Insurance Coverage for Hurricane Sandy Losses

November 6, 2012

The devastating consequences of Hurricane Sandy to American families and businesses, particularly those in New York, New Jersey, and Connecticut, cannot be overstated. As those affected by the storm begin the process of rebuilding and returning to normalcy, their attention will undoubtedly turn to their insurance coverage. The following are some general observations that policyholders should consider when assessing their coverage.

There are several reasons why securing insurance coverage for this disaster may prove unusually challenging. Hurricane Sandy is likely to be the most costly hurricane ever, with preliminary estimates of insurable losses in the $5 billion range. This is due to the wide and intense impact of the storm, the fact that the areas hit are densely-populated and central to the nation's commercial activity, and the fact that so many airports and other critical hubs of transportation and commerce were affected. Moreover, the storm could not have come at a worse time for the insurance industry. Due to soft markets in recent years, insurers sold broader coverage at lower premiums in an effort to compete for business, and now will face claims well beyond their comfort zone, particularly on the heels of the other natural disasters and financial crises arising over the last 3-5 years. These factors will likely lead insurers to deny claims that ought to be paid, and to short-pay claims wherever they perceive an opportunity to do so. Policyholders will therefore need to be more aggressive than ever in pursuing their claims.

The most obvious source of insurance coverage for Hurricane Sandy is first-party property insurance, which provides coverage for damage to the policyholder's own property. In addition to providing coverage for physical damage to property itself, most commercial property policies also provide business interruption coverage, which reimburses the policyholder for lost income when its business is interrupted by loss of property due to a hurricane or similar peril.

Typically, one of the most challenging issues with respect to first-party claims is determining which peril(s) actually caused the property damage. In the case of Hurricane Sandy, damage or loss of property could have been caused by wind, rain, storm surge, flooding, power outages, or looting/vandalism, just to name a few. Depending on the wording of any given policy, each peril may be covered or excluded. Insurers are often quick to characterize the cause as a peril that is not covered, even in cases where more than one peril worked in conjunction to cause damage, or in cases where the facts are not yet known. In these cases it is essential to be vigilant and not accept insurers' self-serving characterizations at face value.

The first step to any insurance coverage analysis is to identify all the policies that might potentially apply. The following is a checklist of the types of policies to consider.

1. **First-Party Property** policies are typically included in any personal or commercial insurance program, and can go by a variety of names. Any policy with the term "Property" in its name, or with a title along the lines of Multiperil, Inland Marine, Boiler and Machinery, Fire, Equipment

Breakdown, or Flood are worth reviewing.

2. **Business Interruption** coverage, which is frequently imbedded within first-party property coverage, provides coverage for a policyholder's loss of business income sustained due to the necessary suspension of a policyholder's operations. Often, to obtain such coverage, physical damage to the insured's property or adjacent property due to a covered peril is must be shown. Restaurants, retailers, and other businesses that depend on walk-in customers for their revenue typically have an easier time proving their business interruption losses; in contrast, professional service providers such as law firms and accountants find the proof issues to be more challenging, since they typically find ways to meet their clients' needs in spite of natural disruptions. That said, all businesses that were forced to close due to the effects of Hurricane Sandy should review their policies and consider a claim.

3. **Contingent Business Interruption** provisions provide coverage for a policyholder's business interruption losses arising from property damage or other interruption to a policyholder's suppliers, customers, or other third-party businesses impacting the policyholder. This line of coverage allows businesses anywhere in the world, who perhaps did not contemplate that Hurricane Sandy would affect them, to make a claim to the extent that their own business was reduced in some way due to the effects of the hurricane on somebody else.

4. **Civil Authority** provisions, typically included in first-party property policies, provide coverage for a policyholder's business interruption losses resulting from orders of civil authority, such as evacuation orders, curfews, street closures, and the like, including airspace closures put in place by the FAA and similar authorities.

5. **Ingress/Egress** provisions, typically included in first-party property policies, provide coverage for a policyholder's business interruption losses incurred when access to and from the insured premises is severely curtailed or prevented.

6. **Extra Expense** provisions, also typically in first-party property policies, provide coverage for costs incurred by a policyholder to prevent, limit, or mitigate further loss by minimizing the disruption of normal operations.

7. **Third Party Policies** may come into play if another person or business alleges that storm-related property damage was caused, at least in part, by actions or negligence of the policyholder. For example, a tenant could claim that a landlord took inadequate measures to avoid or mitigate the damages caused by Hurricane Sandy, and on that basis seek to hold the landlord liable for its loss of property or personal injuries. In this instance, the landlord would look to its third-party insurance for coverage. Types of coverage that might apply include Commercial General Liability and similar liability forms, Errors and Omissions, and in the case of a privately held company, Directors' and Officers' Side C coverage.

Businesses should consider taking the following steps in order to maximize their chances of recovery for losses due to Hurricane Sandy:

1. **Collect all insurance policies**: As noted above, coverage may be available under several different types of policies, so all potentially relevant policies should be collected and analyzed.

2. **Document all damaged or lost property**: Prepare the most detailed ledger possible of all property that is damaged or lost, along with estimated costs to repair or replace each piece of

property.   Take as many photographs as possible of the property itself, and of the conditions that caused the damage. If access to the property is partially or entirely blocked, take photographs to document the blockage. Consider using video if doing so will better demonstrate the extent of the damage.

3. **Document lost income**: Use business records from prior days, months, and years to estimate your anticipated income during the affected days or weeks, controlling for seasonal variation or other factors that affect levels of business, and then compare to the actual income for the period in question.

4. **Give appropriate notices to insurance carriers**: Notice requirements are set forth in the policy and often vary from one policy to the next. Most, however, contain two basic requirements, which should not be confused with one another: (a) to provide notification that a loss has happened, and (b) to provide the insurer with a sworn "proof of loss." These two requirements are discussed further in points 5 and 6 below.

5. **Provide immediate notification that a loss has happened**: Most policies require that the first notice be provided "as soon as practicable," which is not defined in the policy, but which courts have defined as 30-60 days. However, whenever possible, it is good practice to give notice sooner in order to get the claim process moving promptly. Many policies contain specific instructions as to whether the notice needs to be in writing or whether it can be by telephone, the person(s) to whom notice must be given, and what information must be included in the initial notification. While failure to follow these requirements exactly is not necessarily fatal, it is good practice to do so in order to avoid nit-picky disputes. Usually notice to the broker who placed the policy is not sufficient, but rather the notice must go to the insurer itself. While there is not any specific wording that the notice must contain, the policy terms, conditions and exclusions should be reviewed closely, and extreme care should be given to the wording of the notice letter so that the loss is described in a way most likely to be covered.

6. **Provide a sworn proof of loss**: A sworn proof of loss, which typically must be submitted within 60 or 90 days of the loss, provides a detailed description of the property that was damaged and forms the basis for the claim. A thorough and detailed proof of loss increases the likelihood and the amount of recovery. The 60-90 day period for submitting a proof of loss can often be extended by written agreement.

7. **Expect an in-person inspection from an insurer representative**: Be as cooperative and courteous as possible to the insurer representative, but beware that the inspection serves a dual purpose. In addition to documenting the amount of the loss, the insurer representative is also gathering information regarding the cause(s) of the loss and other factors that might be used to deny the claim. It is important to think carefully about the questions asked and to consider having legal counsel present for an on-site inspection.

8. **Examination under oath**: Often an insurer will conduct a verbal examination of the policyholder under oath, much like a deposition in a civil lawsuit, as a supplement to the sworn proof of loss. It is not advisable to submit to such an examination without policyholder's counsel present.

9. **Be leery of lowball offers**: Insurers will frequently make early, low settlement offers in order to resolve a claim for less than its full value. Often such offers are traps, and they should be considered carefully.

10. **Understand the different types of adjusters who may become involved**: There are three types of adjusters: "company adjusters," who are employed by a particular insurance company, "independent adjusters," who are hired by insurers on a case-by-case basis to adjust claims on their behalf, and "public adjusters," who can be hired by policyholders to evaluate and pursue claims on their behalf. If an adjuster identifies him/herself as an "independent adjuster," do not be fooled into thinking that he or she is truly independent. Independent adjusters work for the insurance company and will try to reduce the claim if they can. A public adjuster can be hired by a policyholder, usually for a fee of 10-15% of the claim, to assist in preparing the proof of loss, answering the insurers' questions, and negotiating resolution of the claim with the insurer. A public adjuster cannot provide legal advice nor litigate on a client's behalf. If there is no dispute as to coverage and the only issue is the amount of the claim, and if the amount at stake is low enough that paying an hourly fee to a law firm would be disproportionate to the recovery, then a public adjuster may be a sensible alternative to retaining an insurance recovery attorney.

11. **Consult insurance coverage counsel to analyze the extent of coverage available under the policies**: For larger sized claims, and/or claims with disputed coverage issues, it is advisable to hire an insurance coverage attorney to analyze the claim, negotiate with the insurer, and, if necessary, file suit on your behalf. All insurance claims ultimately depend on the facts surrounding the loss, the policy language, and the applicable state's laws, and an experienced policyholders' attorney is in the best position to analyze these three variables in such a way as to maximize the potential recovery.