

Client Alert

Insurance Coverage & Recovery Practice Group

August 30, 2017

Hurricane Harvey: Don't Get Shortchanged on Your Insurance Recovery for Property Damage and Business Interruption Losses

After making landfall early Saturday morning as a major hurricane, Tropical Storm Harvey has left a widespread path of destruction, significantly damaging the infrastructure in the Houston area and Southeastern Texas, crippling virtually all operations of businesses in the nation's fourth largest city and largest energy hub, and causing losses estimated in the tens of billions of dollars. In addition to the property damage suffered by businesses with facilities in the Houston area, many businesses will experience significant business interruption and supply chain losses as a result of extended closures of refineries, ports, airports, roads, and other critical infrastructure in the wake of the storm.

Texas Policyholders Should Attempt to Notify Insurers of Claims and Potential Claims By August 31, Before HB 1774 Goes Into Effect.

Policies frequently require that an insured notify the insurer "immediately," "as soon as possible," or "as soon as practicable" after the insured becomes aware of a potential claim. The effect of failure to provide notice in accordance with the policy terms varies among jurisdictions, but the consequences of failure to comply with notice provisions may be severe and preclude coverage. Property policies also often contain deadlines for providing a "sworn proof of loss" documenting the causes and value of the loss. It is important to know these deadlines from the outset and to seek extensions if necessary.

In addition to these requirements, the passage of a new law by the Texas legislature means that, if possible, **Texas policyholders should notify their insurance companies of potential first-party property damages claims by August 31, 2017**, even if your business is still assessing its losses. On September 1, 2017, a new Texas law, HB 1774, goes into effect. The new law will impose restrictions on when a policyholder can file a lawsuit to recover a disputed claim, and may limit the amount of statutory penalties and attorneys' fees that a policyholder can recover in the event their insurance companies wrongfully deny or delay payment of valid claims arising from a natural disaster like Harvey. Therefore, even if your business is uncertain whether it has sustained losses as a result of Harvey, it should promptly notify its

For more information, contact:

Meghan Magruder
+1 404 572 2615
mmagruder@kslaw.com

Anthony P. Tatum
+1 404 572 3519
ttatum@kslaw.com

Shelby S. Guilbert, Jr.
+1 404 572 4697
sguilbert@kslaw.com

Joseph M. Englert
+1 404 572 3536
jenglert@kslaw.com

Kenneth Fowler
+ 1 212 556 2227
kfowler@kslaw.com

King & Spalding
Atlanta
1180 Peachtree Street, NE
Atlanta, Georgia 30309-3521
Tel: +1 404 572 4600

New York
1185 Avenue of the Americas
New York, NY 10036
Tel: +1 212 556 2100

www.kslaw.com

insurers of any possible losses from Harvey out of an abundance of caution to potentially avoid any new recovery limitations imposed by HB 1774.

Businesses impacted directly or indirectly by Harvey may be able to recover some or all of their losses under one or more insurance policies.

Key Insurance Coverages for Harvey Losses for All Types of Businesses Include:

Business Interruption (BI) Insurance. Covers lost profits that a business would have earned but for the interruption of business caused by physical damage to, or loss of use of, property covered by the policy.

Contingent Business Interruption (CBI) Insurance. Even if your business did not experience *direct* property damage, your property policy may provide CBI coverage for economic losses arising from supply chain disruptions, such as an inability to acquire goods or services from your suppliers or an inability to deliver your products or services to customers.

Service Interruption Coverage. Covers any loss or expense caused by interruption of utility services resulting from damage to a utility's property.

Civil Authority Coverage. Protects businesses from losses resulting from a government order restricting access to a business's property or closing airports, roadways, bridges, or ports.

Extra Expense Coverage. Covers expenses necessary to resume normal business operations and mitigate losses.

Ingress/Egress Coverage. Pays for loss of business income caused by physical damage to property of others that prevents ingress/egress to your business.

Cyber / Data Security insurance. Covers losses arising from a network security breach that results in the unauthorized disclosure of confidential data. A company's network security systems (or those of its vendors) may be impaired or disabled during a natural disaster, making the company more vulnerable to cyberattacks.

Key Early Steps to Avoid Mishaps That Can Diminish or Prevent Your Insurance Recovery:

When making a claim following a natural disaster, businesses should promptly and proactively assess and document their losses, evaluate their insurance coverage, and act to comply with any contractual conditions that are necessary to obtain coverage. The following is a summary of some essential steps that your business should take to maximize the value of its insurance assets following a natural disaster.

Gather All Policies and Closely Review Their Terms. If your business has not done so already, it should immediately gather and review all potentially applicable insurance policies. As policy terms vary and may be subject to different interpretations, consult with coverage counsel to assist in evaluating coverage. Even if your company is unsure of the full extent of its losses, it is vital to promptly locate all available insurance policies, assess the potential coverages available, and promptly notify the insurers to maximize the recovery available under your company's insurance program.

Provide prompt notice as discussed above.

Collect and Preserve Evidence of Business Losses and Damages. It is important to record all costs, expenses, and damages for which you might seek coverage. If your business sustained direct property damage, take photos and videos of property damage and business interruptions to the extent possible and retain damaged property and equipment. To ensure full coverage under BI and CBI insurance for lost profits, businesses should document their losses by maintaining proof of business performance prior to, during, and following the disaster. Many policies also provide coverage for the expenses associated with such claim preparation-related activities. All such expenses should be tracked.

Be Careful About Internal and External Communications Regarding the Loss. Businesses should be careful about what they say about insurance coverage in internal and external communications with brokers and insurers. If litigation over insurance coverage becomes necessary, insurers may gain access to internal communications such as emails and memoranda regarding a business's claims for insurance. How the loss is characterized in such communications may be used to deny coverage. Involving coverage counsel in these communications may ensure that they are protected as privileged in the event of litigation over coverage. Businesses also should identify a single point of contact or spokesperson for all communications with insurers.

Coordinate Mitigation Efforts With Insurers. While it is important to mitigate losses, it also is important to communicate with insurers regarding such efforts when possible. This will minimize the chance that the insurer will apply hind-sight to second-guess the reasonableness of the mitigation procedures that a business puts in place.

Engage Coverage Counsel. Claims from storm events such as Harvey are complex and may contain potential coverage-defeating traps. Experienced coverage counsel is critical and will work with your brokers to ensure that you can maximize the insurance recovery for your loss.

Coverage Issues to Navigate Before Making a Claim:

Policy Exclusions and Proximate Causation Issues. Property policies typically cover "all risks" or specified "named perils" that are not otherwise excluded. Exclusions generally target specific causes of loss. Flood, mold, bacteria, and pollution exclusions are some key exclusions insurers can be expected to assert for Harvey losses. It is critical to carefully identify the covered, non-excluded cause of loss from the beginning to avoid unwittingly providing the insurer unjustified grounds to deny your claim. As we have seen repeatedly after disasters like 9/11, Hurricane Katrina, the 2011 Japanese earthquake and tsunami, Hurricane Ike, and Superstorm Sandy, causation issues will be hotly contested in any claim that arguably involves more than one cause of loss (*i.e.*, wind and flood, or flood and mold). Recently, the Texas Supreme Court in *JAW the Point, LLC v. Lexington Ins. Co.*, 460 S.W.3d 597 (Tex. 2015), upheld the enforceability of anti-concurrent-causation clauses—*i.e.*, provisions that exclude losses caused by a combination of covered and uncovered causes—and excluded coverage for losses from a combination of wind and flood damage from Hurricane Ike. However, the Texas Supreme Court also reaffirmed in the *JAW* case that, in the absence of an anti-concurrent-causation clause, coverage would exist under Texas common law when a covered event and an excluded event "each independently cause" the loss. The law regarding concurrent causation differs across jurisdictions and continues to develop, so it is important to be cautious when asked by an insurance company to ascribe a specific cause to your loss.

Sub-Limits and Deductibles. Most policies contain varying sublimits and self-insured retentions depending on the cause of the loss. It is important to understand these limitations before making a claim. For example, some named-peril policies contain specific “Named Windstorm” or “Hurricane” coverage in addition to usual coverage for high winds. Such policies often contain sub-limits and deductibles for these perils that limit the amount of coverage available.

Multiple Occurrences vs. Single Occurrences. Insurance policies typically provide for a deductible for each “occurrence” that results in a loss, as well as a per-occurrence limit below the total aggregate limit of the policy. Because Harvey damaged an extremely wide area, many businesses incurred damage to more than one facility in different locations and at different times – sometimes several days apart. Consequently, the resulting losses potentially may be considered one occurrence (*i.e.*, one storm) or multiple occurrences (*i.e.*, numerous locations separately damaged, or damaged by multiple storms) depending on the specific facts involved. Moreover, because Harvey made more than one landfall, number-of-occurrence disputes issues may arise regarding losses incurred on separate dates at the same location. Businesses should consult with coverage counsel before making a claim in anticipation of disputes over the number of occurrences to maximize coverage in view of the specific deductibles and per-occurrence limits of the policy.

Loss Valuation Issues. Many policies contain information about how losses should be accounted (*i.e.*, actual cash value, replacement cost value, or functional replacement cost value) which can have a dramatic impact on the value of an insured loss. It is important to understand these provisions before making a claim, and for complicated losses, it may be advisable to seek the advice of a forensic accountant before submitting a proof of loss. Furthermore, when rebuilding/refurbishing properties after a disaster, businesses generally must comply with building code regulations currently in force, which may be more onerous than code requirements in place when a building was originally constructed. Some policies will cover additional costs to bring a property up to current code regulations, while others will not.

Acts of God / External Infrastructure Exclusions in Cyber Policies. Many cyber policies include exclusions for security breaches arising out of failures of external infrastructure, such as power failures. Some cyber policy forms also include “acts of god” exclusions for breaches arising out of floods, fires or other natural disasters. In other words, coverage may be excluded if an external cause disables the policyholder’s network security defenses, leading to a data breach. Cyber policies are relatively new to the market, and Harvey is the first major natural disaster that has occurred since many of the cyber policies were issued to businesses operating along the Gulf Coast. Thus, it is unclear to what extent insurers will rely on these types of exclusions in the wake of a natural disaster like Harvey. However, it is important to coordinate the communications with the cyber insurers with experienced data security and coverage counsel to minimize the risk of the application of these exclusions.

We work closely with our clients and their risk managers to collect from their insurers for losses arising from property damage, business interruption, and supply chain disruption caused by catastrophic events, and have obtained billions of dollars in insurance recoveries for our policyholder clients.

Celebrating more than 130 years of service, King & Spalding is an international law firm that represents a broad array of clients, including half of the Fortune Global 100, with 1,000 lawyers in 20 offices in the United States, Europe, the Middle East and Asia. The firm has handled matters in over 160 countries on six continents and is consistently recognized for the results it obtains, uncompromising commitment to quality and dedication to understanding the business and culture of its clients. More information is available at www.kslaw.com.

This alert provides a general summary of recent legal developments. It is not intended to be and should not be relied upon as legal advice. In some jurisdictions, this may be considered “Attorney Advertising.”