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Just How Much Business Disruption Is Required To Obtain Coverage Under Contingent Business Interruption Insurance Policies?

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A Total Cessation of a Policyholder's Business Is Not Required for Business Interruption Coverage

In insurance coverage cases relating to the application of contingent business interruption coverage, insurers consistently argue that there must have been a “total cessation” of operations, no matter the applicable policy language. They further argue that if there was no “total cessation” of business operations, the insurers are not obligated to provide contingent business interruption coverage. Those arguments, however, should not carry the day.

First, an overview of contingent business interruption coverage. “Regular business-interruption insurance replaces profits lost as a result of physical damage to the insured’s plant or other equipment; contingent business-interruption coverage goes further,

protecting the insured against the consequences of suppliers' problems." *Archer Daniels Midland Co. v. Hartford Fire Ins. Co.*, 243 F.3d 369, 371 (7th Cir. 2001) ("Archer v. Hartford"). In short, if a third party suffers a business interruption that affects the policyholder, such as "damage to [a third party's] plant, which was neither owned nor operated by" the insured, "contingent business interruption insurance applie[s] to the losses suffered by" the named insured. *CII Carbon, L.L.C. v. Nat'l Union Fire Ins. Co.*, 918 So.2d 1060, 1068 (La. App. 4 Cir. 2005). The operative provision may require a "necessary interruption" or a "necessary suspension" of business operations. Neither clause requires a "total cessation" of business operations, as insurers frequently argue. That is even more true for policies that contain the "necessary interruption" language, rather than "suspension."

The plain language of policies that require only an "interruption of business" does not, by the terms, require a total "cessation" or "suspension" of business. The term "interrupt" means to "hinder" or "break the uniformity or continuity of," as well as "to stop" an activity. Merriam-Webster Online, "Interruption," <http://www.merriam-webster.com/dictionary/interruption> (last visited Mar. 6, 2009). Similarly, *Webster's College Dictionary* (1991) defines "interrupt" not only as the act of causing operations to cease, but also "to interfere with"; "interfere" means "to hamper, hinder or obstruct." *Id.* at 702, 706. Because "interrupt" can mean merely "hinder" or "interfere with" business, a complete cessation or suspension is not necessary under the plain meaning of insurance policies that require only an "interruption" rather than "suspension" of business for contingent business interruption coverage to apply.

Insurers sell and have sold policies that use the more restrictive "necessary suspension" language; policies that use "interruption" should be interpreted as reflecting a choice the insurers made to provide less restrictive coverage. It is a well-accepted concept in insurance coverage law that if an insurer could have included restrictive language in a policy, but did not, it cannot then enforce the same restriction in litigation. *See, e.g., United Servs. Auto. Ass'n v. Webb*, 369 S.E.2d 196, 199 (Va. 1988) (because insurer could have inserted clearer term, but did not, the court rejected the insurer's policy interpretation).

There is limited caselaw available interpreting clauses in the context of contingent business interruption. But considering business interruption clauses, even those policies that use the language “necessary suspension” in their business interruption clauses do not require “total cessation” of business operations. As one court has explained, “the term ‘necessary suspension’ should not be construed to require a total cessation of business operations as prerequisite to payment.” *Icuc Corp. v. U.S. Fid. & Guar. Co.*, No. 07-1781, slip op. at 2 n.1 (E.D. Pa. Apr. 23, 2008), *reconsideration denied*, slip op. (May 9, 2008). Another court, interpreting “necessary suspension” language in another recent decision, explained that “[g]enerally, a business interruption is a temporary cessation or impairment of the operations of an established business.” *Yount v. Lafayette Ins. Co.*, 2008-0380 (La.App. 4 Cir. 01/28/09); 2009 La. App. LEXIS 114, at *21 (La. Ct. App. Jan. 28, 2009) (citing *Morton M. Goldberg Auction Galleries, Inc. v. Canco, Inc.*, 94-0734 (La. App. 4th Cir. 1/31/95), 650 So.2d 801).

Similarly, in *Maher v. Continental Casualty Co.*, 76 F.3d 535, 539 n.1 (4th Cir. 1996), the court rejected the insurer’s argument that “a complete shutdown of the entire business” was required (under a policy with explicit “suspension” language). The Third Circuit is in accord, finding that when a policyholder was forced to conduct “the same *kind* of business activities at [a] replacement facility,” that was sufficient to warrant reversal of the district court’s summary judgment for the insurer. *Am. Med. Imaging Corp.*, 949 F.2d at 692.

Moreover, requiring a total cessation of business at a large company would effectively render any insurance for a contingent business interruption loss illusory. Many large companies never totally cease to operate. If a total cessation of business operations was a pre-condition for business interruption coverage, no large company with operations throughout the country or the world could ever obtain insurance coverage for a business interruption loss.

Mitigation clauses also support a policyholder’s position that a complete cessation of business is not required for contingent business interruption coverage.¹ Mitigation clauses in business interruption policies often require the accounting for and of the

policyholder's efforts to reduce, in whole or in part, losses resulting from business interruption. By requiring the partial resumption of operation to reduce loss, the policies cannot also require a complete cessation or suspension of operations as a condition to coverage.²

Case law in the business interruption context recognizes that a mitigation requirement is inconsistent with a requirement that there be a complete cessation of operations in order to obtain coverage, under both the plain language of the policies and public policy. In *American Medical Imaging Corp. v. St. Paul Fire & Marine Insurance Co.*, 949 F.2d 690, 692-93 (3d Cir. 1991), the Third Circuit refused to require a complete cessation of operations for business interruption coverage (under a policy with an express "suspension" requirement) because "the policy imposes on the insured an affirmative duty to mitigate its losses." The court reasoned that if it were to read a total cessation requirement into the policy: "the insured would have no motivation to mitigate its losses. Continuing in business at any level would bar recovery." *Id.* at 692.

In making their argument that contingent business interruption insurance provisions require a "total cessation" of business, insurers may rely on business interruption cases that involve policy language that explicitly requires "suspension" of operations, even for losses under policies requiring only an "interruption" of operations.³ Moreover, the cases that insurers cite often involve an event that failed to cause even a brief interruption of the policyholder's business. Those cases often are distinguishable on the law, the policy language, and the facts of the claim at issue.

Even If a "Total Cessation" Is Required, Consider Whether the Facts Meet the Standard

Even if a policyholder finds itself in an action in which the court holds that the subject policies require a "suspension" of operations, the policyholder may be able to argue that the facts meet the standard nonetheless. For example, consider whether there was a total cessation of the business of any of the policyholder's distributors and receivers, even if briefly.

Even courts honoring insurers' requests to read "total cessation of operations" into policies, however, require only a brief cessation of operations. For example, in *TJS Brokerage & Co. v. Hartford Casualty Insurance Co.*, No. 2755, 2002 Phila. Ct. Com. Pl. LEXIS 38, at *18-*19 (Pa. Ct. Com. Pl. Apr. 22, 2002), the court detailed sufficient evidence necessary to meet the requirements for business interruption coverage. The business was vandalized and many (but not all) employees were unable to work. The court determined that this was sufficient for business interruption coverage under a policy requiring a "necessary suspension." *Id.*

In *Evans v. Lafayette Insurance Co.*, No. 06-6783, 2007 WL 4545883, at *2 (E.D. La. Dec. 18, 2007), a case with "suspension" language in the policies, the court held that when the policyholder law firm's attorneys had to work outside of the home office, there was a sufficient "suspension of operations" for purposes of business interruption coverage, even though office employees worked from remote locations. *See id.*

Conclusion

In insurance coverage litigation regarding contingent business interruption losses, it is important to turn a critical eye on insurers' arguments if they have denied coverage. As always, consider the policy language, and remind insurers that if they used broader language, such as "interruption," rather than "suspension," their "total cessation" assertions should not be considered persuasive. Also pay close attention to the facts relating to the policyholder's relevant third parties, such as distributors, and consider whether there was any "total cessation" of operations, even if briefly. If so, the insurers' arguments should be rejected.

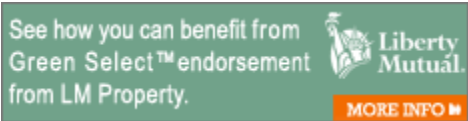





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1 Insurers are obligated to classify losses in the manner that most promotes coverage, and bear the burden of classifying a claim in a manner that promotes coverage. *See Gaetan v. Firemen's Ins. Co.*, 695 N.Y.S.2d 608, 610 (App. Div. 2d Dep't 1999) (insurance company bore the "burden of proving" that lower coverage limit for certain type of claim applied); *Lang v. Asten, Inc.*, No. 2002-02973, slip op. at 2 (La. Dist. Ct. Mar. 26, 2004) ("OneBeacon has failed to prove that any amount paid in indemnity should have been allocated to the products hazard/completed operations provisions of the OneBeacon

policies.”), *aff’d on other grounds*, 900 So. 2d 1031 (La. Ct. App. 2005), *rev’d as to contempt finding*, 918 So. 2d 453 (La. 2006); *Am. Employers Ins. Co. v. Eagle, Inc.*, No. Civ. A. 03-0048, 2003 WL 23305664, at *1 (E.D. La. Nov. 12, 2003) (“Plaintiffs [insurance companies] must prove that the products/completed operations aggregate limits have been exhausted by their proper allocation of each and every claim.”), *aff’d on other grounds*, 122 F. Appx. 700, 2004 WL 2790622 (5th Cir. 2004).

2 See, e.g., *E.I. du Pont de Nemours & Co. v. Shell Oil Co.*, 498 A.2d 1108, 1114 (Del. 1985) (“where possible, a court should give effect to all contract provisions”).

3 As examples of cases that insurers often cite that have interpreted “suspension,” rather than “interruption,” see *Home Indem. Co. v. Hyplains Beef, L.C.*, 893 F. Supp. 987, 990 (D. Kan. 1995) (requiring “suspension”); *54th St. Ltd. Partners, L.P. v. Fid. & Guar. Ins. Co.*, 763 N.Y.S.2d 243, 243-44 (App. Div. 2003) (same); *Am. States Ins. Co. v. Creative Walking, Inc.*, 16 F. Supp. 2d 1062, 1063 (E.D. Mo. 1998) (same); *Buxbaum v. Aetna Life & Cas. Co.*, 126 Cal. Rptr. 2d 682, 683 (Ct. App. 2002) (same).

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