PICKING UP THE PIECES: IMPORTANT INSURANCE COVERAGE CONSIDERATIONS FOR LOSSES CAUSED BY HURRICANE HARVEY

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Insurance Coverage Alert

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While the full extent of damages caused by Hurricane Harvey is unknown , a clearer picture of the disaster is starting to emerge. It is widely expected that the costs from Hurricane Harvey will exceed Hurricane Katrina and Hurricane Sandy, with some current estimates placing Hurricane Harvey's cost at $190 Billion.

As policyholders (and insurance carriers) begin evaluating how much of that amount is insured, policyholders will need to give careful consideration to a variety of issues such as direct damage or destruction of insured property; the interruption of their business that resulted from property damages; the interruption of their business that was caused by damage to the property of important suppliers, customers, and other business partners; extra expenses incurred to resume normal operations; lack of access to property due to damage to buildings, roads, docks, etc.; interrupted electric, gas, and water services; and other circumstances depending on the particular business involved.

It is essential that affected businesses review all relevant or potentially relevant insurance policies promptly, including excess-layer policies, and to comply with notification procedures. Affected businesses must also prepare and maintain detailed loss information. While there will be a variety of individualized issues that arise out of Harvey and depend on an insured's particular circumstances, below is a general overview of select issues that policyholders should consider.

IDENTIFYING POSSIBLE COVERAGE

A common source of responsive coverage for most businesses will be the first-party coverage insuring the assets of the insured entity. Such policies may be in the form of broadly worded "all risk," "difference in conditions," or "inland marine" first-party property policies. Most of these policies also provide so called "time element" coverages, including "business interruption" and "extra expense" coverages that cover loss resulting from the company's inability to conduct normal business operations. While there are standard insurance industry forms for the coverage, some insurers issue tailored policies to meet an insured's particular risk scenarios. Also, in many cases, this insurance is supplemented by specialty coverages applicable to specific situations.

Businesses should start by evaluating the following coverages:

Property Damage.

Commercial property insurance typically provides coverage for loss or damage to real and personal property. Insured property is often broadly defined, and in addition to providing coverage for real property, i.e., a building, it may include coverage for furniture and fixtures, machinery or equipment, newly acquired or constructed property, or property of third parties in the care, custody, or control of the insured.

Preventing or Mitigating Insured Loss.

Many coastal businesses took preventive measures before Harvey to minimize loss. Property policies commonly contain a provision that allows an insured to be reimbursed for costs and expenses in taking preventative measures.

Business Interruption.

Business interruption coverage generally covers an insured for lost revenue or earnings resulting from property damage caused by an insured peril. Generally, in order to trigger business interruption coverage, there must be a covered cause of loss that results in physical damage to insured property that also causes a suspension or interruption of operations resulting in loss of income.

Contingent Business Interruption.

Contingent business interruption provides coverage for losses as a result of damage to "dependent property," such as that of customers, suppliers, or other business partners, which renders that entity unable to conduct normal business operations. This coverage is not focused on whether an insured's own property is damaged, but, instead, looks to damage that occurred to a third-party location and resulted in the insured suffering economic losses.

Extra Expense.

Extra expense coverage may apply when an insured incurs expenses to minimize loss in an effort to resume normal operations.

Actions of Civil Authority.

Civil authority coverage can apply when a business suffers economic loss when an order of civil or military authorities prevents or limits access to the property. Similar to contingent business interruption coverage, civil authority coverage may apply even when there is no damage to an insured's own property. Some policies may require that there be damage to property of others surrounding the insured premises, while others may provide broader coverage for mandatory evacuations, curfews, or airport closures.

Lack of Access to Insured Premises.

Ingress and egress coverage is similar to civil authority coverage and may provide coverage for economic losses sustained when access to an insured's premises is blocked by a covered peril.

Service Interruption.

Service interruption coverage covers loss due to lack of incoming utilities.

Claim Preparation.

Claim preparation coverage generally provides coverage for the costs associated with compiling and certifying a claim.

Advance Payments.

Businesses often cannot afford a protracted adjustment period. Many policies expressly require that insurers pay losses as incurred while the full extent of the loss is being adjusted.

Flood Insurance.

Coverage for damage directly caused by flooding should be covered under an insured's flood insurance policies. Flood coverage may be included in a private insurance policy or through the National Flood Insurance Program.

PRESENTING A CLAIM

Most policies identify specific procedures to be followed in presenting a claim, and some of these procedures may have timing deadlines associated with them. Failure to comply with these procedures may give insurers a basis to attempt to deny an otherwise covered claim.

In addition to notification and claim submission procedures, policyholders should also consider how a claim is presented (for example, as a flood, service interruption, or civil authority claim). This can sometimes impact the ultimate recovery, particularly in the context of limits of liability and deductibles, which may be expressed to be "per occurrence" or "per loss."

Where policies have specific exclusions applicable to certain perils or circumstances, it is important the insured takes these into account when presenting its claim.
In all cases, an insured should promptly collect and document its loss information, evaluate the information in light of the policy wording and applicable law, and present it to the appropriate insurers in a timely and coverage-promoting manner.

ADVANCE PAYMENTS

Businesses often need insurance to resume normal business operations and cannot afford a protracted adjustment period. Indeed, an insurer's delay in making appropriate and periodic payments may cause an increase in the covered timeframe for business interruption and extra expense purposes. Importantly, many policies expressly require that insurers pay losses as incurred while the full extent of the loss is being adjusted.

COMMON INSURER RESPONSES

Faced with a large claim after Harvey, insurers may raise a number of potential limitations or restrictions on coverage. In our experience, some of the most common issues raised by insurers include the following:

Was the damage to insured property caused by an insured peril?

It is important to properly characterize the cause of loss as policies may exclude or limit coverage for certain causes. For example, many first-party policies are written on an "all risk" basis but may exclude or limit damage caused by flood. Courts have taken different approaches in evaluating coverage when a loss is concurrently caused by covered and noncovered events. State laws vary and causation issues can be, and often are, nuanced and complex.

Did an interruption of business result?

An insured may have a claim, depending on the circumstances, any time its income is adversely affected by an insured event. Insurers often take a narrow view of what constitutes an interruption.

Was the interruption necessary?

Insurers may argue that at least some part of the interruption or reduction in a policyholder's business was the result of a normal business decision by the policyholder, or the consequence of an economic downturn, and was not made necessary solely because of damage to insured property.

Does the loss meet any requirements the policy may have regarding duration of the interruption?

Some policies have language limiting coverage to interruptions that extend for longer than a specified period of time.

How long is the allowed recovery period?

Policies sometime include provisions specifying that it will only cover loss of income and related expenses for a specified period of time after an insured event occurs. Where this time is not specifically defined, it may be tied to the time it would take the insured, employing reasonable mitigation efforts, to resume normal business operations under the circumstances. In view of the magnitude of some natural disasters and the number of businesses affected, the length of time it will take to repair property and resume normal business operations may be longer than had the claim been an isolated event affecting a single facility.

How many occurrences are implicated by the alleged loss?

Many policies have a per-occurrence deductible or other self-insurance features that may reduce the amount of coverage available, depending on how the number of occurrences issue is addressed. This issue can also impact the amount of per-occurrence policy limits that may be available to the insured.

Did the interruption result from damage by an insured peril to property of the provider of the service?

In the case of a claim resulting from loss of income or extra expenses associated with loss of electrical power or other services, did the interruption result from damage by an insured peril to property of the provider of the service? Some policies purport to exclude business interruption coverage arising from interruptions in electrical service. Other policies have language explicitly promising business interruption coverage for losses arising out of service interruptions (including service interruption to suppliers of the insured) but purport to require that the interruption resulted from damage to property of the service provider. Policy language in this context varies considerably, and an insured must review carefully its own policy's wording to assess the availability of business interruption coverage arising out of the interruption of services.

EVALUATING AND CHALLENGING INSURER POSITIONS

The validity of any defenses or limitations to coverage raised by insurers may vary depending on the law governing the policy. Moreover, the applicability of defenses as to liability or valuation depends to a great extent on specific language used in the policy and the applicable law. Experienced insurance coverage counsel is often needed to assess the viability and strength of a policyholder's claim, in dealing with the insurers' loss adjusters, and in maximizing the policyholder's potential insurance recovery.