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## Preserving and Maximizing Insurance Claims in the Aftermath of Superstorm Sandy

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*Superstorm Sandy has caused immense damage to the East Coast, with losses estimated in the tens of billions. Those affected face significant challenges as they begin the process of recovering from severe flood and wind damage, utility outages, impaired access, disrupted supply and customer chains, and extended business interruption. As companies turn to their insurance carriers for assistance, we offer this guidance, gleaned from our experience in representing corporate policyholders on their insurance coverage claims arising from scores of natural disasters.*

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Superstorm Sandy -- the freakish result of a massive tropical storm colliding with a cold mass that turned the storm inland -- has caused unprecedented damage to coastal areas lying in its destructive path, from North Carolina to Connecticut, and inland up to the Great Lakes. The storm caused enormous tidal surges that have inundated Lower Manhattan, flooded New York airports, and damaged railroads and other public transportation infrastructure critical to businesses up and down the coast. At the same time, the storm blanketed mountain areas to the west, from Virginia to Pennsylvania, with several feet of snow. In New York, the deluge flooded subways and tunnels, shorted out electrical systems supplying a variety of businesses, from telecom providers to internet services, leaving a corrosive moisture that could require weeks if not months to repair. As business and property owners take stock of their losses, plan their response, and examine their insurance policies, numerous questions will arise. To help address some of the inevitable issues, and to assist with the initial insurance claim process, we have prepared this guidance for our clients. We will likely issue a supplemental Advisory in the coming weeks in response to future developments.

### **Obtain and Evaluate Policies**

To begin with, it is crucial to obtain, review and evaluate all potentially applicable insurance policies for coverage. Understanding your rights and obligations requires a thorough review of the policies to determine what coverages may apply. Property insurance is the most obvious source of coverage, but do

not overlook auto policies, marine cargo policies, pollution policies, and for those facing potential third-party claims, liability policies.

### **Place All Insurers on Notice**

Notifying each insurer of losses as soon as possible is one of the most important steps to preserving potential insurance rights. Most insurance policies include express instructions for providing notice to the insurer. These instructions should be followed meticulously. Notice is generally provided through the insurance broker, but it is important to verify that the notice is accurate and sent to the correct parties. Even if you have not yet identified all of your losses, or determined conclusively that a policy might respond, make sure to notify all insurers that may provide coverage, including excess and quota share participants on your property program.

### **Document Your Losses**

Properly documenting the loss or damage to property is crucial. This includes not only property that was damaged during the storm, but also any property rendered unusable in the days following the storm -- for example, inventory exposed to moisture. Aside from emergency repairs, it is important to document the damage with photographic evidence before undertaking any restoration activities. Establish separate accounts to track losses, including any extra expenses, professional fees, mitigation and clean-up costs, and other expenses associated with the storm and the recovery period. Keep a log of all actions taken. Save all repair receipts and other records of additional expenses made necessary by storm-related damage.

### **Engage Experts**

It is usually prudent to engage professional claim consultants, such as forensic accountants, particularly where there is business interruption loss. Additional experts may be needed to model the unique financial aspects of your business. Their professional fees and other mitigation expenses are frequently covered under property policies, subject to sub-limits. Usually, public adjuster fees are not covered. It is also a good idea to retain an experienced insurance coverage lawyer, not just when you need an advocate, but to help you protect the privileged nature of your communications and to avoid many of the traps for the unwary when presenting your insurance claim. Counsel may work in the background, without revealing their involvement to carriers. Carriers usually do the same thing. Cooperate with the insurance company adjuster, but don't forget they work for your insurer, not for you. If you need an advocate, hire your own.

### **Follow the Policy to Preserve the Claim**

After the initial notice of loss, most property policies also require that the insured later submit a sworn "proof of loss" to catalogue the damages. Although this is usually done after reaching agreement with the insurer on the amount of the insured claim, occasionally, policies require the proof of loss to be submitted within a fairly short time after the event. Insurers are usually amenable to extending these deadlines if requested, but make sure that any extensions are memorialized in writing. In addition to notice and proof of loss, insureds must also preserve and protect the property from further losses, including taking any and all steps necessary to mitigate (or minimize) additional damage, including business interruption. Because such steps are required to be taken, the mitigation expenses are covered under property insurance policies. For example, if a building is flooded, the policy requires the insured to take necessary steps to dry out flooded areas; and, accordingly, provides reimbursement of such mitigation expense, subject to certain

limits. Lastly, the insurer may have salvage rights to damaged property and stock, so it is important to preserve any salvageable property to the extent possible.

### Assess all Possible Coverages

With respect to storm-related damages, “first-party” policies such as commercial property policies are the ones most likely to provide coverage for an insured’s own losses. Although residential policies frequently exclude flood loss, flood may be covered under commercial policies. Even when flood is not an insured peril, there may be coverage when another, covered cause (such as wind or power outage) contributes to or ensues from the loss, as in a fire caused by a flood-related transformer explosion. In addition to providing coverage for physical damage to an insured’s property, many commercial property policies also include coverage for losses due to the interruption of the insured’s normal business activity due to damage to utilities, customers, suppliers, infrastructure and other critical, or dependent, properties. These extended coverages may apply, even if the insured’s own property was not physically damaged. For example, depending on policy wording, damage to certain suppliers or customers may result in covered “contingent business interruption” losses. In the case of Sandy, this may be critical to businesses whose supply and customer chains are disrupted as a result of the severe damage to and closure of railroads and other transportation infrastructure. Similarly, disruption in of power and other utilities may trigger losses insured by service interruption coverage. As well, curfews, prohibitions against entry and physical obstructions to roads may trigger civil authority or loss of ingress/egress coverage. A thorough review of the insuring provisions is critical to determine whether, and the extent to which, such coverage may apply.

### Review Relevant Lease Provisions

Whether you are a landlord or tenant, casualty losses typically raise challenging issues relating to leased property. The first named insured may be responsible for notifying insurers and adjusting the claim, but the other party – be it landlord or tenant – also has rights, which may be just as significant. Careful review of lease and policy terms should include determining: what procedures to follow in the event of casualty loss; which party is insured for loss to tenant improvements; which party determines whether to repair or replace damaged property; what coverages are available for loss of income, including lost rents; what happens in event of a “total loss,” such as when the property cannot be restored for occupancy within the period specified in the lease’s casualty clause; whether coverage is available for temporary replacement facilities; and what are the applicable waiting periods and deductibles under the policy and the lease? Unfortunately, there are no “standard” answers to these questions, and understanding the parties’ respective rights and the applicable procedures from day “one” often makes a difference.

This guidance is prepared to help put your company on the right path towards maximizing the available insurance coverage that can be used to offset losses from Sandy and rebuild for the future.

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If you have any questions about the content of this advisory, please contact the Pillsbury attorney with whom you regularly work, or the authors below.

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