Best Practices in Presenting Business Interruption Claims

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Summary

- Knowing the policy's terms helps ensure the insurer can efficiently evaluate the loss.
- Attempt to mitigate losses—inaction is inexcusable.
- Insurance adjusters tend to request further clarification or retain their own experts when presented with disorganized, irrelevant, or excessive documentation.

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When a catastrophic loss occurs, business owners often experience a heightened sense of anxiety and insecurity, particularly how they will stay solvent until their business operations can resume. This is where we, as attorneys, step in. Attorneys can assist our clients by effectively presenting and promptly resolving their business interruption claims, restoring a sense of normalcy and security. To facilitate this process, the following best practices are recommended.

Knowledge Is Power—Carefully Review the Policy

Knowing the policy's terms helps ensure the insurer can efficiently evaluate the loss. A thorough review of the policy enables you to: determine the post-loss obligations (*e.g.,* notice, proof of loss, and loss mitigation); set realistic client expectations (*e.g.,* timing, covered/uncovered losses); and identify and gather necessary documentation (*e.g.,* P&L statements, forecast/budgets) for submission to the insurance company.

Policy forms and coverage can vary significantly. For example, some policy forms specifically allow post-loss economy to be considered, while others do not. Depending on the Policy form, the evidence required may vary:

- Economy Ignored: This approach focuses on pre-loss business levels to determine the loss, effectively disregarding the impact of post-loss economic conditions. It assumes the business would have performed similarly to its pre-loss state if the event had not occurred. Courts favoring this approach may do so to prevent the policyholder from receiving a “windfall” if their business would have thrived due to the disaster's impact on competitors or increased demand.

For example, in *American Auto Insurance Company v. Fisherman’s Paradise*, the court declined to consider post-economic conditions where the Policy only allowed for recovery for net income not created by the peril. *Am. Auto. Ins. Co. v. Fisherman’s Paradise*, No. 93-2349-CIV-GRAHAM, 1994 WL 1720238 (S.D. Fla. Oct. 3, 1994).

- Economy Considered: This approach aims to place policyholders in the position they would have been in within the actual post-loss economic environment had they been able to continue operating. It accounts for potential increases or decreases in demand and market changes caused by the loss event. This approach may be favored by some courts as it prevents the insurer from receiving a “windfall” by benefiting from a potentially reduced loss calculation due to negative post-loss economic conditions.

For example, in *Consolidated Companies. v. Lexington Insurance Company*, the court permitted consideration of post-economic conditions where those conditions were caused by the peril itself and such consideration was not prohibited by the terms of the policy. *Consol. Companies, Inc. v. Lexington Ins. Co.*, No. 06-4700, 2009 WL 211751 (E.D. La. Jan. 23, 2009), *aff’d and rev’d in part on other grounds,* 616 F.3d 422 (5th Cir. 2010).

As such, to effectively present your client’s claim, it is necessary to know what the Policy states and what information will be considered by the insurer in its analysis of the loss.

Presentation Is Everything

Insurance adjusters tend to request further clarification or retain their own experts when presented with disorganized, irrelevant, or excessive documentation, so retain needed experts early and present your client’s claim in a logical and organized manner. By investing effort early in the claims process—ensuring that documentation and analyses are logically structured—you can significantly increase the likelihood of a proper evaluation and prompt payment of your client’s business interruption claim. Some policies include coverage that pays for “professional services” to assist the policyholders in preparing this information.

Do Not Overstate the Claim

Many policies contain provisions voiding coverage if false statements or material misrepresentations are made during the claims process. Beyond voiding coverage, overstated losses may invite additional scrutiny and cause unnecessary delays. For example, policies can void coverage for misrepresentation, concealment or fraud made during the claim investigation, as follows:

> A. CONCEALMENT, MISREPRESENTATION OR FRAUD

> This Coverage Part is void in any case of fraud by you as it relates to this Coverage Part at any time. It is also void if you or any other insured, at any time, intentionally conceal or misrepresent a material fact concerning:

> **1.** This Coverage Part;

> **2.** The Covered Property;

> **3.** Your interest in the Covered Property; or

> **4.** A claim under this Coverage Part.

Attempt to Mitigate Losses—Inaction Is Inexcusable

Carriers will not reimburse losses that could have avoided though reasonable efforts. Examples of mitigating losses in business interruption claims include:

- Attempting to use the unaffected portion of premises.
- Temporarily relocating equipmen, or business operations.
- Removing debris to restore partial operations.
- Spending on extra logistics to resume operations.

By following these best practices, businesses can avoid common pitfalls that often lead to claim delays or denials—ultimately helping them “get back to business.”

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