

Data Exposures

This Bulletin contains the following RRC recommended clauses:

1. Loss Occurrence Clause
2. Data Exclusion Clause

RRC recommends these clauses be applied to new and renewal policies in order to prevent a potential gap in reinsurance coverage protection.

In May 2000, an Arizona federal judge held that in the case of Ingram Micro , the “physical damage” coverage under a property insurance policy covers business losses from loss of computer data, access, use and functionality. The ruling centred on the main issue of the insurer’s duty to indemnify and the insurer, American Guarantee & Liability Insurance Company asked the judge for permission to appeal the ruling immediately. The case was recently concluded with a pre-trial settlement being reached. Although part of the settlement was that there would be no discussion of terms, the “...settlement was satisfactory to both parties,” according to Daniel McNeil, a legal representative for Zurich U.S., the parent company of American Guarantee. On August 27, 2001 a news item by Best’s notes that, “the ruling on the definition of physical damage ‘is still a matter of record in Arizona but is an unpublished opinion,’ McNeil said. ‘Whether it is binding or controlling outside of Arizona are things that lawyers will have to debate in later cases.’”

Following the May 2000 court ruling, very significant changes were made to manuscript policy wordings to provide coverage for all types of cyber risk exposures. Some of the major brokers had explicitly stated that it was their intention to amend the wordings they produce (but which are ultimately considered to be the insurers wording) for their clients, to include data corruption and loss of data as well as malfunctions and cessation. These “extensions” were being provided on the basis that the corruption or loss of data, malfunction and cessation and loss of functionality were all that was necessary in order for the insured to be indemnified under the property policy. Given the continuing widespread use of manuscript wordings in Canada, the cumulative impact of these wording revisions represents a serious aggregation exposure to reinsurers under catastrophe, per risk and proportional treaties as well as facultative business. The scope of viruses and other cyber risks also means that these unidentifiable and un-quantifiable liabilities are accumulated not only on a local, but global scale.

A computer virus can and has caused data corruption, loss of data, malfunction and cessation to happen. The impact of the "Melissa", the "I love you" viruses and "Code Red" worm was both immediate and global. The insured loss was minor due mainly to two factors: (1) neither virus was very virulent and, (2) the process of revising insurance policy wordings had not yet become widespread. It is almost certainly only a matter of time until we are faced with the global loss consequences of a computer virus of a far more virulent and destructive nature.

It is for the above reasons that these clauses have been introduced by the RRC. The new Loss Occurrence Clause uses the wording of the NMA 2244 Loss Occurrence Clause (U.S.A. and Canada) No. 1 and adds a section addressing data exposures. This process can also be applied to the NMA 2244a Loss Occurrence Clause (U.S.A. and Canada) No.2.

The "Data Exclusion Clauses" has wordings addressing both direct damage and business interruption exposures. Policies covering both direct damage and business interruption will require the application of both sections to properly deal with the exposures.

LOSS OCCURRENCE CLAUSE (CANADA)

The term "Loss Occurrence" shall mean the sum of all individual losses directly occasioned by any one disaster, accident or loss or series of disasters, accidents or losses arising out of one event which occurs within the area of one state of the United States or province of Canada and states or provinces contiguous thereto and to one another. However, the duration and extent of any one "Loss Occurrence" shall be limited to all individual losses sustained by the Company occurring during any period of 168 consecutive hours arising out of and directly occasioned by the same event except that the term "Loss Occurrence" shall be further defined as follows:

- (i) As regards windstorm, hail, tornado, hurricane, cyclone, including ensuing collapse and water damage, all individual losses sustained by the Company occurring during any period of 72 consecutive hours arising out of and directly occasioned by the same event. However, the event need not be limited to one state or province or states or provinces contiguous thereto.
- (ii) As regards riot, riot attending a strike, civil commotion, vandalism and malicious mischief, all individual losses sustained by the Company occurring during any period of 72 consecutive hours within the area of one municipality or county and the municipalities or counties contiguous thereto arising out of and directly occasioned by the same event. The maximum duration of 72 consecutive hours may be extended in respect of individual losses which occur beyond such 72 consecutive hours during the continued occupation of an Assured's premises by strikers, provided such occupation commenced during the aforesaid period.
- (iii) As regards earthquake (the epicentre of which need not necessarily be within the territorial confines referred to in the opening paragraph of this article) and fire following directly occasioned by the earthquake, only those individual fire losses which commence during the period of 168 consecutive hours may be included in the Company's "Loss Occurrence".
- (iv) As regards "Freeze", only individual losses directly occasioned by collapse, breakage of glass and water damage (caused by bursting of frozen pipes and tanks) may be included in the Company's "Loss Occurrence".

Except for those “Loss Occurrences” referred to in (i) and (ii) the Company may choose the date and time when any such period of consecutive hours commences provided that it is not earlier than the date and time of the occurrence of the first recorded individual loss sustained by the Company arising out of that disaster, accident or loss and provided that only one such period of 168 consecutive hours shall apply with respect to one event.

However, as respects those “Loss Occurrences” referred to in (i) and (ii), if the disaster, accident or loss occasioned by the event is of greater duration than 72 consecutive hours, then the Company may divide that disaster, accident or loss into two or more “Loss Occurrences” provided no two periods overlap and no individual loss is included in more than one such period and provided that no period commences earlier than the date and time of the occurrence of the first recorded individual loss sustained by the Company arising out of that disaster, accident or loss.

No individual losses occasioned by an event that would be covered by 72 hours clauses may be included in any “Loss Occurrence” claimed under the 168 hours provision.

Losses directly or indirectly occasioned by:

- (i) erasure, destruction, corruption, misappropriation, misinterpretation of “data”
- (ii) error in creating, amending, entering, deleting or using “data”; or
- (iii) inability to receive, transmit or use “data”

do not in and of themselves constitute an event unless directly resulting from one or more of the following perils:

fire, lightning, explosion, impact by aircraft, spacecraft or land vehicle, smoke, windstorm or hail, leakage from fire protective equipment, earthquake, tsunami, flood, freeze or weight of snow.

“Data” means representations of information or concepts, in any form.

DATA EXCLUSION

The following exclusion applies to all new, renewal or replacement policies that become effective on or after January 1, 2002 and are within the scope of this Agreement. "Renewal policies" shall mean the next anniversary date on or after January 1, 2002, in respect of policies issued for a period of more than one year.

A **DATA EXCLUSION – DIRECT DAMAGE**

1.
 - (i) This Agreement does not cover "data".
 - (ii) This Agreement does not cover loss or damage caused directly or indirectly by "data problem", however, if loss or damage caused by "data problem" results in the occurrence of further loss of or damage to property insured by the original insurance policy that is directly caused by fire, lightning explosion, smoke, leakage from fire protective equipment, impact by aircraft, spacecraft or land vehicle, windstorm or hail, earthquake, tsunami, flood, freeze or weight of snow, this exclusion (ii) shall not apply to such resulting loss or damage.
2. **"Data"** means representations of information or concepts, in any form.
3. **"Data problem"** means:
 - (i) erasure, destruction, corruption, misappropriation, misinterpretation of "data";
 - (ii) error in creating, amending, entering, deleting or using "data"; or
 - (iii) inability to receive, transmit or use "data"
4. **Records:** The liability of the Reinsurer under this Agreement for loss or damage to:
 - (i) books of accounts, drawings, card index systems and other records, other than as described in (ii) below, shall not exceed the cost of blank books, blank pages or other materials, plus the cost of labour for actually transcribing or copying said records;
 - (ii) media, data storage devices, and programme devices for electronic and electro-mechanical data processing or for electronically controlled equipment, notwithstanding that "data" is not covered, shall not exceed the cost of reproducing such media, data storage devices, and programme devices from duplicates or from originals of the previous generation of the media, but no liability is assumed hereunder for the cost of gathering or assembling information or "data" for such reproduction.

B. DATA EXCLUSION – BUSINESS INTERRUPTION

1. Subject to a) and b) following, the Reinsurer shall not be liable under this Agreement for loss of “Business Income” directly or indirectly caused by “data problem”.

a) If “data problem” results in direct physical loss of or damage to property at the premises caused by:

fire, explosion, smoke, leakage from fire protective equipment, lightning, impact by aircraft, spacecraft or land vehicle, windstorm or hail, earthquake, tsunami, flood, freeze or weight of snow, this exclusion shall not apply to resulting loss of “Business Income” suffered through such resulting loss or damage.

b) If “data problem” is the direct result of:

fire, lightning, explosion, impact by aircraft, spacecraft or land vehicle, smoke, leakage from fire protective equipment; windstorm or hail, earthquake, tsunami, flood, freeze or weight of snow, at the premise this exclusion shall not apply.

2. “**Data**” means representations of information or concepts, in any form.

3. “**Data problem**” means:

- (i) erasure, destruction, corruption, misappropriation, misinterpretation of “data”,
- (ii) error in creating, amending, entering, deleting or using “data”, or
- (iii) inability to receive, transmit or use “data”.