
First Floods of 2016: Insurance Recovery Tips for Midwestern Businesses

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The beginning of 2016 brought floods to the Midwest—and, tragically, loss of life and extensive property damage. With the floodwaters now receding and cleanup underway, affected businesses should consider obtaining insurance proceeds and FEMA assistance as critical and immediate steps to their recovery. These business policyholders might consider the following guidance to maximize that recovery.

1. Review Your Insurance Policies and Calendar Deadlines.

As a first step, review and evaluate all potentially applicable insurance policies for coverage. Understanding both your available coverage and your 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, marine cargo, pollution and—for those facing potential third-party claims—liability policies.

When reviewing your 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. Most property policies require that the policyholder submit a sworn "proof of loss" to catalogue the damages. Although this is usually done after reaching agreement with the insurance company on the amount of the insured claim, occasionally policies require the policyholder to submit a proof of loss within a fairly short time after the event. Insurance companies are usually amenable to extending these deadlines if requested, but make sure that any extensions are memorialized in writing. Certain state laws and insurance regulations may also impact your rights and obligations under the policies. It is therefore equally important to know the law and these insurance regulations.

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. (Insurance companies typically do the same thing).

2. Place All Insurance Companies on Notice.

Even if you have not yet identified all of your losses, or are unsure if you have coverage under a certain policy, provide notice that you might have a claim to any insurance company under whose policy you might conceivably seek coverage, and do so as soon as possible. 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 storm-related damages, a threshold question is whether and to what extent the policy insures against the peril of flood. Under all-risk (as opposed to named-peril) policies, flood is covered except to the extent there is an applicable flood sub-limit or exclusion. Named-peril policies may or may not provide coverage for flood, depending on whether flood is named or excluded, how “flood” is defined, and how flood exclusions are worded. Even when flood is not an insured peril, there may be coverage when another, covered cause (such as wind, power outage, a construction defect or faulty workmanship) precedes, contributes to, or causes the loss.

Assuming the cause of loss is covered, the next question is whether the policy insures the specific types of losses incurred. Commercial “first-party” property policies are designed to insure losses sustained to the policyholder’s property damaged by the occurrence and the business income losses associated with the inability to utilize that property (often called business interruption or time element coverage), as well as extraordinary expenses incurred. In addition, commercial policies typically include a wide range of coverage extensions, including “contingent” coverages that apply even when the policyholder’s own property is not physically damaged. Contingent coverages apply 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 customers or employees) that prevents the supplier or customer from supplying or accepting the policyholder’s goods or services. These extensions include coverages for contingent business interruption, contingent extra expense, service interruption (e.g., disruption of power and other utilities), loss of ingress/egress, and losses due to orders of civil authority (e.g., curfews, prohibitions against entry). These coverage extensions are often poorly understood and are therefore a common source of disagreement with insurance companies.

One case involving Mississippi River flooding in 1993 is illustrative. In *Archer-Daniels-Midland Co. v. Phoenix Assur. Co.*, 936 F. Supp. 534 (S.D. Ill. 1996), Archer-Daniels-Midland (ADM), a processor of farm products for domestic and international consumption, sought coverage under its first-party property insurance policy for the increased costs it incurred as a result of the flooding. ADM argued that the contingent business interruption and extra expense provision in its policy provided coverage for its losses because ADM was no longer able to receive services provided by the US Army Corps of Engineers, the United States Coast Guard, or Midwestern farmers due to the flooding. That provision included this language:

This policy covers against loss of earnings and necessary extra expense resulting from necessary interruption of business of the insured caused by damage to or destruction of real or personal property, by the perils insured against under this policy, of any supplier of goods or services which results in the inability of such supplier to supply an insured locations [sic].

After noting that this language was unambiguous, the court reasoned that the “key phrase for present purposes was ‘any supplier of goods or services,’” and that the “plain, ordinary, and popular meaning” of that phrase “denotes an unrestricted group of those who furnish what is needed or desired.” *Archer-Daniels-Midland Co.*, 936 F. Supp. at 541. Despite the insurance company’s arguments to the contrary, the court held that the Army Corps and the Coast Guard (by constructing physical improvements and allowing for transportation of ADM’s goods along the river) as well as Midwestern farmers (by growing the crops that ADM purchased from grain dealers) were “suppliers of goods and services” within the meaning of the provision, and thus, the increased costs ADM incurred for transportation and raw materials were insured under ADM’s policy.

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 and applicable case law, engaging an insurance coverage attorney can be helpful.

In the Midwest, these coverages might be particularly valuable given that, for example, certain communities were evacuated, rail and ferry service was suspended, river waterways were unusable, roads were closed, a pipeline that carries oil from Oklahoma to Illinois was shut down, and raw sewage spewed into the Meramec River after two wastewater treatment plants were damaged.

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 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 are required to be taken, the mitigation expenses are covered under property insurance policies. For example, if a building is flooded, the policy might require the policyholder to take necessary steps to dry out flooded areas—and, accordingly, it would provide reimbursement of such mitigation expense, subject to certain limits. Lastly, 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. 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. Government Funds Might Be Available for Non-Profits Providing Critical Infrastructure and Essential Services.

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; and community, senior citizen, 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.

By following these tips, Midwestern business and property owners should be well placed to recover quickly.

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