

Businesses Globally Affected by the Japan Earthquake— What to Do Now to Preserve Insurance Coverage

March 16, 2011

Although the human tragedy associated with Japan's catastrophe continues to be front of mind, and our thoughts and prayers continue to be with friends, colleagues, and business partners who may be personally affected by this disaster, its impact is already extending beyond Japan to the global business market.

Businesses that are suffering the effects of the Japan earthquake, tsunami, or nuclear crisis—whether due to property damage, limited availability of materials, increase in price, or interruption of shipping channels leading to delivery delays—should examine their insurance policies in light of the following potentially relevant insurance coverage issues:

- **Business Interruption:** Lost profits may be covered under one or more provisions of most property policies. Business interruption insurance makes the insured whole as if no interruption took place. Such coverage reimburses an insured for losses sustained due to the necessary total or partial suspension of the policyholder's operations during a period of interruption. Business interruption provisions generally require (a) loss or damage to insured property, (b) interruption of the business due to a covered loss, (c) loss of income or profits, and (d) the loss to occur within a "period of restoration." An early review of coverage can help a business make certain that covered expenses are properly captured and presented to insurers.
- **Contingent Business Interruption:** The global network of transportation and transportation-related businesses are interdependent and will likely experience significant disruptions over the coming days and weeks as airports, ports, rail operators, and trucking companies adjust to closures caused by the earthquake and tsunami. This will result in increased costs and delivery delays for products and component parts that travel along the global supply chain. Interruption to suppliers' or customers' utility services would have a similar effect.

A loss suffered by either a business's suppliers or its customers that would be covered under the business's property damage policy may trigger a claim for contingent business interruption due to the business's inability to acquire or deliver materials or services. These provisions generally extend the business interruption coverage to include loss of gross earnings at the insured's premises as a result of a supplier's or customer's inability to deliver

or receive goods or supplies as a result of damage to its property. Counsel can help determine whether a policy has been triggered, and assist with determining the cost and requirement to purchase “cover,” the appropriate period of restoration, and the anticipated revenue or income had the damage not taken place.

- **Property Damage:** Most first-party property policies cover much more than just physical damage to owned property. Many policies also define property damage to include loss of use of property that has not been physically damaged and include additional coverage for debris removal, demolition, and increased cost of construction in the event of physical loss to covered property.
- **Service Interruption/Impounded Water:** Many global companies have facilities or affiliates that operate facilities in Japan that have been affected by the widespread power outages. When utility services to a business’s premises are interrupted, service interruption coverage may be available to cover any loss of income or extra expenses incurred.
- **Civil Authority Restricting Access:** An order by a governmental entity restricting access to a business’s property may trigger insurance coverage. In contrast to triggering events for business interruption coverage, courts have held physical damage is not required to invoke the civil authority coverage. There are many types of civil authority orders, including orders closing airports, financial exchanges, and waterways, among other things, that could lead to insurance claims.

Although claims for such losses may involve different types of insurance coverage depending upon how individual programs are set up, certain common issues will likely arise: causation, trigger, notice, quantification, number of occurrences, limits and deductibles, and defenses and exclusions.

What Should Businesses Do Now?

It is never too early to begin assessing coverage and quantifying loss. Any delay can lead to lost coverage as, for example, covered costs may not be recorded and evidence of loss may not be maintained. Policyholders with potentially covered business losses should, at a minimum, do the following:

- Immediately obtain and review all insurance policies.
- Document loss by maintaining proof of business performance prior to, during, and after loss.
- Record the expenses incurred in preparing a claim, as many policies often cover such expenses.
- Comply with any applicable notice and proof of loss provisions in the policies, including obtaining waivers or tolling agreements from insurers if necessary.
- Create and maintain evidence of damage.

What Can Businesses Do to Protect Themselves in the Future?

As some scientists are predicting continued increased seismological activity in the coming years, businesses should consider purchasing coverage to handle property damage and business interruption that may result from future disasters. It is important to obtain the right insurance at the right cost, and

it is reasonable to anticipate that flood and earthquake exclusions will begin to be more broadly defined in standard form policies offered by insurers. Now, more than ever, it is important to use experienced counsel to help negotiate for the coverage that best protects your business.

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