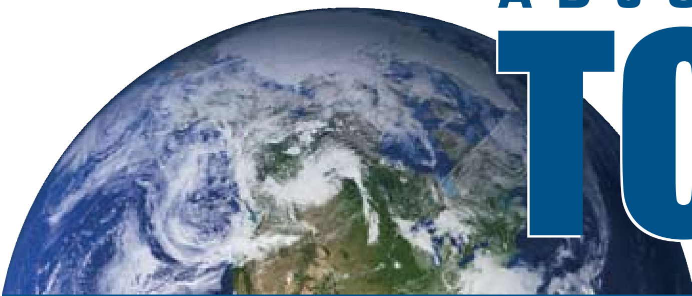

ADJUSTING TODAY

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EDITOR'S NOTE

While working through a BI insurance claim, the policyholder and the insurer need to reach an agreement on a number of variables, none more worthy of discussion than the question of **how long does a business suffer the consequences after a disaster strikes?**

This issue of *Adjusting Today,* "The Length of the Road Back from Disaster: Four Rules for Measuring the Business Interruption Period," by Gary Thompson, brings into focus the elements that will help determine who is holding the map, and which route to take toward recovery of business interruption losses.

Drawing on more than seven decades of case law, Thompson compiles for policyholders the rules of the road when establishing their period of interruption, moving from "theory" to reality. His article cites decisions that are "remarkably consistent and harmonious."

Policyholders will understand what course to take when the BI period is developed after reading this fundamental discussion of the topic.

The Length of the Road Back from Disaster

Four Rules for Measuring the Business Interruption Period

By Gary Thompson

Commercial property insurance policies commonly cover business interruption (BI) losses during the period of time that a business is interrupted by a covered peril such as a hurricane. The typical BI coverage within that period is for the "actual loss sustained" by the policyholder, usually further defined as the net profits that would have been earned plus any continuing expenses such as rent (or alternatively, gross revenues minus discontinued expenses). Apart from calculating the BI loss itself (the province of forensic accountants), adjusting the *length* of the "BI period" (or "period of recovery") is a common point of disagreement between insurer and policyholder. *How long* should the insurer pay such a BI loss?

This article addresses the proper approach for measuring the length of the BI period. There are four major, distinct rules that should be followed in this regard, including the rule that where an *insurer* acts to delay the BI period by failing to make sufficient partial payments, such delay is included in the BI period. The case law is remarkably consistent and harmonious in articulating and

applying these four rules.

Most policies define the BI period as starting on the date of the covered peril and "ending when with *due diligence and dispatch* the building and equipment could be repaired or replaced and made ready for operations, under the same or equivalent physical and operating conditions that existed prior to the damage, not to be limited by the expiration of the policy." Wording varies among policies, but for most policyholders, the BI period ends when its damaged property is physically repaired and returned to operations under the same conditions that existed prior to the disaster.

Most policies also include an "extended period of liability" for any "additional length of time as would be required with the exercise of due diligence and dispatch to restore the policyholder's business to the condition that would have existed had no loss occurred." Thus, while the "regular BI period" ends when certain physical events have taken place, the "extended BI period" takes the BI period out to the point to restore fully the business. After reopening, many businesses gradually ramp up to prior business levels. Most policies limit this extended BI period to a year or less.

It is no surprise that there is disagreement over adjusting the precise length of the regular and extended BI periods. Each additional month could entail thousands and even millions more in covered BI losses. The issue is largely dependent on facts, and policyholders and insurers often see the same facts differently. In any given claim, a number of questions arise. How long did it, in fact, take to complete all repairs and reopen under equivalent conditions? How long *should* it have taken with all "due diligence and dispatch"? *Whose* "due diligence and dispatch"? What if the *insurer* is the cause of the delay? After the physical reopening, what constitutes "due diligence and dispatch" with respect to returning to the expected business levels had the loss never occurred?

It is no surprise that there is disagreement over adjusting the precise length of the regular and extended BI periods. Each additional month could entail thousands and even millions more in covered BI losses. The issue is largely dependent on facts, and policyholders and insurers often see the same facts differently.

Insurers frequently misrepresent the method for adjusting the BI period as revolving on one rule. They commonly claim that the BI period is always that period of "theoretical" time that it *ought to* take one to complete repairs working with "due diligence and dispatch," with this theoretical view divorced from any of the actual facts involved in the repairs. The insurers seek to place the focus on the policyholder, otherwise assuming an ideal world where there are no delays or impediments from contractors, code officials, or the insurers' adjusters. The insurers assume there is ample money available for repairs even where the insurers have not provided sufficient advances to allow repairs to proceed.

The insurers erroneously insist on this purely "theoretical" ideal approach to setting the length of the BI period. This gives insurers the leverage to point the finger at their policyholder and accuse them of failing to move with such ideal "due diligence and dispatch." Not surprisingly, an insurer's view of the length of the BI period usually comes out months shorter than what it actually was, leaving the policyholder uninsured for significant amounts of BI losses.

There are, however, four well-settled rules for determining the length of the BI period. These four rules are based on the policy language, case law, and obvious principles of equity and fair play. Policyholders should insist that their insurers observe these four rules.

Rule One: When the Property is Not Actually Repaired

Sometimes a policyholder does not repair its damaged property, such

as when the property is a total loss and the policyholder chooses to rebuild elsewhere, when the damaged property is condemned, or when the unrepaired property is sold but the insurance rights are not assigned. In such circumstances where the actual repairs to the property will not take place, then there is no actual or historic information, and by necessity, one must predict the "theoretical" amount of time it *should* take, with all due diligence and dispatch, to complete repairs and return to expected business levels.

Insurers mechanically reference the "theoretical" BI rule even when there is an actual record, but when one reads the seminal cases addressing a "theoretical" BI period, one finds that the theoretical approach is adopted only in such circumstances when there is no actual repair period available to otherwise define the BI period. Thus, in the most oft-cited case for this proposition, *Beautytuft, Inc. v. Factory Ins. Association, 431 F.2d 1122 (6th Cir. 1970)*, a building destroyed by fire was not rebuilt because the policyholder decided to move to a new location.

The court held that the policyholder remained entitled to recover BI for the "theoretical" time it would have taken to rebuild on the old site. *Id*. at 1124-25. In another frequently cited case for this rule, *Anchor Toy Corp. v. American Eagle Ins. Co*., 155 N.Y.S.2d 600 (N.Y. Sup. Ct. 1956), the policyholder chose not to rebuild, but again remained entitled to BI for the theoretical rebuild period.

Even then, the court held that in calculating the "entirely theoretical" period, ordinary construction delays should be assumed. *Id*. at 603. The court allowed an estimated eight weeks of "contingencies" to be included in the calculation of the theoretical BI period. *Id*. at 604. Likewise, in *Dileo v. U.S. Fiduciary & Guaranty Co*., 248 N.E.2d 669, 676 (Ill. App. 1969), where a building was condemned after a fire, the court allowed a theoretical BI period not cut off by the condemnation date. The theoretical claim also included continuing expenses for necessary payroll that "would have" been paid in the theoretical period. *Id*.[1]

> **When one reads the seminal cases addressing a "theoretical" BI period, one finds that the theoretical approach is adopted only in such circumstances when there is no actual repair period available to otherwise define the BI period.**

The "theoretical" rule likewise comes into play when a property is sold before repairs are complete, and insurance rights are retained by the seller. In that scenario, the policyholder remains entitled to the full theoretical BI loss, including for the period after the sale date, pursuant to this precedent. For example, in *BA Properties, Inc. v. Aetna Cas. & Sur. Co*., 273 F.Supp.2d 673 (D. Virgin Islands 2003), a hurricane damaged a hotel, which was then sold before repairs were completed. The court found that "any change in the insurable interest *after* the time of loss does not affect the amount that the insured can recover under the applicable insurance policy." Thus, the court ruled that the policyholder could recover "for its business interruption losses for the time period *after* it sold the Hotel," including expenses that would have continued in the period.[2]

A review of these cases reveals the correct application of the so-called "theoretical" BI rule. The rule comes into play only when repairs are not, in fact, completed, thus causing the need to estimate the amount of time it would have taken to complete repairs and return to expected business levels. This estimation is, by nature,

1. Similarly, in *Grand Pacific Hotel Co. v. Michigan Commercial Ins. Co.*, 90 N.E. 244 (Ill. 1909), a theoretical BI period was used where the policyholder's hotel was destroyed by fire and it relocated elsewhere. And in *Hawkinson Tread Tire Service Co. v. Indiana Lumbermans Mutual Ins. Co.*, 245 S.W.2d 24 (Mo. 1951), the "probable experience" at the location destroyed by fire was used where the policyholder relocated.

2. There are a few off-point cases in the assignment context that insurers sometimes cite addressing the very different issue of whether a purchaser who has been assigned a claim can thereby assert its *own* BI loss. For example, in *Bronx Entertainment, LLC v. St. Paul's Mercury Ins. Co.*, 265 F.Supp.2d 359 (S.D.N.Y. 2003), the policyholder experienced losses and thereafter sold its assets and assigned its insurance claim. The court correctly noted that the assignee received only those insurance rights that belonged to the assignor, and no more. The assignee, thus, could not assert *its own* post-sale BI losses.

speculative, but it is not divorced from reality. In projecting the theoretical time it would have taken, one takes into account the usual and expected contingencies under the facts and circumstances. As in *Anchor Toy*, a certain number of weeks for normal contingencies should be included in the BI period estimate (155 N.Y.S.2d at 603).

Rule Two: When the Property is Actually Repaired

If the property is actually repaired, as is more often the case, the presumptive BI period is the amount of time the repairs *actually* took. As the *Dileo* court explained in discussing a rebuild versus a no-rebuild scenario, "the only difference is that in the [rebuild] case [the] proof is governed by the time actually and necessarily taken to restore the business, while in the [no rebuild] case [the] proof is governed by estimates." 248 N.E.2d at 676. Indeed, the BI policy language is for "actual loss sustained," directing that the actual interruption period (if there is one) be used to calculate the actual BI loss.

Against this actual baseline, the burden then shifts to the insurer to establish that the policyholder failed to move with all due diligence and dispatch. Sometimes this is the case, and it makes sense that an insurer should not have to pay extra BI simply because the policyholder unduly delayed the repair process. But many times, this is not the case—the policyholder did everything it could, within its power, to keep repairs moving. And yet insurers frequently point the "due diligence and dispatch" accusatory finger at the policyholder. This can be highly frustrating for a policyholder when it has done all it could to keep on schedule, despite delays caused by the insurer and without adequate insurer funding.

The actual time is the analytical starting point from which the insurer may try to prove that the policyholder has failed in some respect, such that the adjustment of the BI period should be shorter. For example, in *Alevy v. Alliance General Ins. Co.,* 1996 U.S. App. LEXIS 27826 (9th Cir. 1996), the court held that where actual repairs have taken place, this presumptively fixes the BI period. "In this case, rebuilding has occurred, and the actual replacement time may be determined with some accuracy. To find that the actual replacement time cannot be used to determine the 'actual loss sustained' would be contrary to a layperson's interpretation of the policy language and would defy common sense." *Id*. at *5. "Thus, the appropriate methodology…is to begin the analysis using actual replacement time. [The insurer] is entitled to contest…whether the actual replacement time [the policyholder] claims is 'such length of time as would be required with the exercise of due diligence and dispatch…' " *Id*. at *5-6.

The *Alevy* court correctly distinguished and harmonized the "theoretical" BI period cases. "[I]n these cases either the insurance payment was to be made before rebuilding was complete or no rebuilding was contemplated. Using theoretical replacement time is entirely appropriate under such circumstances. In this case, rebuilding has occurred and replacement time may be calculated using historical information." *Id*.

More recently, in *SR International Business Ins. Co., Ltd. v. World Trade Center Properties et al.*, 2005 U.S. Dist. Lexis 13001 (S.D.N.Y. 2005), the court held that the BI period for the World Trade Center buildings is theoretical because repairs are not yet complete. *Id*. at *22. The court declined to adopt actual repair time as the measure, but noted that if and when repairs are, in fact, completed, that time should become the "analytical starting point" for the adjustment. The court likewise harmonized its ruling with *Alevy* and other cases:

> [T]he use of a non-theoretical measure in many of the cases cited by the Silverstein Parties was shaped by the posture in which such cases were presented to the courts—namely, the stage of rebuilding then completed. In *Alevy*, for example, the insured party had already rebuilt its property by the time the Ninth Circuit addressed how the restoration period was to be measured. *It thus made perfect sense under such circumstances, as the Court concluded, to utilize the actual rebuilding period as an analytic 'starting point' for determining the period of restoration*….Here, by contrast, the Silverstein Parties have not yet rebuilt the WTC properties….
> *Id*. at *22-23.[3] [emphasis added.]

Nearly every case addressing this issue can be understood in this simple fashion: if there are not actual repairs, the court resorts to the theoretical approach; if there are actual repairs, the court adopts the actual time period as the presumptive starting point. From there, the insurer can attempt to prove that the policyholder unfairly delayed and added to the BI period. Rules three and four, however, are critical to the analysis.

Rule Three: When the Insurer Causes the Delay

Where delay is caused not by the policyholder, but by *the insurer*, the BI period includes such delay. For example, the insurer might hold up repairs because it is taking extra time to issue approvals for certain work or contractors, or the insurer's adjuster is failing to be attentive to the claim. Commonly, repairs are held up because the insurer has failed to provide sufficient advances to pay for them, and the policyholder does not happen to have surplus cash to front the repair costs. The main ingredient for any repair job is money, and insurers control when and how much of it is supplied. In short, just as the insurer should not pay extra BI where the policyholder delays, the policyholder should not receive less BI where the *insurer* delays. Both rules, a simple mirror of each other, are fair and equitable.

Thus, courts have consistently held that where repairs are delayed because of *insurer* delays—either in funding or in adjustment activity—the BI period is lengthened:

Calculating Business Interruption Period

1. **When the property is not actually repaired:** Policyholder must revert to theoretical calculation of Business Income.
2. **When the property is actually repaired:** The court adopts the actual time period of repair as a starting point for analysis.
3. **When the insurer causes delay:** If through funding or an adjustment activity the insurer cause a delay in repair, the BI period is lengthened.
4. **When a third-party causes the delay:** If, for example, a contractor or codes officer causes the delay, the risk should shift from the policyholder to the insurer.

- In *SR International Business Ins. Co., Ltd. v. World Trade Center Properties et al.*, 2005 U.S. Dist. Lexis 13001, *20 (S.D.N.Y. 2005), with respect to the World Trade Center Buildings, the court acknowledged that the BI period can be extended by "delays attributable to actions taken by the *insurers*, not the insureds."
- In *Streamline Capital, L.L.C. v. Hartford Casualty Ins. Co.*, 2003 U.S. Dist. LEXIS 14677, *7 n.5 (S.D.N.Y. 2003), where a tenant's offices were destroyed in the World Trade Center, the court acknowledged that cases "support the view that a delay in payment may have a direct effect on the timing of an insured's resumption of business."
- In *Sabbeth Ind. Ltd. v. Pennsylvania Lumbermans Mut. Ins. Co.*, 656 N.Y.S.2d 475, 477 (1997), where an *insurer's* delay in investigation and payment caused the policyholder to shut down its business, the extra BI loss was recoverable as a consequential damage.
- In *Western American, Inc. v. Aetna Casualty & Surety Co.*, 915 F.2d 1181, 1184 (8th Cir. 1990), a fire destroyed a manufacturing plan; the BI period, although "theoretical," was held extended as a result of *insurer* delay in performing its duties under the policy.
- In *Bard's Apparel Mfr., Inc. v. Bituminous Fire & Mar. Ins. Co.*, 849 F.2d 245, 251 (6th Cir. 1988), the policyholder's machinery was damaged due to vandalism. Where the policyholder's due diligence was impacted by *insurer* delay in payment, that could be taken into account in fixing the BI period. A court will "allow for an extension of the theoretical replacement time for a reasonable period for any delay in the insured's ability to reenter business that was due to the *insurer's* unreasonable failure to timely perform its duties under the policy." *Id.*
- In *Hampton Foods, Inc. v. Aetna Casualty & Surety Co.*, 843 F.2d 1140, 1143-44 (8th Cir. 1988), a store was forced to evacuate due to imminent collapse caused by weather conditions. The BI period was held extended by the *insurer's* refusal to pay. While the BI period is "theoretical," it is extended where repair delay is due to the inaction of the insurer. The court also allowed coverage for interest on loans that had to be taken out during the BI period due to lack of insurer funding. *Id.*

3. Similarly, in *Duane Reade, Inc. v. St. Paul Fire & Marine Ins. Co.*, 411 F.2d 384 (2d Cir. 2005), the policyholder had not and would not rebuild its drug store destroyed in the lower level of the World Trade Center. As a result, the court employed a "hypothetical" approach to determining the BI period (and not tied to the WTC site). Had actual repairs been completed, the actual period would have been the presumptive measure.

If the insurer fails to do its part promptly in adjusting the claim and providing advances for repairs, the policy, the case law, and fairness dictate that the insurer's delay must be taken into account in setting the BI period.

- In *Constitution State Ins. Co. v. Werner Enterprises, Inc.*, 1987 U.S. Dist. LEXIS 6023, at *4 (E.D.La. 1987), a restaurant was damaged as a result of flooding caused by a hurricane. *Insurer* delay in payment was held to extend the BI period.
- In *United Land Investors, Inc. v. Northern Ins. Co.*, 476 So.2d 432, 438 (La. Ct. App. 1985), the BI period did not start until the date that *insurer* payments were made to allow for such repairs to proceed, even though the "due diligence" period could have been shorter. The BI period was specifically held to include "the time necessary for plaintiff to furnish adequate proofs of loss, submission of accurate estimates for repairs by building contractors and the time required for both parties to engage in negotiations over the amount to be paid." *Id.*
- In *Arnold v. Liberty Mut. Ins. Co,* 469 So.2d 1155, 1159 (La. Ct. App. 1985), where a fire damaged a rental property, the BI period to recover for lost rents was extended due to *insurer* delay in securing an estimate and funding repairs.
- In *Salamey v. Aetna Cas. & Sur. Co.*, 741 F.2d. 874, 877 (6th Cir. 1984), where a fire damaged the policyholder's store, the BI period would have been two and a half months, but the insurer failed to pay for repairs. The *insurer* was held responsible for the additional BI loss caused by its failure to fund repairs.
- In *Thico Plan, Inc. v. Ashkouti*, 320 S.E.2d. 604, 609 (Ga. 1984), where a fire damaged apartments, *insurer* delay in funding allowed for the policyholder to collect lost rental income beyond the 120 days fixed by the policy.
- In *A&S Corp. v. Centennial Ins. Co.,* 242 F.Supp. 584, 587 (N.D.Ill. 1965), where a fire destroyed the policyholder's building & bowling alley, the delay by the *insurer* and its adjuster in approval of the contractors and plans was held to extend the BI period.
- In *Saperston v. American & Foreign Ins. Co.,* 255 N.Y.S. 405 (N.Y.Sup. Ct. 1932), the court noted that the existence of "evidence which warranted…a [jury] finding that a delay was caused by the acts and conduct of the insurer," was enough to estop the insurer "from the claim that the [policyholder] did not proceed with reasonable diligence and dispatch."

Insurers tend to ignore these cases, seeking to place the spotlight on a policyholder's "due diligence." In fact, policy language does not relate the required "due diligence and dispatch" to the policyholder. The BI period simply is defined to end "when with due diligence and dispatch the building and equipment could be repaired or replaced." This required "due diligence and dispatch" fairly includes the policyholder and the insurer. If the insurer fails to do its part promptly in adjusting the claim and providing advances for repairs, the policy, the case law, and fairness dictate that the insurer's delay must be taken into account in setting the BI period.

Rule Four: When a Third-Party Causes the Delay

The BI period likewise includes additional time where delay is caused neither by the policyholder nor the insurer, but by a contractor, subcontractor, code official, or by another factor beyond the control of the policyholder or insurer. Although this type of delay is the fault of neither the policyholder nor the insurer, the policyholder's coverage should not be blunted when a third party causes the delay. The most common example is contractor delay. Another example is a policyholder with a retail store within a damaged shopping complex, where repairs to the store might proceed sooner, but are delayed because repairs to the larger

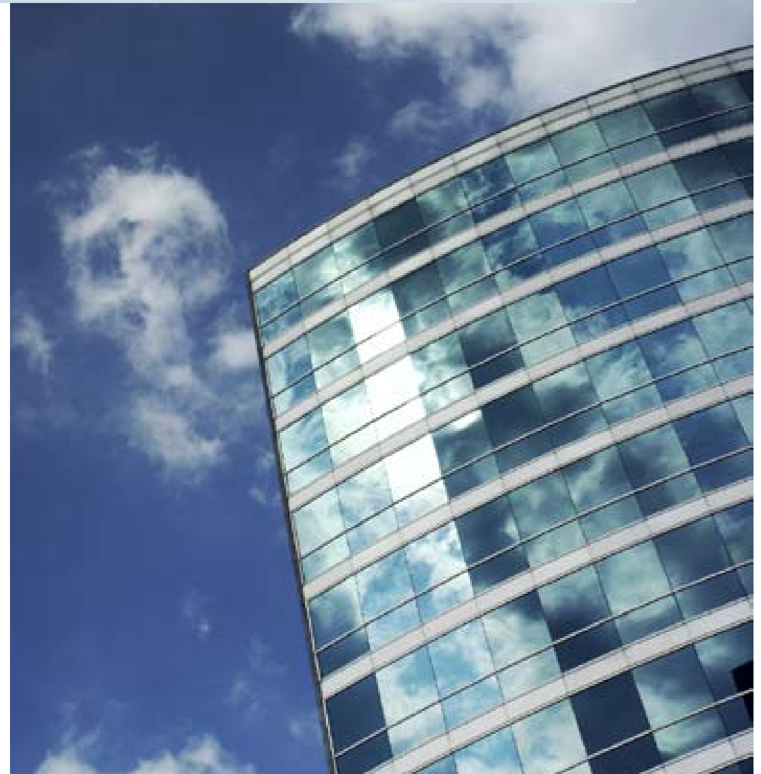
shopping center must first be completed.

In some cases, delay is truly nobody's fault, such as where a massive disaster depletes an area's disaster recovery resources. In the aftermath of Hurricane Katrina, or the four successive 2004 Florida hurricanes, the construction and labor market was completely exhausted—there were few if any available contractors, roofers, electricians, etc., to proceed with repairs. In such a case, that reality must be taken into account in setting the length of the BI period. That is fair because in writing property insurance, the insurer agreed to shift the risk of BI losses caused by a disaster from the policyholder to the insurer. In a large disaster like Katrina, an insurer sometimes approaches the "due diligence and dispatch" issue completely in the abstract, as if only that one property is affected and there is an ample supply of contractors at the ready. Such an approach ignores the clear rule that delay and difficulty caused by circumstances beyond the control of the policyholder must be taken into account.

This rule also is easily found in the case law, such as in the following cases:

- In *Zurich American Ins. Co. v. ABM Industries, Inc.*, 2006 U.S. Dist. LEXIS 28249, at *8 (S.D.N.Y. May 10, 2006), the policyholder provided janitorial services to the WTC building and tenants. The BI period was defined by the time it would take to reestablish the policyholder's services that were uniquely connected to the WTC. The BI period was thus dependent on a much longer BI period tied to the entire WTC complex over which neither party had control. *Id.* Where neither party is to blame, the risk shifts to the insurer as part of the insurance contract.
- In *International Office Centers Corp. v. Providence Wash. Ins. Co.*, 2005 U.S. Dist. LEXIS 20494, at *15-17 (D. Conn. Sept. 14, 2005), the policyholder's offices at the WTC were destroyed. The BI period was defined by the time it would take to reopen the offices at the World Trade Center, not at a different location. The BI period was thus dependent on a much longer BI period tied to the rebuilding of the entire WTC complex.
- In *United Nuclear Corp. v. Allendale Mutual Ins. Co.*, 709 P.2d 649, 656 (N.M. 1985), there was a dam collapse at a uranium mill. The *contractor* delay in the design and engineering was added to the BI period, even if such time overlapped with time otherwise excluded as code compliance. "[T]he overall repair delay was complicated by conflicts among the engineers regarding making repairs before design, engineering and construction plans had been fully examined and proven." *Id.*
- In *American National Bank & Trust Co. of Chicago v. Continental Casualty Co.*, 434 N.E.2d 321, 324 (Ill. App. 1982), a fire caused significant damage to an apartment building, interrupting rents. There were delays in repairs caused by the approved *contractor*, the fault of neither the insurer nor the policyholder. The court

The theoretical BI period "is the time it would take to replace the structure providing the building was put up by the experts in the court room. But buildings seldom are. In the field it snows, and men fall off girders, and the wrong size window glass is delivered."



allowed a jury to include within the BI period the extra time caused by contractor delays. As the court aptly noted, "[t]he disparity between the times within which construction is scheduled to be done and is in fact done is part of the experience in life of most people." *Id.*

- In *Eureka Security Fire & Marine Ins. Co. v. Simon*, 401 P.2d 759, 763-64 (Ariz. App. 1965), a fire damaged a shopping complex that included the policyholder's store. Delay in rebuilding the store (under lease) was caused by the landlord's plan to first rebuild the entire shopping center. The extra time was included in the BI period for the store. Such delay "in returning to business was occasioned by events without the control of the [policyholder]." *Id.*
- In *Anchor Toy Corp. v. American Eagle Ins. Co.*, 155 N.Y.S.2d 600, 604 (N.Y. Sup. Ct. 1956), even where the BI period was measured as purely theoretical (due to the fact that the property was not rebuilt), the measure properly allowed for an additional contingency period. As the court wisely commented, the theoretical BI period "is the time it would take to replace the structure providing the building was put up by the experts in the court room. But buildings seldom are. In the field it snows, and men fall off girders, and the wrong size window glass is delivered. An estimate of 8 weeks for these contingencies is not believed to be excessive." *Id.*

It is fair and equitable to include in the BI period delays and contingencies that were not caused by the policyholder. This is in the very nature of the insurance contract, which shifts such risks from policyholder to insurer.

Conclusion

The lesson for policyholders is this: When the insurer measures the BI period using a "theoretical" approach, they are probably artificially reducing the covered BI period. A correct statement of the "theoretical" rule is as follows: Where there are no actual repairs due to a policyholder's decision not to rebuild, or due to a condemnation or sale of the property, then the proper measure of the BI period is the "theoretical" time it should take to complete repairs with "due diligence and dispatch" (assuming realistic contingencies).

Where there is an actual BI period, the proper approach is to start with such *actual* time it took to rebuild and reopen. If the actual period is what it is because of delay caused by the insurer or others beyond the control of the policyholder, the insurer cannot subtract from the actual period. The insurer can subtract from the actual period only if it can prove that the policyholder irresponsibly delayed in its repairs, due to its own fault. After all, this is the insurers' main point—a policyholder should not receive extra BI if it is itself at fault in delaying repairs. That would obviously create poor incentives. But insurers, unfortunately, commonly take the "theoretical" "due diligence and dispatch" rule well beyond its purpose and proper scope—even to the point of ignoring its own delays that led to a longer-than-necessary period.

The lesson for insurers is this: Adjust the claim promptly and diligently, immediately respond to all requests for approvals to do certain work or hire certain contractors, and promptly issue sufficient advances for repairs to commence and continue. If an insurer does those things, it will have "clean hands" and be in a much better position to identify where the policyholder has delayed. All too commonly, an insurer blames its policyholder for delay caused *by the insurer*. This leads to frustration too often felt by companies attempting to recover insurance in the wake of a disaster—when its own insurer adds injury on top of injury.

Gary Thompson is a partner with the law firm of Reed Smith, LLP, in Washington, DC. The views herein do not necessarily reflect those of the firm, its attorneys, or its clients, or with regard to any pending cases. *The author thanks his colleague Michael Raibman for his review.*

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PRINTED ON RECYCLED PAPER

AT06-2 3029

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