Business interruption: the saga continues

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In the latest chapter of the long-running saga between Archer Daniels Midland and its insurers and insurance brokers arising from the 1993 Mississippi River flooding, the Federal Court of Appeal for the Eighth Circuit has issued a decision addressing several issues of importance to business interruption and extra expense insurers. *Archer Daniels Midland Company v. Aon Risk Services, Inc. of Minnesota, 2004 WL 86721*.

Property insurance coverage wonks will undoubtedly remember that there are many earlier chapters in this story, all adjudicating claims by Archer Daniels Midland under marine policies and excess Difference in Conditions (DIC) policies. The case which set the stage for the most recent decision, though, was *Archer Daniels Midland Co. v. Hartford Fire Ins. Co., 243 F.3d 369 (7th Cir. 2001)*. There, the Seventh Circuit rejected ADM's arguments that Aon, acting as an appointed agent of Hartford, committed the company to provide following-form excess DIC coverage. It thereby shifted the spotlight to ADM's claims against Aon, which were pending in parallel litigation in Minnesota (in the Eighth Circuit).

As the decisions from the Seventh and the Eighth Circuits explain the situation, Aon became the broker for ADM's property/DIC insurance program in 1988. During the 1992/1993 year, ADM changed carriers for a layer of $50M excess of $50M DIC coverage in order to obtain a more favorable premium. The new policy, however, failed to include contingent business interruption and extra expense coverage.

In the Eighth Circuit case, Aon admitted negligence in the placement of the excess DIC policy, but argued (among other defenses) that ADM had no right to collect under the excess policy because it had settled with the primary insurers for less than their policy limits. The Eighth Circuit rejected that argument and held that the primary policies were "exhausted" by the settlement. Affirming the "thorough and well reasoned analysis" of the District Court (2002 WL 31185884), the Court of Appeal concluded that the ADM would have been entitled to collect under the excess policy if it had been correctly placed, so long as ADM absorbed the balance of the primary coverage layer.

The second significant ruling in the Eighth Circuit decision is its definition of "interruption." Aon argued that ADM could not recover contingent extra expense benefits because it did not suffer any cessation of production (an "interruption") at its plants. The Court noted that the policy provisions defining extra expense coverage did not expressly require an "interruption" and that "'extra expense' clearly includes those expenses necessary to carry on business operations." Such coverage "would not make sense," according to the Court, "if the DIC policy were interpreted as covering only the extra expense incurred as a result of a complete cessation of business."

Although the decision turns heavily on the language of this particular policy, and the Eighth Circuit acknowledged both the fact that the parties might have contracted otherwise and that other reported decisions involve significantly different policy language, we can nevertheless anticipate that insureds will seek to rely heavily on the Eighth Circuit's approval of the District Court's jury instruction which defined "interruption of business" as "some harm to the insured's business, including the payment of extra expense, that would not have been incurred but for damage that an insured peril has caused to the property of any supplier."

The third significant ruling in the Eighth Circuit's decision is its affirmance of the District Court's ruling which prohibited Aon from introducing evidence that ADM had passed on its extra

expenses to customers in the form of higher prices, so any recovery would be a windfall. The Eighth Circuit agreed with ADM that the loss of earnings coverage was separate from the extra expense coverage, and that "the DIC policy covers extra expenses without offset for profits or sales revenues."