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### **Risk Management: Loss of Use**

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The Rough Notes Company, Inc.

New ISO endorsement offers first-party coverage

It may not be a common occurrence, but once in a while an accident involves a special kind of vehicle or equipment that cannot be immediately repaired or is not repairable, resulting not only in its physical damage, but also in its loss of use.

By loss of use is meant what the owner sustains in monetary terms because it cannot continue to conduct its business to the same extent had no accident occurred, and it is all because of the damage or destruction of special equipment.

The natural reaction to these kinds of events has been for those who are harmed to file a liability claim or suit against the negligent party, since coverage for loss of use has been largely unavailable otherwise. However, beginning in 2014, more insurers may be willing to provide loss of use coverage on a first-party basis through newly introduced ISO endorsements.

The focus of this article is on this new first-party coverage which is examined through the discussion of a couple of court cases to help illustrate the loss exposure that is intended to be covered.

An example of one such exposure that comes to mind here is the case of *DTS Tank Service, Inc. v. Vanderveen, et al.*, 683 P.2d 1345 (Sup. Ct. OK 1984), which involved a truck-car accident, where both the specially equipped truck and tractor were totally destroyed.

The truck owner sued, alleging that \$31,000 was the amount it lost in profits during the 79 days it took to order and receive a new truck and trailer. The owner also alleged no rental truck/trailer was available. The question over coverage dealt with whether loss of use should be included in the amount of damages. The court held here that loss of use was to be included in damages recoverable when a commercial vehicle was destroyed, subject to a condition of "reasonableness."

The court stated, however, that the owner had to show he could not have rented a similar truck while the replacement was being delivered. He also was required to show that the 79-day waiting period was reasonable.

When, however, the vehicle that had been destroyed was not repairable, its owner, according to the court, could recover all damages, including, but not limited to, loss of use during replacement.

Another actual example is the case of *Nashvan Barrel and Container Co., Inc., v. G.G. Parsons Trucking Co., et al.*, 182 N.W.2d 448 (Sup. Ct. WI 1971). This case, which was said to be the seminal decision in Wisconsin on the right to recover damages for loss of use of vehicle, arose out of an accident in which a tractor-trailer was significantly damaged.

The trailer was unusual in that its height and rear opening were larger than those of standard tractor-trailers. This unusual size made it difficult for its owner to obtain a replacement. In the interim, however, the owner rented a trailer while seeking replacement.

The focus of this case was whether the court should recognize loss of use damages when the vehicle could not be repaired. To answer that question the court began its analysis by noting other cases where loss of use was permitted.

After summarizing the cases, the court adopted the so-called "modern view" allowing recovery for loss of use, in addition to total damages, even when a vehicle was not repairable. The standard the court applied to recovery for loss of use was "that of reasonableness" under all the circumstances of the particular case.

During the period of these early cases, the courts referred to state statutes to resolve these issues, which addressed loss of use recovery, sometimes involving both repairable and nonrepairable situations.

### **Pondering the need for cover**

Back when the foregoing decisions were rendered, specialized motor vehicles and equipment used with those vehicles may not have been as prevalent as they are today. In fact, if producers were to ponder the situation today, they are likely to come up with any number of situations where coverage for loss of use of vehicles would be valuable.

Take the construction industry, for example, where all kinds of mobile equipment can be used in conjunction with vehicles and be hard to replace in the event of an accident. The mobile welding shop is one example. Another is a concrete pump truck with a boom that costs \$400,000 and \$400 to \$600 an hour to operate. A drilling rig used in conjunction with the oil and gas industry is yet another example.

The small business operator of septic services is another candidate for loss of use coverage. The units for cleaning can cost as much as \$200,000. If the truck conveying that equipment were involved in an accident and out of service for a month, the owner's loss of use could be more than the actual physical damage.

### **A potential new market**

What all of this discussion is leading up to is some potentially good news for producers and some of their insureds, in terms of production and service. The Insurance Services Office (ISO) has introduced an endorsement designed to provide coverage for the business interruption exposures of certain vehicles and mobile equipment—a coverage, in other words, that has long been needed but only provided on a limited basis through inland marine and specialty forms. Examples of coverage candidates offered by ISO include mobile document shredding units; geophysical exploration vehicles; and mobile medical units. Vehicles used to provide mobile pet grooming services are another increasingly common prospect for this coverage.

The endorsement for use with the Auto Dealers, Business Auto, and Motor Carrier Coverage Forms is titled "Business Interruption Coverage" CA 99 05 02 14. The endorsement schedule requires a description of the business activity dependent on the scheduled property; whether business income without extra expense applies or business income and extra expense, and two ways for handling coverage on the scheduled property. Option A requires a description of the scheduled equipment and the applicable limit of insurance for each one listed. This option also is to be used if there is only one item of scheduled equipment. When a single limit is to apply to the total of all scheduled items, Option B is to be used.

The covered causes of loss also must be designated. When comprehensive is selected, coverage includes any cause of direct and accidental loss or damage except the scheduled property's collision with another object or the scheduled property's overturn.

If specified causes of loss is selected instead of comprehensive coverage, the perils are: fire, lightning or explosion; theft; windstorm, hail or earthquake; flood; mischief or vandalism; or the sinking, burning, collision or derailment of any conveyance transporting "scheduled property." This latter quoted term is defined in the endorsement as "the items of property described in the Schedule, including machinery or equipment that is permanently installed in such property." Not included are buildings, locations or premises.

When collision is selected as a cause of loss, coverage applies to direct and accidental loss or damage caused by the scheduled property's collision with another object, or its overturn.

With the selection of business income coverage, the insurer will pay for the actual loss of business income due to the necessary suspension of operations during the "period of restoration." The suspension must be caused by the direct and accidental loss or damage to scheduled property from a covered cause, while the scheduled property is within the coverage territory.

When extra expense coverage also applies, the insurer agrees to pay the actual and necessary "extra expenses, (other than the expense to repair or replace property)" that the named insured incurs during the "period of restoration due to direct and accidental loss or damage to 'scheduled property'."

All defined terms are important. "Period of restoration," for example, explains that this period of time begins 72 hours after the time of direct and accidental loss or damage, unless a different number of hours of waiting time is shown, or immediately after the time of accidental loss or damage for extra expense coverage.

### **Two additional coverages are available:**

The first is extended business income coverage. This pays for loss of business income incurred between the date that the scheduled property is repaired or replaced and operations are resumed, and ends on the earlier of the following: (A) the date the named insured could have restored its operations to the level that would have existed if no loss or damage had occurred, or (B) 60 consecutive days after the date determined in (A), unless a different number of days are shown.

The second additional coverage is extended to apply to property used as a temporary substitute for "scheduled property," along with newly acquired property that serves as a replacement for "scheduled property," or the insurer is informed within 30 days after its acquisition and it is to be added as "scheduled property."

For newly acquired property, the limit is either \$25,000 or 10% of the highest off-premises limit of insurance, whichever is less.

Producers are advised to carefully review the terms and conditions of these new endorsements and are reminded that business interruption coverage is still subject to many of the provisions of coverage forms to which these endorsements are attached.

Endorsement CA 99 05, for use with the auto dealers, business auto, and motor carrier coverage forms, is but one of three such endorsements being introduced.

Similar coverage is also being introduced with the commercial property form in connection with the Business Income (and extra expense) Coverage Form CP 00 30; Business Income (without extra expense) Coverage Form CP 00 32; and the Extra Expense Coverage form CP 00 50. The endorsement, which is not designed for businesses that consist only of mobile operations, is titled: "Off-Premises Interruption of Business—Vehicles and Mobile Equipment" CP 15 06.

Another endorsement, BP10 80, by the same above name, is intended to be used with the businessowners coverage form.

### **Good news and maybe bad news**

These new endorsements, as mentioned, should be advantageous to prospects because they fill an important need that has long existed. Sometimes loss of business income following damage or destruction of special equipment that cannot easily be replaced can far exceed the cost of actually repairing or replacing the equipment.

Through the purchase of the coverages being introduced, insureds do not have to be concerned about whether or not damage or destruction to qualifying equipment also involves loss of use damages and any limitations.

Another point to consider is that having the direct coverage is advantageous to the insured, particularly when the responsible party is unable to pay because the insured recovers from the insurer, even if the insurer cannot recover anything in a subrogation action.

The fact that ISO is introducing this new coverage, however, does not necessarily mean that all standard line insurers will be accommodating. To the extent some insurers decide not to offer this coverage, or to offer it at too high a price, some producers may be disappointed.

Whatever the case may be, kudos are owed to the Countrywide Technical Affairs Committee (CTAC) of the Big "I," which is credited with persuading ISO to introduce this latest change. This committee meets with ISO once a year to discuss typically 30 to 40 new and old agenda items. It has been stated that half of the principal changes in the latest commercial property forms can be attributed to the efforts of CTAC.

### **The author**

Donald S. Malecki, CPCU, has spent more than 50 years in the insurance and risk management consulting business.

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