Property Insurance Allocation When Storms Strike Back-to-Back

by Finley Harckham and Dennis J. Artese

The 2017 hurricane season was extraordinary not only in the extent of damage wrought by each storm, but also in the one-two punch suffered by various areas as major storms hit in rapid succession. This year may follow suit, with the National Oceanic and Atmospheric Administration forecasting 10-16 named tropical storms. That raises the question of how to allocate property damage and business income losses when more than one storm (or occurrence) causes loss and damage.

Hurricanes Harvey, Irma, Jose, Maria and other named storms of 2017 are estimated to have caused approximately $200 billion in damage. Unique to last year's hurricane season were the geographic concentration and frequency of some of the most severe storms, particularly Hurricanes Irma and Maria. Hurricane Irma wreaked havoc on the Leeward Islands of the Caribbean, starting with the Virgin Islands east of Puerto Rico and reaching southeast to Dominica, before making landfall in the Florida Keys on September 10, 2017. Shortly thereafter, Hurricane Maria destroyed vital infrastructure and numerous homes in this same region, coming ashore in Puerto Rico on September 20, 2017. For policyholders in the path of both storms, the thorny allocation questions loom large as they navigate the insurance claims process.

Indeed, many buildings that were damaged, but not totally destroyed by Hurricane Irma, were then battered a second time by the high winds and torrential rains of Hurricane Maria. Correctly allocating the losses caused by those two separate occurrences is important in two scenarios: 1) if the policyholder has insufficient per occurrence limits to cover its entire loss, and therefore needs to take full advantage of a second limit available for Hurricane Maria, or 2) if there are sufficient per occurrence limits but there is a large per occurrence deductible that could eat into the available coverage if each storm is assigned a significant amount of loss. Of course, in each of those scenarios the policyholder and its insurance companies have contrary interests, which may make it particularly difficult to reach a consensus on how to allocate the loss.

PHYSICAL DAMAGE REPAIR/ REPLACEMENT COST ALLOCATION

The allocation of property loss from the two storms requires a fact intensive inquiry into what damage was caused by each storm. This can be very difficult because in many instances the effects of each storm are not readily apparent. So policyholders may have nothing more than personal observations after each storm, and perhaps some photographs. This analysis may be helped by the fact that in many locations Hurricane Irma produced high winds and storm surge, but little rain, whereas Hurricane Maria brought tremendous amounts of rain and flooding along with high winds.

Policyholders who seek to allocate their losses may be faced with demands from their insurance companies for detailed proof as to the exact damage caused by each storm. The policyholder must demonstrate that a covered loss occurred, and therefore bears an initial burden with respect to allocation. However, there is no requirement under policy language or the law that the cause of particular damage be established with abso-

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lute certainty. The policyholder's burden is simply to establish that it is more likely than not that claimed damage was caused by one particular storm over another.

An allocation between storms may be heavily influenced by the insurance policy provisions that define an "occurrence," "hurricane" or "named storm." For example, some policies place time limits on the duration of a single occurrence. This may be helpful to policyholders that are faced with an argument by their insurance companies that the rain from Hurricane Maria was not a covered second occurrence because it would not have infiltrated buildings but for the prior damage caused by Hurricane Irma. Indeed, it is difficult to imagine why such time limitations appear in policies except to make clear that damage from an event after the first occurrence ends is subject to a separate limit of coverage.

BUSINESS INTERRUPTION LOSS ALLOCATION

The allocation of business interruption between occurrences also can be very difficult. As a general rule, insurance policies do not provide guidance on how such an allocation should be made, other than to indicate that the period of restoration for an occurrence is the hypothetical period of time in which the damaged property could be repaired or replaced "with due diligence and dispatch." In many instances, policyholders and insurance companies are agreeing to allocate the business interruption loss on a percentage basis that mirrors the allocation of property loss. That is a simple and seemingly fair approach, but some insurance companies are refusing to employ it on larger losses, where they instead argue that Hurricane Maria damage added little or no time to the period of restoration, because such damage could be repaired at the same time as the Hurricane Irma damage. That position may raise a number of issues about the proper sequencing of repairs, but as a general rule, if Hurricane Irma primarily caused structural damage from wind and Hurricane Maria then caused extensive water damage to interior elements of the covered property, the policyholder should have a strong argument that the interior elements damaged by Hurricane Maria cannot be repaired until after the structural damage has been repaired, and therefore increase the time to complete the restoration.

Further, the allocation of business interruption losses may be complicated by the fact that the damage from one or both storms may have triggered coverage for service interruption, lack of ingress to or egress from the premises, or contingent business interruption for damage to the property of customers or suppliers. To some extent, those coverages may relate to the same period of interruption caused by damage to the policyholder's premises, and therefore not add to the period of restoration. Nonetheless, they might provide valuable additional coverage limits if the business interruption limit is insufficient.

CONCLUSION

In situations of inadequate coverage, the allocation of multiple occurrences of property damage and business interruption losses resulting from back-to-back storms can be complex but necessary in order to maximize insurance recovery, rebuild damaged property and resume a policyholder's business operations. At the same time, insurance companies may be keen on taking advantage of large, per occurrence deductibles by attempting to allocate such losses to more than one occurrence. Should you be faced with either situation, experienced coverage counsel should be consulted to assist in navigating all attendant issues. ■

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