In the aftermath of two powerful hurricanes the process of assessing the damage and rebuilding begins. Businesses suffered billions of dollars in losses during hurricanes Harvey and Irma, both in physical property damage and disruption of their business (i.e., lost profits). That is precisely why businesses purchase property and other commercial insurance – to indemnify them when disaster strikes. However, it is not uncommon for businesses to be unpleasantly surprised when they present a claim that their insurers are unwilling to stand behind the full insurance coverage they promised. This is particularly so in the case of a substantial loss, and even more so in the aftermath of a wide-area catastrophe – such as a hurricane or other natural disaster – because such catastrophes have negative repercussions on insurers given the number of impacted policyholders.

This article highlights eight property adjustment and coverage issues. Understanding and being thoughtful about these issues now, including working with coverage counsel as appropriate, is critical to maximizing insurance recovery.

**Did a named storm, hurricane, windstorm, flood, or something else cause the loss?**

A ubiquitous issue that arises with respect to natural disasters is how the peril is characterized – is it a hurricane, a “named storm,” a windstorm, a flood, or something else for policy purposes? And what occasioned the particular damage at issue in the insurance claim – wind, wind-drive rain, storm surge, or flood?
How the storm and mechanism of loss is characterized has critical implications for insurance recovery. Policies commonly provide different amounts of available limits (and sub-limits) for different types of losses. And in some cases policies may not provide coverage at all for losses that occurred as a result of certain causes. For example, a commercial property insurance policy may provide coverage for damage caused by wind or a named storm but exclude coverage for damage caused by flood. To complicate matters further, policies often contain overlapping ill-defined concepts of what is a “flood” vs. a “named storm,” including, for example, whether storm surge resulting from a named storm is treated as part of the named storm or as flood.

Property policies purchased by businesses often contain different sub-limits, deductibles, and business interruption waiting periods depending on the cause of loss. The net effect is that the scope and amount of coverage can vary dramatically depending on how the cause of loss is characterized up front to the carrier when the proof of loss is transmitted – a critical juncture that is rarely straightforward and that usually benefits from thoughtful analysis and advocacy on the policyholder’s behalf. To recover what they are fairly owed, policyholders need to have a thorough understanding of the coverage provided under their policies, the relevant case law, and the mechanism or mechanisms that caused their loss.

**Service Interruption (Off-Premises Utilities)**

With untold millions in the dark after Irma, it is easy to see why service interruption will have far reaching consequences for loss presentation. Assuming there is no physical damage to your premises at all, how can your business function without electricity, telephone, email or water service? Utility service interruption coverage (if purchased) indemnifies, for example, against loss due to lack of incoming electricity affected by damage from a covered cause (fire or named storm) to property away from the insured’s premises – usually the utility generating station. This type of insurance is commonly referred to as “off-premises power coverage.” Utility service interruption endorsements vary widely as to what utility services may trigger coverage, whether both direct damage and time element loss are covered, and whether “transmission lines” are covered.

This is not standard, or even common, commercial insurance, but available endorsements your business may have in its policy can extend business interruption cover to this scenario. One type of service interruption cover provides direct damage coverage while the other affords time element (business income and extra expense) coverage. You can purchase one or both.

Commonly covered off-premises utilities include:

- Water Services - pumping stations and water mains
- Communications Services - property used to supply telephone, radio, microwave or television services. Includes communication transmission lines, coaxial cables and microwave relays.
The value of goods, including raw goods under refrigeration, is often challenged by the carrier when presented for coverage. The issue is further complicated in large scale operations by several commonly found exclusions that limit the inherent risks associated with perishables, including mechanical defect, failure to maintain systems, and consequential losses.

**When a loss is caused by both covered and non-covered perils**

Given that property policies may provide coverage only for certain causes of loss, or may provide different amounts of coverage depending on the cause of loss (e.g., named storm vs. flood), a contentious issue for policyholders and insurers will be the extent to which a loss is covered when it is caused concurrently or sequentially by both covered and non-covered perils. Courts in different jurisdictions have adopted various approaches to resolve this issue.

Some courts apply an “efficient proximate cause” test, under which a dominant cause is determined and coverage hinges upon whether that cause is covered, or alternatively whether the covered cause set the chain of events in motion. Other courts apply one of two “concurrent cause” analyses – (1) some courts have ruled that when two causes combine to produce an indivisible loss, there is coverage as long as one of the causes was a covered peril under the policy, and (2) other courts have ruled that the policyholder bears the burden of differentiating damage attributable to covered and non-covered causes, and if the policyholder cannot meet that burden there is no coverage.

Of particular relevance here, Texas courts have held that coverage may be excluded in certain circumstances when covered and excluded events combine to cause a loss, *see JAW The Pointe, L.L.C. v. Lexington Ins. Co.*, 460 S.W.3d 597, 608 (Tex. 2015) (coverage is barred when “‘excluded and covered events combine to cause’ a loss and ‘the two causes cannot be separated’”), whereas recent Florida authority supports that there is coverage in such a situation. *Sebo v. Am. Home Assurance Co., Inc.*, 208 So. 3d 694, 700 (Fla. 2016) (noting that “it seems logical and reasonable to find the loss covered by an all-risk policy even if one of the causes is excluded from coverage”).

This analysis turns on the policy language as well. Insurers have sought to eliminate coverage in instances involving concurrent causes by incorporating “anti-concurrent causation” language in their policies that purports to bar coverage when an uncovered cause is involved in any way, whether directly or indirectly. For example, the policy may state: “*We will not pay for loss or damage caused directly or indirectly by any of the following. Such loss or damage is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss.*” Some courts have enforced these anti-concurrent cause provisions while others have held that they are unenforceable, predominantly on public policy
grounds. Where and how this language appears in the policy is also important and factors into how a court will view it. If the language is buried deep in a definition or an exclusion, for example, the situation might be distinguishable from existing case law.

Causation is a critical issue in natural disaster-related insurance claims. An understanding of the policy language, the specific chain of events or circumstances leading to the loss, and the law in the relevant jurisdiction(s) is imperative to presenting the claim in the most favorable manner.

Civil Authority coverage

Commercial property policies typically provide coverage for business interruption losses resulting from orders of civil authority, such as evacuation orders, curfews, highway and other transportation-related closures, and the like, which prevent or impair access to the insured’s property. Many of these types of orders have been put in place in connection with Harvey and Irma.

Policies may require that the government order be the result of “physical damage of the type insured,” rather than a preventive or public safety measure. Policies also may require that such physical damage be within a certain distance of the insured property. Several coverage issues tend to arise with respect to civil authority coverage, including whether there first must be actual physical damage, how to measure the distance between the insured location and the site of physical damage (if off-site), and whether a governmental order actually prohibited access to the insured premises.

Impact of area-wide economic conditions after a catastrophe on business interruption coverage

A common issue that arises in wide-impact catastrophes – like hurricanes – is how to measure business interruption losses when an entire geographic area has been materially impacted. As an example, one business may experience a post-catastrophe boom in business and increase in profits because it is the only business of its type operating in the area, whereas another business in the same area may experience a downturn in business due to the long-lasting impacts the catastrophe had on the area.

Two prevailing lines of authority exist for measuring a policyholder’s business interruption loss following a wide-impact catastrophe: the “Economy Ignored” and the “Economy Considered” tests. The Economy Ignored test looks backward and measures the policyholder’s loss only against pre-catastrophe business levels and does not take into consideration the impact of actual post-catastrophe conditions on the economy, market or demand. The Economy Considered test, on the other hand, seeks to place the policyholder in the position that it would have occupied in the actual post-catastrophe environment had it been able to continue its operations. Neither test consistently benefits a policyholder or an insurer in every situation; the outcome instead relies on the unique facts in each particular circumstance. And this issue, first and foremost, depends on the language of the policy, which may – but typically does not – provide clear guidance on the proper measurement of business interruption losses. In addition, certain carriers
recently introduced language to reduce their exposures to post-loss economic changes, and that language has yet to be tested in court.

**Calculating business interruption waiting periods**

Time element coverage waiting periods often are expressed in the form of a period of time, meaning coverage kicks in only after the policyholder’s business has been disrupted for a certain amount of time – often ranging anywhere from 48 hours or 30+ days. Waiting periods typically are calculated from the date of first damage to the insured property. But policies may be ambiguous as to the method of calculating the waiting period. For example, in connection with Superstorm Sandy an insurer argued that a 72-hour waiting period meant nine working days because the business was open only eight hours per day. This is surely contrary to the insured’s reasonable expectations given the common understanding that 72 hours means three full days. Longer waiting periods can dramatically decrease insurers’ coverage exposure when facing large-scale catastrophes, so we can expect that insurers will take aggressive positions in this regard.

**Challenges of proving contingent business interruption loss**

“Contingent business interruption” coverage – which covers a loss in the policyholder’s income due to damage to the property of the policyholder’s suppliers or customers – is one of the most common and important coverages in the aftermath of a catastrophe given the far-reaching impact of the catastrophe. But proving the loss that pivots on the impact to customers and suppliers is challenging and policies generally offer little guidance on how to prove contingent losses. In connection with past catastrophes we have seen insurers take hard stances on contingent business interruption claims, requiring policyholders to substantiate losses to an unreasonable degree – for example, requiring them to prove exactly what customers were affected by a storm. This can be difficult with respect to suppliers as well, as policyholders do not have access to the supplier’s records, suppliers may fail to document their damages, and suppliers may have their own business reasons for not wanting to disclose the full magnitude of their damage.

Policies may impose additional limitations of which to be aware, including limitations to specifically-identified suppliers/property and first-tier suppliers.

**Timeliness of the claim and any potential ensuing lawsuit**

In the aftermath of a catastrophe businesses are dealing with a multitude of crises and often are not focused on insurance. This is understandable. But insurance policies sometimes contain time limitations within which policyholders must take certain steps to present and preserve a claim. In the property context, the policy may require notice “as soon as practicable” and may require a sworn proof of loss within a short time after the event – for example, within 60 or 90 days. Insurers may agree to extend the
deadline to submit a proof of loss, but you need to request it and get it in writing.

Under both Texas and Florida law, and in many other states, generally an insurer cannot avoid its coverage obligations based on a policyholder’s technical failure to comply with a notice or proof of loss requirement unless the insurer was prejudiced. Herrera v. State Farm Lloyds, 2016 WL 1076911, at *3 (S.D. Tex. Mar. 18, 2016) (“[I]n order for an insured’s breach [of a notice provision] to defeat coverage, the breach must prejudice the insurer in some tangible way.”); Hunt v. State Farm Florida Ins. Co., 145 So. 3d 210, 212 (Fla. Dist. Ct. App. 4th 2014) (an untimely proof of loss will not preclude coverage if the insurer was not prejudiced); Stark v. State Farm Florida Ins. Co., 95 So. 3d 285, 288 (Fla. Dist. Ct. App. 4th 2012) (the “notice condition in an insurance policy ‘can be avoided by a party alleging and showing that the insurance carrier was not prejudiced by noncompliance’”). Policies also commonly include provisions requiring a policyholder to bring legal action against the insurer within a certain amount of time after the loss (typically one year or longer), although those provisions may not be enforceable as a matter of law if they set too short of a limitations period.

Insurers will be looking to escape coverage obligations based on policyholders’ failure to comply with policy conditions and deadlines. Policyholders need to review their policies closely and stay on top of these obligations and deadlines in their policies so that they do not jeopardize coverage. The best practice is to comply as soon as reasonably possible or get an extension.

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