



INSURANCE COVERAGE

ALERT

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HOW BUSINESSES CAN MAXIMIZE AVAILABLE INSURANCE TO PAY FOR HURRICANE-RELATED LOSSES

Hurricane Katrina caused an estimated \$41 billion of losses. Many of the businesses that suffered those losses turned to their property and business interruption insurers for compensation. Not surprisingly, given the amounts at issue, many of those insurance claims resulted in hotly contested coverage battles (many of which remain ongoing). While the extent of the losses resulting from this year's hurricanes still is being tallied, current estimates place those losses in the billions of dollars. As with Katrina, insurance is going to be a critical resource for affected businesses seeking financial relief. To ensure that they obtain the full recoveries to which they are entitled, insureds should pay careful attention to the following lessons learned in connection with Katrina-related losses:

1. Protect Internal Conversations So That They Don't Come Back To Bite You

Property insurance policies can be long and complicated. They often contain unclear language that insurers attempt to use to their advantage to minimize coverage. Insurers frequently try to use against insureds the insureds' internal communications in e-mails, letters, and conversations that characterize losses or coverage questions. Thus, early on in the

process of loss investigation and adjustment, businesses should consult with internal risk managers *and* counsel to ensure that they understand the nuances of how their policies may apply to their claims. Most discussions with counsel are privileged and protected from disclosure. Thus, the involvement of counsel will allow insureds both to get legal opinions on the merits of the claim and to protect confidential communications regarding the claim from being released to their insurers.

2. Avoid Policy Traps That Can Gut Coverage

Property policies contain a number of procedural requirements that must be understood and carefully followed. For example, "notice" provisions generally require that an insured provide notice within a reasonable time after an insured event occurs. If an insured fails to do so, the insurer may be excused from its duties. Therefore, an insured should give notice as soon as practicable. Most policies also require that an

Because of the many variations in policy language, this alert does not address all of the issues. It also does not replace, and should not be relied on instead of, legal advice based on the specific policy language involved and an insured's particular situation. However, it does provide a starting point and is intended to be an aid in considering what sometimes is a maze of factual and legal issues regarding insurance. This alert may be considered advertising in some states.

insured provide a “proof of loss, signed and sworn to by the insured,” within a certain number of days after “inception” of the loss. It is not unusual for the effects of a hurricane and the resulting loss, particularly rebuilding efforts and time element losses, to continue well beyond the date specified for submitting a proof of loss. Therefore, insureds should calendar the earliest day for when the proof of loss is due and consider seeking an extension of the proof of loss date until some time after the claim is adjusted and both sides reach agreement on the amount of the claim. If the insurer will not agree to an extension, then the insured must keep careful track of the deadline for providing the proof of loss. If necessary, submit a proof of loss before the deadline that provides as much information as reasonably possible, while noting that the loss is continuing. Also important are more general duties (i) to “cooperate” in responding to insurer requests for information, such as relevant books and records and an opportunity to interview witnesses and employees, (ii) not to commit fraud or perjury, and (iii) not to release claims against other parties against whom the carrier may have a right of subrogation. Most courts require that the insurer prove that it has been prejudiced by any breach of the “cooperation” requirements in the policy.

3. Be Cautious If You Discuss Your Claim With Insurance Brokers And Forensic Accountants

After Katrina, many businesses turned to their insurance brokers and accounting firms for advice about how to handle and present their insurance claims. In that context, insureds had candid discussions about coverage issues,

relevant facts, and the evaluation of damages. However, in many states, communications between insureds and their brokers and accountants are not subject to the attorney-client privilege or treated as confidential. In the event that litigation takes place, insurers may be able to discover these communications and may attempt to use them to support their arguments against coverage. Thus, insureds should be careful about having unprotected detailed discussions with their brokers and accountants about how and whether their coverage may apply to current hurricane losses.

4. Don’t Overlook Less Obvious Coverages

All coverage starts with a comparison of what has been lost with what is covered under the policy. Immediately upon suffering a loss, an insured should review the policy to determine what categories of coverage may be available. The following are some of the categories of loss covered in a typical property policy: property damage, extra expense, accounts receivable, leasehold interest, rental value, royalties, demolition of buildings/structures, decontamination costs, fire extinguishing expenses, interruption by civil authority, and debris removal. In addition, many property policies cover “service interruption.” This coverage sometimes applies to lost profits because of damage to a “direct service provider’s property” located away from the insured’s premises. If “service providers” constitute “employees,” this coverage may kick in if employees cannot work because their homes were destroyed or damaged by the hurricane. In addition, most policies cover “contingent business interruption.” In other words, even if a company itself did not suffer hurricane-related damage, it still may have coverage for lost

profits if its business has been impacted because key suppliers or customers have suffered damage. Coverage also can be found in other places where it may not be obvious.

5. Document, Document, Document Actual Losses

Another battleground in the Katrina claims has been how to quantify how much insureds actually lost. Insureds should document all property damage and keep a detailed account of all costs incurred to repair or to replace property that has been damaged. In many cases, it is wise to use the resources of forensic accountants to document a business's losses. The costs of retaining such an accountant often are covered under the policy. Business interruption claims can be particularly difficult to quantify because they involve estimations and expectations. Insureds will have a better chance of recovery if they can present concrete evidence to substantiate prior sales and an inability to meet expected sales because of a hurricane. Therefore, insureds should do what is necessary to preserve historical sales data as soon as possible. Insureds also should carefully document all repairs and other financial hardship as a result of a hurricane.

6. Be Careful Not To "Short Change" Your Coverage When Measuring The Loss Amount

Insureds frequently measure their loss by comparing the income they would have generated without the hurricane to the income they actually generated. Under at least some policies this may result in a lower insurance recovery than the law permits. An insured may be entitled to measure its loss not based on what it would have made if there had been no

hurricane, but based on what it would have made if there had been increased demand for its goods or services after the hurricane and it had been able to conduct business after the hurricane. Indeed, at least one court has so held. In *Levitz Furniture Corp. v. Houston Casualty Co.*, the insured was closed after a flood and claimed that it was entitled to recover not only what it would have earned had there been no flood, but what it could have made had it been open because of the increased consumer demand for its products after the flood. The insurer argued that the insured was entitled only to be placed in the position that it would have been in with no flood—that is, "had there been no flood, there would have been neither damage to [the insured] nor increased consumer demand." The court disagreed, holding: "Business interruption loss earnings may include sales [the insured] would have made in the aftermath of the flood had it been open for business during that period."

7. Establish An Appropriate Working Relationship With Your Insurer

Insurers will seek supporting information from insureds in order to make payments on claims. However, insurers often extend out the information gathering process and, as a result, delay payment unreasonably. Striking the proper balance between legitimate requests for substantiation of a loss and endless demands for more information requires good faith activity on both sides and a working relationship whose goal is to close the claim with an agreed-upon adjustment. If each response to an insurer inquiry is met with additional inquiries, a red light should go off—the claim is in peril of not being resolved anytime soon. At that point, the insured should consider dispute resolution

methods that may expedite claim resolution with the insurer.

8. Don't Lose Your Right To Sue

Most property insurance policies have a contractual limitations provision—that is, a contract equivalent to a statute of limitations that states when a lawsuit against the insurer must be filed. Many policies require that any suit be filed within one year (sometimes two years) of ‘inception’ of the loss. These provisions typically are enforced. Some states do not count in this period the time from first notice to the insurer until the insurer conveys its coverage position. Some states permit parties to extend the period or waive the deadline. However, not all states permit extensions or waivers, so care must be taken. Additionally, it is not always clear what state’s law may govern this issue or how a policy is interpreted. Therefore, it is important not to assume that the law in the jurisdiction where the insurer is based or the loss occurs is the law that will control.

As insureds learned after Katrina, property policies may provide a wide range of coverage for hurricane-related losses. However, insureds should carefully navigate the policy provisions and claim processes to ensure that they obtain all of the coverage for which they have paid.

Dickstein Shapiro LLP

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