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Tom Hagy
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Strategies for Maximizing Insurance Recovery for Climate Change–Related Loss and Damage

Dennis J. Artese*

Abstract: *Losses from natural catastrophes are costing many tens of billions as year, from hurricanes and tornadoes to record-breaking rainfall and floods. Whether the insurance industry will or can provide coverage for all of the devastating effects of climate change (or, as some might put it, a new and calamitous phase in our earth's existence) only time will tell. In the meantime, policyholders must cross their Ts if they expect coverage. In this article the author shares insights on the complex but essential task of documenting and valuing post-storm losses.*

It is widely accepted that climate change has given rise to a number of substantial property damage–related risks, primarily in the form of extreme weather events, such as hurricanes, tornadoes, and hailstorms, as well as increased risks of wildfires fueled by hot, dry weather. Just about every commentator on climate change–related weather events echoes the same phrase—the storms are becoming more frequent and more severe.

The numbers do not lie. Natural catastrophe losses across the globe totaled $40 billion in the first six months of 2021, according to a recent report published by Swiss Re Institute. That figure does not include the devastating losses caused by more recent hurricanes, including Hurricane Ida, which ravaged much of southeastern Louisiana before losing its tropical characteristics yet still wreaking havoc across parts of Pennsylvania, New Jersey, and New York with tornadoes and record-breaking rainfall.

Years from now our infrastructure may be upgraded to better withstand these events. Even then, however, some level of loss and

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damage can reasonably be expected. Accordingly, business owners affected by natural disasters stemming from climate change should do everything possible to maximize their first-party property insurance recoveries. This article discusses strategies that policyholders can employ long before and after the loss event to maximize their insurance recoveries.

Assemble Your Claim Team and Understand Your Coverage in Advance of the Loss

Immediately after a storm businesses often scramble to assemble their insurance assets and put together a team to prepare and present their property insurance claims. Insurance companies will have lawyers, accountants, adjusters, building consultants, engineers, and even meteorologists on the payroll and ready to go. Don't be outgunned from the start.

Before claims arise, policyholders should put their claim team in place and have all outside consultants on retainer and familiar with the policyholder's business and real and personal property. In most complex property insurance claims, the policyholder's claim team consists of the risk manager, general counsel, CFO, coverage counsel, insurance broker, public adjuster or other claims preparation professional, building consultant, structural engineer, and forensic accountant. Although not part of the claim team, it is also a good idea to establish a relationship with an emergency restoration company prior to the loss. A restoration company is needed to respond immediately after a loss to secure the property, take reasonable steps to prevent further damage, and set the policyholder on a track to resume operations as soon as possible. Emergency restoration companies in particular are in great demand after a loss, so it is important to line them up before the event occurs and have them ready to go on short notice.

It is also important to read and understand the terms of all potentially responsive insurance coverage prior to the loss event. 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. Some policyholders may have pollution policies that

cover remediation costs associated with mold, contaminated water, etc., along with coverage for business income losses associated with such damages. Certain industries may have more specialized insurance coverage available for storm-related losses, such as piers, wharves, and docks coverage for damaged marinas in the affected coastal areas. While this article focuses primarily on commercial property insurance coverage, many of the tips presented here apply equally to other potentially available types of property insurance 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 income. Coverage for lost profits and extra expenses you may incur to resume normal operations may be available to you whether or not your business actually sustained physical damage. Civil authority, ingress/egress, and contingent business interruption are just a few examples of such potentially available coverages. Important coverage considerations include whether the policies provide all risk or named peril coverage, whether there are exclusions pertaining to flood or to storm surge, how the policies define "flood," 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.

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 time, amount, or both. As a related issue, the number of "occurrences" produced by a storm can affect the number of times that limits, sublimits, and deductibles are triggered. This issue is particularly relevant in recent times, with severe storms occurring in close succession, potentially triggering multiple policy limits and deductibles. This can work to the benefit

either of policyholders or insurance companies, depending on the amount of the loss at stake relative to the amount of applicable policy limits and deductibles.

Many policies that provide flood coverage will sublimit it, meaning that less than full limits may be available for losses resulting from flood. Policies do not define "flood" uniformly, and the manner in which your policy defines "flood," and the case law interpreting that definition, may mean the difference between coverage and no coverage. Experienced coverage counsel should be involved in the coverage review or contacted about the potential meaning and application of policy terms, which are rarely straightforward.

Take Measures to Mitigate Your Loss

There are a number of mitigation measures that policyholders can put in place prior to a loss event in order to minimize their loss and damage and resume operations more quickly. These include identifying risks; backing up data; establishing a plan to operate remotely; and protecting property by, for example, clearing drains, boarding up doors and windows, placing sandbags at entry points, and relocating critical equipment.

Policyholders should take all reasonable measures to mitigate their loss and damage before a storm, document those efforts in detail, and pass along the costs of such mitigation to their property insurance companies.

Meet Prompt Notice and Other Policy Requirements—But Don't Give Away the Store

Insurance policies generally require prompt notice of loss. Late notice can result in forfeiture of coverage in the worst case, and lead 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 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 a specified number of days—typically 30, 60, or 90 days—measured either from the inception of the loss or from the insurance company's request that the policyholder submit a proof of loss. Some states may modify this time period by statute. Any agreement to extend this deadline should be obtained in writing from the insurance company or its authorized representative.

Another important time-related issue concerns contractual suit limitations periods. Many property policies provide that any insurance coverage lawsuit must be filed within a short period of time—usually one or two years—from 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. For example, a statutory extension of a suit limitations period under a standard fire insurance policy may not apply to a flood loss. To the extent an extension of the suit limitation deadline is required, policyholders should have experienced counsel negotiate a proper and enforceable written tolling agreement with the insurance company.

Some policies also contain a "replacement cost coverage election" period. This provision provides a deadline by which a policyholder has to specify their intention to replace damaged property and receive replacement cost coverage (*i.e.*, the undepreciated value of the loss). There may also be a deadline by which a policyholder must complete repairs to obtain replacement cost coverage. Often in complex property insurance losses, policyholders require additional time to decide whether, how, and even where to rebuild. Supply and other issues also can delay the rebuild. Failure to comply with the rebuild deadline, however, could jeopardize a policyholder's right to recover the replacement cost value of its claim. Therefore, policyholders should be careful to comply with any replacement

deadline under the policy or seek an agreement in writing from the insurance company extending its time to rebuild.

Undertake and Document Emergency and Temporary Repairs

In the immediate aftermath 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.

As discussed above, a best practice is to establish a relationship with a reputable emergency restoration company before a loss event so that it can be mobilized immediately after the event. If the policyholder does not have such a preexisting relationship, they will have to engage a restoration company immediately after the event and should enlist their property insurance company's support in that process. Typical emergency measures include pumping out any standing water; "flood cuts" of wet sheetrock; drying out wet materials and other measures aimed at preventing mold; temporary roofing, window, and other repairs to prevent additional water from entering the building; and securing the premises to prevent theft, vandalism, and workers and others on the premises from getting injured on the site.

All activity and costs, both internal and external, should 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 code 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.

Take the Measure of Business Income Loss

Maximizing post-storm insurance 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, business interruption 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, although 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 on 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 distributors, 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 affected 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 defined very broadly. Contingent extra expense coverage applies when costs are incurred to reduce business interruption losses caused by damage to the property of a supplier or customer.

In this second summer of pandemic, calculations of business interruption losses are complicated by the effects of the pandemic, which continues to affect business income in various industries. Insurance companies are likely to incorporate pandemic effects

into their estimates of storm-triggered income losses. Businesses should be prepared to dispute insurance company estimates that start from an inaccurate baseline.

Conclusion

Documenting and valuing post-storm losses is a complex task, and the claims process can be protracted. Getting off on the right foot is critical.

- Have an insurance recovery plan in place before the loss event occurs.
- Give prompt notice and comply with other policy requirements without compromising coverage.
- Secure the property against follow-on damage that may not be covered.
- Document property damage.
- Recognize the scope of potential income losses and include them in the claims process.

These are all important steps that can make a significant difference in your property insurance recovery.

Note

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