BUSINESS INTERRUPTION INSURANCE COVERAGE ISSUES TO CONSIDER FOR CLAIMS PRESENTATION AND POLICY PLACEMENT OR RENEWAL

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This article is intended to briefly discuss some of the recurring coverage disputes faced when presenting business interruption claims to insurers under a policy subject to United States law and some of the issues that policyholders should be addressing during the initial placement or renewal of such programmes in hopes of avoiding such coverage disputes at claims time. It is hoped that a discussion of this subject is not only of interest to lawyers advising their policyholder clients on such issues when United States law is applicable, but also proves useful to lawyers who might be advising their policyholder clients on such issues for insurance policies subject to the law of a jurisdiction other than the United States. The author recently has advised policyholder clients on business interruption losses under policies subject to non-United States law and was surprised to see that many of the coverage issues that exist under United States law are addressed similarly under the laws of several jurisdictions in the United Kingdom and Europe.

RECURRING BUSINESS INTERRUPTION COVERAGE ISSUES

Business interruption coverage has existed for decades. As with any type of insurance, business interruption coverage has not been free of its share of insurance coverage disputes. Certain of the issues repeatedly encountered by the author when presenting business interruption claims are discussed below.

In the last several years, the author has represented exclusively policyholders on numeraus business interruption claims presented to insurers under polides subject to United States law. The author also has advised several policyholders on initial placements and renewals of business interruption insurance programmes. From that experience, the author has compiled certain information regarding recurring and future business interruption coverage issues under insurance polices that are subject to United States law.

WHAT PRINCIPLES OF INSURANCE LAW SHOULD BE CONSIDERED?

There are several principles of insurance law that favour policyholders that should serve as the foundation for any legal analysis and/or presentation of a particular business interruption claim. Because such principles favour policyholders, insurers often do not advise the insureds of the benefits of applying such principles to the claim at issue.

Thus, it is incumbent upon the lawyer representing the policyholder to understand such principles and make sure that such principles are applied to the claim to maximise coverage for the lawyer's client. Several of the principles that cross. all types of business interruption claims are discussed below (others that are particular to certain types of losses are omitted due to space limitations).

CHOICE OF LAW

One need only review the issues discussed in this article to see that courts from different states within the United States can interpret the same insurance policy language in dramatically different ways. Thus, what might be covered under a particular insurance clause under one state's law may not be covered if another state's law were applied to the insurance coverage dispute. This is one of the more perplexing principles to keep in mind when analysing an insurance coverage issue when the insurance policy is subject to the United States law. The importance of this issue cannot be overstated, because insurers often ignore this principle when they rely on case law to support their declinations of coverage.

When insurers support their declinations with case law, they typically base their coverage positions on the law of a particular state. That state's law typically provides the most favourable law for the insurer and the least favourable for the policyholder on the particular coverage question at issue. But how does anyone know that the law of the particular state upon which the insurer relies is the law that should apply to the specific coverage question at issue? What if the loss really is *not* covered under the law of the state upon which the insurer relies, but it *is* covered under the law of a state whose law is potentially applicable to the insured's policy? In that event, it should be argued that the state's law upon which the insurer is relying does not apply to the matter at issue, and that the law of another state, one that supports coverage for the loss, applies.

Thus, whenever the policyholder receives a declination letter from its insurer, the policyholder really must conduct two separate analyses. First, the policyholder must analyse the carrier's position under the law of the state the carrier relies upon for its declination. Is the carrier's declination correct, or does it rest upon one or more of the invalid or arguably debatable grounds described in this article or another equally unsound basis? If so, the policyholder should try to overcome the declination. Secondly, even if the insurer's declination is sound as a matter of the law of the state upon which the insurer relies, the policyholder must determine whether another state's law applies, or potentially applies, to the coverage dispute at issue.

If so, the policyholder may want to argue that that state's law applies, and that the policyholder is entitled to coverage for the loss.

The second of the two analyses required is commonly referred to as a "conflict of laws" analysis. When courts are faced with an insurance coverage question and the parties 'argue that the laws of different states apply to the matter, the court will conduct a conflict of laws analysis. If the court decides that the same conclusion is reached under either of the potentially applicable states' law, then the court rules on the issue, calling the conflict a "false conflict". However, if the court determines that the result would be different depending upon which state's law is used, the court must decide which state's law applies to the dispute at issue.

There are three main "conflict of laws" tests applied by the courts in the United States to determine which state's law applies to the dispute at issue:

(1) the place of contracting test;
(2) the most significant relationship test;
(3) the government interests analysis test.

Pursuant to the place of contracting test, the law that applies to the insurance policy is the law of the state where the insurance contract was made. This conflict of laws test is the oldest test, and considered the least flexible, so that it has fallen out of favour with many courts. Nevertheless, the test is still used by several jurisdictions.[1] As with all conflict of laws tests, however, even this presumably straightforward test has its wrinkles, in that jurisdictions differ with respect to the question of where the insurance contract is "made". Some jurisdictions recognise the place of delivery of the contract as the place of making, others recognise the place where the last act necessary to bind the coverage took place as the place of making.[2]

In contrast to the place of contracting test, the most significant relationship test does not look merely to the place of contracting to determine which state's law applies to the insurance coverage dispute at issue. Rather, the court determines which state has the most significant relationship to the subject matter of the lawsuit, as provided for by the Restatement (Second) of Conflict of Laws. For disputes concerning contracts, such as insurance contracts, the most significant relationship test as outlined by the Restatement emphasises the place of contracting. However, other considerations, such as the location of the injury sustained by the underlying claimant, the location of the policyholder and the location of the insurance company, are also given consideration.[3]

Similar to the most significant relationship test is the government interest analysis test. Under this test, courts recognise that state governments have competing interests in having their law applied to a particular court action regardless of where that action is pending. Courts will determine which state government has the greatest interest in having its law apply to the matter, and choose that law to apply.[4]

The important point to remember when it comes to choice of law issues for adjusting business interruption claims is that the insurer may be relying on law that will not, or likely will not, be applied to the policy at issue. Never assume that the state's law upon which the insurer relies is the state's law that would apply to the policy if the matter were litigated. Therefore, an independent analysis of what state's law applies, or could apply, and what the law of that state says on the coverage issues in dispute always should be made.

PRACTICAL CONSTRUCTION

Insurers often ignore a little-known principle of insurance contract interpretation known as the doctrine of "practical construction". That doctrine provides that parties to a contract, by their conduct, can give meaning to the contract. The

1 See, *e.g. General Telephone Co.* of *the Southeast v. Trimm*, 252 Ga. 95, 311 S.E.2d 460 (1984); *Fast v. Gulley,* 271 N.C. *208,* 211, 155 S.E.2d *507* (1967); *Ohio Casualty Ins. Co. v. Travelers Indemnity Co.,* 493 5.W.2d 465 (Tenn. 1973).

2 See, *e.g. Mullinax Eng'g Co. v. Platte Valley Cont. Co.,* 412 F.2d 553 (10th Cir. 1969) (applying Wyoming law, place of delivery of contract is the place where contract is made for conflict of law analysis); *Whitfield v. Empire Mut. Ins. Co.,* 167 Conn. 499, 506, 356 A.2d 139 (1975) (the Supreme Court of Connecticut, in construing an insurance contract, explained that "[t]he general rule is that the validity and the construction of a contract are determined by the law of the place where the contract was made. But if the contract is to have its operative effect or place of performance in a jurisdiction other than the place where it was entered into, our rule is that the law of the place of operative effect or performance governs its validity and construction'").

3 See, *e.g. Bates v. Superior Court of Maricopa County,* 156 Ariz. 46, 749 P.2d 1367 (1988); *Wood Bros. Homes, Inc. v. Walker Adjustment Bureau,* 198 Colo. 444, 60 I P.2d 1369 (1979); *Hubbard Mfg* Co., *Inc. v. Greeson,* 515 N.E.2d 1071 (Ind. 1987); *Breeding v. Massachusetts Indemnity and Life Ins. Co.,* 633 S.W. 2d 717 (Ky. 1982); *Glowski v. Allstate Insurance Company,* 134 N.H. 196, 198,589 A.2d 593 (1991); *Gilbert Spruance Co. v. Pennsylvania Manufacturers' Association Insurance Co.,* No. A-59 (July 21, 1993); *Borg-Warner Corporation v. Ins. Co. of North America,* 174 A.D.2d 24, 29, 577 N.Y.S.2d 953, *appeal denied,* 80 N. Y.2d 853, 587 N. Y.S.2d 905 (1992); *Morton International, Inc. v. Harbor* Insurance *Co.,* 79 Ohio App. 3d 183, 192, 607 N.E.2d 28 (1992); *Manz v. Continental Am. Life Ins. Co.,* 117 Ore. App. 78, 843 P.2d 480, *modified,* 119 Ore. App. 31, *review denied,* 317 Ore. 162 (1992); *Griffith v. United Airlines,* 416 Pa. I, 203 A.2d 796 (1964); *Duncan v. Cessna Aircraft Co.,* 665 S.W.2d 414 (Tex. 1984).

4 See, *e.g. Robert McMullan & Son, Inc. v. U.S. Fidelity & Guar. Co.,* 103 Cal. App. 3d 198 (1980).

Supreme Court of California has explained the doctrine of "practical construction" as follows:

> [The] rule of practical construction is predicated on the common sense concept that "actions speak louder than words" ... When the parties to a contract perform under [a contract] and demonstrate by their conduct that they knew what they were talking about the courts should enforce that intent... [It is true that] this doctrine of practical construction can only be applied when the contract is ambiguous... [Citations omitted.] But the question involved in such cases is ambiguous to whom? Words frequently mean different things to different people. Here the contracting parties demonstrated by their actions that they knew what the words meant and were intended to mean. *Thus, even if it be assumed that the words standing alone might mean one thing to the members of this court, where the parties have demonstrated by their actions and performance that to them the contract meant something quite different, the meaning and intent of the parties should be enforced. In such a situation the parties by their actions have created the 'ambiguity" required to bring the rule [of practical construction] into operation.* If this were not the rule the courts would be enforcing one contract when both parties have demonstrated that they meant and intended the contract to be quite different.[5]

This doctrine of "practical construction" as explained and applied by the California Supreme Court as quoted above applies to insurance policies as well as to other types of contracts.[6]

Accordingly, one question a lawyer always should ask a policyholder client when advising on an insurance claim is whether the client and its insurer have previously adjusted a similar loss on either the same policy or prior policy containing the same or similar language than the current policy. If so, it should be determined whether the insurer's past conduct can be used to the policyholder's advantage for the claim at issue. For example, did the insurer provide coverage on the prior claim? Did the insurer take a position on the prior claim that favours coverage for the policyholder on the current claim?

INSURER'S CONDUCT ON OTHER INSUREDS' CLAIMS

An insurer often overlooks the rule of insurance contract construction that its own conduct in connection with claims by *other insureds* can give meaning to its policy for another policyholder. If an insurer takes a particular position with respect to the policyholder client's claim that is contrary to a position that the insurer has taken on a similar claim by another policyholder, such conduct can be used to argue that the language should be interpreted in favour of coverage.

Courts have allowed discovery of such "other insured" information for several reasons. Some courts reason that information showing the insurer's understanding of its own policy language can be used to provide meaning to the language, because one rule of construing ambiguous policy language is that the insurer's understanding of what the insured thought the language meant, or could think the language meant, may be applied.[7] Other courts reason that "other insured" information is relevant because it can be used to support the policyholder's argument that the policy language is ambiguous and that the policyholder's proffered interpretation of the policy language is reasonable.[8] It is interesting to note that some of the law on this issue has come from disputes between insurers and their reinsurers.[9]

Accordingly, one issue a lawyer always should analyse is how the insurer has interpreted the policy language in dispute on other insureds' claims. If the insurer has taken different positions on the same coverage issue for other insureds, the issue should be further explored to determine whether the insurer's differing positions can be used to the advantage of the policyholder client.

WHAT COVERAGE ISSUES ARE FREQUENTLY ENCOUNTERED?

In addition to the several principles of insurance law that should be kept in mind when advising policyholders on business interruption claims, there are several frequently encountered coverage issues that also should be kept in mind. Although not all of the issues can be discussed in this article, the issues discussed below hopefully can help provide some useful information to the practitioner and if nothing else will impart one important rule of handling insurance coverage disputes-never assume how courts have interpreted any particular insurance policy language or resolved a particular issue (an independent analysis of the coverage issues involved always should be conducted).

IS A COMPLETE CESSATION OF OPERATIONS NEEDED TO TRIGGER BUSINESS INTERRUPTION COVERAGE?

One of the most hotly contested business interruption coverage issues in recent years is the position being taken by certain insurers that a complete cessation of all activities at the insured's location must occur in order for business interruption coverage to be triggered. In other words, according to such insurers, a covered peril that merely impairs operations or only causes part of the operations to cease does not give rise to covered business interruption coverage. Most policyholders when advised of this issue scoff at its incredulity, until the cases on the issue are shown to them that is.

5 See *Crestview Cemetery Assn v. Dieden,* 54 Cal. 2d 744, 754 (1960) (emphasis added).

6 See, *e.g. Zito v. Firemen's Ins. Co.,* 36 Cal. App. 3d 277 (1973) (court applied doctrine of "practical construction" to an insurance policy).

7 See, *e.g. Lawyer's Title Ins. Corp. v. United States Fid. & Guar. Co.,* 122 F.R.D. 567 (N.D. Cal. 1988).

8 See, *e.g. Pfizer, Inc. v. Superior Court (Aetna Casualty & Surety Company),* 97 Daily Journal D.A.R. 14541 (Cal. Ct. App., Fourth District, December 1, 1997), depublished.

9 See *Great Plains Mut. Ins. Co. v. Mutual Reinsurance Bur.,* 1993 U.S. Dist. LEXIS 9897 (D. Kan. 1993) (district court granted reinsured's motion to compel discovery of reinsurer's information and materials on how reinsurer handled claims involving a storm that took place a year before the storm that caused the damages sustained by the reinsured who sought the discovery; the reinsured was looking for information on how the reinsurer had interpreted "loss occurrence" for past storms).

Indeed, insurers have taken this position and some courts have agreed with it.[10] How does this position work? Assume that the insured has a factory housing 10 machines producing widgets and a covered peril destroys five of the machines, but the other five continue to produce widgets. According to certain insurers, there is no business interruption coverage because operations were only "impaired", they were not "interrupted". Any lawyer representing a policyholder client faced with this position should vigorously resist it; it goes against all reasonable expectations of the insured and the explanation of business interruption coverage proffered by many insurers when explaining such coverage during policy placement.[11]

CAN THE INSURED LOCATION BE DIVIDED INTO SEPARATE OPERATING UNITS?

Assume that the policyholder's premises are a department store, an amusement park or a hotel. What if only a portion of the operations sustains physical loss or damage - one de partment of the department store, five out of 50 rides at the amusement park, or three out of 20 floors at the hotel - but the income of the entire operation is adversely affected. Under such circumstances, insurers often argue that the policyholder is entitled to business interruption coverage only for that particular portion of the property that sustained physical loss or damage. For example, if the men's shoe department of a department store is damaged by fire, but the remainder of the store is able to operate, the insurers who use this argument would provide coverage only for the lost income generated by the men's shoe department (notwithstanding that it can be shown that the sales of the entire department store have decreased because of the fire).

The insurer's position on this issue should be challenged. Courts have long recognised that a premises insured under a business interruption policy may have several parts to it, and that physical loss to one part of the premises may cause a business interruption loss for the entire premises.[12] The reasoning applied by such courts applies equally to an insured premises that has several component parts. Where a portion of an insured location sustains physical loss or damage, the earnings of the entire location can be used to measure a business interruption loss covered by the insurance policy that insures that location.

MUST THE POLICYHOLDER DEMONSTRATE THAT IT LOST SALES?

Sometimes a policy is not clear on what *quantum* of proof an insured must present to show a business interruption loss. In such circumstances, insurers sometimes argue that the insured did not suffer any business interruption loss because the insured cannot prove that it actually lost sales.

Not all courts agree with such an argument. Indeed, many courts recognise business interruption coverage for policyholders who merely show lost production. Sometimes, neither the court nor the policy at issue clearly addresses the difference between a loss of production and a loss of sales valuation.[13] Other times, the policy at issue expressly provides that the loss can be valued on a loss of production basis.[14] Still other times, courts note that a showing of lost sales is not required, but hold that if inventory on hand was used by the policyholder during an interruption, then the policyholde r is not entitled to coverage.[15]

WHAT IF THE POLICYHOLDER SUSTAINS AN INTERDEPENDENT BUSINESS INTERRUPTION LOSS?

The term "interdependency" is often referred to in business interruption parlance to denote that a particular operation of the insured is dependent upon certain other operations of the insured in order to produce income-typically because the other operations act as either providers of raw materials or consumers of products or services.

Must an insured's policy expressly state that it provides "interdependent" business interruption coverage in order for a policyholder to be entitled to such coverage? Some courts have not required such express wording but rather reason that such coverage would be expected by the insured.[16]

10 See, *e.g. The Home Indemnity Company v. Hyplains Beer;* 893 F. Supp. 1987 (D.Kan. I 99S), *aff'd without opinion,* 89 F.3d 850 (10th Cir. 1996).

11 It should be noted that policies have been sold in the U.S. for decades that expressly state that business interruption coverage is provided for any "impairment" of operations or if there is "partial or total interruption" of business. So policyholders can try to address this issue during policy placement or renewal by amending the policy language.
It just so happens that most of the business interruption policies sold in the U.S. use the phrase "necessary interruption of business". It would appear advisable to try to address this issue by amending the language rather than waiting for a coverage dispute after a serious business interruption loss occurs.

12 See, *e.g. Datatab, Inc. v. St Paul and Marine Insurance Company,* 347 F. Supp. 36 (S.D. New York 1972) (fire to basement did not destroy insured's equipment on fifth and sixth floors of building, but entire building was treated as a single premises for purposes of measuring t he covered business interruption loss); *Linnton Plywood Association v. Protection Mutual Ins. Co.,* 760 F. Supp. 170 (D. Ore. 1991) (sprinkler system in only a portion of a plywood mill sustained damage, but entire mill treated as one premises for purposes of measuring a business interruption loss).

13 See, *e.g. Rubbermaid, Inc. v. Hartford* Steam *Boilers Inspection Co.,* Inc., 96 Ohio App. 3d 406, 645 N.E.2d 116 (1994); *Travelers Indem. Co. v. Kasnner,* 322 So. 2d 80, 82 (Fla. Ct. App. 1975) (the court reasoned that "courts have said that losses covered by this type of insurance should be determined in a practical way, having regard for the nature of the business and the methods employed in its operation, in order to give practical effect to the intentions of the parties and the purpose of the insurance as evidenced by the terms, conditions, and provisions of the policy"); *Northwestem States Portland Cement Company v. Hartford Fire Ins. Co.,* 243 F. Supp 386 (D. Iowa 1965).

14 See, *e.g. Hawkeye Chemical Company v.* St *Paul Fire and Marine Ins. Co.,* 1974 Fire & Casualty Cas. (CCH) PI018 (S.D. III. 1973) (policy contained express valuation language for loss of production claim).

15 See, *e.g. Metalmasters of Minneapolis, Inc. v. Liberty Mutual Ins. Co.,* 461 N.W. 2d 496 (Ct. App. Minn. 1990); *Insurance Company of North America v. U.S. Gypsum,* 870 F.2d 148 (4th Cir. 1989); *Stone Container Corporation v. Arkwright Mutual Ins. Co.,* 1997 U.S. Dist. LEXIS 3978 (N.D. III. March 31, 1997).

16 See, *e.g. Pennbar Corp. v. Insurance Co. of North America,* 976 F.2d 145 (3rd Cir. 1992) (insured's typewriter sales

As will be noted below, the issue of "interdependent" and "contingent" business interruption coverage is best addressed during policy placement and/or renewal with express policy language. However, if such issues were not expressly addressed, the policy language that was used should be carefully examined at claims time to determine how the policyholder can maximise coverage for the claim it is presenting to its insurer.

THE FUTURE OF BUSINESS INTERRUPTION COVERAGE DISPUTES -- COMPUTER-RELATED LOSSES

Corporate society's increasing use of and reliance upon computers is entering a new age with the advent of enhanced networking capabilities because of the Internet. Never before has a company had so many ways to provide expansive, immediate access to a tremendous amount of up-to-date information to the company's employees, customers and suppliers with Internet home pages, intranets, networks, etc. Increased efficiency and profits are sure to be realised. But just as sure, such increasing reliance on computers, coupled with the increased access by so many persons to information on those computers and elsewhere, exposes companies to risks that heretofore they were not exposed to at all, or were not exposed as much.

What happens when a computer virus accidentally is introduced into any of the company's computer-related platforms, whether it is its home page on the World Wide Web or its intranet or network, and eventually wipes out vital computer data or otherwise corrupts all or part of the company's computer network. Is such a loss covered by traditional business interruption insurance?

What happens when an employee steals important computer data because of the new access given to employees via the company's intranet? What if the employee steals or corrupts such data not for his/her personal gain but just to cause loss to the company? What if the person responsible for such theft or corruption of data is not an employee of the company but rather some other person, such as a computer hacker? Are these types of losses covered by business interruption insurance?

These questions and others are causing many in the insurance profession to take a fresh look at how traditional insurance policies would respond to such losses. Where there are potential problems, some policyholders are seeking enhancements to coverage. Some insurers already are responding to this new reality of insuring computer-related losses.

operations in the United States suffered a business interruption loss when its subsidiary typewriter manufacturer in Italy was damaged by an earthquake and was unable to supply the sales operations with typewriters; the court ruled in favour of coverage because of the interdependency of the operations); *National Union* Fire *Ins. Co. v. Anderson-Prichard Oil Corp.,* 141 F.2d 443 (10th Cir. 1944) (insured had interdependent operations of an oil company, a refining company and a pipeline company, all of which were insured under a fire policy; a pipeline owned by the pipeline company burned, causing a business interruption loss by the refining company and oil company; court held that coverage was provided by the policy).

LOSS OF COMPUTER DATA - DOES IT TRIGGER BUSINESS INTERRUPTION COVERAGE?

One of the first issues that is being asked when analysing coverage for computer-related losses is whether loss to computer data alone-without loss or damage to the CPU or any other property-involves "direct physical loss or damage" to property sufficient to trigger business interruption coverage. Some coverage lawyers, especially insurance company lawyers, say "no" because computer data is *not* tangible property and, therefore, such data cannot itself sustain "direct physical loss or damage". Such lawyers say that loss of intangible property such as computer data is not sufficient to trigger business interruption coverage. Other coverage lawyers disagree. They argue that computer data is, indeed, tangible property, so that the loss thereof or loss of use thereof triggers business interruption coverage. Some lawyers argue that, even if computer data itself is not tangible property, loss caused by computer viruses and the like in reality involve physical injury to the hard drive of a computer and that that loss is direct physical loss to tangible property.

These very important questions have been raised by one court as follows:

> [The policyholder's] claim for lost business income arising from an alleged loss of electronic data raises several interesting questions. Among these are whether there could in fact be a "direct physical loss" to the electronic data which was allegedly collected but never existed in a tangible form. Also, because the electronic data never existed in usable form, was it in fact lost or rather did it never come into existence?[17]

Given this debate, how can any lawyer advising a policyholder client find solid ground on which to give advice? In my opinion, at this point it does not really matter whether one agrees or not with the insurance company lawyers who are asserting positions of no coverage. Given such positions and that courts are even entertaining such positions (as noted above), it behooves all policyholders to address computer data loss issues in the policy placement process rather than wait to "fight it out" with insurance companies and their lawyers if a loss occurs for which they dispute coverage. This is another example of when an ounce of preventive medicine in a policy placement can save a lot of headaches, and potentially a lot of money, at claims time.

SOME INSURERS USE COMPUTER-RELATED LANGUAGE

It is not as if some insurers do not address such issues in their policy forms. For example, some insurers have expressly addressed the issue by providing in their policy forms that losses caused by computer viruses are sufficient to trigger business interruption coverage. What is not addressed in such forms, however, is whether the insurer deems that such a loss involves damage to tangible property and, if so, what is the tangible property at issue-the hard drive or the computer data residing on it?

Similarly, many insurers use a form with the following limitation for computer-related business interruption losses that

17 *The Home Indemnity Company v. Hyplains* Beet: 893 F. Supp. 987 (D. Kan. 1995), *aff'd without opinion,* 89 F. 3d 850 (10th Cir. 1996).

suggests an intent to deem losses involving only the data on computers as sufficient to trigger business interruption coverage:

> Limitation - Electronic Media and Records
>
> We will not pay for any loss of Business Income caused by direct physical loss of or damage to Electronic Media and Records after the longer of:
>
> a. 60 consecutive days from the date of direct physical loss or damage; or
>
> b. The period, beginning with the date of direct physical loss or damage, necessary to repair, rebuild or replace, with reasonable speed and similar quality, other property at the described premises due to loss or damage caused by the same occurrence. Electronic Media and Records are:
>
> (1) Electronic data processing, recording or storage media such as films, tapes, discs, drums or cells;
>
> (2) Data stored on such media; or
>
> (3) Programming records used for electronic data processing or electronically controlled equipment.
>
> This limitation does not apply to Extra Expense.

The policy goes on to give two examples of how the limitation works. The first example demonstrates one way in which the exclusion applies to computer-related losses, and is quoted below:

> Example No.1:
>
> A Covered Cause of Loss damages a computer on June 1. It takes until September 1 to replace the computer, and until October 1 to restore the data that was lost when the damage occurred. We will only pay for the Business Income loss sustained during the period June l-September 1. Loss during the period September 2-0ctober 1 is not covered.

But in addition to noting this point, there are two additional points that should be mentioned here before discussing further the "loss to computer data" issue. First, please note that one *must* look for the limitation quoted above or similar limiting language in policies and, if discovered, try to enhance it because the language quoted above could limit coverage to a mere 60-day period after a computer-related loss occurs. Further on in this article the reasons why such a short "indemnity period" could result in millions of dollars of lost coverage will be discussed. Accordingly, the 60-day period should be amended to at least 12 months, if not longer. Secondly, if the insured's policy contains this limitation and the policyholder suffers a loss, please note that, by its own terms *the limitation does not apply to extra expense.* So an insurer cannot rely on the language to limit coverage for the extra expense portion of the policyholder's claim.

WHAT CAN BE DONE DURING POLICY PLACEMENT OR RENEWAL?

Here is how the author advises clients on some of the ways to address this issue. First, discuss this issue with the underwriter. Explain the problem created by certain insurers in the market who argue that loss to data on computers, without other types of loss or damage to the CPU or other property, is not sufficient to trigger business interruption coverage because, according to such insurers, data is not "tangible property" and cannot, therefore, sustain "direct physical loss or damage". Have the underwriter confirm in writing, or confirm to the underwriter in writing, that the underwriter does not agree with that position. In other words, confirm that loss to merely computer data (whether that data resides on a computer, intranet, Internet home page, etc.) without more, can trigger business interruption coverage under the policy.

Secondly, if the underwriter is not willing to confirm such an interpretation in writing, and the coverage cannot be placed with any other insurer who will address it, the policyholder can try to "paper the file" with its understanding of the language. In the event of a coverage dispute, a court might look at such a record as evidence of how the insurer understood the policyholder to interpret the language and apply that understanding. This is not, however, a foolproof solution because not all courts use this rule of insurance contract construction.

IS COVERAGE LIMITED TO THE "PERIOD OF RESTORATION"?

However, it is not enough simply to provide for the coverage. The business interruption provisions must be worded to provide meaningful coverage. When business interruption coverage forms were first sold in the United States decades ago, most limited coverage in a very important way-by allowing the insured to capture loss of income and increased expenses *only* for the period of time starting with the date that covered property sustained "direct physical loss or damage" and ending with the time that such lost or damaged property was repaired or replaced, or such time as such property would have been repaired or replaced if the insured had been acting with reasonable diligence. Although such coverage was a good start, it did not really provide the insured with complete protection. What was discovered was that most businesses continue to suffer loss of income and sustain extra expenses long after the repair and/or replacement of lost or damaged property that causes the business interruption loss *(i.e.* long after the "period of restoration").

EXTENDED PERIOD OF INDEMNITY

When the shortcomings of standard business interruption coverage limited to the "period of restoration" (the time to repair or replace lost or damaged property) came to light, the insurance industry in the United States responded by offering an "extended period of indemnity". This coverage enhancement entitles the insured to claim coverage for all loss of income and extra expense sustained during a certain time *after* the loss or damaged property at issue is repaired or replaced. In today's insurance market, such an extension varies widely from one form to the next. Some forms provide for a fixed amount of time-such as 30 days-as the "extended period of indemnity". One form of "extended period of indemnity" provision reads as follows:

> d. Extended Business Income. We will pay for the actual loss of Business Income you incur during the period that:
>
> (1) Begins on the date property (except "finished stock") is actually repaired, rebuilt or replaced and "operations" are resumed; and
>
> (2) Ends on the earlier of:
>
> (a) The date you could restore your "operations" with reasonable speed, to the condition that would have existed if no direct physical loss or damage occurred; or

(b) 30 consecutive days after the date determined in (I) above.

Some forms provide functionally the same extension as that quoted above, except that the "30 consecutive days" limitation is "two years" or "24 consecutive months". Most policies sold in the United States provide something in between 30 days and two years.

THE DIFFERENCE COULD MEAN MILLIONS OF DOLLARS

The difference between having an "extended period of indemnity" provision and being limited to business interruption coverage for the "period of restoration" can mean millions of dollars for the policyholder. In the latter scenario the policyholder might be limited to claiming coverage for losses sustained for only a few weeks after the loss, whereas in the former scenario the policyholder might be entitled to claim coverage for losses sustained for a year or more after the loss. All of those additional months of lost income or extra expenses sustained can add up to a lot of money.

HOW TO ADDRESS THIS ISSUE

Whenever reviewing a business interruption policy for an initial placement or renewal, one should always review the policy form and endorsements to determine whether the policy provides for an "'extended period of indemnity"-not only as to lost income but also as to extra expense (some carriers insure these two different risks with the same endorsement or coverage form, others use different endorsements or coverage forms). If the policy limits business interruption coverage to the "period of restoration" *(i.e.* the period of time in which the lost or damaged property at issue is repaired or replaced) try to obtain at least a 12-month "extended period of indemnity", or more. Also, delete or properly amend any indemnity period limitations to sub-categories of property, especially with respect to computers, computer data, intranets, Internet home pages, etc. (an example of which was quoted above). In that example, the 60-day limitation should be removed or extended to one year, or more if possible.

CONTINGENT AND INTERDEPENDENT RISKS

A commonly overlooked coverage is contingent business interruption coverage and coverage for interdependencies. Many companies of substantial size face interdependent business interruption risks, especially if such companies' subsidiaries are suppliers to and/or customers of each other. Many large companies with several subsidiaries and affiliated companies procure property and business interruption coverage with one insurance policy, where the parent and all subsidiary and affiliated companies are listed on the policy as named insureds. When one named insured is a supplier to and/or customer of another named insured on the policy, there exists an interdependent business interruption risk because a loss at one subsidiary can cause a loss of income or increase in operating expense at another subsidiary.

Any company, whether or not it has subsidiaries, faces contingent business interruption risks. If a loss occurs at a supplier operation, it could cause a loss of income or increase in operating expense of the company. The reason why such a risk of loss is labelled "contingent" rather than "interdependent" is because the supplier is not related by common ownership to the company who suffers the business interruption losses caused by the supplier's demise.

Accordingly, policyholders should make sure that such coverage is included in their business interruption policies. In addition, all of the enhancements discussed above regarding computer data losses and indemnity period must expressly be extended to apply to the contingent business interruption coverage afforded by the policy. That is because a policyholder's customers and suppliers could suffer a computer related loss shutting down their operations (and depriving the policyholder of raw materials for its goods, or of a market for its goods).

CRIME POLICIES AND FIDELITY POLICIES

Business interruption coverage typically is found on separate policies in a policyholder's portfolio. In addition to commercial property policies, business interruption can be added to crime and fidelity policies. All of the issues discussed above also are applicable and need to be addressed when placing crime and fidelity policies. Rather than repeat all that has come before, let me point out just a few issues that are particular to such policies in the United States.

FIDELITY/EMPLOYEE DISHONESTY POLICY ISSUES

Most standard-form employee dishonesty policies sold in the United States exclude business interruption losses from coverage. Such an exclusion should be removed. Bottom line, the company should be covered for business interruption losses regardless of who causes the computer data loss, and regardless of the reason why the person did it. But it is not enough merely to add business interruption coverage to an employee dishonesty policy. At least two additional issues need to be addressed.

First, most standard-form employee dishonesty policies sold in the United States require that the employee committing the act of infidelity that has caused the loss at issue must have done so with the manifest intent to (1) obtain a benefit for himself or others which he or the others were not entitled, *and* (2) cause the company a loss. What happens when an employee is corrupting the company's intranet or stealing sensitive computer data with only the intent to cause havoc, not to obtain any benefit for himself? In order for such loss to be covered, the standard form of fidelity policy needs to be enhanced. One way some companies enhance the policy is to replace the "and" with an "or" in the definition of "employee dishonesty" so that employee infidelity is proven if it can be shown that the employee acted with the intent *either* to obtain a benefit for himself or others *or* to cause the company a loss.

Secondly, most standard-form employee dishonesty policies do not respond when a former employee causes a loss, even if the former employee set the stage for the then while an employee. To avoid such a result, an endorsement typically is obtained stating that "employee" means any current employee and any former employee within so many days *(e.g.* 30, 60 or 90) from the date the person ceased being employed.

CRIME POLICY ISSUES

A company's crime policy must be worded correctly to cover the risk posed by computer hackers-persons who do not steal anything, but rather merely wreak havoc on a company's computer systems and data. In addition, some crime policies in the United States expressly exclude coverage for business interruption or are ambiguous with respect to it. If business interruption coverage is expressly excluded, the exclusion should be deleted. If business interruption coverage is not expressly excluded, but also not expressly addressed, the coverage should be expressly addressed so that there is no mistake that such coverage is afforded by the policy.

CONCLUDING REMARKS

Business interruption coverage is a valuable tool that policy-holders can use to help minimise the adverse consequences of a variety of losses. However, in order to maximise the utility of that tool, policyholders and their lawyers must understand how to address the hurdles and roadblocks to coverage that many insurers overtly and/or subtly set up for business interruption claims. Just as important, policyholders and their lawyers should understand what important business interruption coverage issues can and should be addressed during policy placement and/or renewal so that coverage disputes at claims time can be minimised and important shortcomings in a coverage programme eliminated. This article hopefully will prove useful for lawyers who are advising their clients on business interruption coverage issues for both claims presentation and insurance policy placement and renewal whether United States law or the law of another jurisdiction is at issue.

