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Rapid Response to Maximize Insurance Recovery after Hurricanes

By Finley T. Harckham and Dennis J. Artese

While hurricane damage in 2018 is not likely to reach the catastrophic level of 2017, Hurricane Florence and Hurricane Michael have wrought devastating damage by any standard. Hurricane Florence did its damage chiefly through catastrophic flooding, and Hurricane Michael via 150-plus mph winds that left bomb-like damage, as well as severe flooding. Early estimates peg insured losses in a range of $2 billion to more than $10 billion for Michael, and $2 billion to $5 billion for Florence, according to the *Wall Street Journal*.

As affected businesses in the Carolinas, Virginia, the Florida Panhandle and surrounding regions work to restore their property and income to normal, they also need to stay on top of their insurance claims. Businesses on all U.S. coasts still have their guard up — and that should include reviewing and toning up their insurance claims protocols.

When a storm inflicts serious property damage and business interruption on a business, insurance is not often the first thought. But response on this front needs to be as rapid and sustained as action to repair and restore property. Indeed, the two are often intertwined.

In the wake of a storm or other natural disaster, the following steps will get the claims process on the right track and help maximize insurance recovery.

Meet Prompt Notice Requirements — But Keep Your Options Open

Insurance policies generally require prompt notice of loss. Late notice can result in forfeiture of coverage in the worst case, and to needless coverage fights in less extreme cases. Policyholders should give notice promptly to all possibly relevant insurance companies.

At the same time, 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. In the immediate aftermath of a storm, the cause of loss can simply be listed as the storm itself or "the effects of" the storm. Unconsidered attributions as to the cause of loss may run afoul of

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policy exclusions, including anti-concurrent causation clauses purporting to exclude coverage for the full amount of the loss if both covered and uncovered perils contribute to cause the loss.

Commercial property policies typically have several other time-sensitive requirements. Many 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 a request by the insurance company. Some states may modify this time period by statute.

Another key, time-related issue concerns contractual suit limitation periods. Many property policies provide that any insurance coverage lawsuit must be filed within a short period of time — usually one or two years — after the inception of loss. Some states may modify this time period by statute, but 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 limitation 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. There may also be a deadline by which a policyholder must complete repairs to obtain replacement cost coverage.

Allocating Losses after a One-Two Punch

Attributing cause of loss can get particularly thorny when grappling with a misfortune that struck many in 2017: storms that strike in rapid succession. Last year, many buildings that were damaged but not destroyed by Hurricane Irma were hit 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 a second storm.
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. 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.

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. While the policyholder must demonstrate that a covered loss occurred, and therefore bears an initial burden with respect to allocation, there is no requirement under policy language or the law that the cause of particular damage be established with absolute 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. For more information on how to handle such claims, please see our prior article "Property Allocation When Storms Strike Back to Back."

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. 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 have its own employees bill their applicable time to such cost codes and document their activities.

The insurance company should be kept fully apprised of all activity and damage and provided, in writing, with a reasonable time to inspect the premises before damaged, fully documented items are discarded.

Taking the Measure of Business Income Loss

Maximizing post-storm recovery entails assessing not only the physical damage to property, but also income losses stemming from flooded and blocked roads and bridges, interruptions of shipping and air transport, evacuations, and closures by civil authority. Insured losses may extend well beyond the area of impact.

Business interruption insurance covers businesses for losses in income stemming from unavoidable disruptions to their regular operations as a result of covered damage to insured property. In addition to coverage resulting from damage to the policyholder's own property, "BI" coverage also may be triggered by circumstances including utility service interruption, a government evacuation order, or a substantial impairment in access to a business' premises. Many property policies also provide "extended business interruption" coverage that begins when the property is fully repaired and ends when operations are ramped up to their pre-disaster level — though that extension typically is limited to 60 days.

Contingent business interruption coverage is triggered when policyholders lose revenue after a property loss impacts one or more suppliers or customers. For example, businesses that rely upon specialty chemicals from the affected area may have to pay more for supplies, and companies that sell into the area, such as consumer products manufacturers and distributers, will suffer lost sales. While the business itself need not be physically damaged, it does need to have coverage for the type of damage that affects its suppliers, business partners or customers.

Extra expense coverage applies to additional costs incurred by the policyholder as a result of damage to its property, and to costs incurred to mitigate economic losses. This coverage often is very broadly defined. **Contingent extra expense** coverage applies when costs are incurred as a result of a business interruption caused by damage to the property of a supplier or customer.

For more information about the extent and limitations of business income coverage, please see "Understanding Post-Storm Business Interruption Coverage."

Documenting and valuing post-storm losses is a complex task, and the claims process can be protracting. Our focus here is on getting off on the right foot — by giving prompt notice without compromising coverage, by securing the property against follow-on damage that may not be covered, and by recognizing the scope of potential income losses and including them in the claims process. Recognizing these tasks in advance and acting on them promptly are vital to full recovery.

About Anderson Kill

Anderson Kill practices law in the areas of Insurance Recovery, Commercial Litigation, Environmental Law, Estates, Trusts and Tax Services, Corporate and Securities, Antitrust, Banking and Lending, Bankruptcy and Restructuring, Real Estate and Construction, Foreign Investment Recovery, Public Law, Government Affairs, Employment and Labor Law, Captive Insurance, Intellectual Property, Corporate Tax, Hospitality, and Health Reform. Recognized nationwide by Chambers USA, and best-known for its work in insurance recovery, the firm represents policyholders only in insurance coverage disputes — with no ties to insurance companies and has no conflicts of interest. Clients include Fortune 1000 companies, small and medium-sized businesses, governmental entities, and nonprofits as well as personal estates. The firm has offices in New York, NY, Stamford, CT, Newark, NJ, Philadelphia, PA, Washington, D.C., and Los Angeles, CA.