

FINAL TRANSCRIPT

Thomson StreetEventsSM

****ACC - Maximizing Insurance Recoveries in the Aftermath of Katrina**

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PRESENTATION

Patti Phelan - ACC - Vice-Chair of New-To-In House Networking Group

Hello and welcome to this ACC webcast in which we will look at insurance recoveries in the aftermath of Hurricane Katrina. My name is Patti Phelan. I'm an ACC member and the moderator of today's webcast.

We're very fortunate to have as our speakers today Kathy Barlow, VP and Client Executive of the Middle Market Practice of Marsh USA, and Kirk Pasich, Senior Partner of the law firm of Dickstein Shapiro Morin & Oshinsky LLP. Kathy will address navigating and facilitating the claims process. Kirk will focus on maximizing insurance recoveries in the aftermath of Katrina.

Before I tell you more about our speakers, I would like to make a few comments about this most unfortunate event, Hurricane Katrina, which has given rise to this webcast at this time. The human suffering and devastation caused by Hurricane Katrina is so horrific that many of us cannot come even close to comprehending it. Our hearts go out to the victims of Katrina.

ACC has established a number of initiatives to assist those affected by Hurricane Katrina. To learn more about this and how you can help, I refer you to the ACC homepage on the ACC website. Near the top left-hand corner you will see a section of the website entitled ACC Cares. Click on here and you will be taken to a new page where you can learn more about the support being given by ACC.

On that same new page there is a list of ACC crisis management resources. One of these is an article coauthored by Kirk and other lawyers at the law firm of Dickstein Shapiro. The article is entitled An Overview of Insurance Coverages for Losses From Hurricane Katrina. We welcome contributions from ACC members to this resource site.

On the website that you've used to access this webcast there is an outline of the webcast content, a slide presentation to download, my email address to which you can send questions during this webcast, and bios of the speakers to download. This webcast is scheduled for an hour and a half. There will be a presentation by Kirk and Kathy, followed by a question and answer period. Questions can be emailed to me at the email address that appears on the webcast web page under the heading Lessons For the Future.

I will now tell you about our distinguished speakers. Kathy Barlow (ph) is Vice President and Client Executive of the middle market practice of Marsh USA. At Marsh she is responsible for all aspects of client management and development in the risk managed area for various legal, real estate and corporate clients. Prior to joining Marsh, Kathy held positions as general counsel with the Bernstein Company and assistant general counsel with First Virginia Bank. She was a member of the general business group of the law firm of Arent Fox.

Kathy is very active within ACC. She serves on the Board of Directors of the Washington Metropolitan Chapter of ACC. She is the immediate past president of that chapter. She also serves as a Director of the Georgetown Corporate Counsel Institute.

Thank you for being with us today, Kathy.

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Kathy Barlow - Marsh USA - VP and Client Executive of Middle Market Practice

Thank you.

Patti Phelan - ACC - Vice-Chair of New-To-In House Networking Group

Kirk Pasich is a partner in Dickstein Shapiro's insurance coverage practice and a member of the firm's Executive Committee. He is well recognized throughout North America and beyond as an expert in insurance matters and a top litigator. Los Angeles magazine named Kirk as one of Southern California's (inaudible) lawyers. Chambers US named Kirk as one of America's leading business lawyers. This is but a partial list of Kirk's achievements. Kirk is also a prolific writer, an educator, a much sought after presenter, and a past member of the Board of Directors of the National Academy of Jazz.

As mentioned earlier, bios for Kathy and Kirk are on the web page for this webcast. I invite you to read them. Kathy and Kirk, I now turn the program over to you.

Kirk Pasich - Dickstein Shapiro Morin & Oshinsky - Senior Partner

Thank you, Patti.

I think the starting point -- people ask me as an insurance coverage lawyer when do I come into this process and my answer is as early as needed. But the reality is in the aftermath of Katrina, the flooding, the other problems that we're seeing in the affected areas, the initial question from my perspective should be how to best navigate the claims process, what's the practical approach to do that. And, Kathy, I think that's your bailiwick.

Kathy Barlow - Marsh USA - VP and Client Executive of Middle Market Practice

Thank you, Kirk.

Obviously this is a very timely program and literally within the past two minutes I just received an email, a general broadcast email from my organization talking about Hurricane Rita. So it seems like lately we just are inundated with the sad news, unfortunately, and we'll more and more have to navigate through these claims processes.

Hopefully, today I can give you some pointers. And most of these are common sense, but I think it's important to focus on the basics. And hopefully, the people that are preparing the claims or preparing the information for the claims at your organization will have this information and be able to do it effectively for your organization or your employer.

I think there's maybe a top 8 or 10 list that would come to my mind in navigating the claims process and obviously the first and foremost would be timely notice. And whether that's made either to your broker, if you have a broker, or directly to the carrier, that's really important. And again, what is timely? Timely is as close to the event as humanly possible. And in this case obviously, Katrina has thrown quite some events at us, but as timely notice can be made, that's probably in the best interests of your client.

The second item would be, and it's very important, would be to preserve the site, which would be preserve the property and approach the property as if there is no insurance. Make sure to protect the site from further damage, document, photograph; it's very important to lock the moment in time, if you will. Again, to avoid mistakes, do not remove debris. And it's important again to work with your adjustor. If you're going to be making more than temporary repairs, make sure that those repairs are agreed to by the adjustor that's been assigned to you.

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Which leads me to a very important point, you need to work very closely with the adjustor and establish a good rapport with that adjustor. They're obviously, especially with Katrina, inundated with hundreds and possibly thousands of claims and your claim is not the only claim and you need to take responsibility and autonomy for it. So make sure you get your adjustor all the information he or she needs, be proactive, strike a good relationship with them, acknowledge that their job is difficult, as is yours, in trying to make the claim. I think that will go a long way.

As with anything, obviously it's upsetting. People are out of business, out of time, out of money and it's obviously a very stressful period for those in the Gulf area, but good humor and good sense will probably go far in this. Be sure to record your cost of any expenditures and keep copies of the paperwork for these temporary repairs or other items that you have had to incur due to your loss.

I think probably the greatest risk for perhaps some of the organizations that are not as big, if you work for an organization that perhaps does not have a risk manager, perhaps your CFO is involved in the claims process, perhaps he or she is not as knowledgeable, perhaps they're new to the organization or new to the job and they're just not as knowledgeable on what actually needs to be done in the claims process, be sure that they're educated.

As in-house counsel, obviously you should be proactive and make sure that they have the information and confirm that they've either processed a claim before or understand the ramifications of timely notice of preserving the site of all the things we're talking about today. I think that that always goes very far; in general, being a proactive corporate counsel is viewed very positively, especially in a situation like Katrina.

Again, as far as dealing with an adjustor, you need to be proactive. Whether it requires contacting the carrier multiple times or contacting your broker multiple times or contacting the adjustor, everybody will be overwhelmed in the Katrina claims process. But you need to be out there in front, not take it for granted necessarily that your claim is foremost in anyone's mind or that somebody has a tickler and will get back to you in three weeks on your claim.

If you're concerned about your claim or you have not heard, make it a point to make regular contact and see what the status of your claim is. And make sure that it is moving forward and if there's any additional information needed, that you're available to provide it and that will not extend the claim process any further.

One of the biggest things that you will need to do is to make sure that you avoid any out of market rates in the rebuilding process. Be sure that you clear any rates that you're going to have to pay with your adjustor. In events in the past, insurers went out and obtained contracts that contained out of market rates and then that resulted in problems with the carrier and with the adjustor. And you should just avoid that right up front and make sure that before you sign any contracts for the rebuilding process, that those rates are cleared with your adjustor.

I think I've left the most important for last and again, it might be self-evident, but the most important thing you can do in your advice on the whole Katrina claims process is to make sure that the individuals who are focused on the rebuilding and the getting back to business, make sure that they understand that they need to preserve the life and safety of their employees.

Obviously every employer wants to get their people back to business, back to protecting their property, whether it's an oil refinery plant or anything else, but you cannot subject these employees, in that same vein, to any unsafe conditions such as live electric wires or water or other conditions that might be unsafe or hazardous to anyone. And that's extremely important to avoid potential liability claims as well.

I think those are pretty, again, self-evident or common sense sort of responses, but a good checklist perhaps to just talk to the person that you believe to be working on the claims process. Whether the legal department in your organization is doing that or not, it might be worth a phone call to speak with that person to make sure that they don't have any questions on this process and that they've done this before.

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I think that's it, Kirk.

Kirk Pasich - *Dickstein Shapiro Morin & Oshinsky - Senior Partner*

Great. Thank you, Kathy.

From outside counsel's perspective, when we're navigating through the claim process, one of the things to keep in mind is that while there are standard forms of property insurance and other types of insurance that might apply, there are many variations in policy language from insurance company to insurance company and it's important to focus on the nuances. A broker can be a godsend in this situation because they're familiar with the market and they've had the circumstance of being involved in prior losses. So a broker can provide good practical advice and guidance, in addition to many occasions providing a copy of a missing policy that may have been lost in the disaster.

One other practical point, though, to keep in mind as you work through the claims process relates to the confidentiality of internal communications. And on the PowerPoint presentation we're actually on the first substantive page, which is page two of the PowerPoint. We have as an item, preserving the confidentiality, and it's this point; in most states, communications between an insured and the insurance broker are not privileged from discovery. There's no equivalent privilege to the attorney/client privilege, which means what you say to your broker you generally should assume will be something that will ultimately end up in the hands of the insurance company if you have a dispute.

Now, there are a couple of ways to avoid this. One is by an express agreement with the insurance company. Another is by carefully considering how and what you say to the broker or any other third party and having a lot of the communications done at the direction of inside counsel. That doesn't mean that the lawyer has to run everything because a lot of what happens in these circumstances is calculation of the physical property damage, the rebuilding effort, calculation of business interruption losses, and those are the kinds of things that a lawyer may have some involvement in, but typically somebody else is tasked with the responsibility.

And let me give you an example from prior circumstances, other disasters if you will. Oftentimes there's a need to do a calculation as to what the period of business interruption is. Frequently in corporations, that is the responsibility of someone on the financial side. If no lawyer is involved in that process, then it means that initial draft reports, questions that go as to how you calculate income, perhaps dialogs with an outside consultant, whether it be an accounting firm or someone else, none of those communications might be subject to the protection of the attorney/client privilege.

And so if that's of concern, then the initial involvement should be by a lawyer, at least to coordinate and say to do this and a request that documents be treated as if they're subject to the privilege. That way you may be able to protect drafts that reflect initial tentative thinking, as opposed to final conclusions, if you need to in the event of a dispute. It's simply an area to be aware of and to consider.

On the next page of the PowerPoint we have outlined some of the key insurance coverage issues and I think the starting point in this dialog is with the cause of the loss. And, by the way, we do get -- if you email in questions, we will see the questions and we will attempt to weave in answers to questions as we go or to answer them perhaps at the end. But I know one issue that's been raised already by a question, which fits in with this topic, is how you determine what the cause of the loss is and the question raises what happens if Hurricane Rita hits New Orleans; does an insured have to pay multiple deductibles or retentions, is it going to be one loss, is it going to be two losses.

That brings really directly into focus here the question of how do you determine what is a loss and how many occurrences. And we've already seen a homeowners' proposed class action lawsuit filed that contends that the hurricane itself may be the cause of the loss or maybe it's the levee design, but it's not floods because a lot of people have flood exclusions. You can articulate a number of loss causes here; Hurricane Katrina, the flood, the design of the levees, the maintenance of the levees, the failure of

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the levees, orders from civil authorities, for example, to evacuate New Orleans or not to return as they're turning people away again, you can allegedly say it's the government, whether it's local, state or federal, their early failure to act is the cause, subsequent discharge of things that might be pollutants, is it looting, is it fire? You can develop an entire laundry list of theoretical causes.

And while New Orleans and the Gulf are recovering from Katrina, if Rita really does hit and is anything close to the impact of Katrina, then you've got two sets of events that happened. Many insurance policies do contain some provisions regarding deductibles or limits that talk about time limitations. For example, it's very common with earthquakes to see a statement that aftershocks within a 72-hour period are treated as still constituting one occurrence. Some policies have descriptions about atmospheric disturbances, some even have deductible limitations that treat all atmospheric disturbances within a particular period of time as a single event. I am not aware of any significant number of policies that treat two separate storm systems that are a couple of weeks apart as being a single occurrence.

And so what we're likely to see when we start talking about the impact of one storm versus another is a determination as to what damage was caused by what. For example, if the levee system has not been completely repaired here and there's new damage that comes in on top of it, is that because of Hurricane Rita? Is it because of Hurricane Katrina? Or is it because of the design or maintenance or failure to effectuate repairs quickly enough? This is a breeding ground for potential coverage disputes. And if, of course, Rita doesn't hit, if we're fortunate that it doesn't hit and cause damage, then we're just left with what will be the so-called more mundane issues of levee design, flood, hurricane, civil authority, how do you sort those out.

Well, the courts have developed a couple of tests to determine what is the cause of a loss like this. One test is efficient proximate cause. It's been bandied about in a number of decisions that goes back several decades, but essentially what it means is to figure out whether you have coverage, you look at what is the cause that set everything else in motion. Is it the hurricane in this case because without the hurricane you'd have no floodwaters? Is it the levees because if the levees had withstood the effect, the city would have been fine? You look at those issues and you approach it from the efficient proximate cause.

There are a number of court cases out there that stand for the proposition that -- and it's sort of contradictory. Some court cases say look, it all started with the hurricane and, therefore, the hurricane is the one that set everything else in motion because without the hurricane there'd be no flooding. And, therefore, you get coverage if your policy covers hurricanes.

There is, though, a State of Washington decision that deals with massive rainstorms that says if you live in an area where you have federal flood insurance and you have a policy that doesn't cover floods, you know that the only time you're going to be covered for anything relating to a flood is if you have flood insurance. And we all know that floods usually depend on rainfall of some sort. So the Washington court said if you live in an area that's a flood zone or where the federal flood insurance program is available, then you have no reasonable expectation of coverage for any flood related damage unless you have explicit flood coverage in your policy.

What that means is for entities that have no flood coverage, if that decision is the law of the land then you're not going to get coverage for any damage attributable to the flood. If you have flood coverage and it has a sub-limit, which is a specific amount of coverage afforded for floods, then you would get that coverage, but maybe not coverage afforded for wind damage from the hurricane. And then, of course, there's the question of what damage is cause by water and what damage is cause by wind.

There's actually a case coming out of New Orleans where a court decided that some damage was cause by wind and covered under a wind insurance policy and some damage was covered by water and covered under a flood policy. That simply demonstrates that if you end up having two separate causes or three or four causes of loss, that you can be covered under multiple provisions of an insurance policy or under multiple policies.

For example, many of the all risk insurance policies that are sold out there provide coverage for physical property damage or loss. They provide separate coverage for business interruption, which is usually defined as the loss of gross earnings caused by a covered peril. They provide coverage for contingent business interruption, which is coverage that applies if you can't get goods and suppliers or your customers are unable to accept delivery of your goods. There's coverage for extra expense, the

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extra cost associated because of the loss. There's coverage for expediting expense to help you get over the loss in some way. There's coverage for reducing the loss. And if you look at extra expense -- expediting expense and reducing the loss, they look very similar but they cover different aspects of the consequences of dealing with the loss and trying to get your business back to normal.

There's coverage for service interruption, which could be an interruption of power or water supply or simply the inability of third parties to provide services that are necessary. Example, if you're in New Orleans, you have a factory, you can open it, but your employees can't get in or they have no place to live or they can't get power at their homes, you may have an argument, depending on the precise language of the service interruption, clause that that is interrupted service and that you're covered because of your employees' inability to get there or your employees' inability to work.

Now, that's not going to be the case with most service interruption clauses, but it does trigger the question of what rights does an insured have with respect to its power supply contracts, who is responsible for paying for repairs of electric and gas delivery systems. If a business is assessed those repair costs through future increased rates, are they covered by your insurance because they're storm related? If they're assessed as a lump sum charge, are they covered? What say does an insured have and who has to pay those things? What changes do you have to make in your power supply arrangements or your water supply arrangements?

These are all kinds of questions that implicate potential insurance coverages under the policy and when we're dealing with the circumstances now that we see in New Orleans, for example, where three weeks after the storm we have hundreds of thousands of customers and businesses that are without power or that have damage because of energy supply facilities or other infrastructures, there are a whole series of possible measures of coverage for these different things depending on what the cause of loss is and what coverage provisions might apply.

And it's quite possible that the same event can trigger multiple coverage provisions or that you might have multiple events that trigger multiple coverage provisions. For example, one issue that's out there is if the flood is separate from the hurricane, how do you point to in a warehouse what damage was caused by floodwaters or what damage was caused by the roof being torn off and water coming in in the form of rain? What happens if a sewer backs up; is that pollution, which may be covered on a limited basis or not covered at all, or is it something separate and apart from pollution? These are the kinds of issues that lurk in the question of cause.

And so early in the claim process one has to try and figure out what the cause is and there's actually a Louisiana case involving Loyola University where the courts found that if there was covered and uncovered damage and the insured could not separate the different types of damages and associate them with a particular cause, then it would not be entitled to recover anything. That is, I think, a rather draconian result, but it does demonstrate that early on in the process of dealing with the claim and dealing with efforts to recover, one has to be sensitive to how the cause of the loss is going to be characterized later. That can be outcome determinative and it can affect how much coverage you have.

Now, as a footnote to this, there is a brand new decision. It's about three weeks old from a federal court in New York in a case called Hit (ph) Factory. And the court was asked to address this notion of efficient proximate cause, the one cause that triggers everything. And in that circumstance the battle wasn't whether there was coverage or not, it was which of two coverage provisions applied. The insurance company took the position that only one coverage provision could apply if there was one loss, one cause of loss, say hurricane versus flood, and that the efficient proximate cause doctrine said that's what you do.

The New York court rejected that and said look, if you're dealing with the circumstance where there's more than one kind of coverage in a policy that could apply, we're going to go with the old traditional doctrine of concurrent causation, meaning if you have two causes and they're each covered, separate provisions in the policy will apply up to the full extent of their limits as to the loss covered by that cause. So if you have a hurricane limit of, say, \$1 million and flood limit of \$1 million and you can show \$1 million in damage from the hurricane and \$1 million from flood, you're going to get \$2 million in coverage.

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By comparison, if you had hurricane coverage but no flood coverage and it was determined that the flood was the so-called efficient proximate cause, in the eyes of many courts you would get \$0. Not \$1 million, but \$0 because the uncovered event of flood is the triggering cause. So it is important in reviewing the policy to consider whether you have all covered causes of loss or some uncovered and some covered.

If you have all covered causes of loss, you, in fact, may be able to stack up a whole series of sub-limits or limits on coverage and thus increase the coverage. It's what you're entitled to under the contract. We're not talking at this point about getting recoveries outside the face of the contract, but simply making sure you get the benefit of the coverage that you paid for in the first instance. So those are the kinds of things that one would expect to deal with on cause.

By the way, there's one other point to keep in mind; what is the standard of proof. And this goes back to one of Kathy's points on the practical side of dealing with claims and working closely with the adjustors, protecting property, being proactive. You need to establish in that process the evidence of what the damage is, document it as you go along, because there's a court that says, and this is generally accepted by most courts, that it's up to the insured to prove that there's damage and to show some causal connection between the damage and a covered cause of loss. And what one Louisiana court said a few years ago is, I'm going to quote this one sentence because it says it as directly as it can be said, "This proof must be shown by a reasonable preponderance of the evidence and with some detail and specificity." So it's the reasonable preponderance of the evidence, some detail, some specificity.

That is not an insurmountable burden. It's not precise detail, it's not extraordinary specificity; it is some detail and some specificity. And I think personally that courts will take into account the circumstances that permit you to develop the proof or not, as the case may be. But that burden is generally on the insured to come up with some of these ideas.

Patti Phelan - ACC - Vice-Chair of New-To-In House Networking Group

Kirk?

Kirk Pasich - Dickstein Shapiro Morin & Oshinsky - Senior Partner

Yes?

Patti Phelan - ACC - Vice-Chair of New-To-In House Networking Group

Would a prudent insured, given a backlog in the adjustor's schedule so that the insured's property will not be looked at for a number of weeks, would a prudent insured engage the services of some third party insurance expert to assess and document the damage and then provide that to the adjustor?

Kirk Pasich - Dickstein Shapiro Morin & Oshinsky - Senior Partner

I think that's an excellent question and I think the answer is yes. You need someone who can document damage and provide it to the adjuster. With some companies that don't have the internal capability to do that and, therefore, they need to go outside, some people talk about using a public adjustor and those folks usually take a piece, a percentage. They don't usually deal with very large losses.

But there are certainly crisis consultants or crisis management firms, some brokers such as Marsh, have an ability to provide some of those services through one of their divisions or companies. The big accounting firms or even the smaller accounting firms also have the capability to come in and do the financial side, not necessarily the let's document the actual physical damage, but there are certainly outside services that are available that work through disaster recovery in establishing losses.

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This is not the kind of thing, by the way, that a law firm typically would do or typically should do. One doesn't want to pay an hourly rate to have lawyers become folks who document property damage or business interruption.

So in the realm of who does what, yes, I think the idea of using outside consultants makes sense. I think there's some advantages to having lawyers guide that process and be aware of it as consultants start to categorize the nature of a loss and some consultants will put in there wind damage or assume it's rain damage when it might be flood damage, sewer backup, those sorts of things. So an outside consultant can, indeed, make a big difference on that.

Patti Phelan - ACC - Vice-Chair of New-To-In House Networking Group

And are the costs paid by the insured for those outside consultants recoverable under the policy usually or is it something that has to be specifically negotiated?

Kirk Pasich - Dickstein Shapiro Morin & Oshinsky - Senior Partner

Well, that -- it depends. Many policies issued to corporate America have express coverages for loss adjustment expenses. Those coverages vary. Some are simply for the cost of inventorying property and that's what they expressly provide. Other policy provisions will extend the coverage to almost any cost with providing the calculated amount of the loss. So, for example, if one brought in a large accounting firm, or any accounting firm for that matter, to calculate the business interruption loss, to calculate the value of the property that was lost, those kinds of things under many loss adjustment expense provisions, those would be fully insured. Caveat, many loss adjustment provisions provide that lawyer's fees will not be paid.

Separate and apart from that, there are provisions also that provide temporary or permanent rebuild costs are going to be separately covered if they're not to rebuild the entire facility but they're aimed at basically temporary steps that will ultimately enable you to get back into action. Some loss adjustment expenses will provide for business planning coverage in the sense that you're trying to figure out how to deal with this loss, you have to do some business planning, you incur some expense. All of that is aimed at reducing the total amount of loss or getting the business back together or documenting it for the insurance company. Any one of those sort of phrases might trigger coverage under the policy.

And I should note that most policies that provide for business interruption coverage require either implicitly or explicitly that the insured take all reasonable steps to return the business to its normal state. And whether the policies expressly say so or not, courts have recognized that if you incur costs to do so, as long as they're reasonable, those will be covered by the policy and it's up to the insurance company to pay for the cost of restoring the business to normal.

So yes, Patti, there's a whole variety of provisions in the insurance policy that may cover various aspects of so-called loss adjustment expenses, either because they're to calculate the loss or they have something to do with enabling the insured to return to its normal business. I think we could see those coverages typically available for most insureds.

Patti Phelan - ACC - Vice-Chair of New-To-In House Networking Group

Thank you.

Kirk Pasich - Dickstein Shapiro Morin & Oshinsky - Senior Partner

Other coverage issues which sometimes get overlooked but relate to separate coverages include coverages for ingress or egress and civil authority. New Orleans, unfortunately, is the perfect example of how these two provisions will play out. Ingress or egress basically says if you're prevented from reaching your premises, you're going to be covered and it often has a separate

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limit of insurance. It's typically less insurance, sometimes it may only be \$25,000, but sometimes it's literally tens of millions of dollars if people can't get ingress or egress to your property. Obviously if there's a flood, it doesn't require a total prevention.

There's actually a case where an insurance company tried to argue that if you could helicopter people in, then egress or ingress wasn't prevented, it was just made more difficult. As you might guess, the key courts that have been called to address that kind of issue have found it to be close to ludicrous. They look at normal modes of ingress and egress and they find that total prevention of ingress or egress is not required. A partial prevention, which they read as a hindrance, something more than just it's too hot today but a substantial hindrance, certainly would constitute an interference with ingress or egress, that would trigger that coverage.

Civil authority, same kind of thing if you get an order, as you do to evacuate a city. We know some insureds that gave notice to their carriers regarding Katrina; when the order to evacuate the city was given, they were already reporting the civil authority loss under the policy. That is cutting edge for most people in terms of how quickly to give notice, but you certainly could give notice of a civil authority loss with an evacuation order.

Example, yesterday the mayor decided to turn people away again from New Orleans. That's an order of civil authority. That presumably will be covered under a separate sub-limit in the policy. And so we're clear, most of these policies will have a big aggregate limit but for particular types of coverage, they'll have special limits that apply to that coverage alone. And that's what we mean when we talk about sub-limits.

They may also have deductibles that apply to those particular types of coverage. They may have an overall policy deductible, they may have a deductible for all losses coming out of a single occurrence, they may have a deductible in addition for each kind of coverage available, whether it's civil authority or contingent business interruption or extra expense or whatever it is. And it's complicated because some of these deductibles are dollar amounts and some are time. For example, you could have a deductible on business interruption that says we don't pay the first \$500,000 of business interruption loss and we don't pay the first 48 hours of business interruption. Those both might apply; they might overlap. So it's not unusual to see that.

We also see some policies that have dollar amount deductibles and some that have percentage deductibles. Percentage deductibles, those of us who had to work through earthquakes, know that for years earthquakes have had deductibles that aren't a set dollar value, but rather they're a percentage of the insured value. So if you insured a piece of property for \$1 million and you had a 5% deductible, then regardless of the amount of your loss, your responsibility would be for the first \$50,000. If you got a 10% deductible, then your responsibility would be the first \$100,000.

And that has forced insureds over the years, particularly small businesses, to make the judgment call, "Do I want to buy insurance that really protects me against the catastrophic loss where it completely wipes me out or do I want to buy insurance that's going to provide at least some financial support if I have a less damaging loss, something that rips the roof off or damages a room or one of my facilities?"

And in New Orleans what we've seen, certainly for personal residences, is a lot of people went with the lower coverage to get the lower deductible so they'd have at least something to pay them if they had a moderate amount of damage. When you get the devastation of Katrina, it results in folks being underinsured because it's much more the catastrophic loss rather than the moderate loss.

So one has to grapple with a variety of deductible issues and there is some interplay between deductibles and sub-limits and the overall policy limits. Going back to the question, for example, of whether Hurricane Rita is a separate cause, if it's one cause or one occurrence, it may limit the number of deductibles you pay. But it also probably limits the total amount of coverage available for you. So you may get one deductible instead of two, but you probably will get one limit of coverage instead of two.

As a caveat to all of that, there's actually a District of Columbia decision, and it's the only one I know of that addresses this precise issue, that says that an occurrence for purposes of deductibles can mean something different than an occurrence for purposes

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of limits. And in that case, which involved asbestos exposures, the court ruled that you would have one occurrence for the number of deductibles and multiple occurrences for the number of limits, which basically gave the insured its cake and let it eat it, too. So there are those results. And they're explained only by the fact that in most cases dealing with how many occurrences are there, the courts have come out with the conclusion that maximizes coverage for the insured.

Patti Phelan - ACC - Vice-Chair of New-To-In House Networking Group

Kirk?

Kirk Pasich - Dickstein Shapiro Morin & Oshinsky - Senior Partner

Yes?

Patti Phelan - ACC - Vice-Chair of New-To-In House Networking Group

In the case of Katrina, do any of the government bodies anticipate assisting people who cannot pay their deductibles? I'm thinking of individuals as opposed to businesses.

Kirk Pasich - Dickstein Shapiro Morin & Oshinsky - Senior Partner

Well, I think the answer is yes and no. There will be legislation that deals with these issues. It's complicated by the fact that we already have the one lawsuit that's been filed that basically seeks to say that insurance companies cannot enforce flood exclusions and would in essence attempt to rewrite the policy. I think it's not very far removed from that to say you can't enforce the deductible. If you can, by litigation, remove exclusions from homeowner policies for floods, then you can probably remove deductibles by the same token because you're actually taking away less.

Now, I'm not a fan -- so we're clear, we at Dickstein represent policyholders only. We don't represent insurance companies, so no one would ever mix us up as being a fan of the insurance industry. But I do think that when you get into relief programs and litigation and the combination of the two, you have to be careful about what damage you do to the insurance industry. And you have to be careful about telling a group that they have to rewrite their contracts after the fact if that's, in case, the circumstance.

By which I mean if a policy doesn't cover flood insurance and that's clear and you then litigate to make it cover flood insurance, what's happened is the insurance company did not collect a premium for that, it did not set reserves for that, it did not obtain reinsurance for that. And if you can do it for floods, then you can do it for terrorism and you can do it for earthquakes and you can basically rewrite any contracts. At some point, one has to honor the sanctity of contracts.

That's not to say that I agree that insurance companies will be able to apply flood exclusions to Hurricane Katrina related losses. I think that's a different issue. But I think if you don't cover floods and it's determined that a particular loss is caused solely by a flood, that's a very different thing than what most of the circumstances we're going to see.

The legislation that's pending and the relief efforts, there have been hundreds of millions of dollars that people are talking about having been raised by a whole bunch of different organizations and I know that we're going to see an announcement on the Bush/Clinton fund in terms of what they're going to use that money for. It would not surprise me to see that the money is going to be allocated to satisfy whatever needs are out there and that would include folks who were uninsured and folks who were underinsured and folks who have deductibles.

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And there is in that regard, with respect to deductibles and retentions, there is a pretty good body of law nationally that says it's not necessary that the insured pay the deductible. It can come from any source as long as somebody pays it, the insurance company is getting the benefit of its economic bargain. And there are even cases that say, although these are more mixed, that as long as the insurance company isn't being asked to pay the deductible amount, it doesn't matter whether that amount is paid or not. And that's typically what we see. If you have \$1 million coverage with a \$50,000 deductible and a \$1 million loss, your insurance company is going to write you a check, usually for 950,000, whether or not you pay the first 50,000.

One point of clarification here, although it becomes confused a lot of times, retentions and deductibles, historically and in the eyes of many courts, are not the same thing. An insurance policy that provides \$10 million in coverage with a \$1 million deductible historically means that the insured gets \$9 million in coverage; the 10 million under the policy minus the \$1 million deductible, it's taken away. A \$10 million policy with a \$1 million retention means that the policy is paid on top of or after the \$1 million, so it provides a full 10 million in coverage once the insured pays the first million or incurs it.

It's complicated because some policies use the terms interchangeably and some call retentions deductibles or vice versa, so you really have to look at the policy wording. But in my example, it's a \$1 million difference in the amount of coverage available. That's the focal point on deductibles.

On the next page of the PowerPoint we continue with some of the key coverage issues and there are a number of issues here. Most of these issues that I'm going to talk about now will relate to so-called business interruption, when you cannot conduct your business. And business interruption coverage typically measures, and we have a measuring stick discussion here, gross earnings and a recovery period and sometimes something called a period of restoration. These are all part of what in some policies are referred to as timed element coverages and they basically mean anything that has to do with time and your inability to function or carry on your normal business per time.

And let me give you an example that we're now seeing in New Orleans. You are a retail business or a restaurant, you're a hotel or somebody that survives on tourism. The French Quarter, power's back on and the streets are dry, the physical damage is fairly minimal. If you're going to open for business tomorrow, do you have business interruption coverage or not? Do you have to open for business tomorrow because you're physically able? Do you have to open even if no one's coming to New Orleans?

These are questions that we are going to see debated. We saw them debated in California with the Northridge earthquake and its impact, among other things, on theme parks. And then you really get into some causation issues; are people staying away because they're fearful? Or are they staying away because of the actual physical damage and does it make a difference for your coverage? Do you have to reopen your grocery store, your whatever kind of retail establishment? Do you have to reopen when you're physically capable of it or do you lose your coverage if you don't reopen? And if you do reopen and there's nobody there, who pays for the fact that you're losing money every week that you're open?

All of these are the kinds of issues that we're likely to see and we do have some sense as to some of the answers that are out there. It starts with the notion of how these coverages fit together. Generally, with a business interruption coverage you're covered for a period of interruption, the period your business is actually interrupted because of damage from a covered peril, and for a recovery or extended period or a restoration period or pick whatever name happens to be applied. And so what happens is for the period of interruption, you have coverage. And I have to say that this coverage typically is subject to deductibles and it's typically subject to sub-limits, meaning that you're going to have to pay the first chunk of it and that it's going to stop at some point. And for some business interruption policies I have seen the period of interruption be as short as 30 days; others it's longer and I've seen it up to a year or more.

Once you reach a cutoff point on the period of interruption, then the extended recovery period kicks in. And that cutoff point is either typically, again it depends on the nuances of policy language, it's typically either the date the business interruption terminates or the date that repairs to your facility are completed so that you're ready to go again. That ends the period of interruption and starts the recovery period or the extended period.

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And that recovery period usually has its own separate limit and it's usually a time-based limit. So, for example, you could see, as we've seen in some policies, a one-year period of business interruption with only a 90-day period of recovery or 6 months interruption and 120-day period of recovery.

This brings into front and center the issue of what happens in New Orleans where you can complete the repairs to your facility by the end of the month, let's say, and you've got a 90-day recovery period. That means that your business interruption coverage ends with September and your recovery period is October, November and December. And for many businesses, it's not going to be business as usual in New Orleans by December.

And the problem with that is, of course, you're stuck with the coverage you have and if that's really your period, then you have to figure out whether or not you have arguments that the period of interruption continues. And some policies provide that the trigger event for cutting that off and starting the recovery period is the later of the end of your business interruption or the completion of your repairs so that even if you completed repairs tomorrow, you still might be in the period of interruption. And we are going to see some disputes about when the period of interruption ends and when the extended period of recovery begins and those disputes could be worth millions of dollars. That's the basic aspect of business interruption coverage.

The measuring stick for gross earnings, this is the kind of thing where you might want an expert consultant to provide some guidance or help. It's usually measured by historical norms with projections of what you anticipated had this event not happened.

Now, there is a very interesting case out there called *Levitz* (ph), which is another federal decision out of Louisiana a few years ago. And the question in *Levitz* is do we have to pretend, because this test is really kind of an objective test based to some degree on the actual experience you had historically, but the question is do we have to assume that the earthquake affected a whole bunch of people or can we say we get to take into account the business we could have done if everybody else had been wiped out and we were left standing.

In fact, in *Levitz* what the insurance company argued was that *Levitz* was not entitled to recover lost profit for the increased consumer demand that resulted from a flood. And they said look, profit opportunities that are created by the very perils you insure against are not recoverable under the policy. And their point being, look, you guys got damaged with it. That's what triggered it. You can't assume for purposes of this that you would make all the money because you're the only business left standing.

Well, the *Levitz* court rejected that and it sided with the insured. And what it said is look, very simply here -- and, by the way, the court's language was, "We flatly reject the insurance company argument and the policy clearly and unambiguously does not exclude profit opportunities due to increased consumer demand created by the flood." And so the court said business interruption loss earnings can include sales that an insured would have made in the aftermath of the flood had it been open for business.

So let's take the converse situation from the example I gave of where a retail establishment can open but there's nobody there. What if you can't open and there's the need for goods or services or products that you would supply? Under the *Levitz* case you're entitled to collect for that not just based on historical profit, but based on what you could have done if you were, in fact, open today or next week, if you were the only grocery store open or you were the only store selling electrical generators or vacuum pumps or whatever it is. If you were open during that period of loss, you're entitled to recover what you could have done if you'd been open.

So if you're not open, you can recover for it and it's based on the heightened demand from the fact that you might have been the only business left standing. It's a hypothetical test, but it is worth potentially millions of dollars under an insurance policy.

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Patti Phelan - ACC - Vice-Chair of New-To-In House Networking Group

Kirk?

Kirk Pasich - Dickstein Shapiro Morin & Oshinsky - Senior Partner

Yes?

Patti Phelan - ACC - Vice-Chair of New-To-In House Networking Group

Is this helpful for a business to incorporate something like that in a business plan in terms of increasing its recovery?

Kirk Pasich - Dickstein Shapiro Morin & Oshinsky - Senior Partner

I do think it's helpful. I think we have to talk about when the business plan is done. If the business plan is done up front and says what would happen if we had a hurricane three years from now, that might be subject to greater scrutiny. One of the arguments we would see is, and we're seeing variants of this now, is that that's an expected loss and the insurance companies don't insure for expected losses.

But I think the reality of the problem is from an accounting perspective, whatever the submission is, looking back in time at a past business plan is something that insurance companies typically will do, although the test is what your historical performance has been. They're more likely to look at a business plan for 2005, 2006. And the problem, which is not insurmountable, with assuming we have a hurricane that shuts down the entire city except us is no one really knows up front what the damage from a hurricane or other natural disaster is going to be.

In this circumstance, you have the question of parts of the city are fine, other parts aren't fine, outlying areas have been damaged, other communities have been damaged, how do you evaluate that in the business plan up front as opposed to if we were doing the business plan today. One of the things you would do in a business plan is revise it to take into account the effects of this event. And one alternative might be what would our business be if we were open today and for the next six months. And I think that's a fair question to ask in light of the Levitz decision.

That, by the way, is the one decision I know of that squarely addresses this issue. And since it's out of the Louisiana court it will probably be given some guidance, although please keep in mind that Louisiana is unlike the rest of the country because it's based on the French legal system rather than the English legal system, meaning that the decisions of court are not precedential, they're not controlling over later courts. They can be looked at for guidance, but an appellate decision in Louisiana essentially binds nobody except the parties to that case. So, this is one of the things we see in this sort of process with dealing with folks.

Coverage for loss adjustment expenses we talked about a few minutes ago when Patti asked the question. It is a provision not to overlook; it is important to document the cost. And I would add, to Kathy's point on documenting costs, I would keep track of all costs that are incurred, regardless of who the service provider is if it's a third party just because -- I went through this yesterday in a policy, for example, and I found, count them, 17 different coverage provisions. And some of them, like the provisions that we touched on earlier that talk about insuring you for extra expense or for expediting expense or for reducing loss, those all sound pretty similar to me. And when you read the actual language, you'll see what the differences can be.

But the bottom line is you may get coverage for a lot of things and if it's not expressly covered under the policy, there's a common law doctrine of mitigation, the notion of mitigating damages, and courts have said even though you may have separate coverage for expenses you take to mitigate damage, you can get coverage as a common law basis if the net effect was it was a reasonable effort to mitigate the damages.

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Now, I mention this because yes, a lot of people are happy with the provisions in their policy that say "expenses we incur to reduce our loss or to return to business, the insurance company pays." Those are frequently subject to another limit of coverage not found on the declarations page, not found in those sub-limits, but often stuck as a tagline at the end of the provision. And it says "we'll pay you for the costs you incur to reduce loss as long as they don't exceed the amount you saved." So if you reduced your loss by \$100,000, we're only going to reimburse you the expenses you incurred to reduce that loss, those will be capped at \$100,000.

The common law doctrine of mitigation is different. It doesn't put a dollar limit. It simply says if you incurred these costs reasonably, then you're going to get them reimbursed. And there is no magic cap that says they can't exceed. Example, you could decide when the hurricane was approaching to board up windows and do all that sort of stuff and it turns out that the insurance company comes back and says, "Well, you know that succeeded, but gosh, the price tag of the windows was only \$10,000 and you took \$15,000 to board up your windows. We're only going to pay you for 10."

That would work perhaps under the insurance policy provision, but it probably doesn't work under the common law mitigation doctrine where the test is were you reasonable in the steps you took. Katrina is a great example. It so vastly exceeded expectations in terms of damage it would inflict that it's hard to say you would have been unreasonable in evacuating your facilities. It's hard to say right now that the order to evacuate Key West is inappropriate or that a business that decides to shut down in the face of Rita that that's not a reasonable cost, even if it exceeds what the loss was. And in that regard, if you shut down and you pay people for time they're away from work and you lose business and you lose sales, is that covered as a cost incurred to prevent or minimize loss? My answer is yes it is because you would have faced other potential losses had you continued to operate in the normal course of business.

Not a lot of case law in it. Insurance companies might differ. But that's why we track that as one of those expenses. And if you bring a loss adjustor in, whether it's an accountant or somebody else, and they're documenting these expenses, they should make sure to look at all the expenses you incurred, all the losses you suffered in attempting to minimize your loss, either up front, during the course of the event, or after the event, and that would include steps you take to return your business to normal if that's the right thing for your business.

Now, some folks have responded by temporarily finding other work for their employees, either in that area or elsewhere. And a question that comes up in that circumstance is how do you measure that loss, is it a loss at all? If they're gainfully employed elsewhere where you needed people, it's probably not going to be covered as an expense of this loss. However, if you're paying them salaries and they're not doing anything for you and that's a reasonable step to help you reopen on time, then you may be covered. In fact, some policies specifically designate employee levels or officer levels where you can compensate your people for a period of time and it's expressly covered by the policy.

Exclusions. We'll touch on a few exclusions here because they're coming up. One exclusion is one we've already touched on, which is the flood exclusion. And, as I said, we have some case law out there that says if you live in a floodplain or you have the availability of flood insurance, then you knew your policy was going to exclude flood. That may not be an issue for a lot of business whose policies separately and expressly cover flood. In that circumstance, we're back to dealing with what the coverage is, what the deductibles are, how the limits play out.

Another exclusion, though, that we're hearing some early signals might be in play is the pollution exclusion. And there's already a lawsuit filed. The tobacco bar is largely based in the southern U.S. and the tobacco bar seems to be pretty active in thinking about lawsuits. One lawsuit's been filed against some of the oil companies, alleging that their designs and precautionary steps and reactive measures were not sufficient to stop the spread of petroleum. And what we're hearing now is some insurance companies are saying, "Well, that's pollution, as we define it, and therefore there is no coverage for it."

And some of these policies speak actually in terms of whether or not there's any pollution that contributes in any way. So in other words, they don't depend on the so-called efficient proximate cause doctrine that if pollution contributes in any way to

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a loss, it's not covered. Some courts have rejected those clauses as void against public policy. Others have said they're fine. But whatever else we can say about pollution, it does not typically apply as a clause or exclusion to bacteria or viruses.

Some property policies have their own bacteria or mold exclusions now, some don't, and we are seeing a lot of mold develop in New Orleans between the water damage and exposure and the high temperature and humidity. Mold looks like it's going to be a problem. Depending on the policy, even with the mold exclusion there may be coverage. Pollution exclusion shouldn't apply at all to mold; it wasn't intended to deal with bacteria, mold, living organisms.

And there's also a case that deals with asbestos. And that court found that if, for example, floor tile contained asbestos and you had to remove it, that the reason for the removal was flood, not the presence of asbestos in the floor tile. And, therefore, even with an asbestos exclusion, coverage would be afforded.

This is one of the areas, by the way, that I think demonstrates, whether you have the capability inside or outside, you really need a team of people that can advise. Some risk management people are very, very experienced on natural disasters and first party business interruption losses and you can depend completely on them. Some haven't had the task of working through hurricanes and floods and earthquakes, terrorists attacks, civil unrest, sort of everything we've seen in the last 10 years or so, and may not be as familiar or have as much time available with the rest of their risk management functions to deal with all of the nuances of policy language, court decisions, accounting calculations.

By the way, I understand that the accounting profession, at least initially, has taken the position that Hurricane Katrina and the losses are not extraordinary losses. They're ordinary losses. That may have an interplay with the insurance angle at some point, too.

Patti Phelan - ACC - Vice-Chair of New-To-In House Networking Group

Kirk? With respect to the applicability of exclusions for something like mold, could you not go back to the efficient proximate cause argument?

Kirk Pasich - Dickstein Shapiro Morin & Oshinsky - Senior Partner

That's what I would turn to. Now, please keep in mind that if you have the efficient proximate cause argument and the cause was the flood or the hurricane and you were covered for it, you would argue that the mold exclusion does not apply. In fact, some property policies have tried to address this issue by, because of hostility from courts to exclusions, by putting in express coverages for things like mold or pollution and then sticking a really small sub-limit on it. So they might say \$10,000 for mold on the theory that if they excluded mold completely, a court would say no, you can't do that here.

So there are some policies where you have a mold exclusion and you're going to argue exactly your point, Patti, that the efficient proximate cause wasn't mold that caused the damage, it was water or the hurricane. There'll be other policies where you can get \$10,000 for mold and then you're back to arguing efficient proximate cause to trigger the full coverage under another provision of the policy. So that doctrine, you're absolutely right, has the potential to assist or hurt coverage in a couple of different ways.

If we turn to what are on my list, I realize I haven't been paying really close attention to the PowerPoint, to page 5, which is the impact on the insurance market, we see we have three broad categories there, losses, profits and coverage changes. And by those categories, what we're referring to are insurance industry losses, insurance industry profits and changes we're likely to see in the policies as a consequence of these developments.

The losses, my personal observation is I don't think the insurance industry as a whole is going to be threatened by Katrina. I do think that we'll see some insurance companies who are otherwise on the brink be pushed over the brink. But by and large I

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think most will survive. Swiss Re, for example, which is the second largest reinsurer, has indicated that pretax losses could approach \$1.2 billion for it. That's 7% of its shareholder equity. Montpelier Re by comparison a much smaller reinsurer, has indicated that its Katrina related losses will be about \$675 million, so 1.2 billion versus 675 million. But for Montpelier that's about 46% of shareholder equity.

The reinsurance market is going to be behind a lot of these risks anyway because a lot of the property insurance is so heavily reinsured. But Lloyds has already indicated that it's projecting its share to be about \$26 billion and it expects all of its syndicates to be able to handle this. So there will be some sizeable losses for some companies. They'll certainly hurt some of the leading personal lines companies. And even without federal bailout of insurance, the indications are, at least right now given the current estimated, although escalating magnitude of the Katrina loss, that the insurance industry will be able to get through this. They'll have some heavy losses, it will affect some underwriting cycles, but they will be able to survive it.

My footnote on this really relates to profit. There was an interesting statement made after the 9/11 attacks attributed to the London market where someone in London made the statement that this is a historic opportunity for profit taking. I believe if you go back and look at the disasters over time, going back as far as the London dock fires or the great Chicago fire, that whenever there's a loss of this magnitude that it generally has resulted in profits on an overall basis for the insurance industry, not necessarily for this loss itself but because of what happens.

And what often, not always, but what often happens is the coverage market hardens, pricing goes up, deductibles go up, and limits drop down so that in essence the insurance companies collect more money for selling less coverage on a going forward basis. I saw a study that reported after the disasters in the '90s that in fact the insurance market place as a whole did better when there were disasters than it did when there weren't disasters judged from profitability.

Now, I don't know how accurate those are and I suspect Katrina may test every conventional theory about profiteering, if there is profiteering, losses to the extent there are losses, and that we'll see some new economic models developed in terms of assessing reserves and financial stability and whether the insurance industry really makes a profit on a loss or makes a loss on a loss.

One thing I do think we will see is coverage changes. I do think we'll see some price increases. I do think that coverage will be more limited. The early reports as of late yesterday that were in the energy insurance business that renewal rates outside the Gulf have gone up by more than 25%. Now, that is a very large move in a very short period of time that seems to be traced directly to Katrina.

If, in fact, some of the concerns come true about Rita, as I understand it, one projected landfall for it is between west Louisiana and Houston. That's 25% of the U.S. oil refinery capacity. If it's really hard hit, then it's just going to take what happened with Katrina and magnify it by multiples and the 25% increase we've seen just this week on the renewal rates in the energy insurance market we're likely to see exacerbated.

So I do think we can expect substantially increased rates, a harder market, less flexibility. I think then the key in that circumstance, if those things come about, is to work with a good insurance broker at navigating one's way through this, getting guidance from the broker on market conditions, on market changes, those sorts of things.

Lesson to the future, next page on the PowerPoint, the first point about evaluating limits and deductibles really is a subset of evaluating everything about your insurance program. For example, do you have brand or trademark protection that protects you if your product has to be salvaged and it's taken out there and sold in the marketplace without your name on it or, perhaps, sold with your name on it. What rights do you have to stop that if you're concerned about the damage to quality, if you're concerned about liability because there may be damage flowing out of your products, if they've been water damaged there may be shorts or whatever down the road. Those kinds of issues.

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This is one where yes, a coverage lawyer can help to some degree, but it's really going to be looking to your insurance broker and obtaining guidance based on the state of the market at that time, what your options are in terms of what markets you can go to, who you can talk to, what limits are available.

On the record front, I think Kathy said it well at the start of our dialog in terms of the records you want to build and keep. The piece of advice I would add is on the lesson learned front it's a good idea to do this sort of inventory up front and it's a good idea to make sure that wherever you keep your records, you consider offsite facilities for backups. And in this world of computers, it's easier than it used to be.

I know businesses that were based in New Orleans that thought if they had a facility elsewhere in Louisiana or in Mississippi that would be good enough for backup. They had a contingency plan for backup like that and what happened, of course, is Katrina wiped out both. Those are the kinds of contingency plans that should be thought about, but keeping track of records, past business performance for historical basis.

If you were in New Orleans, what we saw for a lot of folks is their accounting firm was in New Orleans, their law firm was in New Orleans, their broker was in New Orleans, and they were in New Orleans. Whether their records survived or not, when you still can't get back to the city to those offices it makes documentation of loss a quasi-difficult process to do.

So we recommend taking into account potential locations that might be affected, taking into account on a preventative upfront basis, looking at the insurance policy and seeing what kind of records it requires you to have to establish a loss and thinking about how to develop those records today rather than after the next Katrina hit. So those are some of our thoughts on lessons for the future.

That covers, from my perspective at least, I won't put words in Kathy's mouth, the topics that we had on the agenda. We have a few minutes left. If there are questions, you can email those questions in. And, Patti, I think we have a few questions.

Patti Phelan - ACC - Vice-Chair of New-To-In House Networking Group

Yes. In connection with business interruption coverage, what do you see as the minimum coverage requirement for sort of adequate, reasonably priced business interruption coverage? What are the essentials?

Kirk Pasich - Dickstein Shapiro Morin & Oshinsky - Senior Partner

From my perspective as a coverage lawyer, I have to give this answer which people hate, which is it depends. Part of it depends on business outlook. What is the business sensitivity to risk? And going back to an example I said earlier, do you want to insure for the calamity, the catastrophe, or do you want to sort of hedge your bets that the damage isn't going to reach catastrophic levels but it's going to reach something less than that and, therefore, you will favor -- you're willing to buy less in limits and you want to get a lower deductible. Those are the issues that play out. I'm not sure there's a right answer that would apply categorically.

Patti Phelan - ACC - Vice-Chair of New-To-In House Networking Group

Are there any types of business interruption insurance that have not been provided, let's say up until today, that you see coming into the fore or being available in the next few months?

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Kirk Pasich - *Dickstein Shapiro Morin & Oshinsky - Senior Partner*

I don't see anything right now, but if we use terrorism as an example in terms of coverage, in response to the 9/11 attacks what we saw was, first, a hardening of the market and less available coverage. And we saw obviously the Federal Terrorism Insurance Program come in as a backstop.

But, after time, we started to see the private market respond by offering some new types of coverage, some of which is business interruption, some of which is differences in how the limits work, some of which is different types of damage coverage. So I do think the insurance market is extremely creative. I do think if there's a need and an opportunity and the market can get comfortable with its ability to write insurance and establish the appropriate reserves that we will see some new types of coverage, including business interruption coverage.

Patti Phelan - *ACC - Vice-Chair of New-To-In House Networking Group*

Thank you. Now, those are pretty much the questions that have been submitted so far and we're quite close to the end of the program. Kathy, is there anything that you wanted to add?

Kathy Barlow - *Marsh USA - VP and Client Executive of Middle Market Practice*

No, I think that's it.

Patti Phelan - *ACC - Vice-Chair of New-To-In House Networking Group*

Okay. And, Kirk, we're done?

Kirk Pasich - *Dickstein Shapiro Morin & Oshinsky - Senior Partner*

I think we're done. I'm sure people are tired of hearing my voice at this point. If there are particular questions that you do have, at the very last page of the PowerPoint you will see my email address. And if folks do want to email questions, I can't promise to give long legal answers, but I'm certainly willing to answer questions along the way. And relatively short questions I'm willing to answer without even charging for it. So if folks have questions, we're happy. Our overview covers many of these points and it's downloadable at the website.

Patti Phelan - *ACC - Vice-Chair of New-To-In House Networking Group*

Well, thank you very much, Kathy and Kirk, for speaking to us today. I know that I have learned a lot about insurance and have a much clearer idea as how to approach some of the problems that could arise following a disaster. I also want to thank everyone in the audience who participated in the webcast.

And finally, as a reminder, ACC always welcomes resources to add to our virtual library. We're particularly interested in crisis management type resources so that anyone who has any such resources they might donate, please contact Karen Palmer or Julianne Bermesco or you have my email and you could also send it to me for me to deliver to ACC.

I want to thank everyone. This has been a great webcast. ACC has put a lot of effort into organizing it on very short notice. Our speakers have come on very short notice. And I would just like to thank everyone for attending.

And lastly, I will remind everyone that ACC also has a webcast tomorrow, which is entitled In-house Counsel as Targets; Fact or Fiction, and it is at 1 o'clock tomorrow, September the 21st.

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Thank you everyone and I'll say goodbye.

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