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INTRODUCTION

On November 15, 2002 Joshua Mallin was a featured speaker at an ABA seminar focusing on business interruption claims as a result of 911. Mr. Mallin pointed out that while it is settled law that the purpose of business interruption insurance is to indemnify the insured against losses arising from inability to continue normal business activities due to the damage sustained as a result of a covered peril...,See e.g., Howard Stores Corp. v. Foremost Ins. Co., 82 A.D.2d 398, 400-01, 441 N.Y.S.2d 674, 676 (1st Dept. 1981); Datatab, Inc. v. St. Paul Fire & Marine Ins. Co., 347 F. Supp. 2d 36, 38 (S.D.N.Y. 1972); see also, 68A NY Jurisprudence, 2nd Edition, Insurance §539 (1998), the legal analysis employed by the Courts does not always provide for a uniformity of outcome.

ACCESS

In analyzing what is meant by "access", it must first be noted that most if not all policies do not define the term. Accordingly, "access" has been defined as 1) the act of coming forward or near to; approach 2) a way or means of approaching, getting, using, etc. 3) the right to enter, approach or use; admittance 4) increase or growth 5) an outburst. Webster's New World Dictionary, (Third College Ed. 1988)."Access" is also defined as 1) a means of approaching, entering, exiting, communicating with, or making use of: *a store with easy access* 2) the act of approaching 3) the ability or right to approach, enter, exit, communicate with, or make use of: *has access to the restricted area; has access to classified material* 4) public access 5) an increase by addition 6) an outburst or onset: *an access of rage*. The American Heritage Dictionary of the English Language, (The Fourth Ed. 2000).Given such definitions, not only can the word "access" be deemed to be ambiguous in the context of "civil authority" coverage, but the term cannot be deemed to solely mean an absolute physical prohibition from one's premises.

The issue of what constitutes "access" becomes extremely significant in the context of September 11th claims because in New York, numerous streets were either (1) closed to vehicular but not pedestrian traffic or (2) closed to the public but not to the owners or tenants of the commercial premises. Accordingly, while the District Court for the Eastern District of Louisiana recently ruled against the insured's civil authority claim in connection with the loss of business suffered by two hotels in New Orleans, 730 Bienville Partners v. Assurance Company of America, (Civ. Action No. 02-106), that Court was faced with the contention that there was a lack of access to the hotels as a result of the airport in New Orleans being shut down. Consequently, while the Court held that a shutdown of the airport did not prevent customers from gaining access to the hotels, the same analysis cannot be used when evaluating "access" to lower Manhattan post-September 11.

The issue of "access" primarily arises in the context of the application of "civil authority" coverage which is employed where the insured has suffered no physical loss or damage". A

significant number of claims arising out of September 11, 2001 fall within this context. While not uniform, typical "civil authority" coverage provides:

"We will pay for the actual loss of Business Income you sustain…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 property at the described premises, caused by or resulting from any Covered Cause of Loss."

The issue of "access" for the purpose of triggering "civil authority" coverage becomes even more important in light of the holding of a majority of courts that refuse to extend business interruption coverage to scenarios wherein the insured's premises did not suffer "physical damage" to its premises. See Syufy Enterprises v. The Home Insurance Company of Indiana, 1995 WL 129229 (N.D. Cal. 1995); Bros. Inc. v. Liberty Mutual Fire Insurance Co., 268 A2d 611 (D.C. App. 1970); Two Cesaers Corp. v. Jefferson Insurance Co., 280 A2d. 305 (D.C. App. 1971); Mac's Pipe & Drum, Inc. v. Northern Ins. Co., 280 A2d 308 (D.C. App. 1971); Adelman Laundry & Cleaners, Inc. v. Factory Insurance Ass'n, 59 Wis. 2d 145, 207 N.W.2d 646 (1973) [1].

Given the numerous September 11th claims that do not involve physical damage to the premises, the insurance industry can expect that their insureds will press their "civil authority" claims for the maximum time period allowed under the policy.The fact that some type of limited access may have been allowed does not appear to be a legitimate basis for limiting civil authority coverage in this instance.

PERIOD OF RESTORATION :

Another issue that will arise concerns the calculation of business interruption claims stemming from September 11th and the period of restoration to be utilized. Under most business interruption policies, the period of restoration is typically defined as the time it should reasonably take to repair, rebuild or replace the property in question after initial damage has been sustained. In many cases the period of restoration is determined based on a hypothetical/theoretical time period.

This maxim, however, has been put to the test based upon a variety of circumstances that act as an exception to this rule. For example, one question has inevitably become what would happen if the property were not or cannot be rebuilt, a question that takes on added significance in the wake of September 11th.In those instances where the insured chooses to relocate, the courts have still utilized the theoretical time period even if that time period exceeds the time that it took to relocate.

In Hawkinson Tread Tire Service Co. v. Indiana Lumbermans Mut. Ins. Co. of Indianapolis, Ind., 245 S.W.2d 24 (Missouri, 1930) a fire destroyed the insured property. Rather than rebuild at the location of the destroyed building, the insured sought a new location out of which to run his business. While doing so it was determined that had the insured wanted to rebuild rather than relocate, hypothetically speaking, it would have taken approximately ten months to do so. Thus

the insured argued that ten months should have been the proper period of loss utilized in determining the business interruption claim. In contrast, the insurer argued that the proper period of loss should have lapsed when the insured relocated, approximately six months after the fire.The Court decided that it would utilize the hypothetical ten-month period rather than the actual six-month period as the applicable period of loss. In doing so it stated that the policy only referenced the original location thus using the period of loss reflecting how long it would take to rebuild at the original location was a must.

A similar outcome was reached in DiLeo v. U.S. Fidelity & Guaranty Co., 248 N.E.2d 669, 676 (Ill. App. Ct. 1969). In that case, the plaintiffs owned a grocery and meat market located in Chicago, Illinois. In attempting to minimize its exposure with respect to the insured's business interruption claim, the carrier argued that the plaintiffs were being evicted from the building that their store was located in because it had been marked for demolition. However, the Court pointed to the fact that the policy provided that the period to be calculated was the period of time necessary to rebuild, repair, or replace the physical damage to the property. Accordingly, the Court calculated the damages based upon a four-month period, notwithstanding the fact that the insured was not going to rebuild due to the fact that it was shortly going to be evicted. See also Omaha Paper Stock v. Harbor Ins. Co., 445 F.Supp. 179 (D. Neb. 1978) aff'd 596 F.2d 283, 291 (8th Cir. 1979); Beautytuft, Inc. v. Factory Ins. Ass'n, 431 F.2d 1122, (6th Cir. 1970).

While the courts still look to the theoretical time period to rebuild when the insured looks to relocate, this theoretical time period will be extended when delays occur through no fault of the insured. For example, in Omaha Paper Stock v. Harbor Ins. Co., supra, substantial delays in resuming operations resulted from delays in obtaining replacement parts and from mistaken ordering of the wrong type of parts that were deemed to have occurred through no fault of the insured. The adjusters who were representatives of the insurer took the responsibility for selecting the supplier and installer of the equipment. In that instance, the Court held that the delays caused by the failure to promptly ship the equipment and to provide a qualified installer were the responsibility of the insurer and thus the delays would be extend the period of restoration originally calculated.

In A & S Corp. v Centennial Insurance Co., 242 F.Supp. 584 (N.D. Ill. 1965), the Court again dealt with the issue of delays that were caused through no fault of the insured. The plaintiff was the owner of a bowling alley when a fire occurred on the insured premises causing total damage to the building, bowling alley and equipment, resulting in an interruption of plaintiff's bowling related businesses. In determining the period of loss for a claim for business interruption caused by a fire, the Court held that as there was a "custom and usage among insurance adjusters that fire insurance claims be adjusted prior to claims for business interruption relating to premises damaged by fire," and the insured "was unable to commence reconstruction until after the fire claims were adjusted," the period of loss included the time spent by the adjuster adjusting the claim.

While the period of the loss may terminate before the completion of repairs if it is determined that the insured has not complied with the usual policy requirement to act with "due diligence

and dispatch" in repairing or replacing the destroyed property, courts have allowed for improvements that were deemed necessary in order to avoid the same damage from reoccurring. In Compagnie Des Bauxites de Guinea v. Insurance Co. of North America, 794 F2d 871 (3 rd Cir. 1986) the Court held that the business interruption losses were not limited to repair of the building, as the insured "was entitled to rebuild the crushing facility in a way which would avoid further cracking."Compagnie Des Bauxites ("CBG") mined bauxite in the interior of Guinea at Sangaredi and transported it by railway to the processing and ship loading facility at Kamsar, on the coast of Guinea. It was discovered that there were serious problems with the structural integrity of the building and that crushing, and therefore shipments of bauxite would have to be curtailed to avoid the building's collapse. In such a circumstance, the Court held that it was proper to calculate the additional time necessary to redesign and reconstruct the facility in calculating the insured's business interruption loss.

A similar decision was handed down in Anchor Toy Corp. v. American Eagle Fire Ins. Co., 155 N.Y.S.2d 600 (Sup. Ct. 1956).Plaintiff Anchor Toy Corporation was in the business of making toys from wood. The factory burned to the ground on July 16, 1953. No effort to rebuild it was ever made. Instead, plaintiff directed its energies to replacing it by the purchase of another factory. However the purchase of the replacement plant never materialized due to numerous delays and problems, and the plaintiffs decided not to replace the destroyed plant. As the factory was never replaced, the Court determined a theoretical period in which the property could have been replaced or repaired with due diligence and dispatch. The Court rejected the insurer's argument that the period should be determined with regard to the time required to build an identical plant. The Court held that "it is beyond the bounds of reasonable contemplation to expect that a replacement structure would ignore all progress in the art and slavishly retain any proven disadvantage. It must be the intent of the policy that the new building be erected to be modern as well." Id. Thus Anchor Toy and Compagnie demonstrate that the courts are reluctant to rule that periods of loss are limited to the period required to complete the most basic repairs, and not the time necessary to make innovative changes and/or prophylactic changes to the building's design.

Another important question arises when delays to the repair or replacement process are not a result of any action by the insured. In United Land Investors, Inc. v. Northern Insurance Co. of America, 476 So. 2d 432 (La. Ct. App. 1985) the Court held that in determining the period of loss, it would have to be a consideration that the plaintiff could not begin repairs until money was received necessary to complete the project. The plaintiff could not contract to have damages repaired until the insurance company agreed on an amount to be paid. In Hampton Foods, Inc. v. Aetna Cas. and Sur. Co., 787 F.2d 349 (8th Cir. 1986), the Court reiterated the holding in United Land Investors by ruling that the theoretical period of restoration could be reasonably extended when a delay in restoration was due to the actions by the insurance company. It went on to conclude that even if there is a reasonable basis to deny coverage, failure to provide such may be used in extending the period of loss for a business interruption claim.

CONCLUSION

From the above, one can discern any number of adjustment/legal issues that may arise in the wake of September 11th in connection with the proper restoration period to be utilized. However, September 11 th may prove to be such a unique fact pattern that the Courts that are confronted with these issues will ignore other case law and make decisions based upon the most equitable solution.