



FOCUS - 2 of 2 DOCUMENTS



Caution

As of: Jun 07, 2011

**SR INTERNATIONAL BUSINESS INSURANCE CO., LTD.,  
Plaintiff-Counterclaim Defendant, -against- WORLD TRADE CENTER  
PROPERTIES, LLC, et al., Defendants-Counterclaimants. WORLD TRADE  
CENTER PROPERTIES, LLC, et al., Counterclaimants, -against- ALLIANZ  
INSURANCE COMPANY, et al., Additional Counterclaim-Defendants.**

01 Civ. 9291 (MBM)

**UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF  
NEW YORK**

2005 U.S. Dist. LEXIS 13001

**February 16, 2005, Decided  
October 17, 2005, Filed**

**SUBSEQUENT HISTORY:** Partial summary judgment denied by *SR Int'l Bus. Ins. Co. v. World Trade Ctr. Props., LLC*, 375 F. Supp. 2d 238, 2005 U.S. Dist. LEXIS 13000 (S.D.N.Y., Apr. 21, 2005)

**PRIOR HISTORY:** *SR Int'l Bus. Ins. Co. v. World Trade Ctr. Props., LLC*, 2004 U.S. Dist. LEXIS 25642 (S.D.N.Y., Dec. 1, 2004)

**DISPOSITION:** [\*1]

**CASE SUMMARY:**

**PROCEDURAL POSTURE:** Appraising insurers moved for partial summary judgment, seeking to establish that the period of restoration during which certain parties could recover the value of rental losses following the September 11, 2001 terrorist attack was the theoretical time reasonably needed to replace the World

Trade Center complex.

**OVERVIEW:** The parties opposing the motion argued that (i) the insurers' motion was not ripe, as it was subject to future contingencies that would not require a decision for nearly five years; and (ii) even if the motion was ripe, the opposing parties were entitled to recover rental value losses for the actual time necessary to rebuild the properties. The motion was ripe for resolution. Despite the claim that denying the motion without prejudice would result in no hardship, the opposing parties did not address the practical difficulties that would result were the court to keep the matter on its docket for five years, preventing the appraisal panel from quantifying the full rental value loss to which the opposing parties were entitled, and which the insurers had to pay, until the court determined finally the applicable period of restoration. One purpose behind using a theoretical measure of the restoration period was to allow a court to establish the

time for which the insured could be compensated before completion of rebuilding. The restoration period during which the opposing parties could be compensated for losses was the theoretical time needed to repair, rebuild, or replace the complex.

**OUTCOME:** The motion for partial summary judgment was granted.

**CORE TERMS:** restoration, insured, insurer's, rebuilding, rebuild, replacement, reasonable speed, rental value, declaratory judgment, rebuilt, diligence, coverage, policy language, summary judgment, actual loss, hypothetical, appraisal, partial, replace, damaged, repair, ripe, interruption, computation, ripeness, repaired, dispatch, restored, case law, calculating

### LexisNexis(R) Headnotes

#### *Civil Procedure > Justiciability > Ripeness > General Overview*

#### *Constitutional Law > The Judiciary > Case or Controversy > Ripeness*

[HN1] The factors that determine whether a matter is ripe for consideration are (i) whether the underlying issue is fit for judicial decision, and (ii) whether and to what extent the parties will endure hardship if a decision is withheld. Issues are fit for judicial decision when they would not benefit from any further factual development and when the court would be in no better position to adjudicate the issues in the future than it is now. In assessing the possible hardship to the parties resulting from withholding judicial resolution, the court asks whether the challenged action creates a direct and immediate dilemma for the parties.

#### *Insurance Law > Property Insurance > Coverage > Replacement Costs*

[HN2] Where an insured party rebuilds with "reasonable speed" and "similar quality," the actual period should coincide with the theoretical period. It is only where an insured party fails to comply with such policy terms, or in the rare case where an insured rebuilds more quickly than anticipated, that a gap between the actual and theoretical periods will arise. In such cases, it is the theoretical, not the actual, period of restoration that governs.

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**JUDGES:** Michael B. Mukasey, U.S. District Judge.

**OPINION BY:** Michael B. Mukasey

**OPINION**

## OPINION AND ORDER

MICHAEL B. MUKASEY, U.S.D.J.

Now before the court is a partial summary judgment motion in which the Appraising Insurers seek to establish that the period of restoration during which the Silverstein Parties may recover the value of rental losses following the September 11, 2001 terrorist attack on the World Trade Center ("WTC") is the theoretical time reasonably needed to replace the WTC complex. The Silverstein Parties oppose the Insurers' motion on two main grounds, arguing that (i) the Insurers' motion is not yet ripe because it is subject [\*3] to future contingencies that will not require a decision for nearly five years; and (ii) even if the Insurers' motion is ripe, it should be denied because the Silverstein Parties are entitled to recover rental value losses for the actual, not the theoretical, time necessary to rebuild the WTC properties.<sup>1</sup> This litigation has already given rise to numerous opinions and rulings of the court; familiarity with all of them, if such a thing can be imagined, is assumed for current purposes. For the following reasons, the Insurers' motion for partial summary judgment is granted.

1 In the final nine pages of their memorandum of law, the Silverstein Parties also argue that any measure of the restoration period, whether actual or theoretical, must take "real-world circumstances" into account. (Silverstein Parties' Mem. of Law in Opp'n to Appraising Insurers' Mot. for Partial Summ. J. as to Period of Restoration at 33-41 ("Silverstein Mem. in Opp'n").) As conceded by the Silverstein Parties, however, the specific factors to be considered in calculating the restoration period are not at issue on this motion and are to be decided by the Appraisal Panel. (See *id.* at 33, 41.)

[\*4] I.

At the threshold, the Silverstein Parties argue that the court need not decide whether to use a theoretical or an actual measure of the restoration period at this time because the Appraising Insurers' motion for partial summary judgment is not yet ripe and will remain unripe for several years. Specifically, they argue that any determination now as to the period of restoration "will have no practical impact on the insureds' recoveries for five years, if ever" because the litigants agree that the Silverstein Parties are entitled to recover rental value

losses at least until September 2009, the end of the Insurers' estimated restoration period.<sup>2</sup> (Silverstein Mem. in Opp'n at 3-5.) In addition, the Silverstein Parties argue that any rental losses are recoverable only as they are actually sustained and are contingent on numerous future events, including the results on appeal of the verdicts in the first and second phases of this litigation, as well as whether any insurance proceeds actually remain available after the Silverstein Parties' claims for property damage and rental value losses through 2009 have been met. (*Id.* at 6-7.) The Silverstein Parties thus ask that the court [\*5] deny the Insurers' motion without prejudice as "premature and contingent." (*Id.* at 3.)

2 It should be emphasized, however, that it is the Appraisal Panel, not the parties, that will be responsible ultimately for calculating the precise length of the restoration period. See *Duane Reade, Inc. v. St. Paul Fire & Marine Ins. Co.*, 279 F. Supp. 2d 235, 241 (S.D.N.Y. 2003) ("Questions concerning valuation of the loss, as opposed to coverage under the Policy, must be submitted to appraisal.").

[HN1] The factors that determine whether a matter is ripe for consideration are (i) whether the underlying issue is fit for judicial decision, and (ii) whether and to what extent the parties will endure hardship if a decision is withheld. *Abbott Labs. v. Gardner*, 387 U.S. 136, 148-49, 18 L. Ed. 2d 681, 87 S. Ct. 1507 (1967). Issues are "fit for judicial decision" when "they would not benefit from any further factual development and when the court would be in no better position to adjudicate the issues in the future than [\*6] it is now." *Simmonds v. INS*, 326 F.3d 351, 359 (2d Cir. 2003). "In assessing the possible hardship to the parties resulting from withholding judicial resolution, we ask whether the challenged action creates a direct and immediate dilemma for the parties." *Id.* at 360 (citation omitted).

In *Duane Reade, Inc. v. St. Paul Fire & Marine Ins. Co.*, 261 F. Supp. 2d 293 (S.D.N.Y. 2003), the insured party brought breach of contract and declaratory judgment claims with respect to disputed business interruption losses arising from the destruction of its drug store in the World Trade Center retail mall. Citing ripeness concerns, Judge Rakoff dismissed the insured party's contract claims as premature because no proof of loss had been filed by Duane Reade. *Id.* at 295. However, the Court allowed the insured party's declaratory

judgment claims to proceed, stating that "the standard for ripeness in a declaratory judgment action is 'whether . . . there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.'" *Id.* [\*7] (citation omitted). Noting that the defendant itself had conceded "an actual and continuing controversy" between the parties and that judgment on the claim would "almost certainly resolve the primary issue in this case as to scope of coverage," the Court found the declaratory judgment claim to be ripe. *Id.* at 295-96.

Similarly, in this case, the Silverstein Parties have acknowledged that there is an "actual case or controversy" pertaining to calculation of the rental value loss claim, and they seek a declaratory judgment that, *inter alia*, the "period of restoration" under the governing policies "refers to the period of time it will actually take to rebuild what is actually constructed at the World Trade Center site." (Bergman Decl. Ex. C PP575-76 ("Silverstein Counterclaims").) Nevertheless, the Silverstein Parties contend that this declaratory judgment claim "was only asserted in that pleading as a protective matter" in order to meet a two-year filing requirement in the Travelers Indemnity Company policy. (Silverstein Mem. in Opp'n at 5.) Straining to distinguish this case from *Duane Reade*, the Silverstein Parties argue that "while there may be Article III [\*8] jurisdiction over the Silverstein Parties' claim, the five-year delay until this issue becomes relevant and the number of intervening contingencies strongly support the conclusion that there is no reason to decide the insurers' motion at this time." (*Id.* at 10-11.)

The Silverstein Parties, however, cite no case law for their asserted distinction between a "claim" and a "motion" for ripeness purposes. Nor do the handful of precedents cited by the Silverstein Parties provide any support for their ripeness argument; in each, the court was asked to dismiss an entire pending case because whether the case would have to be litigated at all was contingent on the outcome of separate litigation. *See Certain Underwriters at Lloyd's, London v. St. Joe Minerals Corp.*, 90 F.3d 671, 675-76 (2d Cir. 1996) (affirming dismissal of excess insurers' declaratory judgment action where litigation between insured party and primary insurer was pending in another forum); *Bellefonte Reinsurance Co. v. Aetna Cas. & Sur. Co.*, 590 F. Supp. 187, 191-92 (S.D.N.Y. 1984) (dismissing

reinsurers' declaratory judgment action where direct insurance liability remained [\*9] pending in separate action); *cf. Atlanta Gas Light Co. v. Aetna Cas. & Sur. Co.*, 68 F.3d 409, 415 (11th Cir. 1995) (dismissing action to determine insurers' liability for environmental clean-up costs where no such costs incurred).

Moreover, despite their claim that denying the instant motion without prejudice will result in no hardship to the Insurers, the Silverstein Parties fail to address the practical difficulties that would result were the court to keep this matter on its docket for another five years, thereby preventing the Appraisal Panel from quantifying the full rental value loss to which the Silverstein Parties are entitled, and which the Insurers must pay, until the court determines finally the applicable period of restoration. As discussed below, one of the purposes behind using a theoretical measure of the restoration period is that it allows a court to establish the time for which the insured can be compensated *before* the rebuilding is completed. *See Alevy v. Alliance Gen. Ins. Co.*, 1996 U.S. App. LEXIS 27826, No. 95-56034, 1996 WL 623065, at \*2 (9th Cir. Oct. 24, 1996) (unpublished opinion)<sup>3</sup>; *Bard's Apparel Mfg., Inc. v. Bituminous Fire & Marine Ins. Co.*, 849 F.2d 245, 251 (6th Cir. 1988). [\*10] It is precisely the hypothetical or abstract nature of the restoration period in a case such as this that ensures the recovery granted the insured party will *not* be subject to contingent future events. *See Rogers v. Am. Ins. Co.*, 338 F.2d 240, 243 (8th Cir. 1964) ("A 'cut off' date is a necessity. Otherwise, claims would be opened to a degree of speculation which would be absurd. There would be no available method to determine with any degree of accuracy the amount of such losses."). The Insurers' motion for partial summary judgment is ripe for resolution.

<sup>3</sup> For discussion of the minimal precedential value in this forum of the Ninth Circuit's unpublished opinion in *Alevy*, see *infra* note 8.

## II.

With the Silverstein Parties' ripeness argument disposed of, the main issue on this motion remains the appropriate method for calculating the "period of restoration," the time during which the Silverstein Parties are to be compensated for their rental value losses. The relevant policy [\*11] language<sup>4</sup> provides that the Insurers "will pay for the actual loss of . . . Rental Value sustained by the Insured due to the necessary 'suspension'

of the Insured's 'operations' during the 'period of restoration.'" (Bergman Decl. Ex. A § A.) The policy defines "period of restoration" as beginning on "the date and time of direct physical loss or damage" and, absent resumption of operations at "a new permanent location," ending on "the date when the property should be repaired, rebuilt or replaced with reasonable speed and similar quality." (*Id.* Ex. A PG(5).) Because the Silverstein Parties do not intend to resume business at a "new permanent location," the applicable inquiry here is the meaning of the phrase "when the property should be repaired, rebuilt or replaced with reasonable speed and similar quality."

4 Both sides have agreed to rely on the policy language found in the Travelers business income coverage form. (*See* Silverstein Mem. in Opp'n at 4.)

The Insurers argue that the period of restoration [\*12] is a theoretical construct, defined as the reasonable time that would be needed to repair, rebuild, or replace the WTC properties as they stood before the September 11 attacks. They rely on Judge Rakoff's recent decision in *Duane Reade* to apply a theoretical measure to a similar restoration period provision:

On their face, the Restoration Period clauses envision a hypothetical or constructive (as opposed to actual) time frame for rebuilding, as evidenced, for example, by their use of the subjunctive "would" . . . . Once Duane Reade could resume functionally equivalent operations in the location where its WTC store once stood, the Restoration Period would be at an end.

*Duane Reade, Inc. v. St. Paul Fire & Marine Ins. Co.*, 279 F. Supp. 2d 235, 239 (S.D.N.Y. 2003). Other courts likewise have defined periods of restoration in theoretical terms. *See, e.g., Anchor Toy Corp. v. Am. Eagle Fire Ins. Co.*, 4 Misc. 2d 364, 155 N.Y.S.2d 600, 603 (Sup. Ct. N.Y. County 1956) ("It follows that the period required to rebuild or replace with due diligence and dispatch is, in this case, entirely theoretical."); *Hampton Foods, Inc. v. Aetna Cas. & Sur. Co.*, 843 F.2d 1140, 1143 (8th Cir. 1988) [\*13] ("It is clear that this language contemplates the 'theoretical time period it would have taken to' reenter business.") (citation omitted); *Beautytuft, Inc. v. Factory*

*Ins. Ass'n*, 431 F.2d 1122, 1124 (6th Cir. 1970) ("This contract provides a theoretical as opposed to an actual replacement time as the basic time standard for computation of business interruption loss."); *Steel Products Co. v. Millers Nat'l Ins. Co.*, 209 N.W.2d 32, 38 (Iowa 1973) ("The theoretical period defined in the policy is the length of time required with the exercise of due diligence and dispatch to rebuild, repair or replace the damaged premises. Where the actual restoration period exceeds the theoretical period or where the premises are not restored, the theoretical period becomes the computation period.").

The Silverstein Parties counter that where an insured party actually rebuilds its property, the period of restoration should be measured by the actual, instead of the theoretical, time necessary to rebuild, provided the restoration is conducted with "reasonable speed" and "similar quality." (Silverstein Mem. in Opp'n at 2, 12.) In support of this proposed standard, [\*14] the Silverstein Parties advance three principal lines of argument. First, they suggest that the language of the policy supports them, arguing that the coverage provided for "actual loss . . . sustained" indicates that the period of restoration is tied to "actual," real-world measures. (*Id.* at 14.) Contrary to Judge Rakoff's analysis in *Duane Reade*, the Silverstein Parties argue that the subjunctive "should" in the restoration period definition<sup>5</sup> does not in fact support the use of a theoretical period here. Rather, such language, according to the Silverstein Parties, serves to impose a theoretical measure only where the insured (i) does not rebuild its property (because in that case, no "actual" restoration period would be available) or (ii) fails to rebuild with "reasonable speed" and "similar quality" (policy terms which, the Silverstein Parties maintain, prevent an "actual" restoration period from being completely open-ended). (*See* Silverstein Mem. in Opp'n at 15-16.) Because neither scenario occurs here, the Silverstein Parties argue, the actual rebuilding period must be used to determine the rental insurance coverage to be provided in this case.<sup>6</sup>

5 *See* Bergman Decl. Ex. A § G(5) (restoration period ends "when the property should be repaired, rebuilt or replaced with reasonable speed and similar quality").

[\*15]

6 This interpretation, according to the Silverstein Parties, is likewise supported by extrinsic evidence and by other terms in the insurance

policy. (*Id.* at 16-20, 22-26.)

Second, the Silverstein Parties contend that their position is grounded in case law. For example, in *Alevy v. Alliance General Ins. Co.*, 1996 U.S. App. LEXIS 27826, No. 95-56034, 1996 WL 623065 (9th Cir. Oct. 24, 1996) (unpublished opinion), the Ninth Circuit applied an "actual" measure of the restoration period, reasoning that:

In this case, rebuilding has occurred, and the actual replacement time may be determined with some accuracy. To find that actual replacement time cannot be used to determine the "ACTUAL LOSS SUSTAINED" would be contrary to a lay person's interpretation of the policy language and would defy common sense. Thus, the appropriate methodology in this case is to begin the analysis using actual replacement time.

1996 U.S. App. LEXIS 27826, [WL] at \*2; see also *United Land Investors, Inc. v. Northern Ins. Co. of Am.*, 476 So. 2d 432, 437-38 (La. Ct. App. 1985) (providing coverage for the "actual length [\*16] of the business interruption" where insured could not begin rebuilding until it received payment from insurer); *Eureka-Security Fire & Marine Ins. Co. v. Simon*, 1 Ariz. App. 274, 401 P.2d 759, 763-64 (Ariz. Ct. App. 1965) (extending restoration period to account for delays caused by insurers and landlord).

Third, the Silverstein Parties seek to distinguish the cases cited by the Insurers from the circumstances presented here. These cases, the Silverstein Parties contend, applied a theoretical period of restoration only because "either (i) there was no rebuilding, or (ii) the purported rebuilding was found to be impermissible or unreasonably dilatory." (Silverstein Mem. in Opp'n at 28.) In *Duane Reade*, for example, Judge Rakoff applied a theoretical restoration period, according to the Silverstein Parties, because Duane Reade "had no way of rebuilding a single store in the middle of Ground Zero." (*Id.* at 29.) Similarly, in *Anchor Toy Corp. v. American Eagle Fire Ins. Co.*, 4 Misc. 2d 364, 155 N.Y.S.2d 600 (Sup. Ct. N.Y. County 1956), "no effort to rebuild . . . was ever made" and, therefore, the court had no choice but to use a theoretical measure. *Id.* at 603; [\*17] see also *Steel Products Co. v. Millers Nat'l Ins. Co.*, 209 N.W.2d 32, 38 (Iowa 1973) (theoretical period applies "where the

damaged premises are not restored"); *Congress Bar & Rest., Inc. v. Transamerica Ins. Co.*, 42 Wis. 2d 56, 165 N.W.2d 409, 413 (Wis. 1969) (applying theoretical measure where insured did not repair fire-damaged structure but instead demolished and replaced property with new building). In this case, by contrast, the Silverstein Parties argue, the WTC properties are in fact being rebuilt with "reasonable speed" and "similar quality," and thus a theoretical measure of the restoration period is neither necessary nor appropriate.

These arguments fail for the following reasons. First, the Silverstein Parties' interpretation of the policy language, including their heavy reliance on intrinsic and extrinsic evidence (Silverstein Mem. in Opp'n at 16-20, 22-26), runs counter to the consistent findings of courts that the language defining the period of restoration in other policies, which is similar to the language used here, is unambiguous. See, e.g., *Duane Reade*, 279 F. Supp. 2d at 239 ("On their face, the Restoration Period [\*18] clauses envision a hypothetical or constructive (as opposed to actual) time frame for rebuilding . . .") (emphasis added); *Eastern Associated Coal Corp. v. Aetna Cas. & Sur. Co.*, 632 F.2d 1068, 1077 (3d Cir. 1980) ("We agree with the insurers and find this language unambiguous. . . . Accordingly, we need not resort to rules of construction."); *Steel Products*, 209 N.W.2d at 37 ("We are not aware of any court which has found the policy language involved here to be ambiguous.") (citing *Rogers v. Am. Ins. Co.*, 338 F.2d 240, 242 (8th Cir. 1964)); *Grand Pac. Hotel Co. v. Mich. Commercial Ins. Co.*, 243 Ill. 110, 90 N.E. 244, 245 (Ill. 1909) ("The policy was free from ambiguity, and the words used had a precise, definite, and well-understood meaning. No language could more clearly express the intention of the parties as to the time for which the loss should be computed.").<sup>7</sup>

<sup>7</sup> The mere fact that the restoration period definition in this case used the terms "reasonable speed" and "similar quality," rather than "due diligence and dispatch," does not somehow render the policy language ambiguous. See *Admiral Indem. Co. v. Bouley Int'l Holding, LLC*, 2003 U.S. Dist. LEXIS 20324, No. 02 Civ. 9696, 2003 WL 22682273, at \*3 (S.D.N.Y. Nov. 13, 2003) (where restoration period clause required rebuilding with "reasonable speed" and "similar quality," granting summary judgment because there was "no genuine dispute" that the restoration

period ended when the "property was, *or should have been*, repaired") (emphasis added). Indeed, both the Insurers and the Silverstein Parties rely almost exclusively on case law interpreting and applying restoration period provisions that defined the insurable period as the time needed to rebuild with "due diligence and dispatch."

[\*19] Even standing alone, the Silverstein Parties' novel construction of the policy language is not persuasive. For example, although the policy does indeed provide coverage for "actual loss . . . sustained" (Bergman Decl. Ex. A § A), the term "actual" does not appear anywhere in the definition of the restoration period, which is found in a separate section of the policy (*id.* Ex. A § G(5)) and is couched in hypothetical terms; hence, the subjunctive "should." See *Duane Reade*, 279 F. Supp. 2d at 239. The Silverstein Parties' suggestion that the term "should" does "double duty" because it could apply to either an actual or a hypothetical period is nothing but *ipse dixit*. That certain terms could apply to both an actual and a hypothetical period does not mean that they do when other text, and context, and authority, and logic, prove that they do not. Nor do the terms "reasonable speed" and "similar quality" in the restoration period definition support the Silverstein Parties: rather than "protecting the Insurers against the risk of open-ended liability" by preventing an unlimited "actual" rebuilding period (Silverstein Mem. in Opp'n at 21), such terms qualify only [\*20] how far the theoretical period of restoration may extend in a case such as this. That is, the policy terms simply direct the Appraisal Panel, when calculating the theoretical restoration period, to determine how long it "should" take an insured party to rebuild its properties with "reasonable speed" and "similar quality." The restoration period remains theoretical, even if it is not computed in a vacuum.

Nor do the cases cited by the Silverstein Parties support the use of an actual period of restoration here. Not only do the three main cases relied on by the Silverstein Parties carry little precedential weight in this forum,<sup>8</sup> but they are also factually distinct from the circumstances presented here. For example, in *United Land Investors* and *Eureka-Security*, the courts simply authorized an extension of the restoration period for reasonable and necessary delays attributable to actions taken by the insurers, not the insureds. See *United Land Investors*, 476 So. 2d at 438 (insured unable to begin repairs due to "delay in making payment for structural

damage"); *Eureka-Security*, 401 P.2d at 763-64 (delay caused by insured's landlord and negotiations [\*21] with adjustment company); see also *Hampton Foods, Inc. v. Aetna Cas. & Sur. Co.*, 843 F.2d 1140, 1143 (8th Cir. 1988) (providing coverage for "delay attributable to [the insurer's] failure to perform its duties" but not for "delay caused by other obstacles to restoration such as [the insured's] alleged lack of due diligence or poor financial condition"); *Streamline Capital, L.L.C. v. Hartford Cas. Ins. Co.*, 2003 U.S. Dist. LEXIS 14677, No. 02 Civ. 8123, 2003 WL 22004888, at \*7 n.5 (S.D.N.Y. Aug. 25, 2003) ("Several cases from other jurisdictions support the view that a delay in payment may have a direct effect on the timing of an insured's resumption of business.").

8 Two of cases cited are decades-old decisions of intermediate state appellate courts, *United Land Investors, Inc. v. Northern Ins. Co. of Am.*, 476 So. 2d 432 (La. Ct. App. 1985); *Eureka-Security Fire & Marine Ins. Co. v. Simon*, 1 Ariz. App. 274, 401 P.2d 759 (Ariz. Ct. App. 1965), while the other decision is an unpublished memorandum opinion of the Ninth Circuit, the citation of which is strictly prohibited in that Circuit. *Alevy v. Alliance Gen. Ins. Co.*, 1996 U.S. App. LEXIS 27826, No. 95-56034, 1996 WL 623065 (9th Cir. Oct. 24, 1996); see *Conboy v. AT & T Corp.*, 241 F.3d 242, 255 n.13 (2d Cir. 2001) ("Because the opinion is an unpublished disposition, it is not binding even in the Ninth Circuit, let alone here."); 9th Cir. R. 36-3(a)-(b) ("Unpublished dispositions and orders of this Court are not binding precedent, except when relevant under the doctrines of law of the case, res judicata, and collateral estoppel. . . . Unpublished dispositions and orders of this court may not be cited to or by the courts of this circuit . . .").

[\*22] In addition, the use of a non-theoretical measure in many of the cases cited by the Silverstein Parties was shaped by the posture in which such cases were presented to the courts -- namely, the stage of rebuilding then completed. In *Alevy*, for example, the insured party had already rebuilt its property by the time the Ninth Circuit addressed how the restoration period was to be measured. It thus made perfect sense under such circumstances, as the Court concluded, to utilize the actual rebuilding period as an analytic "starting point" for determining the period of restoration. *Alevy*, 1996 U.S. App. LEXIS 27826, 1996 WL 623065, at \*3; 1996 U.S.

*App. LEXIS 27826, [WL] at \*2* ("In this case, rebuilding has occurred, and the actual replacement time may be determined with some accuracy."). In other cases applying a non-theoretical measure of the restoration period, the insured likewise had rebuilt the damaged or destroyed property substantially to its as-was condition before the insurable event. *See A & S Corp. v. Centennial Ins. Co.*, 242 F. Supp. 584, 588 (N.D. Ill. 1965) (damaged bowling alley restored and "reopened to the public for business"); *Steel Products*, 209 N.W.2d at 34 (damaged [\*23] portion of factory building restored and rebuilt with "due diligence"); *see also Dictiomatic, Inc. v. U.S. Fid. & Guar. Co.*, 958 F. Supp. 594, 602 (S.D. Fla. 1997) (developer of consumer electronics returned to premises after hurricane and was "fully back in operation"). Here, by contrast, the Silverstein Parties have not yet rebuilt the WTC properties; they are only now in the early stages of planning the construction of the Freedom Tower and related development on the former site of the World Trade Center. The Appraisal Panel in this case, therefore, will not have the "historical information" that allowed the Court in *Alevy* to calculate the restoration period by using the actual replacement time. *See Alevy*, 1996 U.S. App. LEXIS 27826, 1996 WL 623065, at \*2.

The Insurers argue also that the Silverstein Parties cannot rely on cases such as *Alevy*, *Steel Products*, and *Anchor Toy*, among others, because the proposed construction of the new WTC properties does not qualify under the policy as a "rebuilding" of the insured properties. (*See Insurers' Reply Mem.* at 1-2 ("By no stretch of the imagination can one conceive that the construction of the Freedom Tower and [\*24] a proposed one million square-foot office building is a rebuilding of the World Trade Center's 10 million square-foot complex that was destroyed on September 11, 2001.")) In *Congress Bar & Restaurant, Inc. v. Transamerica Ins. Co.*, 42 Wis. 2d 56, 165 N.W.2d 409 (Wis. 1969), the Court held that although an insured may "utilize a business interruption . . . to upgrade his business property . . . that decision should not increase the amount of recovery to which he is entitled -- he would still be limited to compensation for the shorter period of time in which the structure could be repaired." *Id.* at 413. In *Anchor Toy*, however, the Court rejected the notion that a replacement building need be an "exact duplicate" of the destroyed structure:

The rebuilding contemplated by the policy is the replacement that would

actually follow after a disaster. It is beyond the bounds of reasonable contemplation to expect that a replacement structure would ignore all progress in the art and slavishly retain any proven disadvantage. It must be the intent of the policy that the new building to be erected would be modern as well.

*Anchor Toy Corp. v. Am. Eagle Fire Ins. Co.*, 4 Misc. 2d 364, 155 N.Y.S.2d 600, 603 (Sup. Ct. N.Y. County 1956). [\*25] Nevertheless, in *Anchor Toy*, the Court warned that "if an extraordinary additional time would be required to include improvements or innovations[,] these would not be included." *Id.*

The New York courts have not defined what constitutes an "extraordinary additional time" under *Anchor Toy*, and neither *Congress Bar* nor *Anchor Toy* appears to settle whether the construction of the new WTC properties contemplated here qualifies as "rebuilding" or "replacement" under the terms of the policy. However, the outcome here need not turn on such determinations because the case law supports using a theoretical restoration period even where the insured party is rebuilding its property. In *Steel Products*, for example, the Court held that "where the actual restoration period exceeds the theoretical period . . . the theoretical period becomes the computation period," thus suggesting that the theoretical restoration period serves as the outer limit for which compensation may be paid as to a property, regardless of the actual replacement time and the stage at which the issue is presented to the court. *See Steel Products*, 209 N.W.2d at 38. [HN2] Where an insured party [\*26] rebuilds with "reasonable speed" and "similar quality," as required by the policy here, the actual period should coincide with the theoretical period. *See Midland Broadcasters, Inc. v. Ins. Co. of N. Am.*, 636 F. Supp. 165, 167-68 (D. Kan. 1986) (finding that actual and theoretical periods coincided where insured rebuilt with due diligence and dispatch). It is only where an insured party fails to comply with such policy terms, or in the rare case where an insured rebuilds more quickly than anticipated, that a gap between the actual and theoretical periods will arise. In such cases, it is the theoretical, not the actual, period of restoration that governs. *See Steel Products*, 209 N.W.2d at 37-38 ("The cases uniformly stand for the principle that the date by which the damaged premises could have been restored with due diligence is a cut off date for computation of reduced gross earnings.");

*Pennbarr Corp. v. Ins. Co. of N. Am.*, 976 F.2d 145, 155 (3d Cir. 1992) ("This type of policy is not designed to compensate for losses sustained beyond the period of restoration."); cf. William H. Danne, Jr., Annotation, *Business Interruption* [\*27] *Insurance*, 37 A.L.R.5th 41 § 53 (2004) ("Consistent with the principle that . . . the period of loss for which recovery is allowed is 'theoretical' in nature . . . courts [have] recognized that the period of recoverable loss is not reduced by the fact that the insured is able to resume production activities prior to restoration of the insured property."); *Beautytuft, Inc. v. Factory Ins. Ass'n*, 431 F.2d 1122, 1125 (6th Cir. 1970) (allowing recovery for entire theoretical period even though insured party promptly obtained substitute plant nine months before end of theoretical period because insured's "actual losses . . . continued beyond that [earlier] date").<sup>9</sup>

9 As implied by *Beautytuft*, where an insured party rebuilds, replaces, or repairs its property before the end of the theoretical restoration period, the insured may recover only for "actual losses . . . sustained" during that theoretical period.

Courts likewise have allowed the restoration period to be set [\*28] in advance of the contemplated rebuilding. See *Alevy*, 1996 U.S. App. LEXIS 27826, 1996 WL 623065, at \*2 (use of theoretical restoration period is "entirely appropriate" where "the insurance payment was to be made *before* rebuilding") (emphasis added); *Bard's Apparel Mfg., Inc. v. Bituminous Fire & Marine Ins. Co.*, 849 F.2d 245, 251 (6th Cir. 1988) ("Appellants wanted a standard of potential replacement time which was *amenable to computation in advance* and which was not

subject to vagaries like owner indecision, strikes, or failure of lease negotiations which might affect the actual rebuilding time.") (emphasis added) (quoting *Beautytuft*, 431 F.2d at 1125). Especially in a case such as this, where rebuilding is likely to take many years, it would be impractical, as well as inconsistent with the long-standing interpretations of the restoration period clauses at issue here, to conclude that the court and the parties should all be required to await the passage of those years until the new WTC properties are in place to determine for just how long the Silverstein Parties will be allowed to recover their rental value losses. In sum, although one may applaud [\*29] the occasional ingenuity of the Silverstein Parties' various arguments, they are devoid of support in language, law, or logic. The restoration period during which the Silverstein Parties can be compensated for their rental value losses is the theoretical, not the actual, time needed to repair, rebuild, or replace the WTC complex.

\* \* \*

For the reasons stated above, the Insurers' motion for partial summary judgment is granted.

SO ORDERED:

Dated: New York, New York

February 16, 2005

Michael B. Mukasey

U.S. District Judge