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## South Carolina's 1,000-Year Flood Requires Immediate Action to Maximize Recovery

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*South Carolina was recently pummeled by a devastating storm that Governor Haley described as happening “once in a thousand years.” Compounding the resultant flooding, many dam breaks exacerbated the catastrophic losses South Carolina business owners have suffered. Clean-up costs alone are estimated to exceed \$1 billion.*

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As business and property owners take stock of their losses, plan their response, and examine their insurance policies and their recovery options, numerous questions will arise. How am I going to pay to repair damaged property? What is the quickest way to resume my business? Can I recover any of the profits I lost when my business was interrupted or my customers' or suppliers' businesses were interrupted? Are there any government funds, such as FEMA assistance, available?

Obtaining insurance proceeds and FEMA assistance is paramount in the recovery process. To help address some inevitable issues, and to assist with the initial insurance claim and FEMA application processes, we provide the following guidance.

### **1. Obtain and Review Your Insurance Policies.**

To begin with, it is crucial to obtain, review and evaluate all potentially applicable insurance policies for coverage. Understanding your rights and obligations requires a thorough review of the policies to determine what coverages may apply. Property insurance is the most obvious source of coverage, but do not overlook auto policies, marine cargo policies, pollution policies and, for those facing potential third-party claims, liability policies.

When reviewing your insurance policies, note any deadlines and calendar those dates with reminders set several weeks before the deadline. Initially, calendar the deadline by which you must give notice, file a sworn proof of loss, and file suit if you disagree with the insurance company's coverage determination (bearing in mind that that date might be years in the future). Tasks that must be completed within a “reasonable” amount of time should be done as soon as practicable. Missing deadlines can be fatal to an insurance claim.

## 2. Assess All Possible Coverages.

With respect to storm-related damages, “first-party” policies such as commercial property policies are the ones most likely to provide coverage for an insured’s own losses. Although residential policies frequently exclude flood loss, flood may be covered under commercial policies. Even when flood is not an insured peril, there may be coverage when another, covered cause (such as wind or power outage) contributes to or ensues from the loss, as in a fire caused by a flood-related transformer explosion.

In addition to providing coverage for physical damage to an insured’s property, many commercial property policies also include coverage for losses due to the interruption of the insured’s normal business activity due to damage to utilities, customers, suppliers, infrastructure and other critical, or dependent, properties. These extended coverages may apply, even if the insured’s own property was not physically damaged. For example, depending on policy wording, damage to certain suppliers or customers may result in covered “contingent business interruption” losses. This may be critical to businesses whose supply and customer chains are disrupted as a result of the severe damage to and closure of transportation infrastructure, including roads, railroads and even intercoastal waterways.

Similarly, disruption of power and other utilities may trigger losses insured by service interruption coverage. As well, curfews, prohibitions against entry and physical obstructions to roads may trigger civil authority or loss of ingress/egress coverage. A thorough review of the insuring provisions is critical to determine whether, and the extent to which, such coverage may apply.

## 3. Place All Insurers on Notice.

Even if you have not yet identified all of your losses, or determined that a policy might be implicated, provide notice as soon as possible to any insurance company under whose policy you might seek coverage. Do not assume you do not have coverage. Give notice regardless. Notice is just that: notice to your insurance company that you might have a claim. It need not, at the initial stage, be too detailed, so there is no reason to delay in providing notice. Be sure to precisely follow the directions in each insurance policy regarding notice, and be aware that notice instructions might differ from policy to policy. Pay close attention to the date by which you must provide notice, to whom notice must be provided, and the form the notice must take. Insurance brokers might be best positioned to provide the notice, so consider consulting with your broker for assistance.

## 4. Document and Mitigate Your Losses.

Carefully documenting losses, especially before you undertake any cleanup efforts, is critically important for evaluating the loss. This includes not only property that was damaged during the storm, but also any property rendered unusable in the days following the storm—for example, inventory exposed to moisture. Take notes and photographs. Keep a log of all actions taken. Track expenses for professional fees, mitigation and clean-up costs. Establish separate accounts to track losses. Save all repair receipts and other records of additional expenses made necessary by storm-related damage.

You might also have an obligation to preserve and protect the property from further losses, including mitigating additional damage. Because such steps are required to be taken, the mitigation expenses are covered under property insurance policies. For example, if a building is flooded, the policy requires the insured to take necessary steps to dry out flooded areas; and, accordingly, provides reimbursement of such mitigation expense, subject to certain limits. Lastly, the insurer may have salvage rights to damaged property and stock, so it is important to preserve any salvageable property to the extent possible.

## 5. Detail Your Business Interruption and Contingent Business Interruption Claims.

Business interruption coverage reimburses the policyholder for lost profits during the time that the business was interrupted because of a certain event (here, the rain and flood). Contingent business interruption provides coverage for losses due to the interruption of business due to damage to customers or suppliers. The biggest challenging in securing coverage for either of these types of insurance is valuing and documenting the loss. Accordingly, it is crucial to keep detailed records documenting when and how their businesses were interrupted.

## 6. Engage Experts.

It is usually prudent to engage professional claim consultants, such as forensic accountants, particularly where there is business interruption loss. Additional experts may be needed to model the unique financial aspects of your business. Their professional fees and other mitigation expenses are frequently covered under property policies, subject to sub-limits. Usually, public adjuster fees are not covered.

It is also a good idea to retain an experienced insurance coverage lawyer, not just when you need an advocate, but to help you protect the privileged nature of your communications and to avoid many of the traps for the unwary when presenting your insurance claim. Counsel may work in the background, without revealing their involvement to insurers. Insurers typically do the same thing. Cooperate with the insurance company adjuster, but don't forget that the adjuster works for the insurer, not for you. If you need an advocate, hire your own.

## 7. Follow the Policy to Preserve the Claim.

After the initial notice of loss, most property policies also require that the insured later submit a sworn "proof of loss" to catalogue the damages. Although this is usually done after reaching agreement with the insurer on the amount of the insured claim, occasionally, policies require the proof of loss to be submitted within a fairly short time after the event. Insurers are usually amenable to extending these deadlines if requested, but make sure that any extensions are memorialized in writing. In addition to notice and proof of loss, insureds must also preserve and protect the property from further losses, including taking any and all steps necessary to mitigate (or minimize) additional damage, including business interruption.

## 8. Government Funds Might Be Available for Non-Profits Providing Critical Infrastructure and Essential Services.

Most people know that FEMA frequently provides funds to state and local governments and individuals. But FEMA and other government-based programs are also potentially available for certain not-for-profits that provide critical infrastructure and essential services. Critical infrastructure and services include: hospitals and other medical-treatment facilities, fire, police and other emergency services, power, water and sewer utilities, educational institutions, libraries, museums and zoos, community centers, and senior citizen centers and day-care centers. The program and application process can be complicated and daunting. And strict time limits apply. But a successful applicant can see FEMA reimburse no less than 75 percent of the eligible costs for emergency protective measures and permanent restoration costs, including debris removal and infrastructure repair or replacement. FEMA does not, however, pay for business interruption losses and grant recipients must reimburse FEMA for any benefits that are duplicated by other sources such as insurance.

South Carolina may have experienced a thousand-year flood, but by following these tips, business and property owners should be well-placed to quickly recover.

*Haynsworth Sinkler Boyd and Pillsbury Winthrop Shaw Pittman collaborated to publish this alert. For the past 128 years, Haynsworth Sinkler Boyd has represented South Carolina businesses and individuals in complex litigation and general business matters. Pillsbury's Insurance Recovery & Advisory practice is one of the first insurance policyholder practices in the United States, dating back to the Great San Francisco Earthquake and Fire in 1906. These two firms stand ready to assist with South Carolina's recovery efforts.*

If you have any questions about the content of this alert, please contact the Pillsbury attorney with whom you regularly work, or the authors below.

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