included in the sections below.
- 39 It is notable that it is possible to reduce or remove the waiting period when placing coverage. However, in most cases it will come at an additional cost.
- 40 ISO Business Income (and Extra Expense) Coverage Form (CP 00 30 10 00), at 7 (1999) (emphasis added).
- 41 404 F.3d 312 (5th Cir. 2005).
- 42 *Id.* at 313.
- 43 *Id.*
- 44 *Id.*

45 *Id.*

46 *Id.*

47 *Id.*

48 *Id.*

49 *Id.*

50 *Id.* at 314.

51 *Id.* at 314-15; *see also* [Catlin Syndicate Ltd. v. Imperial Palace of Miss., Inc.](#), 600 F.3d 511 (5th Cir. 2010) (explaining that post-loss increase in revenues after hurricane resulting from decreased competition due to closed competitors did not reduce BI damages); [Levitz Furniture Corp. v. Hous. Cas. Co.](#), No. 96-1790, 1997 WL 218256 (E.D. La. Apr. 28, 1997) (holding policyholder's increase in sales after reopening after flood due to increased demand for furniture did not reduce BI loss).

52 552 F. Supp. 2d 637 (S.D. Tex. 2007).

53 *Id.* at 640.

54 *Id.*

55 *Id.*

56 *Id.*

57 *Id.*

58 *See* [Finger Furniture Co. v. Commonwealth Ins. Co.](#), 404 F.3d 312, 313 (5th Cir. 2005).

59 [Rimkus Consulting](#), 552 F. Supp. 2d at 641.

60 *See id.* at 645-46.

61 [Consol. Cos., Inc. v. Lexington Ins. Co.](#), 616 F.3d 411, 427 n.5 (5th Cir. 2010). These types of expenses are also referred to as expediting expenses or “sue and labor.”

62 Steven J. Meils, [Expenses to Reduce Loss and Extra Expenses](#), Business Income Loss Blogger (Jan. 1, 2008, 9:14 AM), <https://businessinterruptionblogger.blogspot.com/2008/07/expenses-to-reduce-loss-and-extra.html>.

- 63 *See* *R.D. Offutt Co. v. Lexington Ins. Co.*, 494 F.3d 668, 674-75 (8th Cir. 2007) (costs incurred to rent portable generators and purchase diesel fuel in order to keep water station operational were covered under BI policy).
- 64 Julia Kagan, *Extra Expense Insurance*, Ivestopedia.com, <https://www.investopedia.com/terms/e/extra-expense-insurance.asp> (last updated Mar. 29, 2018).
- 65 In practice, policyholders and carriers should discuss these expenses before they are incurred (including their classification).
- 66 *GTE Corp. v. Allendale Mut. Ins. Co.*, 258 F. Supp. 2d 364, 380-81 (D.N.J. 2003).
- 67 *See supra* Part II.B.
- 68 *See, e.g., AFLAC Inc. v. Chubb & Sons, Inc.*, 581 S.E.2d 317, 319 (Ga. Ct. App. 2003) (“[A direct physical loss] contemplates an actual change in insured property then in a satisfactory state, occasioned by accident or other fortuitous event directly upon the property causing it to become unsatisfactory for future use or requiring that repairs be made to make it so.”); *MRI Healthcare Ctr. of Glendale, Inc. v. State Farm Gen. Ins. Co.*, 115 Cal. Rptr. 3d 27, 38 (Cal Ct. App. 2010) (“[D]istinct, demonstrable, physical alteration” of the property must be shown).
- 69 279 F.2d 428 (2d Cir. 1960).
- 70 *Id.* at 429.
- 71 *Id.* at 430.
- 72 ISO Business Income (and Extra Expense) Coverage Form (CP 00 30 04 02) at 1, 8 (2001) (emphasis added); ISO Business Income (and Extra Expense) Coverage Form (CP 00 30 10 00), at 7 (1999); *see also supra* Parts II.A, B, and C.
- 73 *See e.g., Nat’l Union Fire Ins. Co. v. Texpak Grp., N.V.*, 906 So. 2d 300 (Fla. Dist. Ct. App. 2005) (explaining that defective design not covered by the policy); *Prot. Mut. v. Mitsubishi Silicon*, 992 P.2d 479, 485-86 (Or. Ct. App. 1999) (holding that because policy explicitly excluded flood damage, extension to business interruption for service interruption did not apply); *GTE Corp. v. Allendale Mut. Ins. Co.*, 372 F.3d 598, 616 (3d Cir. 2004) (“GTE cannot claim business interruption losses ensuing or resulting from the specifically excluded intrinsic design defect and inherent vice perils.”).
- 74 ISO Business Income (and Extra Expense) Coverage Form (CP 00 30 04 02) at 1, 8 (2001) (emphasis added); ISO Business Income (and Extra Expense) Coverage Form (CP 00 30 10 00), at 7 (1999); *see also supra* Parts II.A, B, and C.
- 75 *See S. Hotels Ltd. v. Underwriters at London Cos.*, Civ. A. No. 95-2739, 1996 WL 592732, at *4 (E.D. La. Oct. 11, 1996) (finding plaintiff failed to prove a “causal nexus between” damages and a loss of revenue).
- 76 Civ. A. No. 95-2739, 1996 WL 592732 (E.D. La. Oct 11, 1996).
- 77 *Id.* at *1.

- 78 *Id.* It is notable that the evidence showed that the policyholder had not turned away customers as a result of the damage allegedly caused by the hurricane. *Id.* at *2.
- 79 *Id.* at *3.
- 80 *Id.*
- 81 *Id.* at *2.
- 82 *Id.* at *3.
- 83 831 P.2d 784 (Wash. Ct. App. 1992).
- 84 *Id.* at 785.
- 85 *Id.*
- 86 *Id.* at 786.
- 87 *Id.*
- 88 *See* ISO business Income (and Extra Expense) Coverage Form (CP 00 30 04 02) at 1 (2001); *see also supra* Part II. A.
- 89 835 F.2d 812 (11th Cir. 1988).
- 90 *Id.* at 813.
- 91 *Id.*
- 92 *Id.* at 814.
- 93 *Id.*
- 94 940 F. Supp. 155 (S.D. Tex. 1996).
- 95 *Id.* at 155.
- 96 *Id.*
- 97 *Id.* at 156-157.

- 98 *Id.* at 157.
- 99 *Ramada Inn Ramogreen, Inc. v. Travelers Indem. Co.*, 835 F.2d 812 (11th Cir. 1988).
- 100 *Keetch v. Mutual of Enumclaw Ins. Co.*, 831 P.2d 784 (Wash. Ct. App. 1992).
- 101 *Mikob Props., Inc.*, 940 F. Supp. at 159 (citing *Keetch v. Mut. of Enumclaw Ins. Co.*, 831 P.2d 784, 786 (Wash. Ct. App. 1992)).
- 102 *Id.* at 159-60 (citing *Ramada Inn Ramogreen, Inc. v. Travelers Indem. Co.*, 835 F.2d 812, 814 (11th Cir. 1988)).
- 103 *See, e.g., Duane Reade, Inc. v. St. Paul Fire & Marine Ins. Co.*, 411 F.3d 384, 392-93 (2d Cir. 2005). It is noted that the disputes revolve heavily around the specific language of the policies at issue.
- 104 *See, e.g., Am. States Ins. Co. v. Creative Walking, Inc.*, 16 F. Supp. 2d 1062 (E.D. Mo. 1998), *aff'd*, 75 F.3d 1023 (8th Cir. 1999) (policy at issue provided coverage for a “necessary suspension of operations”); *see also Home Indem. Co. v. Hyplains Beef, L.C.*, 893 F. Supp. 987 (D. Kan. 1995), *aff'd*, 89 F.3d 850 (10th Cir. 1996) (policyholder’s loss of electronic data did not cause a suspension of operations--it merely caused operations to slow and become less efficient).
- 105 *See, e.g., Omaha Paper Stock Co. v. Harbor Ins. Co.*, 596 F.2d 283, 289 (8th Cir. 1979) (policy at issue provided coverage for a “total or partial suspension of business activity”); *see also Aztar Corp. v. U.S. Fire Ins. Co.*, 224 P.3d 960, 965 (Ariz. Ct. App. 2010) (“This policy insures against loss resulting directly from necessary interruption of business, whether total or partial.”).
- 106 411 F.3d 384, 387 (2d Cir. 2005).
- 107 *Id.* at 393; *see also United Fire & Cas. Co. v. Arkwright Mut. Ins. Co.*, 53 F. Supp. 2d 632, 640 (S.D.N.Y. 1999) (“The EPI endorsement, for which an additional premium was charged, extended the time during which Warnaco is compensated for its loss but it also covers remote or indirect business interruption losses, such as losses of market share, which are not insured under the BI endorsement.”).
- 108 ISO Business Income (and Extra Expense) Coverage Form (CP 00 30 04 02) at 2-3 (2001).
- 109 226 F. Supp. 3d 658 (E.D. La. 2017).
- 110 *Id.* at 661.
- 111 *Id.* at 662.
- 112 *Id.* at 679 (emphasis added).
- 113 *Id.* at 669, 670, 678-80.
- 114 *Id.* at 679.

- 115 *Id.*
- 116 *Id.* at 679-80 (citations omitted; emphasis in original).
- 117 *See also* [Lightfoot v. Hartford Fire Ins. Co.](#), CIV. A. 07-4833, 2011 WL 2293123, at *4 (E.D. La. June 8, 2011) (EPI provision provided additional coverage for losses incurred until date that business operations could be restored “with due diligence and dispatch, to the level which would generate the amount of sales that would have existed had no direct physical loss or damage occurred.”).
- 118 Alan R. Miller & Michael J. Garko, *Time Element Coverage*, ROBINS KAPLAN LLP (Apr. 3-5, 2008), https://www.robinskaplan.com/resources/articles/time-element-coverage#_ftn1.
- 119 *Id.*
- 120 *Id.*
- 121 *Id.*
- 122 *Id.*
- 123 *Id.*
- 124 *Id.*
- 125 *Id.*
- 126 *See id.*
- 127 *Id.*; *see also* [Duane Reade, Inc. v. St. Paul Fire](#), 411 F.3d 384, 394 (2d Cir. 2005).
- 128 936 F. Supp. 534 (S.D. Ill. 1996).
- 129 *Id.* at 536.
- 130 *Id.* at 540 (emphasis added).
- 131 *Id.*
- 132 *Id.* at 542.
- 133 *Id.* at 543-54.

- 134 400 F.3d 613 (8th Cir. 2005).
- 135 *Id.* at 615.
- 136 *Id.* at 614.
- 137 *Id.*
- 138 *Id.* at 615.
- 139 Robert Redfearn, Jr., *Business Losses Due to Civil Authority Action: When Is There Coverage?*, May 12, 2011, <https://www.insurancejournal.com/news/southcentral/2011/05/12/198244.htm>; *see also* Miller & Garko, *supra* note 118.
- 140 *See* Redfearn, *supra* note 139.
- 141 *See id.*
- 142 *Id.* (Two examples include the September 11, 2001 terrorist attacks, which led to a nationwide shutdown of air travel, and Hurricane Katrina, which involved “mandatory evacuation orders [that] were issued prior to the hurricane's landfall and remained in effect” for relatively long time periods.).
- 143 *See id.*
- 144 ISO Business Income (and Extra Expense) Coverage Form (CP 00 30 04 02) at 2 (2001).
- 145 *Dickie Brennan & Co. v. Lexington Ins. Co.*, 636 F.3d 683, 685 (5th Cir. 2011).
- 146 *Id.*
- 147 No. 1:03 CV 2111, 2006 WL 2504907 (N.D. Ohio Aug. 29, 2006), *aff'd*, 245 F. App'x 495 (6th Cir. Aug. 15, 2007).
- 148 *Id.* at *1.
- 149 *Id.*
- 150 *Id.*
- 151 *Id.* at *8.
- 152 *Id.* *6.
- 153 ISO Business Income (and Extra Expense) Coverage Form (CP 00 30 04 02) at 2 (2001).

- 154 No. Civ. A. 02-106, 2002 WL 31996014 (E.D. La. Sept. 30, 2002).
- 155 *Id.* at *1 n.2.
- 156 *Id.* at *1.
- 157 *Id.* at *2.
- 158 *Id.*
- 159 *Id.*
- 160 *Id.* (citations omitted).
- 161 *See id.* at *2 n.3; *see also* [S. Hosp., Inc. v. Zurich Am. Ins. Co.](#), 393 F.3d 1137 (10th Cir. 2004) (finding no coverage under the plaintiff hotel's civil authority policy because the FAA's order prohibiting airplanes from flying did not prohibit access to hotel operations); [Kean, Miller, Hawthorne, D'Armond, McCowan & Jarman, LLP v. Nat'l Fire Ins. Co.](#), No. 06-770-C, 2007 WL 2489711 (M.D. La. Aug. 29, 2007) (finding no coverage under the plaintiff business's hotel civil authority policy because the recommendations by Baton Rouge officials to stay off the streets did not deny access to the business's premises); [Dixson Produce, LLC v. Nat'l Fire Ins. Co. of Hartford](#), 99 P.3d 725 (Okla. Civ. App. 2004) (finding no civil authority coverage because although travel to the insured business was not as convenient as before a tornado struck, a civil authority did not prohibit access to the insured business).
- 162 No. Civ. A. H-06-4041, 2008 WL 450012 (S.D. Tex. Feb. 15, 2008).
- 163 *Id.* at *10.
- 164 *Id.*
- 165 *Id.*
- 166 *Id.* (internal citations omitted) (emphasis added); *see also* [Dickie Brennan & Co. v. Lexington Ins. Co.](#), 636 F.3d 683, 686 (5th Cir. 2011) (“[T]he district court correctly accepted Lexington's argument that the Brennans failed to establish a link between the property damage in the Caribbean and the issuance of Nagin's evacuation order so as to trigger coverage under the Lexington policy.”); [Not Home Alone, Inc. v. Phila. Indem. Ins. Co.](#), No. 1:10-CV-54, 2011 WL 13214381, at *6 (E.D. Tex. Mar. 30, 2011), *report and recommendation adopted*, No. 1:10-CV-54, 2011 WL 13217067 (E.D. Tex. Apr. 8, 2011) (no coverage under civil authority provision because “[w]hen [the orders] were issued, Hurricane Ike had not made landfall, and had caused no direct physical loss of or damage to other properties”).
- 167 *See, e.g.*, [Assurance Co. v. BBB Serv. Co.](#), 593 S.E.2d 7 (Ga. Ct. App. 2003).
- 168 ISO Business Income (and Extra Expense) Coverage Form (CP 00 30 04 02) at 1 (2001).
- 169 *See* Miller & Garko, *supra* note 118.

- 170 *Id.*
- 171 Fountain Powerboat Indus., Inc. v. Reliance Ins. Co., 119 F. Supp. 2d 552, 556 (E.D.N.C. 2000).
- 172 119 F. Supp. 2d 552 (E.D.N.C. 2000).
- 173 *Id.* at 554.
- 174 *Id.*
- 175 *Id.*
- 176 *Id.*
- 177 *Id.*
- 178 *Id.* at 554-55.
- 179 *Id.* at 555-56.
- 180 *Id.* at 557 (citations omitted); *see also* Hous. Cas. Co. v. Lexington Ins. Co., Civ. A. No. H-05-1804, 2006 WL 7348102, at *2 (S.D. Tex. June 15, 2006) (acknowledging that a policyholder's entitlement to ingress/egress provisions do not require physical loss to property).
- 181 *See* Miller & Garko, *supra* note 118.
- 182 *Id.*
- 183 ISO Utility Services - Time Element Endorsement Form (CP 15 45 04 02) at 1 (2001).
- 184 Miller & Garko, *supra* note 118.
- 185 *Id.*; *see also* Bagelman's Best, Inc. v. Nationwide Mut. Ins. Co., No. COA03-1413, 2004 WL 2793214 (N.C. Ct. App. Dec. 7, 2004).
- 186 No. COA03-1413, 2004 WL 2793214 (N.C. Ct. App. Dec. 7, 2004).
- 187 *Id.* at *2, *3.
- 188 *Id.* at *1.
- 189 *Id.*

190 *Id.*

191 *Id.* at *2.

192 *Id.* at *3.

193 *Id.*

194 *Id.*

195 *Id.*; see also *Lyle Enterprizes, Inc. v. Hartford Steam Boiler Inspection & Inc.*, 399 F. Supp. 2d 821 (W.D. Mich. 2005) (no coverage found because engaging of power company's protection mechanisms, which was purposeful, caused the outage).

196 See *Miller & Garko*, *supra* note 118.

197 *Id.*

198 ISO Business Income (and Extra Expense) Coverage Form (CP 00 30 04 02) at 8 (2001).

199 *Id.*

200 *Id.* at 3.

201 *Id.* at 8.

202 Civ. A. No. 06-1341, 2008 WL 282203 (E.D. Pa. Jan. 1, 2008).

203 *Id.* at *1, *4.

204 *Id.* at *1.

205 *Id.* at *3.

206 *Id.* at *4 (emphasis added).

207 *Id.*

208 832 N.Y.S.2d 1 (N.Y. App. Div. 2006).

209 *Id.* at 2.

210 *Id.*

211 *Id.*

212 *Id.*

213 *Id.* at 2-3.

214 *Id.* at 3.

215 *Id.*

216 *Id.* at 6.

217 *Id.*; *see also* *Buxbaum v. Aetna Life & Cas. Co.*, 126 Cal. Rptr. 2d 682, 688 (Cal. Ct. App. 2002).

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