SEVERE WINTER STORM IN TEXAS: INSURANCE COVERAGE CONSIDERATIONS

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Insurance Recovery and Counseling Alert

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The winter storm that ravaged Texas this week has caused considerable damage and suffering, and it is predicted by some that it will to lead to the largest number of insurance claims resulting from a single event. For a state that is used to dealing with large-scale hurricane disasters, that is a remarkable prediction. For example, press reports estimate that Hurricane Harvey yielded US$19 billion in insurance claims. The Texas winter storm of 2021 has the potential to exceed that.

The damage caused by this extreme winter weather event, which has brought with it unprecedented amounts of ice, snow, and freezing temperatures; has been felt by communities, individuals, and businesses all across Texas; and has been compounded by widespread and prolonged power outages. Businesses will need to confront and address a wide range of losses including damage to property caused by collapsed roofs and burst water pipes, interruption of their business caused by the damage to their property, impeded access to property, and the loss of power and other public utility services, as well as extra expenses incurred to resume normal operations.

It is important that businesses impacted by this severe winter storm understand their insurance resources and take steps to protect and maximize any insurance recovery in the event that they make a claim. The storm will give rise to a variety of individualized losses, which will vary depending upon each insured business's particular circumstances. The following checklist provides a general overview of selected issues that may be relevant to the preservation and pursuit of insurance coverage for those losses.

IDENTIFYING POSSIBLE COVERAGE

The most common source of insurance coverage for businesses facing losses resulting from the crippling cold weather in Texas will be the commercial property insurance policy that insures the assets of the business. Although insurers issue such coverage under many different standard insurance industry policy forms, some insurers have issued tailored policies to meet a policyholder's particular risk scenarios. Evaluation of your specific policy language and the law applicable to your policy is critical.

Businesses may have first-party coverage that includes the following specific elements:

- "Property damage" coverage for damage to, or destruction of, any insured property resulting from an insured peril. Insured property is typically defined to include buildings and other structures, equipment, supplies, and other personal property. Typically, water damage caused by frozen/burst pipes or collapsed roofs would fit under this coverage.

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- "Business interruption" coverage, which generally covers the policyholder's loss of earnings or revenue resulting from property damage or loss caused by an insured peril. (The proper quantification of the loss under this coverage sometimes leads to disputes.)
- "Contingent business interruption" coverage, which generally covers the policyholder for losses, including lost earnings or revenue, as a result of damage to property of a supplier, customer, or some other business partner or entity that leads to that supplier or customer being unable to provide its goods/services to the policyholder or being unable to take the policyholder's goods/services. Notably, this coverage typically is written to apply even where the policyholder's own property has not been damaged.
- "Attraction property" coverage, which is a sub-category of contingent business interruption coverage that may apply where an insured business - such as a hotel or restaurant - suffers loss of income as a result of damage to a designated "attraction property," such as a nearby sports venue, theme park, or convention center.
- "Extra expense" coverage, which generally covers the policyholder for certain extra expenses that it incurs as a result of a loss event in order to resume normal operations to the extent possible and/or mitigate other losses.
- "Ingress and egress" coverage, which generally covers the policyholder when access to a business premises or location is prevented for a time, e.g., if the access roadway leading to the policyholder's business has collapsed.
- "Civil authority" coverage, which generally covers the policyholder for losses arising from an order of a governmental authority that interferes with normal business operations. Similar to contingent business interruption coverage, civil authority coverage may apply even when there is no damage to the policyholder's own property.
- "Service interruption" coverage, which generally covers the policyholder for losses related to electric or other power supply interruption. Often this coverage is written to require the outage to be the result of a damage event to the utility provider's equipment within a certain distance of the policyholder's property.
- "Advance payments" by the insurer may be expressly required under the terms of a commercial property policy, even if the full extent of the insured loss is still being investigated and adjusted. Such advance payments can be important where a business cannot afford a protracted adjustment period before receiving funds for repairs and to replace a lost stream of income.
- "Claim preparation" coverage, which generally covers the policyholder for the costs associated with compiling, supporting and certifying a claim.

COMMON INSURER RESPONSES

In light of the large number of claims certain to result from the ongoing Texas winter storm, and the tremendous overall value of those claims, insurers can be expected to raise a number of potential limitations or restrictions on coverage. Here are just a few of the common issues that may be raised by insurers:

- *“There was no covered business interruption.”* Insurers often take a narrow view of what constitutes a business interruption, sometimes arguing that a complete cessation of operations is necessary to support

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a claim. The insurer may also dispute the necessity or cause of the interruption. For example, the insurer may argue that at least some part of the interruption or reduction in an insured business was the result of an unrelated business decision by the policyholder, or the consequence of an economic downturn, and it was not caused solely by damaged to insured property as the result of the Texas winter storm.

- "*The claim involves multiple 'occurrences' under the policy, each of which is subject to a separate per-occurrence deductible*." Most 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. In particular, there may be disputes about whether the entirety of a business's loss was the result of a single storm event, or instead involved multiple weather patterns and freeze/thaw cycles that constitute multiple occurrences under the policy.
- "*Some of the property damage is of a type excluded under the policy, such as for 'flood'*." Although many businesses - particularly large commercial enterprises - have "all risk" policies that explicitly include some measure of coverage for "flood," many others do not. In the aftermath of some previous natural disasters, some insurers have taken strained positions in an attempt to characterize their policyholders' water-related damage as excluded "flood" related damage, even with respect to water damage to the interior of a building caused by a burst pipe.
- "*The claim is for losses beyond the allowed recovery period*." Policies sometime include provisions specifying that they only cover loss of income and related expenses for a specified period of time after an insured event occurs. If the policy does not define that period, it may be tied to the time it would take a policyholder, employing reasonable mitigation efforts, to resume normal business operations under the circumstances. In view of the magnitude of the losses in Texas and the number of properties affected, the length of time it will take to repair property and resume normal business operations may be longer than the length of time had the claim been from an isolated event affecting a single facility.

PRESENTING A CLAIM

Most policies include specific procedures describing how and when a claim must be presented and documented. Some of these procedures may have timing deadlines associated with them. Failure to timely comply with these procedures may give insurers a basis to attempt to deny an otherwise covered claim.

In addition, the manner in which a claim is presented by the policyholder to its insurer can have a significant impact on the ultimate recovery, particularly in the context of limits of liability and what deductibles or self-insured retentions apply. As a result, policyholders should be proactive in assembling an insurance recovery team, including working with accountants and claim professionals as well as insurance coverage counsel. At a minimum, a policyholder should consider the following common, potentially time-sensitive policy provisions:

- *Notice of Loss*. Most policies require the insurer be notified "as soon as practicable" or within a specified time period after learning of a claim, or sometimes even after learning of circumstances that may lead to a claim. Policyholders should be mindful of such deadlines and also should carefully evaluate whether they may have rights as an insured not only under the policy purchased directly by them, but also under some other policy. (For example, a property owner may have rights to insurance coverage under the policy issued to a business leasing space and operating on the property.)

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- *Proof of Loss*. Property policies generally require that a policyholder submit a sworn “proof of loss” summarizing the amount and extent of the damage or loss. The policy language may purport to require this proof of loss be submitted within a specified timeframe (e.g., 60 or 90 days), though it is not uncommon for insurers to agree to extend this deadline, if so requested. A policyholder 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.
- *Suit Limitation*. Policies often include a "suit limitation" provision, which provides that an action to recover under the policy is barred if not initiated within a certain timeframe (e.g., “within 12 months of the loss”). In some states, these provisions may not be enforceable if they provide for a period less than a statutory limitations period or other minimum amount of time, while in other states, they are enforceable. For example, Texas Civil Practice and Remedies Code Section 16.070(a) purports to set a two-year statutory limit, but businesses should consult counsel to determine what limitations period may be applicable to their claim.

CONCLUSION

Businesses that have suffered losses because of the Texas winter storm should not overlook the significant financial protection that may be provided through their insurance policies. Businesses should act carefully and proactively - now - to protect and help maximize their coverage. Experienced insurance coverage counsel is often needed to assess the viability and strength of a policyholder's claim, in dealing with an insurer's loss adjusters, and in maximizing the policyholder's potential insurance recovery. We have represented clients in dealing with claims arising from many types of natural disasters and perils, including storms, hurricanes, wildfires, floods, as well in other complex insurance claims for over 35 years. Our team is dedicated to assisting policyholders in assessing and prosecuting insurance coverage claims.

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