Hurricane Harvey: Five Key Insurance Considerations

Hurricane Harvey struck the Texas Gulf Coast with a liquid fist on August 25th, devastating the region, causing loss of life and severe and widespread destruction of property, and leaving tens of thousands dislocated.

While the human toll is and will remain incalculable, insurance can play a vital role in helping businesses and individuals recover financially from the storm. The extent of property damage and business disruption caused by what is now known to be the biggest rainstorm in the history of the continental United States will not be assessed in concrete dollar terms for some time, but estimates predict that the storm has caused at least $20 billion in losses in the Houston metropolitan area alone. Many businesses proximate to the storm's path remain shut down, and many others outside of the storm's physical reach have suffered losses resulting from the loss of supply of petroleum-based products and other supply chain disruptions.

As post-Harvey recovery efforts continue, Hurricane Irma–the most powerful Atlantic Ocean hurricane in recorded history–is fast-approaching Florida after destroying buildings and causing major flooding on several Caribbean islands.

Importantly, businesses may have valuable insurance for property damage and economic losses arising from storm related events and other natural disasters. Most business have insurance that covers, not just physical property damage, but also business interruption and income losses, including those incurred as a result of the actions of civil authorities (such as evacuations, mass transit suspensions and airport closures), and for extra expenses incurred to minimize or avoid business interruption. Even if a major storm event does not damage its *own* property, a business may have so-called "contingent" business interruption insurance for losses sustained because of damage to the property of third parties upon which the insured business relies to conduct business, including suppliers, customers and other business partners. Even businesses located in areas far outside of a storm's path likely have suffered losses that may be covered by insurance.

Businesses impacted by Hurricane Harvey and other natural disasters are advised to maximize insurance recoveries. Careful and proactive attention to insurance coverage considerations could be the key to restoring business operations and recouping losses.

Here are five key tips for preserving and maximizing insurance recovery.

1. **Identify Possible Coverage**

   As the aftermath of Hurricane Harvey or other major storm unfolds, it is important for impacted businesses to ensure that all potentially responsive insurance policies are identified, considered and evaluated as a potential source of recovery.

A common source of coverage for many businesses will be first-party commercial property insurance, which insures a business's own property and assets. This type of insurance generally covers "physical loss of or damage to" property that results from covered causes of loss. Covered causes of loss often specifically encompass storms such as Harvey. These types of commercial property policies may be in the form of broadly worded "all risk," "difference in conditions" or "inland marine" policies.

Most commercial property policies also provide so-called "time element" coverages, including "business interruption" coverage, which generally reimburses a business for its loss of income resulting from covered property damage, and "extra expense" coverage, which generally covers the business for extra expenses incurred to minimize or avoid insured losses.

Importantly, commercial property policies also typically provide so-called "contingent" business interruption coverage for lost revenue resulting from damage to the property of third parties upon which the insured business relies to conduct its own operations, such as an insured's suppliers, customers or other business partners. This coverage can be extremely valuable in the storm context, as supply and customer chains are often disrupted by hurricanes and other natural disasters.

Other first-party coverages to look for are "civil authority" coverage, which generally covers losses arising from an "action" or "order" of a civil authority that prevents or impairs access to the business premises, "ingress and egress" coverage, which also may provide coverage for business losses sustained when access to the insured's premises is prevented by an insured peril, "service interruption" coverage, which generally covers losses arising from the interruption of services to an insured property, and "claim preparation" coverage, which, as the name implies, generally covers the insured for the costs associated with effectively presenting an insurance claim.

Although first-party commercial property insurance is an obvious source of potential recovery, it is important to remember that many other types of insurance coverage may be available to cover storm-related losses. Coverage may be available, for example, under commercial generally liability policies, directors' and officers' liability insurance policies, pollution policies, and credit risk policies. In addition, many businesses may have specialty policies that are potentially responsive to particular situations.

A business also may have purchased coverage through the National Flood Insurance Program (NFIP). As with any other insurance policy, businesses should carefully review their NFIP coverage and consider potential coverage issues prior to submitting a claim. Insureds also are advised to consider whether Federal Emergency Management Agency assistance may be available to assist in the recovery efforts.

2. Consider the Facts and Potentially Applicable Law

The terms and conditions of insurance policies can and do vary significantly, and insureds are well advised to pay careful consideration to the policy language as the facts in the aftermath of Hurricane Harvey or other storm event crystallize, together with potentially applicable law, which can be outcome-determinative in a coverage dispute.

It is important to remember that insurance contracts are generally interpreted according to state law, and the various state courts diverge widely on issues surrounding insurance coverage.

By way of example, one legal issue that frequently arises in the storm context is that of causation. In the case of Hurricane Harvey and other storms, there may be multiple causes of loss, including the windstorm itself, high winds, tidal surges, floods, the actions of civil authority, and damage to the insured's property or to other property. Determining the cause of loss is important because policies may exclude or limit coverage (including through application of lower sublimits and/or higher deductibles) for certain causes of loss, but not others. By way of example, property policies often exclude "flood" or contain sublimits applicable to "flood" that are substantially lower than the otherwise applicable policy limits. Likewise, "named" windstorms such as Hurricane Harvey may be subject to higher self-insurance features.

The issue of causation features prominently in insurance disputes in the storm context, and courts have taken different approaches in determining the cause or causes of loss or damage. For example, some courts have adopted the "efficient proximate cause" doctrine, which generally affords insurance recovery where the covered risk was the "efficient proximate cause of the loss," whereas other courts have adopted the "concurrent causation" doctrine, which generally affords insurance recovery where two or more causes appreciably contribute to the loss and at least one of the causes is a covered risk. Very recently, on September 5, 2017, a New Jersey trial court ruled that a $100 million sublimit for flood losses did not apply to the New Jersey Transit Corporation's claim for coverage of Superstorm Sandy damage, granting the transportation system a major win in its $400 million dispute with its insurers. The court found that because the storm surge at issue was caused, not solely by the sublimited "flood" peril, but "by another independent peril, such as a named windstorm, then the flood sublimit w[ould] not apply."[1]

Businesses should also note that the insurance contract itself may contain broadly-worded anti-concurrent causation language, which purports to exclude or sublimit a loss if any part of the causal chain involves the excluded or limited peril, although such provisions may be held invalid.

The validity of any defenses or limitations to coverage raised by insurers — including policy exclusions — may also vary from state to state.

Until the governing law applicable to an insurance contract is established, the policy can be, in a figurative and yet a very real sense, a blank piece of paper. And the

[1] New Jersey Transit Corp. v. Certain Underwriters at Lloyd's London et al., No. ESX-L-006977-14 (N.J. Super. Ct. Sept.5. 2017).

different interpretations given the same language from one state to the next can mean the difference between a coverage victory and a loss. It is therefore critical to undertake a careful choice of law analysis before initiating coverage litigation in the event of a disputed claim, selecting a venue, or, where the insurer brings an action first, taking a choice of law position or deciding whether to challenge the insurer's selected forum.

3. Provide Notice and Comply with Other Policy Conditions

Insurance policies typically contain notification provisions stating that the insured business must provide notice within a certain time frame, often "as soon as practicable," even "immediately," after the business becomes aware of a loss. It is important for businesses to reasonably comply with notice provisions (and other policy conditions, including consent provisions) in order not to jeopardize, or delay, coverage.

Absent a compelling reason, notice should be provided under *all* policies that potentially provide coverage.

In addition to notice provisions, first-party policies typically require a sworn proof of loss summarizing the amount and extent of the damage or loss. An insured should consider requesting a written agreement extending the time for submission of a proof of loss (and potentially other policy conditions) depending on the nature of the loss.

Businesses also should be aware that insurance policies often include "suit limitation" provisions, which may provide that an action or suit to recover under the policies must be bought within a specified time (12 months, for example) after inception of a loss. Although these provisions may not be enforceable if shorter than the applicable statute of limitations, it is important that insureds take all appropriate steps to ensure that suits, if necessary, are filed in a timely fashion.

4. Carefully Document and Present the Claim

It is important for an insured business to carefully document its losses, as this is critical to evaluating coverage, valuing the insured loss, and maximizing overall insurance recovery. It is advisable for companies to keep complete and accurate records concerning all elements of loss, including lost sales and revenues, and extra expenses that have been incurred. In addition, it is advisable that accounting procedures be established to collect and maintain adequate supporting documentation for claimed losses. Proving losses, including business interruption and contingent business interruption losses, can be challenging. Complete and accurate records will facilitate the process.

In addition, given the complexities that may be involved in documenting and proving a loss, it is important to assemble a capable insurance recovery team. Retention of the services of a forensic accountant and other claim professionals, working with risk management, in-house legal and experienced insurance coverage counsel, is often advisable in formulating a claim – particularly a claim for business interruption coverage. And it is important to remember that certain claim preparation expenses may be covered under the insurance policy.

Early identification, characterization and presentation of loss information in light of potentially applicable insurance policy provisions and insurance coverage law can make a substantial difference in a policyholder's ultimate recovery.

In all cases, an insured should evaluate its loss information in light of the policy wording and applicable law, and present the claim to the insurer or insurers in a coverage-promoting manner.

5. Maximize Coverage Across the Entire Insurance Portfolio.

Although first-party commercial property insurance is an obvious place to look for coverage in the wake of a storm like Hurricane Harvey, businesses are advised to consider all potentially applicable insurance policies and coverages. The various types of insurance policies that may be triggered by a storm event carry different insurance limits, deductibles, retentions and other self-insurance features, together with various different and potentially conflicting provisions addressing, for example, other insurance, erosion of self-insurance and stacking of limits. For this reason, in addition to considering the scope of substantive coverage under an insured's different policies, it is important to carefully consider the best strategy for pursuing coverage in a manner that will most effectively and efficiently maximize the potentially available coverage across the insured's entire insurance portfolio.

Insurance is a valuable asset. Businesses that have suffered losses arising out of Hurricane Harvey may have substantial financial protection through their insurance policies. Businesses are advised to consider the scope of coverage under those policies carefully and maximize all insurance coverage that may be available.

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