

APPEAL PANEL DECISION FORM

I. CLAIMANT AND CLAIM INFORMATION

Claimant Name	Last/Name of Business [REDACTED]	First [REDACTED]	Middle [REDACTED]
Claimant ID	[REDACTED]	Claim ID	[REDACTED]
Claim Type	Business Economic Loss		
Law Firm	[REDACTED]		

II. DECISION

Denial Upheld

Denial Overturned

III. PRIMARY BASIS FOR PANELIST DECISION

Please select the primary basis for your decision. You may also write a comment describing the basis for your decision.

Claim should have been excluded.

Claim should have been denied.

Claim should not have been excluded.

Claim should not have been denied.

No error.

Comment (optional):

See reasons submitted to Appeals Coordinator.

Reasons for Decision

Appeal # [REDACTED]

November 24, 2015

Claimant appeals the denial of its BEL Claim. The Claim was denied on the grounds that Claimant failed to meet the applicable causation test.

Claimant contends that it would have met the causation test had the Settlement Program not reallocated Claimant's rental revenue for 2010. Claimant argues that it was error to do so.

The facts are as follows: Claimant is a commercial property owner who receives rental income from tenants. In 2010, Claimant's records showed no rental income for May and October. However, revenue for the succeeding months (June and November) was approximately double the usual monthly rental income.

In reviewing this Claim, the Settlement Program applied the so-called "seven criteria" and determined that the Claim triggered the application of the AVM methodology under Policy 495. However, prior to applying the AVM, the Settlement Program reallocated a portion of the June and November rental revenue to other months. [Apparently, Claimant would have met the causation test had this reallocation not been performed.]

Claimant argues that this pre-AVM reallocation goes beyond the scope of the intended application of Policy 495. Specifically, Claimant contends that reallocating the rental revenue amounts to "smoothing," which Claimant argues is beyond the scope of Policy 495 and was rejected by the Fifth Circuit Court of Appeals.

Further, Claimant suggests that revenues are not to be reallocated prior to applying the AVM methodology unless there is an error in the P&Ls. "Error" is defined in Policy 495 as "accounting transactions that have been identified in the ordinary course of processing to have been inappropriately recorded in the claimant's contemporaneous P&Ls and will include, but be limited to: duplicate accounting entries; debit entries recorded as credits or vice versa; mistakes in applying applicable accounting principles based on the claimant's method of accounting; oversights or misinterpretation of the facts; input or calculation errors; and/or postings to the incorrect revenue and/or expenses categories."

A Summary of Review was requested wherein the Claims Administrator was asked to explain why the rental revenue was reallocated prior to applying the AVM methodology. The response, in part, was as follows:

"The Settlement Program relied upon specific provisions of Policy 495 as authority to adjust Claimant's rental income revenue in the professional discretion of the Program Accountants. Item 7, page 3 of Policy 495 states

that ‘Depending on the specifics of a given business, it may be appropriate to make adjustments to the claimant’s financials as to the timing of the recognition of either revenues or expenses or both.’ Page 6, paragraph 1, permits Program Accountants to utilize their professional judgment regarding ‘other significant indicia that the claim may not be “sufficiently matched.” Paragraph 2 provides that in exercising professional judgment regarding whether a claim is “sufficiently matched,” Program Accountants will consider ‘the nature and complexity of the industry or business in question, particularly with regard to claims based upon cash-basis accounting records.’”

“Using their professional judgment . . . Program Accountants adjusted the Claimant’s P&Ls as to the timing of revenue to reflect the periods the lease payments related to.”

The Summary of Review also acknowledged that there were no errors in Claimant’s P&Ls.

In light of the above, it would appear that the issue before this Panelist is whether or not Policy 495 allows the pre-AVM reallocation of revenue for reasons other than “error.” [Secondarily, Claimant seems to argue that, even if pre-AVM reallocation in this matter is allowed, the manner of reallocation is not supported by the record.]

Claimant correctly points out that BP has often argued on appeal that the Settlement Program erred in not reallocating revenue prior to applying the AVM methodology. Claimant is also correct in its observation that most Panelists have ruled against BP on this issue, generally concluding that Policy 495 does not require pre-AVM reallocation, except for error. That said, these rulings have never found that pre-AVM reallocation of revenue is *prohibited* under Policy 495 – only that reallocation is not required.

Likewise, this Panelist has reviewed the Fifth Circuit’s decision that spawned Policy 495 and finds no language prohibiting the type of reallocation of revenue that was performed in this matter.

BP cites several appeal decisions wherein Appeal Panelists have either approved of the Settlement Program’s reallocation of rental revenue or remanded the claim with instructions to reallocate the rental income from the month in which it was received to the months in which the income was earned. The basis for these decisions appears to be the broad discretion attributed to the Settlement Program under Policy 495 by the authors of those decisions.

After much reflection (this Panelist considers the arguments raised by Claimant in this matter to be very persuasive), and in the interest of consistency, this Panelist agrees with the Claims Administrator that the Program Accountants had the

discretion under Policy 495 to reallocate rental income and that this discretion was not abused in this matter. [Note: Each of these reallocation-of-revenue inquiries is claim specific and nothing in this decision should be interpreted as granting Program Accountants unlimited discretion under Policy 495 to reallocate revenue.]

Claimant also appears to argue that the Settlement Program's reallocation was carried out incorrectly and is not supported by the record. According to Claimant, instead of reallocating the revenues in proportion to the expenses, the Accounting Vendors simply smoothed out the revenues to the same or similar amount for every month of the year.

The Summary of Review lays out the method of reallocation utilized by the Settlement Program:

“Claimant filed with its claim a ‘Tenant Payments Report’ . . . which indicated the periods rental revenue related to. Program Accountant requested the same report for the years 2007-2009. . . . Using their professional judgment in light of the information contained in the Tenant Payments Report, Program Accountants adjusted the Claimant P&L as to the timing of revenue to reflect the periods the lease payments related to.”

This Panelist finds the method of reallocation in this matter was reasonable and within the discretion of the Settlement Program.

In light of the above, the denial of this Claim is upheld.