

# 'Winter Is Coming': Commercial Insurance Policyholders Should Prepare Now to Protect Their Property and Income Streams

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**A**s hurricane season comes to its traditional close at the end of November, the recent devastation of Hurricane Melissa, a Category 5 hurricane, serves as a reminder that forces of nature can still arise at any time. Accordingly, as the chapter closes on hurricane season, the winter season begins shortly after. This is not the time for complacency. Weather forecasters are predicting that early winter storms from Canada could hit the Midwest and push into the mid-Atlantic and New England areas. Powerful winter Nor'easters (named such because the winds over the coastal area are typically from the northeast) can also bring devastating weather all along the U.S. East Coast.

If weather predictions hold true, many businesses could suffer property damage or lose business income due to weather-related shutdowns, road closures, supply chain interference and more. As a result, commercial policyholders may have significant insurance claims for property damage, loss of business income and extra expenses that



**Anthony B. Crawford, left, of Olshan Frome Wolosky, and Arnie Mascali, right, of A. Mascali Enterprise. Courtesy photos**

they may incur to continue or resume operations. Businesses should look to their property insurance policies for coverage for these losses. The following is a short summary of some of the typical questions and concerns that business owners face in a wide range of industries.

## **Business Interruption (or Business Income) Insurance**

Business interruption insurance is designed to cover a policyholder for profits lost, and

unavoidable expenses incurred, during a “period of restoration” (as defined by the insurance policy) needed to repair or replace damaged or destroyed property used in the policyholder’s operations. There are a number of common issues that policyholders may face when pursuing business interruption claims, including:

- **Must the policyholder’s property be damaged in order to trigger a business interruption claim?** Generally, yes. Accordingly, for example, there is no business income coverage if snow prevents people from getting to your store. On the other hand, traditionally, property that cannot be used for its intended purpose has suffered damage. Thus, in the past, a building which is not safe to inhabit because of the weight of accumulated snow can be categorized as damaged until the snow is removed, and will support a business income claim. Policyholders should be aware that insurance companies will look to recent COVID-19 insurance cases to challenge that traditional interpretation.
- **Can the insurance company reduce my claim because my customers are affected by the weather?** Generally, no. A policyholder’s loss of business income is based on its expected net profits prior to a catastrophe and cannot necessarily be reduced by decreased local demand caused by the same catastrophe causing the loss. Property insurance policies often contain a “loss of market” exclusion that is typically worded: “This policy does not insure against loss or damage caused directly or indirectly by loss of market.” Courts addressing this exclusion have held that the “loss of market” exclusion is intended to preclude coverage for damages that result

solely from the operation of market forces, not to preclude coverage for business interruption losses arising from a covered peril.

- **How does a policyholder prove the amount of its business income loss?** Case law permits a policyholder to prove its business interruption loss in a practical way, through virtually any type of evidence. Because of the complexity of these types of claims, prudent policyholders often hire forensic accountants experienced in insurance matters to assemble their business interruption claim. Note, however, that policyholders should always treat their claim as if it will go to trial, and carriers often seek to exclude the testimony of forensic accountants. It is best to have multiple people who can prove the claim, including the policyholder’s regular accountants and its own employees.
- **How long may an insured claim a business interruption loss?** The time element portion of the property policy, which includes business interruption, does not provide an endless period to recoup income losses. Rather, income losses are measured for the duration of the period of restoration (POR), generally defined as starting on the date of the loss, and extending to the date, with the exercise of due diligence and dispatch, the damaged property should be repaired or replaced. Significantly, the POR is not the actual time it takes for a policyholder to repair the damage, but rather a hypothetical and subjective period. Simply submitting an income loss claim for the entire period a policyholder spent repairing the property will oftentimes lead to delays in reimbursement.

• **What about the period of time when a business reopens but does not realize the income that it had expected?** A property and business interruption policy may include an “extended period of indemnity” provision that would prove valuable. Rarely does a business sustain a suspension of operations and immediately return to pre-loss income streams after repair. For example, a restaurant that suffers a fire loss and shuts down completely for six months would not return to pre-fire reservation and guest levels immediately upon reopening. It is normal for there to be a ramp-up period where the restaurant reestablishes its operations, markets its reopening, advertises that it has made a return to the local market, and begins to slowly recover its expected number of guests. An extended period of indemnity would provide coverage during this ramp-up timeframe and reimburse the policyholder for the difference between its expected net

profit and the actual amount. This coverage is normally limited to a certain number of days once the insured resumes operation, so it is wise to consult an insurance broker or attorney to fully understand the available coverage under the given circumstances.

From better understanding a commercial insurance policy to obtaining insurance recovery monies, proactive review and preparation combined with having a team at the ready to navigate post-weather calamities is essential. While “winter is coming” can sometimes be inevitable, businesses can remain strong when they position themselves to protect their business interests adequately.

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