

HURRICANE KATRINA: ARE YOU COVERED?

Individuals and businesses worldwide are struggling to determine the devastating losses left in Katrina's wake. The hurricane knocked out power to 2 million people, and authorities report it could be two months before electricity is fully restored. Hundreds of thousands have been displaced. The petroleum industry has suffered crippling setbacks due to platform damage in the Gulf of Mexico as well as supply network disruption. Apartment complexes, waterfront homes, community landmarks, courthouses, and businesses alike have been wiped out. The catastrophic destruction we see across the gulf coast states is only part of the picture. In our global economy, the financial aftershocks will be felt around the world.

After locating and caring for loved ones, friends, and colleagues, the question businesses, individuals, and even the government will be asking is, "Are we insured?"

Many losses resulting from Hurricane Katrina will raise complex issues involving property damage and causation. Businesses are generally entitled to coverage when part of the loss was caused by a covered peril, even if the loss was exacerbated by a non-covered peril. Therefore, if a policy covers flooding but not wind damage, or vice versa, but both have caused damage to a covered property, the insured may be fully covered for all of the resulting losses. Also, additional coverages, such as business interruption, contingent business interruption, and civil authority may broaden the scope of recovery.

COMMERCIAL PROPERTY INSURANCE

First and foremost, companies with assets in the hurricane zone should look to their commercial property policies. Every business should carry this type of insurance, which will generally cover fixed assets lost as a result of various perils. Companies should pay close attention to what perils are actually covered by their policies: many policies will cover damage resulting from a flood (including flooding caused by a hurricane) but might exclude other perils such as fire or explosions. Some policies even cover land and water contamination or pollutant removal caused to the property as a result of flooding. Some policies may also cover flood and earth movement damage that is not natural, but man-made. Thus, if property damage was caused not by the hurricane itself, but by some action taken by authorities in rescue operations or the re-building process, such damage could be covered. Many policies also cover the cost incurred by the insured to protect and preserve its property. However, such policies may also contain exclusions for the protection of property against an intentional harm, i.e., terrorism, looting, etc. Of course, as with any insurance case, companies must consult the actual policy language in evaluating coverage issues.

First and foremost, though, a company must take steps to preserve coverage in the case of loss. Under a commercial property policy, a company must generally:

- Give immediate notice of any loss to the insurer;
- Try to protect property from any further loss or damage (if possible);
- Separate damaged from undamaged property (if or when possible); and
- Provide the insurer with a signed and sworn proof of loss. The statement should include the time and origin of loss, description of damage, and the actual and/or replacement value of property. This must usually be done within 90 days but can be extended depending on the circumstances. If an extension is needed, the insured must request one and the insurer must grant it in writing.

BUSINESS INTERRUPTION INSURANCE

Business interruption coverage can be as vital to the survival of a company as property insurance. This type of policy compensates the insured for not only lost income but also continuing ordinary business expenses incurred for a specific period of time after the insured's business is impaired as a result to direct physical loss or damage to the insured's business premises from particular causes. Coverage for business interruption generally begins 72 hours after the time that the premises suffered the physical loss and ends when either (1) the property should be repaired/replaced with reasonable speed and similar quality or (2) when business is resumed at a new permanent location, whichever is earlier.

In addition to the general policy conditions, including providing the carrier with prompt notice, many business interruption policies are subject to a "coinsurance condition" whereby the insured is required to purchase a specific amount of insurance or risk bearing a portion of its own business income losses according to predetermined formulas. Again, businesses must look to their specific policy language in assessing coverage.

In order to preserve coverage in the case of loss under a business interruption policy, a company must generally:

- Give prompt notice of the loss to the carrier, including (1) a description of the property, and (2) how, when and where the direct physical loss or damage occurred.
- Take all reasonable steps to protect the covered property from further damage, regardless of the cause of loss.
- Keep a record of all expenses necessarily incurred to protect the covered property. These expenses will be considered by the insurer in settlement of the claim. If possible, consult with the adjuster before taking steps to protect the property in order to ensure that those expenses will be reimbursed.
- If possible, set aside the damaged property in the best possible order for examination by the carrier.
- Permit the insurer, as often as may be reasonably required, to inspect the property, including the relevant books and records.

- Provide the insurer with a signed, sworn proof of loss within 60 days after a request from the carrier. The insurer will supply the necessary forms and indicate the information to be provided. If the information cannot be provided within 60 days, an extension may be requested.
- Resume all or part of any business activities previously occurring at the specified premises as soon as possible if it is the insured's intention to continue the business.

If the insurer and the insured disagree on the amount of income lost and/or operating expenses incurred, either party may make a written demand for appraisal whereby each party selects an impartial appraiser. The appraisers will select an umpire to which the parties will submit their differences, if any. A decision from the umpire will be binding.

CONTINGENT BUSINESS INTERRUPTION

In recent years, insurance companies have adapted to the changing needs of a global economy, offering more novel coverage options than in the past. For instance, in Katrina's wake, many businesses will find that their customers or suppliers are unable to do business because of the physical damage those customers and suppliers have sustained. Contingent business interruption coverage is an invaluable source of recovery in such a situation, protecting the earnings of the insured following a physical loss or damage to the property of the insured's customers or suppliers, as opposed to its own property.

It is generally not necessary that the dependent property shut down, only that the insured's operations be suspended as a result of the physical loss or damage to the dependent property. Like business interruption policies, coverage under contingent business policies generally begins 72 hours after the physical damage to the dependent property and ends when such property should be repaired/replaced. Another important consideration in contingent business interruption coverage is that most policies require that the cause of damage and the type of damage to the dependent property be the same as would be covered for the insured's own property. But, again, insured must examine their own policies to determine the extent of such coverage.

Since contingent business interruption coverage will typically be issued in conjunction with general business interruption coverage, the same notification requirements and other duties will apply.

OTHER COVERAGES

Several other types of coverage may also be available:



- **Extended Business Income**

An insured may also obtain coverage for business income lost after the period of restoration outlined in a policy. Specifically, the insured may recover business income loss, otherwise recoverable, for a period of thirty days after the insured' property is repaired or replaced, or until the insured's business recovers to pre-loss levels, whichever is earlier.

- **Extra Expense**

Extra Expense coverage compensates the insured for (1) necessary expenses actually incurred (2) because of direct physical loss or damage to property (3) caused by or resulting from a covered cause of loss (4) during the period of restoration. This type of coverage may be included in a company's business interruption policy.

- **Civil Authority**

An insured may obtain coverage for business income lost as a result of actions by civil authorities to prohibit access to specified premises due to direct physical loss or damage to other property caused by a covered cause of loss. This coverage typically begins 72 hours after the restrictions are in place and lasts for up to three weeks.

- **Utility Services**

This type of policy covers business interruption losses caused by loss of power or communication services.

- **Ingress/Egress**

Some policies extend coverage for loss sustained when, as a result of a covered peril, ingress, access to, or egress from an insured property is prevented or impaired. These provisions generally do not require that the peril damage the insured property or, for that matter, that any property be damaged at all. Further, no civil authority order preventing access is required by this provision. Such coverage generally continues as long as the losses sustained result from the prevention of ingress/egress to the property.



- **Interruption of Computer Operations**

Ordinarily, business income coverage does not apply when there is loss or damage to electronic data. However, additional coverage may be acquired for loss of business income resulting from a suspension of operations caused by an interruption of computer operations due to the destruction or corruption of electronic data resulting from a covered cause of loss.

Taking immediate action following a loss will help preserve your rights under your insurance policy and increase the probability of a permanent recovery. To maximize recovery, every business should examine all available coverage and take steps to preserve it. However, an insured faced with this situation should exercise caution and consult with insurance counsel to determine the appropriate course of action. As always, Haynes and Boone stands ready to assist in any way possible.

Ernest Martin

ernest.martin@haynesboone.com
(214) 651-5641

Matt W. Holley

matt.holley@haynesboone.com
(214) 651-5371

David Taubenfeld

david.taubenfeld@haynesboone.com
(214) 651-5531

Werner Powers

Werner.powers@haynesboone.com
(214) 651-5581

D-1372382_1.DOC