

TEN YEARS AFTER 9/11: PROPERTY INSURANCE
LESSONS LEARNED

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I. INTRODUCTION

“September 11, 2001, was a day of unprecedented shock and suffering in the history of the United States.”¹ On that day, terrorists hijacked and flew two commercial aircraft into the twin towers of the World Trade Center (WTC), destroying both of them, damaging or destroying a number of other surrounding buildings, and killing nearly 3,000 people.² Terrorists flew another hijacked commercial airliner into the Pentagon, and another hijacked airliner crashed into a field in rural Pennsylvania.³

The September 11 terrorist attack resulted in insured losses of nearly \$40 billion.⁴ At the time, it was the most expensive loss in insurance industry history, only later to be eclipsed by Hurricane Katrina.⁵ Although aviation, workers’ compensation, life, and liability insurers all paid significant losses, nearly two-thirds of the 9/11 insurance losses were paid by property insurers.⁶

Not surprisingly, the September 11 attack generated a significant amount of coverage litigation, some of which just recently ended.⁷ That litigation involved a myriad of coverage issues, including the number of occurrences, the period of indemnity for time element coverage, the meaning of physical loss or damage, civil authority and ingress and egress coverages, contingent business interruption coverage, insurable interest, contamination

1. NAT’L COMM’N ON TERRORIST ATTACKS UPON THE UNITED STATES, THE 9/11 COMMISSION REPORT, at xv (2004) [hereinafter 9/11 COMMISSION REPORT].

2. See generally *id.* §§ 9.2–9.4, at 285–323. In addition to the WTC towers, three other buildings fully collapsed (WTC 3, WTC 7, and the Greek Orthodox Church at 155 Cedar Street). Patricia Grossi, *Property Damage and Insured Losses from the 2001 World Trade Center Attacks*, 15(2) PEACE ECON., PEACE SCI. & PUB. POL’Y 6 (2009), available at www.bepress.com/peps/vol15/iss2/. Three other buildings partially collapsed (WTC 4, WTC 5, and WTC 6), and eleven other buildings sustained major damage. *Id.*

3. See generally 9/11 COMMISSION REPORT, *supra* note 1, § 1.2, at 24–30.

4. *E.g.*, *9/11 and Insurance: The Eight Year Anniversary*, INS. J. (Sept. 11, 2009), www.insurancejournal.com/news/national/2009/09/11/103694.htm (last visited Feb. 14, 2011); INS. INFO. INST., *9/11 AND INSURANCE: THE EIGHT YEAR ANNIVERSARY—INSURERS PAID OUT NEARLY \$40 BILLION* (Sept. 10, 2009), www.iii.org/Press_Releases/9-11-and-Insurance-the-Eight-Year-Anniversary.html (last visited Feb. 14, 2011).

5. *E.g.*, *9/11 and Insurance: The Eight Year Anniversary*, *supra* note 4.

6. *E.g.*, *id.*

7. See, e.g., *Duane Reade, Inc. v. St. Paul Fire & Marine Ins. Co.*, 600 F.3d 190 (2d Cir. 2010); *Arthur Andersen LLP v. Fed. Ins. Co.*, 3 A.3d 1279 (N.J. Super. Ct. App. Div. 2010).

and consequential loss exclusions, terms of insurance binders, the scope of replacement cost, and salvage and recoveries, among others. This article reviews the 9/11 property insurance cases and identifies the significant lessons learned from those cases.

II. NUMBER OF OCCURRENCES

In commercial property insurance policies, the limits of insurance and the number of deductibles are typically determined on a per occurrence basis.⁸ If the per occurrence limit of insurance is adequate to cover the insured's loss, it does not matter whether a loss involves one occurrence or multiple occurrences.⁹ However, where the per occurrence limit of insurance does not fully compensate the insured for its loss, whether a loss constitutes one occurrence or multiple occurrences can be a significant issue. And nowhere was this more evident than after 9/11. Indeed, whether the two airliners crashing separately into the twin towers of the WTC as part of a coordinated terrorist attack was one occurrence or two turned out to be a \$3.5 billion question.

Silverstein Properties, Inc., which had recently leased the WTC from its owner, the Port Authority of New York and New Jersey, and was required to insure it, procured a primary layer and eleven excess layers of property insurance in the total amount of approximately \$3.5 billion on a per occurrence basis.¹⁰ But by September 11, only one of the many insurers in the program had actually issued a final policy.¹¹ The remaining insurers were governed by the terms of the insurance binders that each had issued.¹² After the September 11 attack, which caused considerably more than \$3.5 billion in damages, Silverstein claimed that there were two occurrences and, thus, that it could recover up to \$7 billion.¹³ The insurers, on the other hand, claimed that there was a single occurrence and, hence, that Silverstein could recover only \$3.5 billion.¹⁴

In the ensuing litigation, the insurers fell into two groups. The first group was governed by a policy form included as part of the underwriting submission by Silverstein's broker, Willis of New York, known as the WilProp form.¹⁵ The WilProp form defined *occurrence* to mean "all losses

8. See generally 1 LINDA G. ROBINSON & JACK P. GIBSON, COMMERCIAL PROPERTY INSURANCE, at V.I.3 (2009).

9. See generally *id.*

10. World Trade Ctr. Props., L.L.C. v. Hartford Fire Ins. Co., 345 F.3d 154, 159 (2d Cir. 2003).

11. *Id.* Allianz Insurance Company was the only insurer to have issued a final policy as of September 11, 2001. *Id.* at 160.

12. *Id.* at 159.

13. *Id.*

14. See *id.*

15. *Id.* at 158–59.

or damages that are attributable directly or indirectly to one cause or to one series of similar causes.¹⁶ The second group was bound to other forms that either did not define the term *occurrence* or defined it differently. The difference turned out to be significant.

In *World Trade Center Properties, L.L.C. v. Hartford Fire Insurance Co.*,¹⁷ the U.S. Court of Appeals for the Second Circuit affirmed the district court's single-occurrence determination under the WilProp form. The appeals court agreed that "no finder of fact could reasonably fail to find that the intentional crashes into the WTC of two hijacked airplanes sixteen minutes apart as a result of a single, coordinated plan of attack, was, at the least, a 'series of similar causes.'"¹⁸ So, for the insurers subscribing to the WilProp form, coverage was subject to a single limit of liability.

The result was different for the other insurers.¹⁹ Indeed, the district and appeals courts found that the undefined term *occurrence* was sufficiently ambiguous and required consideration of extrinsic evidence to determine the parties' intent as to whether the September 11 attack was one occurrence or two.²⁰ The Second Circuit concluded that its prior decision in

16. *Id.* at 160. The complete definition was:

"Occurrence" shall mean all losses or damages that are attributable directly or indirectly to one cause or to one series of similar causes. All such losses will be added together and the total amount of such losses will be treated as one occurrence irrespective of the period of time or area over which such losses occur.

Id. The WilProp form was intended to be a pro-insured form because it would limit the number of deductibles that the insured would have to pay in the event of a loss. *SR Int'l Bus. Ins. Co. v. World Trade Ctr. Props., L.L.C.*, 467 F.3d 107, 115 (2d Cir. 2006). But, ironically, the WilProp form, at least on the issue of occurrence, turned out to favor the insurers.

17. 345 F.3d 154 (2d Cir. 2003).

18. *Id.* at 180. Only a few of the more than thirty insurers were the immediate beneficiaries of the court's one-occurrence summary judgment ruling. To be sure, the ruling immediately affected only those insurers that had agreed to be bound to the WilProp form. For the majority of insurers, there were fact issues as to whether they were bound to the WilProp form. As a result, the district court held a two-phase jury trial. The first phase was designed to determine which insurers were bound to the WilProp form, and the second was designed to determine the number of occurrences for each insurer that was not bound to the WilProp form. *SR Int'l Bus. Ins. Co.*, 467 F.3d at 114–15. A jury determined that all but three of the insurers that participated in the Phase I trial were bound to the WilProp form. *Id.* at 115.

19. The second group included three insurers that participated in the Phase I trial and were found not to be bound to the WilProp form (Zurich American Insurance Co., Royal Specialty Underwriting, Inc., and Twin City Fire Insurance Co.) and six other insurers that conceded that fact (Allianz Insurance Co., Gulf Insurance Co., Industrial Risk Insurers (IRI), TIG Insurance Co., Travelers Indemnity Co., and Tokio Marine and Fire Insurance Co.). *SR Int'l Bus. Ins. Co.*, 467 F.3d at 131. Five of these insurers (Allianz, IRI, TIG, Zurich, and Twin City) defined *occurrence* in their forms to mean a loss, disaster, or casualty or a series of losses, disasters, or casualties arising out of one "event." *Id.* at 136. The policies did not define *event*. *Id.*

20. *World Trade Ctr. Props.*, 345 F.3d at 180, *aff'g* *SR Int'l Bus. Ins. Co. v. World Trade Ctr. Props., LLC*, No. 01 Civ. 9291 (JSM), 2002 WL 1163577, at *6 (S.D.N.Y. June 3, 2002).

*Newmont Mines Ltd. v. Hanover Insurance Co.*²¹ dictated that the meaning must be interpreted in the context of the specific policy and facts of the case.²² In *Newmont Mines*, the jury was asked whether the loss (the collapse of two sections of a roof several days apart) was the result of a single, continuous event or the result of two separate events.²³ Citing *Newmont Mines*, the *World Trade Center Properties* court decided that the number of occurrences in 9/11 was a question for the fact finder.²⁴

In the subsequent trial, the jury determined that the insurers contemplated a two-occurrence treatment of the 9/11 events.²⁵ At trial, Silverstein presented expert witness testimony as to the custom and practice regarding per occurrence property insurance coverage.²⁶ Silverstein's expert testified that there was an industry custom that insurers utilize a narrow definition of *occurrence* in their policy forms because, absent a total loss situation, it was in the insurer's best interest to define *occurrence* in terms of a physical cause of loss to maximize the number of deductibles that apply.²⁷ With respect to those insurers that defined *occurrence* to mean any loss or series of losses arising out of one event, Silverstein's expert testified that the un-

21. 784 F.2d 127 (2d Cir. 1986).

22. *World Trade Ctr. Props.*, 345 F.3d at 189 (quoting *Newmont Mines*, 784 F.2d at 136 n.9).

23. "In *Newmont Mines*, a heavy accumulation of snow caused two separate parts of a roof to collapse several days apart, requiring two independent repairs." 784 F.2d at 129–31. None of the policies at issue defined the term *occurrence*. *Id.* at 135. Citing the dictionary definition, however, the appeals court noted that the term *occurrence* is ordinarily understood to mean "something that takes place" or "something that happens unexpectedly and without design." *Id.* (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1561 (1981)). The Second Circuit concluded that the following jury instruction properly interpreted the term *occurrence* based on the ordinary meaning of that term and the business purpose sought to be achieved by the parties:

It is for you to decide whether or not the losses which are alleged to have occurred or the loss that's alleged to have occurred in this case was the result of a single, continuous event or incident, or whether or not it was the result of two separate incidents. If you find that the collapse of the two sections of the roof was a single, continuous event or incident, then the collapse constituted a single occurrence—and there would be only one loss. If, on the other hand, you find that the collapse of the two sections of the roof constituted separate events or incidents that were not causally related, then of course you would have two separate losses.

Id. at 134. The court also held that there was sufficient evidence to support the jury's verdict that the two losses constituted two occurrences under the policies. *Id.* at 137.

24. *World Trade Ctr. Props.*, 345 F.3d at 189–90; see also *Newmont Mines*, 784 F.2d at 136 (noting distinctions between liability and property insurance when analyzing meaning of *occurrence*); *Basler Turbo Conversions LLC v. HCC Ins. Co.*, 601 F. Supp. 2d 1082, 1089 (E.D. Wis. 2009) (same).

25. *SR Int'l Bus. Ins. Co. v. World Trade Ctr. Props., LLC*, 467 F.3d 107, 115 (2d Cir. 2006).

26. *Id.* at 131. Silverstein's expert was Jeffrey McKinley, who reportedly "had 31 years of experience in the insurance industry, including 23 years as a broker . . . and 4 years as an underwriter" for a property insurer. *Id.* at 132.

27. *Id.* at 135.

defined term *event* had the same meaning as the undefined term *occurrence* and was tied to a physical cause of loss.²⁸ In addition to this custom and usage testimony, the jury was presented evidence that these insurers did not bind to the WilProp form and that the WilProp form treated the term differently than did the insurers' forms.²⁹ The jury found this testimony and evidence persuasive.

As illustrated by the WTC events, whether a loss constitutes one or multiple occurrences can have a significant impact on the amount of an insurer's liability. This is true whether the occurrence issue relates to the limit of liability or the policy deductible.³⁰ The starting point for determining the number of occurrences will be the policy language. As illustrated by *World Trade Center Properties*, where the term *occurrence* is defined, the number of occurrences issue can likely be decided as a matter of law.³¹

However, where that term is undefined, the issue of whether there are single or multiple occurrences often will turn on the approach that the jurisdiction has adopted to determine the number of occurrences. Generally, courts have developed three different approaches to determine the number of occurrences under a property insurance policy: (1) the cause approach, (2) the effects approach, and (3) the continuous process approach.³² The cause approach, which is the majority rule, treats all damage from a single, proximate cause as a single occurrence.³³ Under the effects approach, each separate incident of loss constitutes a separate occurrence.³⁴

28. *Id.* at 136.

29. *Id.* at 137.

30. Multiple occurrences work in the insured's favor in cases involving policy limits but against the insured in cases involving policy deductibles. See, e.g., *Basler Turbo Conversions, LLC v. HHC Ins. Co.*, 601 F. Supp. 2d 1082, 1091–92 (E.D. Wis. 2009) (holding that each in a series of thefts of aircraft parts was a separate occurrence, and thus each theft was subject to a \$5,000 deductible).

31. See also *All Metals, Inc. v. Liberty Mut. Ins. Co.*, No. 3-09-CV-0846-BD, 2010 WL 3027045, at *1 (N.D. Tex. July 29, 2010) (granting summary judgment to the insurer, holding that loss involved a single occurrence).

32. See generally Francis F. Maloney, *The Application of "Per-Occurrence" Deductible Provisions in First-Party Property Claims*, 37 *TORT & INS. L.J.* 921, 925 (2002); see also Michael F. Aylward, *Twin Towers: The 3.6 Billion Question Arising from the World Trade Center Attacks*, 69 *DEF. COUNS. J.* 169 (2002); Jeffrey W. Stempel, *The Insurance Aftermath of September 11: Myriad Claims, Multiple Lines, Arguments over Occurrence Counting, War Risk Exclusions, the Future of Terrorism Coverage, and New Issues of Government Role*, 37 *TORT & INS. L.J.* 817, 832–43 (2002).

33. See, e.g., *Peco Energy Co. v. Boden*, 64 F.3d 852, 856 (3d Cir. 1995) (trucking company's repeated thefts of fuel oil over a six-year period constituted a single occurrence subject to a single deductible); *EOTT Energy Corp. v. Storebrand Int'l Ins. Co.*, 52 Cal. Rptr. 2d 894, 901 (Ct. App. 1996) (653 thefts of diesel fuel would constitute a single occurrence if there was proof that a systematic and organized scheme to steal diesel fuel was the proximate cause of the loss). See generally Maloney, *supra* note 32, at 925.

34. See, e.g., *U.E. Tex. One-Barrington, Ltd. v. Gen. Star Ins. Co.*, 332 F.3d 274, 278 (5th Cir. 2003) (water damage from plumbing leaks to nineteen separate buildings in a large apartment complex was nineteen separate occurrences for purposes of policy deductible). See generally Maloney, *supra* note 32, at 925.

The continuous process approach tries to ascertain whether the loss was part of a “single, continuous event.”³⁵ Some other courts consider the plain and ordinary meaning of the word.³⁶ Dictionaries generally define *occurrence* to mean “something that takes place,”³⁷ “something that happens unexpectedly,”³⁸ or “an incident or event.”³⁹ When the term is undefined, the number of occurrences sometimes is determined by the court as a matter of law⁴⁰ and sometimes, as illustrated by the WTC case, by the fact finder.⁴¹

III. PERIOD OF INDEMNITY FOR TIME ELEMENT LOSSES

Business interruption coverage is designed to compensate the insured for the loss of business income stemming from the interruption of its business resulting from physical damage by an insured peril.⁴² Business interruption forms include a “period of indemnity” or “period of restoration” that generally limits the recovery to the time period required to repair or rebuild the damaged property with reasonable speed.⁴³ This seemingly straightforward concept was the subject of considerable litigation after 9/11.

A. Building Owner

The WTC policies typically defined *period of restoration* as beginning on “the date and time of direct physical loss or damage” and ending on “[t]he date when the property should be repaired, rebuilt or replaced with

35. See, e.g., *Newmont Mines Ltd. v. Hanover Ins. Co.*, 784 F.2d 127, 134, 137 (2d Cir. 1986) (jury determined whether a heavy accumulation of snow causing two separate parts of a roof to collapse several days apart, requiring two independent repairs, was the result of a single, continuous event or incident or whether it was the result of two separate incidents). See generally Maloney, *supra* note 32, at 925.

36. See, e.g., *Basler Turbo Conversions LLC v. HCC Ins. Co.*, 601 F. Supp. 2d 1082, 1089 (E.D. Wis. 2009).

37. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1561 (1993).

38. *Id.*

39. THE NEW OXFORD AMERICAN DICTIONARY 1177 (2d ed. 2005).

40. See, e.g., *Budway Enters., Inc. v. Fed. Ins. Co.*, No. EDCV 09-448-VAP, 2009 WL 1014899, at *3-5 (C.D. Cal. Apr. 14, 2009) (finding undefined term *occurrence* to be unambiguous and that thefts of two separate trailers on same day constituted a single occurrence for purposes of the policy's limit of liability); *Basler Turbo*, 601 F. Supp. 2d at 1089-91 (holding that a series of thefts of airplane parts during a six-month period constituted multiple occurrences and that multiple deductibles, one for each theft, thus applied).

41. See also *Newmont Mines Ltd. v. Hanover Ins. Co.*, 784 F.2d 127, 134, 137 (2d Cir. 1986).

42. See, e.g., *Buxbaum v. Aetna Life & Cas. Co.*, 126 Cal. Rptr. 2d 682, 687-88 (Ct. App. 2002). See generally Clark Schirle, *Time Element Coverages in Business Interruption Insurance*, THE BRIEF, Fall 2007, at 32.

43. See, e.g., *Dictiomatic, Inc. v. U.S. Fid. & Guar. Co.*, 958 F. Supp. 594, 602 (S.D. Fla. 1997). See generally 11 LEE R. RUSS & THOMAS F. SEGALLA, COUCH ON INSURANCE § 167:18 (3d ed. 2010).

reasonable speed and similar quality.”⁴⁴ An appraisal panel, rather than a court or jury, determined the applicable period of restoration.⁴⁵ However, the courts did provide guidance to the appraisal process in a series of important rulings.

First, one court determined that the period of restoration would be determined based on a theoretical, and not actual, time period to rebuild or replace the WTC complex.⁴⁶ Silverstein, the WTC lessee, argued that the period of restoration should be measured by the actual period of time necessary to rebuild as long as the restoration was conducted with “reasonable speed” and “similar quality.”⁴⁷ The court rejected the argument, reasoning that the language, prior case law, and logic supported application of a theoretical time period.⁴⁸

Second, the same court ruled that the period of restoration would be limited to the length of time necessary to rebuild the WTC on an “as was” basis.⁴⁹ The court rejected Silverstein’s argument that its lease requirement to rebuild the WTC complex in compliance with any present or future laws or ordinances allowed it to extend the period of restoration for the additional time it would cost to rebuild a WTC that was “safe, modern, and politically palatable.”⁵⁰ The court found that the lease requirement did not impose additional obligations on the insurers and that the policies did not insure “against technological change and shifts in the political winds.”⁵¹

Finally, the court held that evidence relating to the post-9/11 altered commercial real estate market, namely, rental market rates and vacancy statistics, was relevant and thus could be considered by the appraisal panel.⁵² The court acknowledged that such data would undoubtedly reflect a changed commercial real estate market in New York City.⁵³ The court said that the appraisal panel was entitled to give the evidence whatever weight it believed appropriate.⁵⁴

44. *SR Int’l Bus. Ins. Co. v. World Trade Ctr. Props., LLC*, No. 01 Civ. 9291(JSM), 2002 WL 1905968, at *3 (S.D.N.Y. Aug. 19, 2002).

45. *Id.* at *6.

46. *SR Int’l Bus. Ins. Co. v. World Trade Ctr. Props., LLC*, No. 01 Civ. 9291(MBM), 2005 WL 827074, at *3 (S.D.N.Y. Feb. 15, 2005).

47. *Id.* at *4.

48. *Id.* at *5–9.

49. *SR Int’l Bus. Ins. Co. v. World Trade Ctr. Props., LLC*, No. 01 Civ. 9291HB, 2006 WL 3073220, at *6 (S.D.N.Y. Oct. 31, 2006).

50. *Id.* at *1, *5.

51. *Id.* at *10. In a later ruling, the court determined that evidence relating to the rebuilding of a structurally different WTC from the one that stood on September 11, 2001, was not relevant and, accordingly, could not be considered by the appraisal panel. *See SR Int’l Bus. Ins. Co. v. World Trade Ctr. Props., LLC*, No. 01 Civ. 9291HB, 2007 WL 519245, at *2 (S.D.N.Y. Feb. 16, 2007).

52. *SR Int’l Bus. Ins. Co.*, 2007 WL 519245, at *2.

53. *Id.*

54. *Id.*

B. Building Tenants

1. Retail Tenants

For a building owner, the period of restoration is the theoretical time period to repair or rebuild the owner's building. However, does the same period of indemnity apply to tenants or others occupying space in the building? The WTC tenants thought so and argued that the WTC was a unique property and so the period of restoration should run until the WTC could be rebuilt—a period of many years. Their insurers, on the other hand, argued that the period of restoration ended when the insureds could resume operations at another suitable location. The courts uniformly sided with the insurers.⁵⁵

The leading case was *Duane Reade, Inc. v. St. Paul Fire & Marine Insurance Co.*⁵⁶ Duane Reade owned 200 drugstores in and around New York City, with its single most profitable store located in the main concourse of the WTC.⁵⁷ After the destruction of the WTC, Duane Reade sought to recover business interruption losses under its policy, which defined the period of restoration as “such length of time as would be required with the exercise of due diligence and dispatch to rebuild, repair, or replace such property that has been destroyed or damaged.”⁵⁸ Duane Reade claimed that the period of restoration was the actual time that would be “required to restore Duane Reade’s operations to the kind, quality, and level which existed at the WTC store prior to the terrorist attack,” which, in effect, was “the time necessary to rebuild the complex which will replace the [WTC].”⁵⁹ St. Paul, on the other hand, argued that the period of restoration ended when Duane Reade could have restored operations at a location other than the WTC.⁶⁰

The Second Circuit held that the period of restoration extended only for the hypothetical time it would reasonably take Duane Reade to rebuild or replace its WTC store at another suitable location.⁶¹ The appeals

55. See, e.g., *In re Cosmetics Plus Group, Ltd.*, 379 B.R. 464 (S.D.N.Y. 2007) (Cosmetics Plus store in WTC concourse); *Children’s Place Retail Stores v. Fed. Ins. Co.*, 829 N.Y.S.2d 500 (App. Div. 2007) (clothing store in WTC’s main concourse); see also *Royal Indem. Co. v. Retail Brand Alliance, Inc.*, 822 N.Y.S.2d 268 (App. Div. 2006) (Brooks Brothers clothing store at One Liberty Plaza).

56. 411 F.3d 384 (2d Cir. 2005).

57. *Id.* at 387.

58. *Id.*

59. *Id.* (quoting *Duane Reade, Inc. v. St. Paul Fire & Marine Ins. Co.*, 261 F. Supp. 2d 293 (S.D.N.Y. 2003)).

60. *Id.* St. Paul paid Duane Reade \$9.8 million to cover nine months of lost profits “to locate, furnish and open a new drug store” plus an additional twelve months of profits to compensate for the lowered profits Duane Reade was likely to receive once its new store opened. *Id.*

61. *Id.* at 398.

court rejected the trial court's determination that the period of restoration ended when Duane Reade could resume "functionally equivalent operations," reasoning that the trial court effectively rewrote the policy and rendered the policy's extended period of indemnity coverage superfluous.⁶² Additionally, the Second Circuit held that the trial court improperly tied the period of restoration to the specific site of Duane Reade's former store at the WTC.⁶³ The appeals court reasoned that the policy "ma[de] no reference to the WTC store or . . . [to] any specific property other than Duane Reade's main headquarters, which [wa]s listed on the . . . declarations page."⁶⁴ Hence, the court found nothing in the policy that supported Duane Reade's claim that the policy provided site-specific coverage for its WTC store.⁶⁵

In another case involving a WTC retail tenant, the court in *Retail Brand Alliance v. Factory Mutual Insurance Co.*⁶⁶ followed *Duane Reade* and found that the period of restoration ended when the insured could resume operations at another location and not when the WTC could be rebuilt. Retail Brand Alliance (RBA) operated three retail women's clothing stores in the underground mall in the WTC complex as part of a chain of 600 stores across the country.⁶⁷ After the WTC was destroyed, RBA sought recovery of business interruption losses for the theoretical period of time reasonably necessary to replace its three WTC stores "at a location with a sales environment that is comparable to the one which existed at the WTC" or, if none, the hypothetical period of time to rebuild the WTC.⁶⁸ The court rejected RBA's proffered interpretation and found, as Factory Mutual contended, "that the Period of Liability [wa]s the hypothetical period of time in which [the insured] would be able to replace its [WTC] stores with

62. *Id.* at 392-93. Specifically, the court noted that the extended period of indemnity coverage "provide[d] additional coverage for the likely event that Duane Reade will continue to suffer losses due to its business interruption after it reopens the WTC store," guaranteeing it "its pre-9/11 profits until the earlier of when Duane Reade can restore business at its WTC store to the condition it would have been in had the WTC not been destroyed or twelve months after the Restoration Period ends." *Id.*

63. *Id.* at 394.

64. *Id.* (emphasis in original).

65. *Id.* at 395.

66. 489 F. Supp. 2d 326 (S.D.N.Y. 2007).

67. *Id.* at 328. The Factory Mutual policy provided business interruption coverage during the "period of liability," which was defined as the period

a) starting from the time of physical loss or damage of the type insured against; and b) ending when with due diligence and dispatch the building and equipment could be: (i) repaired or replaced; and (ii) made ready for operations, under the same or equivalent physical and operating conditions that existed prior to the damage.

Id. at 329.

68. *Id.*

reasonably equivalent stores . . . in a reasonably equivalent location.”⁶⁹ The court rejected RBA’s claim that RBA’s interest in “increased foot traffic, entrenched customer base, or superior location” enjoyed by its stores at the WTC was protected by the business interruption clause.⁷⁰ As in *Duane Reade*, the court found that the period of liability clause did not tie coverage to the site-specific restoration of each of RBA’s more than 600 stores.⁷¹

Thus, under *Duane Reade* and *Retail Brand Alliance*, a retail tenant’s business interruption coverage is not site-specific absent some specific reference to a particular location in the policy.

2. Nonretail Tenants

Like the retail tenants, nonretail tenants of the WTC also claimed that the period of restoration extended until the WTC could be rebuilt. In several cases, the courts found, as in the cases involving retail tenants, that the period of restoration ended when the insured could resume operations at another suitable location and not when the WTC could be rebuilt.

*Streamline Capital LLC v. Hartford Casualty Insurance Co.*⁷² is one example. Streamline provided securities traders, brokers, and dealers with technological and computer management facilities in the WTC. After those facilities were destroyed, Streamline sought coverage for property damage and time element losses.⁷³ Streamline argued that the period of restoration for business income coverage should extend to the period of time required to replace the WTC; thus, it was entitled to recover for the maximum allowed under the policy, which was twelve months and thirty days.⁷⁴ The court, however, rejected that argument, reasoning that the word *premises*

69. *Id.* at 329–30.

70. *Id.* at 331–33. The court determined that the period of liability was tied to the condition of the policyholder’s property, not the condition of the policyholder’s operations. *Id.* at 331. The court reasoned that it “would be nonsensical to interpret the Period of Liability as extending until the building and equipment are restored to the same ‘sales environment’ or ‘profit-earning potential,’ as these conditions are irrelevant to the operation of building and equipment.” *Id.*

71. *Id.* at 334. The court found that the policy was “a general one that cover[ed] hundreds of retail stores and contemplate[d] the possibility that stores would be rebuilt in new locations.” *Id.* RBA’s stores were not specifically named in the policy, but they were each listed on a schedule that was referred to in Appendix A of the policy. *Id.* at 333. RBA argued that the only reason the stores were not listed in the policy was because the list of locations was too long to be included in the policy’s declaration page. *Id.* at 333–34. Even accepting this as true, the court concluded that it did not support RBA’s position that the policy extended business interruption coverage until the time its stores were rebuilt at their original locations. *Id.* at 334.

72. No. 02 CIV. 8123(NRB), 2003 WL 22004888 (S.D.N.Y. Aug. 25, 2003).

73. *Id.* at *1.

74. *Id.* at *7. The Hartford policy limited the loss of business income that occurred “within 12 consecutive months after the date of direct physical loss or damage.” *Id.* at *2 n.2. The policy also provided “extended business income” coverage for up to thirty days. *Id.*

in the phrase *property at the described premises* in the period of restoration clause meant Streamline's office suite.⁷⁵ Thus, the court found that the business income coverage was "dependent only on replacing what [wa]s necessary to resume . . . operations," namely, Streamline's business personal property and "not a specific office at a specific location."⁷⁶

A similar result can be seen in *Lava Trading Co. v. Hartford Fire Insurance Co.*⁷⁷ Lava Trading, which had its offices and a data center in the WTC, sold computer programs to assist in the electronic trading of equities in various markets.⁷⁸ Lava Trading also maintained a backup location at 75 Broad Street, which was not destroyed. After the WTC was destroyed, Lava Trading briefly set up temporary office space at another location and at its backup location.⁷⁹ By October 12, 2001, Lava had resumed operations.⁸⁰ In December 2001, Lava signed a lease for its new permanent office space; and by April 8, 2002, the company had moved to that location but kept its data center at 75 Broad Street.⁸¹ Lava established a backup data center in Connecticut sometime after October 2002.⁸² The Hartford policy defined the *period of restoration* as ending "when the property at the described premises should be repaired, rebuilt or replaced with reasonable speed and similar quality."⁸³ Hartford determined that Lava's operations were suspended from September 11, 2001, through October 31, 2001, and paid Lava its measure of the loss during that period.⁸⁴ Lava, on the other hand, "assert[ed] that its business was not fully restored until a new back up facility was completed in October 2002."⁸⁵

The court found Hartford's period of restoration language unambiguous and concluded that the period of restoration ended, at the latest, on April 30, 2002, when Lava moved into its new permanent office space.⁸⁶ The court reasoned that the phrase *property at the described premises* meant the property in Lava's WTC offices.⁸⁷ Thus, the court concluded that the period of restoration ended when the property at Lava's WTC offices "should have been repaired, rebuilt or replaced with reasonable speed and similar quality."⁸⁸ As in *Retail Brand Alliance* and *Duane Reade*, the court

75. *Id.* at *9.

76. *Id.*

77. 365 F. Supp. 2d 434 (S.D.N.Y. 2005).

78. *Id.* at 437.

79. *Id.*

80. *Id.*

81. *Id.* at 437-38.

82. *Id.* at 438.

83. *Id.* at 439.

84. *Id.* at 438.

85. *Id.*

86. *Id.* at 440.

87. *Id.*

88. *Id.*

disagreed with Lava's contention that the period of restoration should be measured by "the time needed for the policyholder to resume functionally equivalent operations," whether at its former location or elsewhere.⁸⁹

Where, however, the policy includes language indicating that the coverage was tied to the WTC location and the nonretail tenant's business depended on the existence of the real property at the WTC, courts in two cases found that the period of restoration ended when the WTC could be rebuilt.

The first of these cases was *International Office Centers Corp. v. Providence Washington Insurance Co.*⁹⁰ There, International Office Centers Corporation (IOC) had provided executive office space in the WTC since the date the WTC opened in 1979.⁹¹ Its own office was also located in the WTC.⁹² After the destruction of the WTC, IOC sought coverage for its property damage and business interruption losses from its insurer, Providence Washington.⁹³ Under the policy, the period of restoration ended on the earlier of "(1) The date when the property at the described premises should be repaired, rebuilt or replaced with reasonable speed and similar quality; or (2) The date when the business is resumed at a new permanent location."⁹⁴ IOC argued that the period of restoration ended when its office at the WTC could be replaced at the replacement WTC.⁹⁵ Providence Washington, on the other hand, argued that the period of restoration ended when IOC's office could be replaced at another location.⁹⁶

The court found that the correct answer turned on the meaning of the phrase *property at the described premises*.⁹⁷ The court observed that the described premises as listed in the declarations was "One World Trade Center, New York, NY. . . ."⁹⁸ Thus, the court reasoned that the period of restoration must end when the WTC should be rebuilt or replaced.⁹⁹ The court distinguished *Duane Reade* and *Streamline Capital*, reasoning that IOC's operations were dependent on replacing "a specific office at a specific location" and that the WTC location was the essence of IOC's business.¹⁰⁰ The court also concluded that the reference to a "new permanent location" in the second possible end date in the *period of restoration*

89. *Id.* at 443.

90. No. 3-04-CV-990, 2005 WL 2258531 (D. Conn. Sept. 16, 2005).

91. *Id.* at *1.

92. *Id.*

93. *Id.*

94. *Id.* at *2.

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.* at *5.

99. *Id.*

100. *Id.* at *4.

definition strongly suggests that the term *property at the described premises* is geographically limited to the specific property described in the declarations, i.e., the WTC.¹⁰¹

*Zurich American Insurance Co. v. ABM Industries, Inc.*¹⁰² was the second case in which a court found that the scope of business interruption coverage was tied to the rebuilding of the WTC. ABM provided janitorial, lighting, and engineering services in the common areas of the WTC.¹⁰³ It also provided janitorial services for virtually all of the WTC tenants and operated a call center through which it provided WTC tenants with lighting and engineering services.¹⁰⁴ The Zurich policy defined the period of recovery for business interruption as starting on the date of loss and ending when the damaged or destroyed property could be rebuilt, repaired, or replaced with the exercise of due diligence and dispatch.¹⁰⁵ ABM argued that the destroyed property referred to the WTC.¹⁰⁶ Zurich, on the other hand, argued that the period of recovery ended when ABM's customers (i.e., the WTC tenants) relocated their businesses.¹⁰⁷

The court agreed with ABM. The court distinguished *Duane Reade* and *Streamline Capital* because the insured property in those cases was the insured's personal property at the WTC, not the WTC itself, which was the case with ABM.¹⁰⁸ The court also reasoned that ABM's business was fundamentally different than that of either Duane Reade or Streamline Capital because "[u]nlike Duane Reade and Streamline Capital, ABM cannot simply relocate to another building and carry on its business"—its business was "fundamentally connected to its use of the common space" at the WTC.¹⁰⁹

101. *Id.* The court also noted that the policy provided that the amount of business income is subject to reduction "to the extent [IOC] can resume [its] 'operations,' in whole or in part, by using damaged or undamaged property (including merchandise or stock) at the described premises or elsewhere." *Id.* at *5. The court found that this provision required IOC to mitigate its damages. But the court found that the key term was *operations*, noting that if it meant "leasing temporary executive office space," "the resumption time period will be much shorter than if the term is defined as the leasing of temporary executive office space at the [WTC]." *Id.* The court concluded that it was the latter, reasoning that IOC served as the sole provider of temporary executive office space from the date the WTC opened until September 11, 2001. *Id.* The court reasoned that IOC's only place of business was the WTC and that its business model was dependent on its location in the WTC. Therefore, the court found the term *operations* to mean the leasing of temporary executive office space at the WTC. *Id.*

102. No. 01 Civ. 11200(JSR), 2006 WL 1293360 (S.D.N.Y. May 11, 2006).

103. *Id.* at *1.

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.* at *2.

108. *Id.*

109. *Id.* There remained a question of fact as to the specific length of the period of recovery and whether ABM would have lost income during that entire period because ABM's contract to service the WTC was set to expire in mid-January 2004. The court observed that

These cases illustrate that the particular policy language likely will determine whether the period of restoration will be tied to the damaged building or to the insured's property. In the absence of any specific language, the period of restoration ends when the insured tenant could resume operations at another suitable location and not when the leased premises could be rebuilt. However, where the policy includes language indicating that the coverage was tied to the leased location and the tenant's business depended on the existence of the real property at that location, the period of restoration may end when the leased premises could be rebuilt.

C. *Nearby Businesses*

The owner and tenants of the WTC buildings were not the only ones who sustained business income losses. Owners and tenants of nearby buildings also sought coverage for their business income losses.

A nearby apartment complex sought coverage for its losses in *Broad Street, LLC v. Gulf Insurance Co.*¹¹⁰ Broad Street owned and operated 25 Broad Street, a building three blocks from the WTC site.¹¹¹ The building included 345 residential units and three commercial spaces.¹¹² The building was completely shut down from September 11 until September 18, 2001, "at which time tenants were permitted back into their units."¹¹³ Broad Street sought coverage for its business income losses from Gulf, its commercial property insurer, claiming that the losses were caused by smoke damage and interrupted utility service.¹¹⁴ Gulf argued, and the appellate court agreed, that the period of restoration, which began on the date of loss, ended on September 18, the date when tenants returned to the building.¹¹⁵ The court reasoned that there must be a complete cessation of operations for business interruption coverage to be triggered and that complete cessation ended when tenants were allowed to return to the building.¹¹⁶ The court rejected Broad Street's argument that the period of restoration extended beyond September 18 because it was not able to provide a habitable environment for its tenants, reasoning that the pe-

to recover for losses after that date, ABM would have to establish that it was more probable than not that the contract would have been renewed. *Id.* at *3.

110. 832 N.Y.S.2d 1 (App. Div. 2006).

111. *Id.* at 2.

112. *Id.*

113. *Id.*

114. *Id.* The Gulf policy provided coverage for "the actual loss of Business Income you sustain due to the necessary suspension of your 'operations' during the 'period of restoration.'" *Id.*

115. *Id.* at 2-3. The policy's period of restoration ended "when the property at the described premises should be repaired, rebuilt or replaced with reasonable speed and similar quality." *Id.*

116. *Id.* at 4, 6.

riod of restoration is only as long as necessary for Broad Street to resume operations.¹¹⁷

A restaurant owner sought coverage for its business income losses in *Admiral Indemnity Co. v. Bouley International Holding, LLC*.¹¹⁸ There, Bouley owned two adjacent restaurants in lower Manhattan that suffered damage consisting principally of dust and debris and water contamination.¹¹⁹ The restaurants were forced to close for several weeks because they were within the portion of lower Manhattan that was cordoned off by the police.¹²⁰ In addition, the telephone reservation system for the two restaurants was not functional until January 7, 2002.¹²¹ However, one of the two restaurants reopened on September 28, 2001.¹²² And in early October, Bouley contracted with the American Red Cross to provide meals for the Ground Zero workers and earned more than \$5.8 million on this contract.¹²³

Bouley submitted a claim for lost business income between September 11, 2001, and January 7, 2002, when its telephone reservation system for the restaurants was restored.¹²⁴ Admiral, however, claimed that the period of restoration ended on September 28, 2001, when one of the restaurants reopened, not including thirty days of extended business interruption coverage.¹²⁵ Admiral also argued that Bouley sustained no loss because the proceeds from the Red Cross contract exceeded the business income claim.¹²⁶ On summary judgment, the court agreed with Admiral and held that the facilities were or should have been repaired by September 29, and the period of restoration ended at that point.¹²⁷ The court also found that the proceeds from the Red Cross contract should be considered and that Bouley did not incur an actual loss of business income from the date that the Red Cross contract went into effect.¹²⁸ Thus, the principal question remaining for trial was the amount Bouley was entitled to recover under the policy for the period before October 1.¹²⁹

In *Broad Street*, the apartment owner's period of restoration ended when tenants were allowed to return to the building. It did not matter that the

117. *Id.*

118. No. 02 Civ. 9696(HB), 2003 WL 22682273 (S.D.N.Y. Nov. 13, 2003).

119. *Id.* at *1.

120. *Id.*

121. *Id.* at *2.

122. *Id.* at *1.

123. *Id.* at *2.

124. *Id.*

125. *Id.* at *3.

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.* at *4. Admiral also argued that Bouley failed to disclose and actively concealed information about the Red Cross contract. The court found that there were issues of fact that precluded summary judgment on this issue. *Id.*

apartment allegedly was not a habitable environment. In *Bouley*, the restaurant owner's period of restoration ended when the restaurants were or should have been repaired even though the restaurant's telephone reservation system was still inoperable.

D. *Extended Period of Indemnity*

In many cases, an insured's business income will not return to preloss levels immediately upon repair, rebuilding, or replacement of the damaged property. Thus, many business interruption forms provide extended business interruption coverage for a period of time, usually limited, after property has been repaired, rebuilt, or replaced. The ISO business income forms, for example, provide coverage for loss of income for a period that begins on the date the property is actually repaired, rebuilt, or replaced and ends on the earlier of the date that the insured could with reasonable diligence restore its operations to generate its preloss level of business income or thirty days, whichever comes first.¹³⁰

In *Duane Reade*,¹³¹ the Second Circuit examined whether there could be any extended business interruption recovery absent actual replacement of Duane Reade's WTC store. This question arose while the earlier appeal of the district court's period of indemnity ruling was pending and after an appraisal panel found that Duane Reade was entitled to \$4,300,561 for loss under the extended recovery period provision of the policy.¹³² The Second Circuit affirmed the district court's refusal to confirm this portion of the appraisal award because Duane Reade had not actually replaced its WTC store.¹³³ The appeals court found no ambiguity in the extended recovery period provision. Specifically, it read that provision to provide coverage for the actual loss sustained beginning with the commencement of the later of two events: (a) the end of the policy's restoration period or (b) the date

130. See ISO, Business Income (and Extra Expense) Coverage Form CP 00 30 06 07 (2007); ISO, Business Income (Without Extra Expense) Coverage Form CP 00 32 06 07 (2007).

131. 600 F.3d 190 (2d Cir. 2010).

132. The "extended recovery period" provided:

This policy is extended to cover the Actual Loss Sustained by the Assured resulting from interruption of business for such additional length of time as would be required with the exercise of due diligence and dispatch to restore the Assured's business to the condition that would have existed had no loss occurred, commencing with the latter of the following dates: a) the date on which liability of the Company of [sic] loss resulting from interruption of business would terminate if the clause had not been attached to this policy or b) the date on which repair, replacement, or re-building of such part of the property as has been damaged is actually replaced; but in no event for more than twelve months from said later commencement date.

Id. at 201.

133. *Id.*

on which the store is “actually replaced.”¹³⁴ The Second Circuit found the extended recovery period provision inapplicable because Duane Reade’s store had not yet been actually replaced and because the restoration period had not ended.¹³⁵

E. Summary

Catastrophic events like 9/11 and Hurricane Katrina have led to a flurry of judicial opinions interpreting the limits of business interruption coverage. The 9/11 cases reaffirmed the principle that the period of restoration is a theoretical, not the actual, replacement time.¹³⁶

The courts’ principal focus in the 9/11 cases concerned the period of restoration for tenants of the WTC. In these cases, the courts generally found that the period of restoration ended when the tenant could resume operations at another suitable location and not when the WTC could be rebuilt. As *Streamline Capital* and *Lava Trading* illustrate, to resume operations does not require that a business be operating at its preloss level, just that the business be operating again.¹³⁷

However, there was an exception where the policy included language indicating that the coverage was tied to the leased location and the tenant’s business depended on the existence of the real property at that location, such as being the sole provider of executive office space in the WTC or the provider of janitorial services for the WTC’s common spaces. In those instances, the period of restoration was tied to the rebuilding of the leased premises.

IV. REQUIREMENT OF PHYSICAL LOSS OR DAMAGE FOR TIME ELEMENT COVERAGE

Business interruption coverage is triggered if a covered peril causes physical loss or damage to insured property resulting in an interruption of the insured’s operations.¹³⁸ Whether an insured seeking time element coverage suffered the required direct physical loss or damage was an issue in several 9/11 cases.

134. *Id.*

135. *Id.*

136. *See, e.g.*, *Hampton Foods, Inc. v. Aetna Cas. & Sur. Co.*, 843 F.2d 1140, 1143 (8th Cir. 1988); *Beautytuft, Inc. v. Factory Ins. Ass’n*, 431 F.2d 1122, 1124 (6th Cir. 1970); *Vt. Mut. Ins. Co. v. Petit*, 613 F. Supp. 2d 154, 161 (D. Vt. 2009); *Steel Prods. Co. v. Millers Nat’l Ins. Co.*, 209 N.W.2d 32, 38 (Iowa 1973); *Anchor Toy Corp. v. Am. Eagle Fire Ins. Co.*, 155 N.Y.S.2d 600, 603 (Sup. Ct. 1956).

137. This principle has been followed in subsequent non-9/11 cases. *See, e.g.*, *Shaw Mortgage Corp. v. Peerless Ins. Co.*, 615 F. Supp. 2d 1172, 1176–77 (S.D. Cal. 2009); *Cincinnati Ins. Co. v. Washer & Refrigeration Supply Co.*, No. 07-0330-CG-B, 2008 WL 4600560, at *10 (S.D. Ala. Aug. 22, 2008).

138. *See generally* Peter E. Kanaris, *Analytical Approach to Business Interruption, Extra Expense, and Civil Authority Coverage Issues*, 43 TORT TRIAL & INS. PRAC. L.J. 113, 114 (2007).

In *Schlam Stone & Dolan, LLP v. Seneca Insurance Co.*,¹³⁹ a trial court judge found that “the presence of noxious particles, both in the air and on surfaces in [the insured]’s premises, . . . constitute[d]” physical damage to property. Schlam Stone & Dolan, a law firm in lower Manhattan, sought coverage for business income losses sustained from September 11, 2001, until the end of September 2001.¹⁴⁰ Seneca denied coverage, claiming that the business interruption losses were caused by the excluded peril of an order of civil authority and not by any direct damage to Schlam’s premises.¹⁴¹ In the subsequent lawsuit, the court agreed that there was no coverage based on the civil authority exclusion for losses sustained from September 11 through September 16, 2001, the period of time that the City of New York ordered lower Manhattan closed to all nonessential personnel.¹⁴² However, the court denied Seneca’s summary judgment motion regarding losses occurring after that date. Specifically, the court found that Schlam presented evidence that even though employees could return to the offices on September 17, dust and other particles remained in the air and on surfaces, making it difficult for employees to remain in their offices for long periods of time.¹⁴³ Curiously, the court relied on the definition of *property damage* from the liability portion of the Seneca policy in concluding that the presence of noxious particles in the air and on surfaces in Schlam’s premises constituted property damage for purposes of the first-party property coverage.¹⁴⁴

Several insureds that sustained no direct physical loss or damage to their own property argued that economic damage was sufficient to trigger their business interruption coverage. These claims, however, were not successful.

139. No. 603009/2002, 2005 WL 600021 (N.Y. Sup. Ct. Mar. 4, 2005).

140. *Id.* at *1.

141. *Id.* at *2. The business interruption coverage provided:

This policy covers the actual business loss sustained by the insured and the expenses necessarily incurred to resume normal business operations resulting from the interruption of business or the untenability of the premises when the building or the personal property is damaged as a direct result of an insured peril.

Id. at *1.

142. *Id.* at *3–4.

143. *Id.* at *4.

144. *Id.* The policy defined *property damage* as

(a) physical injury to or destruction of tangible property which occurs during the policy period, including the loss of use thereof at any time resulting therefrom, or (b) loss of use of tangible property which has not been physically injured or destroyed provided such loss of use is caused by an occurrence during the policy period.

Id. The policy defined *occurrence* as “an accident . . . which results in bodily injury or property damage neither expected nor intended from the standpoint of the insured. . . .” *Id.*

One such case was *Philadelphia Parking Authority v. Federal Insurance Co.*¹⁴⁵ Philadelphia Parking Authority operated parking garages at the Philadelphia International Airport.¹⁴⁶ It sought coverage for its business income losses sustained after the FAA grounded air traffic following the terrorist attack on the WTC.¹⁴⁷ The parking authority claimed that the phrase *direct physical loss or damage* in the Federal policy's business income and extra expense provision was ambiguous because it was unclear whether *direct physical* modified *damage* as well as *loss*, and, therefore, the court should construe the phrase in its favor and read the word *damage* to include economic damage.¹⁴⁸ Federal, however, argued that *direct physical* modified both *loss* and *damage*, and, thus, purely economic damage was not covered.¹⁴⁹

In granting Federal's motion to dismiss without leave to amend, the court took a different approach and found that the parking authority could not meet the requirements of coverage even assuming that economic damage could trigger business interruption coverage. The court reasoned that the policy required that a covered peril must result in some "direct physical loss or damage," which in turn must interrupt the insured's business operations.¹⁵⁰ But the parking authority did not allege that the economic damage for which it sought recovery actually caused the interruption of its business. Instead, as the court observed, the interruption of the parking authority's business caused it economic damage.¹⁵¹ The court concluded that this did not fit the requirements of the plain language of the business income provision, even assuming that *direct physical loss or damage* could be construed to include purely economic damage.¹⁵²

A similar issue arose in *United Airlines, Inc. v. Insurance Co. of the State of Pennsylvania*.¹⁵³ There, United Airlines sought to recover \$1.2 billion in a system-wide loss of income resulting from the September 11 terror-

145. 385 F. Supp. 2d 280 (S.D.N.Y. 2005).

146. *Id.* at 281.

147. *Id.* at 282.

148. *Id.* at 286. The policy provision read:

We will pay for the loss of Business Income and Extra Expense which you incur due to the actual interruption of your operations during the period of indemnity. This actual interruption of your operations must be caused by direct physical loss or damage caused by a covered cause of loss to: A. covered property . . .

Id. at 282.

149. *Id.* at 286.

150. *Id.* at 287.

151. *Id.*

152. *Id.* The court applied the same reasoning to the parking authority's claim under the policy's contingent business premises provision. That provision also required that the interruption of operations take place "as a result of direct physical loss or damage." *Id.*

153. 385 F. Supp. 2d 343 (S.D.N.Y. 2005).

ist attack.¹⁵⁴ United Airlines' policy with Insurance Company of the State of Pennsylvania (ISOP) provided coverage for business interruption losses caused by damage to or destruction of insured locations from terrorism.¹⁵⁵ United Airlines argued that there was coverage because the word *damage* without any adjective in the insuring agreement did not require "physical" damage; and even if physical damage was required, United suffered physical damage because its ticket counter in the WTC was destroyed.¹⁵⁶

In granting summary judgment to ISOP, the court first rejected United Airlines' physical damage argument, finding that the policy language was clear and unambiguous and required that damage be physical in nature.¹⁵⁷ The court reasoned that particular words or phrases from the insuring agreement could not be read in isolation from other policy provisions, such as the civil authority clause, which extended coverage to "a situation when access to the Insured Locations is prohibited by order of civil authority as a direct result of damage to adjacent premises. . . ."¹⁵⁸ The court concluded that United Airlines' argument that the word *damage* included economic as well as physical damage to insured locations would render the civil authority clause meaningless.¹⁵⁹ The court explained that if United Airlines could "recover for business interruption losses in the absence of any physical damage to an insured Location, there would be no need to 'specifically extend' coverage to cases involving 'damage to an adjacent location.'"¹⁶⁰ Next, the court rejected United Airlines' contention that the "destruction of its ticket counter in the WTC . . . trigger[ed] coverage for system-wide

154. *Id.* at 344.

155. *Id.* at 345. The policy provided:

This policy insures against loss resulting directly from the necessary interruption of business caused by damage to or destruction of the Insured Locations, resulting from Terrorism. . . . This section is specifically extended to cover a situation when access to the Insured Locations is prohibited by order of civil authority as a direct result of damage to adjacent premises, not exceeding, however, two (2) consecutive weeks.

Id.

156. *Id.* at 348. United Airlines also claimed that its gate property at Reagan National Airport was impacted by ash from the terrorist attack on the Pentagon. *Id.*

157. *Id.*

158. *Id.* In addition, the court cited the policy's valuation clause, which provided that loss of gross earnings means "loss resulting directly from the necessary interruption of business caused by damage to or destruction of the Insured Locations. . . ." *Id.*

159. *Id.* at 349.

160. *Id.* The court also concluded that other clauses of the policy supported the requirement of physical damage, including, for example, the gross earnings clause, which stated that "[i]n the event of loss, the Company will be liable for the reduction in gross earnings . . . for only such length of time [needed] to rebuild, repair or replace such part of the Insured Location(s) as has been damaged or destroyed . . .," and the notice of incident clause, which stated that "the Insured must notify the Company within 180 days after an incident of the Insured's intent to either repair or replace Buildings or Contents," suggesting that *rebuild*, *repair*, and *replace* imply that the damage contemplated by the policy is physical in nature. *Id.*

business interruption losses approaching \$1.2 billion,” finding it “untenable because the amount of recovery sought bears no relation to the actual damage suffered at the WTC Insured Location.”¹⁶¹

As *Schlam Stone*, *Philadelphia Parking Authority*, and *United Airlines* demonstrate, there must be physical loss or damage to insured property before there can be any business interruption coverage; purely economic damage does not suffice. Clearly, there was no physical damage at the Philadelphia Parking Authority’s parking garages located approximately one hundred miles away from New York City. In *Schlam Stone*, there was physical damage in the form of dust and debris on surfaces in Schlam’s premises. Although not an issue in the opinion, the period of restoration likely was brief in that case. And although there was physical damage to United Airlines’ WTC ticket counter, that relatively minimal damage did not mean that United could recover \$1.2 billion in system-wide business income losses sustained after 9/11. As the court found, there must be a direct correlation between the amount of recovery and the actual damage suffered.

V. CIVIL AUTHORITY AND INGRESS/EGRESS COVERAGES

Civil authority coverage compensates the insured for the loss of business income that results when an order of civil authority, issued as a direct result of physical damage to a third party’s property, prevents access to the insured’s property.¹⁶² Ingress/egress coverage is similar to civil authority coverage, but it does not require an order of civil authority to trigger coverage; rather, it requires only that physical loss or damage to third-party property prevents ingress to or egress from the insured’s property.¹⁶³ Claims under civil authority and ingress/egress coverages have arisen when access to insured property has been prevented because of weather,¹⁶⁴ civil disturbances,¹⁶⁵ and the 9/11 terrorist attack.

161. *Id.* at 350. The court also found that United Airlines’ position was not supported by policy language requiring a direct correlation between the amount of recovery and the actual damage suffered. *Id.* Similarly, the court found that the policy did not support United Airlines’ claim that accumulation of ash at the carrier’s gates at Reagan National Airport entitled it to business interruption coverage. *Id.* at 351. The court observed that the policy covered business interruption losses “for only such length of time as would be required . . . to rebuild, repair or replace such part of the Insured Location(s) as has been damaged or destroyed” and that there was no evidence indicating whether United Airlines’ gate required rebuilding, repair, or replacement and, if so, for what period of time. *Id.*

162. See generally Schirle, *supra* note 42, at 38; Kanaris, *supra* note 138, at 132.

163. See generally Schirle, *supra* note 42, at 38.

164. See, e.g., *Fountain Powerboat Indus., Inc. v. Reliance Ins. Co.*, 119 F. Supp. 2d 552 (E.D.N.C. 2000) (Hurricane Floyd); *Cleland Simpson Co. v. Fireman’s Ins. Co. of Newark*, N.J., 140 A.2d 41 (Pa. 1958) (Hurricane Diane).

165. See, e.g., *Syufy Enters. v. Home Ins. Co. of Ind.*, No. 94-0756 EMS, 1995 WL 129229 (N.D. Cal. Mar. 21, 1995) (riots following verdict in Rodney King case); *Sloan v. Phoenix of Hartford Ins. Co.*, 207 N.W.2d 434 (Mich. Ct. App. 1973) (riots following Martin Luther

A. New York–Based Claims

The extent of civil authority coverage for an insured in lower Manhattan was at issue in *Abner, Herrman & Brock, Inc. v. Great Northern Insurance Co.*¹⁶⁶ There, an order of civil authority prohibited access to Abner, Herrman & Brock's (AHB's) investment and brokerage firm from September 11 through September 14.¹⁶⁷ Also, starting on September 17, "vehicular traffic was restricted in the area, but pedestrian access was permitted, and public transport[ation] was available."¹⁶⁸ AHB claimed that it suffered a business income loss because the traffic restrictions made it difficult for its personnel to get to work and to attend meetings outside the office.¹⁶⁹ AHB sought coverage under its policy's civil authority provision for the four days when access to its premises was prohibited and for an additional twenty-five days when there were traffic restrictions.¹⁷⁰ The court ruled, as Great Northern argued, that the policy covered only losses for the four days that the civil authority actually prohibited access to the insured's offices but not for the subsequent days when traffic was restricted because access to the premises was not prohibited.¹⁷¹

In *Penton Media, Inc. v. Affiliated FM Insurance Co.*,¹⁷² the court addressed the applicability of civil authority coverage to a claim by the operator of a trade show that was canceled after 9/11. After the terrorist attack, and under the threat of condemnation, the Federal Emergency Management Administration (FEMA) entered into a lease agreement with New York City's Javits Center to use the center as a base of operations for the disaster relief efforts.¹⁷³ As a result, Penton canceled a trade show scheduled there for October 1–7 and sought coverage under the civil authority provision of its policy.¹⁷⁴ The civil authority coverage applied when access to a

King, Jr. assassination); *Adelman Laundry & Cleaners, Inc. v. Factory Ins. Ass'n*, 207 N.W.2d 646 (Wis. 1973) (1967 Milwaukee civil rights riots).

166. 308 F. Supp. 2d 331 (S.D.N.Y. 2004).

167. *Id.* at 333.

168. *Id.*

169. *Id.*

170. *Id.* at 334. The civil authority coverage provided that Great Northern

will pay for the actual business income loss you incur due to the actual impairment of your operations; and extra expense you incur due to the actual or potential impairment of your operations, when a civil authority prohibits access to your premises or a dependent business premises.

Id. The policy also limited the civil authority coverage to thirty consecutive days. *Id.*

171. *Id.* at 335.

172. 245 F. App'x 495 (6th Cir. 2007), *aff'g* No. 1:03 CV 2111, 2006 WL 2504907 (N.D. Ohio Aug. 29, 2006).

173. *Penton Media*, 2006 WL 2504907, at *6.

174. *Penton Media*, 245 F. App'x at 497.

described location was prohibited by order of civil authority.¹⁷⁵ Affiliated denied coverage, claiming that there was no order of civil authority and that the Javits Center was not a described location because it did not appear on the policy's location schedule, which included only Penton's thirty-one office locations.¹⁷⁶ Penton challenged the denial, claiming that the words *described location* in the civil authority provision reasonably referred to all locations described in the policy, including the "supplier and customer locations" in the policy's contingent business interruption (CBI) provision.¹⁷⁷

In granting summary judgment to Affiliated, the trial court found that the reference to described locations in the civil authority provision did not include the supplier and customer locations referenced in the CBI coverage.¹⁷⁸ The trial court also found that there was no order of civil authority, concluding that based on the dictionary definition of *order*, an order of civil authority required something authoritative or mandated.¹⁷⁹ The court found that the execution of the lease agreement, even under the threat of condemnation, was not an order of civil authority.¹⁸⁰ On appeal, the U.S. Court of Appeals for the Sixth Circuit affirmed, finding that Penton's argument that the words *described locations* in the civil authority provision applied to all locations described in the policy, including locations designated specifically for a different coverage, was "a strained one."¹⁸¹ In light of this ruling, the court did not address the trial court's ruling that the FEMA takeover of the Javits Center was not an "order of civil authority."¹⁸²

175. *Id.* at 498. The civil authority coverage provided:

Coverage is provided when access to the described location is prohibited by order of civil authority. This order must be given as a direct result of physical loss or damage from a peril of the type insured by this policy. The company will be liable for the actual amount of loss sustained at such location for a period of up to 30 consecutive days from the date of this action.

Id.

176. *Id.*

177. *Id.* The policy declarations also included, under "Special Terms and Conditions," the provision regarding CBI coverage, which Affiliated inserted pursuant to Penton's request for business interruption coverage for its trade show locations. *Id.* The CBI coverage extended the business interruption coverage to "loss . . . resulting from direct physical loss or damage insured by this policy occurring at each supplier and customer location(s) list[ed] below. . . ." *Id.* at 499. That list included only one item: "Coverage is provided for supplier and customer locations situated in: the fifty (50) United States; Commonwealth of Puerto Rico; Virgin Islands; and Canada." *Id.*

178. *Penton Media*, 2006 WL 2504907, at *5.

179. *Id.* at *6.

180. *Id.*

181. *Penton Media*, 245 F. App'x at 500.

182. *Id.*

B. Claims Outside of New York

Immediately after the September 11 attack, the Federal Aviation Administration (FAA) issued an order grounding all air traffic.¹⁸³ Transportation Secretary Norman Y. Mineta testified that he issued this unprecedented order because of “the risk of additional flights that might be used as terrorist weapons.”¹⁸⁴ This FAA ground stop order was lifted on September 14, 2001.¹⁸⁵ Relying on the order, policyholders located throughout the country sought to recover for their business income losses under their civil authority or ingress/egress coverage.

1. Hotel Claims

In *730 Bienville Partners Ltd. v. Assurance Co. of America*,¹⁸⁶ the insured’s two New Orleans–based hotels received a significant number of guest cancellations after the FAA ground stop order.¹⁸⁷ Bienville sought coverage for its lost income under the policy’s civil authority provision, which covered time element losses “caused by action of civil authority that prohibits access to your premises due to direct physical loss of or damage to property.”¹⁸⁸ The U.S. Court of Appeals for the Fifth Circuit affirmed summary judgment in favor of Assurance, finding that the FAA order did not prohibit access to Bienville’s hotels.¹⁸⁹ The appeals court found that *prohibit* meant

183. There were several orders issued by the FAA on September 11, culminating with the FAA’s issuance of the following Notice to Airmen, which halted takeoffs and landings at all airports in the United States:

SPECIAL NOTICE—DUE TO EXTRAORDINARY CIRCUMSTANCES AND FOR REASONS OF SAFETY. ATTENTION ALL AIRCRAFT OPERATORS, BY ORDER OF THE FEDERAL AVATION [sic] COMMAND CENTER, ALL AIRPORTS/AIRDROMES ARE NOT AUTHORIZED FOR LANDING AND TAKEOFF. ALL TRAFFIC INCLUDING AIRBORNE AIRCRAFT ARE ENCOURAGE [sic] TO LAND SHORTLY.

See, e.g., *Phila. Parking Auth. v. Fed. Ins. Co.*, 385 F. Supp. 2d 280 (S.D.N.Y. 2005).

184. *Paradies Shops, Inc. v. Hartford Fire Ins. Co.*, No. 1:03-CV-3154-JEC, 2004 WL 5704715, at *2 (N.D. Ga. Dec. 15, 2004) (citing *Airport Security: Hearing Before the S. Comm. on Commerce, Science, and Transportation*, 107th Cong. 13 (statement of Norman Y. Mineta) (Sept. 20, 2001)).

185. *United Airlines, Inc. v. Ins. Co. of the State of Pa.*, 385 F. Supp. 2d 343, 346 (S.D.N.Y. 2005).

186. 67 F. App’x 248 (5th Cir. 2003).

187. *Id.* at 1. In fact, one of the two hotels closed from September 18 to September 26. *Id.*

188. The policy’s civil authority extension read:

We will pay for the actual loss of “business income” you sustained and necessary “extra expense” caused by action of civil authority that prohibits access to your premises due to direct physical loss of or damage to property, other than that at the “covered premises” caused by or resulting from any Covered Cause of Loss. This coverage will apply for a period of up to 4 consecutive weeks from the date of that action.

Id.

189. *Id.* at 2.

“to forbid by authority or command” and that the FAA order did not forbid any person from accessing Bienville’s hotels.¹⁹⁰ The court reasoned that no customer was actually prevented from getting to New Orleans because there were other means of transportation, namely, trains and automobiles, available.¹⁹¹

The U.S. Court of Appeals for the Tenth Circuit reached a similar conclusion in *Southern Hospitality, Inc. v. Zurich American Insurance Co.*¹⁹² There, Southern managed a number of hotels throughout the United States that it claimed were highly dependent on air travel.¹⁹³ When hotel revenues fell after 9/11, Southern sought coverage under its civil authority provision.¹⁹⁴ Southern argued that this coverage applied because the FAA order prevented customers from coming to its hotels by air.¹⁹⁵ The appeals court affirmed summary judgment in favor of Zurich, finding that the FAA’s order did not prohibit access to Southern’s hotels. Although the court acknowledged that the FAA ground stop order was an “action of civil authority,” it concluded that there must be a nexus between the action of civil authority and the suspension of the insured’s business.¹⁹⁶ The court found that the nexus was absent because the FAA order “did not itself prevent, bar, or hinder access to Southern Hospitality’s hotels.”¹⁹⁷

2. Airport Claims

In *Philadelphia Parking Authority*,¹⁹⁸ the operator of the parking garages at the Philadelphia International Airport sought civil authority coverage for its business income losses sustained after the FAA ground stop order.¹⁹⁹

190. *Id.*

191. *Id.*

192. 393 F.3d 1137 (10th Cir. 2004).

193. *Id.* at 1138.

194. *Id.* The civil authority provision stated:

Civil Authority. We will pay for the actual loss of Business Income you sustain and necessary Extra Expense caused by action of civil authority that prohibits access to the described premises due to direct physical loss of or damage to property, other than at the described premises, caused by or resulting from any Covered Cause of Loss. This coverage will apply for a period of up to two consecutive weeks from the date of that action.

Id. at 1139.

195. *Id.*

196. *Id.*

197. *Id.* at 1141. Southern Hospitality also argued that there was coverage under the policy’s CBI provision that covered losses caused by damage to “dependent property,” as defined by the policy. *Id.* at 1138. The district court and appeals court concluded there was no coverage under this provision because Southern Hospitality could not identify any dependent property that was damaged by a covered cause of loss. *Id.* at 1142.

198. 385 F. Supp. 2d 280 (S.D.N.Y. 2005) (see discussion at notes 145–52 and accompanying text concerning scope of property damage).

199. *Id.* at 281–82. The Federal policy’s civil authority clause provided coverage for “the loss of Business Income and Extra Expenses which you incur due [to] the actual interruption

The parking authority alleged that the FAA's order "effectively prevented ingress and egress of passengers into terminal areas of the Philadelphia International Airport and [the] Airport Parking Facilities."²⁰⁰ However, the district court dismissed the parking authority's claim, reasoning that although the FAA order may have "temporarily obviated the need for . . . [airport] parking services, it did not prohibit access to [the parking authority]'s garages."²⁰¹

A similar claim was made in *Paradies Shops, Inc. v. Hartford Fire Insurance Co.*²⁰² Paradies operated gift shops, newsstands, and retail stores in fifty-one airport terminals around the country.²⁰³ Paradies sought civil authority coverage for losses sustained during the FAA ground stop order.²⁰⁴ Paradies claimed that the FAA ground stop order effectively prohibited access to its airport shops because "there was no reason for the traveling public to go to the airport" and that the order was issued because of the terrorist-inflicted damage.²⁰⁵ In granting summary judgment to Hartford, the court found that the FAA order was not "issued as the direct result of the physical damage sustained by the [WTC], the Pentagon, or the field in [rural] Pennsylvania."²⁰⁶ The court also found that the FAA order did not prohibit access to Paradies' premises even though, as Paradies argued, "there was no reason for the traveling public to go to the airport."²⁰⁷ The court found that the word *prohibit* was clear and unambiguous and meant "to forbid by authority or

of your operations during the period of indemnity when a civil authority prohibits access to your covered property because of direct physical loss or damage caused by a covered cause of loss to property not otherwise excluded in the vicinity of your covered property.'

transfer *Id.* at 282 up.

200. *Id.* at 289.

201. *Id.* The court denied the parking authority leave to amend because it concluded that any amendment would be futile. *Id.*

202. No. 1:03-CV-3154, 2004 WL 5704715 (N.D. Ga. Dec. 15, 2004).

203. *Id.* at **1, 3.

204. *Id.* at *3. The civil authority coverage provided:

Coverage: This insurance is extended to apply to Business Income and Extra Expense loss when access to insured premises is specifically prohibited by order of a civil authority as the direct result of a Covered Cause of Loss to property away from your premises. This coverage will apply up to 30 consecutive days from the date of the civil action.

Id. at *1.

205. *Id.* at *2. Paradies relied on Transportation Secretary Norman Mineta's testimony before the Senate Committee on Commerce, Science, and Transportation, asserting that the decision to order the national ground stop was based in part on the fear of additional terrorist attacks and in part on the terrorist attack that had already occurred. *Id.*

206. *Id.* at *6. The court reasoned that Transportation Secretary Mineta specifically stated that he issued the ground stop order to prevent, protect against, or avoid future damage and not as a "direct result" of already existing damage. *Id.* at *7.

207. *Id.*

command.”²⁰⁸ The court saw “no reasonable means of construing Secretary Mineta’s order to ground all aircraft as an order specifically forbidding access to [Paradies’] premises.”²⁰⁹

In *City of Chicago v. Factory Mutual Insurance Co.*,²¹⁰ the city sought coverage under an ingress/egress provision for business income losses at its three airports (O’Hare, Midway, and Meigs Field) sustained as a result of the FAA ground stop order. The ingress/egress provision covered business interruption losses where ingress to or egress from the insured’s property was prevented because of “physical damage of the type insured against.”²¹¹ Noting the absence of the word *direct* in the ingress/egress provision, the city argued that the FAA order was indirectly caused by terrorist-inflicted physical damage to the WTC and the Pentagon.²¹² The court, however, rejected the city’s argument, reasoning that it ignored the fact that the ingress/egress provision required that the damage be of the type “not excluded by this policy” and that “indirect or remote loss or damage” was excluded by the policy.²¹³ The court found that although the FAA’s order was indirectly caused by terrorist-inflicted damage, this damage was excluded by the policy because it was “indirect and remote damage” that had been inflicted upon the [WTC] and the Pentagon.”²¹⁴

The owner of McCarran International Airport in Las Vegas made a similar ingress/egress and civil authority claim in *County of Clark v. Factory Mu-*

208. *Id.* at *7 & n.4 (citing Merriam-Webster online dictionary).

209. *Id.* Paradies also argued that access to its premises was prohibited by order of individual airport authorities at each of the airports where Paradies had stores. *Id.* at *8. The court, however, found that the supporting evidence proffered by Paradies, i.e., declarations from general managers of each Paradies store stating that they were informed that the airports were closed, was inadmissible hearsay. *Id.*

210. No. 02 C 7023, 2004 WL 549447 (N.D. Ill. Mar. 18, 2004).

211. The Factory Mutual policy’s ingress/egress coverage provision stated:

This policy will cover the Actual Loss Sustained by the Insured due to the necessary interruption of the Insured’s business due to prevention of ingress to or egress from the Insured’s property, whether or not the premises or property of the Insured shall have been damaged, provided that such interruption must be a result of physical damage of the type insured against and not excluded by this policy, to the kind of property not excluded by this policy.

Id. at *2.

212. *Id.* at *3.

213. *Id.*

214. *Id.* The court also found that the city’s ingress/egress claim failed because the provision’s “final clause dictate[d] that the prevention of ingress to or egress from the airports must be the result of nonexcluded physical damage ‘to the kind of property not excluded by this policy.’” *Id.* The court observed that “the kind of property covered by the policy include[d] real property in which the City has an insurable interest, ‘or within 1,000 feet’ of such property.” *Id.* In addition, “[b]ecause the damage that indirectly caused the ingress and egress prevention at the airports did not occur at or within 1,000 feet of the insured properties, the Court [held] that the Ingress/Egress provision [did] not provide coverage for the damage suffered by the City.” *Id.*

*tual Insurance Co.*²¹⁵ The policy was nearly identical to that in *City of Chicago* except that it required that the prevention of ingress or egress be the “direct” result of physical damage of the type insured to covered property.²¹⁶ The Factory Mutual policy’s “period of liability” for civil authority coverage applied when access to an insured location was prohibited by an order that was the result of “direct damage . . . at the Insured Location” or within 1,000 feet of it.²¹⁷ In granting summary judgment for Factory Mutual, the court found that there was no civil authority coverage because the period of liability could not be established.²¹⁸ Specifically, the court reasoned that civil authority coverage applied only when the damage occurred at an insured location or within 1,000 feet of it, which did not occur.²¹⁹ Additionally, the court found that the ingress/egress provision did not apply because the prevention of ingress to and egress from insured locations was caused by the FAA ground stop order, not physical damage.²²⁰ The court rejected the county’s argument that the FAA ground stop order was issued as the direct result of the damage to the WTC and the Pentagon, reasoning “that damage is too remote in time and place to qualify as direct as required in this case.”²²¹

3. Airline Claims

In *United Airlines*,²²² United Airlines sought to recover \$1.2 billion in system-wide loss of income resulting from 9/11 under a civil authority provision that provided coverage “when access to the Insured Locations is prohibited by order of civil authority as a direct result of damage to adjacent premises.”²²³ United Airlines asserted that this coverage applied

215. No. CV-S-02–1258-KJD-RJJ, 2005 WL 6720917 (D. Nev. Mar. 28, 2005).

216. *Id.* at *3. The ingress/egress provision read:

This Policy covers the Actual Loss Sustained and EXTRA EXPENSE incurred by the insured due to the necessary interruption of the Insured’s business due to the prevention of ingress to or egress from an Insured Location, whether or not the premises or property of the Insured is damaged, provided that such prevention is a direct result of physical damage of the type insured by this Policy, to the kind of property not excluded by this Policy.

Id.

217. *Id.*

218. *Id.* at *4.

219. *Id.*

220. *Id.* at *5.

221. *Id.* As in *City of Chicago*, the court rejected the insured’s argument that there was coverage under the policy’s protection and preservation of property provision, which provided coverage for business interruption loss when the insured takes reasonable action “to prevent immediately impending physical loss or damage insured by this policy.” *Id.* at *6. The court reasoned that the county proffered no admissible evidence that actions were taken to protect the county’s airports from immediately impending physical loss or damage. *Id.*

222. 385 F. Supp. 2d 343 (S.D.N.Y. 2005) (see discussion at notes 153–61 and accompanying text concerning scope of “property damage”).

223. *Id.* The Insurance Company of the State of Pennsylvania provided civil authority coverage as follows:

because of the order closing Reagan National Airport for more than three weeks, which United Airlines claimed was the result of the terrorist attack on the Pentagon, an “adjacent premises” to the airport.²²⁴ The court, however, rejected United Airlines’ argument and granted the insurer summary judgment.²²⁵ The court concluded that the Pentagon and Reagan National Airport were not adjacent because the Pentagon was at least 3.4 miles away and separated by several intervening structures and properties.²²⁶ The court also found that the order closing the airport until October 4, 2001, was not issued as a direct result of damage to the Pentagon.²²⁷

US Airways also sought to recover its business income losses related to 9/11. The outcome of this case was more favorable to the insured at first, but the final ruling favored the insurer. In *US Airways, Inc. v. Commonwealth Insurance Co.*,²²⁸ US Airways’ insurer, PMA Capital Insurance Company, conceded that orders of civil authority closed the national airspace for three days and Reagan National Airport for three weeks.²²⁹ However, PMA argued that these orders were not issued as a direct result of a covered peril as required for the civil authority coverage to apply.²³⁰ US Airways presented evidence, and the court so found at a bench trial, that the Metropolitan Washington Airport Authority ordered “Reagan National

This policy insures against loss resulting directly from the necessary interruption of business caused by damage to or destruction of the Insured Locations, resulting from Terrorism. . . . This section is specifically extended to cover a situation when access to the Insured Locations is prohibited by order of civil authority as a direct result of damage to adjacent premises, not exceeding, however, two (2) consecutive weeks.

Id. at 345.

224. *Id.* at 351. Reagan National Airport was closed from September 11 until October 4, 2001. *Id.* at 346. United Airlines argued that the airport and the Pentagon were “adjacent premises” because, among other things, they were “so close that burning debris from the 9/11 fire at the Pentagon landed on the Airport” and the airport’s fire fighting equipment was dispatched to extinguish the fire at the Pentagon. *Id.*

225. *Id.* (quoting *Stanley Co. of Am. v. McLaughlin*, 195 F. Supp. 519, 522 (D.D.C. 1961)). The court found that the terms *adjacent* and *direct result of damage* in the civil authority clause were unambiguous. *Id.* The court found that the plain and ordinary meaning of *adjacent* is “lying near, close or contiguous, neighboring, [or] bordering on.” *Id.*

226. *Id.* at 352.

227. *Id.* at 353.

228. No. 03-587, 2004 WL 1637139, at *2 (Va. Cir. Ct. July 23, 2004), *rev’d*, 626 S.E.2d 369 (Va. 2006).

229. *Id.*

230. *Id.* The policy’s civil authority coverage provided:

This policy is extended to cover the loss sustained during the period of time, not to exceed 30 consecutive days when, as a direct result of a peril insured against, access to real or personal property is prohibited by order of civil authority.

Id. *Peril insured against* was defined to mean “all risk of direct physical loss of or damage to property described herein including general average, salvage, and all other charges on shipments covered hereunder, except as hereinafter excluded.” *Id.* at *5.

Airport . . . closed as a direct result of fear that United Flight 93 was heading for the airport,” and, thus, the airport was a target of a further terrorist attack.²³¹ The court further found that the policy did not require actual damage or loss of property to trigger the civil authority coverage and that an order of civil authority was issued as a direct result of risk of damage or loss to US Airways’ property.²³² Because the order of civil authority denied access to Reagan National Airport and US Airways’ property there, the court found that civil authority coverage applied.²³³ Similarly, the court found that the FAA’s ground stop order denied access to US Airways’ property and prohibited it from operating its business, i.e., the transportation of passengers and cargo by aircraft.²³⁴ Thus, the court found that there was civil authority coverage for the three-day closure of the nation’s airspace.²³⁵ This was a hollow victory because the judgment was ultimately reversed and judgment entered in favor of PMA on different grounds, i.e., that the proceeds that US Airways received under the Air Transportation Safety and System Stabilization Act (Stabilization Act) reduced (and in fact exceeded) its claimed losses under the PMA policy.²³⁶

4. Summary

After 9/11, a considerable number of insureds sought coverage under civil authority and ingress/egress provisions. For the most part, these claims were not successful. The only truly successful claim was brought by an insured, Abner, Herrman & Brock, located in lower Manhattan, where access was prohibited by a four-day complete closure of the area around the WTC.

The 9/11 cases nonetheless established significant principles for future civil authority and ingress/egress claims. First, for civil authority coverage to apply, the order of civil authority must be issued as a direct result of physical damage. Indirect or remote damage will not suffice. Second, for

231. *Id.* The court had previously denied PMA’s motion for summary judgment, finding that the applicability of civil authority coverage was a question of fact. *US Airways, Inc. v. Commonwealth Ins. Co.*, No. 03-587, 2004 WL 1094684, at *3–5 (Va. Cir. Ct. May 14, 2004).

232. *US Airways, Inc. v. Commonwealth Ins. Co.*, No. 03-587, 2004 WL 1637139, at *5 (Va. Cir. Ct. July 23, 2004). In an earlier ruling on PMA’s motion for summary judgment, the court had rejected PMA’s argument that actual damage to US Airways’ property was required to trigger civil authority coverage. *Id.* at *4–5. Without expressly stating so, the court apparently accepted US Airways’ argument that US Airways suffered a direct physical loss of all of its airport facilities and its abilities to serve its customers by being denied access by civil authority and that such damage alone was sufficient. *Id.* at *3.

233. *Id.*

234. *Id.*

235. *Id.*

236. See *infra* notes 354–66 and accompanying text.

ingress/egress coverage to apply, the prevention of access must be caused by physical damage. Third, for both civil authority and ingress/egress coverages, there must be a complete prohibition of access. There is no coverage where an order of civil authority merely hinders access to an insured's property. Thus, there is no coverage if one of several means of access, including the primary means, is prohibited but other means of access are still available.

VI. CONTINGENT BUSINESS INTERRUPTION COVERAGE

Business interruption coverage applies when a covered event damages the insured's property.²³⁷ In contrast, CBI coverage applies when a covered event damages the property of the insured's customers or suppliers.²³⁸ Courts reviewed two CBI claims arising out of the events of September 11.

In *Arthur Andersen LLP v. Federal Insurance Co.*,²³⁹ the court was presented with a CBI claim where the insured could not identify any supplier or customer whose property was damaged. Arthur Andersen, the well-known accounting firm, sought coverage from its London insurers under the policy's CBI and interdependency provisions, claiming that it earned \$204 million less than expected in the three and one-half months following the September 11 terrorist attacks.²⁴⁰ Because Arthur Andersen could not identify any specific supplier or customer whose property was damaged, its claim was based solely on a comparison of its actual and expected revenues.²⁴¹ In affirming summary judgment for the insurers, the court first held that Arthur Andersen could not meet the requirements of the CBI coverage because it could not identify any interruption of its business or any customer that was unable to receive services as a result of property damage to the WTC or the Pentagon.²⁴² The court said that Arthur Andersen could not meet its burden of proving coverage "by merely showing a decline in income coupled with property damage that does not meet the

237. See generally Schirle, *supra* note 42, at 32.

238. See generally *id.* at 37.

239. A.3d 1279 (N.J. Super. Ct. App. Div. 2010).

240. *Id.* at 1281. The CBI coverage provided in part:

This policy . . . is extended to cover the actual loss sustained by the Insured resulting from the necessary interruption of the business conducted by the Insured, whether partial or total, caused by loss, damage or destruction covered herein . . . to: Property that directly or indirectly prevents a supplier of goods, services or information to the Insured from rendering their goods, services, or information or property that directly or indirectly prevents a receiver of goods, services or information from the Insured from accepting or receiving the Insured's goods, services or information.

Id. at 1282.

241. *Id.* at 1281–82.

242. *Id.* at 1287.

criteria clearly and unambiguously established by the CBI clause.”²⁴³ The court rejected Arthur Andersen’s argument that the prerequisites to CBI coverage should be inferred from its generalized revenue shortfall, characterizing it as “a rather transparent attempt to skirt criteria for coverage that it cannot satisfy.”²⁴⁴

The court in *Snelling & Snelling, Inc. v. Federal Insurance Co.*²⁴⁵ addressed the applicability of a CBI limit. Snelling was an employment agency that had one of its many offices located near the WTC.²⁴⁶ This office provided personnel to various businesses located in or near the WTC.²⁴⁷ “Many of that . . . office’s clients sustained physical loss or damage from the . . . attack,” and, as a result, “they were no longer able to accept Snelling’s services.”²⁴⁸ The Federal policy’s CBI coverage (termed “dependent business premises” coverage) provided coverage for time element losses sustained as a result of damage to dependent business premises “not to exceed the Limit Of Insurance for Dependent Business Premises shown under Business Income in the Declarations.”²⁴⁹ The supplementary declarations included a \$250,000 limit for dependent business premises and provided that the limits of insurance “apply separately at each of your premises unless otherwise shown.”²⁵⁰ Snelling submitted a claim of approximately \$4 million, asserting that the policy provided up to \$250,000 in coverage for each office of Snelling’s dependent business premises.²⁵¹ Federal, however, disagreed and paid Snelling \$250,000, claiming that it was the full limit of its liability.²⁵² The court affirmed summary judgment in favor of Federal, characterizing Snelling’s argument that its customers’ offices qualified as “your premises” as “too great a stretch.”²⁵³ The court noted that the policy defined *you* and *your* to mean Snelling, and that definition along with the plain meaning of the restriction “These Limits Of Insurance apply separately at each of your

243. *Id.*

244. *Id.* at 1288.

245. 205 F. App’x 199 (5th Cir. 2006).

246. *Id.* at 200.

247. *Id.*

248. *Id.*

249. *Id.* The dependent business premises provision in question read:

We will pay for the actual business income loss and extra expense you incur due to the actual or potential impairment of your operations during the period of restoration, not to exceed the Limit of Insurance for Dependent Business Premises shown under Business Income in the Declarations. This actual or potential impairment of operations must be caused by or result from direct physical loss or damage by a covered peril to property or personal property of a dependent business premises at a dependent business premises.

Id. at 202.

250. *Id.*

251. *Id.* at 200–01.

252. *Id.*

253. *Id.* at 203.

premises unless otherwise shown” indicated that *your premises* referred only to Snelling’s premises.²⁵⁴

CBI coverage applies where a covered event damages the property of the insured’s customers or suppliers. The *Arthur Andersen* case confirms that the insured must prove that its business income loss was the direct result of damage to a particular supplier or customer. Proof of the prerequisites to CBI coverage cannot be inferred from a generalized revenue shortfall occurring after a catastrophic event.

VII. INSURABLE INTEREST

No person can recover on an insurance policy unless he has an insurable interest in the property insured.²⁵⁵ Indeed, by statute in many states, an insurance policy is enforceable only to the extent that the insured has an insurable interest in the property insured.²⁵⁶ An insurable interest exists where the insured will suffer a loss if the subject property is damaged or destroyed.²⁵⁷ It is generally not necessary that the insured actually own or have an absolute right to the property; the insured has an insurable interest if, by the destruction of the property, it will suffer a loss, whether or not it has any title to, lien upon, or possession of the property itself.²⁵⁸ Whether an insured had an insurable interest in property was the subject of several 9/11 cases.

In *ABM Industries*,²⁵⁹ the court found that ABM, the company that provided janitorial, lighting, and engineering services throughout the WTC, had an insurable interest in the common areas and premises of WTC tenants.²⁶⁰ The Zurich policy’s insurable interest provision covered loss or damage to “real and personal property, including but not limited to property owned, controlled, used, leased, or intended for use by the

254. *Id.*

255. See generally 3 RUSS & SEGALLA, *supra* note 43, § 41:1.

256. See, e.g., CAL. INS. CODE § 280; ARIZ. REV. STAT. § 20–1105(B). See generally 3 RUSS & SEGALLA, *supra* note 43, § 41:1.

257. See, e.g., Int’l Serv. Ins. Co. v. Gonzales, 239 Cal. Rptr. 341, 345 (Ct. App. 1987); Casablanca Concerts, Inc. v. Am. Nat’l Gen. Agencies, Inc., 407 N.W.2d 440, 443 (Minn. 1987). See generally 3 RUSS & SEGALLA, *supra* note 43, § 41:11.

258. See, e.g., Davis v. Phoenix Ins. Co., 43 P. 1115, 1117 (Cal. 1896); Banner Laundry Co. v. Great E. Cas. Co., 180 N.W. 997, 999 (Minn. 1921). See generally 3 RUSS & SEGALLA, *supra* note 43, § 41:11.

259. 397 F.3d 158 (2d Cir. 2005) (see discussion at notes 102–09 and accompanying text concerning scope of business interruption coverage).

260. “ABM provided extensive janitorial, lighting, and engineering services at the [WTC]” and also operated the HVAC systems for the entire WTC and serviced the common areas of the WTC complex under a contract with the owner and lessee of the property. *Id.* at 161. “Under these contracts[,] ABM had office and storage space in the complex and had access to janitorial closets and . . . sinks on every floor of the WTC buildings.” *Id.*

Insured.”²⁶¹ The Zurich policy provided both business interruption coverage and CBI coverage.²⁶² The business interruption coverage was subject to a blanket limit of more than \$127 million, but the CBI coverage was limited to \$10 million.²⁶³ ABM sought coverage under the business interruption provision, claiming that the common areas and tenant premises in the WTC constituted insured property because ABM had an insurable interest in them.²⁶⁴ Zurich, however, claimed that the common areas and tenant premises in the WTC were not insured property and that ABM was only entitled to coverage under the CBI provision.²⁶⁵

The Second Circuit ruled that ABM’s claim was covered under the business interruption provision and not the CBI provision.²⁶⁶ The court rejected Zurich’s argument that “a property interest such as ownership or tenancy [was] necessary for business interruption coverage” to exist.²⁶⁷ Instead, the court concluded that the business interruption provision required only that ABM have an insurable interest in the damaged property.²⁶⁸ The court found that ABM had an insurable interest in the WTC common areas, tenant premises, and HVAC systems because ABM used these within the meaning of the insurable interest provision.²⁶⁹ The court reasoned that “[t]he existence and configuration of the common areas and tenants’ premises were vital to the execution of ABM’s business purpose” and “were the means by which ABM derived its income.”²⁷⁰ The court also concluded that ABM was entitled to business interruption coverage for the destruction of property it occupied, such as its on-site offices, its call center, the freight elevator, janitorial closets, and sinks, because it used or controlled the areas it occupied.²⁷¹

261. *Id.* at 162.

262. *Id.* The Zurich policy provided business interruption coverage for “loss resulting directly from the necessary interruption of business caused by direct physical loss or damage not otherwise excluded, to insured property at an insured location.” *Id.* The policy also provided CBI coverage for losses sustained because of loss or damage to “properties not operated by the Insured which wholly or partially prevents any direct supplier of goods and/or services to the Insured from rendering their goods and/or services. . . .” *Id.*

263. *Id.*

264. *Id.*

265. *Id.* at 163.

266. *Id.* at 165–70.

267. *Id.* at 165.

268. *Id.*

269. *Id.*

270. *Id.* at 165–66. The court stated that ABM’s “use” of the WTC space that it serviced was no different than an accounting firm’s “use” of the office that it occupies. *Id.* at 166.

271. *Id.* at 166–67. The court also concluded that the Zurich policy’s CBI coverage was inapplicable. *Id.* at 168. The court reasoned that the CBI provision covered business interruption due to loss or damage to properties “not operated by the Insured,” that is, operated by suppliers or customers. *Id.* at 169. The court held that ABM operated the physical spaces that it and the WTC tenants occupied, as well as the common areas. *Id.* The court “recognize[d]

The court also addressed the insurable interest requirement in *Citigroup, Inc. v. Industrial Risk Insurers*.²⁷² Citigroup was a tenant in 7 World Trade Center, leasing twenty-four of the building's forty-seven floors.²⁷³ The lease obligated the building's operator and manager, 7 World Trade Center Company, L.P. (7WTCLP), to carry insurance on "landlord's property" and obligated Citigroup to insure "tenant's property."²⁷⁴ 7WTCLP, through its agent Silverstein Properties, purchased a property insurance policy from Industrial Risk Insurers (IRI).²⁷⁵ Citigroup was not a party to the policy and was not named as an insured, additional insured, or loss payee.²⁷⁶ After 7 World Trade Center was destroyed in the terrorist attack, however, Citigroup sought to recover under the IRI policy for the loss of its permanent but removable property.²⁷⁷

On appeal, the Second Circuit affirmed the district court's determination that Citigroup could not recover because the policy did not cover Citigroup's property and because Citigroup did not have an insurable interest in the damaged property.²⁷⁸ The appeals court rejected Citigroup's argument that 7WTCLP had an insurable interest, that is, an indirect economic interest, in tenant's property under the reasoning of *ABM Industries*.²⁷⁹ The Second Circuit distinguished *ABM Industries*, noting that an indirect economic interest can be insured only "if . . . it falls within the definitional boundaries set by the insurance policy."²⁸⁰ The court found that the IRI policy "explicitly exempts Tenant's Property from coverage," and 7WTCLP thus had no insurable interest in the property.²⁸¹

The existence of an insurable interest was also an issue in *Arthur Andersen*.²⁸² There, Arthur Andersen sought coverage under the policy's interdependency provision, claiming that it earned \$204 million less than expected

that CBI coverage usually encompasses destroyed property of . . . customers" and suppliers and that the tenants were ABM's customers. *Id.* But the court also reasoned that this case "involves a unique set of circumstances where the insured's customers occupied a building that the insured itself operated, thus rendering the CBI provision inapplicable." *Id.* at 170.

272. 421 F.3d 81 (2d Cir. 2005).

273. *Id.* at 82.

274. *Id.* *Landlord Property* was defined as property that could not be removed without damaging the building. *Tenant's Property* was defined as property that could be removed without damaging the building. *Id.*

275. *Id.*

276. *Citigroup, Inc. v. Indus. Risk Insurers*, 336 F. Supp. 2d 282, 284 (S.D.N.Y. 2004), *aff'd*, 421 F.3d 81 (2d Cir. 2005).

277. 421 F.3d at 82.

278. *Id.* at 83.

279. *Id.*

280. *Id.* (quoting *Zurich Am. Ins. Co. v. ABM Indus., Inc.*, 397 F.3d 158, 168 (2d Cir. 2005)).

281. *Id.*

282. 3 A.3d 1279 (N.J. Super. Ct. App. Div. 2010) (see discussion at 239–44 and accompanying text concerning CBI coverage).

in the three and one-half months following 9/11.²⁸³ The interdependency provision provided that the policy covered the total loss sustained by the insured when the insured sustains losses at one location as a result of damage to real or personal property at another.²⁸⁴ Arthur Andersen argued that its claim was covered because the WTC, the Pentagon, and United Airlines' Boeing 757 aircraft (Flight 93) fell within the policy's definition of *real and personal property*, and Arthur Andersen had an insurable interest in that property.²⁸⁵ The appellate court disagreed.²⁸⁶ In rejecting the insured's argument, the court observed that insurable interest requires that the insured "derive a direct pecuniary benefit from the property or suffer a direct pecuniary loss if the property is damaged."²⁸⁷ The court found that Arthur Andersen did not derive any income, such as rent, from the existence of the WTC or Pentagon and that it did not have any potential liability to others based upon its interest in those properties.²⁸⁸ Lastly, the court noted that if Arthur Andersen's broad insurable interest argument were accepted, it would allow an insured "to reap a windfall recovery for a loss . . . clearly unanticipated in the calculation of the premium," making it impossible for insurers to underwrite the risk.²⁸⁹

In sum, an insurable interest exists where the insured suffers a loss if the subject property is damaged. In *ABM Industries*, the court found that ABM had such an interest in the WTC common areas and premises of WTC tenants even though ABM did not own, lease, or occupy those areas. ABM's right to use those areas under the contracts with the WTC owner and tenants was sufficient to give it an insurable interest. In light of those contracts, ABM obviously would suffer a loss if the WTC were destroyed.²⁹⁰ In *Citigroup*, however, a landlord did not have an insurable

283. *Id.* at 1282.

284. *Id.* at 1288. The interdependency provision stated:

This policy is extended to cover the total loss sustained by the Insured anywhere in the world caused by loss, damage or destruction by any of the perils covered herein during the term of this policy to any real or personal property as described in Clause 9 situated within the Territory covered by this policy.

Id. at 1282.

285. *Id.* at 1282–83. The policy defined *Real and Personal Property* as follows:

The interest of the Insured in all real and personal property . . . which is not otherwise excluded and which is owned, used, leased or intended for use by the Insured, or in which the Insured may have an insurable interest, or for which the Insured may be responsible for the insurance. . . .

Id. at 1283.

286. *Id.* at 1288–89.

287. *Id.* at 1289.

288. *Id.* at 1289–90.

289. *Id.* at 1290.

290. As *ABM Industries* illustrates, the right to use property may give rise to an insurable interest. See, e.g., *Jerome v. Great Am. Ins. Co.*, 279 S.E.2d 42, 45 (N.C. Ct. App. 1981). But

interest in a tenant's property. There, because the lease did not require the landlord to repair or replace the tenant's property, the insured landlord would suffer no loss if the property were damaged. And in *Arthur Andersen*, an accounting firm did not have an insurable interest in property like the WTC and Pentagon, property that the accounting firm did not own, lease, occupy, or derive any revenue from.

VIII. POLICY EXCLUSIONS

A. *Contamination Exclusion*

Many commercial property insurance policies exclude coverage for contamination. The dictionary defines *contamination* to mean "unfit for use by the introduction of unwholesome or undesirable elements."²⁹¹ Numerous courts have defined *contamination* in a similar manner.²⁹²

After the WTC towers collapsed, a cloud of particulate matter from the two collapsed towers spread throughout lower Manhattan. This particulate matter included hydroxyls, chlorides, sulfates, asbestos, lead, mercury, and cadmium, among other things.²⁹³ Businesses affected by this particulate sought coverage for the damage. In response, some insurers raised the contamination exclusion.

In *Parks Real Estate Purchasing Group v. St. Paul Fire & Marine Insurance Co.*,²⁹⁴ the court found that the contamination exclusion was ambiguous and that a fact finder should determine the meaning of *contamination*. There, particulate matter from the WTC collapse penetrated the insured's building located about five blocks away and settled in the building's mechanical and electrical systems.²⁹⁵ St. Paul made an advance payment on the loss, but the insured contended that the payment was inadequate to cover its losses and filed suit.²⁹⁶ The policy's exclusion for "loss or damage used by or made worse by any kind of contamination of . . . products or property covered by this insuring agreement" was then litigated. Relying on prior court definitions of *contamination*, the district court found the exclusion applicable.²⁹⁷ On appeal, the Second Circuit reversed, finding the exclu-

not every right to use will give rise to an insurable interest. Where, for example, the right to use can be revoked at any time, there is no insurable interest. *See, e.g.*, *Boston Ins. Co. v. Beckett*, 419 P.2d 475, 477 (Idaho 1966) (user of cabin had no insurable interest in cabin where cabin owner could terminate the right of use at any time).

291. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 491 (1993).

292. *See, e.g.*, *Hi G, Inc. v. St. Paul Fire & Marine Ins. Co.*, 391 F.2d 924, 925 (1st Cir. 1968); *Am. Cas. Co. of Reading, Pa. v. Myrick*, 304 F.2d 179, 183 (5th Cir. 1962).

293. *See Parks Real Estate Purchasing Group v. St. Paul Fire & Marine Ins. Co.*, 472 F.2d 33 (2d Cir. 2006).

294. 472 F.3d 33 (2d Cir. 2006).

295. *Id.* at 36.

296. *Id.* at 37.

297. *Id.* at 39.

sion ambiguous in the context of the policy because the common definition applied by the district court, i.e., “introduction of a foreign substance that injures the usefulness of the object” and “a condition of impurity resulting from the mixture or contact with a foreign substance,” would allow the exclusion to be applied “in a limitless variety of situations.”²⁹⁸ The court reasoned that “almost any unintended damage to a building or its contents could be considered contamination within these broad definitions of the term,” so an all-risk policy “would insure against virtually nothing.”²⁹⁹ The court, however, did not find the exclusion inapplicable. Instead, it concluded that the meaning of *contamination* was a question of fact and that the parties should be allowed to introduce extrinsic evidence to show what was intended by that term.³⁰⁰

The court reached the same conclusion in *Ocean Partners, LLC v. North River Insurance Co.*³⁰¹ As in *Parks Real Estate*, the insured’s building in lower Manhattan was impacted by particulate from the WTC collapse.³⁰² North River denied coverage based on the policy’s contamination exclusion. However, the court followed *Parks Real Estate* and found the term to be ambiguous and that its meaning must be resolved by the finder of fact.³⁰³

Parks Real Estate and *Ocean Partners* do not represent the majority rule. In prior decisions, courts had almost uniformly construed the term *contamination* in insurance policies in light of dictionary definitions and found it to be unambiguous.³⁰⁴ Courts have generally found the exclusion to apply in a wide variety of circumstances.³⁰⁵ Thus, *Parks Real Estate* and *Ocean*

298. *Id.* at 45.

299. *Id.* at 48.

300. *Id.*

301. 546 F. Supp. 2d 101 (S.D.N.Y. 2008).

302. *Id.* at 103.

303. *Id.* at 105.

304. See, e.g., *Am. Cas. Co. of Reading, Pa. v. Myrick*, 304 F.2d 179, 183 (5th Cir. 1962); *J.L. French Auto. Castings, Inc. v. Factory Mut. Ins. Co.*, No. 02 C 9479, 2003 WL 21730127, at *2 (N.D. Ill. July 23, 2003); *Duensing v. Travelers Cos.*, 849 P.2d 203, 380 (Mont. 1993); *Richland Valley Prods., Inc. v. St. Paul Fire & Cas. Co.*, 548 N.W.2d 127, 131 (Wis. Ct. App. 1996).

305. See, e.g., *Nat’l Union Fire Ins. Co. of Pittsburgh, Pa. v. Stroh Brewery Co.*, 265 F.3d 97 (2d Cir. 2001) (glass shards found in bottles of Arizona Iced Tea); *Haman, Inc. v. St. Paul Fire & Marine Ins. Co.*, 18 F. Supp. 2d 1306, 1309 (N.D. Ala. 1998) (hotel was damaged and rendered uninhabitable because of exterminator’s use of a highly toxic pesticide to accomplish exterminations); *McQuade v. Nationwide Mut. Fire Ins. Co.*, 587 F. Supp. 67, 68 (D. Mass. 1984) (home was damaged and rendered uninhabitable because of exterminator’s use of excessive amounts of the chemical chlordane); *J & S Enters., Inc. v. Cont’l Cas. Co.*, 825 P.2d 1020, 1022–24 (Colo. Ct. App. 1991) (shopping mall damaged by release of asbestos during renovation); *Hartory v. State Auto. Mut. Ins. Co.*, 552 N.E.2d 223, 225 (Ohio Ct. App. 1988) (home damaged by infiltration of methane gas from nearby landfill); *Raybestos Manhattan, Inc. v. Indus. Risk Insurers*, 433 A.2d 906, 907–09 (Pa. Super. Ct. 1981) (production damaged by inadvertent mixture of fuel oil and heptane in the auxiliary heptane tank used for production purposes); *Auten v. Employers Nat’l Ins. Co.*, 722 S.W.2d 468, 470 (Tex. App. 1987) (home rendered uninhabitable because of exterminator’s misapplication of the pesticide Dursban);

Partners mark a departure from those cases. Although those courts found the term to be ambiguous, they did not find the exclusion inapplicable. Rather, the courts found that the fact finder would have to determine the meaning of *contamination*.

B. *Consequential Loss Exclusion*

Some commercial property insurance policies exclude coverage for consequential losses. Often, these policies add back coverage for certain consequential losses, such as business interruption and extra expense, but exclude coverage for all other consequential losses. Several courts in 9/11 matters considered whether a consequential loss exclusion barred coverage for an insured's claim of consequential damages against an insurer based on the insurer's alleged failure to pay timely the insured's claim.

In *Lava Trading*,³⁰⁶ the insured Lava Trading, a WTC tenant, sued its insurer claiming that its failure to pay funds to Lava caused it to incur financing costs for alternative funding that it would not have incurred had the insurer properly paid under the policy.³⁰⁷ Hartford moved to dismiss the consequential damages claim based on a policy exclusion for "any other consequential loss" in its business interruption and extra expense coverages.³⁰⁸ The court found the exclusion inapplicable, reasoning that the exclusion addressed only "what constitutes a covered loss under [the] policy" and "not . . . what remedies were available for breach of [the] policy."³⁰⁹

The court in *Hold Bros., Inc. v. Hartford Casualty Insurance Co.*³¹⁰ reached the same conclusion. There, Hold Brothers, another WTC tenant, sued Hartford seeking to recover "consequential damages, including lost business and increased costs, stemming from Hartford's" failure to pay what was allegedly owed under the policy.³¹¹ Hartford moved to dismiss based

Richland Valley Prods., Inc. v. St. Paul Fire & Cas. Co., 548 N.W.2d 127, 130–32 (Wis. Ct. App. 1996) (damage to cooling system for manufacturing ice cream products caused by mixture of brine and ammonia). *But see, e.g.,* *Largent v. State Farm Fire & Cas. Co.*, 842 P.2d 445, 446 (Or. Ct. App. 1992) (contamination exclusion did not preclude coverage for damage to home caused by an illegal methamphetamine laboratory).

306. 326 F. Supp. 2d 434 (S.D.N.Y. 2004) (see discussion at notes 77–89 and accompanying text concerning period of restoration).

307. *Id.* at 437.

308. *Id.* at 441–43.

309. *Id.* But the court also concluded that the consequential loss exclusion may be relevant to the issue of whether consequential damages are recoverable because that issue depended, in part, on the parties' intent, that is, whether consequential damages were reasonably foreseeable and contemplated by the parties at the time of contracting. *Id.* at 442. *Lava Trading* involved a motion to dismiss under FED. R. CIV. P. 12(b)(6). Thus, the court declined to dismiss the insured's claim for consequential damages. *Id.* at 443.

310. 357 F. Supp. 2d 651 (S.D.N.Y. 2005).

311. *Id.* at 655.

on the consequential loss exclusions.³¹² As in *Lava Trading*, the court observed that consequential damages for breach of contract were recoverable only if the insured could show “that such damages were within the contemplation of the parties as the probable result of a breach” at or before the time of contracting.³¹³ For purposes of the motion to dismiss, the court found that the consequential loss exclusions relied upon by Hartford did not unambiguously exclude recovery for consequential damages resulting from breach of the policy.³¹⁴

The common, accepted definition of *consequential loss* is “an indirect or secondary loss occasioned by direct property loss. . . .”³¹⁵ Thus, a distinction must be drawn between the direct property loss, which is all damage immediately and directly caused by the peril, and that which is an indirect or secondary result of the direct property loss. A consequential loss exclusion is designed to exclude the latter type of damage.³¹⁶ As *Lava Trading* and *Hold Bros.* illustrate, the consequential loss exclusion was not intended to limit the insured’s remedies for breach of contract.

IX. MISCELLANEOUS ISSUES

A. *Terms of Insurance Binders*

After agreeing to provide insurance coverage, an insurer may issue a binder as a quick and informal way of providing coverage until the actual insurance policy is prepared and delivered.³¹⁷ Binders are temporary and typically do not include the detailed terms of coverage.³¹⁸ Although a binder is not an insurance policy, it is a legal contract.³¹⁹ If a loss occurs before the

312. *Id.* at 658. The policy provided that Hartford “will not pay for loss or damage caused by or resulting from . . . Consequential Losses: Delay, loss of use or loss of market.” *Id.* The policy’s business income and extra expense form excluded coverage for “[a]ny other consequential loss.” *Id.*

313. *Id.* at 659.

314. *Id.*

315. WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 483 (1993).

316. See, e.g., *Twin City Hide v. Transamerica Ins. Co.*, 358 N.W.2d 90 (Minn. Ct. App. 1984). In *Twin City Hide*, the insured discovered a water leak in the roof of its cattle hide tanning factory. Damaged hides were discovered later, after the hides arrived at their destinations in Japan, Korea, and Italy. *Id.* at 91. *Twin City Hide* then sent its president to Japan to attempt settlement of the claim and to maintain the customer’s goodwill. *Id.* at 92. Thereafter, *Twin City Hide* sought coverage for “the expenses incurred by its president in traveling to Japan.” The appellate court affirmed the trial court’s finding that these expenses were excluded as consequential losses: “These expenses are clearly excluded by the provision in the policy which excluded coverage for ‘Delay, loss of market, interruption of business, nor consequential loss of any nature.’” *Id.*

317. As courts have recognized, the use of binders is a “common and necessary practice in the world of insurance, where speed is often of the essence.” *Employers Commercial Union Ins. Co. v. Firemen’s Fund Ins. Co.*, 384 N.E.2d 668, 670 (N.Y. 1978).

318. See generally 1A RUSS & SEGALLA, *supra* note 43, § 13:1.

319. See generally *id.*

actual policy is issued, which was the case for all but one of the WTC insurers, the court will have to determine the terms of the coverage provided by the binder.

In *World Trade Center Properties*,³²⁰ one issue was whether the binders issued by three of the WTC insurers incorporated the term of the broker-supplied WilProp form or some other policy form. Because the WilProp form included a definition of *occurrence* that resulted in application of a single occurrence, the insured, Silverstein, argued that its insurers were bound by forms in which the term was undefined.³²¹ The court acknowledged that the specific terms of a binder are often implied.³²² To determine those implied terms, the court looked to the specific terms contained in the binder or incorporated by reference and to the terms included in the insurer's usual policy form, to the extent necessary as gap fillers.³²³

The court also noted that it may rely on extrinsic evidence of the parties' prebinder negotiations.³²⁴ Where one insurer repeatedly indicated that it was binding itself to the terms of the "manuscript form submitted," i.e., the WilProp form), the court found that the parties intended the binder to incorporate the terms of the WilProp form.³²⁵ Similarly, the court found that another insurer's binder incorporated the WilProp form where the underwriter's original authorization identified the policy form as "Willis manuscript policy form as submitted except for the changes noted in the addendum to this quote."³²⁶ Finally, another insurer's confirmation of coverage after receipt of the insurance submission, which included a draft of the WilProp form along with the underwriter's testimony that the insurer would be following Willis's broker manuscript form, demonstrated as a matter of law that the insurer's binder incorporated the WilProp form.³²⁷

The general rule is that the terms of coverage afforded under a binder are those terms in the insurer's usual policy form.³²⁸ However, that rule is

320. 345 F.3d 154 (2d Cir. 2003).

321. *Id.* at 167.

322. *Id.* at 169.

323. *Id.*

324. *Id.* at 170. The court reasoned that "any policy form that was exchanged in the process of negotiating the binder, together with any express modifications to that form, is likely the most reliable manifestation of the terms by which the parties intended to be bound while the binder was in effect." *Id.*

325. *See id.* at 170-74.

326. *Id.* at 175.

327. *Id.* at 178-80.

328. *See, e.g.,* Maxton v. Garegnani, 627 N.E.2d 723, 727 (Ill. App. Ct. 1994) ("When an insurance binder does not specify the terms and the provisions of the policy applied for, it, as a matter of law, incorporates all of the terms and provisions of the policy for which application through the binder is made."); Zimmerman Leasing Co. v. Williams, 582 N.E.2d 631, 632 (Ohio Ct. App. 1989) ("When nothing is said in the negotiations about special conditions of the policy, it will be presumed that those which were usual and customary were intended.");

overridden when there is a specific reference in the binder to a particular policy form,³²⁹ as was the case in *World Trade Center Properties*.

B. Scope of Replacement Cost

Most commercial property policies provide coverage on a replacement cost basis. *Replacement cost* is usually defined in the policy as the cost to replace damaged property with new property of like kind and quality without deduction for depreciation.³³⁰

The scope of replacement cost coverage for the WTC was at issue in *SR International Business Insurance Co. v. World Trade Center Properties, LLC*.³³¹ As part of its replacement cost claim, WTC lessee Silverstein Properties included \$700 million in additional costs associated with adapting the Twin Towers' design to the "changed legal, physical, and political environment of post-9/11 New York."³³² This included such things as an increased floor height, nine new floors, a blast wall at the base of each tower, use of "embassy glass," and elimination of the steel truss-based floor design.³³³ The WTC site was not subject to New York City codes or New York State laws, so none of these expenses resulted from the enforcement of laws or ordinances.³³⁴ However, Silverstein Properties claimed that it was required to incur these additional costs under § 6 of its lease with the Port Author-

Matousek v. S.D. Farm Bureau Mut. Ins. Co., 450 N.W.2d 236, 238 (S.D. 1990) ("The terms and provisions which control in the construction of coverage afforded by a binder are those contained in the ordinary form of policy usually issued by the company at that time upon similar risks."). See generally 12A JOHN A. APPLEMAN & JEAN APPLEMAN, INSURANCE LAW & PRACTICE § 7232, at 179-83 (1981) ("The terms and provisions which control in the construction of coverage afforded by a binder are those contained in the ordinary form of policy usually issued by the company at that time upon similar risks."); 1A RUSS & SEGALLA, *supra* note 43, § 13:1 ("Generally, a binder contemplates a subsequent and more formal agreement, and by its nature incorporates the terms of the prospective policy whether those terms are prescribed by law or are part of the customary policy issued by the insurer.").

329. See, e.g., *Statewide Ins. Corp. v. Dewar*, 694 P.2d 1167, 1170 (Ariz. Ct. App. 1984) ("The binder incorporates by implication all the terms of the policy to be issued."); *Parlier Fruit Co. v. Fireman's Fund Ins. Co.*, 311 P.2d 62, 71 (Cal. Ct. App. 1957) (finding that the binder "is construed as being subject to the terms and conditions of the policy to be issued or of the policy ordinarily used by the company"); *Unigard Sec. Ins. Co. v. Mission Ins. Co. Trust*, 12 P.3d 296, 299 (Colo. Ct. App. 2000) ("Absent an express agreement to the contrary, a binder incorporates the terms of the contemplated policy."). See generally 12A APPLEMAN & APPLEMAN, *supra* note 328, § 7232; 1A RUSS & SEGALLA, *supra* note 43, § 13:19.

330. See generally GLOSSARY OF INSURANCE AND RISK MANAGEMENT TERMS 213 (11th ed. 2007).

331. No. 01 Civ. 9291, 2006 WL 3073220 (S.D.N.Y. Oct. 31, 2006) (see discussion at notes 49-51 and accompanying text concerning period of restoration).

332. *Id.* at *2. At the time, some of the WTC insurers were in the midst of an appraisal process to determine the measurement of the loss. *Id.*

333. *Id.* at *13.

334. *Id.* at *6.

ity, which in effect required the insured to comply with the New York City Building Code and other state and local laws.³³⁵

The court concluded that the policies clearly and unambiguously did not cover the lease's § 6 costs.³³⁶ The court reasoned that when the words *replacement cost as of the time and place of loss* were given their most natural reading and read against the background of insurance industry practice and other court decisions, "the relevant benchmark is the amount it would cost to reproduce the WTC as of the time and place of loss—i.e., as it existed early on the morning of September 11, 2001."³³⁷ The court found that cases allowing recovery for expenses related to changes in the design and material of the replaced property where these changes were mandated by law were not instructive where, as here, the changes in design and material were the result of contracts between the insured and a third party.³³⁸

Lastly, the court rejected the insured's argument that it was entitled to recover the expenses incurred in redesigning the WTC to account for

advances in construction and the understanding of extremely tall buildings; public policy imperatives, such as ensuring that the footprints of the fallen towers not be rebuilt upon; and safety imperatives such as ensuring that the buildings are designed and situated in a manner to best protect against the potentiality of any future possible terrorist attack.³³⁹

The court concluded that "[i]nsurance against technological change and shifts in the political winds may very well exist in the marketplace. But no

335. *Id.* at *5. Section 6 of Silverstein's lease with the Port Authority required compliance "with the Port Authority Manual and all Governmental Requirements." *Id.* at *4. *Governmental requirements* was further defined as "any present or future governmental law, rule, regulation, ordinance, requirement, order or direction (including compliance with the enactments, ordinances, resolutions and regulations of the City of New York and its departments . . .) which would be applicable to the Building if the Port Authority were a private entity." *Id.* at *4.

336. *Id.* at *2. The policy also provided that the insurer would not pay more than the cost to rebuild the damaged property "at the same site" and "with other property of comparable size, material and quality." *Id.* at *3. The Travelers policy provided in part:

In the event of a covered loss or damage, the [insurer] will determine the value of Covered Property at the replacement cost as of the time and place of loss, without deduction for physical deterioration, depreciation, obsolescence and depletion, except as otherwise provided in this endorsement or as stipulated by any other endorsement(s) attached to this policy. This replacement cost valuation is subject to the following conditions: 1. The [insurer] will not pay more on a replacement cost basis than the least of: a. The cost to repair, rebuild, or replace, at the same site, the lost, damaged or destroyed property, with other property of comparable size, material and quality; or b. The actual amount incurred by the insured that is necessary to repair, rebuild or replace the lost, damaged or destroyed property; or c. The Limit of Insurance applicable to the lost, damaged or destroyed property.

Id. at *2-3.

337. *Id.*

338. *Id.* at *9.

339. *Id.* at *10.

court has ever found that such coverage is included in a replacement cost policy.”³⁴⁰

Because replacement cost coverage allows for recovery on a “new-for-old” basis instead of the “old-for-old” recovery provided by actual cash value coverage, it necessarily puts the insured in a better position than it was in before the loss.³⁴¹ As *SR International* illustrates, however, replacement cost coverage does not entitle the insured to any greater windfall. The “like kind and quality” limitation is designed to prevent recovery for betterments and enhancements like those sought by the insured in *SR International*.³⁴² An insured is not entitled to recover the costs of betterments or enhancements except in those cases where they are required by building codes and the policy includes code upgrade coverage.

C. Coverage for Tenant Improvements

Tenants in commercial buildings typically make improvements to the premises to suit their business or tenancy. Some of these leasehold im-

340. *Id.* In a subsequent opinion, the district court ruled that in connection with Silverstein’s rental income claim, the appraisal panel could not hear evidence relating to the rebuilding of a structurally different WTC from the one that stood on September 11, for example, one that included such things as (1) an eighteen-inch increase in the height of each floor and the addition of nine new floors, (2) the addition of a 200-foot blast wall to the base of each tower, (3) use of “embassy glass,” (4) elimination of the Twin Towers’ steel truss-based floor design, and (5) movement of the new towers outside the original buildings’ footprint. *SR Int’l Bus. Ins. Co. v. World Trade Ctr. Props., LLC*, No. 01 Civ. 9291HB, 2007 WL 519245, at *2 (S.D.N.Y. Feb. 16, 2007). But the district court concluded that the appraisal panel may consider evidence of “real-world circumstance,” such as rental market rates or vacancy statistics for the relevant time periods after September 11 in arriving at its valuation. *Id.*

341. *See, e.g., SR Int’l Bus. Ins. Co. Ltd. v. World Trade Ctr. Props., LLC*, 445 F. Supp. 2d 320, 333 n.6 (S.D.N.Y. 2006) (“By paying an extra premium, the insured can recover on a ‘new-for-old’ basis instead of the ‘old-for-old’ recovery provided by ACV coverage.”); *Fire Ins. Exch. v. Superior Court*, 10 Cal. Rptr. 3d 617, 631 (Ct. App. 2004) (“A replacement cost policy does more than an actual cash value policy; it necessarily places the insured in a better position than actual cash value would provide.”); *Travelers Indem. Co. v. Armstrong*, 442 N.E.2d 349, 352 (Ind. 1982) (“Replacement cost coverage reimburses the insured for the full cost of repairs, if the insured repairs or rebuilds the building, even if that results in putting the insured in a better position than he was before the loss.”).

342. *See, e.g., Ga.-Pac. Corp. v. Allianz Ins. Co.*, 977 F.2d 459, 461–62 (8th Cir. 1992) (“The policy makes clear that the insurer will pay the lesser of repairing or replacing the property. If the insured decided to replace the property with property of better kind or quality or of a larger capacity, the insurer will not pay for the extra cost.”); *Celebrate Windsor, Inc. v. Harleysville Worcester Ins. Co.*, No. 3:05CV282 (MRK), 2006 WL 1169816, at *20 (D. Conn. May 2, 2006) (“In sum, the clear and unambiguous language of the policy indicates that there is no coverage for costs incurred to remedy the defects and code noncompliance in the original Birdair design, and whatever ‘leeway’ or flexibility may exist in the use of phrases like ‘like kind and quality’ is not sufficient to encompass substantial additional changes and upgrades made with just that purpose.”); *McCorkle v. State Farm Ins. Co.*, 270 Cal. Rptr. 492, 495 (Ct. App. 1990) (The *like kind and quality* language served “the purpose of fire insurance—to compensate for the actual loss sustained, not to place the insured in a better position than he or she was before the fire.”).

provements are permanent and not removable at the end of the lease. Commercial leases often provide that the landlord owns these leasehold improvements, either upon installation or upon expiration of the lease. Nonetheless, the tenant still has an insurable interest in these leasehold improvements during the term of the lease.³⁴³

The extent of coverage for these types of leasehold improvements was at issue in *Bank of Taiwan New York Agency v. Granite State Insurance Co.*³⁴⁴ Granite issued policies to the Bank of Taiwan and several other banks insuring their property in the WTC.³⁴⁵ The policy covered the banks' "use interest as tenant in improvements and betterments."³⁴⁶ *Improvements and betterments* was defined as "fixtures, alterations, installations or additions" made to leased premises that the insureds acquired or made at their expense "but cannot legally remove."³⁴⁷ The banks' leases provided that all improvements became the property of the owner upon installation.³⁴⁸ The policy provided replacement cost coverage on insured property except "property of others," which was covered on an actual cash value basis.³⁴⁹

After the WTC was destroyed, the banks submitted claims for their leasehold improvements, and Granite paid them for the actual cash value of the improvements but not the replacement cost.³⁵⁰ Granite asserted that the banks were not entitled to replacement cost of the improvements because they became the property of the lessor upon installation.³⁵¹ The district court granted summary judgment to Granite, reasoning that the policy was clear and unambiguous and that it covered the banks' use interest in improvements and betterments that the banks made at their expense and could not legally remove, and the court valued that interest at actual cash value.³⁵² The court concluded that because the banks' leasehold improvements became the property of the owner upon installation and the replacement cost provision did not apply to property of others, Granite properly compensated the banks for the actual cash value of those improvements.³⁵³

Bank of Taiwan involved a straightforward application of the clear and unambiguous policy language and lease agreement. The lease provided that

343. See, e.g., *C-Suzanne Beauty Salon, Ltd. v. Gen. Ins. Co. of Am.*, 574 F.2d 106, 113 (2d Cir. 1977); *Lighting Fixture Supply Co. v. Fid. Union Fire Ins. Co.*, 55 F.2d 110, 113 (5th Cir.), cert. denied, 286 U.S. 558 (1932).

344. No. 03 Civ.0682, 2003 WL 21540664 (S.D.N.Y. July 9, 2003).

345. *Id.* at *1.

346. *Id.*

347. *Id.*

348. *Id.* at *3.

349. *Id.* at *8.

350. *Id.* at *1.

351. *Id.*

352. *Id.* at *8.

353. *Id.* at *9.

the lessor owned the leasehold improvements that could not be removed immediately upon installation. Thus, these leasehold improvements were property of others, not property of the banks. The Granite policy valued property of others on an actual cash value basis.

D. *Salvage and Recoveries*

Some property insurance policies provide that loss payments may be reduced or offset by recoveries that the insured received from others. These provisions are sometimes referred to as salvage and recoveries provisions. Whether payments under the Stabilization Act to an insurance claimant would be considered “recoveries” within the meaning of a salvage and recoveries provision, thereby reducing any insurance recovery, was the question that the Virginia Supreme Court faced in *PMA Capital Insurance Co. v. US Airways, Inc.*³⁵⁴ After 9/11, President Bush signed into law the Stabilization Act,³⁵⁵ which was designed to compensate air carriers for direct losses caused by the FAA ground stop order issued on September 11 and any incremental losses sustained from September 11 until the end of 2001 as a result of the terrorist attack.³⁵⁶ Air carriers, including US Airways, received millions of dollars under the Stabilization Act.³⁵⁷

Nonetheless, US Airways sought coverage for its business income losses (totaling \$58 million) suffered as a result of the FAA’s 9/11 ground stop order and the three-week closure of Reagan National Airport.³⁵⁸ PMA Capital, one of six participating insurers on US Airways’ policy, claimed that the proceeds that US Airways received under the Stabilization Act should offset any insurance proceeds under the salvage and recoveries provision.³⁵⁹ The Virginia Supreme Court agreed and found that when viewed together, the plain language of the salvage and recoveries provision and the

354. 626 S.E.2d 369 (Va. 2006).

355. Pub. L. No. 107-42, 115 Stat. 230 (2001), *reprinted in* 49 U.S.C.A. § 40101, Historical and Statutory Notes (2007).

356. *Id.* Section 101 of the Stabilization Act (“Aviation Disaster Relief”) provided in part:

(a) In General.—Notwithstanding any other provisions of law, the President shall take the following actions to compensate air carriers for losses incurred by the air carriers as a result of the terrorist attacks on the United States that occurred on September 11, 2001: . . . Compensate air carriers in an aggregate amount equal to \$5,000,000,000 for—(A) direct losses incurred beginning on September 11, 2001, by air carriers as a result of any Federal ground stop order issued by the Secretary of Transportation or any subsequent order which continues or renews such a stoppage; and (B) the incremental losses incurred beginning September 11, 2001, and ending December 31, 2001, by air carriers as a direct result of such attacks.

Pub. L. No. 107-42, § 101(a), 115 Stat. 230, 230 (2001), *quoted in* *PMA Capital*, 626 S.E.2d at 373.

357. For example, US Airways received \$310 million. *PMA Capital*, 626 S.E.2d at 373.

358. *Id.* at 371.

359. *Id.* That provision stated that

Stabilization Act clearly indicated that the proceeds received by US Airways did constitute “salvages, recoveries, and payments.”³⁶⁰ Of those three qualifying categories, the court found the term *recoveries* to be the most applicable.³⁶¹ Citing general dictionaries, the court said that *recovery* is defined as “the regaining or restoration of something lost or taken away,” and “the act of regaining or returning toward a normal or usual state.”³⁶² The court reasoned that the purpose of the Stabilization Act was to compensate air carriers for direct and incremental losses incurred by the air carriers as a result of 9/11.³⁶³ Thus, the court found that Stabilization Act compensation was intended to regain or restore the losses suffered by US Airways as a result of 9/11 and, as such, was a form of recovery under the salvage and recoveries provision.³⁶⁴ Because the \$310 million received far exceeded the \$58 million in claimed losses, the court found remand unnecessary and, thus, entered final judgment in favor of PMA.³⁶⁵

Salvage and recoveries provisions typically come into play when the damaged property is sold for salvage or where a subrogation recovery is obtained from a third party. However, as *PMA Capital* illustrates, compensation from a government-sponsored disaster relief fund will also reduce any insurance recovery.³⁶⁶ Applying the same rationale, compensation

“[a]ll salvages, recoveries, and payments, excluding proceeds from subrogation and underlying insurance recovered or received prior to a loss settlement under this policy shall reduce the loss accordingly.”

Id.

360. *Id.* at 374. US Airways argued that Congress did not intend for the Stabilization Act to reduce insurance proceeds, but PMA argued that the plain language of the provision dictated otherwise. *Id.* at 372. The trial court rejected PMA’s argument, concluding that “payments” as used in the salvage and recoveries provision did not contemplate proceeds from the federal government. *Id.*

361. *Id.*

362. *Id.* (quoting BLACK’S LAW DICTIONARY 1302 (8th ed. 2004); WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 1898 (1993)).

363. *Id.* (quoting Pub. L. No. 107-42, § 101(a), 115 Stat. 230, 230 (2001)). The court also noted that comments published in the *Federal Register* by the Department of Transportation reaffirmed this purpose. *Id.*

364. *Id.* The appellate court concluded that the trial court, in ruling that federal government proceeds did not constitute “recoveries” under the policy, “essentially re-wrote the Policy and made a new contract between PMA and US Airways.” *Id.*

365. *Id.* The airline’s policy limits were \$25 million, and PMA Capital, one of six participating insurers on the policy, faced maximum exposure of \$2.5 million. *Id.* at 373.

366. Payments from FEMA, however, may not constitute “recoveries” under a salvage and recoveries provision. *See, e.g.,* Cameron Parish Sch. Bd. v. RSUI Indem. Co., No. 2:06 CV 1970, 2008 WL 4622328 (W.D. La. Oct. 16, 2008). In *Cameron*, the insurer in a Hurricane Katrina claim asserted that it was entitled to an offset from moneys that the insured received or will receive from FEMA based on *PMA Capital*. *Id.* at *1. The RSUI policy provided for an offset when the insured “has rights to recover damages from another.” *Id.* The district court denied RSUI’s summary judgment motion, reasoning that RSUI had not demonstrated that the insured had a “right to recover damages” from FEMA. *Id.* The court found *PMA Capital* distinguishable principally because of the differences in policy language. *Id.*

from a privately funded disaster relief fund, like the one established by BP after the 2010 Gulf of Mexico oil spill, should also reduce any insurance recovery.

X. CONCLUSION

The September 11 terrorist attack resulted in a substantial amount of coverage litigation under property insurance policies. Although other catastrophic events also have resulted in considerable coverage litigation, none of these events involved the wide variety of issues that were litigated after 9/11. That litigation included the number of occurrences, the period of indemnity for time element coverage, the meaning of physical loss or damage, civil authority and ingress and egress coverages, CBI coverage, insurable interest, contamination and consequential loss exclusions, terms of insurance binders, the scope of replacement cost, and salvage and recoveries, among others. None of these issues is unique to terrorism losses. The lessons learned from the 9/11 cases will continue to guide insureds, insurers, and courts in future losses whether they involve a natural event, such as a hurricane, or one precipitated by human intervention, such as a terrorist attack.

