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Earth, Wind and Fire –
When it’s Not a Concert Invitation

Mark S. Scudder
STRASBURGER & PRICE, LLP
Dallas, Texas
(214) 651-4654
mark.scudder@strasburger.com

Brian P. McCarthy
McDOWELL, KNIGHT, ROEDDER & SLEDGE, LLC
Mobile, Alabama
(251) 431-8806
bmccarthy@mcdowellknight.com
I. Catastrophic Events – When, Not If

What is a catastrophe? Webster’s defines a catastrophe as a momentous tragic event from extreme misfortune to utter overthrow or ruin.\(^1\) Dictionary.com defines catastrophe as a sudden and widespread disaster.\(^2\) Our daily news broadcasts are filled with reports of disasters and catastrophic events. The past few decades have brought a rapid increase in both the frequency and severity of extreme natural catastrophes. Among the recent extraordinary natural catastrophes are: Hurricane Andrew (1992), the Northridge Earthquake (1994), the Kobe Earthquake (1995), South Asia Tsunami (2004), Hurricane Katrina (2005), the Fukushima nuclear meltdown that resulted from an earthquake and tsunami (2011), Super Storm Sandy (2012), and the Moore, Oklahoma tornado (2013). Of course, catastrophes are not always natural disasters. The world as we knew it changed as a result of the September 11, 2001 terrorist attacks.

Disasters such as earthquakes, hurricanes, tornadoes, floods, fires, and acts of terrorism naturally turn our focus towards the loss of life, injury to persons, and the devastating effect on local communities. Such events, however, can similarly devastate a business. For most businesses, a catastrophe is a very low frequency but very high severity event. Although uncommon, it is just a matter of time until a catastrophic event

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strikes. The issue is no longer if, but when, a business will be affected by a catastrophic event. Since most catastrophic events hit with little or no warning, businesses must be prepared. Unfortunately, the low probability of such occurrences often causes businesses to fail to prepare for the consequences of a catastrophic event.

According to the Federal Emergency Management Agency (FEMA), 40% of businesses do not reopen after a disaster and another 25% fail within one year.\(^3\) According to the U.S. Bureau of Labor, most businesses that experience a major disaster are no longer in business within five years.\(^4\) If a disaster struck your business tomorrow, would you be prepared? Would your business survive?

To survive a catastrophic event, businesses must invest time developing procedures that prevent, prepare for, and minimize the effect of a catastrophe. Businesses must be proactive in planning and resilient in responding to catastrophic events. Although there is no way to address every type of potential disaster and every topic within the myriad of issues associated with them, this paper will attempt to address the threshold issues of how your business can prepare for and respond to such events, as well as some of the practical issues that arise as a result of such events.


II. Preparing for the Catastrophic Event

A. Risk Management

Risk management is defined as the identification, assessment, and prioritization of risk followed by coordinated and economical application of resources to minimize, monitor, and control the probability and/or impact of unfortunate events or to maximize the realization of opportunities.5 The first step in preparing for a catastrophic event is the identification and assessment of such risk through a dedicated and proactive approach to risk management. Similarly, responding to a threat of disruption in business operations and services as a result of a catastrophic event begins with an effective management strategy.

In a 2011 survey by Harvard Business Review Analytic Services sponsored by Zurich, the majority of surveyed business executives concluded that risk management had become more important to their business over the past few years.6 According to the survey, 42% of businesses with 10,000 or more employees reported that they employed a Chief Risk Officer (“CRO”), compared with only 11% three years prior to the survey.7 The study found that businesses with a CRO do more advanced risk management planning than those without a CRO.8 Additionally, the presence of a CRO, or an individual directly responsible for risk management who reported directly to the CEO,

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7 Id.
8 Id. at 9.
was a key indicator of success in emerging from catastrophic events. Interviews with executives who participated in the study resulted in important lessons: (1) risk management required a dedicated and empowered senior advocate to be effective, (2) risk management and corporate goals should be integrated, (3) risk must be managed proactively by businesses, and (4) businesses must search further than they have in the past to determine their most serious risks.

Where does a business start in its risk management assessment for catastrophic events? First, the business must generate a list of all possible threats to the business, including natural disasters, terrorism, and other catastrophic events. Although some events may seem remote, it is safer to include them in the initial risk management assessment. Once the list is complete, the business must analyze the potential consequences of each catastrophic event and determine the potential costs associated with them. These costs could include damage to physical property and, more importantly, business interruption losses, including potential violations of contractual agreements and losing customers. Once this risk management assessment is completed, then the business is in a position to develop a business continuity plan to best address the risk.

B. Business Continuity Plan

One of the keys to preparing for a catastrophic event is documenting a plan for your business. A business continuity plan, or disaster recovery plan, is a written document or manual explaining how a business will carry on with its critical business processes in

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9 Id. at 2.
10 Id.
the event of a catastrophic event.\footnote{BDA GLOBAL LLC, SURVIVING A DISASTER: A LAWYER’S GUIDE TO DISASTER PLANNING 1 (American Bar Association, Special Committee on Disaster Response and Preparedness 2011).} According to one certified contingency planner with the Disaster Recovery Institute, any such strategy must identify a plan for recovery, an alternative business location, a method for accessing vital records and resources during the recovery, and key people assigned to the recovery effort.\footnote{Kenneth L. Fulmer, Business Continuity Planning, A Step-By-Step Guide, The Rothstein Catalog on Disaster Recovery, (2000) (discussing business continuity plans).} Of course, an effective plan will involve not only continuous development, but also testing and training on a regular basis.\footnote{BDA GLOBAL LLC, supra note 11, at 4.}

A business contingency plan may never be able to address every possible scenario that could occur as a result of a disaster. Thus, it is important for a plan to be flexible and adaptable. While there is no one particular way a business must draft its business contingency plan, there are some topics and issues that most businesses do generally include in their business contingency plans. Standards often used in creating a business continuity plan are available on the internet, including the procedures adopted by the Department of Homeland Security. Most of the following standards are present in business continuity plans:

1. Essential functions and processes,
2. Order of succession,
3. Delegation of authority,
4. Alternative facilities,
5. Continuity communications,
6. Vital records management,
7. Human capital,
8. Devolution of control,
9. Test, training and exercise,
10. Reconstitution.\(^\text{14}\)

The following discussion will address some of the key aspects of a business continuity plan, many of which are listed above.

Given the limited resources and personnel available in the event of a catastrophic event, a good starting point for developing a business continuity plan is to identify those processes and operations that are critical to carrying out the business’s objectives.\(^\text{15}\) These are the operations that must continue during and after a disruption due to a catastrophic event.\(^\text{16}\) It is also important to identify the personnel and resources that are essential in carrying out these critical operations.\(^\text{17}\)

If relocation is necessary due to a catastrophe, it is vital to business continuity for an alternative business location to be identified so employees can relocate and resume critical processes and operations. Typically, the alternative facility is not as large as the current operation, but it should be large enough for the key disaster recovery team to operate.\(^\text{18}\) Though the facility is temporary, it must also be equipped to accommodate

\(^{14}\) BDA GLOBAL LLC, supra note 11, at 2-3.

\(^{15}\) Id. at 10.

\(^{16}\) Id.

\(^{17}\) Id. at 4.

\(^{18}\) Id. at 15.
the personnel necessary for essential and critical operating processes.\textsuperscript{19} In the aftermath of Hurricane Katrina, some substitute accommodations included renting undamaged buildings or leasing mobile units.\textsuperscript{20} Similarly, businesses can enter into mutual assistance agreements with one or more companies in a similar business. Among other things, arrangements can be made for the use or loan of equipment and supplies.

Businesses should also consider alternative means of getting key personnel to the business location in the event that a disaster results in an interruption in public transportation or impassable roads. For example, Waffle House, Inc. ("Waffle House") maintains a running list of employees who drive four-wheel drive vehicles for purposes of shuttling their fellow employees to the corporate office. Of course, many employees may be able to work from home when a network connection is established.

Even if it is not necessary to move to an alternative business location, it may be necessary to use a backup power source. After Hurricane Katrina, many businesses used portable generators powered by gasoline or propane as a primary backup power source.\textsuperscript{21} Depending on your business requirements, you may consider having specialized equipment staged or ready to travel to a site hit by a catastrophic event. For example, when a hurricane is approaching the coast, Waffle House proactively moves its satellite-communications-equipped recreational vehicle to the site of the hurricane’s

\textsuperscript{19} \textit{Id.} at 14.

\textsuperscript{20} \textit{Lessons Learned From Hurricane Katrina: Preparing your Institution for a Catastrophic Event}, FED. DEPOSIT INS. CORP. \url{https://www.fdic.gov/regulations/resources/lessons/index.html} (last updated Apr. 1, 2008).

\textsuperscript{21} \textit{Id.}
anticipated landfall. Depending on the severity of the hurricane’s potential wrath, Waffle House also sends other equipment, including gasoline storage/pumping trucks, generators, portable toilets, minivans and four-wheel drive vehicles, and water delivery trucks. Although each business is different, these are examples of the types of things that should be considered in the business continuity plan.

One of the most important features of a business continuity plan is access to vital records and resources, including information systems and data management systems that are necessary to support the critical operations and processes of the business.\textsuperscript{22} This, of course, requires that records, files, and applications are backed up off site and tested periodically.\textsuperscript{23} Some businesses utilize “cloud” storage as a solution to this potential problem.

Perhaps the most important part of the business continuity plan is communication, both internal and external. A business should consider establishing a disaster communications tree that operates via telephone and email. After Hurricane Katrina, many businesses and employees were without access to landline or cellular telephone services.\textsuperscript{24} As a result, any business continuity plan must also consider alternative internal communication methods. Additionally, the plan must include a way for the business to communicate with its outside customers and vendors, including maintaining updated telephone lists and assigning personnel to contact those parties.\textsuperscript{25}

\textsuperscript{22} BDA GLOBAL LLC, supra note 11, at 16.
\textsuperscript{23} Id.
\textsuperscript{24} Lessons Learned From Hurricane Katrina, supra note 20.
\textsuperscript{25} BDA GLOBAL LLC, supra note 11, at 16.
Finally, once a business continuity plan is in place, a responsible employee or team of employees should be designated to continually monitor and update the plan as necessary. In addition, after a catastrophic event, a business should retrospectively examine its business continuity plan and determine what worked and what did not work under the circumstances. During this self-assessment, it is important to obtain input from management as well as employees involved in ground-level operations in order to properly evaluate the effectiveness of your plan and make necessary changes.

AT&T has prepared a business continuity planning checklist which is attached as Exhibit A.

C. Insurance

In preparing for a catastrophic event, it is important for a business to analyze its insurance coverage thoroughly. The business should be concerned not only with the amount of insurance coverage, but also with whether catastrophic events, in particular, are covered. It is vital that you review your insurance portfolio with your insurance broker or agent to ensure that you fully understand the coverage, deductibles, and exclusions in your policy. You should generate a list of potential catastrophic incidents applicable to your business and then review the incidents with the agent/broker to make sure they are covered. Often, additional riders are required to cover such natural disasters as floods and earthquakes. This may include an “Act of God” clause, which covers damages due to natural causes. It is important to insure against not only property damage, but also losses arising from business and work stoppages, lost
income, and terminated operations since such problems are common with catastrophic events. As a result, business interruption insurance is essential.

1. **Business Interruption Insurance**

Business interruption insurance, also known as business income insurance, covers the business' loss of income after a catastrophic event while the business facility is closed or in the process of being rebuilt. While property insurance only covers physical damage to the business, business interruption insurance covers profits the business would have earned during the down period.

There are many aspects to business interruption insurance coverage that businesses should be aware of in order to help mitigate the risk of having inadequate or no coverage in the event of a catastrophic loss.

- Business interruption losses are calculated either by the “net income method,” which starts with net income without the loss plus actual continuing expenses minus any earnings recognized from continued operations, or the “gross earnings method,” which consists of net lost sales less non-continuing expenses.

- Generally accepted accounting principles and insurance loss accounting are not always the same for business interruption values.

- Even though replacement costs may exceed the cost to repair damaged equipment, replacing damaged equipment might be more cost effective.

For example, replacing equipment in order to restart business operations
as soon as reasonably possible may result in income and a significantly smaller loss than the delay associated with the repair of equipment.

- In the event of a catastrophe, “extra expense” coverage may be available to cover “extra reasonable and necessary costs” to continue operations while the business facility and equipment are being restored and repaired.

- Business interruption coverage usually begins the day damage is incurred and stops once the damage is or should have been replaced or repaired.\(^{26}\)

2. **Contingent Business Interruption Insurance**

In today’s business market, many businesses rely on suppliers or customers in other countries to produce and purchase products and services.\(^{27}\) With global supply chains, many businesses look to contingent business interruption insurance as a way to ensure adequate financial protection.\(^{28}\) Contingent business interruption insurance reimburses a business for lost profits and other possible transferred risks, such as necessary continuing expenses, due to an insurable loss suffered by one or more of its suppliers or customers.\(^{29}\) Contingent business interruption insurance is also referred to as “dependent properties coverage” and is triggered if the following occurs:

1. Direct physical loss or damage to a dependent property (supplier or customer),

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\(^{26}\) [ZURICH AMERICAN INS. CO., 10 THINGS YOU PROBABLY DON’T KNOW ABOUT BUSINESS INTERRUPTION (Zurich HelpPoint. 2011)].

\(^{27}\) [ZURICH AMERICAN INS. CO., CONTINGENT BUSINESS INTERRUPTION INSURANCE: DOES YOUR COMPANY NEED IT? 1 (Zurich HelpPoint 2011)].

\(^{28}\) *Id.*

\(^{29}\) *Id.*
2. The loss or damage is caused by a covered cause of loss, and
3. The loss results in a suspension of operations at a covered location.\textsuperscript{30}

Contingent business interruption insurance is typically provided for the reasonable amount of time it takes the dependent property to repair their damage and resume normal operations.\textsuperscript{31} As with an underlying property insurance policy, catastrophic events such as earthquakes or flood losses typically are not covered under a contingent business interruption policy.\textsuperscript{32} As a result, businesses need to specifically request and purchase this type of coverage.\textsuperscript{33}

3. Alternative Risk Transfers

In the area of catastrophic losses, insurance can be problematic because catastrophes are low frequency but high severity events. Premium pricing incorporates a substantial risk premium. Therefore, insurance can be expensive and not economically feasible for some businesses. As a result, the insurance and financial markets have developed alternatives to traditional risk management techniques and insurance in order to make the pricing of catastrophic risks more efficient.\textsuperscript{34} For example, contingent capital structures are contractual agreements that provide an infusion of capital in the event of a catastrophic loss.\textsuperscript{35} These contingent capital contracts provide capital at a

\begin{flushleft}
\textsuperscript{30} Id.
\textsuperscript{31} Id.
\textsuperscript{32} Id. at 2.
\textsuperscript{33} Id.
\textsuperscript{34} ROBERT J. RHEE, INSURANCE ALTERNATIVE RISK TRANSFER 4.
\textsuperscript{35} Id.
\end{flushleft}
prearranged, pre-loss event cost of capital. They may consist of debt or equity infusion.  

Insurance derivatives are also instruments that are directly linked to a catastrophic event. A derivative is a financial contract with value derived from something else, typically the value of an asset like a stock or an index or market reference. Basically, a derivative is a bet on the occurrence or nonoccurrence of a future event. Derivatives can be tailored to a specific risk transfer and can be structured around things such as temperature, precipitation, stream flow, and wind.  

Another alternative risk transfer mechanism is insurance securitization. Insurance securitization converts an asset that is on an issuer’s balance sheet into a bond obligation. In response to catastrophes in the 1990s, this securitization technique was used to create catastrophe bonds that securitized a catastrophic risk. An insurance securitization is basically a secured structured note providing for a collateralized reinsurance obligation. The insurer typically cedes all or a portion of the premium to a special purpose reinsurance vehicle, which is usually established offshore in the

36 Id. at 5.  
37 Id.  
38 Id.  
39 Id.  
40 Id.  
41 Id.  
42 Id.  
43 Id.
Cayman Islands or Bermuda due to regulatory and tax restrictions in the United States.\textsuperscript{44}

\section*{D. Supply Chain Interruptions}

As referenced in earlier portions of this paper, today’s global economy results in complex links between suppliers, manufacturers, distributors, and retailers. A catastrophic event suffered by a supplier on the other side of the world can result in a shutdown of a business’s operations just as if the catastrophic event occurred at the business’s facility.\textsuperscript{45} Because of this, supply chain risks require extra attention by a business. For example, earthquake damage to a Japanese factory supplying piston rings to eight of twelve Japanese car manufacturers disrupted production for three weeks.\textsuperscript{46} An international electronics company maintained a single source of supply for a critical component and after a fire at the supplier’s plant, the company lost $400 million in sales and subsequently shut down an entire business line.\textsuperscript{47} Similarly, a fire at a plant in South Korea contributed to a shortage of notebook computer batteries and slowed market growth for ultra low cost notebook computers and ultra-mobile computers.\textsuperscript{48} Many domestic companies were also negatively affected because of the destruction to shippers and suppliers of goods caused by the devastation to the Gulf Coast area after Hurricane Katrina.

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\textsuperscript{44} Id.

\textsuperscript{45} Linda Conrad, \textit{Protecting Profitability if Your Supply Chain Breaks}, \textit{RISK INSIGHT SUPPLY CHAIN ISSUE}, 2009, at 8, 9 (discussing the effect of a global economy on supply chains).

\textsuperscript{46} Id. at 12.

\textsuperscript{47} Id.

\textsuperscript{48} Id.
As a result, businesses must know their suppliers and how their suppliers deal with disruption from catastrophic events. This involves knowing where your suppliers’ supplies—and possibly even raw materials—come from.\(^{49}\) It is also important to know where your business stands among your suppliers’ priorities.\(^{50}\) Does your supplier consider your business a critical customer that will get appropriate attention if the supplier is affected by a catastrophic event?\(^{51}\) Part of business risk management is knowing how prepared your suppliers are for disruption from catastrophic events. For example, do your suppliers have a business continuity plan? Many insurance companies will provide their insureds with a supply chain risk assessment and will help businesses develop benchmarks to gauge external suppliers. For example, Zurich provides the following supply chain checklist:

1. Do you know who your critical suppliers are and how much their failure would impact your company’s profits?

2. Have you fully mapped your critical supply chains downstream to the raw material level and upstream to the customer level?

3. Have you integrated risk management processes into your supply chain management approaches?

4. Do you have routine timely systems for measuring the financial stability of critical suppliers?

5. Do you understand your tier 1 production facilities and logistic hub exposures to natural catastrophes?

\(^{49}\) *Avoiding the Pitfalls of Supply Chain Disruption*, RISK INSIGHT SUPPLY CHAIN ISSUE, 2011, AT 4, 6 (discussing the importance of mapping a business’ supply chain).

\(^{50}\) *Id.*

\(^{51}\) *Id.*
6. Is supply chain risk management integrated into your enterprise risk management approach?

7. Do you record the details of supply chain incidents and the actions you have put in place to avoid future incidents?

8. Do your tier 1 suppliers have business continuity plans that have been tested in terms of their viability?

9. Have you provided risk training to your supply chain management team?

10. Is risk on the agenda of performance meetings with your strategic suppliers?  

Similarly, some businesses have developed protocols that must be met by suppliers. One example of this type of protocol is the Customs-Trade Partnership Against Terrorism or C-TPAT, created by a consortium of the U.S. Government and businesses after the September 11, 2001 terrorist attacks.

E. Contractual Protection

In light of the continued threat of catastrophic events, it is imperative that businesses analyze their contractual relationships to allocate the risk of non-performance as a result of these events. Although contractual provisions can include indemnity, additional insured, notice, liquidated damages, suspension, and other provisions, the most important provision is a properly-drafted force majeure clause. The purpose of a force majeure clause is to (1) allocate risk and (2) place the parties on notice of events that

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52 Zurich HelpPoint Supply Chain Health Check, Risk Insight Supply Chain Issue, 2009, at 26, 27 (discussing standards by which a business can measure its supply chain health).

might temporarily or permanently excuse service.\textsuperscript{54} The primary requirement of any force majeure clause is that the invoking party's performance of a contractual obligation is prevented by an event that is unforeseen and not within the control of either party.\textsuperscript{55} A force majeure clause allows a company to protect itself in the event of an Act of God, such as a hurricane, earthquake, or tornado.

In drafting a force majeure clause, parties typically utilize either a general clause or a specific clause which enumerates the events that will constitute force majeure.\textsuperscript{56} An example of a general force majeure is as follows:

\begin{quote}
It shall not constitute a material breach, and neither party shall lose any rights hereunder or be liable to the other party for damages or losses, on account of failure of performance by the defaulting party, if the failure is the result of a natural disaster, national emergency, the act or omission of a third party or similar event outside of a party’s control.\textsuperscript{57}
\end{quote}

An example of a specific force majeure clause that enumerates the events that will prevent or suspend performance is as follows:

\begin{quote}
Neither party shall lose any rights hereunder or be liable to the other party for damages or losses except for payment obligations, on account of failure of performance by the defaulting party if the failure is the result of
\end{quote}


\textsuperscript{55}\textit{Id.}

\textsuperscript{56}\textit{Id.}

\textsuperscript{57}\textit{Id.}
an act of God (e.g., earthquake, tornado, flood, inclement weather) or an act of terrorism, including chemical or biological warfare; labor dispute, lockout, strike, embargo; governmental acts, orders or restrictions; failure of suppliers or third persons; or any other reason where failure to perform is beyond the reasonable control, and is not caused by the negligence, intentional conduct or misconduct of the defaulting party, and the defaulting party has exercised all reasonable efforts to avoid or remedy such force majeure. The defaulting party must provide written notice of the force majeure event to the remaining parties within three (3) days of such event.58

From a legal standpoint, a well-drafted force majeure clause can act as a defense to a breach of contract claim against a business. However, once a force majeure clause is invoked, the burden is on the party invoking the clause to prove that the event was beyond its control and without its fault or negligence.59 Additionally, the party invoking the force majeure clause must provide notice to the other party so that the other party can mitigate against the effects of the force majeure event.60

58 Id.
59 Id.; see also Gulf Oil Corp. v. F.E.R.C., 706 F.2d 444 (3d Cir. 1983).
60 Ruzzat, supra note 53.
III. Responding to the Catastrophic Event

A. Immediate Response

The first priority for a business faced with a catastrophic event is to make sure all of its employees are safe during and after the event. Depending on the nature of the catastrophic event, businesses must ensure that their employees are following a well-designed emergency evacuation plan to get employees out of harm's way. Once a business ensures that its employees are safe, it should immediately put in place its business continuity plan, including assembling the proper pre-determined team to launch and implement the plan. Businesses that can resume normal operations quickly have a much better chance of minimizing loss and surviving.

Businesses should get their in-house or outside counsel involved early after a catastrophic event for both disaster-related advice and to protect sensitive communications. If a business continues to operate in a limited capacity after a catastrophic event, there may be governmental, regulatory, and various legal issues that need to be assessed. For example, there may be OSHA, workers’ compensation, wage/hour, and health code implications if you continue to operate in a limited capacity.

B. Provide Timely Notice

As soon as practical after the catastrophic event, businesses should notify each of their applicable insurance carriers of the event and any known losses. Similarly, given the notice requirement in most force majeure provisions, businesses should provide notice of the catastrophic event and the invoking of the force majeure clause to all of their contracting vendors, suppliers, and customers.
C. Pursuing Insurance Claims

After all applicable insurance companies are put on notice, businesses should immediately assemble a team of professionals and experts to assist in the claim process. The team should normally consist of an attorney, independent appraisers, forensic accountants with insurance experience, and possibly a public adjuster. The proper team will allow the business to pursue creative but legitimate recoveries under the policy language and maximize coverage opportunities and potential recoveries. Retaining a team of experts early in the claim process will also allow the business to provide the insurance adjuster with the business’s preliminary loss estimate before a reserve is set.

Many legal issues can arise with business interruption insurance claims after a catastrophic event. The following issues are particularly relevant and interesting.61

1. Measurement of loss

As indicated in an earlier section in this paper, business interruption loss is typically measured in one of two ways: the net income method or the gross earnings method. The focus is typically on an insured’s historical profits, but in some cases an insured can demonstrate that profits during the recovery period would have exceeded historical profits. In General Insurance Co. of America v. Pathfinder Petroleum Co., the insured was in business only eight months when its gasoline manufacturing plant was destroyed.

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61 Russell Kranzler, *Averting Disaster: Techniques for Analyzing Business Interruption Claims*, N.Y. St. B.J. (Oct. 2008) (discussing insurance issues arising from business interruption claims after catastrophic events). The entire discussion of the issues below was derived from this article.
by fire. The insured sought recovery of lost profits under the policy and an issue arose as to whether the lost profits should include those that would have been earned during the recovery period by a polymerization plant that the insured had contracted to build on its destroyed premises. The insurer argued against the recovery of such profits as the plant did not exist at the time of the loss. The court found that the insurance policy covered net profits from the “business of manufacturing gasoline,” and the polymerization plant was part of that business, thus the loss of the insured’s facility prevented it from building the plant and earning the profits it would have generated.

2. Can a business profit from a catastrophic event?

One issue often litigated after a catastrophic event is whether the insured can calculate its lost profits based on an increased demand for its products or services actually resulting from the catastrophic event itself. In Prudential-LMI Commercial Insurance Co. v. Colleton Enterprises, Inc., the insured operated a hotel that had operated at a loss for several years prior to Hurricane Hugo. The insured sought to recover lost profits claiming that if its property had not been destroyed, it would have realized profits from the construction workers and temporary residents who came to the area as a result of the hurricane. The insurance company argued against such a recovery as it was

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62 General Insurance Co. of America v. Pathfinder Petroleum Co., 145 F.2d 368 (9th Cir. 1944).
63 Id.
64 Id.
65 Id.
67 Id.
caused by the hurricane itself. The insurance policy allowed consideration of “probable earnings. . . had no loss occurred.” The court interpreted the term “loss” to mean the hurricane, so the insured could only recover profits it would have earned if the hurricane had not occurred.

In contrast, in Stamen v. Cigna Property and Casualty Co., the insured’s grocery stores were damaged by Hurricane Andrew and the insured claimed business interruption losses based on the profits it would have earned if the stores had been open after the hurricane. The insurance company claimed that this would result in a windfall for the insured. The court distinguished between “loss” and “occurrence” in finding that the “occurrence” was the hurricane but the “loss” was damage to the insured’s grocery stores. In finding for the insured, the court concluded that if the insurance company intended to calculate the insured’s lost profits based only on what it would have earned if the hurricane had not occurred, then the insurance policy could have used that language.

As a result of such rulings, the Insurance Services Office, known as “ISO”, a supplier of policy forms to the insurance industry, has amended its forms to exclude any net income that would have been earned because of an increase in the volume of business due to the favorable business conditions created by the loss on customers or on other

68 Id.
69 Id.
70 Id.
72 Id.
73 Id.
74 Id.
businesses.\textsuperscript{75} The specific policy language and interpretation of the language by courts in the relevant state will, of course, determine how that issue is resolved on a case-by-case basis.

3. Period of Restoration

A business’s potential recovery on a business interruption claim will be significantly impacted by the period of restoration. The attorneys and experts for a business must work together to make sure that the appropriate period of restoration is utilized in calculating any loss. Most insurance policies provide for the recovery of lost income during the period it would take, with due diligence, to repair or replace the damaged property and to resume business operations under the same or similar conditions that existed before the catastrophic event. In some situations, the business needs to extend the period of restoration, and courts have allowed such extensions. For example, in \textit{Compagnie Des and Bauxites de Guinea v. Insurance Company of North America}, the court allowed an extension of the period of restoration so that the insured could improve its facility to prevent the same damage from occurring again.\textsuperscript{76}

After the September 11 terrorist attacks destroyed the World Trade Center, some interesting litigation ensued regarding an insured’s location. In \textit{Duane Reade, Inc. v. St. Paul Fire & Marine Insurance Co.}, the appellate court defined the period of restoration as the time required to “build a reasonably equivalent store in a reasonably equivalent location,” disagreeing with the district court that found the period of restoration was the

\textsuperscript{75} Russell Krauzler, Supra Note 61.

\textsuperscript{76} Compagnie Des and Bauxites de Guinea v. Insurance Company of North America, 794 F.2d 871 (3rd Cir. 1986).
time needed for the insured drug store chain to resume “functionally equivalent operations” at the location where its World Trade Center store was located. In Zurich American Insurance v. ABM Industries, the insured maintained facilities at the World Trade Center providing janitorial and engineering services to the tenants and common areas. After remand from the Circuit Court of Appeals, the district court distinguished the case from those like Duane Reade, Inc., finding that the insured could not simply relocate to another building and carry on its business. Instead, the court concluded that the appropriate period of restoration was the “hypothetical length of time required to rebuild the World Trade Center.”

D. Disease/Pandemic

Although uncommon, the recent Ebola scare in Dallas, Texas underscores the importance of businesses being prepared for disease and pandemic in the workplace. The U.S. Centers for Disease Control and Prevention (“CDC”) require the existence of three conditions to declare that a global outbreak of disease has occurred: (1) the emergence of a new type of virus for which humans have little or no immunity, (2) the culpability of the new virus to infect and cause illness in humans, and (3) the capability of the virus to spread easily and without interruption among humans. Because many American companies' sales, logistics, operations and financial employees regularly

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79 Id.
travel overseas, and personnel from overseas vendors and buyers often travel to the United States, the World Health Organization estimates that a highly contagious airborne disease like Avian Influenza could reach pandemic distribution in as little as three months.\(^81\)

When faced with a disease in the workplace, it is imperative that businesses do not panic or contribute to already-existing panic. This requires early education on the part of the business regarding the applicable disease. In addition to being educated on the disease at issue, businesses should also be aware of the various state and federal laws governing the workplace and should be careful not to violate such laws by hastily reacting. Understanding the legal consequences associated with a potential pandemic in the workplace could, at times, be crucial to the business’s continued operation.

For example, if a business is an employer covered by the Americans with Disabilities Act (“ADA”), it must abide by the confidentiality provisions of the ADA.\(^82\) Thus, if an employee suffers permanent health problems from contracting a disease and this affects a major life activity of the employee, the employer may not release medical information related to its employees or information that could reasonably identify the employee.

Similarly, medical information received in connection with a request for leave under the Family and Medical Leave Act (“FMLA”) should also be kept confidential.\(^83\) FMLA leave

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\(^{82}\) See 42 U.S.C. § 12181 et seq.

\(^{83}\) See 29 U.S.C. § 2601 et seq.; 29 C.F.R. 825.100 to .800.
can be made available for those employees who have been exposed to other
individuals diagnosed with a disease or who are under close observation and
monitoring. If a business has a suspected case of Ebola or other disease at work, the
business should not immediately rush to send out a notification letter. Instead, the
business should gather facts (not rumors) and immediately consult with an infectious
disease expert and an attorney about the careful wording of a notification letter and the
best course of action. If the Health Insurance Portability and Accountability Act
(“HIPAA”) applies to a business, then the business must also be careful of HIPAA
violations when handling certain information related to the health of an infected
employee, or when there is a need to inform other employees of possible exposure.84

A pandemic may lead to employee absence in the workplace, and many employees
may work from home. If employees are quarantined by the CDC due to possible
infection or are asked by local health authorities to stay home, businesses can grant
time off for FMLA leave. If asked to send employees home, businesses may be
required to pay the employees who are exempt under the Fair Labor Standards Act
(“FLSA”), but not their non-exempt employees.85

Of course, prevention is still the best medicine, and businesses should adopt common
sense policies or protocols. For example, after the H1N1 flu scare years ago,
employers put in reasonable low cost measures to help stop the spread of that disease,
such as extra hand sanitizing stations and posters reminding employees to frequently
wash their hands. Businesses can adopt such measures at work and also remind

84 See 42 U.S.C. § 1320(d) et seq.
85 See 29 U.S.C. § 201 et seq.
employees of basic policies, such as not coming to work if you have a fever. With the recent Ebola scare, businesses can request that employees notify them if they plan to conduct travel in Ebola infected areas or if they have been in contact with someone diagnosed with or suspected of having the Ebola virus.

IV. Conclusion

Could a hurricane, earthquake, tornado, act of terrorism, disease outbreak, or other catastrophic event possibly affect your business? A catastrophe is a low probability but, unfortunately, a very high severity event. Business leaders cannot assume it will never happen to their business. Instead, businesses must prepare for the consequences of a catastrophic event by implementing procedures that put them in a position to react quickly and appropriately. Businesses must devote the appropriate resources to develop a business continuity plan in preparation for a catastrophic event. When such an event occurs, businesses must rapidly respond so they can return to normal operations as soon as possible. Statistically, the odds are stacked against the long-term survival of a business hit by a catastrophic event. Only those businesses that devote the time, effort, and resources necessary to prepare and plan for a catastrophic event will survive. It is no longer if, but when, your business will be affected by a catastrophic event. When it does, will your business survive or will it be another business statistic?