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HOSPITALITY ALERT

Insurance Recovery Tips for the Hospitality Industry in the Wake of the Recent Hurricanes

By Finley T. Harckham

The hurricane season has brought an unprecedented barrage of major storms to the U.S. mainland and the Caribbean, leaving many resorts, hotels and restaurants with major losses that may exceed the limits of their insurance or fall within coverage exclusions. This challenge requires policyholders to carefully analyze their insurance and prepare and present their claims in the way that maximizes all available coverages. The following tips can help businesses in the hospitality industry to squeeze every dollar out of their insurance.

1. Consider All of the Time Element Coverages in Your Policies

Many businesses are suffering lost profits that will exceed their coverage limit for business interruption resulting from physical damage to their own property. They may find additional limits for their loss of business in various coverages that are triggered by damage to third-party property. Those coverages typically include contingent business interruption, order of civil authority, ingress and egress, and service interruption, all of which may be triggered by the widespread damage from a major storm. When that happens, the policyholder's loss of income may properly be considered to result, at least for a while, from both damage to its own property and that of third parties, and provide access to extra limits of coverage. Each of these coverages requires damage to third-party property of a kind that would be covered for the policyholder's own property. That requirement may present challenges, particularly for businesses with no flood coverage and so-called "anticoncurrent causation" clauses, which expand various exclusions to apply as long as the excluded peril, such as flood, contributes in any sequence to the loss.

Contingent Business Interruption: Many policies cover income losses resulting from damage to property of customers, suppliers or leader properties. Often referred to as contingent business interruption insurance, this coverage has been interpreted broadly by the courts. For example, in *Millenium v. National Union,* 2012 U.S. Dist. LEXIS 140258 (D. Md. 2012), the court interpreted CBI coverage for loss resulting from damage to the property of "direct suppliers" of goods and services to include the business disruption that resulted from an explosion at a natural gas processing plant even though the

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policyholder purchased its gas from a distributor of the affected facility.

Similarly, in *Archer Daniels Midland Co. v. Phoenix*, 936 F.Supp. 534 (S.D. Ill. 1996), a food processing company was found to have CBI coverage under a provision that was triggered by damage to the property of "any" supplier, based upon damage to the property of farmers who supplied crops, and the Coast Guard and Army Corps of Engineers, which provided navigational aid and flood control on the Mississippi River that enabled the policyholder to move grain by barge rather than more expensive railroads. Unlike the other time element coverages discussed below, CBI losses may continue for as long as a business interruption loss, or even longer in extreme situations where people and businesses leave a storm-ravaged area, as happened in New Orleans after Hurricane Katrina, and may occur in Puerto Rico and the Virgin Islands in the wake of Irma and Maria.

Lack of Ingress or Egress: Ingress or egress coverage applies if access to the policyholder's property is "denied" or "prevented" by such obstacles as standing water or downed power lines or trees. Often, access will be blocked by all of these obstacles. If so, policyholders with no flood insurance may nonetheless be able to trigger ingress or egress coverage, particularly if they can establish that the water was preceded by other obstacles. Also, whether standing water falls within a flood exclusion may depend upon the cause of the inundation and the wording of the policy.

Civil Authority: Access to a policyholder's premises may be prohibited during or after a major storm by a government evacuation order or curfew. If so, the policyholder might be insured for lost income under its coverage for "orders" or "actions" of civil authority. Whether such government action is covered, in whole or in part, may depend upon a variety of factors including whether the perils of concern when an order was issued are covered or excluded (or both) and whether the order resulted in a "necessary suspension" of the insured's business.

Service Interruption: Service interruption insurance covers losses resulting from damage to property of a utility that supplies water, power, communications, natural gas or sewage. Some policies require that the damage take place in proximity to insured premises, and loss from downed power lines is often excluded. Issues often arise over the cause of the interruption, when excluded flood and covered wind and rain are both possible culprits.

2. Ordinance or Law Coverage May Pay For Upgrades

Many buildings that were damaged by the recent hurricanes predate the enactment of building codes requiring storm-resistant construction and laws that govern access to commercial businesses and accommodations, including the Americans with Disabilities Act. Those laws may require that damaged and undamaged portions of a building be upgraded. The extra cost of such modifications may be covered under ordinance or law coverage depending upon the specific policy language and, under many policies, whether there is a causal connection between the covered occurrence and the damage that triggered the enforcement of the statute. For example, such causation is clear where hurricane damage results in the application of building codes requiring stormproof construction, but may not be clear when improved access for the handicapped is required after such a loss. Ordinance or law coverage is triggered by the "enforcement" of a legal mandate, but the courts generally consider voluntary compliance to satisfy that requirement.

3. The Importance of Coverage Analysis

As touched upon above, whether and to what extent a policyholder can take advantage of various coverages to supplement its basic property loss and business interruption insurance depends upon the precise policy wording at issue, the particular circumstances of the claim, and any controlling law or guidance from applicable court decisions. This analysis may be complicated by the fact that each state and territory has its own body of case law, and consequently the same standard form policy provisions have been interpreted differently from one jurisdiction to the next. So, policyholders with complex losses should assemble teams with expertise in risk management, insurance coverage law and loss quantification to prepare their claims and pursue their recoveries.

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