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INSURANCE RECOVERY FOR SUPERSTORM SANDY LOSSES: WHAT POLICYHOLDERS NEED TO KNOW

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In the wake of Superstorm Sandy, many businesses and organizations have incurred a wide range of significant losses and damages. A large portion of those damages and losses will be covered by insurance.

However, accessing coverage will be complicated because, in many instances, policyholders will need to pursue claims under more than one insurance policy – and sometimes pursue coverage under a policy that was not even issued to their company. In addition, quantifying the **amount** of the loss and determining the **cause** of the damage will be complex exercises that may have a substantial impact on the overall recovery obtained.

Insurance companies are already well versed in the nuances of the insurance policies that they sold to their policyholders and have an army of well-trained claims handlers to evaluate and adjust claims. Insureds are playing catch-up in the midst of responding to the many crises that have arisen in the aftermath of Sandy. In order to receive the maximum return on the premium investment made in their insurance policies, policyholders need the assistance of experienced coverage counsel and a team of experts to properly investigate and present their claims to their insurance companies.

In the near term, policyholders must proceed in a deliberate and organized manner to assemble all potentially available insurance coverage and then observe best practices to document their losses. This article provides an overview of the steps that policyholders should be taking in the coming days to begin the recovery process and assemble the most complete package of information for their claim submissions.

First, most policyholders will look to their first-party property and business interruption insurance for coverage of Sandy losses. These policies come in a variety of shapes and sizes, but most property policies these days are written on a broad “All Risk” basis, which covers all loss and damage to the property unless a specific exclusion applies. Please note, however, that some property policies may be written on a “Named Peril” basis, which provides coverage only if one of the particular perils insured against – e.g., fire, flood, hurricane – is the cause of the loss. Both types of property policies require physical damage to property insured by the policy in order to trigger coverage. Therefore, it is crucially important for policyholders to know how their property coverage grant is written and to tailor their claims submissions to fit within the specific terms and conditions of their individual policies.

Most property policies also provide business interruption coverage, which is a blanket term for various types of coverage for losses that flow from covered property damage. Common business interruption coverages include lost profits, lost opportunities, extra expenses, logistics, and loss mitigation. Importantly, though, in order to trigger business interruption coverage, the loss must result from an **insured** loss under the policy.

Again, the scope of business interruption coverage conferred varies from policy to policy and may be subject to several different sub-limits, depending on the nature of the loss incurred. There may be waiting periods associated with some of the time element coverage conferred. In addition, coverage disputes may arise with respect to the “Restoration Period,” i.e., when a company’s business has been sufficiently restored such that it may resume “normal” business operations. Following a wide-scale catastrophe of Sandy’s size and scope, identifying the appropriate (and most advantageous) business interruption coverage to apply can be extremely complex and fact-sensitive. Accordingly, it is important to understand the scope of coverage

provided and develop an accounting of the losses incurred based on the available coverage.

Policyholders must also be careful not to overlook the availability of contingent business interruption coverage. This coverage may apply even if the policyholder itself did not sustain any direct physical losses. Contingent business interruption will be available to policyholders whose major suppliers suffered a loss and are unable to continue delivery to the policyholder. Please note, however, that contingent business interruption requires the supplier to have suffered a loss or type of peril that is covered by the policyholder's policy.

Second, it is important for policyholders to evaluate their **entire** coverage program to identify the insurance policies that have been triggered by the damages and losses suffered as a result of the storm. In addition to the first-party property and business interruption policies discussed above, likely sources of insurance recovery may include the following types of policies:

- Flood
- Commercial General Liability
- Cyber-Liability
- Professional Liability
- Directors & Officers Liability
- Pollution Legal Liability
- Inland Marine
- OCIP – specific to construction industry
- Policies under which additional insured coverage has been conferred or received

Note that federal and state assistance may be available for losses not otherwise compensated by insurance coverage or other recoveries for

certain types of business concerns. In particular, hospitals, educational institutions, and other organizations that serve public functions should carefully evaluate whether they may be eligible for loans, grants, and other resources that may be made available through FEMA and similar agencies.

Third, upon assessing each type of loss suffered, policyholders should **provide immediate notice** to all insurers whose policies may **even potentially** apply to a loss. Lack of notice can eliminate coverage; therefore, it is always safer to provide precautionary notice rather than forfeiting coverage. In addition, getting an insurance company involved in the claims adjustment process early on helps to avoid coverage defenses later, when an insurer may claim that the policyholder incurred costs without the insurance company's knowledge or consent. When in doubt, provide notice. If an insurance policy is not triggered by the loss, the insurer will not be shy in so informing the policyholder, and in the case of a valid declination, no further action will need to be taken.

Fourth, before charging forward with submitting information about their claims, policyholders must give careful consideration to the cause of each loss that has been incurred. Superstorm Sandy caused damages in a variety of ways – flood, storm surge, sewer backup, wind, fire, debris, etc. Policyholders must be careful to evaluate each loss on an individual basis and conduct a separate causation analysis for each loss. This is so because many policies offering first-party property coverage and business interruption coverage are subject to specific sub-limits based on the type of loss incurred. Therefore, it is not safe for policyholders to assume that their

\$25 million aggregate limit on a policy is available for all of the losses that they have incurred if the policy offers only \$2 million in coverage for flood and/or wind-related claims. Insurers invariably try to shoehorn losses into categories with lower sub-limits; policyholders should know their policies intimately and be prepared to argue facts that lead to a different conclusion.

Fifth, policyholders must pay careful attention to how they document their losses. For example, the initial notice letter should **not** specify a cause of loss unless there is no question as to how the loss occurred. As noted above, taking an early, and potentially incorrect, position on the cause of a loss may directly impact whether coverage is available and/or whether a sub-limit applies. Therefore, a broad form of notice is preferred and details concerning the claim may be provided later, after all facts have been developed and considered.

To the greatest extent possible, policyholders should keep damaged property and preserve the area of loss to allow for reasonable inspection by the insurance company. Policyholders should take photographs and videos, and be sure to keep accurate records of the costs incurred to remove and dispose of the damaged property. Policyholders will also be well served to get the insurer's explicit permission before discarding damaged property or altering the condition of damaged real property.

With respect to business interruption-related losses, policyholders should begin assembling as much accounting-related information to support their claims as possible. The services of a forensic accountant may be needed to accurately and completely quantify the losses incurred. In that regard,

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policyholders should carefully review their policies to determine whether the fees incurred by accountants and other professionals (though not lawyers or public adjusters) to quantify and document the loss may also be recovered under the policy.

Sixth, immediately following a loss, and both before and after notice is given, policyholders must take appropriate steps to protect persons and property from further injury and damage. The cost of such measures is almost always covered and a “failure to mitigate” the loss may result in a subsequent reduction in coverage.

Seventh, policyholders must familiarize themselves with the details of making a sworn proof of loss. Many policies require submission of such a proof of loss within a limited number of days, sometimes keyed off of the date of loss and other times triggered by the insurance company’s request for the document. Policyholders must pay attention to those deadlines and secure extensions from the insurance company if additional time is needed.

Likewise, many policies contain “limitation of action” provisions that shorten the statute of limitations applicable to a claim under the policy, and courts generally enforce such provisions. If a coverage dispute is brewing, policyholders should seek a tolling agreement – insurers rarely refuse, because they recognize that the alternative is to be sued immediately.

Finally, policyholders must remain mindful of, and diligent in protecting, applicable privileges and immunities. Many policyholders are currently in close and constant contact with their insurance brokers. However, it is important to remember that brokers are not an agent for policyholders and they do not share a privileged relationship with policyholders. Therefore, policyholders should not provide insurance brokers with privileged and confidential information related to their claims – especially communications shared between policyholders and their coverage counsel. Likewise, policyholders should consider engaging all their professionals on a formal basis as soon

as it appears that coverage litigation with the insurance company may be imminent. Taking this step will facilitate the free flow of information and allow policyholders to evaluate claims without inadvertently waiving privileges that are designed to protect them.

Recovering from Superstorm Sandy will be a lengthy, difficult, and expensive process. Patience, diligence, and careful documentation will be the keys to a successful insurance recovery. The Lowenstein Sandler Insurance Coverage Group is prepared to assist corporate policyholders through the process to negotiate reasonable and fair resolutions.

Please contact either of the attorneys listed for further information:

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