

## Do You Have Business Interruption Coverage for the Time it Takes to Get Up to Code?

By: Jason S. Mazer<sup>1</sup>  
Mallory L. Gold

Imagine that your family-owned store falls victim to an accidental fire. Even though the property damage is slight, your contractor reports back that you cannot open your doors until a brand new up-to-code sprinkler system is installed. Repairs that initially were scheduled to take two months will now take four. Your business interruption coverage will respond for the first couple months your store is out of commission, but is your carrier on the hook for the second two?

This question is one to consider when reviewing your business interruption coverage. While the policy may cover the cost to repair or replace property pursuant to a building code upgrade, it often excludes business income coverage for the extra time required to comply.

The term “code upgrade” refers to building laws and ordinances that require repairs or reconstruction of damaged structures to comply with current building codes. Scott G. Johnson, *Insurance Coverage for Building Code Upgrades*, 44 Tort Trial & Ins. Prac. L.J. 1031, 1032 (2009). In such a situation, the immediate concern is the cost associated with rebuilding or restoring damaged property to comply with the applicable code. For commercial property owners, however, another significant concern should be the additional time necessary to repair the property in order to comply with the relevant building law or ordinance. This extra time can keep doors closed for business for periods longer than initially contemplated, causing a policyholder to suffer substantial loss of income.

As a starting point, the key component to a business interruption claim is the “period of restoration,” or the time required to restore commercial property back to its pre-loss condition. *Duane Reade, Inc. v. St. Paul Fire & Marine Ins. Co.*, 600 F.3d 190, 201 (2d Cir. 2010). As a general matter, the insured will only be covered for lost income from the date of loss through the date that the repairs should be completed if they are undertaken with “due diligence and dispatch.” *Id.* Does this include the additional time to comply with an applicable building law or ordinance?

Many policies exclude or limit business interruption coverage for the additional time required to repair or reconstruct damaged property in accordance with an applicable law or ordinance. It is accordingly essential to closely review the policy for applicable language. While one should review the entire policy, such language is generally found in one of two parts of a commercial general liability (CGL) or an all-risk commercial policy: 1) the provision defining “Period of Restoration” in your business interruption

---

<sup>1</sup> Mr. Mazer is a shareholder with Ver Ploeg & Lumpkin, P.A., in Miami, Florida, where he represents corporate, municipal and individual policyholders in all manner of first and third-party coverage and bad faith disputes with insurance carriers. Mr. Mazer also serves as co-chair of the ICLC’s bad faith subcommittee. Ms. Gold is an associate attorney with the firm and is also resident in the Miami office.

provision or endorsement or 2) the provision or endorsement generally addressing code upgrade coverage (also known as a “Law or Ordinance” coverage). The latter can be treated as an insuring clause or an exclusion, depending on the policy.

When there is no specific policy language about how code upgrades should be treated under business interruption coverage, federal courts have reached divergent results. *See Davidson Hotel Co. v. St. Paul Fire & Marine Ins. Co.*, 136 F. Supp. 2d 901 (W.D. Tenn. 2001)(finding coverage for the time necessary to comply with pre-existing code violations); *Commonwealth Ins. Co. v. Benihana of Tokyo, Inc.*, No. 3:96-CCV-0826-R, 1997 WL 36167 (N.D. Tex. 1997); *contra 61 Jane Street Tenants Corp. v. Great Am. Ins. Co.*, No. 00 Civ. 1049 (GEL), 2001 WL 40774 (S.D.N.Y Jan. 17, 2001)(finding coverage for the time necessary to comply with pre-existing code violations); *St. Paul Fire & Marine Ins. Co. v. Darlak Motor Inns, Inc.* No. 3:97-CV- 1559, 1999 WL 33755848 (M.D. Pa. Mar. 9, 1999). Furthermore, if the period of restoration is otherwise capped, i.e. there is a fixed amount of time in which an insured has to repair or restore her property, Courts may not alter that period to include the extra time needed to bring the building up to code. *See generally Elec. Supplies, Inc. v. Travelers Ins. Cos.*, 859 F.2d 149 (4th Cir. 1988).

The standard business interruption form developed by the Insurance Services Organization (“ISO”) excludes extended business interruption coverage when additional time is needed to comply with a code upgrade. Specifically, the standard policy provision provides, in pertinent part:

“Period of restoration” does not include any increased period required due to the enforcement of any ordinance or law that:

- (1) Regulates the construction, use or repair, or required the tearing down, of any property.

ISO Business Income (and Extra Expense) Coverage Form CP 00 30 06 07, at 9; *see also Jardine v. Maryland Cas. Co.*, 10-3335 SC, 2011 WL 6778798 (N.D. Cal. 2011).

Other policies, however, explicitly include such coverage as part of a Code Upgrade provision or endorsement. The following is an example:

In the event of loss or damage by an insured peril under the policy that causes the enforcement of any law or ordinance regulation to construction or repair of damaged facility, underwriters shall be liable for:

Any increase in the Business Interruption and extra expense loss arising out of the additional time required to comply with state law or ordinance.

*See MarkWest HydroCarbon, Inc v. Liberty Mut. Ins. Co.*, 558 F.3d (10th Cir. 2009); *see also Seattle Monorail Servs. v. Affiliated FM. Ins. Co.*, No. C05-1052-MJP.

The relevant language is important, because mandatory code upgrades cannot extend an insured's period of restoration and business interruption recovery when explicitly excluded by the policy, as evidenced by the recent case *Jardine v. Maryland Casualty Co.*, Nos. 10-3335 SC, 10-3336 SC, 10-3318 SC, 10-3319 SC, 2011 WL 6778798 (N.D. Cal. Dec. 27, 2011). In this case, James Jardine owned a commercial property, parts of which he leased out to various commercial tenants. *Id.* at \*1. In June of 2007, a fire broke out in one of tenant's units, eventually causing that tenant to breach her contract and stop paying rent in October of 2007. *Id.* at \*2. Jardine hired a consultant to assess the damage, who estimated the fire caused about \$34,000 in property damages, plus the additional expense of "code upgrades" that might be required by the city. Jardine tendered this claim to his insurer, and ultimately settled. *Id.* Subsequently, however, Jardine sued his insurer for falsely representing the applicable policy's coverage limit. *Id.* at \*5. He claimed that although settlement amount for the fire damage was adequate, he was owed code upgrade expenses and business interruption coverage for the period of time necessary to meet the mandates upgrades. *Id.*

On the code upgrade expenses, the Court granted summary judgment to the insurer, finding that although code upgrade coverage was available, the insured was not entitled to such coverage because he never actually performed any code upgrades after the fire. *Id.* at \*5.

As to the business interruption claim, Jardine argued he was entitled to an additional \$79,000 lost rental income for the period of time after his tenant ceased paying rent due to the fire damage. His contractors testified that "building code upgrade and energy requirements" would have taken an additional eight months, after the tenant stopped paying rent, to complete. The court, however, refused to even consider this argument because the applicable policy "expressly provide[d] that the period of restoration does not include any increased period required to perform such code upgrades." *Id.* at \*8. Thus, the business interruption argument had no merit.

This recent case exemplifies the unwillingness of courts to uphold code upgrade exclusion when it is clearly written into the policy. Thus, it becomes essential to analyze a policy's definition of "period of restoration," because the lost income due to code upgrades can often be substantial.

In conclusion, as an owner of commercial property, one should not overlook the need to expand your business interruption coverage to include the extra time that may be required to bring a building damaged by an otherwise insurable risk up to code. This coverage extension can ultimately be invaluable to a business in lost profits saved.