Business Interruption and Catastrophes

2016 SCG Legal Conference, Zurich, Switzerland
The example of Christchurch, New Zealand

Some Key Facts:
• 167’000 residential properties damaged
• Total economic loss: ~USD 32bn
• Total insured loss: ~USD 25bn
We will pay for the actual loss of Business Income you sustain due to the necessary suspension of your “operations” during the “period of restoration.” The suspension must be caused by direct physical loss of or physical damage to property at the “scheduled premises”, ...caused by or resulting form a Covered Cause of Loss.
If any property owned [...] by the Insured [...] suffers Damage [...] and the Business be in consequence thereof interrupted or interfered with the Insurers will pay to the Insured the amount of the loss resulting from such Interruption in accordance with the provisions contained herein.

.....for Gross Revenue and Standard Revenue adjustments shall be made [...] to provide for the trend of the Business [...] affecting the Business either before or after the Damage [...] so that the figures thus adjusted shall represent as nearly as may be reasonably practicable the results which but for the Damage would have been obtained during the relative period after the Damage.
Business Interruption Coverage

- Requires covered direct physical loss to insured property/property described in declarations
- Causing “interruption of business” (some courts require complete cessation)
- Causing loss of business income
IN THE EVENT OF:

- PHYSICAL DAMAGE
- TO DESCRIBED PROPERTY
- BY AN INSURED PERIL
- CAUSING A NECESSARY INTERRUPTION OF OPERATIONS

POLICY COVERS:

- ACTUAL LOSS SUSTAINED AS DEFINED IN POLICY (A)
- FOR THE DEFINED INDEMNITY PERIOD

NOTE: (A) NET OF POLICY DEDUCTIBLES, WAITING PERIODS AND/OR SUB-LIMITS

Had No Loss Occurred “HNLO”
Period of restoration begins at the time of loss and ends on “the date when the property at the described premises should be repaired, rebuilt or replaced with reasonable speed and similar quality.”
We will pay for the actual loss of Business Income you sustain due to the necessary ‘suspension’ of your ‘operations’ during the ‘period of restoration.’ The ‘suspension’ must be caused by direct physical loss of or damage to ‘dependent property’ at a premises described in the Schedule caused by or resulting from a Covered Cause of Loss.

— ISO Form No. CP 15 08 (Ed. 04 02)
The Catastrophe Issues

- Separating that part of loss caused by interruption of the insured’s operations from that part caused by other effects of a catastrophe
- Losses of customers or suppliers (the Cantor Fitzgerald example)
- Stigma of devastated area (hotels and convention center)
Trends Clause

External Factor

External Factor

Causal Link

External Factor
so that the figures thus adjusted shall represent as nearly as may be reasonably practicable the results which but for the Damage would have been obtained during the relative period after the Damage.

but for the Damage = what would have happened had the Damage not occurred
Trends Clause

External Factor

Causal Link

External Factor

External Factor
Trends Clause in Wide Area Damage (WAD) Situations

Orient-Express Hotel, New Orleans
Insurer can argue: Even if the hotel had not been damaged – the loss would still have occurred.

Policyholder can argue: Even if the city had not been closed to the public – the loss would still have occurred.
... so that the figures thus adjusted shall represent as nearly as may be reasonably practicable the results which but for the Damage would have been obtained during the relative period after the Damage.

but for the Damage = what would have happened had the Damage not occurred
Trends Clause
Do you compare the actual situation with the hypothetical situation
A) "..."but for the damage to the insured property" or
B) "... "but for the occurrence of the hurricane"?

Trends Clause in OEH case:

".....the results which but for the Damage would have been obtained ....."
Do we, or do we not, consider the collateral effects of the catastrophe in measuring loss of Business Income?
Period of restoration begins at the time of loss and ends on “the date when the property at the described premises should be repaired, rebuilt or replaced with reasonable speed and similar quality.”
Begins when den business re-opens – ends when the business is restored to its pre-loss condition, or at the latest at the end of a specified time.
Civil Authority Coverage

* “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 your premises due to direct physical loss of or damage to property, other than at the ‘covered premises,’ caused by or resulting from any Covered Cause of Loss.”
We will pay for the actual loss of Business Income you sustain due to the necessary ‘suspension’ of your ‘operations’ during the ‘period of restoration.’ The ‘suspension’ must be caused by direct physical loss of or damage to ‘dependent property’ at a premises described in the Schedule caused by or resulting from a Covered Cause of Loss.

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“Dependent Property” means property operated by others that the insured depends on to:

- Supply materials or services to the Insured, or to others for the account of the Insured (Contributing Locations)
- Accept the Insured’s products or services (Recipient Locations)
- Manufacture products for delivery to the Insured’s customers under contract of sale (Manufacturing Locations); or
- Attract customers to the Insured’s business (Leader Locations)
Supplier can be indirect supplier in chain of production. *Archer Daniels Midland Co. v. Phoenix Assur. Co of New York*, 936 F. Supp. 534 (S.D. Ill. 1996) (finds coverage where barge traffic on Mississippi River was halted due to flooding)
Any questions?

(before we all leave for the reception...)