Property Insurance and Disaster Recovery After Sandy

by Joshua Gold and Lawrence Bartelemucci

As the devastation wrought by Superstorm Sandy brought home, natural disasters can imperil even the most rock-solid businesses and the survival of a business often hinges on how quickly and completely it is able to recover from such a catastrophe. Since no region of the world is immune, assembling a team to implement a disaster recovery plan is invaluable to any business. While generally no single disaster recovery approach will be right for every business, individual or governmental unit, below are some insurance and property considerations to help ensure prompt action and increase the likelihood of a quick recovery once disaster occurs.

Insurance Concerns

The vast majority of businesses purchase commercial property insurance. Depending upon the type of coverage bought, this insurance can cover storm-related loss or damage to insured property, time element losses, research and development, public relations costs, claim adjustment expenses, loss mitigation efforts and many other items. To both preserve and maximize this coverage, develop a checklist of certain action items to address with your property insurance companies (including your excess insurance companies) after a loss occurs:

Notice: Provide timely notices of claim to all insurance companies.

Proofs of loss: Schedule and meet deadlines to file proofs or statements of loss. If the proof of loss deadline appears unrealistic given the scale of the damage, be proactive and get extensions (in writing) in advance of the looming deadline. If there is not enough time to do so, file a partial proof of loss reserving the right to amend/supplement the proof.

Sub-limits: Analyze your insurance coverage to determine what coverages are triggered and whether you are subject to any sub-limits (insurance policies are not always clear on the issues of sub-limits, concurrent losses and overlapping coverage).

Suit limitation: If your policy contains a suit limitation clause (and almost all do), this date must be conservatively calendared, no matter how friendly your local underwriter seems to be while handling your claim in the early stages.

Election of valuation method: Check your insurance policy to see if there is any deadline on the date by which the insurance policy seeks to have you elect the valuation method for the loss claimed.

Time requirements to rebuild or replace: Similar to the point above, see if there is a deadline by which policy seeks to have the rebuilding or replacement of the affected property completed.

Preservation of evidence: Sort out in writing how evidence is to be preserved if destructive testing or immediate remedial work needs to be undertaken. Note also that many policies provide coverage for debris removal.

Loss mitigation: Address in writing the loss mitigation steps you intend to take. If there is no time to do this in advance, then address it in writing soon thereafter, memorializing the urgent conditions that required you to act immediately.

Demands for partial payments: Some policies have express provisions requiring the insurance company to make partial payments or claim advances. Invoke these clauses so that cash flow issues are ameliorated. Some insurance companies will also provide cash advances if simply requested.

Property Considerations

The plan for getting your loss adjusted and paid should also consider (both before a loss and most certainly after) issues that are specific to your property needs:

Is your space worth rehabilitating? If it is, then your company will need to contract for design and construction services to rehabilitate the current space or rebuild on site. If the space that will be rehabilitated is leased, your company needs to coordinate its efforts with the landlord.

If it is not worth rehabilitating, then your company must consider how it will dispose of the space (for example, selling the property or cancelling the lease), and how it will acquire new permanent space. In addition, your company will need to contract for design and construction services for its new space. This process should involve a zoning analysis to ensure that your company can build what it needs and conduct its operations at the new location.

If you do choose to relocate, FEMA's Hazard Mitigation Grant Program (HMGP) may prove to be a valuable resource. The HMGP marshals a mix of federal and other funds to buy the damaged property, demolish it and return the land to its natural state. The property owner (business or individual) must apply through its municipality, which buys the property and applies for federal funds. To qualify, the property must be located in a flood plain, and the cost to repair or replace must exceed 50% of fair market value.

How will you operate on a current basis? Whether or not your company relocates, it will likely need to lease temporary space to resume current operations. It may also need to rent space to store saved or salvageable equipment and inventory.

Do your telecommunications leasing and services require changes? Both existing and any new contracts should be tailored to your operations and the realities of the space within which you will conduct business. In addition, current agreements should be reviewed for applicable termination or transfer provisions, as well as potential cancellation penalties.

Will the recovery require financing? The recovery may require financing — be it an acquisition loan, line of credit to continue operations, advance of insurance proceeds or construction loan to fund the rehabilitation or new construction. The different means available for acquiring such financing should be considered.

Will you need special consideration from existing creditors? If so, it may be vital to reach out proactively, perhaps with the help of a restructuring professional, who can calculate projected revenue and cash flow, map out obligations to creditors, and begin negotiations, taking into account the likely time needed to restore the business to pre-disaster strength, the sums reasonably expected from insurance recovery and other variables.

What are the tax consequences? Depending upon what a business plans or ends up opting to do after a loss, tax consequences may arise. A tax analysis should factor into the ultimate decisions made about repairing/replacing the damaged property, or even abandoning the property and opting for a new property for conducting business. Attention should be paid to your property insurance as it may specifically address tax treatment and provide certain options and benefits depending upon the circumstances.

While no one can work out every detail of a disaster plan before disaster strikes, preparing checklists in advance, and taking steps such as scouting out viable temporary space, can greatly smooth the path to recovery and maximization of insurance claims.

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