

Do Weather Related Sublimits Apply to Time Element Coverages?

The seemingly daily barrage of climate-related disasters has compelled insureds and insurers alike to scrutinize property insurance policy language and the law for guidance on the extent to which loss is covered and what perils are excluded or subject to a sublimit—that is, a lower limit for certain losses than the overall policy limit. While insureds regularly turn to their property insurance policies to cover physical damage to their property after a climate-related disaster, physical damage is not the only type of loss that insureds face. Insureds can also incur economic loss over a period of time because they are unable to conduct business as usual. These losses may be covered by “time element” provisions in property insurance policies. Given the continued climate concerns and recent case law, insureds are well served to understand the potential interplay between sublimits and time element coverages.

Time element provisions in a property policy insure against losses in business income when a covered peril causes an interruption or cessation of business for a certain time period. Examples of time element coverages include business interruption coverage, contingent business interruption coverage, extra expense coverage and civil authority coverage. Business interruption coverage typically reimburses the insured for the lost profits the insured would have earned but for the interruption of the insured’s business. Contingent business interruption coverage protects against economic loss caused by damage to the property of suppliers, customers and other third-parties upon which the insured depends. Extra expense coverage indemnifies the insured for any increased costs of business operations above the norm because of a peril insured against. Civil authority coverage often applies whenever the insured loses business income because access to its premises is prohibited as the direct result of damage to or destruction of property belonging to others caused by a covered cause of loss. While some policies contain other kinds or variations of these time element provisions, insureds are well served to have a basic understanding of those described above.

The same property policies that contain time-element provisions can also contain a sublimit for specified perils, such as floods, “Named Storm,” earthquakes, or types of loss like debris removal costs. When an insured suffers loss from a climate-related event, it will often experience both property damage losses and time element losses. Thereafter, when a coverage claim is made, the issue is whether the lower sublimit that applies to floods for example, applies only to property damage or also limits recovery for time element losses. The answer: It depends. Courts are split as to whether weather-related sublimits apply to time element losses, typically basing their decisions on the particularly policy language involved.

In *Northrop Grumman Corp. v. Factory Mutual Insurance Co.*, the insured suffered approximately \$940,000,000 in loss at its shipyard from Hurricane Katrina. *Northrop Grumman Corp. v. Factory Mut. Ins. Co.*, 805 F. Supp. 2d 945, 947 (C.D. Cal. 2011). The primary property policy had a \$500,000,000 limit with a \$400,000,000 per occurrence flood sublimit. *Id.* In the coverage litigation, the parties disagreed whether the flood sublimit applied only to property damage from Hurricane Katrina or also to time element losses. *Id.* The court agreed with the insured and concluded that an “examination of the ordinary and plain meaning of Factory Mutual’s Primary Policy reveals that there is no language regarding time element loss in the discussion of the Flood Sublimit.” The court further reasoned that the policy did not clearly include time element losses in the section concerning the flood sublimit and if the insurer wanted to include time element losses in other sublimits, it did just that. *Id.* Therefore, the court held that the flood sublimit did not apply to time element losses. Based primarily on an analysis of the applicable policy’s language, other courts have found similarly. *See e.g., Federal-Mogul Corp. v. Ins. Co. of the State of Pa.*, 2015 WL 5999658, at *4-5 (E.D. Mich. Oct. 1, 2015) (based on policy’s plain language, there is no indication that high hazard sublimit was intended to apply to time element losses; inclusion of time element losses in flood sublimit indicates that such losses could have been added to high hazard sublimit if intended); *Hewlett-Packard Co. v. Factory Mut. Ins. Co.*, 2007 WL 983990, at *3 (S.D.N.Y. March 30, 2007) (because policy contains provisions that specifically refer sublimits to time element losses, it is natural to read any provision that does not include such reference as not imposing a sublimit on time element coverage).

However, the Southern District of New York recently held that time element losses suffered by New York University from flood damage were subject to a \$40,000,000 flood sublimit. *See N.Y. Univ. v. Factory Mut. Ins. Co.*, 374 F. Supp. 3d 315, 324 (S.D.N.Y. 2019). The policy at issue provided that, “limits of liability in an occurrence policy apply to the total loss or damage at all [l]ocations and for all coverages involved, including any insured TIME ELEMENT loss . . .” *Id.* at 320. The court held that this language “unambiguously subjected time element claims to the limit of liability for flood.” *Id.* at *323. Notably, the court distinguished *Northrop* and concluded that it did not control because the policy at issue in *Northrop* considered a policy with “materially different prefatory language in its limits of liability.” *See also Almah LLC v. Lexington Ins. Co.*, 2016 WL 369576, at *6 (Del. Super. Ct. Jan. 27, 2016) (policy language is not ambiguous; any time element loss is included in flood sublimit); *El-Ad 250 West LLC v. Zurich Am. Ins. Co.*, 44 Misc.3d 633, 638 (N.Y. Sup. Ct. 2014) (based on the broad definition of flood and language of policy, delay in completion losses arising from flood subject to flood sublimit); *Altru Health Sys. v. Am. Protection Ins. Co.*, 238 F. 3d 961, 965 (8th Cir. 2001) (the insureds business interruption loss following flood subject to flood sublimit because policy language unambiguously stated that flood sublimit applies to all losses caused by a flood).

The primary takeaway for insureds on this issue is: Read your property policy and consider how any weather-related sublimits might apply to time element losses. As evident from the cases above, depending on the amount of time element loss at issue and the sublimit versus primary policy limit amount, the policy language can materially impact how much insurance is available for economic losses.

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