CLIMATE CHANGE & DISASTER RECOVERY ALERT

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Six Tips for Maximizing Property Insurance Recovery for the One-Two Punch of Hurricanes Helene and Milton

By Dennis J. Artese

In the wake of Hurricanes Helene and Milton, thousands of affected businesses will begin the difficult task of building their businesses back. Insurance recoveries for both property damage and business interruption losses will be vital to that process. Virtually every difficult task and source of expense businesses face in the immediate aftermath and in the months following should ultimately be financed by insurance: emergency and temporary repairs, inventory replacement, extra expenses (e.g., setting up employees to work remotely), and business income losses, as well as repair or replacement of damaged property.

When a storm inflicts serious property damage and business interruption, 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. Properly documenting essential early action and its costs -- for example, sourcing suppliers, contractors and transportation for emergency repairs -- will maximize insurance recovery. Providing prompt notice and meeting other time-sensitive policy requirements is essential to securing coverage. And fully documenting all expenses and income losses as they unfold over time maximizes your chances of being made whole for virtually all your losses. Due consideration also must be given to the one-two punch of Helene and Milton in many affected areas of Florida, which may raise thorny issues of allocating loss and damage between the storms.

The following steps will get the claims process on the right track and help maximize insurance recovery.

1. Assemble Your Claim Team

Immediately after a storm, 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. If your claim team is not already assembled, move quickly to get it in place.

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, an emergency restoration company is often vital in the immediate aftermath of a hurricane. They should secure the property, take reasonable steps to prevent further damage, and set the policyholder on a track to resume operations as soon as possible.

2. Meet Prompt Notice and Other Time-Sensitive Requirements – But Don't Lead with Your Chin

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 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 certain that 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).

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.

Written tolling agreements can help protect policyholders against these various time-sensitive provisions.

3. Undertake and Document 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 take reasonable steps 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. Asbestos testing and abatement by a licensed professional in a manner that conforms with all state requirements also may be necessary.

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 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.

4. Allocate Losses after a One-Two Punch

Attributing cause of loss can get particularly thorny when grappling with storms that strike in rapid succession, like Hurricanes Helene and Milton. Many buildings that were damaged but not destroyed by Helene were hit a second time by the high winds, tornadoes, storm surge and torrential rains of Milton. Correctly allocating the losses caused by those two separate occurrences is important in two scenarios:

- 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; and
- 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. Nor must the policyholder prove its damages with mathematical precision. 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 Insurance Allocation When Storms Strike Back-to-Back."

Dealing with multiple hits like those from Helene and Milton is not unusual. In 2004, Hurricanes Charley, Frances, Ivan, and Jeanne struck many of the same parts of Florida over the course of just six weeks. In 2017, 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 multiple storms occurring in close succession, thorny allocation questions loom large as they navigate the insurance claims process.

5. Take 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 an 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.

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 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 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.

6. Understand Your Insurance Policies – Or Find Someone Who Does

Insurance policy review, if not undertaken prior to loss, should be done as close to the immediate aftermath as possible. 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.

The 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 even if your business did not actually sustain 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 so-called “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. 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. Also, the “flood” sublimit may be limited to physical loss and not extend to business interruption and other non-physical losses.

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.

Start a Long Journey on the Right Foot

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 allocating losses between the storms, 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. Identifying these tasks in advance and acting on them promptly are vital to full insurance recovery.

To learn more about hurricane-related insurance recovery topics, visit our **Climate Change & Disaster Recovery Group** webpage.

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