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Practice Group:

Insurance Coverage

*Construction &
Engineering*

Superstorm Sandy: Are You Covered?

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Perennial hurricanes and typhoons, isolated but powerful tornados, earthquakes, and floods—the question is not whether, but where and when policyholders will confront the next natural disaster. In all of these circumstances, careful and proactive attention to insurance coverage considerations could be the key to restoring business operations and weathering the financial storm that inevitably follows the natural one. These considerations are particularly important when policyholders confront a storm such as Superstorm Sandy, which devastated the U.S. Mid-Atlantic region on October 29 and 30, 2012.

Losses will arise not only from the direct damage or destruction of insured property, but also from the interruption of business resulting from that property damage, business interruption caused by damage to the property of important suppliers, customers and other business partners, extra expenses incurred to resume normal operations, lack of access to property due to damage to buildings, roads, docks, etc., interrupted electric, gas and water services, and other circumstances depending on the particular business involved.

The business losses will take many forms, and businesses affected should, where possible, seek to maximize insurance recoveries.

When presenting an insurance claim, it is important that the policy provisions should be considered against the backdrop of potentially applicable insurance coverage law to ensure that the policyholder is taking the steps necessary to maximize coverage.

It is vital for affected businesses to review all relevant or potentially relevant insurance policies promptly, including excess-layer policies, and to comply with notification procedures. Affected businesses must also prepare and maintain detailed loss information.

Of course, there are likely to be a variety of issues that arise out of flood- and wind-related claims depending on an insured's individual circumstances. The following checklist provides a general overview of selected issues that may be relevant to such claims:

Identifying Possible Coverage

The most common source of responsive coverage for most businesses is likely to be the first-party coverage insuring the assets of the insured entity. Such policies may be in the form of broadly worded “all risk,” “difference in conditions” or “inland marine” first-party property policies. In many cases, this insurance is supplemented by specialty coverages applicable to specific situations. While there are standard insurance industry forms for the coverage, some insurers have issued tailored policies to meet an insured's particular risk scenarios. Evaluation of specific policy language by reference to relevant law is critical.

Businesses may have first-party coverage that includes the following specific elements:

- “property damage” coverage with respect to any property that may be classified as “insured property,” a term that often is broadly defined by the policy or applicable law;

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- “business interruption” coverage, which generally covers the insured’s loss of earnings or revenue resulting from property damage caused by an insured peril, but often leads to significant disputes regarding the proper quantification of the insured loss;
- “contingent business interruption” coverage, which generally covers the insured with respect to losses, including lost earnings or revenue as a result of damage to property of a supplier, customer or some other business partner or entity;
- “extra expense” coverage, which generally covers the insured for certain extra expenses incurred by the insured as a result of an insured event and in order to resume normal operations and mitigate other losses;
- “ingress and egress” coverage, which generally covers the insured when access to a business premises or location is blocked for a time;
- “civil authority” coverage, which generally covers the insured for losses arising from an order of a governmental authority that interferes with normal business operations;
- “service interruption” coverage, which generally covers the insured for losses related to electric or other power supply interruption;
- “defense” coverage, which may cover the insured for defense costs incurred with respect to claims alleging that the insured is responsible for damage to covered property of others; and
- “claim preparation” coverage, which generally covers the insured for the costs associated with compiling and certifying a claim.

Presenting a Claim

Most policies identify specific procedures to be followed in presenting a claim, and some of these procedures may have timing deadlines associated with them. Failure to comply with these procedures and time limits may give insurers a basis to attempt to deny a claim otherwise covered under the policy.

In addition to notification and claim submission procedures, consideration also should be given to the manner in which a claim is presented (for example, as a flood, service interruption or civil authority claim). This can sometimes have an impact on the ultimate recovery, particularly in the context of limits of liability and deductibles, which may be expressed to be “per occurrence” or “per loss.” The presentation of the claim could affect the number of deductibles applied or the amount of the limits available.

Where policies have specific exclusions applicable to certain perils or circumstances, it is important the insured also take these into account when presenting its claim.

In all cases, an insured should promptly collect and document its loss information, evaluate the information in light of the policy wording and applicable law, and present it to the appropriate insurers in a timely and coverage-promoting manner.

Advance Payments

Businesses often need insurance to resume normal business operations and thus cannot afford a protracted adjustment period. Indeed, 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.

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Importantly, many policies expressly require that insurers pay losses as incurred while the full extent of the loss is being adjusted.

Common Insurer Responses

Faced with a large property damage or business interruption claim, insurers may raise a number of potential limitations or restrictions on coverage. In our experience, some of the most common issues raised by insurers include the following:

Was the damage to insured property caused by an “insured peril”? For example, many first-party policies are written on an “all risk” basis but may have exclusions or limitations for damage caused by “flood.” A proper analysis of the policy wording is vital if insurers are seeking to avoid coverage based on alleged exclusionary wording.

Did the alleged loss of income or extra expense arise out of damage to “insured property”? The specific wording of the policy language will be important here and some policies may include coverage when a supplier, customer or other entity has incurred property damage that results in an interruption to the insured’s business. Such coverage is sometimes known as “contingent business interruption” coverage. There may also be arguments for coverage where business was disrupted by circumstances created by inaccessible ports, roads and closed airports.

Did an “interruption” of business result? An insured may have a claim, depending on the circumstances, any time its income is adversely affected by an insured event. Insurers often seek to take a narrow view of what constitutes an “interruption.”

Was the interruption necessary? Insurers may argue that at least some part of the interruption or reduction in a policyholder’s business was the result of a normal business decision by the policyholder, or the consequence of an economic downturn, and was not made “necessary” solely because of damage to insured property.

Does the loss meet any requirements the policy may have regarding duration of the interruption? Some policies have language limiting coverage to interruptions that extend for longer than a specified period of time.

How long is the allowed “recovery period”? Policies sometimes include provisions specifying that the policy will only cover loss of income and related expenses for a specified period of time after an insured event occurs. Where this time is not specifically defined, it may be tied to the time it would take the insured, employing reasonable mitigation efforts, to resume normal business operations under the circumstances. In view of the magnitude of the floods and the number of businesses affected, the length of time it will take to repair property and resume normal business operations may be longer than had the claim been an isolated event affecting a single facility.

How many “occurrences” are implicated by the alleged loss? Many policies have “per occurrence” deductible or other self-insurance features that may reduce the amount of coverage available, depending on how the “number of occurrences” issue is addressed. This issue can also impact the amount of per-occurrence policy limits that may be available to the insured.

In the case of a claim resulting from loss of income or extra expenses associated with loss of electrical power or other services, did the interruption result from damage by an insured peril to property of the provider of the service? Some policies purport to exclude business interruption coverage arising from interruptions in electrical service. Other policies have language explicitly promising business interruption coverage for losses arising out of service interruptions (including service interruption to suppliers of the insured) but purport to require that the interruption resulted

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from damage to property of the service provider. Policy language in this context varies considerably, and an insured must review carefully its own policy wordings to assess the availability of business interruption coverage arising out of the interruption of services.

Evaluating and Challenging Insurer Positions

The validity of any defenses or limitations to coverage raised by insurers may vary depending on whether the policy is governed by the laws of the United States, the United Kingdom, Bermuda or another jurisdiction.

Moreover, the applicability of defenses as to liability or valuation depends to a great extent on specific language used in the policy and the applicable law.

Experienced insurance coverage counsel may be able to assist an insured in assessing the viability and strength of its potential claim, in dealing with the insurers' loss adjusters and in maximizing the insured's potential insurance recovery.

K&L Gates has one of the world's largest insurance coverage practice groups, which acts exclusively for policyholders in insurance coverage disputes. K&L Gates has acted for many businesses in their dealings with their insurers regarding claims arising from hurricanes, floods and other natural disasters.

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