King & Spalding

Client Alert

Insurance Coverage & Recovery Practice Group

November 9, 2012

How to Maximize Your Insurance Recovery for Property Damage, Business Interruption, and Supply Chain Losses After Superstorm Sandy

It has now been over a week since Superstorm Sandy decimated the northeastern United States. Major rail, trucking, and shipping portals of the Port Authority of New York and New Jersey were incapacitated for nearly a week, disrupting global trade and supply chains. Businesses in lower Manhattan and elsewhere in the region sustained significant wind and flood damage and have been unable to complete damage assessments or restore business operations due to widespread power interruptions. Travel and hospitality businesses also have been devastated by property damage, airport closures, and canceled flights. With the massive concentration of critical financial, manufacturing, and distribution assets in the region, the disaster may have ripple effects in the form of plant closures, supply chain disruptions, and lost revenue streams around the world.

Estimates suggest that Sandy may have caused up to $20 billion in insured property damage and business income losses in the New York/New Jersey area alone, making the storm one of the most costly disasters in U.S. history.

Whether your business was directly hit by Sandy or is located thousands of miles from the disaster zone and did not suffer any property damage, 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 storm. As outlined below, your early communications with insurers and procedures for documenting the losses can have a great impact on your ultimate recovery.

Key Insurance Coverages for Sandy Losses Include:

<u>Business Interruption (BI) Insurance</u>. 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.

<u>Contingent Business Interruption (CBI) Insurance</u>. 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.

For more information, contact:

Meghan H. Magruder
+1 404 572 2615
mmagruder@kslaw.com

Anthony P. Tatum
+1 404 572 3519
ttatum@kslaw.com

Shelby S. Guilbert
+1 404 572 4697
sguilbert@kslaw.com

Robert D. Stonebraker
+1 404 572 3536
rstonebraker@kslaw.com

King & Spalding
Atlanta
1180 Peachtree Street, NE
Atlanta, Georgia 30309-3521
Tel: +1 404 572 4600
Fax: +1 404 572 5100

www.kslaw.com

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 Navigate Before Making a Claim:

Policy Exclusions and Proximate Causation Issues. Property policies typically cover "all risks" or specified "named perils" that are not otherwise excluded. Exclusions generally target specific causes of loss. Flood, mold, bacteria, and pollution exclusions are some key exclusions insurers can be expected to assert for Sandy losses. It is critical to carefully identify the covered, non-excluded cause of loss from the beginning to avoid unwittingly providing the carrier unjustified grounds to deny your claim. As we have seen repeatedly after disasters like 9/11, Hurricane Katrina, and the 2011 Japanese earthquake and tsunami, causation issues will be hotly contested in any claim that arguably involves more than one cause of loss (*i.e.*, wind and flood, or flood and mold). The law on proximate causation and the enforceability of anti-concurrent causation exclusions continues to develop in response to recent disasters and varies across jurisdictions, so it is critical to understand these issues as you prepare a claim and communicate with your insurer.

Sub-Limits and Deductibles. Most policies contain varying sublimits 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. In policies containing "Hurricane" coverage, it is important to note that Sandy was at sub-hurricane strength when it reached shore, so that sub-limit or deductible should not apply.

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 Sandy damaged an extremely wide area, many businesses incurred damage to more than one facility in different locations. Consequently, the resulting losses potentially 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.*, actual cash value, replacement cost value, or functional replacement cost 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. Furthermore, 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.

Key Early Steps to Avoid Mishaps That Can Diminish or Prevent Your Insurance Recovery:

When making a claim following a natural disaster, businesses should promptly and proactively assess and document their losses, evaluate their insurance coverage, and act to comply with any contractual conditions that are necessary to obtain coverage. The following is a summary of some essential steps that your business should take to maximize the value of its insurance assets following a natural disaster.

Gather All Policies and Closely Review Their Terms. If your business has not done so already, it should immediately gather and review all potentially applicable insurance policies. 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 frequently require that an insured notify the insurer "immediately," "as soon as possible," or "as soon as practicable" after the insured becomes aware of a potential claim. The effect of failure to provide notice in accordance with the policy terms varies among jurisdictions, but the consequences of failure to comply with notice provisions may be severe and preclude coverage. Property policies also often contain deadlines for providing a "sworn proof of loss" documenting the causes and value of the loss. It is important to know these deadlines from the outset and to seek extensions if necessary. Internal tracking systems should be put in place to make sure deadlines are not missed. Insurers often are willing to toll the deadlines for reporting a claim, particularly in the wake of a fluid situation like a large-scale natural disaster. Therefore, even if your business is uncertain whether it has sustained losses as a result of Sandy, 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 disaster. Many policies also provide coverage for the expenses associated with such claim-related activities. All such expenses should be tracked.

Be Careful About Internal and External Communications Regarding the Loss. Businesses should be careful about what they say about insurance coverage in internal and external communications with brokers and insurers. If litigation over insurance coverage becomes necessary, insurers may gain access to internal communications such as emails and memoranda regarding a business's claims for insurance. How the 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, it also is important to communicate with insurers regarding such efforts when possible. This 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 Sandy, 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. At the same time, insurers may respond to the recent record property and casualty losses by quietly including endorsements with stricter policy terms at upcoming renewals, which could create unexpected gaps in coverage. 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 Sandy 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 $54 million recovery for Hurricane Ike losses in Texas.

Celebrating more than 125 years of service, King & Spalding is an international law firm that represents a broad array of clients, including half of the Fortune Global 100, with 800 lawyers in 17 offices in the United States, Europe, the Middle East and Asia. The firm has handled matters in over 160 countries on six continents and is consistently recognized for the results it obtains, uncompromising commitment to quality and dedication to understanding the business and culture of its clients. More information is available at www.kslaw.com.

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.