

Securing a Full Insurance Recovery After Natural Disasters

By Finley T. Harckham



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After several years of relative calm, the hurricane season hit this year with fury. Damage estimates for Hurricane Charley alone exceed \$20 billion with billions more still being calculated from Frances, Ivan and Jeanne, and new storms are lining up in the tropics for their turn to assault the Caribbean Islands and U.S. mainland. Fortunately, most businesses are insured against such catastrophic loss. Unfortunately, securing a full recovery requires a great deal of work, the right team to prepare the claim, the right strategy for dealing with the insurance company, and dogged determination to secure every last dollar of coverage. Anything less could well result in a recovery of far less than the policyholder is entitled to.

Assemble a Team of Experts

Many companies which lack in-house insurance professionals fall prey to the belief that a complex property and business interruption loss can be handled by a facilities manager, an in-house accountant and an insurance broker. Those assumptions are often misguided, because preparing and pursuing a large insurance claim is a unique exercise which is closely linked to the arcane, and often ambiguous language of an insurance contract. A policyholder needs a team of experts to prepare the claim and aggressively negotiate on the policyholder's behalf. The insurance company will have a team of experts to advocate its position. To trust them to do the right thing for the policyholder is a formula for disaster. Likewise, relying upon a broker or other middleman to advocate for the policyholder is playing into the insurance company's hand, because it can then negotiate from its self-serving position against the middle ground.

The policyholder's team must provide expertise in each of three important areas: (1) physical loss or damage calculation; (2) lost income, profits or rents; and (3) policy analysis. Some companies have risk managers and other personnel who know how to prepare a building and income loss claim, but this can often be a much more complicated process than it

may appear to someone who handles insurance as just one of a number of other functions. Preparing such claims is the *raison de etre* of public loss adjusters, who serve as the *advocate* for the policyholder in preparing and negotiating coverage claims. Care must be taken to select a public loss adjusting firm which has the skill and resources needed, and that is free from any conflict of interest when negotiating with insurance companies. Some companies prefer to use accounting firms to quantify their losses, but they must be careful to ensure that the firm truly has expertise in quantifying physical damages losses to machinery, equipment, inventory and buildings—which is not an accounting exercise.

Preparing a business interruption loss is an entirely different exercise than putting together a property loss claim, and requires different expertise. Some loss adjusting firms have accountants and others with expertise in this field, but some do not. Likewise, some, but not all, accounting firms have such specialists.

Whoever prepares the claim must have a thorough understanding of property insurance forms and coverages. This is an important reason for employing loss adjustment specialists and, where the scope of coverage is unclear, obtaining legal advice on policy interpretation. Insurance companies routinely engage coverage counsel at the outset to advise them on the adjustment of a large loss.

Review the Policy Carefully for All Applicable Coverages

Business interruption, business income and lost rents are the primary time element coverages in most policies. In addition, some policies contain little used coverages for such causes of loss as order of civil authority, lack of ingress or egress and disruption of power or phone service. Any of these coverages may

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RECENT DEVELOPMENTS

Payment Delays Lead to \$8.6 Million Judgment Against Allstate. *Cassims v. Allstate Insurance Co.* The California Supreme Court has reversed a judgment for Allstate Insurance Co. ("Allstate"), ruling that the company's bad-faith delays in fulfilling contractual obligations would cost it more than \$8 million. Fareed and Rashida Cassims insured their home with Allstate. In December 1990 an arson fire caused damage to the home. Although the fire burned only in the master bedroom and the kitchen, the extensive heat, smoke and water damage to the rest of the structure rendered the home uninhabitable. Allstate denied the Cassims' claim, asserting that the Cassims had set fire to their own home and had been "materially false with regard to the submission of information concerning the cause and origin of this loss and the nature and extent of the property claimed." The Cassims lost their home to foreclosure. The Cassims sued Allstate for breaching the covenant of good faith and fair dealing, alleging that when informed that they were facing foreclosure, Allstate "exploited" this knowledge by unfairly delaying resolution of the claim and "insisting that small aspects of the case justified the delay." After a 38-day trial, the jury found the Cassims had made no intentional material misrepresentations, that they did not set the fire, that Allstate had breached the contract, that the Cassims did not breach the covenant, and that Allstate was responsible for 100 percent of the comparative bad faith. The jury awarded \$3.6 million in compensatory damages to the Cassims, and \$5 million

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apply to a hurricane or other natural disaster loss to supplement, or serve in place of, business interruption coverage. For example, phone and electrical power are often not restored for weeks after natural disasters (or the terrorist attacks on September 11, 2001). After Hurricane Charley moved through Florida over 400,000 customers were without power for over a week. An evacuation order by the local police department could trigger civil authority coverage. Downed trees or flood waters could prevent access to your business premises. Also, under contingent business interruption coverage policyholders who themselves suffered no physical loss or damage may nonetheless be entitled to recover lost profits due to the inability of suppliers to provide raw materials, or the inability of customers to accept deliveries.

Develop a Strategy For Dealing With the Insurance Company

The loss adjustment process is like an old-fashioned lawn mower; it needs to be pushed hard to yield results. The policyholder's team must develop and implement a plan for preparing the claim, cooperating with the insurance company in the adjustment process, and negotiating disputed items. Every plan should include, among other things:

- compliance with contractual requirements for notice of loss and proof of loss, and contractual limitations periods for suits or arbitrations against the insurer. Deadlines for filing proofs of loss and lawsuits can be extended by agreement, which should be done in writing;
- frequent communication with the insurance adjuster to try to develop a partnership approach to resolving the coverage claim. All important communications should be in writing, or memorialized in writing after the fact, to preserve a record of the adjustment process;
- wherever possible, provide the insurer with prior written notification of major expenses for which you seek coverage;
- procedures to ensure prompt responses to insurer requests for information. The most common explanation of insurance adjusters for inaction on a claim is that the policyholder has not provided needed information. This is often just an excuse for delay, but the policyholder should do whatever it can to not give the insurer that argument;
- consider preparing and submitting the claim in installments if the entire loss cannot be compiled quickly, and request partial payments as losses are substantiated and costs are incurred;
- attempt to resolve coverage issues while the claim is being adjusted. Those issues are much more likely to be resolved if they are addressed when other issues are being compromised, rather than saving them for the end of the process because they are problematic.

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Following these steps will allow you to influence the pace of the adjustment process, avoid the forfeiture of coverage for noncompliance with obligations under the contract, and hopefully obtain quick payment of at least part of what you are owed.

Keep the Heat on the Insurance Adjuster to Resolve the Claim

As a general rule, Insurance company adjusters are notoriously slow in resolving large claims. Frustration and delays are a virtual certainty. Nonetheless, you can mitigate these problems by persistently requesting prompt action by the adjuster. This should be done frequently and always in writing. Creating a written record of adjuster misconduct sends a strong message to the insurance company that it should reach a reasonable resolution of the claim, or face a bad faith lawsuit based upon a well documented record. Consider using counsel when creating a record of insurer inaction or intransigence.

To Appraise, or Not to Appraise?

Many large insurance claims cannot be fully resolved without some form of dispute resolution. For this reason, it is important to demand that all undisputed amounts claimed be paid without delay, so you are not held hostage by the insurer's refusal to pay the full amount claimed. Then, you must decide how to recover the remaining amount owed.

Most property insurance policies provide that disputes over the amount of a loss shall be submitted to appraisal upon the request of either party. For merely placing a value on lost or damaged property, appraisal can be a quick, inexpensive and reasonable form of dispute resolution. However, many disputes over the amount owed by an insurance company involve both valuation and issues of the scope of coverage provided under the policy. In those instances, the policyholder is not required to submit to appraisal, but may instead initiate a lawsuit or arbitration. Whether it is preferable to submit such matters to appraisal or litigation will depend upon a number of factors unique to each claim. Appraisals are generally conducted by umpires who are contractors or other business people with expertise in construction, machinery, etc. They are not insurance experts, and may not have the expertise needed to decide the scope of coverage to which you are entitled. Moreover many jurisdictions treat appraisal as a form of arbitration, and therefore there may be no meaningful right to appeal even a blatantly erroneous coverage determination by an appraisal umpire.

Conclusion

In today's environment of sky high insurance premiums, policyholders should not have to fight to secure the coverage they are entitled to. Nonetheless, unless you are prepared to aggressively and expertly pursue your rights, you will not get the coverage you paid for. ■

Finley Harckham is a senior shareholder in the New York office of Anderson Kill & Olick, P.C. He regularly represents policyholders in insurance coverage claims and litigations. He also heads Anderson Kill Loss Advisors and Anderson Kill Insurance Services, both of which are subsidiaries of AKO which assist policyholders with property and business interruption insurance claims, and provide insurance consulting services. Finley Harckham can be reached at: 212-278-1543 or fharckham@andersonkill.com

INDUSTRY NEWS

New York Court Holds That "Breach of Contract" Claims Trigger Insurance Company's Duty to Defend. Insurance companies often seek to evade their contractual obligations to their policyholders by arguing that "breach of contract" claims are not covered under their policies. Although the coverage definition of "occurrence" does not distinguish between liability acquired by contract or tort, some courts have incorrectly focused on the theory of the policyholder's legal liability in determining whether an underlying claim falls within coverage. Recently, however, a New York court rejected such an argument.

In *Hotel des Artistes, Inc. v. General Accident Insurance Co. of America*, the court considered whether breach of contract claims arising out of the policyholder-hotel's alleged failure to fulfill certain lease obligations to its tenant after a fire, triggered the insurance company's duty to defend under the commercial general liability ("CGL") insurance policy at issue. The insurance company argued that it had no duty to defend or indemnify because its CGL policy did not provide coverage for losses caused by the policyholder's failure to perform its contractual obligations. The First Department rejected this

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WHO SAID WHAT?

Zurich North America,
Zurich Advertisement, Bus.
Ins., Oct. 29, 2001, at 21.

INDUSTRY NEWS...continued from p3.

argument, finding that “nowhere in the policy’s coverage provisions are there any restrictions on the source or theory of the insured’s legal liability. For instance, nowhere is it said the insured’s ‘legal obligation to pay damages because of property damage’ is limited to the insured’s liability in tort.... In short, nothing in the coverage terms of the policy even implies a distinction between liability acquired by contract or in tort.”

The insurance company also argued that its CGL policy was not “intended” to cover breach of contract claims. The First Department resoundingly rejected this argument finding that the insurance company agreed to defend the policyholder-hotel “for all sums the hotel becomes ‘legally obligated to pay as damages

because of . . . property damage,’ without any limitation or restriction as to the source of legal obligation.” The court further held that “there is no requirement that the [policyholder-hotel] engage in negligent conduct, commit any tort or even be at fault for the property damage, so long as it is ‘legally obligated to pay’ for it. Without such requirements, one cannot read into the policy an exclusion for contract-based liability that is not stated in the policy.” ■

—Kate Cinella Tylis

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in punitive damages. Allstate appealed. The California Supreme Court disagreed with Allstate. The California Supreme Court remanded the case to the trial court only for recalculation of the proper damages amount. ■

—Claudia Ilie

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