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## Inadequate Documentation Can Scuttle Your Company's Business Interruption Claim

By Allen R. Wolff and Eric R. Reed

Decisions a company makes in the days and weeks following an unforeseen event — think flood, fire or equipment breakdown — will bear directly on the success of a subsequent claim under the business interruption part of that company's commercial property policy. Two recent federal court decisions illustrate the importance of promptly identifying and documenting the losses related to the event.

In *Pyramid Technologies, Inc. v. Hartford Casualty Insurance Company*, 752 F.3d 807 (9th Cir. 2014), a flood prompted Pyramid to notify Hartford of potential damage to electronics components a customer had recently committed to buy. Hartford found no evidence of water-related damage and denied coverage under Pyramid's business interruption policy. Pyramid sued for declaratory relief as to coverage, but Hartford prevailed on summary judgment. The Ninth U.S. Circuit Court of Appeals affirmed because Pyramid failed to show that it actually lost business as a result of the flood. The court noted the "commitment" to purchase the components was still subject to the approval of the customer's quality control department. It also pointed to evidence

that the customer may have rejected Pyramid as a supplier anyway because the facility lacked a humidity control system. The appeals court refused to allow the business interruption claim to go to trial when doing so would require the jury to "speculate" about whether the customer would honor its commitment to buy from Pyramid.

More recently, in *Metro Hospitality Partners, Ltd. v. Lexington Insurance Company*, 2015 U.S. Dist. LEXIS 10171 (S.D. Texas January 25, 2015) the trial court granted an insurance company summary judgment for similar reasons in a hospitality context. The loss occurred when a Texas hotel's air conditioning unit failed during the summer. Lexington accepted the loss under the equipment-breakdown coverage in the hotel's commercial property policy and requested repair or replacement quotes, invoices and contracts. The hotel forwarded the insurance company an initial estimate but did not provide additional information or documents for another nine months — at which point the hotel demanded over \$600,000 for repair costs and unquantified "reputation" damages. The hotel sued for coverage under the business

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interruption part of the policy, but Lexington prevailed on summary judgment. The court agreed that a spreadsheet produced during the corporate designee's deposition did not satisfy the requirement that losses be supported by "financial records and accounting procedures, bills, invoices and other vouchers, and deeds, liens or contracts." The court took issue with the designee's lack of knowledge about the data underlying losses related to meal vouchers, canceled reservations and room discounts purportedly caused by the outage.

These decisions illustrate that a business interruption loss that is not carefully documented is suspect in the eyes of insurance companies and courts. A policyholder must make every effort to mitigate the loss while also assembling historical documentation evidencing both past and expected income, such as tax returns, income statements, balance

sheets, inventory reports and sales volume reports. The insurance company (and later, the court) will view post-loss attempts to reconstruct financial figures with doubt, or disregard them altogether.

Many business interruption policies limit interruption losses to those incurred during the "period of restoration." This means a policyholder will get coverage for as long as the insurance company believes is required to get the business on its feet. The policyholder must show it resumed operations promptly. Delays should be explained in writing and supported by construction contracts, schedules, invoices, change orders or proprietary documents that demonstrate the company's diligence. Finally, as we learned in *Metro Hospitality Partners*, a qualified individual in the organization should be designated to present this documentation effectively to adjusters and attorneys.▲

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Anderson Kill practices law in the areas of Insurance Recovery, Commercial Litigation, Environmental Law, Estate, Trusts and Tax Services, Corporate and Securities, Antitrust, Banking and Lending, Bankruptcy and Restructuring, Real Estate and Construction, Foreign Investment Recovery, Public Law, Government Affairs, Employment and Labor Law, Captive Insurance, Intellectual Property, Corporate Tax, Hospitality, and Health Reform. Recognized nationwide by Chambers USA for Client Service and Commercial Awareness, and best-known for its work in insurance recovery, the firm represents policyholders only in insurance coverage disputes — with no ties to insurance companies and has no conflicts of interest. Clients include Fortune 1000 companies, small and medium-sized businesses, governmental entities, and nonprofits as well as personal estates. Based in New York City, the firm also has offices in Ventura, CA, Philadelphia, PA, Stamford, CT, Washington, DC, Newark, NJ, and Dallas, TX.

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