Insurance Recovery & Advisory

January 19, 2016

Insurance Coverage Issues for Hotel and Apartment High-Rises Damaged by Fire

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This alert also was published as a bylined article in FC&S Legal *on February 22, 2016.*

Just before fireworks exploded across the sky to usher in 2016, a massive fire engulfed the Address Downtown Hotel in Dubai. At nearly 1,000 feet tall, this five-star hotel and luxury apartment building —with about 200 hotel rooms and 600 residential units—suffered significant damage, and a number of people were injured.

This is not the first high-rise fire in Dubai's recent history. In February 2015, a fire damaged over 100 luxury apartments in the Marina Torch tower, and back in 2012, a fire destroyed the thirty-four-story Tamweel Tower.

These fires—in tall, luxury buildings that may have mixed hotel, retail, and residential spaces, and that have been sprouting up in cities like New York, London, Paris, Berlin, and Hong Kong—pose a number of complicated questions about how best to maximize insurance recovery. Here are some tips of what to do and to look out for in the immediate aftermath of a fire.

1. Review Your Insurance Policies and Calendar Deadlines.

Understanding both your available coverage and your obligations requires a thorough review of all potentially applicable insurance policies to determine what coverages may apply. Where the high-rise has mixed hotel, retail, or residential spaces, this review will entail unraveling the potentially complicated web of overlapping coverages and obligations arising from the various insurance policies that insure all or parts of the building. For example, the building owner, the hotel operator, the personal residences, and the retailers might all have different policies.

When reviewing insurance policies, calendar any deadlines and set reminders several weeks before the deadline. Initial deadlines typically include the date 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.

Because understanding your policy and obligations can be challenging, and because missing deadlines can be fatal to an insurance claim, retaining an experienced insurance coverage lawyer during these initial stages might be a good idea. Counsel may work in the background without revealing their involvement to insurance companies (note that insurance companies typically do the same thing).

2. Place All Insurance Companies on Notice.

After a fire, you should immediately give notice to any insurance company under whose policy you might conceivably seek coverage. Fire and property insurance are the most obvious source of coverage, but do not overlook commercial general liability, auto, pollution, and other types of policies. Do not forget about liability policies either, particularly for those facing potential third-party claims, such as from hotel guests who were injured or lost property. Even if you have not yet identified all of your losses, or are unsure whether you have coverage under a certain policy, seriously consider providing notice to all potentially applicable policies. Do not rely on coverage advice from brokers or assume your policy is not applicable. Notice need not, at the initial stage, be very detailed or specify the cause or extent of your loss, 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.

3. Assess All Possible Coverages.

With respect to fire damages, a threshold question is whether and to what extent the policy insures against the peril of fire. Under all-risk policies, fire is covered except to the extent there is an applicable sub-limit or exclusion. Even when fire is not an insured peril, there may be coverage when another, covered cause (such as a construction defect or faulty workmanship) precedes, contributes to, or causes the loss.

In addition to property coverage, businesses might also have business interruption and contingent business interruption coverage. Business interruption coverage reimburses the policyholder for, among other things, lost profits during the time that the business was interrupted because of a certain event (here, the fire). Contingent business interruption—which applies even when the policyholder’s own property is not physically damaged—provides coverage when the policyholder sustains losses as a result of damage to third-party property (such as the property of critical suppliers of goods and services, utility providers, or the policyholder’s landlord, customers or employees) that prevents the supplier or customer from supplying or accepting the policyholder’s goods or services.

These coverage extensions are often poorly understood and are therefore a common source of disagreement with insurance companies. Furthermore, policyholders should be aware that these coverages and extensions might be subject to certain sub-limits. But sub-limits do not end the analysis. For example, various sub-limits may be “stacked”—that is, applying two or more limits for a single occurrence or claim. Additionally, some courts have held that time element coverage is not subject to or is in addition to certain sub-limits. *See, e.g., Fed.-Mogul Corp. v. Ins. Co. of the State of Pennsylvania*, No. 12-12005, 2015 WL 5999658 (E.D. Mich. Oct. 15, 2015); *Northrop Grumman Corp. v. Factory Mutual Ins. Co*., 805 F. Supp. 2d 945 (C.D. Cal. 2011); *Hewlett-Packard Co. v. Factory Mutual Ins. Co*., No. 04 Civ. 2791, 2007 WL 983990 (S.D.N.Y. Mar. 30, 2007). Because the results are often dependent on policy language, applicable case law and jurisdictional specifics, engaging an insurance coverage attorney can be helpful.

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 damaged during the fire, but also any property rendered unusable in the days following the fire—for example, inventory exposed to smoke or water damage. Take notes and photographs. Keep a log of all actions taken. Track expenses for professional fees and mitigation and cleanup costs. Establish separate accounts to track losses. Save all repair receipts and other records of additional expenses made necessary by storm-related damage.

You may also have an obligation to preserve and protect the property from further losses, including mitigating additional damage. Because such steps may be required, the mitigation expenses may be covered, particularly under property insurance policies. Additionally, the insurance company may have salvage rights to damaged property and stock, so it is important to preserve any salvageable property to the extent possible.

5. Engage Experts.

In addition to having an experienced insurance coverage lawyer, 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.

Experts typically take into account past years' performance to help calculate the business interruption loss. This can be particularly challenging where, as here, the buildings are new and so do not have much data from past years on which to base financial models. This issue further supports the need for qualified experts.

Their professional fees and other mitigation expenses are frequently covered under property policies, subject to sub-limits. Usually, public adjuster fees and fees charged by lawyers are not covered. Cooperate with the insurance company adjuster, but do not forget that the adjuster works for the insurance company, not for you. If you need an advocate, hire your own.

6. Avoid Fire Hurdles and Pitfalls.

Fires in high-rise, mixed-space buildings pose a number of unique hurdles to insurance recovery. Being aware of them from the outset helps you to avoid them:

- Insurance companies frequently minimize fire losses. Policyholders should not simply settle for minimum payments.
- Smoke can be as damaging as the fire itself. Insurance companies might try to classify smoke as a "pollutant" to exclude it under a pollution exclusion. A standard insurance policy, however, should not exclude this loss.
- Water from sprinklers causes very significant damage. In certain climates, mold can begin to grow almost immediately. Insurance companies often try to exclude damage caused by mold either in the insurance policy itself or as an endorsement.
- Good-faith efforts to save property from a fire might be covered by insurance against fire.

- When a fire destroys a hotel or apartments, owners might incur expenses for relocating and housing the guests. The owners, therefore, should seek insurance coverage for those expenses as well.
- Luxury apartment owners who rent out their apartments might be required to have leases in place in order to recover for lost future rent if the apartment is destroyed or rendered uninhabitable. This condition might depend on the specific language of the policy. Leasehold interest and fair-rental losses are often highly contested.

Building owners, hotel and retail operators, and apartment owners should be well versed in what to do if a fire damages the building. These tips can help to maximize that recovery and minimize disputes.

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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