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BUSINESS INTERRUPTION

Among the calamities resulting from Sandy was the inability of businesses, large and small, to immediately reopen operations. In some cases, there was physical damage to the business itself from flooding or falling trees. Such problems were universally compounded by infrastructure issues such as lack of power and impassible roadways. While Sandy's scope may have been unprecedented, the concept of storm-related business losses is hardly new. Business Interruption Insurance has been available for decades under various policy forms. Having such coverage may not, however, be the panacea that policyholders anticipate.

Business Interruption Insurance, in its various forms, generally reimburses the insured for lost income during the period when the business cannot function. Coverages are also available for fixed expenses which must be met, irrespective of the business' ability to operate. Such expenses include: taxes; insurance; payroll; and, loan and rental obligations. Most Business Interruption policies require: (1) actual physical loss resulting from a named peril; (2) to covered property; (3) proximately causing; (4) an actual interruption in business operations; and, (5) resulting loss of business income. Each of these requirements presents issues which will ultimately be determinative of the existence of coverage. Other issues may also arise, such as "when is the business no longer "interrupted?" See, Pennbarr Corp. v. Insurance Co. of North America, 976 F.2d 145 (3d Cir. 1992)

As a practical matter, the requirement of actual physical damage will eliminate coverage for the post-Sandy infrastructure problems which affected many businesses. See, e.g. Port Murray Dairy Co. v. Providence Washington Ins. Co., 52 N.J. Super. 350 (Ch. Div. 1958). Moreover, the documentation necessary to establish a claim may be difficult to assemble and may itself be lost due to storm conditions, such as flooding. As with any other insurance, it is incumbent upon the insured to bring the loss within the coverage of the policy, which obviously includes the amount of loss. Lancellotti v. Maryland Cas. Co., 260 N.J. Super. 579 (App. Div. 1992). Similarly, alternate means of conducting business may provide a hurdle to coverage. In Pennbarr Corp. v. Insurance Co. of North America, 976 F.2d 145 (3rd Cir. 1992), the insured was denied recovery for loss of sales when it was able to stretch its inventory to meet demand for the full period during which its plant underwent repairs for earthquake damage.

While some policy forms provide coverage for off-premises service interruption, a recent decision of New Jersey’s Appellate Division found coverage for off-site damage under the traditional policy language by generously interpreting the meaning of “physical damage”. In Wakefern Food Corp. v. Liberty Mutual Fire Ins. Co., 406 N.J. Super. 524 (App. Div. 2009), a supermarket sustained losses when its utility’s relays tripped, causing the power grid to go offline resulting in a blackout. The Appellate Division found that the “physical damage” requirement in the policy was ambiguous. The Court reasoned that “physical damage” could mean failure of the utility equipment to operate during the blackout.

In determining whether there are covered Business Interruption losses, it is particularly important to evaluate the loss in terms of the entire policy. Coverage may be found under endorsements such as the endorsement for damages resulting from the actions of civil authorities. Similarly, specific item coverages available for cyber equipment and data may have applicability.

Schenck, Price, Smith & King’s Hurricane Sandy Insurance Advisory Group has prepared a presentation on a wide range of topics which are likely to arise from Sandy-related insurance claims. Please feel free to contact any member of the Group with any questions which you may have at 973-539-1000.

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