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Twelve Tips to Secure Insurance Coverage for the Katrina and Rita Disasters

By William G. Passannante

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First, Hurricane Katrina. Then, Hurricane Rita. Insurance policyholders of all types, corporations, not-for-profit organizations, municipalities, individuals and others have been pummeled by the devastation caused by these hurricanes. Insurance companies, which should be riding to the rescue, already have begun circling the wagons to avoid paying claims. The hurricanes have caused massive nationwide dislocation of operations at many policyholder locations. While losses will be enormous, so too should the insurance recovery to cover those losses. We set forth below twelve tips to assist in making sure that policyholders obtain their fair share of the insurance paid for with their hard-earned premium dollars. Remember the first principle of insurance recovery —*The purpose of insurance is to insure.*

1. Find Your Insurance Policies.

The loss of life and the destruction of offices, records and files may make this task more difficult. If you know the names of at least some of your insurance companies, you should send a written request for your policies. If your insurance broker's files are available, contact that office for policy copies.

Find primary, excess, local and global property insurance policies, as well as inland marine, multi-peril, fire and business owners policies that may apply to claims for property damage or business interruption.

2. Look to First-Party Insurance.

Most policyholders affected by the storms will have policies which promise to protect policyholders from losses suffered to their own property or expectations of profit. These policies are generally referred to as "property" insurance policies, but they come under other names, like "inland marine," "fire" or "multiperil" insurance policies. Review all of your insurance policies for potential coverage.

3. Remember Property Damage, Business Income and Extra Expense Coverage.

Property insurance policies contain three basic types of coverage: property damage, business income and extra expense.

- **Property damage coverage** pays for physical loss or damage to buildings and business property – machinery, equipment, inventory, raw materials – as well as property of others in the policyholder's control.
- **Business income coverage** pays for the policyholder's loss of net revenue after expenses (profit), and the policyholder's unavoidable continuing expenses during the loss period.
- **Extra expense coverage** pays for the policyholder's costs in minimizing or avoiding a business income loss.

4. Coverage May be Available Without Direct Physical Loss or Damage.

Businesses which have suffered losses unrelated to direct physical damage to their property may still have coverage under property insurance policies. Check for:

- contingent business income coverage;
- contingent extra expense coverage;
- civil authority clause;
- ingress/egress coverage; and
- utility and communications service interruption coverage.

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UPCOMING CONFERENCE

Katrina/Rita Damages

Recouping Your Losses With An Aggressive Insurance Recovery Program

Thousands of businesses large and small, devastated by Hurricanes Katrina and Rita, will seek to rebuild using the proceeds of their property or first-party insurance policies. These policies typically cover property damage to the policyholder's place of operations, and often promise to pay Business Income: loss of income and continuing unavoidable expenses caused by damage to property critical to the policyholder's operations.

As any policyholder who has examined their property policy knows, the forms are complex. Further, because property disputes typically involve the amount, and not the existence, of coverage—how much a building was worth, how much the policyholder would have earned, etc.—disputes are essentially inevitable for large claims. Last, as with the claims stemming from the attacks of 9/11, claims arising from the hurricanes will be individually and collectively massive, meaning that insurance companies will be very conservative in their coverage positions for fear of setting precedent that can affect a wide body of policyholders.

To compound matters, property insurance law is largely guided by the historic, and sometimes arcane, practices of policyholder and insurance company adjusters, and many of the doctrines involved are not intuitive even to savvy business people. For instance, many insurance companies adjusting 9/11 claims for restaurants and other entertainers sought to slash their policyholders' recoveries on the ground that, after the attacks, people in Manhattan generally stayed home. This argument may sound reasonable, but it is entirely inconsistent with the historic insurance company position that the wider effects of a catastrophe cannot affect the policyholder's recovery.

Anderson Kill will seek to provide guidance to policyholders affected by the hurricanes at a conference scheduled in Houston on November 9, 2005. This conference will address property and loss of income claims generally, as well as how to value such claims and present them to insurance companies. It will further address the impact of pollution, contamination and flood exclusions, and how policyholders can argue for coverage in the face of those exclusions. Some of the topics to be discussed include:

- Can insurance companies slash Business Income recoveries on the grounds that the potential consumers will be absent from New Orleans and other affected areas during the period the business is affected?
- How can you package and present a property claim to the insurance company to maximize the chance of a successful settlement?
- Do businesses which did not suffer damage to property they own nonetheless have coverage for loss of income from the dislocations wreaked by the hurricanes?
- Do alleged contaminants in the flood waters eliminate coverage under pollution or contamination exclusions?
- If property was damaged both by flood and windstorm, can the policyholder still recover if "flood" is excluded?

MARK YOUR CALENDAR | NOVEMBER 9, 2005, 8:30 - 5:30 PM

LOCATION: Alden-Houston Hotel, 1117 Prairie St., Houston, TX 77002

WHO SHOULD ATTEND? In-house Counsel, Risk Managers and Senior Managers Affected by Hurricanes Katrina/Rita

GUEST SPEAKER: Mississippi Attorney General, Jim Hood

TOPICS TO BE DISCUSSED INCLUDE:
- property loss and valuation
- business interruption contingency and valuation
- pollution/mold exclusions and causation
- wind vs. flood exclusions

For further information or to register, please visit our website at www.andersonkill.com or contact Veronica Mordan at (212) 278-1400.

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These and similar provisions may provide coverage for events that interfere with suppliers, or customers or prevent or hinder access to premises.

5. Give Notice.

If there is any possibility that you may have a claim, give notice now. Usually, your insurance broker should give notice under all policies that could be implicated. Have the broker send you a copy of the notice letter.

Give notice even if you do not have all the particulars of your claim. You can always supplement the notice later.

6. Secure Tolling Agreements With Your Insurance Company.

Property and business interruption losses often take months and sometimes years to resolve. Provisions limiting the time for you to provide "proof of loss" or to repair or replace damaged property often are extended by written agreement.

7. Insurance Policy Renewals.

Note that these catastrophes might cause insurance programs to lapse and create unintended gaps in a policyholder's insurance coverage because of the loss of records.

8. Emergency Repairs and Preservation of Property.

Most early emergency efforts were performed by governmental agencies and officials. Insurance companies often argue that certain measures to mitigate losses should be taken.

9. Retain an Engineer or Consultant if There is Risk to the Structural Integrity of a Property.

10. Keep a Diary. Document All Loss Items and Emergency Expenses.

Insurance companies often question, reject and contest loss items submitted by policyholders for reimbursement. Keeping complete and accurate records is helpful to ensure that policyholders are properly reimbursed for the amount of their insurance claims. Video and photographs to document losses may also be helpful.

11. Consider Help in Submitting Your Claim.

Consider hiring a public loss adjuster or an accounting firm that specializes in property insurance coverage accounting. The insurance company will almost certainly hire a supposedly "independent" adjuster, and one or more accounting firms or law firms that specialize in representing insurance companies. Getting your proper insurance recovery often means being *more* prepared than the other side.

12. Consider Insurance Coverage Under Other Insurance Policies.

The impact of these disasters will be far-reaching. Consider what notice (such as notice of an "occurrence" or notice of "circumstances") might be given under liability insurance policies, including general liability insurance and errors and omissions insurance, in the event of claims by third parties. Also, determine if "additional insured" status under the insurance policies of others is available.

Finally, if your insurance company appears to be beating a retreat rather than riding to the rescue and paying your claim, remember the second principle of insurance recovery—***Do not take "No" for an answer.***

William G. Passannante is a senior shareholder in the New York office of Anderson Kill & Olick, P.C., co-chair of the firm's Insurance Recovery Group and Vice Chair of the Professionals, Officers and Directors Liability Committee of the Tort and Insurance Practice Section of the American Bar Association. Mr. Passannante regularly represents policyholders in insurance coverage disputes. Mr. Passannante can be reached at wpassannante@andersonkill.com or (212) 278-1328.

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