

Insured's Income During Partially Resumed Operations Reduces Charges and Expenses Claim

Insurance Law Update

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U.S. Court of Appeals for the Fifth Circuit

In *Consolidated Companies, Inc. v. Lexington Ins. Co.*, ___ F.3d ___, 2010 WL 3223137 (5th Cir. (La.) Aug. 17, 2010), the U.S. Court of Appeals for the Fifth Circuit held that an insured's income during "the period of restoration" must be used to reduce its charges and expenses claim.

Consolidated Companies owns a warehouse in Louisiana that was damaged by Hurricane Katrina. Within 10 days of the loss, Consolidated Companies was able to resume partial operations. The parties disagreed on the interpretation of the business interruption provision. Namely, whether the "charges and expenses" incurred during the loss should be reduced by income earned during partially resumed operations. The district court reduced the lost profits award based on the income earned, but did not agree that the "charges and expenses" award should be reduced. The court also awarded property damage and statutory penalties.

The Fifth Circuit vacated the "charges and expenses" portion of the award, and remanded the statutory penalties portion for further proceedings. The Fifth Circuit disagreed with the district court's interpretation of the "charges and expenses" language, stating that the district court's calculation would provide a "windfall" to the insured by placing them in a better position than if there had been no loss. The court reasoned that the purpose behind the policy was to put the insured in a position as though the loss had not occurred. Here, the "charges and expenses" (incurred regardless of the loss) were recouped from the income of the business and were not a loss to be compensated by the policy.

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