



Current Articles 2007 – June

Business Interruption and a new precedent!

About a year ago, my article dealing with Business Interruption made reference that this class of insurance created the largest percentage of errors and omissions claims. This is the result of the lack of coverage or inadequate limits. Although these errors and omissions causes of losses have not changed, a recent precedent has added to the complexity and possible severity of such claims.

The new precedent case followed a decision in the High Court of England namely *Arbory Group Ltd. V. West Craven Insurance Services*. “This decision may have very expensive ramifications for brokers, and E & O insurers who place business interruption coverages”, said a British lawyer.

This case contradicts the principle that a loss against a broker be restricted to an amount no better than the plaintiff would receive had the broker arranged the appropriate insurance. The *Arbory* case departs from this established principle and suggests that a broker can be liable not only for the underinsurance but also in excess of the correct sum insured if those further losses flow from the non-payment of insurance monies caused by the broker and the underinsurance.

In addition to allowing a claim against the broker for the underinsurance of the Business Interruption coverage (which amounted to 299,902 (British currency)), an additional amount which was well in excess of what should have been the correct limit was awarded for loss of profits. This additional amount represented 311,844 (British currency). The claimant argued for damages for loss of profits, alleging that the underinsured cover and resulting smaller sum paid on settlement of the business interruption claim was insufficient to maintain the business as a profitable going concern, which was the object of having such cover in the first place. Therefore, it was claimed, the business failed to make the profits that it would have made had the business not been interrupted by the fire. Since business interruption cover is designed to maintain the profitability of a business, it is reasonably foreseeable that the amount by which payment under such insurance is less than it should be because of underinsurance will temporarily reduce the ability of the business to resume its pre-incident level of production and sales and thus will adversely affect profitability.

The judges comments were *“the duty of the broker in this case where business interruption cover was required was to effect such cover that would enable the claimant to recover to its pre-incident level of profitability.....It was reasonably foreseeable that the failure to effect cover was liable adversely to affect profitability of the business so insured, if as a result of the broker's negligence insufficient business interruption insurance money was paid to enable the company to recover as it should have so recovered in the event that proper cover had been effected.”*

A British lawyer's comments said the brokers must remember that whilst it is not their duty to calculate the correct figure for business interruption insurance for an insured, they are required to advise on the correct method of calculating that figure. Likewise, brokers should not overestimate

their own abilities when dealing with complex corporate structures by undertaking duties which are properly within the ambit of accountants and other professionals retained by the insured.

As you can appreciate from the dollar value of this case, the amount of the E & O loss as a result of this additional amount for further loss of profits has better than doubled the amount of the E & O loss!

This case may, of course, go to appeal but nevertheless the potential for much higher awards for underinsurance of business interruption claims could accelerate with such a precedent.

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