

**A GUIDE TO
INSURANCE COVERAGE FOR LOSSES
FROM THE SEPTEMBER 11, 2001, ATTACKS**

**By
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Howrey Simon Arnold & White, LLP



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I. INTRODUCTION

As the nation works toward recovery from the attacks on September 11, 2001, on the World Trade Center in Manhattan and on the Pentagon—as well as the aborted attack on Washington, D.C.—everyone is assessing the impact of the attacks and the ensuing losses. The toll is measured not only in the loss of human life and the dramatic impact on others who were personally affected by the attacks but also by the impact on our nation’s economy. Faced with substantial and ongoing financial losses, many businesses and individuals may turn to their insurance policies as a source of financial protection.

At this stage, it may not be possible to know exactly who will call upon what insurance. There are certain obvious examples—the owner and tenants of the World Trade Center, the airlines involved and, on a more personal level, the families of victims who carried life insurance. However, there also are many others who have suffered—and who will continue to suffer—substantial financial losses because of the attacks. Those losses started with the physical destruction in New York and at the Pentagon on September 11, which was immediately followed by a near-complete standstill of business across the country.

For the first time in the aviation age, all commercial flights were grounded. Over the next week, sporting events and cultural events were cancelled, and many skyscrapers and major businesses across the country were closed. However, the closures also extended to shopping centers, motion picture theaters, restaurants, small stores, and much of the entertainment industry, including theme parks and motion picture and television productions. Although most businesses reopened by the following week, many have not yet returned to their normal state or normal level. In fact, the widespread cancellation or postponement of business and vacation plans—and the nation’s reaction to them—has led to mounting financial losses for many

businesses, including hotels, resorts, airlines, and travel agencies. As explained below, there may be significant insurance coverage available for those who have suffered and continue to suffer losses stemming from the attacks on September 11.

II. GENERAL OVERVIEW OF POTENTIALLY APPLICABLE INSURANCE COVERAGE

A. Types of Insurance

There are two general categories of insurance: third-party insurance and first party insurance. Third-party insurance, sometimes called "liability" insurance, protects an insured from claims asserted against it for wrongs allegedly committed by the insured for which damages may be recoverable by a third party. The insurance carrier typically agrees to defend and indemnify the insured against the third party's claims and any damages awarded in, or paid to settle, a claim. Third-party insurance does not pay for losses that the insured suffers. Instead, it pays for the liability of the insured to others and, typically, for the attorneys' fees and costs that the insured incurs in defending potentially covered claims.

The September 11 attacks likely will give rise to third-party claims—many of which may garner substantial media attention. However, the greatest number of potential insurance claims probably will be first-party claims. First-party insurance coverage provides protection for losses directly incurred by the insured. In essence, the insurance carrier agrees to reimburse the insured for losses that it suffers, such as for the destruction of insured property or an interruption of an insured's business.

First- and third-party insurance coverages do not require that separate policies be issued for each type of coverage. Both coverages often are provided in a single policy such as a "multi-peril" or "package" policy, an automobile policy, or a homeowners policy.

B. Parts of an Insurance Policy

In order to understand the scope of coverage afforded by an insurance policy, it is helpful to know the various parts of a typical policy. These parts include the declarations, insuring agreements, conditions, exclusions or limitations, and endorsements.

The **declarations** often are found on a separate page at the front of the policy. They typically list the name of the carrier issuing the policy and the name of the insured; the policy period; the locations of particular risks covered; the dollar amounts of insurance coverage and the deductibles for the basic coverages insured; and any additional coverages or perils insured against under endorsements attached to the policy. The declarations may also list the amount of the premium paid for the policy.

The **insuring agreements** typically state the insurance carrier's promises of coverage and the services that the insurer will provide. The section containing the insuring agreements also typically lists the definitions applicable to the policy and any limitations on coverage.

The **conditions** in a policy spell out the respective rights and obligations of the carrier and the insured. The conditions typically state the duties incumbent upon the insured, such as the duty to give notice to the carrier, a duty to cooperate, and, in many first-party policies, a duty to submit a "proof of loss."

The **exclusions** or **limitations** in a policy specify the circumstances under which there will be no coverage and under which the coverage otherwise provided will be limited. While typically stated in a section titled "exclusions" or "limitations," exclusions may be found in any part of the policy.

Finally, **endorsements** are additions to the standard provisions of a policy that may enhance, limit, or modify its terms. Endorsements may be in a standard form, or they may be

created specifically for a particular insured. Endorsements typically supersede any conflicting provisions in the body of the insurance policy.

C. Property Insurance Policies

Property insurance is first-party coverage. Many property insurance policies cover losses to real property (briefly, land and the structures on it) caused by all perils or risks. Some policies, however, cover all causes of loss that are not expressly excluded.

Because of the breadth of coverage afforded by an "all risk" policy, once an insured shows that it has suffered a loss, the burden of proof shifts to the insurance carrier to show that the loss is not covered.¹ As a California court of appeal has explained:

[I]n an action upon an all-risks policy . . . the insured does not have to prove that the peril proximately causing his loss was covered by the policy. This is because the policy covers *all risks* save for those risks specifically excluded by the policy. The insurer, though, since it is denying liability upon the policy, must prove the policy's noncoverage of the insured's loss—that is, that the insured's loss was *proximately caused* by a peril specifically excluded from the coverage of the policy.²

By comparison, a second type of property insurance—a "named perils" policy—covers only those perils expressly listed. The listed perils typically include fire, explosion, "physical contact of an aircraft," falling objects, riot, civil commotion, and vandalism.³

¹ See Annot., *Coverage Under "All Risk" Insurance*, 88 A.L.R.2d 1122 (1989).

² *Strubble v. United Servs. Auto. Ass'n*, 35 Cal. App. 3d 498, 504-05, 110 Cal. Rptr. 828 (1973).

³ See, e.g., *Causes of Loss – Broad Form*, § A (ISO Commercial Risk Services, Inc. 1994).

Property insurance policies usually cover the structures that are listed and scheduled in the policy. Therefore, in determining whether a particular building is insured, it is necessary to check not just the types of losses that are covered but also the schedule of structures. In addition, the policy should be reviewed to determine whether it contains a provision insuring "newly acquired" property. Under such a provision, an insured may have coverage for property acquired after the contract of insurance became effective, even though that property was not listed on the schedule of structures.

Most property insurance policies also insure personal property. This coverage usually is provided under an "unscheduled personal property" provision, which typically provides coverage for unlisted personal property that is "usual or incidental to the occupancy of the premises" or "used by an insured while on the described premises." However, certain types of property that are easily movable usually are covered only under "floater" policies or "floater" endorsements to the property policy. Floater policies or endorsements cover business personal property, including furniture, machinery, and stock, at least to the extent that these items are found within 100 feet of the insured premises.⁴

D. Business Interruption Insurance

"Business interruption" is a general term that encompasses a variety of specific types of insurance coverage that can be purchased for protection against many types of economic loss. In *Pacific Coast Engineering Co. v. St. Paul Fire & Marine Insurance Co.*,⁵ a California court of appeals explained the nature and purpose of a business interruption policy as follows:

[I]t is well settled that the purpose and nature of "business interruption" or "use and occupancy" insurance is "to indemnify

⁴ See Building and Personal Property Coverage Form, § A.1.b (ISO Commercial Risk Services, Inc. 1994).

the insured against losses arising from his inability to continue the normal operation and functions of his business, industry, or other commercial establishment. . . ." In other words, "to indemnify the insured for any loss sustained by the insured because of his inability to continue to use specified premises . . . [that is,] for loss caused by the interruption of a going business consequent upon the destruction of the building, plant, or parts thereof"⁶

Business interruption insurance usually is found in "all risk" insurance policies and package policies. Occasionally such coverage is provided by a separate policy.

"Contingent Business Interruption" coverage is one popular type of business interruption insurance. This type of insurance protects the insured from economic losses caused by the inability to get a supplier's goods to the insured, thereby preventing the insured from producing and then selling its product in the marketplace. The focus of this coverage is on the interruption to the insured's business because of another person's loss—caused by power outage or the inability to transport or deliver goods, for example—which in turn causes economic loss to the insured's business.

"Gross Earnings" coverage is another type of business interruption insurance. This type of coverage reimburses the insured for the amount of expected gross earnings minus normal expenses that the insured would have earned but for the interruption of the insured's business—that is, it reimburses for lost profits. In making this calculation, most insurers reduce the amount to be paid by the savings inuring to the insured because of the business interruption. For

⁵ 9 Cal. App. 3d 270, 88 Cal. Rptr. 122 (1970).

⁶ *Id.* at 275. See also *A & S Corp. v. Centennial Ins. Co.*, 242 F. Supp. 584, 589 (N.D. Ill. 1965) ("A business interruption policy is designed to do for the business what the business would have done for itself had no loss occurred.").

example, while certain fixed overhead costs are incurred whether or not business is ongoing, the cost of raw materials and items incidental to operations will not be incurred.

"Profit and Commission" coverage is yet another type of business interruption insurance. This coverage applies when the insured's inventory has been destroyed or damaged, depriving the insured of the opportunity to sell that inventory to the public.

Another type of business interruption coverage is known as "Extra Expense" coverage. This coverage is intended to indemnify the insured for any increased cost of business operations above the norm that is caused by a covered peril. For example, coverage typically is provided when an insured has to purchase a special generator after a loss of electricity so the business can continue to operate.

Some types of business interruption insurance contain a "civil authority" provision. This provision typically applies whenever the insured loses business income because access to the insured's premises is prohibited as the direct result of damage to or destruction of property belonging to others, when that damage was caused by a covered cause of loss. However, the "civil authority" coverage usually is limited to a specified period of time, which often is two weeks. For example, an insured whose business is located within the cordoned-off area surrounding the World Trade Center or located in an airport closed by authorities should be able to recover lost profits, even though the business premises were not directly injured by the disaster. The same may hold true both for insureds forced to close their businesses on September 11 or thereafter and for insureds who suffered lost business because of warnings by authorities that people should stay out of affected areas. As long as a covered cause of loss affected someone's property, and it resulted in denial of access to the insured's business because of the intervention of civil authorities, coverage may be afforded.

One issue that often arises in cases dealing with business interruption claims is whether "physical" damage or destruction to some tangible property is a prerequisite for coverage. Insurance carriers usually argue that no business interruption insurance coverage is available if the cause of the insured's loss did not arise from some actual physical damage to or destruction of tangible property. In other words, carriers typically argue that the insured's business losses must have been caused by damage to the insured's premises or to those of its suppliers. Carriers also usually argue that loss of use of the business premises, standing alone, is not one of the covered perils enumerated in a business interruption insurance policy.

Therefore, an insured should point to indications that its business losses were caused by actual physical damage or destruction to some type of tangible property. However, an insured whose loss of revenue was caused by closures stemming from government requests or orders may need to argue that its business interruption insurance does not require actual physical damage or destruction to property as a prerequisite for coverage.

The question of whether business interruption insurance applies to business losses that do not involve actual physical damage or destruction has been addressed in several contexts. One type of large-scale incident that has been addressed involves rioting, looting, and burning followed by government-imposed curfews. Two cases, *Sloan v. Phoenix Insurance Co.*⁷ and *Allen Park Theatre Co. v. Michigan Millers Mutual Insurance Co.*⁸ provide analysis. The insureds in *Sloan* and *Allen Park* claimed lost revenues because they were forced to close their movie theaters during a dusk-to-dawn curfew imposed by the government after the 1967 Detroit riots. The courts in *Sloan* and *Allen Park* focused on the insuring language of the business interruption policies involved to determine whether actual physical damage or destruction of

⁷ 46 Mich. App. 46, 207 N.W.2d 434 (1973).

property was a prerequisite to coverage for those lost revenues. They held that there was coverage because the insuring agreements in the plaintiffs' business interruption policies contained not only the words "damage" and "destruction" but also the word "loss," or otherwise encompassed an interpretation that did not require strictly "physical" damage or destruction to property. The *Allen Park* court also focused on the fact that typical business interruption policies are "all risk" policies, reasoning that "[i]f the insurer wanted to be sure that the payment of business-interruption benefits had to be accompanied by physical damage, it was its burden to say so unequivocally."⁹

Courts interpreting the applicability of business interruption insurance to circumstances other than loss of use caused by riots and/or curfews also recognize that physical damage or destruction to tangible property is not always a prerequisite to coverage.¹⁰ Thus, an insured should not readily accept any insurance carrier's argument that its business interruption insurance does not provide coverage in the absence of physical damage to property. Coverage should be afforded if an insured's business has been interrupted in any way because of the September 11 attacks, unless an insurance policy clearly and unequivocally provides to the contrary.

Even if there has been physical injury to tangible property, carriers may seek to deny business interruption coverage if the physical injury was not covered or if the property did not belong to the policyholder. In *Burdett Oxygen Co. v. Employers Surplus Lines Insurance Co.*,¹¹ for example, the insured suffered damaged to its property when a machine broke down. The physical injury to the machine was excluded from coverage by a "Mechanical Breakdown"

⁸ 48 Mich. App. 199, 210 N.W.2d 402 (1973).

⁹ *Id.* at 201.

¹⁰ *See, e.g., Nat'l Children's Expositions Corp. v. Anchor Ins. Co.*, 279 F.2d 428, 430 (2d Cir. 1960) (business interruption coverage in the absence of actual physical damage).

exclusion. However, the Sixth Circuit held that the business interruption losses and extra expense were covered by the policy because there had been physical injury, and the “all risk” policy did not exclude all loss from mechanical breakdown.

In *Archer-Daniels-Midland Co. v. Phoenix Assurance Co.*,¹² the insured suffered losses that gave rise to a fairly comprehensive review of the law of Illinois regarding extra-expense coverage. The court considered whether increased costs of transportation and raw materials, occasioned by flood, were covered as extra expense when the property that sustained physical damage did not belong to the insured.¹³ The policy language at issue included a coverage grant for “‘Extra Expense’ sustained by the insured as a result of direct physical damage caused by the perils insured against”¹⁴

The insurers denied approximately \$44 million in extra expense and other claims, in part because the extra expense arose out of damage to property that was not covered because it was owned by and in the possession of suppliers.¹⁵ The insured argued that the policy language required only (1) that there be direct physical damage to “property” and (2) that the damage be caused by covered perils.¹⁶ Finding that both of those conditions were met, the court held that the language of the insuring agreement did not require that the damaged property be insured under the policy. Therefore, the insured was entitled to coverage for the extra expense it had incurred.¹⁷

When an insured completely ceases business activities and subsequently resumes operation to the extent possible, business interruption coverage ordinarily extends to cover the

¹¹ 419 F.2d 247 (6th Cir. 1969).

¹² 936 F. Supp. 534 (S.D. Ill. 1996).

¹³ *Id.* at 536.

¹⁴ *Id.* at 537.

¹⁵ *Id.*

¹⁶ *Id.*

resumption period until business returns to normal.¹⁸ In *Lexington Insurance Co. v. Island Recreational Development Corp.*,¹⁹ the insured owned a restaurant that was severely damaged in a storm. When the restaurant reopened, it did not return to the same volume of business for another nine months. The insured sought to recover not only for the time it was closed but also for the time it took to return to its prior volume of business. The court broadly interpreted the policy to protect the reasonable expectations of the insured.²⁰ Because the insurance policy did not explicitly exclude the period of recovery after operations resumed, the court held that the insured was entitled to recover for the loss it suffered during its closure and also during the months that followed, until it recovered its lost business volume.²¹

In *American Medical Imaging Corp. v. St. Paul Fire & Marine Insurance Co.*,²² fire damage rendered the insured's ultrasound-imaging headquarters unusable. The insured's business interruption policy provided coverage for "necessary or potential suspension" of operations. It also required the insured to reduce its loss, if possible, by "resuming operations." Under the policy, the insurer was obligated to indemnify the insured until it returned to "normal business operations." Rather than suffer the extensive losses that a lengthy complete closure of its business would have entailed, and in compliance with the mitigation requirements of the policy, the insured reopened as quickly as possible at an alternate location. As a result, the insured incurred extra expense and earned less than it otherwise would have. Nonetheless, the district court concluded that once the insured had reopened for business, recovery was precluded

¹⁷ *Id.* at 540.

¹⁸ See *Maher v. Continental Cas. Co.*, 76 F.3d 535, 539 n.1 (4th Cir. 1996) (even without complete closure, operating to the extent possible does not defeat coverage); *Metalmasters, Inc. v. Liberty Mut. Ins. Co.*, 461 N.W.2d 496, 501 (Minn. Ct. App. 1990) (when mitigation efforts extend longer than the interruption period, business interruption clause cannot limit coverage to shorter period because mitigation is in interest of insurer).

¹⁹ 706 S.W.2d 754 (Tex. Ct. App. 1986).

²⁰ *Id.* at 756.

²¹ *Id.* at 755-56.

for the further period of operation with reduced earnings. On appeal, the Third Circuit roundly rejected the lower court's conclusion.²³ The appellate court reasoned that the plain language of the policy requiring the insurer to indemnify the insured until it returned to "normal business operations" necessarily implied that the insurer was obligated to indemnify the insured while business continued at a less-than-normal level.²⁴ To bar recovery of the insured's loss of earnings and extra expense when the insured had done no more than attempt to minimize its losses would have the undesirable effect of giving the insured no motivation to mitigate. Moreover, because the policies in question expressly required the insured to attempt to reduce its losses, under the district court's analysis, the mitigation provision "would have imposed upon [the insured] a duty, the performance of which would have forfeited its right to recover under the policy."²⁵ The court concluded that such an anomalous result could not have been intended. It held that the policy covered the period after reopening until the insured's business returned to normal.

Many insurance policies contain no provision excluding from coverage the period of time necessary for a business to regain its lost business volume after resuming operations. Indeed, many policies expressly contemplate that an insured will be covered while it reopens, until its earnings return to the pre-loss projections. Many policies contain language similar to that discussed in *American Medical Imaging* that, in essence, requires an insured to resume operations and mitigate its damages.²⁶

²² 949 F.2d 690, 692-93 (3d Cir. 1991).

²³ *Id.* at 692-93.

²⁴ *Id.* at 693.

²⁵ *Id.*

²⁶ *See, e.g.*, Business Income and Extra Expense Coverage Form, § D.4.d (ISO Commercial Risk Services, Inc. 1994) (stating that if the insured does not "resume 'operations' as quickly as possible," the carrier "will pay based on the length of time it would have taken to resume 'operations' as quickly as possible.").

E. Coverage for Interference with Ingress and Egress

Many insurance policies also cover losses when ingress (entrance) to or egress (exit) from insured premises is prevented because of a covered peril. This clause, too, may provide insureds with coverage for their losses suffered following the terrorist attacks, including losses from closure of businesses and buildings and the shutdown and interference with air travel and other forms of travel.

The term “prevent” is commonly defined to mean not only “stop” but also “hinder,” and it is often used to mean “to interpose an obstacle.”²⁷ In *National Children’s Exposition Corp. v. Anchor Insurance Co.*,²⁸ the court indicated that when “prevent” is used with respect to preventing actions, rather than with respect to preventing the existence of something, “prevent” may mean “hinder.”²⁹ In insurance policies, the word “prevent” clearly refers to people’s actions of ingress to and egress from the premises, rather than to some kind of existence. Thus, “prevent” should be read to mean “hinder.”

In *Fountain Powerboat Industries, Inc. v. Reliance Insurance Co.*,³⁰ for example, hurricanes flooded several roads leading to the insured’s premises. One of the roads was closed for several days. However, the insured was able to transport its employees to and from the facility with large trucks. When production at the facility fell, the insured sought coverage under an ingress/egress clause that insured “loss sustained during the period of time when, as a direct result of a peril not excluded, ingress to or egress from real and personal property not excluded hereunder, is thereby prevented.”³¹ Although ingress and egress to the insured’s facility were still possible, the flooding of the roads hindered travel to and from the facility. Because usual

²⁷ *Webster’s New Collegiate Dictionary* 905 (1980).

²⁸ 279 F.2d 428 (2d Cir. 1960).

²⁹ *Id.* at 431.

³⁰ 119 F. Supp. 2d 552 (E.D.N.C. 2000).

routes to and from the facility were obstructed and transportation to and from the facility was more difficult, the court held that there was coverage.³²

Ingress or egress clearly was hindered for many insureds because of the September 11 attacks and the actions that followed, including the closure of buildings and the bar on air travel.

Therefore, coverage under ingress/egress provisions should be available for many insureds.

F. Recovery for Costs of Loss Prevention

Property insurance policies typically contain provisions that not only pay for preventative measures taken by the insured to avoid loss but they also may *require* such measures. These provisions are called “sue and labor” provisions (in this context, “sue” has the obsolete meaning of “to go in pursuit of”). In essence, sue and labor provisions apply whenever the insured spends money to protect covered property from damage or destruction by a covered peril. This provision is intended to encourage the insured to take steps to protect threatened property in order to avoid a greater loss on the covered property,³³ which would entail a larger expense to the insurer. A typical sue and labor clause states:

In the event of any loss or damage insured against, it shall be lawful and necessary for the Insured . . . to sue, labor, and travel for, in and about the defense, safeguard and recovery of the property insured hereunder . . . without prejudice to this insurance .

. . .³⁴

³¹ *Id.* at 556.

³² *Id.* at 557.

³³ *See Am. Home Assurance Co. v. J.F. Shea Co.*, 445 F. Supp. 365, 369 (D.D.C. 1978).

³⁴ Form CPMIS, *Miller’s Standard Insurance Policies Annotated* I (1990).

The sue and labor clause typically is regarded as a separate contract of insurance. For example, in *White Star S.S. Co. v. North British & Mercantile Insurance Co.*,³⁵ the court described the nature of the sue and labor clause as follows:

The law is well settled that the sue and labor clause is a separate insurance and is supplementary to the contract of the underwriter to pay a particular sum in respect to damage sustained by the subject matter of the insurance. Its purpose is to encourage and bind the assured to take steps to prevent a threatened loss for which the underwriter would be liable if it occurred, and when a loss does occur to take steps to diminish the amount of the loss. Under this clause the assured recovers the whole of the sue and labor expense which he has incurred, subject to the expense having been proper and reasonable in amount under all the circumstances, and without regard to the amount of the loss or whether there has been a loss or whether there is salvage, and even though the underwriter may have paid a total loss under the main policy.³⁶

Therefore, a sue and labor clause typically provides coverage in addition to the limits otherwise available.³⁷

Because the sue and labor clause is viewed as being a separate contract of insurance, the exclusions applicable to other coverage provisions in the policy should not apply to prevent payment under the sue and labor provisions. For example, in *Witcher Construction Co. v. St.*

³⁵ 48 F. Supp. 808 (E.D. Mich. 1943).

³⁶ *Id.* at 812-13.

³⁷ See Lee R. Russ, 12 *Couch on Insurance* 3d § 183:163 (1998) (“[L]iability to the insured for sue and labor expenses is in addition to the amount payable under the dollar limits of the . . . coverage . . .”) [hereinafter “*Couch*”]

Paul Fire & Marine Insurance Co.,³⁸ the court interpreted policy language that was similar to a sue and labor clause. The court held that the provision was separate coverage that was not subject to exclusions; as long as the protective steps were reasonable and calculated to mitigate, the insurance carrier would be held liable for its share of such costs. The court explained:

Because this provision primarily benefits the insurer by limiting its exposure to liability, the insurer must reimburse the insured for the costs of mitigation, even if the policy would not otherwise cover those expenses.³⁹

The court specifically held that the exclusions did not apply to the sue and labor clause.⁴⁰

Although sue and labor clauses usually are invoked in the face of natural disasters such as hurricanes (where businesses may board up their windows to prevent the property from being damaged), insureds can argue that such clauses apply to pay for the reasonable steps that they took to minimize their losses in the hours and days after the terrorist attacks, thereby saving their insurers millions of dollars over what they might have had to pay. Such steps would include building closures.

Insureds also may be able to rely on the common law of mitigation of damages and loss to recover costs they incurred to avoid losses. Courts long have recognized that an injured party has a duty to mitigate its damages,⁴¹ and they have recognized that this doctrine can apply in a

on Insurance”].

³⁸ 550 N.W.2d 1 (Minn. Ct. App. 1966).

³⁹ *Id.* at 20. See also *Am. Home Assurance Co. v. J.F. Shea Co.*, 445 F. Supp. 365, 369 (D.D.C. 1978) (noting that a sue and labor clause provides separate coverage for the underwriter’s benefit, to which the policy’s deductible does not apply); *Swire Pacific Holdings Inc. v. Zurich Ins. Co.*, 139 F. Supp. 2d 1374, 1382 (S.D. Fla. 2001).

⁴⁰ *Id.* at 20-21 (“We agree that the policy’s exclusions do not limit the form of expenses that are reimbursable, provided the insured directs its efforts primarily at preventing an imminent covered loss.”). See also *Swire Pacific Holdings Inc. v. Zurich Ins. Co.*, 139 F. Supp. 2d 1374, 1382 (S.D. Fla. 2001) (condominium owner entitled to recover structural repair costs under “sue and labor clause” even though the policy excluded coverage for defective design).

⁴¹ See, e.g., *Locklin v. City of Lafayette*, 7 Cal. 4th 327, 352, 867 P.2d 724, 27 Cal. Rptr. 2d 613 (1994) (a person

property insurance context.⁴² In fact, if a party mitigates its damages or loss, it should be entitled to recover all reasonable expenses incurred in that effort.⁴³

III. THE WAR EXCLUSION AND RELATED EXCLUSIONS

A. War

Many insurance policies do not have an exclusion for terrorism. Instead, they may contain an exclusion for “war and military action” stating that the insurer will not pay for any loss or damage caused directly or indirectly by:

War, including undeclared or civil war;

Warlike action by a military force, including action in hindering or defending against an actual or expected attack, by any government, sovereign or other authority using military personnel or other agents⁴⁴

The United States, fortunately, has not been the subject of many attacks (at least on the mainland) either during war or by terrorists in the last century. Nonetheless, the scope of war exclusions has been addressed by courts. The war exclusion should apply only to a war, which,

threatened with injury to his property must “take reasonable precautions to avoid or reduce any actual or potential injury”); *Geddes & Smith, Inc. v. St. Paul Mercury Indem. Co.*, 63 Cal. 2d 602, 605, 407 P.2d 868, 47 Cal. Rptr. 564 (1965) (“The policy of the courts has been to promote mitigation of damages . . .”).

⁴² See, e.g., *Witcher Constr. Co. v. St. Paul Fire & Marine Ins. Co.*, 550 N.W. 2d 1, 20-21 (Minn. Ct. App. 1966) (recognizing that insured has “common law duty to prevent harm to the insured property” and that carrier “has corresponding obligation to reimburse [the insured] for those efforts.”).

⁴³ See *Brandon & Tibbs v. George Kevorkian Accountancy Corp.*, 226 Cal. App. 3d 442, 460-61, 277 Cal. Rptr. 40 (1990) (“justice requires that the risks incident to [mitigation] should be carried by the party whose wrongful conduct makes them necessary”); *Globe Indem. Co. v. State of California*, 43 Cal. App. 3d 745, 748 & 751-52, 118 Cal. Rptr. 75 (1974) (insured’s liability carrier obligated to reimburse insured for fire-suppression costs the insured incurred in preventing a fire from spreading from its property to a third party’s property; “[a] rule, reasonably applied, permitting expenses incurred in the mitigation of damages to tangible property to be recoverable under policies insuring against liability incurred because of damages to tangible property would seem to require universal application as it encourages a most salutary course of conduct.”); *Hartong v. Partake, Inc.*, 266 Cal. App. 2d 942, 968, 72 Cal. Rptr. 722 (1968) (party attempting to mitigate entitled to recover “reasonable cost” of mitigation effort).

⁴⁴ Causes of Loss – Broad Form, § B.1.f (ISO Commercial Risk Services, Inc. 1994).

by definition, involves an attack by either a sovereign government or the military forces or agents of a sovereign government.

The leading case is *Pan American World Airways, Inc. v. Aetna Casualty & Surety Co.*⁴⁵ In *Pan American*, the Second Circuit was called upon to interpret the application of an exclusion for “war, . . . civil war, revolution, rebellion, insurrection or warlike operations, whether there be a declaration of war or not” and for riots and civil commotion. Pan American was seeking coverage for the loss it suffered when one of its flights was hijacked over London en route from Brussels to New York. The hijackers forced the crew to fly to Beirut, where a demolitions expert and explosives were put on board. The aircraft was then flown to Egypt, where it was destroyed after the passengers were evacuated. Pan American sought recovery for its loss under “all risk” policies, and the insurers attempted to apply exclusions. The district court ruled that the exclusions did not apply, relying on the observations of an insurance drafting organization that “current war risk exclusions do not appear to be effective against intentional damage such as might be caused by hijackings, by bombs placed in aircraft by political activists, by riotous acts, etc.”⁴⁶ The Second Circuit noted that the fact that the insurers had

. . . chosen to rely on nearly all of the terms of these . . . exclusions has affected their cause adversely. The district court correctly observed that we can infer from their reliance on so large a number of exclusions that the all risk insurers recognize that each of the exclusions is ambiguous or has only uncertain application to the facts.⁴⁷

⁴⁵ 505 F.2d 989 (2d Cir. 1974).

⁴⁶ *See id.* at 1001.

⁴⁷ *Id.* at 1005.

The Second Circuit then addressed each of the exclusions that the insurers relied on. First, it held that the war exclusion did not apply because the hijackers were acting for the Popular Front for the Liberation of Palestine (PFLP), which “was not a de facto government”⁴⁸ As the court observed, “war is a course of hostility engaged in by entities that have at least significant attributes of sovereignty. Under international law war is waged by states or state-like entities.”⁴⁹ It further explained:

In the present case, the loss of the Pan American 747 was in no sense proximately caused by any “war” being waged by or between recognized states. The PFLP has never claimed to be a state. The PFLP could not have been acting on behalf of any of the states in which it existed when it hijacked the 747, since those states uniformly opposed hijacking.⁵⁰

The court also noted:

English and American cases dealing with the insurance meaning of “war” had defined it in accordance with the ancient international law definition: war refers to and includes only hostilities carried on by entities that constitute governments at least de facto in character.⁵¹

In short, in order for there to be a war, a sovereign or quasi-sovereign must engage in hostilities.⁵²

⁴⁸ *Id.* at 1009.

⁴⁹ *Id.* at 1012.

⁵⁰ *Id.* at 1013.

⁵¹ *Id.* at 1012.

⁵² *Id.* at 1005. *See also Welts v. Connecticut Mut. Life Ins. Co.* 48 N.Y. 34 (1871) (“war or rebellion exclusion” does not apply when insured’s death caused by railroad robbers when no showing that robbers were acting under

The Second Circuit also rejected the insurers' contention that the loss was caused by a PFLP "guerilla war" waged against Israel and the United States. The court called this argument "wholly untenable," stating:

The only evidence that the PFLP and the United States were at war consists of the PFLP's self-serving propaganda, propaganda claiming that the PFLP was effectively at war with the entire Western World. Such radical rhetoric cannot affect the outcome of this insurance case. The loss of the Pan American 747 was not caused by any act that is recognized as a warlike act. The hijackers . . . were the agents of a radical political group, rather than a sovereign government.⁵³

However, a formal declaration of war is not a prerequisite for application of the war exclusion.⁵⁴

The September 11 attacks do not constitute a war within the meaning of the war exclusion. Although the National Guard and police forces became involved in the aftermath, there were no hostilities between two sovereign entities. Therefore, insurers should not be able to disclaim coverage by claiming that these tragic events constituted a war. Simply put, there was no war being fought at the time of the attacks.⁵⁵

Any arguments that the attacks constitute a "[w]arlike action by military force . . ." also should be rejected. Based on the information publicly available to date, the hijackers appear to

authority of the Confederacy during Civil War).

⁵³ *Pan American*, 505 F.2d at 1016.

⁵⁴ See *Weissman v. Metropolitan Life Ins. Co.*, 112 F. Supp. 420 (S.D. Cal. 1953) (America's involvement in the Korean conflict in the 1950s constituted a war within the meaning of a war exclusion, even though there was never a formal declaration of war).

⁵⁵ References to responses to the attacks as being a war, even if made by the President, elected officials, or members of the military, do not convert the situation into a war as that term is used in the exclusions. Historically, there have been many references to wars, such as the "war on drugs" and the "war on poverty," that do not satisfy the

be members of various terrorist groups and, perhaps, members of various cells. Therefore, their acts do not appear to constitute warlike action “by a military force.”

B. Insurrection, Rebellion, Revolution, and Invasion

Many insurance policies contain exclusions applicable to “insurrection, rebellion, revolution, usurped power, or action taken by governmental authority in hindering or defending against any of these.”⁵⁶ These exclusions likely do not apply to exclude coverage for losses caused by the September 11 attacks.

An insurrection has been defined as “a violent uprising by a group or movement acting for the specific purpose of overthrowing the government and seizing its powers; there must have been a movement accompanied by action specifically intended to overthrow the constituted government and to take possession of the inherent powers thereof.”⁵⁷ An example of an insurrection would be the turbulence that occurred in Liberia during 1989 and 1990, when an armed faction that opposed the civilian authority captured and killed the country’s president. This was held to constitute an insurrection within the meaning of policy exclusions that barred coverage for losses caused by insurrection.⁵⁸

The actions on September 11 do not appear to have been intended to overthrow the government or seize the government’s powers. Therefore, they should not constitute an insurrection. The attacks also do not appear to constitute a revolution, which is commonly understood to be “a fundamental change in political organization; [especially] the overthrow or

definition of “war” contemplated by the exclusion.

⁵⁶ Causes of Loss—Broad Form, § B.1.f.(3) (ISO Commercial Risk Services, Inc. 1994).

⁵⁷ 10 *Couch on Insurance* § 152.18.

⁵⁸ *Younis Bros. & Co. v. CIGNA Worldwide Ins. Co.*, 91 F.3d 13 (3d Cir. 1996), *cert. denied*, 519 U.S. 1077 (1997).

renunciation of one government or ruler and the substitution of another by the governed”⁵⁹
Indeed, “rebellion,” “insurrection,” and “revolution” are synonymous.⁶⁰

Some policies contain exclusions that purport to apply to an invasion. This term “generally has reference to the warlike or hostile entrance of the armed forces of an organized power into the territory of another state,” typically involving “an invading army”⁶¹ It should not apply.

C. Civil Commotion and Civil Disturbance

Other policies contain exclusions for civil commotion or civil disturbance. Such exclusions also should not apply to bar coverage of damage caused by the September 11 attacks. “Civil commotion” generally is construed to mean

. . . occasional local or temporary outbreaks of unlawful violence on the part of three or more persons assembled together for the common purpose of doing an unlawful act, which violence or unlawful act, though temporarily destructive, does not rise to the proportions of organized rebellion against the government.⁶²

Civil commotion is typically understood to be “a kind of domestic disturbance or disorders such as occur among fellow-citizens or within the limits of one community”⁶³ Obviously, from the information available to date, the September 11 attacks cannot be described as disturbances among “fellow citizens” or “within the limits of one community.”

Furthermore, the *Pan American* court rejected the application of a civil commotion exclusion to a hijacking. As the court explained, “it is not easily imaginable that any ordinary

⁵⁹ *Webster’s New Collegiate Dictionary* 984 (1998).

⁶⁰ *Id.*

⁶¹ 10 *Couch on Insurance* §152:17.

⁶² *Id.*, § 152:19.

man, business or other, would have supposed a hijacking over London of an airplane that never went or was intended to go to Jordan would be deemed the result of ‘civil commotion in Jordan.’”⁶⁴ As the court also stated, “civil commotion does not comprehend a loss occurring in the skies over two continents.”⁶⁵

D. Riots

An exclusion for riots should not apply to the losses arising from the September 11 attacks. As the *Pan American* court explained:

The definitions [proffered by the all-risk insurers] give serious trouble at the outset, and probably would not serve even if there were sound reason to use them. . . . [T]he notion of a flying riot in geographic installments cannot be squeezed into the ancient formula. Among its other attributes, as the cases reflect, a riot is a local disturbance, normally by a mob, not a complex, traveling conspiracy of the kind in this case.⁶⁶

E. Terrorism

If a policy contains a specific terrorism exclusion, that exclusion will have to be reviewed carefully to determine its applicability. The insurer will have the burden of proving that the exclusion clearly, plainly, and unambiguously applies.⁶⁷ If a policy does not contain a specific and clearly applicable terrorism exclusion, insurers should not be permitted to expand the scope of a different exclusion in the policy. As the California Supreme Court recently stated:

⁶³ *Id.*

⁶⁴ *Id.* at 1019-20.

⁶⁵ *Id.*

⁶⁶ *Id.* at 1020.

⁶⁷ *See, e.g.*, 10 *Couch on Insurance* § 152:13 (“Being provisions which narrow the coverage, these provisions are subject to the general rules of construction that favor insureds and coverage when terms are ambiguous, and the

[W]e cannot read into the policy what [the insurer] has omitted.

To do so would violate the fundamental principle that in interpreting contracts, including insurance contracts, courts are not to insert what has been omitted.⁶⁸

IV. DETERMINING THE CAUSE OF THE LOSS

One issue that insurance carriers may raise is whether an insured's loss arose from a covered cause of loss or peril. For example, insurers may attempt to argue that an insured's decision to close its business for a day, or to suspend operations for some period of time, was a voluntary business decision not directly caused by the September 11 attacks. Similarly, an insurer might argue that if an insured cannot get access to its premises because a building owner decided to close the building, interference with ingress or egress did not arise from the terrorist attacks but instead arose from the owner's decision to close.

This is, in essence, a question of causation—that is, what is the event that actually caused the insured's loss? Put another way, was the insured's loss caused by the September 11 attacks, by a resulting order from a government agency to cease business (for example, the shutdown of air travel on September 11 and 12), by a legitimate concern about a possible further terrorist attack, by a decision to minimize potential damage by closing or taking other steps, or by someone's fear or concern that it would not be appropriate to operate in the wake of the attacks?

Insurers might argue that one or more of these factors “caused” the insured's loss.

Courts have addressed coverage in situations where there are alleged multiple causes of loss.

One of the first decisions to address this issue was *Sabella v. Wisler*.⁶⁹ In *Sabella*, a building

corollary rule that narrow terms which limit coverage provide forfeitures.”).

⁶⁸ *Safeco Ins. Co. v. Robert S.*, 26 Cal. 4th 758, 763, 28 P.3d 889, 110 Cal. Rptr. 2d 880 (2001).

⁶⁹ 59 Cal. 2d 21, 377 P.2d 889, 27 Cal. Rptr. 689 (1963).

contractor had constructed a house on uncompacted fill and negligently installed a sewer line. Negligent installation was a covered peril under the insurance policy. The sewer line eventually ruptured, causing water to saturate the ground surrounding the insureds' house, which resulted in subsidence. Subsidence was an excluded peril. In order to determine coverage, the California Supreme Court had to address the question of what caused the insureds' loss. The court stated the test as follows:

[I]n determining whether a loss is within an exception in a policy, where there is a concurrence of different causes, the efficient cause—the one that sets others in motion—is the cause to which the loss is to be attributed, though the other causes may follow it, and operate more immediately in producing the disaster.⁷⁰

This test is called the “efficient proximate cause test.” It has been confirmed by later California decisions and by decisions of other courts, some of which use the term “predominating cause.”⁷¹

As one leading insurance treatise states:

The efficient proximate cause rule allows recovery for a loss caused by a combination of a covered and an excluded risk only if the covered risk was the efficient proximate cause of the loss, meaning that the covered risk set the other causes in motion which, in an unbroken sequence, produced the result for which recovery is sought.⁷²

⁷⁰ *Id.* at 31-32.

⁷¹ See, e.g., *Garvey v. State Farm Fire & Cas. Co.*, 48 Cal.3d 395, 403, 770 P.2d 704, 257 Cal. Rptr. 292 (1989).

⁷² 7 *Couch on Insurance* § 101:57.

Many states do not follow the “efficient proximate causation” test for claims under third-party coverages such as liability policies. Instead, they follow a “concurrent causation” test, under which coverage is afforded as long as one of the contributing causes is insured, even if other contributing causes are not insured.⁷³ Therefore, an insured may be able to mount persuasive arguments that the whole series of intervening events following the September 11 attacks were set in motion by the attacks.

Given that there has been substantial debate over the years about the appropriate causation test to apply, some insurance policies attempt to address the causation requirement directly. In that circumstance, the policy’s language should be reviewed carefully to determine whether it is controlling or whether a common law test should apply. In any event, in many circumstances “the causal relationship of a loss to a particular alleged instrumentality is a question of fact.”⁷⁴ This means that an insurer should not be able to automatically reject coverage on the assumption that the cause of the loss is not a covered peril.

V. NUMBER OF OCCURRENCES

Many insurance policies contain deductibles or “self-insured retentions.” These provisions state how much of a loss must be paid by the insured (or someone else) before the insurance carrier must pay. Many policies state that the deductible or retention must be satisfied “per occurrence,” “per event,” “per loss,” or “per claim.” Many policies also contain limits, or caps, on the coverage, stating the maximum amount that the carrier must pay “per occurrence, event, loss, or claim.”

⁷³ See, e.g., *State Farm Mut. Auto. Ins. Co. v. Partridge*, 10 Cal. 3d 94, 108, 514 P.2d 123, 109 Cal. Rptr. 811 (1973) (coverage provided by both auto policy that covered liability arising from “use of an automobile” and homeowners policy that excluded liability arising from “use of an automobile” where insured drove off road in possession of hair-trigger gun that accidentally fired, injuring passenger).

⁷⁴ 7 *Couch on Insurance* § 101:61.

Policy provisions specifying such deductibles, retentions, and limits may give rise to a debate about how many occurrences or events were involved with the September 11 attacks. Information available to date suggests that the September 11 attacks were part of a well-orchestrated single scheme. However, there were four separate hijacked airplanes, three different locations involved, and a number of untargeted buildings physically damaged in the attacks. There also were myriad orders and decisions that flowed directly from the attacks, such as the decision to ground all airplanes, decisions to close buildings and businesses, and decisions to cancel or postpone various events. Therefore, it is quite likely that insurance coverage considerations for losses caused by the September 11 attacks will involve one key question that may have a major impact on coverage: How many occurrences were there?

The starting point in answering this question is to ascertain the mutual intention of the parties at the time the insurance policy was sold.⁷⁵ However, many policies do not have language that provides a precise answer, especially with regard to the question of how to determine the number of occurrences involved. To assess the number of occurrences,⁷⁶ courts tend to focus on the cause of the loss. Some courts have found that under the circumstances before them, there was only one occurrence.⁷⁷ Other courts have found that multiple occurrences

⁷⁵ See *AIU Ins. Co. v. Superior Court*, 51 Cal. 3d 807, 821, 799 P.2d 1253, 274 Cal. Rptr. 820 (1990).

⁷⁶ See *Peco Energy Co. v. Boden*, 64 F.3d 852, 856 (3d Cir. 1995) (“To determine ‘whether bodily injury or property damage is the result of one occurrence or multiple occurrences, the majority of courts have looked to the cause or causes of the bodily injury or property damage’”).

⁷⁷ See, e.g., *id.* (“[W]hen a scheme to steal property is the proximate and continuing cause of a series or combination of thefts, the losses for liability insurance purposes constitute part of a single occurrence.”); *Bay Cities Paving & Grading, Inc. v. Lawyers’ Mut. Ins. Co.*, 5 Cal. 4th 854, 868, 855 P.2d 1263, 21 Cal. Rptr. 2d 691 (1993) (noting in the context of a legal malpractice claim that “[i]f an attorney’s error causes one or more other errors, the result is a chain of causation that leads to an injury, that is, a single claim.”); *Eott Energy Corp. v. Storebrand Internat’l Ins. Co.*, 45 Cal. App. 4th 565, 575, 52 Cal. Rptr. 2d 894 (1996) (“[T]he term ‘occurrence’ reasonably contemplates that multiple claims could, in at least some circumstances, be treated as a single occurrence or loss. It appears reasonable to us that the term ‘occurrence’ as used in the deductible clause is effectively referring to a loss. In our view, [the insured’s] objectively reasonable expectation would embrace the conclusion that multiple claims, all due to the same cause or a related cause, would be considered a single loss to which a single deductible would apply.”).

existed under circumstances in which some might have said that there was a single occurrence.⁷⁸

However, in disaster situations, courts generally have found that there is a single occurrence.

As one author observed:

As a general rule, when many persons are injured or damaged as the result of an ongoing physical process, the resulting injuries will typically be treated as one “occurrence.” Thus, in cases involving natural disasters, such as fires, floods, or multi-vehicle auto accidents, courts have generally found only one “occurrence.”⁷⁹

If there is a common theme among the decisions, it may be that the courts generally have resolved the issue by adopting a view of the number of occurrences that maximizes coverage for the insured. This is consistent with the widely accepted principle that if policy language is ambiguous, it will be interpreted in the manner that maximizes coverage.⁸⁰ As the California Supreme Court has stated:

If there is ambiguity[,] however, it is resolved by interpreting the ambiguous provisions in the sense the promisor (i.e., the insurer) believed the promisee understood them at the time of formation. If application of this rule does not eliminate the ambiguity, ambiguous language is construed against the party who caused the uncertainty to exist. In the insurance context, we generally resolve

⁷⁸ Compare *Eureka Fed. Sav. & Loan Ass’n v. Am. Cas. Co.*, 873 F.2d 229 (9th Cir. 1989) (court rejected contention of directors of failed savings and loan association, who had been sued in connection with 200 loan transactions, that each loan had resulted from the same lending strategy; court ruled that each failed loan was a separate loss) with *Pennbank v. St. Paul Fire & Marine Ins. Co.*, 669 F. Supp. 122 (W.D. Pa. 1987) (development of a plan for the repossession of separate properties involved an ‘occurrence’).

⁷⁹ See Michael F. Aylward, “Multiple ‘Occurrences’—A Divisive Issue,” *Coverage* Vol. 5, No. 1, at 40 (Jan./Feb. 1995). See also *id.* at 44 (“Diverse tort claims may be aggregated where they result from the same physical cause, as in the case of a fire or train crash.”).

ambiguities in favor of coverage. Similarly, we generally interpret the coverage clauses of insurance policies broadly, protecting the objectively reasonable expectations of the insured.⁸¹

Furthermore, it is possible that a court could rule that there was just one occurrence for purposes of determining the number of deductibles or retentions applicable (a lower number typically means a lower dollar amount of loss that must be sustained by the policyholder before the carrier must start paying) but that there were multiple occurrences for purposes of applying any policy limits on a “per occurrence” basis (which will increase the total insurance money available). Indeed, courts have reached decisions that support such a two-pronged approach.⁸² This is consistent with the notion of maximizing coverage in the event of an ambiguity.

VI. MAKING A CLAIM FOR INSURANCE COVERAGE

Insurance policies typically impose a variety of obligations on the insured that must be satisfied before the policyholder can collect payment for the losses suffered. In seeking the benefits of insurance, many businesses may overlook (or not be aware of) their duties. To preserve their insurance benefits, insureds must recognize and perform these duties. Although an insurance carrier may waive its right to insist on performance, no insured should place itself in the position of having to ask its carrier to give up a legal right to deny coverage because the insured forgot to comply with its duties.

⁸⁰ See, e.g., *AIU Ins. Co. v. Superior Court*, 51 Cal. 3d 807, 822, 799 P.2d 1253, 274 Cal. Rptr. 820 (1990).

⁸¹ *Id.* (citations omitted).

⁸² See *Owens Illinois, Inc. v. Aetna Cas. & Sur. Co.*, 597 F. Supp. 1515 (D.D.C. 1984) (“[T]he allocation of rights and obligations established by the insurance policies would be undermined if [the insured’s] coverage is subject to multiple deductibles.”); Michael F. Aylward, note 79 *supra*, at 40 (“In seeking to ‘maximize’ coverage, courts first look to the type of claims presented. Does the insured face hundreds of small claims that will be absorbed by policy deductibles and self-insured retentions? If so, they are far more likely to treat the claims as involving one ‘occurrence.’ . . . By contrast, courts are more likely to find multiple ‘occurrences’ where the limits of liability are relatively low compared to the insured’s total exposure.”).

A. Duty to Provide Notice

Most insurance policies require an insured to notify the insurance carrier "as soon as possible" or "as soon as practicable" after a loss or other insured event. As part of this notice (which should be in writing), the insured usually must identify itself and provide information about the time, place, and circumstances of the loss. This notice requirement is intended to give an insurance carrier a chance to investigate a loss or claim while the evidence is still fresh. Notice also provides some assurance to the carrier that it can take steps on behalf of the insured to minimize future damage, and it helps the carrier to assess its obligations and determine whether the policy applies to the particular loss or claim.

Notice provisions usually have been construed by courts to require an insured to provide notice within a reasonable time after an insured event occurs.⁸³ If the insured fails to do so, the carrier may be excused from its obligations. Therefore, an insured should do just what the policy calls for it to do—give notice as soon as possible. There may be legitimate reasons why notice cannot be given immediately after a loss, such as the lack of power and telephone services, the lack of insurance information (because, for example, the information was destroyed or was kept in safe deposit boxes at banks that were closed), or the need to concentrate on efforts to protect life or property. However, as soon as it can do so, the insured should take immediate steps to give notice of loss at least to its insurance agent or broker.

Even if an insured is late in giving notice, this does not necessarily mean that it has lost its right to insurance coverage. In many states, including California, a carrier must show that it has been substantially prejudiced by late notice before it may successfully assert late notice as a defense to coverage. In fact, California courts long have held that “[a]n insurer may assert

⁸³ See, e.g., *Provident Life & Accident Ins. Co. v. Bertman*, 151 F.2d 1001 (6th Cir. 1945).

defenses based upon a breach by the insured of a condition of the policy such as a cooperation clause, but the breach cannot be a valid defense unless the insurer was substantially prejudiced thereby.”⁸⁴

California courts have reached similar conclusions with respect to other policy conditions as well. For example, in *Shell Oil Co. v. Winterthur Swiss Insurance Co.*,⁸⁵ the court of appeal recognized that “California law is settled that a defense based on an insured’s failure to give timely notice requires the insurer to prove that it suffered substantial prejudice.”⁸⁶ Regardless of the nature of the insured’s alleged breach, prejudice will not be presumed.⁸⁷ Instead, the insurance carrier has the burden of proving that a breach of a condition in the policy actually and substantially prejudiced the insurer.⁸⁸ As the courts have explained, “[t]he insurer must show actual prejudice, not the mere possibility of prejudice.”⁸⁹ The California Supreme Court stated that “prejudice is not shown simply by displaying end results; the probability that such results could or would have been avoided absent the claimed default or error must also be explored.”⁹⁰

B. Proof of Loss

Most first-party insurance policies require that an insured provide a "proof of loss, signed and sworn to by the insured," including:

- Statements of the time and origin of the loss,
- The interest of the insured and others in the property,
- The actual cash value of the property damaged,

⁸⁴ *Campbell v. Allstate Ins. Co.*, 60 Cal. 2d 303, 305-06, 384 P.2d 155, 32 Cal. Rptr. 827 (1963).

⁸⁵ 12 Cal. App. 4th 715, 15 Cal. Rptr. 2d 815 (1993).

⁸⁶ *Id.* at 760. See *Clemmer v. Hartford Ins. Co.*, 22 Cal. 3d 865, 881-83, 587 P.2d 1098, 151 Cal. Rptr. 285 (1978) (same).

⁸⁷ See *Northwestern Title Security Co. v. Flack*, 6 Cal. App. 3d 134, 141, 85 Cal. Rptr. 693 (1970) (“prejudice is not presumed as a matter of law” from a breach of a condition); *Campbell*, 60 Cal. 2d at 307 (“a judicially created presumption of prejudice, whether conclusive or rebuttable, is unwarranted”); *Moe v. Transamerica Title Ins. Co.*, 21 Cal. App. 3d 289, 302, 98 Cal. Rptr. 547 (1971) (prejudice is not presumed from the fact of untimely notice).

⁸⁸ See *Campbell*, 60 Cal. 2d at 306; *Shell*, 12 Cal. App. 4th at 760.

⁸⁹ *Id.* at 761; *Billington v. Interins. Exch.*, 71 Cal. 2d 728, 737, 456 P.2d 982, 79 Cal. Rptr. 326 (1969).

⁹⁰ *Clemmer*, 22 Cal. 3d at 883 n.12.

- All encumbrances on the property,
- All other contracts of insurance potentially covering any of the property,
- All changes in the title, use, occupation, location, and possession of the property since the policy was issued,
- By whom and for what purpose any buildings were occupied at the time of the loss, and
- Plans and specifications for all buildings, fixtures, and machinery destroyed or damaged.

Proof of loss usually must be submitted within a relatively short time—often within 60 days after the inception of the loss or within 60 days after the insurance carrier requests a proof of loss.

While many insurance carriers may waive proof-of-loss requirements in connection with widespread losses from a common cause such as the September 11 attacks, an insured should fulfill this requirement unless it is expressly waived by the carrier. However, if an insured does not fully comply, it still may be entitled to coverage if it substantially complies with the requirement,⁹¹ unless the carrier proves that it has been prejudiced by a failure to submit a proof of loss in a timely or sufficient manner.⁹²

C. Examinations Under Oath

Most first-party insurance policies also give the insurance carrier the right to conduct an examination under oath by any person it names (including outside counsel). It may conduct such an examination "as often as may be reasonably required" about any matter relating to the insurance or the loss. Furthermore, the insurer may require that the insured produce relevant books and records for examination.

An insured's failure to submit to an examination under oath may excuse an insurance carrier from performing its duties under a policy.⁹³ However, the circumstances giving rise to

⁹¹ See *Brookins v. State Farm Fire & Cas. Co.*, 529 F. Supp. 386, 390 (S.D. Ga. 1982).

⁹² See *Smith v. North Carolina Farm Bureau Mut. Ins. Co.*, 321 N.C. 60, 361 S.E.2d 571 (1987).

⁹³ See *Gould Investors, L.P. v. Gen. Ins. Co.*, 737 F. Supp. 812, 817 (S.D.N.Y. 1990) ("Failure to comply with a policy provision requiring submission to an examination under oath is a material breach of that policy, precluding recovery under it.").

the failure must be examined, and a carrier must exercise its rights to an examination in a reasonable manner.⁹⁴

If an insured is asked to submit to an examination under oath and does so, it must keep in mind that (1) the scope of an examination may be broader than the scope of discovery permitted to prepare a case for trial⁹⁵ and (2) the right to object to questions or refuse to answer or provide documents on the basis of a privilege or for other reasons may be limited.⁹⁶

Furthermore, the carrier also may have the right to examine members of the insured's family under oath.⁹⁷ However, it has long been recognized that an insured has the right to be represented by counsel during an examination⁹⁸ and need not answer questions that are not pertinent to the loss or the insurance.⁹⁹ Thus, while an examination under oath gives insurance carriers the right to examine an insured to determine whether there are grounds for denying coverage, that right is not an unfettered right for the carrier to do as it pleases. Indeed, even if an insured does not submit to a required examination under oath, the carrier must still act in good faith toward the insured.

D. Contractual Limitation Periods

Many insurance policies contain contractual limitation periods—that is, a prescribed period of time within which the insured is required to bring any lawsuit based on insurance coverage. These limitation periods usually extend one or two years after inception of the "loss," which has been defined to be when the insured knew or reasonably should have known about the

⁹⁴ See *Hickman v. London Assurance Corp.*, 184 Cal. 524, 195 P. 45 (1920); *United States v. Moeller*, 402 F. Supp. 49 (D. Conn. 1975).

⁹⁵ See *Dyno-Bite, Inc. v. Travelers Cos.*, 439 N.Y.S.2d 558 (1981).

⁹⁶ See *Hickman v. London Assurance Corp.*, 184 Cal. 524, 195 P. 45 (1920) (privilege against self-incrimination does not excuse insured from duty to submit to examination under oath).

⁹⁷ See *West v. State Farm Fire & Casualty Co.*, 868 F.2d 348 (9th Cir. 1989) (carrier's request for statements from insured's family members was reasonable in light of insured's failure to provide information).

⁹⁸ See, e.g., *Gordon v. St. Paul Fire & Marine Ins. Co.*, 197 Mich. 226, 163 N.W. 956 (1917).

damage to its property.¹⁰⁰ However, this period is often tolled from the time that the carrier is notified of the loss until the carrier provides its final coverage decision.¹⁰¹ Thus, this requirement will not, in most cases, provide any immediate threat to coverage for losses arising from the September 11 attacks.

E. Duty to Cooperate

While the duties outlined above may be set out specifically in an insurance policy, almost all policies also contain a more general "cooperation" provision that obligates the insured to cooperate with the carrier in its investigation of a loss and otherwise. This duty of cooperation obligates the insured:

- (1) To provide access to relevant books and records,
- (2) To provide the carriers with an opportunity to interview witnesses and employees,
- (3) To avoid committing fraud or perjury,
- (4) To avoid releasing claims against other parties to which the carrier may have a right of subrogation,
- (5) To avoid entering into unauthorized settlements with other parties, and
- (6) To assist the carrier in procuring evidence and securing the attendance of witnesses at depositions, hearings, and trial.

An insured should comply with its duty to cooperate and should honor reasonable requests from its insurance carrier to facilitate reimbursement for its losses. Most provisions requiring the cooperation of the insured also provide that the insurer will pay for all additional costs incurred by the insured to comply with the insurer's requests. An insured's breach of its

⁹⁹ See *Insurance Cos. v. Weide*, 81 U.S. 375, 381-82 (1872).

¹⁰⁰ See *Prudential-LMI Ins. v. Superior Court*, 51 Cal. 3d 674, 274 Cal. Rptr. 387 (1990).

¹⁰¹ See *id.* at 693; *Solomon Lieberman & Chevra Lomdei Torah v. Interstate Fire & Cas. Co.*, 768 F.2d 81 (3d Cir. 1985) (the limitation period contained in an insurance policy begins to run from the date of loss, but is tolled from

duty to cooperate could relieve an insurance carrier of its policy obligations. However, most courts first require the carrier to prove that it has been prejudiced by the breach.¹⁰²

VII. LOST OR DESTROYED INSURANCE POLICIES

Absent a waiver from the insurance carrier, it typically is the obligation of the insured to prove the existence and terms of its insurance policies. Given the nature of catastrophic damage, some insureds find themselves unable to locate their policies because they were destroyed or lost. Clearly, the best practice is to store policies in a secure place outside the insured premises so that if the peril insured against occurs, the policy insuring for the loss is not destroyed.

Many insureds, however, need to identify or reconstruct their coverage in the absence of their policies. There are a number of ways to locate or identify policies and their terms. The insured should exhaust all of the likely places that the policy might have been kept, such as a home office or an off-site storage facility. Insurance-related information may be kept in a file other than an "insurance" file, so it may be fruitful to check any file relating to a previous claim that might have been made by the insured or a file for billing invoices that might indicate the purchase of insurance, kept in the accounts-payable files.

If the secondary sources or other files are not helpful, or if such files were destroyed, the insured should contact the broker or agent who sold the policy and may have records of its terms

the date of notice to the date of the rendering of a coverage decision by the carrier).

¹⁰² See *Billington v. Interins. Exch.*, 71 Cal. 2d 728, 737, 456 P.2d 982, 79 Cal. Rptr. 326 (1969) (“[A]n insurer, in order to establish it was prejudiced by the failure of the insured to cooperate in his defense, must establish at the very least that if the cooperation clause had not been breached there was a substantial likelihood the trier of fact would have found in the insured’s favor”); *Twin City Fire Ins. Co. v. King County*, 749 F. Supp. 230 (W.D. Wash. 1990) (carrier must show both breach of duty to cooperate by the insured and prejudice to be relieved of its duties). See also *Ins. Co. of the State of Pa. v. Associated Internat’l Ins. Co.*, 922 F.2d 516, 523 (9th Cir. 1991) (the purpose of a condition in an insurance policy is “not to provide a technical escape-hatch by which to deny coverage in the absence of prejudice nor to evade the fundamental protective purpose of the insurance contract to assure the insured and the general public that liability claims will be paid.”).

and sale. There is no assurance that a broker or agent would retain the policy itself (an insured should inquire in advance about the document-retention policy of an agent or broker). Many claims relating to the September 11 attacks will be first-party claims on existing policies, and it is likely that the broker or agent retained at least a record of the sale and the terms of the policy. However, any erstwhile ability to obtain broker copies of policies may be complicated by the fact that the two largest insurance brokers, Marsh and Aon, had offices in the World Trade Center that were destroyed by the terrorist attacks.

Accounting and bank records are another potential source of information about insurance. Ledger entries in accounting documents have been used to show the purchase of insurance. They often record the policy number, premium, and name of the carrier from whom the policy was purchased. It is doubtful that ledger entries will be sufficient to entirely carry the insured's burden, but they may be helpful to point the insured in the right direction. Similarly, bank records should be examined to find any reference to insurance in check registers, cancelled checks, and account statements. A bank also might maintain microfilm copies of some of these documents. In addition, certain mortgage requirements obligate the borrower to maintain current proof of insurance on the encumbered property; a copy of the policy might be in the loan file at the bank. In other circumstances, a bank actually might have arranged for the insurance on the mortgaged property and would have a copy of the policy.

The insured should not overlook its tax records or bookkeeper. Often the cost of insurance is treated as a business expense, in which case tax records might contain helpful information or a copy of the policy.

Depending on the type of business that the insured engaged in, the insured also may have been required to provide proof of insurance to third parties with whom it did business. For

example, a business might have to provide proof of insurance in connection with real estate and lease transactions, to transport goods, or for bonding employees. Also, insurance might have been required in connection with dealings with federal, state, or local authorities related to small business programs, assistance programs, or loan guarantee programs. All communications regarding such programs should be reviewed carefully; if they are not available, the agency should be contacted directly.

The insured also should consider whether it previously filed a claim under any of its insurance policies. Contacting those involved with the claim might prove helpful; these would include any suppliers who provided goods or services in connection with the loss and who might have dealt directly with, or been paid directly by, the carrier. The same would apply to any litigation that may have involved the carrier. The insured can contact its own lawyers or the lawyers retained by the carrier for information about its insurance. If insurance was an issue in the action, the court records might have evidence of existing or prior insurance that could help establish the terms of the missing policy.

If all else fails, some states' Insurance Code—such as California's—permits an owner of an insurance policy to apply to the Insurance Commissioner for a certificate of facts or information about the policy.¹⁰³ In California, if the Commissioner has that information, he prepares a certificate providing the requested information. If the Commissioner does not have the information, he issues an order for the carrier to provide an affidavit containing all relevant information in its possession. If the carrier does not deliver the affidavit within 90 days, its certificate of authority to transact business may be revoked. Once the insured requests information from the carrier, time limitations that the policy otherwise imposes on the insured—

¹⁰³ See Cal. Ins. Code §§ 12950-12955.

such as the time within which to give notice of the loss or to provide a proof of loss—are stayed, and all rights under the lost policy are preserved until five days after the insured receives the affidavit from the carrier.¹⁰⁴ However, this process, even if available, typically requires the availability of certain minimum information, such as the name of the carrier and the policy number. Thus, this procedure may not be available if the insured lacks even such basic information.

Finally, an insured should not overlook the possibility that it may be entitled to benefits under insurance policies belonging to other persons or companies. It is not unusual for certain types of contracts to require that a company with whom an individual is doing business add the individual as an insured to the coverage under its policy. For example, some vendors and service companies are required to add the purchasers of their services or products as insureds under their policies. Also, landlords often carry insurance on the premises where a business is a tenant. Such insurance could provide coverage for the tenant or the tenant's goods in the event of a covered loss. Therefore, it is a good idea for someone who does not have insurance or cannot prove a policy to request the policies of other persons or companies with whom he or she dealt and to review all contracts entered into to identify any potential coverage.

VIII. PROVING THE AMOUNT OF THE LOSS

Once the terms of the insurance have been determined, the burden is on the insured to prove that the loss it suffered is within the terms of the policy. The first step for an insured is to review all of its policies to ascertain whether the cause of loss is covered. Next, the insured must determine whether the *type* of loss suffered is covered—for example, damage to physical property (buildings and structures), damage to personal property (stock, furniture and fixtures,

¹⁰⁴ *Id.* at § 12955.

machinery and equipment), damage to the personal property of others, the costs of cleanup and debris removal, or losses from business interruption. Once it looks like the policy might cover the type and cause of the loss, the insured should consider the policy limitations and whether any exclusions apply to eliminate coverage. The insured should also look at the amount of the deductible and any coinsurance.

If there appears to be coverage under the policy that may provide benefits to the insured, the insured immediately should provide notice to the carrier. If there is *any* doubt, the insured should give notice to the carrier—the carrier may not resist coverage or may elect not to assert coverage defenses, or the insured may have overlooked something that creates a right to coverage. Whichever is the case, the insured has nothing to lose and should give notice if there is any possibility for coverage.

When an insured suffers loss, it should be aware of the items that must be included in the proof of loss so that it can preserve its right to insurance payments. As a general rule, an insured should retain all receipts, estimates, and documents. Immediately after the loss, an insured should:

- (1) Develop an inventory of all damaged property,
- (2) Determine what property can be repaired and what cannot be repaired,
- (3) Determine salvage value, if any, of property that cannot be repaired,
- (4) Identify quantities, costs, and values of damaged property and the amount of loss claimed (replacement cost versus actual cash value or like-kind repair and replacement), and
- (5) Keep a record of all expenses (such as invoices and receipts).

The insured also should document the damage and loss by taking photographs and, if possible, videotaping the involved property.

In more complicated losses, the insured may need to retain the services of accountants and economists experienced in calculating losses, particularly when there are business interruption losses. Indeed, many coverage disputes likely will focus on the existence and amount of the losses, which will necessitate analyzing historical and projected business performance and tracing claimed losses to covered perils.

If a disagreement between the carrier and the insured arises over the *amount* of liability, most insurance policies provide for an appraisal to establish the amount.¹⁰⁵ Generally, upon either party's written demand, the insured and the carrier each appoints an appraiser. These two appraisers then select an impartial umpire. The appraisers then each set the amount of the loss. If they agree on the amount, the loss amount is established. If the appraisers fail to agree within a reasonable time, each submits his or her appraisal to the umpire, and a written agreement signed by any two of the three establishes the amount of loss. Each appraiser is paid by the party that appointed him or her, and the costs of the umpire are split between the parties. If the carrier or the insured is not satisfied with the amount of the appraisal, either may sue, but courts give strong weight to the appraisers' valuations. If the parties are satisfied with the outcome of the appraisal, then the insured promptly should be paid the appraised value of its loss.

IX. CONCLUSION

While the actual scope of insurance coverage available will depend on the particulars of the policies involved, those who have suffered losses because of the September 11 attacks may have a source of financial protection in the form of their insurance policies. Therefore, insureds should fully explore the possibility of insurance coverage for their losses.

¹⁰⁵ See, e.g., Cal. Ins. Code § 2071 (California's standard-form fire insurance policy).