

Five Issues to Consider in Pursuing Insurance Coverage for Loss and Damage from Hurricane Otis

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On Wednesday, Oct. 25, Hurricane Otis made landfall near Acapulco, Mexico as an intense category 5 hurricane. Over the next several hours, the storm's 165 mph winds and devastating flood surges ravaged the Mexican coast, leaving thousands of buildings damaged or destroyed and at least 100 people dead or missing. The impact has been particularly devastating for the region as Otis suddenly intensified from a tropical storm to become the most powerful hurricane to make landfall in Mexico's recorded history in only a matter of hours.¹

In the weeks and months to come, residents, local businesses, and the many international companies with interests in Acapulco will work to rebuild what has become known to tourists worldwide as the Mexican Riviera. In doing so, many regional and global concerns will be dependent on insurance proceeds to compensate for widespread property damage and intervening loss of income while the process of rebuilding continues. For those corporate policyholders seeking to make the most of available commercial property coverage, here are five (5) important issues to consider.

1. **Mitigate Loss & Damage.** Some policies may include express provisions requiring the insured to take reasonable action to mitigate covered loss and damage. Applicable law may also compel the insured to mitigate loss as a condition of recovering damages under an insurance contract. Either way, in the aftermath of Hurricane Otis, corporate insureds should prioritize steps to protect existing property from further damage and expedite repairs to lessen business income loss. Fortunately, most policies extend coverage for (1) "extra expense," including the cost incurred to continue or resume business operations that would otherwise be suspended because of covered property damage; (2) "expediting expense," consisting of the reasonable costs incurred for temporary repairs or to accelerate permanent repairs to covered property; and/or (3) "sue and labor" expense incurred to protect and preserve insured property and avoid covered loss of business income. Although the widespread damage from Hurricane Otis will limit opportunities for loss mitigation, where possible, insureds should not only seek these opportunities, but also document the costs and expenses incurred in doing so.
2. **Establish a Communication Protocol.** In the chaos of responding to a natural disaster, information and communication about facts and circumstances relevant to an insurance claim is bound to be imperfect. Internal communications within an insured company may contain speculation, inaccuracies, opinions, inconsistencies, and informality that could potentially hinder the progress of an insurance claim. Without planning and coordination, external communications between the corporate policyholder and its insurer may have the same flaws. To avoid these issues, corporate insureds should develop a communication protocol to ensure that information about a pending insurance claim is gathered, organized, and communicated clearly and accurately to the insurer or claim administrator. Where appropriate, including situations where litigation is anticipated, internal communications among stakeholders (as well as some external consultants) should be managed by counsel so that applicable privileges are protected.

3. **Timely Seek Advances & Submit Proof of Loss.** Some policies require repairs to be completed before the full replacement value of the property will be paid by an insurer. Particularly where a single occurrence impacts a large geographic area, as is the case with Hurricane Otis, the limited availability of materials and labor may extend the period required for repairs to be reasonably completed. Under these conditions and even under ordinary circumstances, insureds may need cash to begin and maintain repair operations and to compensate for ongoing loss of income. Accordingly, insureds should proactively seek periodic advances from the insurer before a final proof of loss is prepared and submitted. Doing so will not only provide the insured with sufficient liquidity to continue repairs, but also will afford both parties the opportunity to communicate regularly regarding the progress of the claim. At the same time, the insured should be aware of the policy's deadline to submit a proof of loss and seek extensions where necessary and appropriate. The extensive regional losses resulting from Hurricane Otis and the limited availability of labor and materials to complete repairs may also complicate the calculation of business interruption loss, raising questions over whether business income loss will be determined exclusively by reference to historical data or whether prospective, post-loss conditions are relevant. Corporate insureds should be careful and deliberate in preparing loss submissions for review by insurers to maximize recovery for both property damage and business income loss.
4. **Document Supplementary Coverages.** In addition to extending coverage for the cost of repairing damaged property and paying for business interruption loss, commercial property insurance may include other meaningful benefits that insureds should consider in pursuing coverage after Hurricane Otis. If, for example, the insured retains an accountant, and engineer or other professional to assist in preparing the details of the insurance claim, some policies provide coverage for the fees charged by such professionals. In the event that a company's own insured property has not been damaged, but hurricane-related damage to the insured's clients or suppliers has nonetheless interrupted business operations, an insurance policy may provide "contingent business interruption" coverage to compensate for the insured's loss of income resulting from covered damage to another's property. Similarly, if utility service is interrupted or civil authorities have restricted access to insured premises, resulting again in a loss of income to the policyholder, there may be coverage for these losses in many commercial property policies. In-house counsel and risk managers should be familiar with the terms of the company's commercial property coverage and take advantage of additional supplemental coverages where appropriate.
5. **Avoid Common Pitfalls.** While individual claims and policies each have unique facts and features, corporate insureds can protect against potential loss of coverage by avoiding common errors such as delaying notice with the expectation that a loss may fall entirely within a self-insured retention or deductible. Although the devastation from Hurricane Otis may leave little doubt about whether claims will require the expenditure of policy limits, when in doubt, give timely notice. While timeliness is important, be sure that information provided to the insurance carrier is accurate, even if doing so requires a little extra time. Even in a circumstance like this involving a natural disaster, in the course of rebuilding, the insured may become aware of claims against third parties for some part of the property damage or business interruption loss at issue. Be sure to preserve and do nothing to prejudice the insurer's rights to recover from any responsible third-party. Be aware of deadlines in the policy for making repairs, which may make the difference between recovering "replacement cost" and recovering a depreciated "actual cash value."

If you have any questions about property and business interruption claims relating to Hurricane Otis or about insurance recovery in general, please contact one of Haynes Boone's [Insurance Recovery](#) Practice Group partners listed below.

¹ Evan Bush & Denise Chow, Hurricane Otis: How a tropical storm turned into a 'nightmare scenario' overnight, NBC NEWS (Oct. 25, 2023), available at <https://www.nbcnews.com/science/environment/hurricane-otis-rapid-intensification-climate-change-rcna122090>; Eyder Peralta, People in Mexico are trying to pick up the pieces from Hurricane Otis, NPR (Oct. 31, 2023), available at <https://www.npr.org/2023/10/31/1209644520/people-in-mexico-are-trying-to-pick-up-the-pieces-from-hurricane-otis>.