

26th Annual Insurance Coverage Litigation Midyear Conference

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Arizona Biltmore Resort & Spa

Toolbox Luncheon Session
Contingent Business Interruption Coverage

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1. Claims: Trends and Challenges
2. CBI Coverage Basics
3. Key Coverage Issues and Authority
4. Takeaways

1. Claims: Trends and Challenges

- Supply Chains
 - Increased complexity and interdependencies
- Natural Disasters / Weather Events
 - Hurricanes, wildfires, earthquakes, tsunamis...
- Legal Authority
 - Very few opinions

2. CBI Coverage Basics

- Purpose / Scope
 - Coverage for losses arising from business interruption caused by damage to supplier's or customer's property
 - CBI v. contingent extra expense ("CEE")
- Coverage Prerequisites
 - Direct physical loss or damage
 - To the property of a supplier or customer (specific or blanket)
 - Caused by a covered peril
 - Resulting in loss during the indemnity period

3. Key Coverage Issues / Authority

■ Supplier Issues

○ What is a supplier

- *Archer-Daniels Midland Co. v. Phoenix Assurance Co.*, 936 F. Supp. 534 (S.D. Ill. 1996)
- *Pentair, Inc. v. Am. Guarantee & Liab. Ins. Co.*, 400 F.3d 613 (8th Cir. 2005)

○ Direct v. indirect suppliers

- *Millennium Inorganic Chems. Ltd. v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA*, 893 F. Supp. 2d 715 (D. Md. 2012), *rev'd*, 744 F.3d 279 (4th Cir. 2014)
- *DIRECTV v. Factory Mut. Ins. Co.*, 692 F. App'x 494 (9th Cir. 2017)

Note: for a thorough discussion of the case law on “supplier” issues, see Erica J. Dominitz, Daniel R. Bentson, *The Japanese Earthquake and Tsunami of 2011 and Contingent Business Interruption Coverage*, 52 Tort Trial & Ins. Prac. L.J. 73, 85–93 (2016).

3. Key Coverage Issues / Authority

■ Classifying and Proving CBI Loss

○ Type of loss and sublimit issues

- *Zurich Am. Ins. Co. v. ABM Indus., Inc.*, 397 F.3d 158 (2d Cir. 2005)

○ Proving loss

- Records documenting past performance / accounting
- Forecasts projecting future performance / profits
- Forensic / expert issues
- *Citadel Broad. Corp. v. Axis U.S. Ins. Co.*, 2014-0326 (La. App. 4 Cir. 2/11/15), 162 So. 3d 470, *writ denied*, 2015-0514 (La. 5/15/15), 170 So. 3d 969
- *Wyndham Int'l, Inc. v. Ace Am. Ins. Co.*, 186 S.W.3d 682 (Tex. App. 2006)

4. Takeaways

- Structuring Coverage
 - Knowledge of supply chain is key
 - Raw materials and component parts
 - Supplier and customer contracts have to be considered
 - Have to assume insurer does not contemplate specific CBI claim
- Other / New Coverage Types and Options
 - Utility service interruption, civil/military interruption
 - Non-physical damage business interruption (“NDBI”)

Speakers

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