0001 [ST: 25] [ED: 100000] [REL: 41] (Beg Group) **Composed:** Thu Nov 3 18:14:52 EDT 2016
XPP 9.0C.1 SP #4 SC_00389 nllp 60098 [PW=500pt PD=684pt TW=360pt TD=580pt]
VER: [SC_00389-Master:21 Oct 16 02:10**][MX-SECNDARY:** 13 Sep 16 08:40**][TT-:** 23 Sep 11 07:01 loc=usa unit=60098-businessinterruption] 0

Effect of Post-Loss Economic Factors in Measuring Business Interruption Losses: An Insured's and Insurer's Perspectives

by
Gregory D. Miller and Joseph D. Jean*

I. INTRODUCTION

Business interruption insurance, at its core, is intended to place the insured in the position it would have been in had it not suffered a loss.[1] Although an insured's loss may not have a far reaching economic impact, there are circum- stances from which a loss to a single insured location can impact a region, or even a national economic marketplace. And, whereas a single location loss can, but usually does not, have a wide-impact on the surrounding economic landscape, hurricanes, earthquakes, wild fires, terrorist attacks, and even man-made environ- mental disasters that often cause significant, widespread physical loss and damage will typically have an effect on the regional, or even national, economy.

The significance of post-loss economic factors has become all the more important in recent years. Indeed, during the past 20 years, wide-impact catastrophes have been responsible for causing more than $1.1 trillion in damages worldwide.[2] Hurricane Katrina, the costliest natural disaster in United States' history on record was singularly responsible for causing more than $45 billion in insured damage.[3] And, the oil spill in the Gulf of Mexico, which is already the largest environmental disaster in United States' history, has the potential to cause far-reaching physical and economic damages to businesses and individuals all

---

* Gregory D. Miller is a director/shareholder at Podvey, Meanor, Catenacci, Hildner, Cocoziello & Chattman, P.C. in Newark, New Jersey. A substantial part of his practice is devoted to representing insurance carriers in complex first party property coverage and environmental disputes, including extensive experience with business interruption claims. Joseph D. Jean is a partner in Pillsbury's Insurance Recovery & Advisory practice in New York. He focuses on property and business interruption insurance for commercial property owners in various industries and has represented clients on some of the nation's largest and most important catastrophic property losses. This article is intended as a scholarly discussion of the issues presented and does not necessarily reflect the views of the authors. The authors thank Rachel M. Wrightson and Paulina Stamatelos for their research contributed in support of this article.

[1] Nat'l Union Fire Ins. Co. of Pittsburgh v. Anderson-Prichard Oil Corp., 141 F.2d 443, 445 (10th Cir. 1944) (holding business interruption insurance should place the insured in the same position it would have been in had its business not been interrupted by insured physical damage, no more and no less).

[2] Howard Kunreuther, *Reducing Losses from Catastrophic Risks Through Long-Term Insurance and Mitigation*, Risk Management and Decision Process Center, The Wharton School of the University of Pennsylvania, June 2008, at p. 2.

[3] *Id.* at 3.

along the Gulf Coast and likely elsewhere.

Under ordinary, non-catastrophic circumstances, a business's performance prior to the loss can be an accurate measurement for how that business would have performed if the loss had not occurred. But the same may not be true following a wide-impact catastrophe. For example, wide-impact catastrophes can cause major population shifts and changes in market forces such as supply and demand which in turn can have profound and long-lasting effects on businesses and their income stream. Companies that rely upon shipping and rail systems might find themselves unable to transport or receive goods. Likewise, an influx of temporary rescue workers could cause local hospitality businesses to boom, while mass population shifts might put others out of business.

Whether a single location loss or a wide-impact catastrophe, a loss that changes the economic landscape presents insurers and insureds with unique issues in determining how to measure insured business interruption. For the most part, courts that have addressed these issues either consider the post-loss economic conditions or they ignore them. The decisions, therefore, generally fall into either what has previously been coined the "Economy Considered" or the "Economy Ignored" lines of authority.[4]

This article discusses the developing body of case law analyzing how to measure business interruption losses where the insured's loss is affected by post-loss economic factors. In addition to discussing the two competing ap- proaches, *i.e.*, the Economy Considered and the Economy Ignored lines of authority, this article also analyzes several hypothetical scenarios from both an insured and an insurer perspective, which further serves to facilitate the discussion and highlight the significance of post-loss economic factors in measuring business interruption.

II. "ECONOMY IGNORED" VERSUS "ECONOMY CONSIDERED"

The Economy Ignored line of authority looks backward and measures the insured's loss only against pre-loss business levels, and does not consider the impact of actual post-loss economic market conditions. Courts applying the Economy Ignored approach typically do so because they claim that in situations where the insured's business would have performed better post-loss than it had before the loss, the insured will reap a "windfall" from the loss. The Economy Considered approach, on the other hand, seeks to place the insured in the position that it would have occupied in the actual post-loss environment had it been able to continue its operations.

Whether a court applies the Economy Ignored approach or the Economy Considered approach frequently turns on the actual policy language at issue. However, courts interpreting the applicable business interruption measurement provisions sometimes rely on similar language to yield different results to substantially similar claims. And, because the facts and circumstances of every loss differ, neither approach can be said to consistently benefit insureds or insurers.

---

[4] *See* H. Richard Chattman & Gregory D. Miller, *Measuring Business Interruption Loss in Wide-Impact Catastrophes: Insurance Against Catastrophes or Only Against Insured Damage from Catastrophes?*, 19 Coverage 1 (Jul./Aug. 2009).

A variety of business interruption provisions exist and insureds should be mindful that these provisions often vary by insurer, both in terms of their language and the coverage provided.

A common business interruption provision states:

> In determining the amount of gross earnings covered hereunder for the purposes of ascertaining the amount of loss sustained, due consideration shall be given to the experience of the business before the date of the damage or destruction and to the probable experience thereafter *had no loss occurred*.[5]

A common business policy provision is:

> Business interruption means loss resulting from necessary interruption of business conducted by the insured and caused by direct physical loss or damage by any of the perils covered herein during the term of this policy to real and/or personal property as covered herein.
>
> If such loss occurs during the term of this policy, it shall be adjusted on the basis of the actual loss sustained by the insured, during the period of restoration, consisting of the net profit (or loss) which is thereby prevented from being earned and of all charges and expenses (excluding ordinary payroll), but only to the extent that they must necessarily continue during the interruption of business, and only to the extent to which they would have been incurred *had no loss occurred*.[6]

And yet another provision is:

> In determining the indemnity provision payable under this Endorsement, due consideration shall be given to the experience of the business before the Period of Interruption and the Probable experience thereafter and to the continuation of only those normal charges and expenses that would have existed *had no interruption of production or suspension of business operations or services occurred*.[7]

The following policy provision attempts to limit an insurer's exposure by seeking to exclude increases in business due to favorable business conditions following a covered loss:

"Business Income" is to be determined by:

(1) **The Net Income of the business before the direct physical loss or direct physical damage occurred;**

(2) **The likely Net Income of the business if no physical loss or no physical damage had occurred, *but not including any Net Income that would likely have been earned as a result of an increase in the volume of business due to favorable business conditions caused by the impact of the Covered Cause of***

---

5 Finger Furniture Co. v. Commonwealth Ins. Co., 404 F.3d 312, 314 (4th Cir. 2005) (emphasis added).

6 Consolidated Cos., Inc. (Conco) v. Lexington Ins. Co., No. 06-CV-4700, 2009 U.S. Dist. LEXIS 8542 at *16–17 (E.D. La. Jan. 23, 2009) (emphasis added).

7 Levitz Furniture Corp. v. Houston Cas. Co., No. 96-CIV-1790, 1997 U.S. Dist. LEXIS 5883, at *7 (E.D. La. April 28, 1997) (emphasis in original).

Loss on customers or on other businesses.[8]

As explained more fully, below, insureds generally have some flexibility in choosing which approach benefits them more. Insurers, on the other hand, because they insure a large number of policyholders with a variety of risks and are often the drafters of the policy provisions, must generally choose one approach and consistently apply it. Insureds should, therefore, be certain to fully understand their particular circum- stances, which approach the insurer uses, and the law of each applicable jurisdiction before filing a business interruption claim.

A. The Economy Ignored Approach

1. Courts Use This Approach to Guard Against Windfall Recoveries

In the context of wide-impact catastrophes, a number of federal courts have equated the "had no *loss* occurred" language with "had no *catastrophe* occurred." Those courts justify this approach by noting the difficulty in calculating prospective profits and guarding against an insured's potential windfall recovery as a consequence of the catastrophic loss.

2. *Prudential LMI Commercial Insurance Co. v. Colleton Enterprises, Inc.*[9]

In *Prudential LMI Commercial Insurance Co. v. Colleton Enterprises, Inc.*, the Fourth Circuit focused on the "had no loss occurred" language in the policy's business interruption measurement provision to reverse the district court which had held the insurer liable for lost profits resulting from damage caused by Hurricane Hugo at the policyholder's motel in South Carolina.[10]

In the 32 months preceding the hurricane, the motel endured consistent operating losses. Per the casualty insurance policy, the insurer covered "the loss of earnings sustained, less operating costs . . . , caused directly by the insured perils in this Section of the policy resulting in loss or damage to real or personal property at the described locations during the term of this policy."[11] The policy defined earnings " . . . AS NET PROFIT PLUS EXPENSE, TAXES, INTER- EST, RENTS AND ALL OTHER OPERATING EXPENSES EARNED BY THE BUSINESS. In determining loss . . . due consideration shall be given to . . . the earnings of the business before the date of damage or destruction and to the probable earnings thereafter, *had no loss occurred* . . . ."[12]

Following Hurricane Hugo, the motel would have been profitable because of the increased demand for lodging by hurricane relief workers. The insured, therefore, sought coverage for its probable post-loss earnings based on what

---

[8] Rimkus Consulting Group v. Hartford Cas. Ins. Co., 552 F. Supp. 2d 637, 640 (S.D. Tex. 2007) (emphasis in original).

[9] Prudential LMI Commercial Ins. Co. v. Colleton Enterprises, Inc., 976 F.2d 727 (Table), No. 91-1757, 1992 U.S. App. LEXIS 25719, at *1 (4th Cir. Oct. 5, 1992).

[10] *Id.*

[11] *Id.* at *2.

[12] *Id.* at *2–3 (emphasis supplied).

would have been increased demand if it had been operating. But the insurer argued that only pre-loss earnings should be considered because "probable earnings resulting from accommodating the burgeoning demand due to the hurricane" fell outside the contract's coverage.[13]

To resolve the dispute, the Fourth Circuit addressed the specific issue of whether "the lost opportunity to house the influx of temporary residents after the hurricane constitute[d] loss of earnings cognizable under a policy that is designed to return the [policyholder] to the position it would have occupied had the hurricane not occurred . . . ."[14] In framing the issue this way, the Fourth Circuit equated "had no *loss* occurred" with "had no *hurricane* occurred." In doing so, the Fourth Circuit ignored the post-loss economy and concluded that "the strongest and most reliable evidence of what the business 'would have done' is likely to be what 'it had been doing' in the period just before an interruption."[15] According to the Fourth Circuit, to allow the insured to recover profits of what its business "would have done" following the hurricane would "confer a windfall upon the insured rather than merely to put it in the earnings position it would have been in had the insured peril not occurred."[16]

3. *American Automotive Insurance Co. v. Fisherman's Paradise Boats, Inc.*[17]

In *American Automotive Insurance Company v. Fisherman's Paradise Boats, Inc.*, the insured's boat and marine accessories store endured significant damage by Hurricane Andrew. Following Hurricane Andrew, the insured's store closed and the insured filed a claim for lost profits arguing that its sales would have increased because its goods were in high demand following the hurricane. In fact, the insured submitted evidence that its sales would have increased by 192% had the store "not been damaged and [if it] was positioned to reap the economic benefits of post hurricane demand for boats and marine accessories."[18]

The policy covered "actual loss of Business income you sustain due to the necessary suspension of your operations during the period of restoration . . . .

Business Income [includes the] . . . Net Income (Net Profit or Loss before Income Taxes) that would have been earned or incurred."[19] The amount of Business Income loss was to be "determined based on: (1) [t]he Net Income of this business before the direct physical loss or damage occurred; (2) [t]he likely

---

13 *Id.* at *3.

14 *Id.*

15 *Id.* at *8.

16 *Id.* at *11–12.

17 Am. Auto. Ins. Co. v. Fisherman's Paradise Boats, Inc., No. 93-CV-2349, 1994 U.S. Dist. LEXIS 21068 (S.D. Fla. Oct. 3, 1994).

18 *Fisherman's Paradise*, 1994 U.S. Dist. LEXIS 21068, at *10.

19 *Id.* at *8.

Net Income of the business if no loss or damage occurred."[20]

Relying on *Colleton*, the court voiced a similar concern with the insured gaining "windfall profits" as a result of the hurricane. Rejecting Fisherman's Paradise's argument, and refusing to consider post-Hurricane Andrew economic conditions, the court found that the policy was "drafted in a way that allows net income projections that are not itself created by the peril."[21] Further, the court equated Fisherman's Paradise's income projections as speculation and concluded that doing so was not consistent with the policy when interpreted as a whole.[22]

4. *Finger Furniture Company Inc. v. Commonwealth Insurance Co.*[23]

In *Finger Furniture Company Inc. v. Commonwealth Insurance Co.*, the insured owned and operated several furniture stores that suffered damages as a result of severe flooding and a resultant two-day closure following Tropical Storm Allison.[24] The weekend after the stores re-opened, the insured discounted its prices and sales soared. Finger Furniture filed a claim for lost profits during the period of closure under its business interruption insurance.

The insurer sought to offset Finger Furniture's losses with post-storm profits.[25] Essentially, the insurer argued that Finger Furniture made up the sales that it lost during the closure after it reopened.[26] But Finger Furniture argued, relying on *Colleton* and *Fisherman's Paradise*, that the policy did not allow consideration of post-storm profits.[27]

Agreeing with Finger Furniture, the court held:

> The contract language does not suggest that the insurer can look prospectively to what occurred after the loss to determine whether its insured incurred a business-interruption loss. Instead, the policy requires due consideration of the business's experience before the date of the loss and the business's probable experience had the loss not occurred.[28]

Echoing *Colleton*, the court noted that the "strongest and most reliable evidence of what a business would have done had the catastrophe not occurred is what it had been doing in the period just before the interruption."[29] Thus, the court refused to consider post-loss economic conditions in the measurement of the policyholder's business interruption loss.

---

[20] *Id.* at *7–8.
[21] *Id.* at *9–10.
[22] *Id.* at *10.
[23] Finger Furniture Co. Inc. v. Commonwealth Ins. Co., 404 F.3d 312 (3d Cir. 2005).
[24] *Id.*
[25] *Id.*
[26] *Id.* at 314.
[27] *Id.* at 313.
[28] *Id.* at 314.
[29] *Id.*

5. *Catlin Syndicate Ltd. v. Imperial Palace of Mississippi, Inc.*[30]

The "had no hurricane occurred" approach to determining business interruption loss recurs in *Catlin Syndicate Ltd. v. Imperial Palace of Mississippi, Inc.*[31] In that case, Imperial Palace, a casino operator, filed a claim after suffering damages to its casino from Hurricane Katrina. Following months of closure, the casino reopened to increased earnings because many of the nearby casinos remained closed.[32]

The parties disagreed over the proper method for calculating business interruption losses. Imperial Palace, putting forth an Economy Considered rationale, argued that it should recover "what it would have earned had it been able to remain open immediately after Hurricane Katrina, while all of its competitors were closed due to the damage from the storm."[33] The insurer countered with the Economy Ignored position, namely that the business interruption recovery included only the "net profits Imperial Palace would probably have earned in late 2005 if Hurricane Katrina had not struck . . . and damaged its facilities."[34]

The relevant business interruption provision provided:

> **Experience of the Business** - In determining the amount of the Time Element loss as insured against by this policy, due consideration shall be given to experience of the business before the loss and the probable experience thereafter had no loss occurred.[35]

The district court relied primarily on *Finger Furniture*, as well as Black's Law Dictionary, and noted that "loss" and "damage or destruction" functioned as equivalent terms to conclude that both cases involved "nearly identical business loss provision[s]" and that any difference in terminology between the policy in *Catlin* and in *Finger Furniture* was immaterial.[36] It further held that it would determine business interruption loss based on historical figures, and not on what would have occurred prospectively after the loss and adopted the approach taken in *Finger Furniture*.[37] The district court reasoned that, pursuant to the terms of the policy provisions, "the policy contemplates a calculation based on what Imperial Palace probably would have done had Hurricane Katrina not occurred. Had Hurricane Katrina not occurred, Imperial Palace's competitors would have remained open."[38]

---

[30] Catlin Syndicate Limited v. Imperial Palace of Mississippi, Inc., No. 08 CV 97, 2008 U.S. Dist. LEXIS 103831, at *1 (S.D. Miss. Dec. 15, 2008) *aff'd*, 600 F.3d 511 (5th Cir. 2010).

[31] *Id.*

[32] *Id.*

[33] *Id.* at *14–15.

[34] *Id.* at *14.

[35] *Id.*

[36] *Id.* at *19.

[37] *Id.* at *20–21.

[38] *Id.* at *20.

The Fifth Circuit recently affirmed.[39] On appeal, Imperial Palace argued that Mississippi law, which governed this dispute, required a different outcome than in *Finger Furniture* which was governed by Texas law. But the Fifth Circuit disagreed noting that Texas and Mississippi law was the same with respect to defining loss under "a materially identical business-interruption provision," and although *Finger Furniture* involved a question of Texas law, both states' law concurred on the issue.

The Fifth Circuit agreed with the district court's reasoning and found that "in the context of these business-interruption provisions, the terms 'damage or destruction' and 'loss' are functionally equivalent."[40] Finding in favor of an Economy Ignored approach, the court ruled that "[b]ecause 'loss' and 'damage or destruction' are equivalent terms, the business-interruption provision in *Finger Furniture* is materially identical to [the one in Imperial Palace's contract] and our interpretation of the provision in *Finger Furniture* guides" the court to conclude that "in the business-interruption provision at hand, only historical sales figures should be considered when determining loss, and sales figures after reopening should not be taken into account."[41]

B. The Economy Considered Approach

1. Courts Taking This Approach Distinguish Between "Had No Loss" Occurred and "Had No Interruption Occurred"

Courts disagree as to whether the "had no loss" occurred phrase mandates that the post-loss economic factors should be ignored in measuring the insured's business interruption loss.[42] Additionally, courts have drawn a distinction between the phrases "had no loss" occurred and "had no interruption" occurred in the context of business interruption measurement provisions, finding the latter considers post-loss economic circumstances, specifically including whether the insured would have performed better or worse following the loss.

2. *Levitz Furniture Corp. v. Houston Casualty Co.*[43]

Levitz Furniture Corp. v. Houston Cas. Co., involved a flood which forced Levitz, a furniture store, to close for a period of 67 days.[44] The flood also damaged Levitz' building and showroom inventory. Levitz sought coverage under its business interruption insurance policy but the insurer denied coverage arguing that Levitz was "not entitled to recover lost profit for increased consumer demand

---

[39] Catlin Syndicate Ltd. v. Imperial Palace of Miss., Inc., 600 F.3d 511 (5th Cir. 2010).

[40] *Id.* at 514.

[41] *Id.* at 516.

[42] *See e.g.*, Stamen v. Cigna Property and Cas. Ins. Co., 93-1005-CIV-Davis (S.D. Fla. June 13, 1994) (Order on Motions for Summ. J.) (unpublished decision).

[43] Levitz Furniture Corp. v. Houston Cas. Co., No. 96-CIV-1790, 1997 U.S. Dist. LEXIS 5883, at *1 (E.D. La. Apr. 29, 1997).

[44] *Id.*

which resulted from the flood [because] profit opportunities created by flood and water, the insured perils causing the loss, are not recoverable under the policy."[45] The insurer also argued that if no flood had occurred, Levitz would have neither sustained damage to its property nor enjoyed increased consumer demand; and if the court permitted the insured recovery, the insured would be placed in a better position than if no loss had occurred.[46]

The Levitz' policy provided that:

> In determining the indemnity provision payable under this Endorsement, due consideration shall be given to the experience of the business before the Period of Interruption and the Probable experience thereafter and to the continuation of only those normal charges and expenses that would have existed *had no interruption of production or suspension of business operations or services occurred*.[47]

Focusing on the distinction between "no loss" and "no interruption," the court read this provision as providing coverage for Levitz' earnings as if no business interruption had occurred. According to the court, the "meanings of these terms are self-evident: 'no loss' means no damage, i.e., no flood, and 'no interruption' means no business stoppage."[48] As such, the court reasoned that a plain reading of the policy's terms meant that "business interruption losses includes consideration of earnings 'that would have existed' had no business interruption occurred, i.e., had Levitz not been forced to close after the flood."[49] Accordingly, the court concluded that Levitz' business interruption loss earnings may include sales that it would have made in the aftermath of the flood had it been open for business during that period.[50]

3. *Sher v. Lafayette Ins. Co.*

In *Sher v. Lafayette Insurance Co.*, a New Orleans man lived in an apartment building that he owned and rented.[51] The building sustained flood damage following Hurricane Katrina. Sher sought recovery for, *inter alia*, lost rents under the business income coverage provision of the policy which covered "actual loss of Business Income [sustained] due to the necessary suspension of your 'operations' during the 'period of restoration.' "[52] Sher proffered testimony that the rental value of the apartments increased post-Hurricane Katrina. The jury awarded Sher lost rents under the policy and the court ruled that the "jury's award

---

[45] *Levitz*, 1997 U.S. Dist. LEXIS 5883, at *6.

[46] *Id.* at *6.

[47] *Id.* at *7 (emphasis in original).

[48] *Id.* at *8.

[49] *Id.* at *8.

[50] *Id.*

[51] Sher v. Lafayette Ins. Co., 973 So. 2d 39 (La. Ct. App. 2008), *aff'd in part, rev'd in part*, 988 So. 2d 186 (La. 2008).

[52] *Id.* at 57.

was not manifestly erroneous because the Policy covers actual loss" and if Sher could have leased the rental units, he would have collected rental income higher than what he had collected prior to the storm.[53] Both Louisiana's lower appellate court and its Supreme Court affirmed the jury award and the trial court's decision.[54]

4. *Stamen v. Cigna Property & Cas. Ins. Co.*[55]

In a decision decided two years after *Colleton*, the court in *Stamen v. Cigna Property & Casualty Insurance Company*, found *Colleton* unpersuasive and ruled that the insured's business interruption loss should be measured by the Economy Considered approach.[56] In *Stamen*, the insured's convenience stores suffered physical damage following Hurricane Andrew.[57] Following the storm, several convenience stores were closed for differing periods of time, although some remained opened. Of the convenience stores that closed, most enjoyed increased profits upon reopening. The insured thereafter sought recovery for business interruption losses and argued "that in measuring lost profits for the time period in which the stores were closed, it should be able to factor in the profits the stores would have made had they stayed open immediately after the hurricane."[58]

The relevant measurement provision provided that "[i]n calculating your lost income, we will consider your situation before the *loss* and what your situation would probably have been if the *loss* had not occurred."[59] The insurer argued that only pre-hurricane profits should be considered in measuring the insured's business interruption loss. The insurer sought to equate "loss" with "occurrence" which the policy defined as "an accident, including continuous or repeated exposure to the same event, that results . . . in loss or damage . . . ."[60]

The court, however, agreed with the insured that "lost profits should be measured . . . by the increased profits that would have resulted had the stores been open immediately after the hurricane."[61] In so deciding, the court considered the issue of defining the term "loss" as the policy did not define the term. The court rejected the insurer's contention and clarified that "the 'occurrence' in this case was Hurricane Andrew while the 'loss' was the property damage incurred by

---

53 *Id.* at 57.

54 *Sher,* 973 So. 2d 39; *Sher*, 988 So. 2d 186.

55 Stamen v. Cigna Property & Cas. Ins. Co., 93-1005-CIV-Davis (S.D. Fla. June 13, 1994) (Order on Motions for Summ. J.) (unpublished decision).

56 *Id.*

57 *Id.* at 4.

58 *Id.*

59 *Id.* (emphasis in original).

60 *Id.* at 6.

61 *Id.* at 5.

the [convenience] stores."[62] The court reasoned that had the insurer intended "to preclude consideration of [the insurer's] post-hurricane profits in the lost profits calculation, it should have substituted the word 'occurrence' for the word 'loss' in the clause describing how business interruption losses would be calculated."[63]

Moreover, addressing the "windfall" concerns raised by the court in *Colleton*, the *Stamen* court explained that the insurer's:

> policy argument that [the insured] receives a windfall if it is able to recover more as a result of the hurricane than it would have made if the hurricane had not occurred is unpersuasive. The insurance policy calls for [the insurer], in calculating business interruption losses, to consider what each [convenience] store would have profited had it been open after the hurricane. The fact that the [insured's] stores would have reaped greater profits in the aftermath of Hurricane Andrew and that Cigna therefore must pay higher business interruption losses is not accurately described as a windfall.[64]

This is so, the court explained, because there is no threat of a windfall when the insured seeks only "to recover its actual losses, which is exactly what the insurance policy requires [the insurer] to pay."[65]

5. *Berk-Cohen Associates, LLC v. Landmark American Insurance Co.*[66]

Berk-Cohen Associates, LLC v. Landmark American Insurance Co. involved a series of unfortunate events that struck an apartment complex owned by Berk-Cohen Associates, LLC ("Berk-Cohen") and managed by Manhattan Management.[67] Manhattan Management obtained two property insurance policies from Landmark American Insurance Company. Each policy provided insurance coverage for physical damage to the apartments as well as lost rental value resulting from such damage.[68] Two weeks prior to Hurricane Katrina, a tornado struck the apartments causing severe damage. The insurer covered the physical damage to the building but before repairs were made, Hurricane Katrina further damaged the apartment complex. The insurer then covered the new damages to the building. Several months later, a fire broke out in several apartments that were still under repair from Hurricane Katrina. Again, the insurer covered the fire damage. Lastly, several months thereafter, a vehicle struck and damaged an electrical transformer. The insurer paid for the transformer to be repaired.[69] Full

---

[62] *Id.*

[63] *Id.*

[64] *Id.* at 7–8.

[65] *Id.* at 8.

[66] Berk-Cohen Assocs., LLC v. Landmark Am. Ins. Co., No. 07-9205,c/w, 2009 U.S. Dist. LEXIS 77300, at *2–5 (E.D. La. Aug. 27, 2009).

[67] *Id.*

[68] *Id.*

[69] *Id.*

repair and restoration of the apartment complex took approximately two years following Hurricane Katrina.[70]

Although the insurer covered all of the property damage, it disputed the amount of Berk-Cohen's business interruption claim. Berk-Cohen sought, among other things, coverage for business income loss stemming from its inability to rent apartments in the wake of Hurricane Katrina.[71] Berk-Cohen argued that the housing shortage after Hurricane Katrina caused an increase in demand for apartments in the New Orleans area resulting in an increase in the rental market value of the apartment complex by more than 40 percent.[72]

The insurer, however, calculated the lost business income based solely on pre-Katrina occupancy rates and rental prices, arguing that the policy excluded coverage for expected earnings that would have arisen from favorable economic conditions following the hurricane. In support, the insurer pointed to the exclusionary language in the policy which measured Business Income loss. Specifically, the Policy provided in relevant part:

3. Loss Determination

a. The amount of Business Income loss will be determined based on:

(1) The Net Income of the business before the direct physical loss or damage occurred;

(2) The likely Net Income of the business if no physical loss or damage had occurred, *but not including any Net Income that would likely have been earned as a result of an increase in the volume of business due to favorable business conditions* caused by the impact of the *Covered Cause of Loss* on customers or on other businesses."[73]

But Berk-Cohen argued that the exclusionary language only applied to favorable conditions that were created as a result of a "Covered Cause of Loss." Significantly, the policy excluded loss resulting from "flood" for the insured location at issue.[74] Following Hurricane Katrina, the levy breaches and resultant flooding caused the increase in demand and rental value, not the hurricane itself. Therefore, according to Berk-Cohen, "evidence of favorable business conditions caused by flooding escape the exclusionary wording in paragraph 3(a)(2) because flooding was not the Covered Cause of Loss from which the [apartment complex] sustained [coverage] damage."[75]

The court agreed with Berk-Cohen and explained that the policy—unlike the policies at issue in *Finger Furniture* and *Colleton*—excluded "only favorable

---

[70] *Id.*

[71] *Id.* at *7–8.

[72] *Id.* at *8.

[73] *Id.* at *9–10 (emphasis added).

[74] *Id.* at *14.

[75] *Id.*

business conditions caused by the same cause of loss for which the insured is invoking coverage under the policy."[76] The court found that the policy allowed Berk-Cohen to recover for favorable market conditions resulting from flooding and concluded that "[i]t would make no sense for the drafters of the . . . Policy to include language in paragraph 3(a)(2) that explicitly excludes favorable business conditions resulting from the Covered Cause of Loss, if the drafters intended to also exclude favorable business conditions resulting from losses not covered under the policy, such as those resulting from flood."[77] The court denied the insurer's motion for partial summary judgment precluding Berk-Cohen's use of changed market conditions as evidence of future business income.[78]

6. *Consolidated Cos., Inc. v. Lexington Ins. Co.*[79]

In *Consolidated Companies, Inc. ("Conco") v. Lexington Insurance Co.*, Hurricane Katrina damaged the insured's food distribution facility, resulting in millions of dollars in claimed business interruption.

In measuring business interruption under the policy, which was similar to the policies in *Colleton* and *Finger Furniture*, "due consideration shall be given to the experience of the insured's business before the date of damage or destruction and to the probable experience thereafter had no loss occurred."[80] The policy defined business interruption as "loss resulting from necessary interruption of business conducted by the insured and caused by direct physical loss or damage by any of the perils covered herein during the term of this policy to real and/or personal property. . . ."[81]

In its instructions to the jury, the court stated that:

> The policy is designed to place the insured in the position that it would have been in if there had been no interruption. The policy is not designed to put the insured in a better position than if no loss or interruption of business had occurred.
>
> In calculating business-interruption loss, you may consider only losses caused by covered damage to [the insured's] property during Hurricane Katrina, not any lost profits that may have resulted from changes in [the insured's] customer base and market as a result of Hurricane Katrina.[82]

The jury returned a verdict for the insured for uncompensated losses including

---

[76] *Id.* at *14–15.

[77] *Id.* at *16.

[78] *Id.* at *18.

[79] Consolidated Cos., Inc. v. Lexington Ins. Co., No. 06-CV-4700, 2009 U.S. Dist. LEXIS 8542 (E.D. La. Jan. 23, 2009), *rev'd in part on different grounds*, No. 09-30178, 2010 U.S. App. LEXIS (5th Cir. Aug. 17, 2010).

[80] *Id.* at *18.

[81] *Id.* at *16.

[82] *Conco*, No. 2:06-CV-4700-MVL-SS, (Jury Charges, Docket Entry 146 at 9–10) (E.D. La. July 11, 2008).

those for business interruption.[83] The insurer challenged the jury's verdict in favor of the insured, arguing that the jury awarded the insured's entire business interruption claim without any reduction for losses caused by the hurricane's impact on the surrounding economic environment, and specifically claiming that the verdict should have been less if such impact had been taken into account.[84]

Although the court agreed with the insurer's argument that post-loss economic conditions should be considered in measuring the business interruption, the court ruled that the "evidence [was] sufficient to conclude that the losses were not caused by market conditions after Hurricane Katrina."[85] The court in *Conco* thus allowed the "had no loss" occurred provision to invite evidence of how the insured performed following the catastrophe. To this end, the court further found that "[t]he evidence was sufficient for the jury to conclude that business-interruption losses were the result of Conco's covered damage" and "the evidence [was] sufficient to support the jury's verdict that Conco was prevented from earning a net profit . . . , which it would have earned *if the damage to its property had not occurred.*"[86] In the end, the court considered the insured's business interruption loss what the insured would have earned if no physical loss or damage had occurred, and not what the insured would have earned had the hurricane not occurred.

7. *Penford Corporation v. National Union Fire Ins. Co. of Pittsburgh, PA.*

Penford Corporation v. National Union Fire Ins. Co. of Pittsburgh, PA,[87] a recent Economy Considered case, involved claims for property damage and business interruption loss allegedly incurred as a result of the record flooding of the Cedar River in Cedar Rapids, Iowa in June 2008. The insured argued that the post-loss economy should be ignored, while the insurer argued that it should be considered. At issue in the decision was the insured's motion to bar certain opinions of the insurer's damages expert. The insured argued that the expert "improperly base[d] a portion of his business interruption calculation for [the insured] upon a pre-flood revenue projection and the allegedly unfavorable 'market conditions,' instead of relying solely upon [the insured's] historical revenues and costs."[88] In opposing the motion, the insurer argued that its expert "properly considered the effects of the recession on demand for [the insured's] products" and that "these effects must be considered under both the policy

---

83 *Conco*, 2009 U.S. Dist. LEXIS 8542, at *16.

84 *Id.* at *18.

85 *Id.* at *20.

86 *Id.* at *20–21 (emphasis added).

87 Penford Corporation v. National Union Fire Ins. Co. of Pittsburgh, PA., No. 09-CV-13-LRR, 2010 U.S. Dist. LEXIS 60083 (N.D. Iowa June 17, 2010).

88 *Id.* at *28.

language and the general principles of business interruption coverage .. . . ."[89]

The policy language at issue provided that:

> [I]n determining the amount of loss payable, the [insurers] will consider the experience of the business before and after and the probable experience during the PERIOD OF LIABILITY.[90]

The policy also provided that the insured "may recover lost earnings only to the extent that it is 'able to demonstrate a loss of sales for the operations, services or production prevented.' "[91] Accordingly, the court found that the insurer's consideration of the insured's business experience after the Period of Liability comported with the plain language of the policy.[92]

In reaching this conclusion, the court distinguished *Catlin*, discussed above, finding the reasoning of that case was not applicable to the insured's claim in *Penford*. As the court explained:

> Imperial Palace [i.e., the insured in *Catlin*] based its lost earnings calculation, at least in part, on the fact that it experienced increased revenues because it reopened before most other casinos in the area. *600 F.3d at 512*. This is why the Fifth Circuit Court of Appeals characterized Imperial Palace's calculations as being based upon a hypothetical in which "Hurricane Katrina struck but did not damage Imperial Palace's facilities." *Id.* [The insurer's expert's] consideration of market conditions, including the recession is not analogous. In fact, consideration of such factors appears to be in accord with the argument that the Fifth Circuit Court of Appeals ultimately accepted: that the insured's recovery should be based on the profits that it "would probably have earned if Hurricane Katrina had not struck the Mississippi Gulf Coast and damaged its facilities." *Id. at 513*. Here, unfavorable market conditions, such as a recession, would have affected [the insured's] earnings regardless of whether the flood ever occurred. Accordingly, they are relevant to the question of what [the insured's] likely revenues would have been in the absence of the flood.[93]

Based upon the foregoing, the court denied the insured's motion seeking to bar those portions of the expert's opinion "based on something other than [the insured's] historical revenues and expenses."[94]

III. HYPOTHETICALS: AN INSURED'S AND INSURER'S PERSPECTIVES

To fully appreciate the two competing approaches and the consequences of arguing in favor of one as opposed to the other, it is helpful to analyze and compare different hypothetical scenarios under each approach. Below are four

---

[89] *Id.*

[90] *Id.* at *29.

[91] *Id.*

[92] *Id.*

[93] *Id.* at *31–32.

[94] *Id.* at *33.

hypothetical situations, each highlighting different positions that either the insured or the insurer could take in measuring the business interruption loss. For purposes of this discussion, other than assuming that the same policy is being applied to each of the hypotheticals below, it is unnecessary to identify the specific contractual language being applied (*i.e.*, had "no loss" occurred, had "no interruption" occurred, etc.), since each hypothetical assumes that the court applies either the Economy Ignored or Economy Considered approach. Nevertheless, it is important to recognize that "[w]hether market changes are appropriate considerations in calculating lost business income depends on the language of the policy itself."[95]

Hypothetical No. 1

A limited service hotel chain is significantly damaged by an earthquake. Both the insured and the insurer agree that it will take approximately 12 months to repair the damage. The hotel had experienced an average annual occupancy rate of 75% percent for the three-year period preceding the earthquake, and immediately prior to the loss, the hotel forecasted that its occupancy level would essentially remain the same during the following 18 months. However, following the earthquake, there was an influx of temporary workers in response to recovery efforts in the region (*e.g.*, adjusters, consultants, etc.).

Under these circumstances, the hotel could allege that it would have achieved 100% percent occupancy if it had been open for business because of the increased demand for rooms. In contrast, the insurer could allege that allowing such a recovery will result in windfall profits for the hotel, as compared to merely putting the insured in the earnings position it would have been in (75% occupancy) had the earthquake not occurred.

A court applying the Economy Ignored approach should find in favor of the insurer's measurement, which is that the hotel's business interruption loss be calculated solely based on pre-loss projections, *i.e.*, an occupancy rate of 75% percent. A court applying the Economy Considered approach, on the other hand, should find in favor of the hotel's measurement, which is that the hotel's business interruption loss be calculated based on the occupancy level the hotel would have achieved had it not suffered physical loss or damage from the earthquake and been open for business, *i.e.*, 100% due to the influx of temporary workers.

Hypothetical No. 2

A full service luxury hotel chain is significantly damaged by an earthquake. Again, the insured and the insurer agree that it will take approximately 12 months to repair the damage. The hotel had experienced an average annual occupancy rate of 90% percent for the three-year period preceding the earthquake, and immedi- ately prior to the loss, the hotel forecasted that its occupancy level would essentially remain the same during the following 18 months. The hotel, however, is near a convention center that also suffered major earthquake damage and which

[95] *See Berk-Cohen*, 2009 U.S. Dist. LEXIS 77300, at *9.

will be closed for at least 12 months. If the hotel had not suffered physical damage and been operational, it would have experienced a significant decrease in revenue (*i.e.*, approximately 50% occupancy) due to the hotel's reliance on convention business. Additionally, the policy includes neither contingent or dependent business interruption coverage, nor attractive properties' coverage.[96]

Under these circumstances, the hotel could argue that its pre-loss history is all that need be considered to show that it would have achieved a 90% occupancy rate had the earthquake not occurred. Further, the hotel could argue that any reduction in occupancy below 90% was due to damage to the convention center, not to damage to the hotel, and this should not be considered. The insurer, on the other hand, could argue in favor of considering the post-loss economy and that the policy only requires that the insured be put in its post-loss position which would have been 50% percent occupancy had no insured physical loss or damage occurred at the hotel. Further, the insurer could argue that measuring loss against the 90% pre-earthquake levels would result in a true windfall to the hotel as it would result in payment for business the insured in fact would *not* have earned if it had suffered no damage. A court applying the Economy Ignored approach should find in favor of the hotel's measurement, which is that the hotel's business interruption loss should be calculated solely based on pre-loss projections, *i.e.*, an occupancy rate of 90%. But a court applying the Economy Considered approach should find in favor of the insurer's measurement, which is that the hotel's business interruption loss be calculated based on the occupancy level that the hotel actually would have achieved had it not suffered physical loss or damage from the earthquake and been open for business, *i.e.*, 50% due to the closure of the convention center.

In comparing the arguments in Hypothetical No. 1 and Hypothetical No. 2, there arguably is an irreconcilable conflict in the competing positions of the insured and the insurer. Both hypotheticals address the same business interruption measurement provision, yet the interpretations of that provision are inconsistent. When the insured's business in Hypothetical No. 2 would have done worse had it been operating after the earthquake because of the loss of the convention business, the insured asserts that the court should ignore the impact of the earthquake on the relevant surrounding economic landscape and how the insured's business actually would have performed had it not suffered damage and been operating in the altered post-loss economy (*i.e.*, Economy Ignored), and the insurer asserts that the

[96] Contingent business interruption coverage, also known as dependent time element coverage, is typically in the form of an extension of the business income loss provision or endorsement, and provides, in accordance with the specified terms and conditions of the policy, business income coverage where there has been physical loss or damage to the location of an insured's supplier or customer, and as a result of such physical loss or damage, the insured suffers a business interruption loss. *See e.g.*, Zurich Am. Ins. v. ABM Indus., Inc., 397 F.3d 158, 168 (2d Cir. 2005). Attractive or leader properties coverage typically covers a loss of income to the insured due to physical loss or damage to a nearby property that attracts customers to the insured's business, *e.g.*, an anchor store in a shopping center or a nearby convention center or sports arena. *Id* at 171.

court should consider how the insured would have actually performed had it not suffered damage and been operating in the post-loss economy (*i.e.*, Economy Considered).

In contrast, when the insured's business in Hypothetical No. 1 would have done better post-earthquake because of the influx of temporary workers, the insured and insurer assert the opposite positions, to wit: the insurer argues in favor of the Economy Ignored approach and the insured argues in favor of the Economy Considered approach.

Clear and unambiguous policy language should be subject to a single interpretation, rather than multiple interpretations that are result oriented.[97] An insurer inevitably will encounter a credibility problem if it interprets its policy consistent with the Economy Ignored line of authority when it inures to its benefit, but then interprets the same policy provision consistent with the Economy Considered line of authority when that interpretation results in a lower measure- ment. An insurer will also inevitably encounter difficulty arguing that clear and unambiguous policy language has more than one meaning, and thus, should not be able to argue it both ways, unless the policy language specifically provides for that interpretation.

An example of specific policy language mandating the outcome is *Rimkus Consulting Group, Inc. v. Hartford Casualty Insurance Co.*, in which the business interruption measurement provisions stated in relevant part:

"Business Income" is to be determined by:

(1) The Net Income of the business before the direct physical loss or direct physical damage occurred;

(2) The likely Net Income of the business if no physical loss or no physical damage had occurred, *but not including any Net Income that would likely have been earned as a result of an increase in the volume of the business due to favorable business conditions caused by the impact of the Covered Cause of Loss on customers or on other businesses*.[98]

The insured in *Rimkus* was in the business of providing engineering, accounting and consulting services. Although its New Orleans office was damaged by Hurricane Katrina, the insured continued to provide services and in fact experienced a substantial increase in revenues in the months after the storm. In light of the very specific and special language of the policy's Business Income provision, the court found that coverage for business income loss was never

---

[97] *See e.g.*, Westinghouse Elec. Corp. v. Am. Home Assurance Co., No. A-6706-01T5, 2004 N.J. Super. Unpub. LEXIS 2, at *78 (App. Div. July 8, 2004) (unpublished decision) (holding that "[w]hen policy language and circumstances are similar, the result of the case should be the same, whether or not it benefits the policyholder under the terms of the rest of the policy.").

[98] *See e.g.*, Rimkus Consulting Group v. Hartford Cas. Ins. Co., 552 F. Supp. 2d 637 (S.D. Tex. 2007) (emphasis added).

triggered.[99]

The desirability of and pressure for consistent positions may also hold true, at least to a certain extent, with regard to an insured's interpretation of the business interruption measurement provision. Although an insured may be in a position to assert that the relevant policy language is ambiguous and subject to more than a single interpretation, there are circumstances where this is not feasible, or where doing so is, at the very least, problematic.

For example, an insured may have multiple locations insured by a single policy, with each location sustaining different degrees of insured physical loss or damage arising out of the same catastrophe. And depending on the circumstances, the business interruption measurement at one insured location may be greater under an Economy Ignored interpretation, whereas the measured amount may be greater at a different insured location under an Economy Considered interpretation. While the insured may argue that the language is ambiguous and that it is not inconsistent to argue two different interpretations because the provision should be interpreted in its favor under such circumstances, a court may take issue with an insured arguing it both ways, because facially each competing interpretation has the appearance of being result oriented, *i.e.*, selecting the interpretation that gives the insured the highest recovery.

Hypothetical No. 3

The production plant of a major manufacturer of sheetrock is significantly damaged by fire. It is estimated that it will take 12 months to repair the damage. Prior to the loss, the manufacturer was operating at a loss due to excess supply in the market. However, due to the plant's shutdown, the national wholesale price of sheetrock increased because of the reduced supply in the market.

Under these circumstances, if the manufacturer argues in favor of the Economy Ignored approach, its business interruption loss will be measured based on negative operating earnings because the manufacturer was operating at a loss prior to the fire. This result may lead the manufacturer to argue in favor of the Economy Considered approach with the hope of measuring its business interruption loss based on the inflated wholesale price for sheetrock, which was caused by its own inability to manufacture sheetrock after its fire loss.

The difference here, however, unlike the scenarios presented in Hypothetical Nos. 1 and 2, is that the change in the wholesale market price was caused solely by the physical damage to the insured's facility, i.e., its inability to manufacturer sheetrock following the fire. The Economy Considered cases seek to place the insured in the position it would have been in had it not suffered physical loss or damage, while considering the surrounding economic environment in calculating the business interruption measure. Significantly, if the sheetrock manufacturer had not suffered its fire loss, the price of sheetrock never would have increased and the manufacturer would have continued to operate in the negative. Accordingly, even

---

[99] *Id.* at 642–643.

under the Economy Considered approach, the manufacturer arguably should not be permitted to take advantage of the inflated price for sheetrock in measuring its business interruption loss, since to do so would result in a true windfall for the insured, *i.e.*, the insured would do better with the damage and insurance than if it had not been damaged at all.[100]

Hypothetical No. 4

An oil and gas refinery is directly supplied by a pipeline owned and operated by a major oil and gas producer. The pipeline supplying the refinery is damaged by mudslides and it is estimated that it will take three months to repair the damage. As a result of the shutdown of the pipeline, the cost of unrefined oil increases because of the reduced supply in the market. However, as unrefined oil prices increase, the refinery's profit margins decrease. The refinery's policy contains a contingent/dependent time element endorsement, providing it with business interruption coverage for loss of earnings directly resulting from physical loss or damage to the location of a customer or supplier, *i.e.*, physical loss or damage to the pipeline as a result of the mudslides.

If the refinery argues in favor of the Economy Ignored approach, its business interruption loss will be measured based on its pre-loss projections, *i.e.*, its profit margins before the damage to its supplier's pipeline. Its insurer, however, will likely argue that such a measurement results in a windfall for the insured, because the business interruption loss should be based on reduced margins that exist following the loss. The insured would counter that these reduced margins are its loss, caused directly by the damage that triggered coverage.

Interestingly, if the Economy Considered approach were applied, the result is arguably the same. Although the refinery's margins are reduced in the post-loss marketplace, the reason for the reduced earnings is arguably[101] directly tied to insured property damage that triggers coverage under the policy, *i.e.*, the location of the refinery's supplier.

The goal of the Economy Considered approach is to place the insured in the position it would have been in had the coverage triggering physical damage not occurred. The refinery would argue that the physical loss and damage to its supplier's location is effectively an extension of its basic business interruption coverage under the policy because it purchased contingent/dependent time element coverage. Accordingly, had the pipeline (*i.e.*, coverage-triggering property) not been damaged, its profit margins would have been greater.

In this hypothetical, the reason that both normally conflicting approaches arguably yield the same result is because the economic change being considered

---

[100] In contrast, there is no "windfall" to an insured that would have performed better post-loss if the insured can demonstrate that it would have earned the amount claimed if it had not suffered damage and been operating after the loss.

[101] Real issues on this claim would include whether the reduced margins were the "direct" result of damage to the pipeline within the meaning of the insuring clause, and whether they were within an exclusion for "indirect or remote loss," issues that need not be resolved here.

0021 [ST: 25] [ED: 100000] [REL: 41] Composed: Thu Nov 3 18:14:54 EDT 2016
XPP 9.0C.1 SP #4 SC_00389 nllp 60098 [PW=500pt PD=684pt TW=360pt TD=580pt]
VER: [SC_00389-Master:21 Oct 16 02:10][MX-SECNDARY: 13 Sep 16 08:40][TT-: 23 Sep 11 07:01 loc=usa unit=60098-businessinterruption] 0

is also arguably a direct detrimental change in the insured's business caused by a covered event, *i.e.*, damage to the pipeline directly causing the reduced profit margin and the resulting loss of earnings. The insured loss in this example *is* the economic change resulting from the coverage—triggering damage. In such circumstances, there is arguably no conflict between the two approaches, since this example does not present a situation that gives rise to the normally conflicting approaches.

IV. LESSONS LEARNED

Because the law is not settled and because every situation can differ, below are several additional points to bear in mind when navigating this complex area of the law.

A. Assess the Specific Business Interruption Measurement Provision and Other Potentially Relevant Parts of the Policy

Whether a court will apply the Economy Ignored or Economy Considered approach is dependent on the particular language in the policy. Although some courts tend to find in favor of one approach as opposed to the other, the decisions are rooted in the policy language at issue. Understanding and assessing the relevant business interruption measurement provision is critical, but it is also important to understand other potentially applicable parts of the policy, such as the "Period of Indemnity" or the "Period of Liability." Further, "make-up" of production could be a factor in measuring the business interruption loss, and the policy may contain exclusions for "indirect or remote loss," "loss of market" and/or "idle periods" that also could influence the available business interruption coverage. Insureds should understand these provisions *before* purchasing the policy. If the provisions do not provide the appropriate coverage, insureds should seek to negotiate for more appropriate language. Insurers need to understand the risks that are being insured *before* agreeing to changes in policy wording.

B. Prepare Appropriately for the Adjustment Process

Business Interruption claims are often complex and can be difficult to document and time consuming, especially those where changes to the post-loss economic environment impact the measurement. Unlike an ordinary business interruption loss, claims impacted by changes in the post-loss economy may require the use of consultants and experts not typically retained in the normal course, such as expert demographers and geographers to assist in understanding the impact of population shifts and other changes to an affected region, or expert economists and accountants to understand the impact of such changes on the general economy, the particular market and the insured's business.

C. Be Cognizant of Potential Inconsistencies

An insurer interpreting its policy consistently with the Economy Ignored approach will likely have difficulty arguing in favor of the Economy Considered approach with respect to a different claim, but involving the same or similar policy language. Similarly, although an insured has some flexibility to take inconsistent positions if the applicable policy language is ambiguous, an insured nevertheless should consider potential pitfalls of taking different positions with regard to the same or similar policy language, especially where an insured has losses at multiple locations.

D. Understand the Law

Although there have been a number of decisions interpreting how to measure business interruption losses where changes to the post-loss economy were a factor, the law is still developing and it varies with the jurisdiction. If the policy does not contain a choice of law clause, it is important to determine which jurisdiction's law will apply in order to assess how a court will likely interpret the applicable measurement provision. And notwithstanding that some courts appear to tend to favor one approach over the other, in the final analysis the policy language should control how a court interprets the policy. Accordingly, it is important to analyze how courts in the appropriate jurisdiction have interpreted business interruption measurement provisions, including an assessment of the similarities and differ- ences between the provision at issue and those provisions addressed in the relevant case law.

V. CONCLUSION

Business interruption claims, especially ones involving wide-impact catastrophes, can be extremely complex and can often involve huge differences in measured loss depending upon whether the post-loss economy is considered or ignored. How a business interruption claim is measured depends on the particular policy language at issue, as well as the insured's specific factual situation. But as demonstrated by *Colleton* and *Finger Furniture* on the one hand, and *Conco* and *Stamen* on the other, courts sometimes rely on similar language to yield different results to substantially similar claims. Additionally, courts and the parties alike sometimes develop creative arguments, as was the case in *Berk-Cohen*, where the court found in favor of the insured's Economy Considered approach because the insurer could have drafted the policy to exclude such a result if it had intended to do so. In the end, however, insureds and insurers should be cognizant that neither the Economy Ignored approach nor the Economy Considered approach consistently benefits insureds or insurers in all situations.