

# How Insurance Might Cover Losses Incurred in Connection with Hurricane Lane

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**PRACTICES** Hospitality, Insurance Recovery, Litigation

Although Hurricane Lane's substantial weakening from a Category 5 storm as it approached land likely spared Hawaii a disaster, the storm still caused much harm. Areas of the Big Island got inundated with well over three feet of rain, causing landslides and major road closures, and high winds stoked brush fires on Maui, burning 2,300 acres of land, damaging multiple homes, and forcing hundreds of evacuations. Moreover, a large number of trees fell to high winds, including one that hit BBC reporter during a live radio broadcast.<sup>1</sup>

The suffering of individual homeowners whose houses were flooded, burned, or damaged by falling trees or wind-blown debris deserves much attention, but the economic impact on businesses also warrants discussion. Even those tourism-related businesses that were largely spared direct physical damage likely suffered financially because people fled the island or cancelled vacations to avoid the storm, and those that stayed were locked out of sandbagged stores.<sup>2</sup>

Local businesses may be able to protect themselves to some extent by accessing different types of insurance coverage likely within their first party property damage policies and/or by accessing event cancellation policies. Significantly, these policies often provide coverage for more than physical property damage, such as lost profits. Indeed, businesses may be able to obtain coverage even if they did not sustain any damage to their own facilities.

The article focuses on the main categories of losses that might be covered under these policies and summarizes some of the coverage disputes that may arise. It also identifies the steps that businesses could take now to preserve their right to pursue a claim later.<sup>3</sup>

## Property Insurance

### *Coverage for Physical Damage and Related Losses*

Businesses that sustained damage to one or more of their properties should keep three things in mind when assessing whether they have coverage under their property insurance policies for the cost of rebuilding or repairing these facilities, and for any business interruptions caused by the damage.

First, unlike most homeowner insurance policies, many commercial property policies cover flood damage. Flood coverage may be subject to higher deductibles and/or lower policy limits; however, businesses with such coverage in place likely will be able to avoid the "flood vs. wind" dispute that typically arises in homeowner insurance claims after hurricanes.

Second, a business with a policy excluding flood damage may still be entitled to coverage if the damage was due not only to flooding but also to another, covered cause of loss, such as wind or fire. Insurers have used so-called "anti-concurrent causation clauses" in their policies to contract around the legal doctrines that allow for this potential outcome, and it is unclear whether Hawaii

would enforce an anti-concurrent cause exclusion.<sup>4</sup> Thus, a Hawaii business must pay attention to choice-of-law provisions in their policies—and be prepared to litigate this issue if Hawaii law prevails.

Third, property policies typically cover so-called “extra expenses” that businesses incur in order to mitigate storm-related losses. For example, a hotel or restaurant may have coverage for the cost of overtime pay that they incurred to storm-proof their properties or reopen operations, and potentially even for incentives that they offer to win customers back.

## **Potential Coverage for Losses Even without Physical Damage to the Insured’s Own Property**

### *Civil Authority Provisions*

Commercial property insurance policies typically have “civil authority” coverage for business interruptions caused by the order of a civil authority that prevents access to an insured’s property. Civil authority coverage can be triggered by evacuations, airport or mass transit closures, curfews, or other restrictions on access to the insured’s facility by customers or employees.

Civil authority provisions can vary. Some require actual physical damage to the insured’s property or an adjacent property, while others provide coverage if the order is caused by the threat of physical damage (e.g., an incoming missile). Thus, for example, after U.S. Airways and United Airlines each brought a lawsuit seeking coverage under the civil authority provisions of its respective property insurance policy for losses stemming from the closure of Reagan National Airport after the September 11 terrorist attacks, U.S. Airways won, while United lost, based on subtle differences in policy language. Therefore, businesses should examine the exact language of their civil authority provisions carefully to determine whether a loss is covered.

Moreover, many policies contain waiting periods—typically of 24 to 72 hours—before coverage begins. For example, if the civil authority provision contained a 24-hour waiting period, a business would have a claim only for losses occurring two days or more after a road closure. Thus, a business should review its policy language carefully when evaluating coverage.

### *Ingress/Egress Provisions*

Commercial property insurance policies also often contain “ingress/egress” provisions that cover interruption of an insured’s business when the policyholder’s facilities are inaccessible for reasons other than a civil authority order or damage to the policyholder’s property itself. Many policies require that the inaccessibility result from covered damage to some property, which usually has to be within a certain distance of the insured location.

## **Business Interruption and Contingent Business Interruption Coverage**

Commercial property insurance policies also typically provide protection for lost profits under “business interruption” provisions (covering losses stemming from damage to the insured’s property) and “contingent business interruption” provisions (covering losses stemming from damage at a supplier’s or customer’s property that inhibits the insured from obtaining material from the supplier or selling its goods or services to a customer).

As with civil authority provisions, disputes may arise regarding whether actual physical damage is required to trigger these two types of coverage. The issue is important where, as here, some of the losses are due to the *threat* of damage, rather than by actual physical damage. Although business

interruption and contingent business interruption coverage typically require some type of property damage to trigger coverage, something short of actual physical damage may suffice. For example, in the context of a flu outbreak, a policyholder may be covered if a potential contamination of its building renders that property unusable.<sup>5</sup>

## Event Cancellation Insurance

Event cancellation coverage is an important risk management tool designed to protect the insured from loss arising from the cancellation, interruption, abandonment, relocation, or postponement of an event. Event cancellation policies can vary widely. Typically, however, such policies cover only losses stemming from peril beyond the insured's control. Hurricane watches and warnings are issued by the National Weather Service, and state actors determine road closures. Therefore, insureds should have a strong argument for coverage of events that were cancelled, postponed, or interrupted as a result of an official hurricane alert or an inability of participants to access the event.

Event cancellation can cover a wide variety of financial losses. Many cover out-of-pocket expenses spent on marketing and preparation before the cancellation; others cover lost profits in connection with a cancelled or interrupted event and/or additional expenses incurred in connection with a rescheduled event. Thus, an insured should quickly and thoroughly examine its policy language to see whether a harm stemming from Hurricane Lane is covered.

Although most businesses have the kind of property insurance policies discussed above, many do not have event cancellation insurance. Yet event cancellation insurance avoids a key dispute under property damage policies—*i.e.*, whether there has been physical damage to covered property. Therefore, a business that does not currently have an event cancellation policy should consider buying such coverage.

## Practical Pointers for Preserving Insurance Rights

Even before a business determines whether it has or should pursue an insurance claim, there are steps that businesses can take now to put themselves in the best possible position to secure coverage if and when the need arises:

- **Gather and Review Insurance Policies.** Businesses should collect the insurance policies they have purchased and identify policies issued to other entities, such as affiliates and vendors or other business partners, that may provide coverage. Those policies should be organized and reviewed to determine which policies and provisions are most likely to provide coverage.
- **Submit Notice of Claims and Proof of Loss Quickly.** Most policies require the insured to provide notice of potential claims, and to submit proofs of loss, quickly after the damage is incurred. Policies often demand “immediate” notice of losses that may give rise to a claim, and they often require policyholders to submit documentation of the loss within 60-90 days of the damage. Some policies also include private “statutes” of limitations clauses, requiring insureds to bring coverage lawsuits within a year or two. (Some policies may even require a business to bring suit within six months of a loss.) It is therefore critical for policyholders to act quickly to protect their rights by providing a precautionary notice of their loss.<sup>6</sup>
- **Document Damages and Set Up Communications Protocols.** Businesses should immediately begin documenting their losses, including lost revenues and additional expenses. Further, to avoid inadvertent characterizations of the nature or cause of the losses that could

be used by the insurance company later, businesses should involve legal counsel early in the process, set up internal and external communications protocols, and make sure those protocols are followed.

The insurance policies of any business are critical assets. Businesses can maximize the value of those assets by acting proactively now to analyze them and to comply with their procedural requirements.

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<sup>1</sup> [BBC's James Cook, North America correspondent, hit by tree during report.](#)

<sup>2</sup> [Elizabeth Weise, Lane downgraded to tropical storm, still poses flooding threat to Hawaii, USA Today, Aug. 25, 2018.](#)

<sup>3</sup> A full treatment of these issues is beyond the scope of this article, and the views expressed in the article are solely those of the writers, not Haynes Boone or any of its clients. Moreover, the views of the writers are not legal advice.

<sup>4</sup> A Hawaii case involving an anti-concurrent causation restriction was decided in favor of the insured based on policy language, so the court did not consider whether such provisions would be void as against public policy. See *Association of Apartment Owners of Imperial Plaza v. Fireman's Fund Ins. Co.*, 939 F. Supp. 2d 1059, 1075 (D. Haw. 2013) (finding coverage based on "the plain language of the exception to the Pollution Exclusion that allows coverage for pollution caused by a covered cause of loss prevails over the anti-concurrent causation clause's restriction of coverage" in an all-risks policy).

<sup>5</sup> See *Port Auth. of New York & New Jersey v. Affiliated FM Ins. Co.*, 311 F.3d 226, 236 (3d Cir. 2002) (agreeing with district court's finding that "physical loss or damage" may occur "if there exists an imminent threat of the release of a quantity of asbestos fibers that would" render a structure useless or uninhabitable).

<sup>6</sup> Some states find these shortened provisions to be invalid; Hawaii forbids agreements limiting the right of action against an insured "to a period of less than one year from the date of the loss." HAW. REV. STAT. § 431:10-221(a)(3).