Are You Covered for a Superstorm?

Insurance Issues for Catastrophic Flooding and Wind

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Superstorm Sandy provides a useful but sobering preview of the types of insurance and risk management issues that business and residents face given the prospects of a catastrophic storm. The 2012 storm began life as a hurricane and was still potent when it made landfall in a very populated area; Sandy caused $68 billion of damage. Similar storms can occur on most seacoasts worldwide, whether from single hurricanes, from tsunamis, or simply from unrelenting heavy weather patterns that overwhelm levees and other existing protections.

Exclusions, sublimits and other coverage terms relevant to certain types of natural disasters can have a major impact on policyholder recovery after a storm. Businesses and homeowners think of policies as an off-the-shelf product, but there is a great variety of coverage restrictions and expansions that may be present or that can be shaped.

The Bay Area Council Economic Institute and other organizations recently published a report entitled *Surviving the Storm*, which detailed the risks to the San Francisco Bay Area from sustained winter storms. Severe storms crossing from the mid-Pacific Ocean to the Western coast of North America, along the original so-called "Pineapple Express," have inundated California in the past (notably in 1862) and are expected to recur. It is perhaps incongruous that the report has been issued in the midst of an epic drought in California, but the planning and protection for such an event are overdue.

In connection with the Bay Area Council report, insurance litigator Robert Wallan and infrastructure development lawyer Rob James of Pillsbury Winthrop Shaw Pittman LLP identified for insureds the following issues that have been hotly contested in the wake of major storms.

1. **Flood vs. named storm.** Typical property policies exclude flood losses, but may be less restrictive for storms officially named or declared as emergencies. Ordinary flood coverage can usually be purchased, but this is often expensive and requires careful attention to special deductibles and sublimits.

2. **Hurricane vs. named storm.** At the other end of the spectrum, some policies exclude coverage for hurricanes but not for lesser storm damage. Sandy did not meet federal government

standards to be a hurricane, and some insurers questioned coverage based on "named storm" exclusionary language.

3. **Concurrent causation issues.** In many instances losses may be not only the result of excluded perils like flood, but also the product of covered perils like wind. Insurers have long sought to deny coverage if any excluded peril is a factor. The courts have limited insurers' success on such arguments, but the insurance industry routinely modifies standard policy language to respond to such decisions. Concepts like ensuing loss, efficient proximate cause and anti-concurrent causation have become significant areas of dispute following major catastrophes.

4. **Civil authority and ingress/ egress issues.** Business owners typically obtain coverage for business interruption losses. But coverage for such conditions may depend on whether access is prevented versus merely impaired, whether the government issued written evacuation orders, and whether the specific policy requires physical loss as a condition of recovery.

5. **Service interruption.** This coverage may address the impacts of sustained power outages—which can drive added payroll expense, lead to event cancellations, and cause spoiled food or medicine among other impacts. Such coverage is usually constrained by waiting periods before taking effect, and will vary from policy to policy.

6. **"Loss of market" exclusions.** Major storms can lead to long-term declines in customer base, extending business interruption losses well beyond what might apply for a limited event. Some insurers have cited these exclusions to limit coverage, and this is an area that has led to significant dispute over the calculation of losses.

7. **Waiting periods.** Policies typically provide a waiting period, effectively a form of deductible. Following Sandy, at least one insurer argued that a 72-hour waiting period should be calculated as nine working days, contending that only business hours should be considered.

What steps can be taken to address these issues in advance? Have your insurance reviewed and updated as needed. Property, business interruption or other forms of insurance coverage vary significantly from company to company and change over time. Evaluating existing or prospective coverage in light of these issues allows insureds to be better prepared and protected in case of a major weather event.

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