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HOSPITALITY ALERT

Managing an Insurance Claim After a Natural Disaster

By Dennis J. Artese and Peter A. Halprin

Harvey, Irma, Jose, Maria … The 2017 hurricane season will surely prove to have been one of the most destructive on record. In all areas of impact, hotels, resorts and other hospitality businesses suffered catastrophic property damage and business interruption losses.

Businesses that have suffered property damage and/or business income loss as a result of these storms should take a number of steps to maximize their insurance recoveries. These include:

- identifying and reviewing all potentially applicable insurance policies;
- undertaking and documenting emergency/temporary repairs; and
- preparing and presenting the claim.

Insurance Policy Identification and Review

Private commercial property insurance policies and flood insurance policies issued through the National Flood Insurance Program are typically the policies that will respond to most storm-related commercial losses. Hospitality businesses may have more specialized insurance coverage available for storm-related losses. Those with marinas, for example, may have piers, wharves and docks coverage.

Property insurance policies can be quite complicated, and what you read may differ from what has been established by custom or case law. To that end, working with experienced coverage counsel to understand existing insurance policies can assist policyholders in working efficiently to maximize the coverage available to them.

Insurance policy review should include analyzing all potentially available coverages, including for repairs or replacement of physically damaged real and personal property, as well as coverage for lost profits stemming from a slowdown or complete cessation of your business. See our colleague Finley Harckham's article entitled "Insurance Recovery Tips for the Hospitality Industry in the Wake of the Recent Hurricanes" (*AK Hospitality Alert*, Nov. 2017) for an in-depth overview of coverage for lost profits and extra expenses you may incur to resume normal operations, including business interruption, contingent business interruption, civil authority, and ingress/egress coverage.

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The review also should encompass the limits, sublimits and any deductibles applicable to each potentially available coverage. Business interruption and extra expense limits and deductibles, for example, may be stated in terms of a time period (e.g., twenty-four hours), a dollar amount or both. The number of "occurrences" produced by a storm can affect the amount of times that limits, sublimits and deductibles are triggered. This may be significant in regard to Hurricane Harvey, which made multiple landfalls over multiple days, potentially giving rise to arguments for the application of multiple "occurrences." Many policies that provide flood coverage will sublimit it, meaning that less than full limits are available for losses resulting from flood.

Important considerations in all types of coverage include whether the policies provide all risk and/or named peril coverage, whether there are exclusions pertaining to flood or to storm surge, and whether the policies contain anti-concurrent causation language, which could bar coverage for a loss even if it is a result of both covered and uncovered causes. Policies do not define "flood" uniformly; therefore, the manner in which your policy defines "flood" (and the case law interpreting that definition) may mean the difference between coverage and no coverage.

Beware of Time Periods

Almost all types of insurance policies require prompt notice of loss, and strict compliance with this condition to coverage can be critical. Policyholders should make sure that notice is promptly given to all possibly relevant insurance companies. When giving first notice, policyholders should be cautious in providing any specifics concerning the cause of loss until the policy has been reviewed and all facts have been obtained. The cause of loss, in the immediate aftermath of a storm, can simply be listed as the storm itself or "the effects of" the storm.

Commercial property policies typically have several other time-sensitive requirements, with which some states require strict compliance. Many property policies provide that the policyholder must file a sworn proof of loss within 30, 60 or 90 days of the date of loss or from request by the insurance company. Some states modify this time period by statute.

Another key time-related issue concerns contractual suit limitations periods. Many property policies contain a contractual suit limitation providing that any insurance coverage lawsuit must be filed within a short period of time — usually one or two years — after the inception of the loss. Puerto Rico as well as some states modify this time period by statute, but policyholders should be sure any statutory extension applies to the cause of loss at issue (e.g., a statutory extension for fire losses may not apply to a flood loss). Written tolling agreements can help protect policyholders against suit limitations provisions.

Some policies also contain a "Replacement Cost Coverage Election" period. These periods provide a deadline by which a policyholder has to specify their intention to replace damaged property and receive replacement cost coverage. Relatedly, there may also be a deadline by which a policyholder must complete repairs to obtain replacement cost coverage.

Undertaking and Documenting Emergency and Temporary Repairs

In the immediate aftermath of a storm, and sometimes in advance of a storm, a policyholder may have certain duties relating to the protection and preservation of property. For example, most policies require policyholders to mitigate damages and some require them to do so by resuming operations as quickly as possible.

Either the insurance company (on behalf of the policyholder) or the policyholder (with the consent of the insurance company) should retain an emergency restoration company to pump out any standing water, perform emergency/temporary repairs and secure the premises.

All activity and costs, both internal and external, must be fully documented with photos, videos and other written documentation. It is good practice for the policyholder to create an internal cost code specific to disaster recovery/repairs, and instruct employees to document their activities and bill their applicable time to such cost code.

The insurance company should be kept fully apprised of all activity and damage, and then be provided, in writing, with a reasonable time to inspect the premises before damaged, fully documented items are discarded (unless not discarding them sooner presents a health/safety risk).

Preparation of the Claim

Policyholders should promptly respond in writing to all reasonable insurance company requests for information; however, policyholders should not rely on the insurance company to calculate the loss. Rather, policyholders should prepare, present and defend their claims to their insurance companies.

For large losses, policyholders should consider retaining a professional claim preparer or a public adjuster. Others typically needed to round out the team include coverage counsel, forensic accountants who specialize in business interruption losses, and possibly structural or other engineers, architects and/or contractors. The policy may provide coverage for certain members of the claim preparation team, typically subject to a sublimit.

Policyholders should establish a program to provide insurance companies with regular updates regarding the status of any claims. They should also keep detailed notes of conversations with insurance company representatives, including meeting minutes. Where there are verbal agreements, policyholders should write letters confirming such agreements and seek payment of advances for all proven and undisputed losses.

Diligent Pursuit of Insurance Proceeds

In the wake of natural disaster, insurance is not often the first imperative that comes to mind. Yet policyholders do need to give notice early to all insurance companies that may respond in any way to the damage — and then, over the long haul, be diligent in pursuing insurance through the often frustrating claims process. At the outset, diligence in pursuing insurance involves reviewing insurance policies for all available coverages, taking stock of notice provisions and key time limitations, undertaking and documenting emergency and temporary repairs, and taking steps to prepare, present and defend the claim. Getting these first steps right will help policyholders efficiently maximize their insurance recoveries following natural disasters.

About Anderson Kill

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