

Client Alert

Insurance Coverage & Recovery Practice Group

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How to Maximize Your Insurance Recovery for Property Damage, Business Interruption, and Supply Chain Losses After “Historic” Winter Storms Impact the United States

Last week businesses and communities throughout the United States experienced the fifth in a series of major winter storms since the beginning of 2014. Four separate stretches of winter weather affected the United States in January, bringing heavy snowfall, sleet, freezing rain, ice, gusty winds, and bitterly cold Arctic air to the Southeast, Northeast, Midwest, and Ohio Valley.¹ The January winter storms took more than 50 lives, and preliminary forecasts predict direct economic losses of approximately \$3.5 billion and insured losses of more than \$1.6 billion.² The most recent February storm brought “catastrophic” snow and ice of “historical proportions” to the Southeast and heavy snowfall to cities in the Northeast along the Interstate 95 corridor, from Virginia to Maine. More than 600,000 businesses and homes across the country lost power, and more than 15,000 flights were canceled last week alone.³ Governors in Georgia, Louisiana, North Carolina, South Carolina, Alabama, Mississippi, Virginia, and Maryland declared states of emergency, and the federal government also declared a state of emergency in Georgia.⁴

The current winter weather season has already become the costliest year for winter weather peril in the United States since 2011.⁵ U.S. airlines have canceled more than 75,000 domestic flights since December 1, 2013 (the most in more than 25 years),⁶ hundreds of thousands of homes and businesses have lost power, and the winter storms have resulted in widespread property damage including collapsed buildings, frozen pipes bursting, downed tree limbs and power lines, and hundreds of traffic accidents.⁷ Companies also have sustained business interruption losses due to severe travel and transportation delays and business closings.⁸ These losses have aggregated into direct economic losses in the billions of dollars.⁹

If your business was impacted by this year’s winter storms, your commercial insurance policies may be a valuable asset to recover losses resulting from property damage, business interruption, or supply chain disruption caused by the storms. As outlined below, early communications with your insurers and careful procedures for documenting your losses are critical to maximizing your business’s ultimate recovery.

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Key Insurance Coverages for Winter Storm Losses Include:

Business Interruption (BI) Insurance. Covers lost profits that a business would have earned but for the interruption of business caused by physical damage to, or loss of use of, property covered by the policy.

Contingent Business Interruption (CBI) Insurance. Even if your business did not experience direct property damage, your property policy may provide CBI coverage for economic losses arising from supply chain disruptions, such as an inability to acquire parts or services from your suppliers or an inability to deliver your products or services to customers.

Service Interruption Coverage. Covers any loss or expense caused by interruption of utility services resulting from damage to a utility's property.

Civil Authority Coverage. Protects businesses from losses resulting from a government order restricting access to a business's property or closing airports, roadways, bridges, or ports.

Extra Expense Coverage. Covers expenses necessary to resume normal business operations and mitigate losses.

Ingress/Egress Coverage. Pays for loss of business income caused by physical damage to property of others that prevents ingress/egress to your business.

Even if your company is unsure of the full extent of its losses, it is vital to promptly locate all available insurance policies, assess the potential coverages available, and promptly notify the insurers to maximize the recovery available under your company's insurance program.

Coverage Issues to Consider Before Making a Claim:

Policy Exclusions and Proximate Causation Issues. Commercial property policies typically cover "all risks" or specified "named perils" that are not otherwise excluded. Exclusions generally target specific causes of loss. Flood, corrosion, latent defect, wear & tear, ice, and leak-from-frozen-pipe exclusions are some key exclusions insurers can be expected to assert for winter storm losses relating to snow and ice damage. While businesses must focus first on recovery efforts after winter storms, it is also important to identify the covered, non-excluded cause of your loss as soon as possible to avoid unwittingly providing your insurer unjustified grounds to deny your claim. As we have observed over and over again after catastrophic events like Hurricane Sandy, the 2011 Japanese earthquake and tsunami, and Gulf Coast hurricanes, insurers will contest the cause of loss in any claim that arguably involves more than one cause of loss to minimize their exposure. These causation issues may be particularly important for winter storm claims since policies generally provide coverage for windstorm damage, but exclude coverage for damage from water that may occur after the storm has passed. Anti-concurrent causation exclusions in commercial property policies are increasingly common. Further, the law continues to develop in response to recent disasters and varies across jurisdictions, so it is critical to understand causation issues as you prepare a claim and communicate with your insurer.

Sub-Limits, Deductibles, and the "Named Storm" Trap. Most policies contain varying sub-limits and self-insured retentions depending on the cause of the loss. It is important to understand these limitations before making a claim. For example, some named-peril policies contain specific "Named Windstorm" or "Hurricane" coverage in addition to usual coverage for high winds. Such policies often contain sub-limits and deductibles for these perils that limit the amount of coverage available. Historically, winter storms have not been "named" like hurricanes and other windstorms. In recent years, however, The Weather Channel (not the National Weather Service) has begun "naming" what it considers significant winter weather storms. The Weather Channel's new practice has created a minor uproar in the meteorological community over the practice of "naming" winter storms, which may have more to do with ratings than science. In any event, policyholders should resist any effort by insurers to apply a "Named Windstorm" deductible or exclusion to a winter storm.

Multiple Occurrences vs. Single Occurrences. Insurance policies typically provide for a deductible for each “occurrence” that results in a loss, as well as a per-occurrence limit below the total aggregate limit of the policy. Because the recent winter storms affected an extremely wide portion of the Southeast, Northeast, Midwest, and Ohio Valley, many businesses incurred damage to more than one facility in different locations, often times as a result of different weather-related events. Consequently, the resulting losses may be considered one occurrence (*i.e.*, one storm) or multiple occurrences (*i.e.*, numerous locations separately damaged, or damaged by multiple storms) depending on the specific facts involved. Businesses should consult with coverage counsel before making a claim in anticipation of disputes over the number of occurrences to maximize coverage in view of the specific deductibles and per-occurrence limits of the policy.

Loss Valuation Issues. Many policies contain information about how losses should be accounted (*i.e.*, replacement cost value, functional replacement cost value, or actual cash value), which can have a dramatic impact on the value of an insured loss. It is important to understand these provisions before making a claim, and for complicated losses, it may be advisable to seek the advice of a forensic accountant before submitting a proof of loss.

Building Code Issues. When rebuilding/refurbishing properties after a disaster, businesses generally must comply with building code regulations currently in force, which may be more onerous than code requirements in place when a building was originally constructed. Some policies will cover additional costs to bring a property up to current code regulations, while others will not.

Avoiding Pitfalls That Can Diminish or Prevent Your Insurance Recovery:

The following is a summary of essential steps that your business should take to maximize the value of its insurance assets following a winter storm.

Gather All Policies and Closely Review Their Terms. Do not assume your winter storm losses are uninsured. As policy terms vary and may be subject to different interpretations, consult with coverage counsel to assist in evaluating coverage.

Provide Prompt Notice of All Claims and Potential Claims. Policies often require policyholders to notify the insurer “immediately,” “as soon as possible,” or “as soon as practicable” after the insured becomes aware of a potential claim. The consequences of failure to comply with notice provisions may be severe and preclude coverage. Even if your business is uncertain whether it has sustained losses as a result of the recent winter storms, it should notify its insurers of any possible losses out of an abundance of caution.

Collect and Preserve Evidence of Business Losses and Damages. It is important to record all costs, expenses, and damages for which you might seek coverage. If your business sustained direct property damage, take photos and videos of property damage and business interruptions to the extent possible and retain damaged property and equipment. To ensure full coverage under BI and CBI insurance for lost profits, businesses should document their losses by maintaining proof of business performance prior to, during, and following the recent winter storms. Many policies also provide coverage for debris removal after a storm, as well as the expenses associated with claim-related activities. All such expenses should be tracked.

Be Careful About Internal and External Communications Regarding the Loss. Businesses should be careful when communicating with brokers and insurers concerning winter storm losses. If litigation over insurance coverage becomes necessary, insurers may gain access to internal communications such as emails and memoranda regarding a business’s coverage claim. How a loss is characterized in such communications may be used to deny coverage. Involving coverage counsel in these communications may ensure that they are protected as privileged in the event of litigation over coverage. Businesses also should identify a single point of contact or spokesperson for all communications with insurers.

Coordinate Mitigation Efforts With Insurer. While it is important to mitigate losses, keeping your insurer in the loop about these efforts where possible will minimize the chance that the insurer will apply hind-sight to second-guess the reasonableness of the mitigation procedures that a business puts in place.

Review Your Business's Insurance Program to Ensure Natural Disaster Coverage is Adequate. Even if your business was not impacted by the recent winter storms, the greater frequency and severity of recent natural disasters, coupled with the increased potential for localized natural disasters to disrupt supply chains in today's globalized economy, increase the likelihood that your business may incur significant natural disaster losses in the future. To minimize the risk of future losses and to avoid gaps in coverage, all businesses should carefully review their insurance programs with experienced brokers and legal counsel to ensure coverages are adequate in the event of a catastrophic loss.

Engage Coverage Counsel. Claims from storm events such as the recent winter storms are complex and may contain potential coverage defeating traps. Experienced coverage counsel is critical and will work with your brokers to ensure that you can maximize the insurance recovery for your loss.

We work closely with our clients and their risk managers to collect from their insurers for losses arising from property damage, business interruption, and supply chain disruption caused by catastrophic events, including a recent \$15.5 million recovery for typhoon losses in the Philippines, and a \$54 million recovery for Hurricane Ike losses in Texas.



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This alert provides a general summary of recent legal developments. It is not intended to be and should not be relied upon as legal advice.

¹ January 2014 Global Catastrophe Recap, Aon Benefield Impact Forecasting, Feb. 6, 2014, at 3–4, <http://goo.gl/2mkONh>.

² *Id.*

³ Brian K. Sullivan, *Winter Storm Moves Into U.S. Northeast With Heavy Snow*, BLOOMBERG (Feb. 13, 2014), <http://goo.gl/CVhDMW>.

⁴ Brian K. Sullivan and Andrew Reiersen, *'Historic' Storm Ices Atlanta as Northeast Faces Snow*, BLOOMBERG (Feb. 12, 2014), <http://goo.gl/16aEt7>; Valerie Bauerlein, Mara Gay, and Cameron McWhirter, *Winter Storm Swings Into the Northeast U.S.*, THE WALL STREET JOURNAL (Feb. 13, 2014), <http://goo.gl/WblCcs>.

⁵ *January Cold, Snow in U.S. to Cost Insurers \$1.6 Billion*: Aon, CARRIER MANAGEMENT (Feb. 6, 2014), <http://goo.gl/UEb3E8>.

⁶ The Associated Press, *Canceled! Airlines Scrap Record Number of Flights*, N.Y. TIMES (Feb. 14, 2014), <http://goo.gl/HmF8iH>.

⁷ January 2014 Global Catastrophe Recap, Aon Benefield Impact Forecasting, Feb. 6, 2014, at 4, <http://goo.gl/2mkONh>.

⁸ *Id.*

⁹ *January Cold, Snow in U.S. to Cost Insurers \$1.6 Billion*: Aon, CARRIER MANAGEMENT (Feb. 6, 2014), <http://goo.gl/UEb3E8>.