

**BLOGS**

Natural Disasters;Policyholder

## Record-Breaking Flooding in the Midwest Likely Means a Flood of Business Interruption Claims, Too

The Midwest is experiencing record-breaking flooding this year, bringing back memories of the devastating and costly floods of 1993. Without a doubt, business losses and business interruption claims will be substantial. This post explores when an insured might have coverage for business interruption even if it does not incur significant flood-damage to its own property. As with any coverage claim, the merits will depend on the specific language in the policy and the specific circumstances of the claimed loss. But, here's a rundown of some common policy provisions and issues to keep in mind.

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### Understanding Time Element Generally

Many businesses have "time element" coverage for the interruption of business that may occur after property damage. The phrase "time element" is used because the extent of coverage depends on the time it takes for the damaged property to be replaced or repaired. During this time, the policy may cover the insured's lost profits and/or extra expenses while the insured tries to keep its business running as normal as possible. In a typical time-element claim, the insured has suffered damage to its own covered property at an insured location. But, some policies may be broadly worded to include time element loss that is sustained even if the damage occurs to other property at other locations. Carefully review your policy and take note if the policy requires damage to covered property or, for example, property of the type insured. Likewise, look to see if the policy requires damage at an insured location, or, more broadly, any location.

### The Business Loss or Extra Expense Should Flow From Property Damage, Not Just High Water Itself

The business interruption or extra expense claim will be strongest when the insured can show the loss flows from property damage, and not just high water, itself. For example, in *Cargill, Inc. v. Appalachian Ins. Co. of Providence*, 1983 WL 496522 (D. Minn. Jan. 24, 1983), Cargill operated a plant along the Mississippi River with a marine tower in the water. The river flooded and Cargill was unable to clear barges through the inner berth of the tower. One of the tower decks was submerged, barge collisions damaged the tower, and Cargill had to move and rebuild its equipment at higher levels to avoid loss. It sought coverage for the economic loss it sustained while it could not use the inner berth. Applying Minnesota law, the court agreed with the insurer that there was no coverage for this economic loss. Even though Cargill had some property damage, its economic loss did not flow from that property damage, but rather, from the high water that caused lack of sufficient clearance in the inner berth. "Cargill's contention that high water alone was insured property damage must be rejected. The clear language of the policy provided coverage for property damage *resulting* from flood or high water." *Id.* at \*5. See also, *e.g.*, *The Phoenix Ins. Co. v. Infogroup, Inc.*, 147 F. Supp. 3d 815, 826–27 (S.D. Iowa 2015) (flooding to insured's parking lot caused minor physical damage to its facilities,



but insured moved due to general threat of river flooding, which did not establish “direct physical loss” requirement in extra expense clause).

## Consider Property Damage of a Supplier, Customer or Service Provider

Another way in which affected businesses might be able to tap into coverage is if they can show that their suppliers, customers or service providers incurred property damage, which then caused the insured’s business to be interrupted.

For example, in *Archer Daniels Midland Co. v. Phoenix Assur. Co. of New York*, 936 F. Supp. 534, 536 (S.D. Ill. 1996), Archer Daniels Midland Company (“ADM”) claimed millions of dollars in extra expense and loss of income after the 1993 floods. It had both increased transportation costs when it could not ship goods via river, and increased cost for raw materials when grain crops flooded. Its policy had a contingent business interruption/extra expense provision that covered:

loss of earnings and necessary extra expenses resulting from necessary interruption of the business of the insured caused by damage to or destruction of real or personal property, by the perils insured against under this policy, of any supplier of goods or services which results in the inability of such supplier to supply an insured locations [sic].

One of the disputes was whether the grain farmers and the Army Corps of Engineers (“the Corps”) could be considered a “supplier of goods or services.” Even though they did not have contractual privity with ADM, and even though the Corps was a governmental entity, the court concluded both were nonetheless a “supplier,” and they would satisfy the broad “any supplier” language in ADM’s policy. In part, the court observed that the Corps make physical improvements to enhance the navigation of the waterways and that ADM paid an excise fuel tax to help fund that service. *Id.* at 534. This is a useful coverage argument that could be made by other similarly situated insureds. Note, however, the court also commented that the insurer could have limited its coverage to *direct* suppliers or those in *contractual privity*, but did not do so. Closely review your policy to see which suppliers, customers or providers are included in the contingent time element coverage.

In the ADM case, the insurers also tried to defeat coverage for the transportation expenses on the theory that there was no causal connection between the damage to the Corps’ locks or damages and the barge traffic restrictions that were imposed, but the court did not decide that fact question, and the parties later settled. *Id.* at 543; *Archer Daniels Midland Co. v. Aon Risk Services, Inc. of Minn.*, 356 F. 3d 850, 852-853 (8<sup>th</sup> Cir. 2004).

## You May Have Coverage if You Can’t Access Your Property

Other potential avenues for coverage are the Civil Authority and Ingress/Egress provisions found in most policies. These are triggered when the insured cannot access an insured location – either physically or because of a government order – because of property damage that has occurred elsewhere, sometimes within a defined proximity of an insured location.

In *Narricot Indus. v. Fireman’s Fund Ins. Co.*, for example, the town of Tarboro, North Carolina suspended all plant operations and prohibited access to the road where the insured’s facility was located as Hurricane Floyd approached. The court readily found these were orders of “Civil Authority” that triggered coverage for resulting business interruption and extra expense, even though no formal order had issued. It also rejected the insurer’s argument that the coverage did not apply when the order was issued for preventative measures. “Regardless of whether Tarboro took the measures to prevent hurricane and flood damage or alleviate the perils caused by hurricane and flood damage, the measures still resulted from hurricane and flood.” *Narricot Indus., Inc. v. Fireman’s Fund Ins. Co.*, No. CIV.A.01-4679, 2002 WL 31247972, at \*5 (E.D. Pa. Sept. 30, 2002). In contrast, a mere diversion of traffic to the business, which results in decreased business, is usually insufficient to trigger most policies. See, e.g., *54<sup>th</sup> Street Limited Partners v. Fidelity and Guaranty Ins. Co.*, 306 A.D.2d 67 (S.D. N.Y. 2003).



## Conclusion

These are just a few of the more common ways that coverage can be triggered even if an insured does not incur substantial property damage, itself. A careful policy review can help identify the types of claims that are covered and, potentially, areas for coverage enhancement in future policy placement.