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OUTSIDE PERSPECTIVES

Insurance Recoveries For The Gulf Oil Disaster

MANY BUSINESSES HAVE ALREADY been adversely affected by the massive oil slick in the Gulf of Mexico, and many more will be soon as the contamination intensifies and spreads. Much of that damage will be in the form of lost revenues, as resorts, fishing companies, ports, industries and other businesses are unable to use the Gulf's waters or attract customers to seaside areas. Of course, ultimately the responsibility for those losses rests with BP, which has agreed to place $20 billion in an independently administered fund to pay claims, as well as with its partners, and to a lesser extent with other companies that own, operated and/or built the doomed deep water oil well and platform. BP is making payments on claims submitted to it, but the press is full of reports that the claimants are dissatisfied, and dozens of lawsuits have already been filed. Thus, in all likelihood, it will take years, or even decades, to resolve those claims, and given the massive extent of the damage, BP and other responsible parties may be unable to pay all of the damages they will face. Therefore, every business affected by this disaster should look to its first party property insurance policies and determine whether it has coverage for not only any property damage it suffers, but for lost profits as well.


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Business Interruption Coverage

Most property insurance policies pay for losses of business income resulting from damage to covered property. This is often referred to as business interruption insurance. Many also provide so-called contingent business interruption coverage for losses stemming from damage to the property of a supplier or customer. Both types of insurance require, as a predicate to coverage, that there be damage to property, and that the loss of profits resulted from that damage. The property damage requirement might preclude coverage for businesses in the Gulf areas which suffer losses simply because an offshore oil slick is scaring tourists away, because the Gulf waters are not the property of the policyholder or its customers or suppliers. However, many businesses will be able to meet the property damage requirement if oil reaches their beaches, docks or industrial facilities, or fouls their boats or other equipment. Also, companies which have licenses to use the Gulf waters and seabed for fishing, oil and gas exploration and extraction, or for other purposes, may be able to establish coverage for contingent business interruption caused by damage to the property of a "supplier," i.e., the government entity which has licensed its business activities in the Gulf. For example, fishing companies that have business licenses to fish in certain waters may well be able to argue that property in which they have an insurable interest has been damaged.

Order of Civil Authority Coverage

Coverage might also be provided for some companies under their insurance for business interruption resulting from orders of civil authority which prevent access to their property. An example of such an order was the Mayor of New Orleans' order to evacuate the city as a result of Hurricane Katrina. Like business interruption insurance, order of civil authorities coverage typically is tied to damage to property, though it can be anyone's property, not just that of the policyholder or its suppliers or customers. It is likely that many thorny issues will arise over coverage for business interruption caused by advisories against swimming, fishing and boating in contaminated areas.

Coverage Exclusions

If the requirements for business interruption or order of civil authority coverage can be met, policyholders may still have to contend with exclusions in their insurance policies. Perhaps most problematic will be so-called pollution exclusions. Many such exclusions are broadly worded, and clearly include oil spills in certain circumstances. However, many pollution exclusions contain an exception for contamination which results from a "hostile fire." A very good argument can be made that the current disaster resulted from a hostile fire, but undoubtedly that issue will be contested by insurance companies.

Pursuing Coverage

Pursuing insurance claims can be a long, arduous and frustrating ordeal. To minimize the time and hassle, and to maximize the chances of achieving a full recovery, policyholders should follow the following basic tips:

1. Establish A Settlement Deadline.

Force the insurance company to focus upon your claim by deciding upon a reasonable deadline, and telling the carrier that a settlement must be reached by that date. Insurance companies pay claims when they feel compelled to, not based upon the quality of the relationship between the adjuster and the policyholder.

2. Document Everything!

Keep a written record of everything that transpires with respect to the claim in correspondence to the insurance company. This may deter dilatory claims handling by putting the insurer on notice that its actions – or inaction – are being preserved for a possible bad faith claim later on.

3. Assemble A "Recovery" Team

Assemble a claim team with all of the skills needed to maximize the recovery. The insurance company has a team of attorneys, accountants and in-house claims personnel who are working hard to minimize the payment of your claim, through coverage defenses and the calculation of the loss. The policyholder's knowledge of its own business goes a long way to leveling the playing field, but there are many arcane coverage issues and claims adjustment practices which require special expertise in loss adjusting and contract interpretation. Also, a professional evaluation of your claim may reveal that it is more valuable than you think.

4. Be Aware of Claims Filing Deadlines

Be mindful of all deadlines imposed under the insurance policy. Many policies limit the time in which suit may be brought against the insurer. Also, many policies impose time limitations upon the policyholder's replacement of damaged property in order to recover full replacement cost. If those deadlines are not met, the policyholder may be limited to a recovery based upon the actual cash value of the damaged property, which is the cost of replacing the item less depreciation.

5. Claim Losses Resulting from Dilatory Handling of the Claim

Do not be shy about claiming losses that result from an insurance company's dilatory handling of the claim. Under Louisiana law, and that of other states, the period of restoration for a business interruption loss may be extended by the insurer's untimely payment of the property loss. The insurance company may also be liable for consequential damages flowing from its breach by failing to make timely payments. Those damages might include lost profits or extra expenses that exceed the limits of coverage, and lost value of the enterprise if it could not resume operations because the insurance company improperly withheld, or delayed, payment.

Conclusion

A key to getting insurance claims satisfactorily resolved is for the policyholders to take control of the process to the extent possible and to demonstrate a resolve to secure the coverage they paid for.

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