Helene Highlights How Property Insurance Can Serve as a Hurricane Risk Management Tool

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According to the National Weather Service, the 2024 Atlantic hurricane season, spanning through the end of November, is expected to have above-normal hurricane activity. NOAA is forecasting a range of 17 to 25 total named storms, with 8 to 13 of those expected to become hurricanes.

CoreLogic, a California-based information services provider, released its annual risk report in May 2024, stating that approximately 40 million properties in the U.S. Gulf Coast and East Coast may be impacted by hurricane-related forces this year. CoreLogic estimates the cost of repairing such storm-related damage is $13 trillion.

Last week Hurricane Helene made landfall in the Florida Gulf as a Category 4 storm, wreaking havoc as it moved slowly across the Southeast. In less than a week, AM Best estimates that policyholders have incurred over $5 billion in losses as a result of Helene's wind and storm surges. The total Helene-related losses will depend on yet-to-be-calculated business interruption losses.

Accordingly, property insurance is a critical risk management tool for those that own, manage, or invest in at-risk real estate. While property damage and related losses cannot be completely avoided, businesses can take action to minimize the financial impact by taking certain steps to lay the groundwork for property insurance recoveries.

Laying the Groundwork for Insurance Recoveries

Step 1: Identify and Review All Potentially Relevant Policies

When it comes to insurance coverage, the devil is in the details. Policyholders will want to carefully review and analyze all potentially relevant insurance policies and applicable coverages. The review also should encompass limits, sublimits, exclusions, and deductibles applicable to each potentially available coverage, 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 a business (business interruption).

Coverage for lost profits and extra expenses incurred to resume normal operations may be available whether or not a business actually sustained physical damage. *See Fountain Powerboat Industries, Inc. v. Reliance Ins. Co.*, 119 F.Supp.2d 552 (E.D.N.C. 2000) ("the court finds that no requirement for physical loss to the property is required under the contract of insurance in order to trigger business interruption coverage under the ingress/egress clause."). Civil authority, ingress/egress and contingent business interruption are just a few examples of such potentially available coverages.

Some policies that provide flood coverage will sublimit it, meaning that less than full policy or program limits may be available for losses resulting from flood. That said, policies do not define flood uniformly, and the manner in which a policy defines flood, and the case law interpreting that

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definition, may mean the difference between coverage and no coverage. *Compare National Railroad Passenger Corp. v. Aspen Specialty Ins. Co.*, 661 F. Appx. 10 (2d Cir. 2016) (holding that Sandy damage was a "flood" as that term is defined in the policies), *with N.J. Transit Corp. v. Certain Underwriters at Lloyd's London*, 243 A.3d 1248 (N.J. Sup. 2021) (holding that Sandy damage was not considered "losses caused by flood").

As a related issue, a policyholder may have claims over multiple locations or jurisdictions which could mean that they are entitled to multiple "occurrences." *See Dental Experts, LLC v. Massachusetts Bay Ins. Co.*, No. 20 C 5887, 2022 WL 2528104 (N.D. Ill. July 7, 2022) (holding that each executive order per jurisdiction was a separate occurrence and that the insurer was liable for one executive order for each jurisdiction where the insured operates). The number of "occurrences" produced by a storm can affect the amount of limits, sublimits, and deductibles that are triggered.

Other important coverage considerations include:

- Applicable law;
- Whether the policies provide all risk or named peril coverage;
- Whether there are pertinent exclusions;
- Whether there are applicable sublimits;
- Mitigation coverage; and
- Whether the policies contain anti-concurrent causation language which, if enforceable under applicable law, could limit coverage if something excluded is in the causal chain.

Step 2: Be Mindful of Deadlines

Generally, insurance policies set forth the timing and manner in which insurers must receive notice of a loss. Strict compliance with these kinds of provisions can be critical to recoveries. *See President and Fellows of Harvard College v. Zurich American Ins. Co., 77* F.4th 33 (1st Cir. 2023) ("failure to provide timely written notice under the excess policy resulted in a forfeiture of coverage.").

While one might be hesitant to provide a lot of detail at an early juncture when much is unknown, policyholders should work to provide the information that they have to their insurers when giving notice. They can always indicate, when providing notice, that the information provided is based on what is currently known and is subject to change as more information becomes available.

In addition to notice requirements, property policies typically have several other time-sensitive requirements. Contractual suit limitation provisions reduce the time available to the insured to file suit to time periods as low as one or two years from the date of loss. State law will, however, have to be followed and insurers cannot utilize a period less than a reasonable period of time available under state law. *See Executive Plaza, LLC v. Peerless Ins. Co.*, 5 N.E.3d 989, 992 (N.Y. App. 2014) (stating that insurer "may not insist on a 'limitation period' that renders the coverage valueless when the repairs are time-consuming" and holding that a two-year contractual limitation period is not reasonable if "the property cannot reasonably be replaced within two years."). While written tolling agreements can extend these periods, policyholders need to be careful not to forfeit their right to sue.

Relatedly, there may be other time-based requirements in the policy – such as those pertaining to proofs of loss or repairs, notice of intention to elect replacement cost coverage, and the time within which to complete repairs. These requirements should be reviewed, noted, and acted upon.

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Step 3: Preparation of the Claim

Policyholders should respond to all reasonable insurer requests for information; however, they should feel free to work with the insurer and their broker to limit this cooperation so that it does not interfere with their recovery efforts, such as if the insurer seeks irrelevant or overly burdensome information.

Critically, policyholders should not rely on the insurance company to calculate the loss. Rather, policyholders should first seek to get their arms around a high-level estimate of their claim by calculating what revenues they lost and what expenses they saved as a result of each peril.

Following this high-level estimate, policyholders should consider retaining a professional claim preparer such as a forensic accountant or public adjuster. Calculating the losses attributable to a storm can be challenging. For example, losses resultant from hurricane damage may be greater than expected due to exacerbated supply chain issues which may already problematic due to COVID or political reasons. In addition, indemnity periods to repair hurricane damage may be longer than anticipated due to potential construction material shortages and extended repair timelines.

Forensic accountants, in particular, can help sort through these complex business income losses and can work with the insurer's accountants to try to reach consensus on disputed quantum issues. The policy may even provide coverage for the fees of the claim preparation team, reducing the available limits as well as the policyholder's out-of-pocket costs.

Policyholders should establish a program for regular updates to insurance companies as to the status of the claim. They should also keep detailed notes of conversations with insurance company representatives, including meeting minutes. Where there are verbal agreements, policyholders should write emails or letters confirming such agreements and seek payment of advances for all proven and undisputed losses.

Step 4: Push the Insurers To Pay Promptly

Following natural disasters, policyholders need to be diligent in pursuing insurance to help them quickly get back on their feet. Policyholders will need to push insurers, adjusters, and other agents of the insurers to promptly adjust and pay claims.

Diligence in pursuing insurance involves (1) reviewing insurance policies for all available coverages, (2) taking stock of notice provisions and key time limitations, (3) taking steps to prepare, present and defend the claim, and (4) pushing insurers to make prompt payments. Following these steps can help policyholders efficiently obtain insurance proceeds in the wake of Helene and other natural disasters.

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