



Business Interruption Loss: Expert Should Consider Only Historical Sales

Under a standard business interruption insurance policy, the insured would most likely want to measure any losses, including lost profits, based on its past financial performance. By contrast, an insurer might argue that current figures are the appropriate benchmark, particularly if business profits have declined due to the widespread effects of a natural disaster. But what if a business actually makes more profits after the disaster struck than before? Then it might argue that current experience is the proper measure of damages—but that would create an inconsistent standard, one that the U.S. Court of Appeals for the Fifth Circuit (the appellate forum for most Hurricane Katrina-based claims) specifically sought to avoid in two recent cases.

In *Catlin Syndicate Ltd. v. Imperial Palace of Mississippi*, 600 F.3d 511 (5th Cir. 2010), the hurricane forced a Mississippi gambling casino to shut down for several months. It reopened before many of its competitors did and enjoyed substantially higher revenues than before the storm. The casino submitted a claim to its insurer for roughly \$165 million in losses, based on post-Katrina revenues. The insurance company claimed the losses were closer to \$65 million based on historical net profits, and filed a summary judgment motion to limit the casino's business interruption losses to the same. The district court granted the motion, and the casino appealed.

The 5th Circuit found the business interruption policy specifically provided that to ascertain the covered loss, "due consideration shall be given to the experience of the business before the loss and the probable experience thereafter had no loss occurred." Under this language, the proper method for determining loss was to look at the sales before the interruption rather than after. "Only historical sales figures should be considered when determining loss," the court held, and confirmed the district court's bright-line rule.

This time, the insurer wants losses based on post-Katrina sales.

In *Consolidated Cos. Inc. v. Lexington Insurance Co.*, 2010 WL 3223137 (C.A. 5 (La.)) (Aug. 17, 2010), a Louisiana warehouse bought an insurance policy one day before the hurricane struck. At trial against its insurer, the company claimed business-interruption losses of nearly \$20 million, including \$7.1 million in the profits it would have earned under historic, pre-Katrina operations and \$12.3 million for the "charges and expenses" that it spent during rebuilding, despite having made a small profit during the same time. The jury awarded the entire amount of its claim, and the insurance company appealed, first to the federal district court and then to the 5th Circuit.

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In this case, the insurance policy expressly covered the charges and expenses that the business had to spend while it was shut down, but did not speak to the expenses incurred while resuming partial operations. The court resolved the ambiguity to cover only the business's diminished profit; that is, the policy required reducing a business's actual loss by the income it earned during partial operations. Any other interpretation would reap a windfall to the insured, and it reversed the jury's \$12.3 million award for expenses.

The insurance company also disputed the jury's \$7.1 million lost profits award, claiming that a portion was caused by the post-Katrina economic conditions and damages should be based on post-Katrina business performance. But the court rejected this argument, finding it similar to the one it rejected in *Imperial Palace*. A jury should not to consider the "real-world," post-disaster profit opportunities (or disadvantages) for a business, but should award damages sufficient to place the insured in the same position it would have occupied but for the storm. Further, the insured is not required to differentiate between losses from property damage and losses from market conditions, the court ruled, and upheld the jury's lost profits award.