

Hurricanes Katrina and Rita: Preserving, Perfecting and Maximizing Insurance Recovery

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Introduction & Overview

- ★ Categories of Insurance Coverage Potentially Available for Hurricanes Katrina and Rita
- ★ Preparation and Evaluation of Your Claim
- ★ Calculating and Submitting Your Claim
- ★ Negotiating and Resolving Your Claim
- ★ Key Insurance Policy Provisions and Potential Coverage Issues
- ★ Causation/Concurrent Causation Issues
- ★ Question and Answer Session

What Insurers' Lawyers Are Saying

- ☀ “Insurers will need consistent, defensible standards and techniques for responding to untimely and poorly documented proofs.” Wiley Rein & Fielding
- ☀ “Insurers need to recognize the potential for inflated and even fraudulent claims.” WR&F
- ☀ “It is also clear that perhaps the majority of the property damage and time-element losses resulted from levee breaches, tidal surges and subsequent flooding.... In many claims, only a portion of a given loss may be covered.” WR&F

Categories of Insurance Coverage Potentially Available for Hurricanes Katrina and Rita

★ Physical Damage / Other Costs

- Buildings/Real Property
- Personal Property (Insured and its Officers and Employees)
- Property of Others in Insured's Custody
- Accounts Receivable
- Electronic Data/Programs/Software
- Debris Removal
- Decontamination Costs/Pollutant Removal
- Demolition/Construction Costs
- Valuable Papers/Records
- Professional Fees (excluding attorneys, public adjusters)

Categories of Insurance Coverage Potentially Available for Hurricanes Katrina and Rita

☀ Time Element

- Business Interruption (BI)
- Contingent BI
- Extra Expense
- Leasehold Interest
- Civil Authority
- Ingress/Egress
- Service Interruption
- Electronic Data Processing and Computer Systems

☀ Third Party Liability

- General Liability
- Environmental Impairment Liability
- Directors and Officers Liability

Preparation and Evaluation of Your Claim

- ★ Assemble the claim team
- ★ Determine policy requirements for submission of your claim – timing, format and documentation
- ★ Notice of Claim
- ★ Proof of Loss
- ★ Gather and maintain documentation that supports your claim
- ★ Avoid providing your insurers with any grounds to limit or deny your claim: understand your policies, their limits and exclusions, and properly characterize your claim.
- ★ Identify and comply with key conditions
 - Loss mitigation – “sue and labor”
 - Sworn statements concerning claim

Preparation and Evaluation of Your Claim

- ★ Develop preliminary loss estimates
 - Property damage, extra expense, business interruption, etc.
- ★ Use preliminary loss estimates and incurred costs as a basis for a request for cash advance
 - Cash advances may be appropriate under your policy
 - Many clients have requested and received cash advances
- ★ Gather and maintain documentation that supports your claim
- ★ Establish loss accounting procedures
 - PO's, invoices, payment support
 - Internal costs (i.e. labor, materials, supplies)

Calculating and Submitting Your Claim

★ 3 Column approach

- Industry accepted
- Holistic comparison of projected to actual results
- Captures all losses

★ Incremental cost approach

- Often used for out of pocket expenses / specifically identified costs
- Supports requests for cash advance
- May understate claim

Calculating and Submitting Your Claim

PHASE I » Evaluation and Planning

1. Establish communication protocols internally and externally.
2. Establish claim team (Risk Management, Insurance Adjusters, Navigant Consulting, Finance, Legal, Operations, etc.).
3. Assist in the design of recovery plan for repairs and operations.
4. Establish timeline for claim submission, audit and adjustment.
5. Prepare loss estimates to enable proper reserves and initial advance payment requests.
6. Establish accounting procedures for capturing loss activity accurately and efficiently.

PHASE II » Claim Preparation and Submittal

1. Track and document all property damage claims (repairs, inventories, etc.).
2. Determine direct and indirect factors that impact business affected by the loss event.
3. Prepare loss analyses demonstrating business interruption losses in a clear and concise format in accordance with the policy in force.
4. Determine extra expenses related to loss event.
5. Submit claim(s) to insurer, including explanatory narrative, calculations and supporting documentation.
6. Monitor timelines for claim process and business recovery.

PHASE III » Audit, Adjustment and Settlement

1. Respond to inquiries by insurer and their representatives.
2. Direct timely and complete exchange of claim documentation and insurer's evaluations.
3. Prepare bridge and rebuttal analyses to understand areas of difference from insurer.
4. Assist in final claim negotiations and settlement as requested by the client.

Negotiating and Resolving Your Claim

- ✦ Negotiating calculation/valuation of losses
- ✦ Extensions of deadlines for filing proofs of loss (typically required within 90 days after loss) and suits against insurers (typically must be brought within 12 months after loss)
- ✦ Other potential legal and financial issues to consider

Negotiating and Resolving Your Claim

- ☀ Make your claim defensible
 - Properly supported with documentation and logical
 - Organized and accumulated consistently with insurance coverage
 - Separate copy of claim related expenses
 - Consider online repository for sharing
 - Types of documents
 - Estimates, purchase orders, invoices
 - Financial statements
 - Other corroborating information
 - Bigger is not necessarily better
- ☀ Analysis and reconciliation of differences

★ Time Element Coverages

- ★ Business Interruption Coverage
- ★ Contingent Business Interruption Coverage
- ★ Extra Expense
- ★ Civil Authority
- ★ Ingress/Egress
- ★ Service Interruption
- ★ Electronic Data Processing and Computer Systems

★ Business Interruption Coverage

- Covers actual loss of income/earnings due to suspension of operations caused by covered loss
- Coverage continues through period of restoration of operations (including Extended Coverage Period, if provided)
- Lost income/earnings typically determined based on:
 - Net income earnings before the event
 - Likely or projected net income earnings if no loss or damage had occurred
 - Continuing operating expenses, including payroll, to continue same level of operations

- ✦ What is the length of the Period of Restoration?
- ✦ When it could be repaired vs. actual date of repair
- ✦ Extended Period of Indemnity

☀ Business Interruption Calculation Issues

- Potential calculation of multiple deductibles
 - Fixed value deductibles
 - Waiting periods
 - Percentage of reported values (actual, reported, pre/post loss)
- Determination of mitigation
 - Short-term
 - Long-term
- Indemnity Period
 - Extended period of indemnity
 - Baseline period for projecting future results
 - Planned capital expenditures, expansions, etc.

★ Business Interruption Calculation Issues

- Potential arguments for multiple triggers to coverage
 - Direct physical loss
 - Contingent losses (physical damage at customer or supplier)
 - Restricted access (ingress/egress, civil authority)
 - Multiple triggers may mean multiple deductibles (waiting period, percent of value, dollar value deductible)

★ Contingent Business Interruption Claims

- Coverage is triggered where covered damage to suppliers or customers negatively affects your business operations
- Coverage applies even where insured's own property is not damaged
- Covered Losses include:
 - ★ Additional expenses incurred to obtain supplies and raw materials
 - ★ Diminished revenue because of losses suffered by customers
 - ★ Other expenses due to damage to suppliers or customers

☀ Examples of Contingent Business Interruption Coverage

- Airlines
 - ☀ Losses due to airport closures, flight restrictions
- Hotels, rental car companies:
 - ☀ Cancelled trips, events, etc.
 - ☀ Damage to city attractions as destination points
- Entertainment/Media companies
 - ☀ Return of fees for cancelled events
 - ☀ Declines in attendance, advertising, circulation

★ Examples of Contingent Business Interruption Coverage

- Transporters (air freight, delivery, trucking, rails)
- Manufacturing businesses
 - ★ inability to obtain parts, raw materials
 - ★ inability to deliver goods to retailers for sale
 - ★ destruction of or damage to customers' facilities
- ★ Retail businesses
 - ★ Suppliers of goods unable to make deliveries
 - ★ Customers unable/unavailable to make purchases or accept deliveries

- ✦ Some Insurers already taking position that no BI coverage available because impact of Hurricanes means there is no business being transacted in affected areas
- ✦ Devastation of Gulf Coast gives insurers opportunity to dispute calculation of lost business, proper period of restoration, etc.

☀ Contingent Business Interruption Claim Calculation Issues

- Policy language drives what may be recoverable
 - Direct, indirect
 - May need to demonstrate how losses are driven from damage to suppliers / customers (direct)
 - Period of reconstruction not in insured's control

★ Extra Expense

- Covers necessary additional expenses that you incur:
 - To avoid or minimize the interruption of business
 - To repair or replace property, systems, lost information or damaged valuable papers
- Costs to obtain temporary quarters
 - rent
 - moving and hauling expenses
 - additional insurance costs
- Advertising
- Extra shifts, overtime, temporary labor

★ Extra Expense Claim Calculation Issues

- Understand expenses that are covered by the policy
 - Total expenses above normal
 - Type and nature not normally incurred
- Establish loss accounting procedures
 - New accounts for disaster related expense
 - Don't deviate from normal expense approval process
 - Ensure detailed descriptions on document support
 - Track loss related internal labor with descriptions
 - Don't "move" labor out of their normal accounts

- ★ **Civil Authority: Business Interruption Claims Caused by Acts of Civil Authorities that Impaired Access to Your Business**
 - Applies when government acts prohibit access to covered property due to covered damage (closures, curfews, ingress/egress restrictions)
 - Often limited to 30 days from date of civil action prohibiting access
 - Often subject to geographic limitations (*i.e.*, within certain distance from insured location)

- ★ Civil Authority: Contingent Business Interruption Claims Caused by Acts of Civil Authorities That Impaired Access by Customers, Suppliers, Providers, Markets to their Property or to Transportation Arteries
 - Applies when government acts prohibit access to property of customers, suppliers, etc. (closures, curfews, ingress/egress restrictions)
 - Often limited to 30 days from date of civil action prohibiting access
 - Often subject to geographic limitations

★ Civil Authority, Ingress / Egress Claim Calculation Issues

- Prevents, prohibits, restricts, impairs
- Proximity (1,000 feet)
- Waiting period
- Policy limits (30 days, etc.)

★ Ingress/Egress

- Applies when access to and exit from a policyholder's premises are blocked
- Not standard in business interruption policies
- Applies even if the policyholder's property has not been physically damaged
- Typically requires damage of the type covered under the policy to non-insured locations

★ Service Interruption Coverage

- Covers loss of income or extra expense resulting from interruption of utility services
 - ★ water
 - ★ communications
 - ★ power
 - ★ gas
 - ★ sewage

★ FEMA Claim Issues

- Covered expenses
- Contributing insurance
 - Potential recovery for exhausted limits
 - Complex allocation issues
- Requirements, Deadlines

★ Other Claim Issues

- Lost account receivables
- Coverage for humanitarian expenses

Key Policy Provisions and Coverage Issues

- ★ Real and Personal Property Coverage
- ★ Causation Issues
- ★ General Coverage Considerations

Key Policy Provisions and Coverage Issues

- ★ Must Trigger Policy Through Covered Cause of Loss
- ★ All Risk Policy – Typical Property Damage Coverage
 - All risks
 - Direct physical loss or damage
 - Property insured by this policy
 - Occurring during the policy period
 - Except as excluded
- ★ Specified Perils Policy – Enumerated Causes of Loss
- ★ Insured Property
 - Real property listed on appropriate schedules
 - Personal property at scheduled locations

Key Policy Provisions and Coverage Issues

- ★ Loss from Hurricane
 - All risk coverage
 - Windstorm coverage
 - Clearly covered – damage from wind, wind driven rain
 - The big issue – coverage for storm surge and water damage from levee breach
- ★ Loss from Water
 - Flood limit
 - Flood exclusion
 - Is storm surge a “Flood” loss?

Key Policy Provisions and Coverage Issues

☀ Hurricane

- “Hurricanes are products of the tropical ocean and atmosphere ... generating violent seas. Moving ashore, they sweep the ocean inward.”

http://www.fema.gov/hu97/hu_def.htm.

Key Policy Provisions and Coverage Issues

☀ Hurricane

- National Oceanic and Atmospheric Administration defines “Hurricane”:
 - a storm that dominates the ocean surface and lower atmosphere over tens of thousands of square miles; and
 - brings huge waves and storm tides which may reach 25 feet or more above normal;
 - the rise may come rapidly, flooding coastal lowlands.

Key Policy Provisions and Coverage Issues

- ✦ Loss from other causes:
 - ✦ Pollution
 - ✦ Mold
 - ✦ Theft/Looting
 - ✦ Negligence

Key Policy Provisions and Coverage Issues

- ★ Fundamental Coverage Issue – Proximate Cause of the Loss
- ★ Approaches to Causation
 - Efficient or dominant efficient proximate cause doctrine
 - Minority rule

Key Policy Provisions and Coverage Issues

★ Efficient Proximate Cause

- Is covered cause of loss the dominant or efficient cause?
- Majority rule: If so, damage from non-covered or excluded cause is also covered.
- Examples:
 - Alabama – *Western Assurance Co. v. Hann*, 78 So. 232, 236 (Ala. 1917);
 - Louisiana – *Roach-Strayhan-Holland Post No. 20, American Legion Club, Inc. v. Continental Ins. Co. of N.Y.*, 112 So.2d 680, 683 (La. 1959);
 - Mississippi – *Glen Falls Ins. Co. of Glens Falls, N.Y. v. Linwood Elevator*, 130 So. 2d 262, 270 (Miss. 1961);
 - California – *Garvey v. State Farm Fire and Cas. Co.*, 48 Cal.3d 395 (Cal. 1989).

Key Policy Provisions and Coverage Issues

★ Minority Rule

- Insured must prove the entire loss caused by an insured cause of loss; or
- Insured must prove those damages resulting from covered cause of the loss
- Examples:
 - Nebraska – *Lydick v. Insurance Company of North America*, 187 N.W. 2d 602 (Neb. 1971)
 - Texas – *Travelers Indemnity Company v. McKillip*, 469 S.W. 2d 160 (Tex. 1971)

Key Policy Provisions and Coverage Issues

- ★ Insurer Response – Anti-Concurrent Causation Language
- ★ Typically provides:
 - No coverage if excluded peril of loss causes a loss
 - Even if a covered cause of loss contributes concurrently or in any sequence to the loss
- ★ Some courts Have Enforced:
 - *Alp v. State Farm Fire & Cas. Co.*, 850 P. 2d 1272 (Utah 1993)
 - *State Farm Fire & Cas. Co. v. Slade*, 747 So. 2d 293 (Ala. 1999)
 - *Boteler v. State Farm Cas. Ins. Co.*, 876 So. 2d 1067 (Miss. App. 2004)

Key Policy Provisions and Coverage Issues

- ★ Anti-Concurrent Causation Language
- ★ Some courts have not enforced:
 - *Safco Ins. Co. v. Hirschmann*, 773 P. 2d 413 (Wash. 1999) (*en banc*) (against public policy to contract around efficient proximate cause doctrine)
 - *Mierzwa v. Florida Windstorm Underwriting Ass'n.*, 877 So.2d 774 (Fla. App. 4th Dist. 2004) (holding that total loss required the wind insurer to pay face amount under Florida's valued policy law).

Key Policy Provisions and Coverage Issues

- ★ Burden of proof on the insured
 - The damage
 - The causal connection between damage and covered cause of loss
 - *Loyola University v. Sun Underwriters Ins. Co. of New York*, 93 F. Supp. 186 (E.D. La. 1952) *aff'd*, 196 F. 2d 169 (5th Cir. 1952)

Key Policy Provisions and Coverage Issues

★ Other Key Issues

- Mitigation of damages
 - Sue and labor clause
 - Common law doctrine
- Number of occurrences
 - Cause test
 - Event test
- Privilege
 - Experts
 - Brokers

Key Policy Provisions and Coverage Issues

★ Importance of Forum

- Does policy contain a choice of law or choice of forum?
- Does policy require arbitration of disputes?
- If no policy provisions, forum will determine applicable law
- Applicable law may determine outcome of coverage dispute
- Other points to consider
 - Efficient proximate cause is traditionally a jury issue
 - Possible delays in local courts
 - Effect of Louisiana Civil Law system

Key Policy Provisions and Coverage Issues

- ★ Basic Principles of Policy Interpretation will be Important
 - Is the policy language clear and unambiguous?
 - Is the extrinsic evidence relevant to determining parties' intent?
 - Is the policy ambiguous?
 - If policy is ambiguous, does insured prevail?
 - Can policyholder rely on reasonable expectation doctrine?
 - Can insurer apply sophisticated insured doctrine?

Key Policy Provisions and Coverage Issues

- ★ Commercial First Party Property Policies are not Standard Form Policies
 - Drafting history and negotiation of policy
 - Definitions of key policy terms
- ★ Some Examples
 - All risk coverage
 - Windstorm
 - Flood
 - Contamination

Key Policy Provisions and Coverage Issues

★ Things to Consider:

- Consider policy language very carefully
- Consider drafting and negotiation of policy
- Obtain all facts concerning development of your particular losses
- Retain experts early
- Protect privilege
- Determine how best to characterize your losses
- Consider appropriate forum for any coverage disputes
- Win the race to the courthouse

QUESTION & ANSWER SESSION

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