

Vantage Points - Spring Edition

Dear Friends,

Time to get in the garden!! The change in seasons, especially from winter to spring, gets our household moving in new directions. We'll have the usual yard and garden work, and also youth soccer and baseball this year. A great time to be out and about!!

Articles for our spring edition include topics near and dear to our clients' hearts. Bo Sweeney, one of our senior litigators, addresses Spoliation of Evidence. His advice on keeping property and documents intact to protect you and your business from claims of spoliation, even when inadvertent, is a "good read."

Lee Hall, who does so much of our insurance coverage work, digs into Business Interruption Insurance. Huntington is one of several locales which has endured several devastating fires through the winter. An important survival tool for those businesses affected by fire loss was insurance.

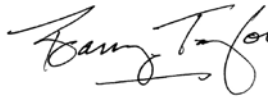
Workplace injuries are always a concern for our clients, with disruption to employees, their families and the jobsite. Steve Wellman, our lead workers' compensation attorney, plants some seeds on what you have to know about protection for you and your business outside of our workers' comp system.

We also have a facilities update!! Our building, The Coal Exchange Building, a landmark in Huntington, is being renovated. Two high speed elevators now are working, with the third to be completed in just a few weeks. We're pleased with these updates, and appreciate that renovations of public spaces are in the works. We actively are encouraging these changes to better serve you.

Our newsletter continues to provide topical and thought-provoking information for our clients and friends. We want to serve you, and look forward to your feedback on the articles now and in the future. Best wishes as you enjoy the warmth, color and scents of spring.



Warmly,



Barry Taylor
Chief Executive Officer



Don't Be A Fire Victim Twice

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Recent fires in Huntington have brought to light the pain that can be inflicted from a fire loss. In terms of property damage, business interruption and loss of life, a fire can start a long period of disruption and suffering for its victims. However, in dealing with a fire loss, it is critical that in the rush to return to a state of normalcy, the fire loss victim does not become a victim twice.

A fire scene is like an archaeological dig. The layers of rubble tell a story about how the fire started, how it progressed and potentially what caused it. Fire cause and origin experts, who have training and experience in analyzing fire loss scenes, can get an understanding as to the fire's beginning and spread, in an effort to come to an understanding as to why and how the fire started. However, for a proper investigation, it is critical that the fire scene be maintained as close as possible to the condition of the property after the fire was extinguished in order to conduct a thorough examination.

The need for a proper cause and origin investigation often conflicts with the homeowner's or business owner's desire to return to the state of normalcy as soon as possible. However, a homeowner or business owner who does not allow or permit time for a proper investigation could end up being a victim a second time, in the form of a lawsuit.

Through several recent decisions, the West Virginia Supreme Court of Appeals has recognized the doctrine of spoliation of evidence. Spoliation of evidence is the altering, loss or destruction of evidence that could be crucial in determining the issues in a subsequent lawsuit. In the case of a fire loss, the primary question is often how and where the fire started. Fires occur because some material reached the point of combustion. While often the cause of the fire is the result of carelessness with combustible materials, some fires are caused by failures of mechanical or electrical products within the building. In those instances, the manufacturer and distributor of those products, or those responsible for maintenance of the premises, may be liable for the fire and the resulting losses.

While it is critical for the homeowner or business owner to have an understanding from the expert as to the cause of the fire, it is just as critical that any potential defendants have the opportunity to inspect the fire scene to make their own determination as to the cause and origin of the fire. A homeowner or business owner who conducts his own investigation and then alters the fire loss scene may be prevented from offering a theory on cause and origin in support of his or her case. That may be critical to the maintenance or defense of a lawsuit to recover damages.

Furthermore, a homeowner or business owner who intentionally destroys evidence of the fire scene may themselves be subject to a lawsuit for spoliation of evidence for the damages that a third party may not be able to recover due to loss of evidence necessary to prosecute the case.

A party that reasonably anticipates litigation has an affirmative duty to preserve relevant evidence. In the case of a fire loss, litigation is almost certain unless there is a clear, accidental cause. As a result, if you are involved in a fire loss, don't compound your injuries by rushing to put your life back to normal. Allow the time for a thorough investigation by any interested party as a part of your effort to gain closure.





Business Interruption Insurance: Protect Your Business Income From Disaster

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We ushered in 2007 with two serious fires in Huntington and an additional explosion near Beckley, W. Va. The tragic fires provided a wake up call to all of us, for our families, homes and businesses. In reviewing property coverages, business owners may want to review their policies to ensure that they contain business interruption insurance (BII). BII is designed to cover the loss of income incurred if normal business operations are disrupted or halted by damage to property. It covers actual loss of income due to loss of physical property. It is designed for those situations where the loss at the site directly triggers a loss of income to the business.

Basic BII generally covers:

- Profits the business would have earned, based on financial records, had the property not been damaged by the covered disaster.
- Ongoing operating expenses that continue even if the main business activities are temporarily stalled. This often includes rent, utilities, payroll, insurance costs, etc.
- Expenses incurred from operating out of a temporary location while the original premises are being repaired.

A valuable feature of BII is the “extra expense” coverage. Extra expenses include those additional expenses -- those beyond actual loss of income—incurred to relocate the business as a result of property damage. Expenses often included are substitute space (perhaps at a greater cost), replacement computers, installation of phone lines, temporary security measures, etc. Frequently, business interruption insurance and extra expense insurance are rolled into one, and defined as "business income extra expense." Be sure to ask your agent or broker if both are specifically included in your policy, and how much coverage for each your business needs.

In addition to losses incurred from an actual physical loss, some policy forms expand coverage through endorsements to include:

- **"Contingent Business Interruption"** coverage -- losses suffered from loss/damage to property that prevents a supplier from supplying goods and/or services to you, or that prevents customers from accepting goods and/or services from you.
- **"Services Interruption/Off Premises Power"** coverage -- losses suffered from loss/damage to the property of any service provider including electrical equipment and systems, fuel, water, gas, feedstock, pulp, liquid gases, sewage, steam, telephone, fiber optic cable, telecommunications, heating, refrigeration and/or air conditioning systems, or utility plants.
- **"Interruption by Civil or Military Authority"** coverage: losses suffered when, as a result of loss, damage, or other event, access to your property is restricted by order or action of civil or military authority.
- **"Ingress/Egress"** coverage -- losses suffered when, as a result of loss, damage or other event, entry to or exit from your property is impaired.

Significant limitations do exist on business interruption coverage. First, the duration is limited. Coverage is only available for as long as it takes to restore the property and resume business operations. Most coverage forms restrict coverage to a specific time period, such as 12 months from the date of loss. Further, most policies have a 48 hour waiting period before the coverage comes into play. Once it's triggered, coverage is not retroactive back to the date of loss.

Business interruption insurance is not sold as a policy by itself. It may be added onto a property insurance policy or included in a package policy, such as a business owner's policy (BOP). Check with agents for different options.

When talking to your agent about purchasing business interruption insurance, ask your agent or broker the following questions:

1. Is the dollar amount of coverage sufficient?
2. Is the insurer financially strong?
3. Does the policy cover salaries, utilities, rent, and other operational expenses while the business is interrupted?
4. Does the policy cover lost profits?
5. Does the policy cover expenses incurred to hasten the reopening of businesses?
6. Does the policy cover losses due to failure of power, light, heat, gas and other utilities?
7. Does the policy cover interruptions to the business due to fire or other casualty caused to a supplier, vendor or customer?
8. Is there a time limit on payments under the policy?
9. Does the policy provide for payments once the business has resumed operations if it continues to show decrease profits and, if so, for how long?
10. Does the policy cover losses incurred where there is no physical harm but access to the property is limited?

If you have reservations about the scope or amount of the coverage, talk to your agent or broker. In the next edition, we will share tips on documenting a BII claim and routine steps that you can take now to make the documentation of a BII claim less painful in the event that disaster strikes.



Is Your Business Covered for all Workplace Injuries?

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You purchased your workers' compensation insurance and made all premium payments when due, so your business cannot be sued for injuries occurring in the workplace, right? Unfortunately, this is not always the case. West Virginia law allows an injured worker to sue his or her employer for excess damages when an injury results from the "deliberate intention" of the employer.

Ah, you would never deliberately cause an employee to be injured, so you are safe, right? Again, not so fast. "Deliberate intention" has two forms. First, and most obviously, an employee may sue for excess damages when their workplace injury results from the actual, specific intent of the employer. But he or she may also pursue a suit for excess damages under certain other specific circumstances. The law provides that an injury is a result of "deliberate intention" when: (1) A specific unsafe working condition exists in the workplace that presents a high degree of risk and strong probability of serious injury or death; (2) the employer has a subjective realization and an appreciation of the existence of the specific unsafe working condition and of the high degree

of risk and the strong probability of serious injury or death presented by the specific unsafe working condition; (3) the specific unsafe working condition was a violation of a state or federal safety statute, rule or regulation, or of a commonly accepted and well-known safety standard within the industry or business of the employer; (4) the employer nevertheless exposed an employee to the specific unsafe working condition intentionally; and (5) the employee exposed suffered serious injury or death as a direct and proximate result of the specific unsafe working condition. See W.Va. Code Section 23-4-2.

Obviously, there are many specific things that a plaintiff must prove in order to succeed in a claim for “deliberately” caused workplace injuries. However, even if a claim has little or no merit, such cases are often very expensive to defend. There are usually many witnesses involved, requiring extensive pretrial discovery, and furthermore, experts are usually required to address issues of whether a particular condition was unsafe, whether it presented a high degree of risk and strong probability of serious injury or death, and whether the condition violated a particular safety statute or regulation, or an accepted and well-known safety standard or practice within the employer’s particular industry.

You can purchase separate insurance, known as “Employer’s Liability” coverage, to protect your business from such suits. Currently, BrickStreet Mutual Insurance Company is the sole provider of workers’ compensation insurance in West Virginia, and it also offers separate coverage for “deliberate intent” suits, but this coverage must be purchased separately. Some other insurance carriers also write “deliberate intent” coverage. We recommend that you inquire of your insurance agent whether you currently have Employer’s Liability coverage, and if not, obtain a quote and determine whether such coverage would be economical for your business. Also, if you would like Jenkins Fenstermaker, PLLC or any other particular law firm to defend your business in the event of a claim or suit, inform your agent before purchasing the policy, as insurance carriers sometimes have established relationships with other law firms, but may be willing to negotiate with you to make sure your business is represented by your preferred lawyers. Please do not hesitate to contact us if you have any questions about “deliberate intent” claims, Employer’s Liability coverage, or any other issues related to workplace injuries.

