



# BUSINESS INTERRUPTION

## COMMON CHALLENGES & SOLUTIONS

Presented By:

Rich Clark, Managing Director – Gallagher Hospitality Services

Marshall Gilinsky - Anderson Kill & Olick, P.C.

Stan Johnson, Managing Director – Disputes & Investigations, Navigant

Christy Edson, Corporate Risk Manager – Pacifica Hotel Company



# Presenters

- Rich Clark, Managing Director – Gallagher Hospitality Services
  - Managing Director of AJ Gallaher’s Hospitality Practice with over 2500 hotels and 600,000 rooms
  - Managing Director of Gallagher’s Property Insurance Practice
  - Over 40 years in the Insurance Industry
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- Christy Edson, Corporate Risk Manager – Pacifica Hotel Company
  - Born and raised in Santa Barbara, California where she still currently still resides.
  - Graduated from Brigham Young University’s Marriott School of Management with a BS in Financial Services and a minor in Statistics.
  - Worked in the insurance industry for the last nine years and most recently since June 2010 as the Corporate Risk Manager for Pacifica Hotel Company managing an insurance portfolio of 25 hotels along the coast of California with one in Hawaii and one in Florida and several retail spaces.

# Presenters

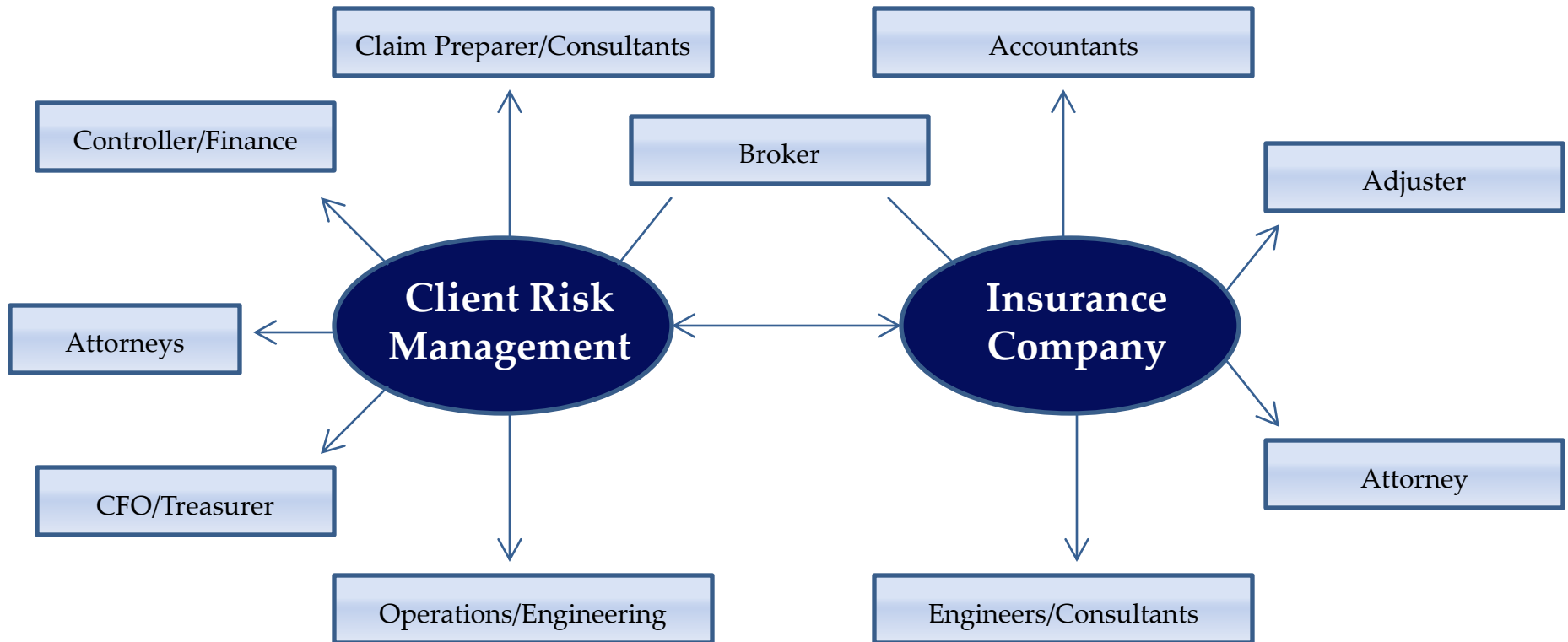
- Marshall Gilinsky - Anderson Kill & Olick, P.C. Marshall Gilinsky is a shareholder in the New York office of Anderson Kill and practices in the Insurance Recovery and the Corporate and Commercial Litigation Departments.
  - He is an experienced commercial litigator who specializes in representing policyholders in disputes with their insurance companies, and much of his practice concentrates on assisting hospitality clients recover business interruption insurance coverage and damages arising out of prominent catastrophes such as 9/11 and Hurricane Katrina.
  - Mr. Gilinsky also assists clients as part of his firm's Captive Insurance group, and recently moved with his family from New York City to Burlington, Vermont.
- 
- Stan Johnson, Managing Director in the Atlanta office of the Disputes and Investigations – Insurance Claims Accounting & Consulting practice of Navigant Consulting Inc.
  - Focus is assisting corporation insurance policyholders compile claims for business interruption, property damage, fidelity/employee dishonesty, product recall, and production liability.
  - Performs business interruption exposure evaluations, prepares lost profits claims, and provides litigation support and expert witness testimony, having testified in state and federal court on various business interruption matters.

# BUSINESS INTERRUPTION TEAM

- Risk Manager
- Broker
- Designated Adjuster
- Forensic Accountant
  - ❖ *Cost covered by policy*
- Coverage Attorney
- Engineer



# CLAIM ADJUSTMENT PLAYERS



- Establish communication protocols with the insurer's team.



# COMMON CHALLENGES & PITFALLS



# 1. BEWARE THE UNDEFINED TERM “SUSPENSION”

- Historically, insurance companies have been quite successful in arguing to courts that the terms “suspension” or “interruption” mean “total cessation” of business
- The “total cessation” argument is absurd:
  - ❖ It renders the Period of Restoration redundant
  - ❖ Most modern businesses are fully capable of conducting some business – by fax, Blackberry, telephone, or laptop – despite catastrophic destruction of their premises
  - ❖ Most policies contain clauses contemplating partial operations
  - ❖ Most policies promise Extra Expense coverage for the above-normal costs of engaging in partial operations during the Period of Restoration

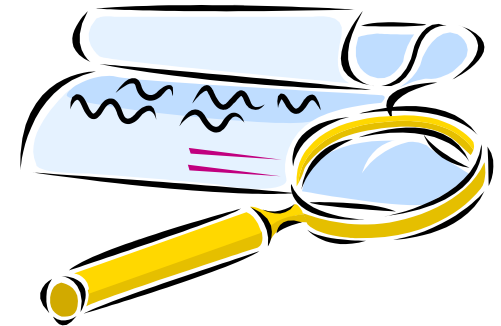
# 1. BEWARE THE UNDEFINED TERM “SUSPENSION” (CONT’D)

- Accordingly, ISO included a definition of “suspension” in its standard-form policy that expressly makes clear that Business Income coverage includes lost profits during slowdowns
  - ❖ Broker, manuscript or insurance company forms do not have the ISO definition of suspension
- Insurance companies repeatedly raised the “total cessation” argument in 9/11 BI claims
- Insurance companies obtained judgments in 9/11 claims based on the argument
- Insurance companies continue to make this argument and sometimes win



# 1. BEWARE THE UNDEFINED TERM “SUSPENSION” (CONT’D)

- Solution:
  - ❖ Attempt to resolve with adjuster, not counsel
  - ❖ Litigate and win
  - ❖ At the point of sale, insist on ISO definition of “suspension”



## 2. BEWARE ARGUMENTS RE: “WIDER EFFECTS” OF THE LOSS

- Post 9/11, insurance companies argued that, because the catastrophe was so big, the recoverable loss for any particular policyholder should be smaller
- Historic insurance industry rejection of arguments by policyholders, whose businesses were destroyed by storm, that their lost profits should include the hypothetical increased sales levels they would have enjoyed had the storm at issue spared their business but still flattened neighboring property
- ISO forms already address wider effects of the loss:
  - ❖ ISO’s BI provisions state that favorable business conditions existing in the wake of a catastrophe do not affect the amount of loss
  - ❖ ISO’s Extended BI provision excludes loss “as a result of unfavorable business conditions caused by the impact of the Covered Cause of Loss in the area where the described premises are located”

## 2. BEWARE ARGUMENTS RE: “WIDER EFFECTS” (CONT’D)

- No cases allowing an insurance company to limit coverage based on “wider effects”
- Solution
  - ❖ Reject attempts to limit post-loss revenue projections based on depressed conditions
  - ❖ Note insurance company’s past positions on “wider effects” if post-loss conditions are more favorable for your business

# 3. BEWARE OF ANTI-CONCURRENT CAUSATION CLAUSES

- Proximate Cause and the General Rule
  - ❖ Property Policies are triggered by a covered cause of loss
    - all risk policies – triggered by any cause that is not specifically excluded
    - named peril policies – coverage for specifically identified perils
  - ❖ Traditionally, the proximate causation doctrine has been used to determine the cause of loss
    - proximate cause is: “that which, in a natural and continuous sequence, unbroken by any efficient intervening cause, produces Injury...”
- Anti-Concurrent Causation Clauses
  - ❖ Come into play if an excluded “cause” or “event” takes place at any point in the sequence of the loss
  - ❖ Insurance companies argue that it eliminates the grant of coverage where a covered cause results from an excluded one
  - ❖ Insurance companies argue that it eliminates the concurrent causation rule

### 3. ANTI-CONCURRENT CAUSATION CLAUSES (CONT'D)



- Example of anti-concurrent causation clause:
  - ❖ We will not pay for loss or damage **caused directly or indirectly** by any of the following. Such loss or damage is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss

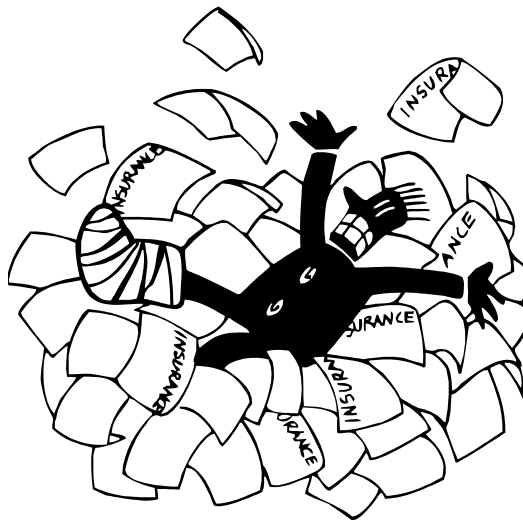
ISO Form (CP 10 30 04 02)

### 3. ANTI-CONCURRENT CAUSATION CLAUSES (CONT'D)

- What to do about Anti-Concurrent Causation Clauses?
  - ❖ Avoid entirely – broker forms
  - ❖ Revise or even flip them during placement
  - ❖ If necessary – choose the least onerous
  - ❖ Submit claims with the clauses in mind
  - ❖ Challenge enforceability:
    - Based upon state law proximate causation rule (good cases in CA, ND, WA, WV)
    - Based upon reasonable expectations doctrine (Mississippi – federal district court – overruled)
    - But, provisions have been upheld in New York, Nevada, Alaska
    - Choice-of-laws is important



# CLAIM SUBMISSION PROCESS



# CLAIM SUBMISSION PROCESS

Early  
Decisions

## Early Decisions:

### **Encourage team to make critical decisions early**

- Utilize alternate “sister” facilities or outsource to other hotels?
- Rebuild “As Was”? Improve? Relocate?
- Repair or replace FF&E or equipment?
- Repair now or later?
- Temporary or alternate facilities?

**Delay in decisions can jeopardize coverage for part of your business interruption loss!**



# CLAIM SUBMISSION PROCESS

Identify  
Losses

## Identify All Loss Elements:

- Lost room occupancy, future bookings, etc;
- Decreased revenue due to cut rates;
- Cost inefficiencies, increased labor OT costs;
- Change in room/guest mix;
- Relocation expenses;
- Ordinary Payroll;
- Extra expenses for maintaining operations (invoiced/operating);
- Level of saved (non-continuing) expenses and/or excess costs;
- Extended period of losses following recovery



**What are the potential issues and challenges surrounding each of the above?**

# CLAIM SUBMISSION PROCESS

What's the big deal?: "My [one page] claim speaks for itself".

## General Claim Design:

- Proactive claim measurement and presentation
- Basis to approach – Good “story”
- Detailed calculations for each claim item
- Complete Documentation in support of all claims – every number
- Follow an “insurance” format
- Claim estimates
- Use good timing

# CLAIM SUBMISSION PROCESS

Claim  
Measurement



## Milestones in Claim Process:

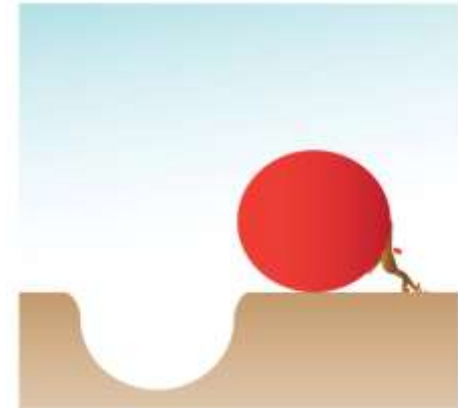
1. Scope of damage Determination
2. Recovery plan
3. Information exchange
4. Claim Submittal
5. Obtaining timely advances
6. Position determination
7. Issue determination
8. Final resolution
9. Final payment

# COMMON BI CLAIM ISSUES

Common  
Issues

## Types of Hurdles:

- Policy constraints
- Management pressure
- Adjuster conflicts
- Auditor conflicts
- Personnel demands
- Situational complexity



# COMMON BI CLAIM ISSUES

## Common Measurement Issues:

- Revenues (projections, causation, etc.)
- Expenses (projections, causation, etc.)
- Time Periods (Idle periods, repair timeline)
- Gross Earnings (GE) vs. GE less Non-Continuing Expenses (NCE)
- Actual Loss Sustained
- Depreciation as NCE
- Losing / New Businesses
- Calculations under Net Profits Form
- Internal Labor (BI vs. PD)

# COMMON BI CLAIM ISSUES

## Revenue Projections – Hotel

- Methods (Historical (tend/avg), Budget, Market, Pro-forma)
- Occupancy rate, Rooms Avail, Metrics / ORN
- Avg Daily Rate, Revenues

## Considerations:

- Base Periods
- New Products
- Market
- Business Environment
- Physical Changes
- Mix
- Post – loss Results





# A BUSINESS INTERRUPTION CASE STUDY

## KING KAMEHAMEHA TSUNAMI CLAIM



# KING KAMEHAMEHA KONA BEACH HOTEL



- Originally built in 1975
- \$35,000,000 renovation of guest rooms in 2009
- 242,700 square feet
- 6 stories
- 452 guest rooms
- 2 restaurants
- Swimming pool, hot tub, and fitness center
- 14 retail tenants
- 161 employees (Union Employees)
- Ahuena – National Historic Landmark on property
- Luau grounds
- White sand beach

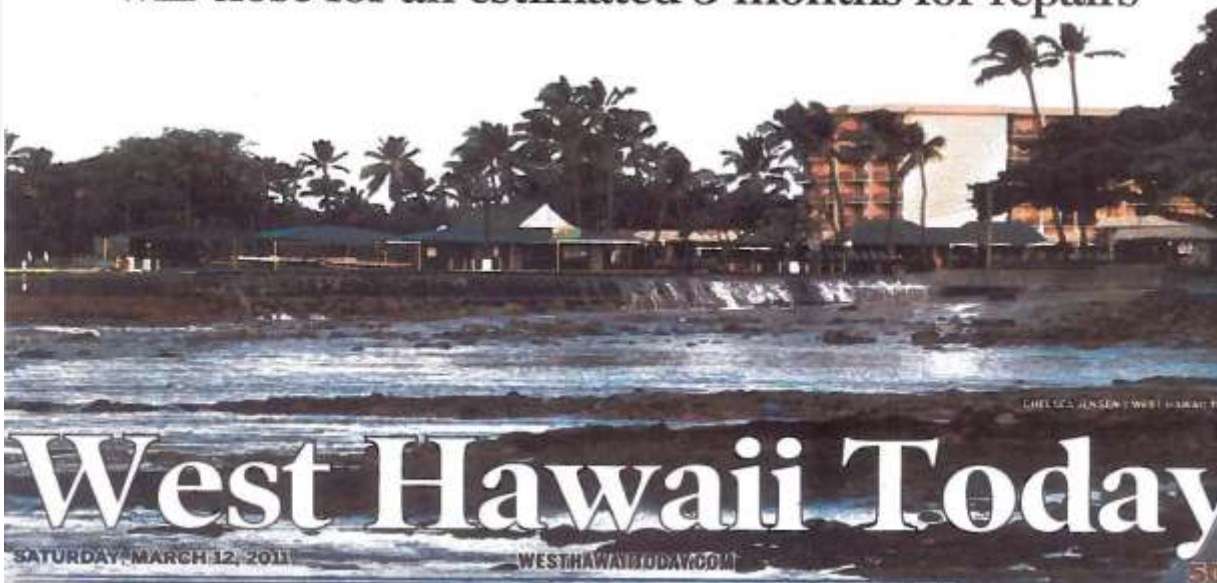


# KING KAMEHAMEHA KONA BEACH HOTEL

## TSUNAMI

‘It’s total devastation’

King Kamehameha’s Kona Beach Hotel  
will close for an estimated 3 months for repairs



West Hawaii Today

SATURDAY, MARCH 12, 2011

WESTHAWAIIODAY.COM

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# HAVE THE RIGHT TEAM IN PLACE BEFOREHAND

- Hotel's Management Team and Broker (Arthur J Gallagher)
- Adjuster (Jeff Hellman)
- Disaster Response Team (BMS Cat)
- Forensic Accountants (Navigant Consulting)  
(PKF Consulting)



# BI CLAIM FACTORS

<ul style="list-style-type: none"><li>▪ Marriott Conversion</li></ul>	<ul style="list-style-type: none"><li>▪ Convincing carrier that although no guestrooms were damaged, that hotel is a construction zone which deters guests</li></ul>
<ul style="list-style-type: none"><li>▪ Activists (bone re-internment/bone vault)</li></ul>	<ul style="list-style-type: none"><li>▪ Approximately six months to rebuild; long lead time for equipment and materials</li></ul>
<ul style="list-style-type: none"><li>▪ Luau company pulled out for about 90 days</li></ul>	<ul style="list-style-type: none"><li>▪ Japanese tourism impact</li></ul>
<ul style="list-style-type: none"><li>▪ Initial media reports said we would be closing for about three months for repairs</li></ul>	<ul style="list-style-type: none"><li>▪ \$35,000,000 room renovation completed six months prior (historical data does not paint an accurate picture)</li></ul>



# CASE STUDY

## “King Kam” Claim Process

1. Claim team contacted within hours
2. Immediate response for cleanup, damage & BI mitigation
3. Documents Preserved
4. Initial estimate developed quickly & jointly discussed
5. BI loss support tracked:
  - Cancellations
  - News articles, trip advisor information
  - Japanese tourism stats, etc.
  - Guest relocation (rooms, Luau)
  - Payroll (PD and Continuing BI)
6. Issues identified early
  - Contents counts
  - BI – baseline, etc.



# CASE STUDY

## “King Kam” Policy Issues

- Named Adjuster – Good relationship from prior losses
- Coordinated response from RM, broker, claim prep, facility management
- Coverage Trigger for policy:
  - ❖ Flood coverage included which includes tsunami in definition
  - ❖ Flood deductible applied (\$10K vs. EQ 2% or minimum \$100K)
- Causation for BI
  - ❖ Direct damage (retail, luau, lobby) – No rooms; Reservation cancellation clause
  - ❖ Extended losses (future reservations); Extended BI – 365 Days
  - ❖ Japanese tourism impact; Contingent BI – Any tier

# CASE STUDY

## “King Kam” BI Claim Issues

- Baseline revenues
  - ❖ Occupancy – Trend & forecast increases; market growth pre-loss; renovation impact
  - ❖ Rate – Trend & forecast increases; post-loss
- Market Impact
- Renovation impact
- Marriott conversion impact
- Franchise fees
- Period of Restoration
- Future loss estimates

### Resolution:

- Ongoing communication
- On – site meeting to review issues
- Claim settlement prior to end of restoration



# SESSION EVALUATION

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