

# **Insurance for Business Interruption Losses Due To Damage Away from the Insured Premises**

## **Lessons from 9/11 and Katrina, and Coverage for the Icelandic Volcanic Eruptions and the Gulf Oil Spill**

# Presenters

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- Marshall Gilinsky, Shareholder, Anderson Kill & Olick, P.C.
- An experienced commercial litigator who applies his complex analysis skills with extensive experience in insurance coverage analysis, litigation and dispute resolution.
- Focuses on property insurance, commercial general liability insurance, captive insurance and reinsurance issues.
- Assists clients in recovering business interruption insurance coverage and damages arising out of prominent catastrophes.



- Bob Glasser, Managing Director, BDO Consulting
- AKA “B.I. Bob”
- Mr. Glasser assists insured businesses including hotels, prepare and substantiate business interruption and property damage.
- Previously, Mr. Glasser served as the CFO and Executive VP of an international telecommunications firm, as well as CFO of a product manufacturer and distributor company.

# Disclaimer

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The views expressed by the participants in this program are not those of the participants employers, their clients, or any other organization. The opinions expressed do not constitute legal advice, or risk management advice. The views discussed are for educational purposes only, and provided only for use during this session.

# Overview

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- The Evolution of Property Damage and Time Element Insurance Coverages
- The Traditional Requirement of “Direct Physical Loss or Damage” to Insured Property
- How Time Element Losses Are Calculated and Adjusted
- Lessons Learned from 9/11, Katrina and other Recent CAT Losses
- Ideas for Protecting Against Future Losses

# Evolution of “BI” Insurance

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- Stage 1 – Property Damage / ACV
- Stage 2 – Replacement Cost
- Stage 3 – Business Interruption Caused by Damage to Your Property
- Stage 4 – Bells and Whistles (examples):
  - Ordinance or Law Coverage
  - Business Interruption Caused by Damage to Others’ Property
  - Business Interruption Caused by Something other than Direct Property Damage

# “Direct Physical Loss or Damage”

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- Traditional way to tie your BI claim to the trigger,
  - But not the only way
- Many significant Business Interruption risks are triggered by damage away from your property:
  - Loss at attraction property (Disney World / Convention Center)
  - Loss at customer’s property (convention host)
  - Service Interruption
  - Ingress / Egress
- Many other risks may not involve “direct physical loss or damage” but nevertheless can be insured:
  - Disruption of air travel as precaution against potential terrorism
  - Disruption of air travel due to volcanic ash
  - Disruption of air or land travel due to grid failure
  - Disruption of travel due to cyber-attack

# Measuring a Time Element Loss

- Future revenues and profits are inherently unpredictable. You must consider the earnings of the business before the date of damage and the probable earnings thereafter, had no loss occurred.
- Attributing business interruption income loss to direct physical damage.
- Ordinary course of business forecasts
- Trending historical results, budgets, etc.
- Period of indemnity performance and demonstrating necessity of continuing expense
- Market/economic conditions
- Comparables
- “Make-up” and other offsets



# Typical Grey Areas in Measuring a BI Loss

- Pro forma sales / projected revenue growth & expenses had no loss occurred (commonly expressed as “But For” the loss)
- Attributing lost business income to direct/in-direct physical damage
- Indemnity Period and Extended Period of Indemnity
- Continuing v. non-continuing expenses
- Make up sales / production vs. improved trending and seasonality
- Loss mitigation opportunities and Measurement





# Lessons Learned

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- Disputes regarding the “Wider Effects” of the Catastrophe
- Disputes regarding the “Period of Recovery”
- Disputes regarding “Anti-Concurrent Causation” clauses
- The Hidden “Daubert” Exclusion

# Best Practices (Part I)

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- Request on site visit by adjuster ASAP and then assume responsibility of measuring your own claim with your contractors, engineers, etc.
- Concentrate on operations and mitigation efforts; form a “Claim Preparation Strategy” and help prepare support for an interim cash advance
- Agree with adjuster to giving insured authority to spend to mitigate loss and incur extra expenses without his item by item approval
- Utilize extra expense coverage for security, power, expediting, payroll, distribution alternatives, advertising, etc.
- Review insurance policy with Insured and Broker
- Those who anticipate what could happen, and thoroughly plan for it, stand a much better chance of a full and prompt recovery.

# Best Practices (Part II)

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- Do not lose sight of the fact that an insurance claim is a cooperative and adversarial process at the same time
- Segregate factual issues from judgment issues
- Take initiative – Your team prepares your claim not the insurer and be prepared to support your position
- Consider viewpoint of insurer – “Devil’s Advocate” while at the same time understand the strengths & weaknesses of your claim (have reasonable expectations)
- Prevent adversarial situations throughout the process; resolve differences item by item; resist time pressures
- Be cautious of signing a general release as a condition of settlement. You are entitled to collect your loss payment by filing an agreed proof of loss



# Ideas for Protecting Your Properties

## BEFORE THE LOSS:

- Assemble the Right Team

Risk Manager

Operations Mgmt.

Financial Mgmt.

Named Adjuster



Insurance Broker

Forensic Accountant

Coverage Counsel

Engineer/Construction

- Create and Pursue Your Dream Coverage
  - Traditional triggers and non-PD triggers

# Ideas for Protecting Your Properties

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## AFTER THE LOSS

- Give Notice of the Loss
- Activate the Claims Team
  - All of the above, plus Public Adjuster and Lawyer
- Track claim costs / maintain documentation
- Keep insurance company representatives updated
- Know Your Policy and pursue all triggered coverages
- Delegate to specialists where appropriate
  - Claim adjustment expenses usually are covered
- Respond promptly to reasonable requests for information
- Remain aware of deadlines:
  - Proof of Loss
  - Suit Limitation Provisions
- **More on Next Slide**

# Ideas for Protecting Your Properties

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AFTER THE LOSS (continued)

- **Don't Take "No" for an Answer**

# THANK YOU!

Marshall Gilinsky  
Anderson Kill & Olick  
(212) 278-1513  
[mgilinsky@andersonkill.com](mailto:mgilinsky@andersonkill.com)

Robert Glasser  
BDO  
(212) 885-8173  
[rglasser@bdo.com](mailto:rglasser@bdo.com)