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Insurance Coverage for Disaster-Related Losses: The Japan Earthquake and Tsunami

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Presenter Information



[Selena J. Linde](#) is Deputy Practice Leader of the Insurance Coverage Practice. *Benchmark: The Definitive Guide to America's Leading Litigation Firms & Attorneys* recognized Ms. Linde as a "Future Star" in its 2009, 2010 and 2011 editions and noted that during her years of practice she has "established a significant mark on the insurance industry." Ms. Linde recently chaired an Insurance Coverage Seminar in Tokyo in the fall of 2010 regarding insurance issues specific to Japanese and multinational companies.

Ms. Linde has an active trial practice representing policyholders in complex insurance coverage matters in federal and state courts throughout the country and an equally active arbitration, mediation, and counseling practice. She can be reached directly at (202) 420-5005 or lindes@dicksteinshapiro.com.

Presenter Information



[John E. Heintz](#) has more than 30 years of experience in the fields of corporate insurance coverage and other complex, multiparty litigation and arbitration. He has successfully represented clients in securing coverage for property and business interruption losses arising out of destruction of property at Ground Zero on 9/11 and other catastrophic events, lead-related public nuisance claims, asbestos bodily injury and abatement claims, and environmental contamination remediation claims under Superfund and similar statutes. In the course of those representations, Mr. Heintz has obtained favorable rulings for his clients in numerous landmark appellate cases at the state and federal levels. He can be reached directly at (202) 420-5373 or heintzj@dicksteinshapiro.com.

Presenter Information



[Ron Van Epps](#) has over 26 years of experience. Ron has significant experience helping clients resolve complex insurance claims. In addition to experience related to asbestos, pollution and human health claims, Ron has worked on a number of complex property damage and business interruption claims. Since 2005, Ron has helped to settle more than fifteen major property damage and business interruption losses. Over the last 3 years alone, Ron has helped clients recover in excess of \$1.3 billion in hurricane and other related losses. Back in 2001/2002, Ron spent six months in NYC assisting multiple clients with claims associated with the destruction of the WTC. By helping policyholders to quantify current damages, lost profits and other future exposures, Ron has led the negotiations for and participated on engagements that collectively have resulted in insurance recoveries of more than \$2.5 billion. Ron can be reached at rvanepps@theclarogroup.com.

Dickstein Shapiro LLP

Dickstein Shapiro is one of the United States' leading law firms in representing policyholders around the world in disputes with their insurers, and has more than 70 dedicated insurance coverage attorneys. Since the beginning of 2007, firm attorneys have recovered more than \$4 billion on behalf of policyholders in matters involving a wide range of coverage types, claims, and industries.

The Claro Group

The Claro Group specializes in assisting policyholders in achieving settlement of complex insurance claims, including major first-party property damage and business interruption claims as well third-party liability claims. We are a multi-disciplinary firm (finance, coverage and engineering) with world-class credentials in all aspects of major insurance claims from coverage analysis, loss quantification and claim preparation, through negotiations and final claim resolution. Founded in 2005 by senior executives of a major accounting firm, The Claro Group now has over 90 employees located in Chicago, Houston and Los Angeles. With more than 40 full time professionals dedicated to our insurance recovery practice, The Claro Group has the resources to assist with even the most complex claims. Our team has served as lead consultants in negotiated settlements totaling in excess of \$8 billion.

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Japanese Earthquake and Tsunami

- Approximately 15,000 confirmed deaths
- 190,000 buildings destroyed or damaged
- Crises at nuclear power plants
- Widespread power outages

Economic Impact

- Economic impact estimated to be up to \$235 billion
- Significant property damage and economic losses within Japan
 - March decline in factory output and consumer spending was the greatest on record
 - 200,000 units of lost sales for Japanese automakers
- Continuing developments
 - Ongoing effects on businesses throughout the supply chain
 - Q1 2011 impacts limited, due to date of quake. Q2 impact still unclear.

Impact of Earthquake/Tsunami on Businesses

- Most impacted American industries:
 - Manufacturing
 - 35% of 2010 U.S. imports of Japanese goods consisted of passenger cars and auto parts
 - Japanese suppliers accounted for 20.8% of the 2010 global semiconductor market
 - Tourism
 - Shipping
- In 2009, U.S. investors had \$103.6 billion in foreign direct investments in Japan

Insurance – A Valuable Resource

- Insurance can help businesses recover from the disaster
- Insureds should move quickly to determine how their purchased coverage may protect them

Key Types of Insurance Policies

- Several types of insurance might respond to pay for losses:
 - First-Party policies, including Time Element coverages
 - Ocean Marine policies
 - Trade Disruption policies
 - Event Cancellation policies
 - Director & Officer policies

Insurance Coverage For Property Damage and Economic Losses

- First-party property policies, which often include time element coverages, may provide coverage for:
 - direct damage to or loss of property;
 - financial losses arising from an inability to conduct business (either at all or at the same levels as before);
 - the extra expenses incurred in dealing with the effects of property loss; and
 - costs incurred in establishing the extent of any losses.

First-Party Property Coverage Overview

- Protects a policyholder's place of operations and inventory
 - Many multinational businesses have locations in Japan
- Provides coverage for lost or damaged property
 - “All Risk” policies: cover losses to real property caused by any peril not expressly excluded
 - “Named Peril” policies: cover only those perils expressly listed, such as fire and explosion

First-Party Property Policies – Coverage

- The typical coverage form describes the coverage as follows:

We will pay for direct physical loss of or damage to Covered Property at the premises described in the declarations caused by or resulting from any Covered Cause of Loss. (ISO Form CP 00 10 06 07).

Additional Insured Coverage

- May allow a company to access coverage outside of its own insurance portfolio.
- Usually obtained in one of two ways:
 - Specific endorsement naming additional insured
 - Blanket endorsement that automatically extends additional insured status to contracting parties
- Additional insureds may have the same rights as the named insured.

Time Element Coverage Overview

- Many First-Party Property policies also provide some or all of the following Time Element coverages:
 - Business Interruption (Business Income)
 - To your own business
 - Due to interruption of key suppliers and/or customers
 - Contingent Business Interruption
 - Order of Civil Authority
 - Ingress / Egress
 - Extra Expense

Business Interruption Coverage

- Provides coverage for lost income due to suspension of business operations, often as a result from direct physical loss to insured property.
- Policies generally provide:
 - Payment for the actual loss of business income sustained due to the necessary “suspension of 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 policy]. (ISO CP 00 30 06 07 at p. 1).
 - Some policies cover interruptions due to a “risk of loss,” rather than to “physical loss or damage.”

Business Interruption Coverage

- Generally, business interruption coverage requires property damage
 - Business Interruption coverage may turn on whether the policy requires property damage to insured property, like the insured's offices or factories.
 - The majority of Time Element coverages, like Contingent Business Interruption (CBI) and Civil Authority coverage, do not require property damage to the insured's property.

Contingent Business Interruption Coverage

- Applies to business interruption losses due to physical loss or damage to the property of the policyholder's customers or suppliers.
- A typical policy provides:
 - “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.” *ADM v. Phoenix Assur. Co.*, 936 F. Supp. 534, 540 (S.D. Ill. 1996).
- See Policy Language Exemplars A, B, and C.

Policy Language Exemplar A

Contingent Business Interruption

“[T]his Policy is extended to cover only against loss directly resulting from necessary interruption of business conducted on premises occupied by the Insured, caused by damage to or destruction of any of the **real or personal property described above and referred to as RECIPIENT OR CONTRIBUTING PROPERTY(IES)** and which is not operated by the Insured, by the peril(s) Insured against during the term of this Policy, which wholly or partially prevents the delivery of materials to the Insured or to others for the account of the Insured and results directly in a necessary interruption of the Insured’s business.”

Policy Language Exemplar B

Contingent Business Interruption

“This policy . . . also insures against loss resulting from physical damage to or destruction by causes of loss insured against **to . . . property that wholly or partially prevents any direct supplier of goods and/or services, or property that wholly or partially prevents any direct receiver of goods and/or services from the Insured** from accepting the Insured’s goods and/or services, such supplier or receiver **to be located anywhere in the world**”

Policy Language Exemplar C

Contingent Business Interruption

“This Policy covers the Actual Loss Sustained and EXTRA EXPENSE incurred by the Insured during the PERIOD OF LIABILITY: 1) directly resulting from physical loss or damage of the type insured; and 2) to **property of the type insured, at any locations of direct suppliers or customers located within the TERRITORY** of this Policy. The term supplier or customer does not include any company supplying or receiving from the Insured Location . . . electricity, fuel, gas, water, steam, refrigeration, or sewage.”

Contingent Business Interruption

- CBI coverage may not be included in large commercial property policies, or may have low sublimits.
 - Higher limits may be purchased
- Disputes may arise over whether the third-party's business interruption was caused by a covered peril.
- Policy may limit coverage to specific suppliers and customers, and may exclude certain risks, such as an earthquake in Japan.
- If suppliers and customers are not specifically listed, policy definition may be quite broad, and include indirect suppliers/customers.

Civil Authority Coverage

- Covers losses due to an order of a civil authority
 - closure of specified areas by the Japanese government
- A typical policy provides:

“When a Covered Cause of Loss causes damage to property other than property at the described premises, 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” (ISO CP 00 30 06 07, at p. 2).
- See Policy Language Exemplars D, E, and F.

Policy Language Exemplar D

Civil or Military Authority

“This policy is extended to insure loss sustained during the period of time not exceeding thirty (30) consecutive days when, as a result of loss, damage or an event not excluded in Clause 6, **at an insured location or within 2 (two) miles of it**, access to property is **prohibited** by order or action of civil or military authority.”

Policy Language Exemplar E

Civil or Military Authority

“This Policy is extended to include the actual loss sustained by the Insured, resulting directly from an interruption of business as covered hereunder, the length of time . . . noted on the Declarations Page, when, as a direct result of damage to or destruction of property **adjacent to the premises** herein described by the peril(s) insured against, access to such described premises is **specifically prohibited by** order of civil authority.”

Policy Language Exemplar F

Civil or Military Authority

“This Policy is extended to include the loss sustained during, the period of time not to exceed 30 days, when, as a direct result of a peril insured against, access to property is **prohibited by** order of civil authority.” PERILS INSURED AGAINST: This policy insures against all risk of direct physical loss or damage to insured property.

Ingress / Egress Coverage

- Provides coverage for lost income due to the inability to access the policyholder's property
- A typical policy provides:
 - “This policy will cover Actual Loss Sustained by the Insured due to the necessary interruption of the Insured's business due to prevention of ingress to or egress from the Insured's property, whether or not the premises or property of the insured shall have been damaged, provided that such interruption must be a result of physical damage of the type insured against and not excluded by this policy, to the kind of property not excluded by this policy.” *City of Chicago v. Factory Mut. Ins. Co.*, 2004 WL 549447 (N.D. Ill. 2004).
- See Policy Language Exemplars G, H, I, and J.

Policy Language Exemplar G

Ingress/Egress

This covers “loss resulting from necessary interruption of business conducted by the Insured as a consequence of denial, prevention of, or reduction in access to or use of highways, bridges, causeways . . . or terminals . . . or the means of access thereto caused by or resulting from a peril insured under this Policy.”

Policy Language Exemplar H

Ingress/Egress

“This policy is extended to insure loss sustained during the period of time not exceeding thirty (30) consecutive days when, as a result of loss, damage or an event not excluded in Clause 6 **at an insured location or within 2 (two) miles** of it, ingress to or egress from real or personal property is **prevented.**”

Policy Language Exemplar I

Ingress/Egress

“This policy is extended to cover, for up to thirty (30) consecutive days excess of the time element deductible, the loss sustained during the period of time when, in connection with or following a peril insured against to property of the type insured access to or egress from real or personal property is **impaired**. This extension applies only to ingress/egress **impairments . . . located within one (1) mile** of the Insured’s premises.”

Policy Language Exemplar J

Ingress/Egress

“This policy is also extended to include the reduction in Gross Earnings and the Extra Expense incurred by the insured, during the length of time, not exceeding thirty (30) consecutive days after the application of the deductible for Extra Expense, when **ingress to or egress from such Premises Described is specifically prohibited**. Such prohibition of ingress or egress must be as a direct result of a peril not otherwise excluded to property of a type not otherwise excluded.”

Extra Expense Coverage

- Indemnifies the policyholder for the reasonable and necessary increased costs of conducting its business operations due to property damage caused by an insured peril.
- Policies generally define “Extra Expense” as:

“[the] necessary expenses you incur during the period of restoration that you would not have incurred if there had been no direct physical loss or damage to property caused by or resulting from a Covered Cause of Loss.” (ISO CP 00 30 06 07, at p. 1).

Insurer Defenses to Coverage

- A broad range of exclusions may be included in companies' property policies, including in the endorsements.
- Insurers may assert that claims arising out of the earthquake or tsunami are barred due to common exclusions or limitations on coverage for:
 - earthquake;
 - flood; and
 - nuclear events.

Insurer Defenses – Earthquake

- “All risk” commercial property policies typically contain an earthquake exclusion that excludes from coverage property damage or loss caused by an earthquake.
- Many businesses with known earthquake exposure, however, purchase earthquake coverage either by endorsement or in a standalone policy.
 - May be subject to separate sublimits and deductibles
- Whether coverage applies will depend on the specific wording of the insurance policy provisions, facts, and applicable law.

Insurer Defenses – Flood

- Standard policy forms exclude coverage for “water,” typically including a tsunami.
- As with earthquake, businesses may purchase standalone flood insurance.

Insurer Defenses – Nuclear Exclusions

- Virtually all standard insurance policies exclude coverage for loss or damage caused by nuclear radiation.
- Government pools of insurance may be available to protect energy producers.

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Policyholder Responses to Insurer Defenses

- When assessing insurer's defenses to coverage, carefully analyze:
 - facts;
 - policy language; and
 - law of the applicable jurisdiction.
- Causation issues, in particular, may be highly complex, and the key to securing an insurance recovery.
 - “Concurrent causation” and “efficient proximate cause”
 - Anti-concurrent causation clauses

Claim Notice

- Precautionary notice vs. actual claim
 - What constitutes a claim?
- Policy requirements
 - Notice
 - Proof of loss
 - Timing issues
 - Insurer response
- Consider state law requirements in responding to claims

Ocean Marine Insurance

- Addresses risks in transporting vessels, persons, and cargo overseas.
 - May include damage to cargo while in port.
- Cargo coverage is available to parties with an insurable interest in the cargo.
- May provide coverage on an “all risk” or “named perils” basis.

Trade Disruption Insurance

- Designed to protect against loss of earnings and extra expense caused by disruption in a supply chain, even when there is no physical loss or damage to the policyholder's assets.
- Developed specifically for businesses that depend on global supply chains, such as shipping companies.
- Provides coverage for loss of earnings and extra expense due to supply chain disruption.

Event Cancellation Insurance

- May provide broad coverage for:
 - Cancellation: the inability to proceed with the Insured Event(s)
 - Abandonment: the inability to complete the Insured Event(s) once started
 - Curtailment: the inability to proceed or continue with the Insured Event(s) in the manner originally planned and agreed
 - Postponement: the unavoidable deferment of the Insured Event(s) to another time

Event Cancellation Insurance

- Policy generally provides:
 - “The Company . . . will indemnify the Insured against their Net Ascertained Loss up to but not exceeding the Limit of Indemnity solely and directly in consequence of:
 - the necessary Cancellation, Abandonment, Postponement, Curtailment, or Relocation in whole or in part of any Insured Event(s)
 - the failure of any Speaker(s) to appear except as excluded below
 - failure to vacate the Venue(s) stated in the Schedule at the termination of the tenancy arising from any cause beyond the control of the Insured, or the Event(s) organizers, or sponsor(s), or financial supporter(s) of such parties.”
 - Zurich Specimen Policy.

Director & Officer Insurance

- Provides defense and indemnity coverage for companies and their directors and officers.
- Could protect against claims against directors and officers regarding their preparation for, or response to, the earthquake or tsunami.

Important Considerations Following Earthquake or Tsunami Loss

- Provide notice to the insurer of loss
- Mitigate loss, protect property, get back up and running
- Policy review
- Maintain excellent records of extra expenses, costs, and lost revenue
 - Note that the insurance company's requirements regarding support for extra expense claims may differ from the business's normal record keeping.

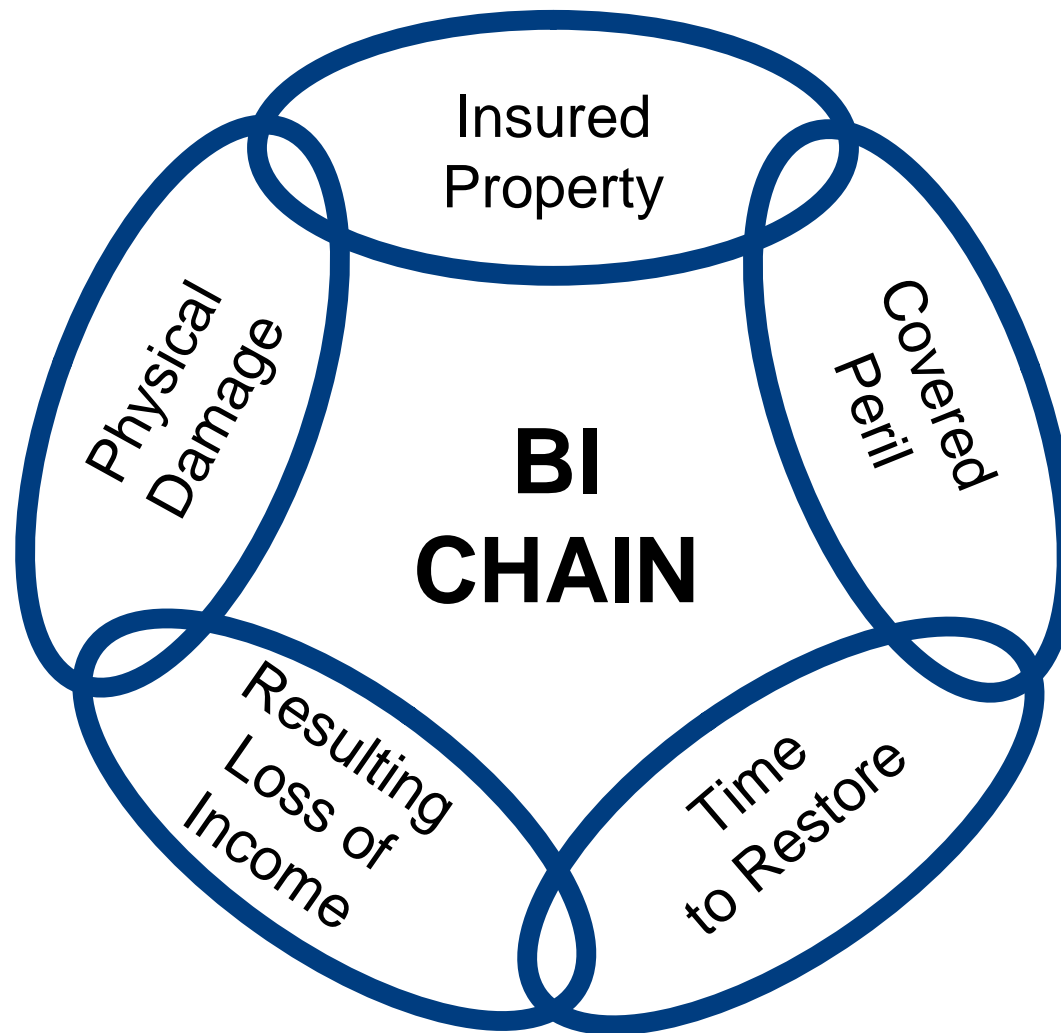
Important Considerations Following Earthquake or Tsunami Loss

- Cooperate with the Insurer
- Comply with deadlines and policy requirements:
 - Proofs of Loss
 - Examinations Under Oath (if requested)
- Request partial or advance payments from your insurance company as needed

Documenting Your Claim – Where Do You Start?

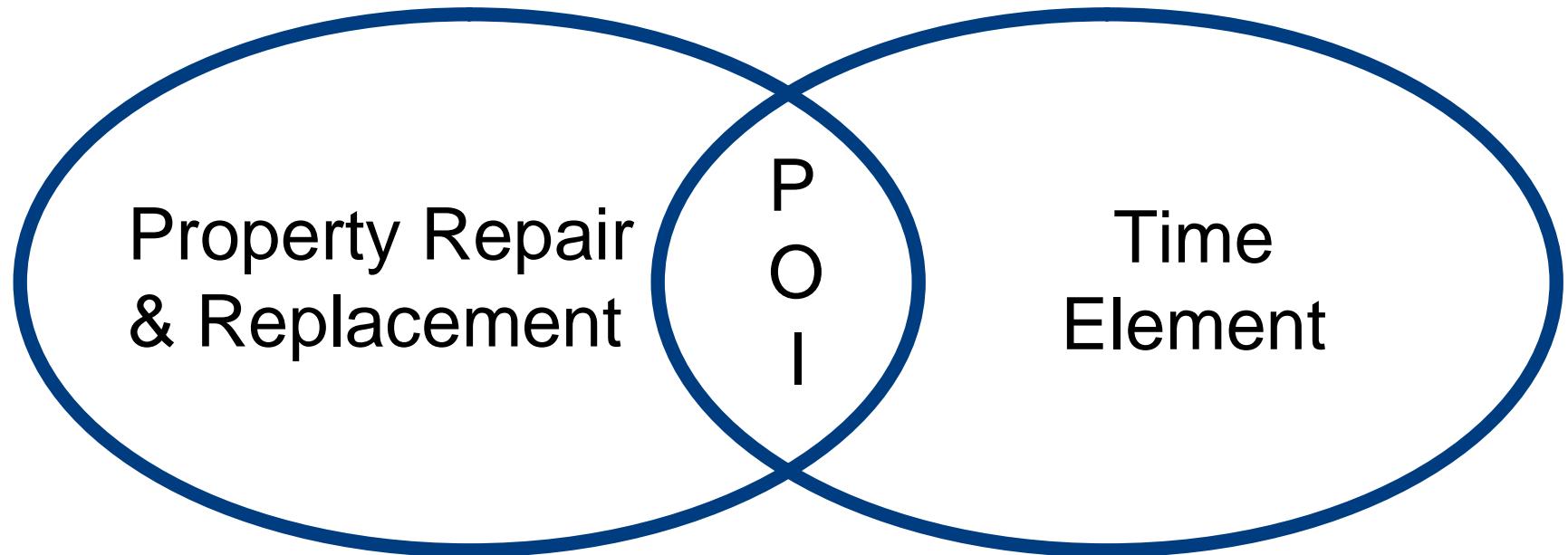
- Read your policy
- Review deductibles and reported values
- Make sure you understand the cause of your losses
- Most policies require that losses be calculated on an “Actual Loss Sustained” basis
- Establish a claim team to help compile and document the claim. This will require resources from throughout the organization
- Establish a project code(s) to accurately capture your costs incurred in responding to the loss
- Consider how best to use technology to document your claim
- Open a dialog with your adjuster

Business Interruption Issues: What Triggers Business Interruption Coverage?



How Long Can a Policyholder Claim Business Interruption Losses?

Period of Indemnity



What Are the Major Drivers of Business Interruption Losses?

BI Loss Drivers

- Length of Compensable Interruption
- Possible Extended Period of Indemnity
- Projection of “But For” Revenues
- Extra Expense
- Expenses to Mitigate Loss
- Possible Saved Expenses

What Should a Policyholder Consider When Calculating ALS?

“Actual Loss Sustained”

- Basis of Projection of “But For” Revenues
- Delayed Sales
- Sale of Finished Goods Inventory
- Make-up of Lost Production and/or Lost Sales
- No Coverage for Unabsorbed Fixed Costs
- Idle Periods/ Seasonality of Revenue
- Loss of New Facility or Construction in Progress

Claim Issues Related to Earthquake and Tsunami

Unique Business Interruption Claim Issues

- Availability of Uninterrupted Power Source
- Major Disruption to Supply Chain (Direct Suppliers?)
- Is Damage related to Earthquake or Tsunami?
- Is there any Impact Related to Radiation Concerns?
- Is there Coverage if a Company Transfers Production to Another Facility?
- Are Costs to Source Alternative Products Covered?
- Are Losses Related to Direct Property Damage or Overall Economic Impact?

Documenting Your Loss

Key Considerations in Documenting Your Loss

- Financial results for last 2 years
- Latest Pre-Loss Projections
- Historic Budget to Actual results for last 2 years
- Monthly Inventory Levels
- Monthly Backlog/ Open Orders Report
- Understanding of Industry Factors
- Business Plan For Next Year (New Products/Models, etc.)
- Correspondence with Customers/ Suppliers
- Saved Expenses (Variable v. Fixed Expenses)

Other Issues and Available Coverages

Other Potentially Available Coverages

- Contingent Business Interruption
- Ingress/Egress
- Civil Authority
- Utility Service Interruption
- Claim Preparation Expense

Claim Issues Related to Earthquake and Tsunami

Possible Property Damage Claim Issues

- Replacement Cost v. Actual Cash Value
- Advances in Technology
- Changes in Building Codes Post-loss
- What if you do not go Back with the Same Design?
- Use of Internal Resources on Rebuild – Are they Covered?
- Possible Salvage Issues related to Temporary Production

Questions to Consider

- Can the business sustain post-loss sales from inventory levels?
- Can the business transfer production to use other facilities' excess capacity?
- Can the business subcontract production to third parties?
- Are production or sales seasonal?
- Does the business have long-term contracts with customers or vendors?
- Is the business substantially dependent upon a few suppliers or customers?
- Are all significant production and business relationship interdependencies identified?
- What is the impact if you do not replace the property "As-Was"?

Questions to Consider

- Is the hourly/direct labor force difficult to replace?
- Are costs of relocating labor force to safe location covered if it helps to reduce business interruption losses?
- Is the cost of internal resources involved in the repairs covered under the policy?
- What is your corporate culture for employee relations in the event of a loss?
- How long might it take to restore/rebuild facilities?
- How long might it take to recapture market share and brand value?
- What extra expenses might be required to assure business continuation?
- In addition to new locations, what changes have occurred or are expected to occur in business operations?

Questions?



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Insurance Coverage for Disaster-Related Losses:
The Japan Earthquake and Tsunami