

MAXIMIZING INSURANCE RECOVERY FOR THE TIANJIN PORT EXPLOSIONS

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Insurance Coverage Alert

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On Wednesday, August 12, 2015, two massive explosions devastated large swaths of Tianjin, China, an industrial powerhouse and home to one of the world's busiest ports. The explosions, which reportedly have killed more than a hundred people, left hundreds more injured, and devastated large areas of the city over several kilometers, originated from a warehouse operated by Rui Hai International Logistics Co. Ltd., a company specializing in the handling of dangerous chemicals. The immediate area surrounding the blasts included industrial facilities and staging areas for international shipping via the nearby port of Tianjin.

In contrast to the human toll surrounding the catastrophe, much of the property devastation and business interruption loss suffered on account of the explosions is measurable and will be insured. Potentially impacted businesses may have insurance for property damage losses and income losses resulting from business interruption, for example, as well as for extra expenses incurred to minimize or avoid business interruption. On August 18, Fitch Ratings estimated insured losses from the disaster as potentially exceeding \$1.5 billion. Even if the explosions did not damage their own property, many businesses will have sustained losses because of damage to the property of others, including important suppliers, customers, and other business partners, damage to infrastructure, transit interruption, power outages, interrupted gas and water services, and/or disruption of various other forms of production and support systems. Indeed, owing to Tianjin's status as one of the most trafficked ports in the world, a cascade of cargo delays and supply chain disruptions are likely to cause potentially covered losses to companies far and wide.

Companies adversely affected by the disaster in Tianjin are encouraged to be proactive in pursuing insurance coverage. Careful attention to insurance coverage considerations could be the key to restoring business operations and recouping losses. Businesses are therefore advised to carefully assess and document losses and promptly review all potentially applicable insurance policies, including excess-layer and umbrella policies. Proactive identification of potentially applicable insurance and careful presentation of loss information in light of controlling insurance law will help maximize coverage and the eventual recovery of losses. Additionally, because insurance policies typically contain notice and reporting requirements, businesses are encouraged to act quickly to identify potentially applicable coverages and provide notice of their claims.

IDENTIFYING POSSIBLE COVERAGE

A key first step for impacted businesses is to carefully evaluate all potentially responsive insurance policies as potential sources of recovery. When attempting to identify potentially relevant types of coverage, it is important to remember that the insurance instruments containing these coverages may take a variety of different forms and may be differently termed. Where a company has a global insurance program, moreover, it is important to check

the company's "master" policy, which can include difference-in-conditions and difference-in-limits clauses to plug any gaps in the coverage provided by the relevant "local" policy.

First-Party Property and Business Interruption

Most businesses have insurance that responds to losses suffered to the policyholder's own property or profits. These policies cover both tangible property (e.g., equipment and inventory) and intangible property (e.g., lost revenue). Property insurance policies generally contain at least three basic types of coverage:

- **Property damage coverage.** Property insurance typically covers "physical loss of or damage to" insured property resulting from a covered cause of loss. "Insured property" often is broadly defined by the policy or applicable law. In addition to the insured's building or structure, policies typically expressly cover "business personal property" such as furniture and fixtures, machinery and equipment, and stock and leased property. Policies also typically provide coverage for unscheduled "newly acquired or constructed" property and the property of third parties that is in the insured's "care, custody or control." As to the cause of loss, a business may have "all risk" coverage, which broadly covers all causes of loss that are not expressly excluded. Alternatively, the business may have "named peril" coverage, which covers against loss caused by various listed "perils" or causes of loss. By way of example, the standard-form Insurance Services Organization (ISO) "Standard Property Policy," which is a "named peril" type of policy, includes "Explosion" as among the "Covered Causes of Loss." See ISO Form CP 00 99 06 07 (2007).
- **Business interruption coverage.** A policy covering property damage also typically reimburses the insured for its loss of earnings or revenue resulting from such damage. For example, the ISO "Business Income (and Extra Expense) Coverage Form" covers the loss of net profit and operating expenses that the insured "sustain[s] due to the necessary 'suspension' of [the insured's] 'operations' during the 'period of restoration.'" ISO Form CP 00 30 06 07 (2007).
- **Extra expense coverage.** A policy covering property damage and business interruption typically covers the insured for extra expenses incurred to minimize or avoid business interruption and in order to resume normal operations. By way of example, the ISO standard form covers, among other things, "Extra Expense" to "[a]void or minimize the 'suspension' of business and to continue operations at the described premises or at replacement premises or temporary locations" ISO Form CP 00 30 06 07. The form defines "Extra Expense" as "necessary expenses" that the insured "would not have incurred if there had been no direct physical loss or damage to property caused by or resulting from a Covered Cause of Loss." ISO Form CP 00 30 06 07 (2007).
- **Advance Payments.** Businesses often need insurance to resume normal business operations and thus cannot afford a protracted adjustment period. 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.

The insurance instruments containing these types of coverages may take a variety of different forms. These policies generally are referred to as "property" or "first party" insurance policies, but also come under other names, such as "all risk," "inland marine," "difference in conditions," "multiperil," or "fire" insurance policies.

Business Interruption and Extra Expense Coverage May Be Available Without Physical Loss or Damage to the Insured's Own Property

Although business interruption and extra expense insurance coverages may be tied to losses and costs incurred because of damage to or destruction of the insured's own property, insured businesses may have coverage for business interruption and extra expense because of events that cause damage to third-party property. Some of the types of potentially applicable coverages in circumstances where interruption is caused by physical damage to property other than insured property include the following:

- **Contingent Business Interruption.** A policy including this coverage generally protects the insured with respect to losses, including lost earnings or revenue, as a result of damage, not to the insured's own property, but to the property of an insured's supplier, customer, or some other business partner or entity, which damage renders that entity unable to conduct normal business operations. A business may have coverage, for example, if it suffers lost earnings or extra expense because a supplier of materials or transportation was impacted by the explosions.
- **Contingent extra expense coverage.** This coverage is designed to pay for an insured's increased costs incurred to minimize or avoid a contingent business interruption claim.
- **Ingress/Egress coverage.** Ingress/Egress coverage generally covers business interruption caused by physical loss or damage to third-party property where the loss or damage prevents or hinders ingress to or egress from the insureds' business.
- **Civil Authority coverage.** Often listed as an "additional coverage" in property insurance policies, civil authority coverage is generally designed to cover an insured for business interruption losses incurred as a result of an order or directive by a civil or military authority, made as a result of property damage, which prevents access to the insured's place of business.
- **Service Interruption coverage.** Service interruption coverage provides coverage for business interruption attributable to the disruption of electric, telecommunication, and other critical services.
- **Claim preparation coverage.** This coverage generally is designed to cover an insured for the costs associated with compiling and certifying a claim.

These coverages, which are found in many property insurance policies, may play a key role for businesses that have been spared physical loss or damage, but that nonetheless are affected by third-party property damage.

Other Potential Coverage

In addition to first-party property and business income loss coverages, many businesses will have other potentially relevant insurance coverage, including commercial general liability insurance and other types of insurance. Some potentially relevant policies and provisions may be somewhat obscure and tailored to the risks of a particular industry or company. Thus, it is important for an insured to ensure that all potentially responsive insurance policies, including excess and umbrella policies, are considered and evaluated as potential sources of recovery.

PRESENTING A CLAIM

The manner in which a claim is presented may have a significant impact upon the insured's ultimate recovery. Policies may have various exclusions, sublimits, or deductibles depending on the particular peril causing the loss. The manner in which the insured characterizes a loss and presents its claim may impact upon whether these limiting features of the policy are applied to its claim. 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 accordingly.

Most policies identify specific procedures that should be followed in presenting and pursuing a claim and usually incorporate time deadlines and other requirements. These provisions usually include the following:

- **Proof of Loss.** Property policies generally require a sworn proof of loss summarizing the amount and extent of the damage or loss. For example, the ISO standard form states that the insured must "[s]end us a signed, sworn proof of loss containing the information we request to investigate the claim. You must do this within 60 days after our request." ISO Form CP 00 30 06 07 (2007). 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.
- **Notice of Loss or Occurrence.** Policies may require the insured to notify the insurance company "immediately," "as soon as practicable," or within a specified period after the insured becomes aware of circumstances that may lead to a claim.
- **Suit Limitation.** Policies may include "suit limitation" provisions, which may provide that an action or suit to recover under the policies must be brought within a specified time after inception of 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.

Failure to comply with these time-sensitive procedural requirements, insurers will argue, may invalidate an otherwise covered claim. Careful advance attention to these requirements is therefore recommended. In addition, virtually all policies contain general "cooperation" provisions obligating the insured to cooperate with the insurer in its investigation of the loss.

CONCLUSION

Insurance is a valuable asset. Businesses affected by the Tianjin disaster may have substantial financial protection through their insurance policies. Businesses are advised to carefully consider the scope of coverage under those policies and act promptly to recover all insurance coverage that may be available. Experienced insurance coverage counsel can assist an insured in identifying coverage, assessing the viability and strength of a potential claim, and maximizing the company's potential insurance recovery.

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