

# Insurance Coverage May Be Available For Recent Business Interruption Losses Suffered as a Result of Volcanic Ash, Flooding, and the Gulf Oil Spill

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Kelley Drye's insurance recovery group has a long history of assisting clients in obtaining coverage for property damage and business interruption suffered as a result of catastrophic events, such as hurricanes and the terrorist attacks of September 11. Our attorneys negotiated the insurance settlement for the hotel that was situated at the World Trade Center and assisted victims of Hurricane Ike, which caused widespread damage in Galveston and Houston, Texas. Given these experiences, we can appreciate the difficulties that businesses have encountered as a result of recent events, including the extended closure of airspace due to volcanic ash from Iceland, the flooding of Nashville, Tennessee and surrounding areas, and the oil spill in the Gulf of Mexico. Kelley Drye's insurance recovery attorneys know how to manage insurance policies - starting with the value of investing in proper coverage, ensuring that claims are timely noticed, and negotiating or litigating with recalcitrant insurance companies.

Often following such disasters, insurance companies take the position that resulting business interruption losses are not fully covered by their policies. But the reality is that some companies likely are entitled to recover from their insurers. Insurance policies covering property losses often include coverage for one or more types of business interruption and resulting extra expenses. Such coverage can be vital, as proven in recent years with Hurricane Katrina and the terrorist attacks of September 11. Courts have held that insurance companies are obligated to cover their policyholders' business interruption losses stemming from floods, air space closures, and various types of environmental contamination disasters pursuant to the specific language contained in the policies at issue. But the coverage provided by business interruption insurance varies significantly from policy to policy and nuanced differences in the policy language, as interpreted by the courts in specific jurisdictions, can spell the difference between coverage and no coverage. The various types of business interruption coverage available include:

1. **Business Interruption** provisions provide coverage for a policyholder's business interruption losses sustained due to the necessary suspension of a policyholder's operations. Often, to obtain such coverage, physical damage to the insured's property or adjacent property due to a covered peril is necessary.
2. **Contingent Business Interruption** provisions provide coverage for a policyholder's business interruption losses arising from property damage or other interruption to a policyholder's supplier, customer, or other business impacting the policyholder.
3. **Civil Authority** provisions provide coverage for a policyholder's business interruption losses

resulting from orders of civil authority, such as evacuation orders, curfews, street closures, and the like, including airspace closures put in place by the FAA and similar authorities.

4. **Ingress / Egress** provisions provide coverage for a policyholder's business interruption losses incurred when access to and from the insured premises is severely curtailed or prevented.
5. **Extra Expense** provisions provide coverage for costs incurred by a policyholder to prevent, limit, or mitigate further loss by minimizing the disruption of normal operations.

A comparison of two airlines' insurance claims, under civil authority coverage, following September 11 demonstrates that the language in a company's business interruption policy often determines whether coverage exists. Both US Airways and United Airlines suffered similar profit losses as a result of the nearly month-long closure of Washington DC's Reagan National Airport, but only one of them obtained insurance coverage. On the one hand, United's policy provided coverage for business interruption if access to insured property was prohibited by order of civil authority as a direct result of "damage to adjacent premises." On the other hand, US Airways' policy provided coverage if access to insured property was prohibited by order of civil authority "as a direct result of a peril insured against," including "all risk of direct physical loss of or damage to property described herein."

With regard to United's claim, a federal appeals court in *United Airlines, Inc. v. Insurance Company of the State of Pennsylvania*, 385 F. Supp. 2d 343 (S.D.N.Y. 2005), held that there was no coverage for two reasons. First, it found that the Pentagon is not "adjacent" to Reagan National Airport, given the three mile distance between the properties and their separation by a number of buildings and roadways. Second, it found that the FAA's closure of Reagan National Airport was not issued as a result of damage to the Pentagon because the closure occurred prior to its attack. For US Airways, a Virginia state court in *US Airways, Inc. v. Commonwealth Insurance Company*, 65 Va. Cir. 238 (Va. Cir. Ct. 2004), held that coverage was available because its policy did "not require actual damage or loss of property to invoke coverage," but only the *risk* of actual damage. The FAA order was issued in response to the risk of an imminent attack on Reagan National Airport. US Airways' policy language was not broader or better than United's for every business interruption situation. Indeed, it is unlikely that the two airlines would have appreciated the distinction between their respective policies prior to September 11 or had any reason to prefer one over the other. Rather, the key difference between the policies was the event that triggered the coverage.

Businesses should consider taking the following steps in order to maximize their chances of recovery for recent business interruption losses:

1. **Collect all insurance policies:** Coverage may be available under several different types of policies, so all potentially relevant policies should be collected.
2. **Give notice to insurance carriers:** Most policies require that insureds provide notice to the insurance carrier promptly following a loss. Some jurisdictions apply those notice rules strictly.
3. **Preserve, organize, and maintain documentation of all costs and losses incurred following the event:** Coverage may be available for various costs, including for repairs, temporarily relocating, lost profits, and activities that protect or allow continuity of business, which would not have otherwise been incurred.
4. **Consult coverage counsel to analyze the extent of coverage available under the**

**policies:** Coverage may be available for various costs as noted above, including property damage and business interruption, but there may be exclusions or other limits to that coverage. Many policy provisions, including those exclusions and limits, have been construed by courts. Kelley Drye's coverage attorneys can assist in working through such issues.

The provisions of US Airways' and United's policies are mere examples of the widely varied coverage available for business interruption. Do not accept insurers' self serving statements that no coverage is available. Kelley Drye's nationally-renowned Insurance Recovery attorneys have extensive experience handling business interruption claims on behalf of policyholders, recovering millions of dollars for our clients, and helping them reap the value of their investment in insurance.