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Tips For Recovering Business Loss Claims Post-Irene

By **Martin Bricketto**

Law360, New York (August 31, 2011) -- As property damage claims over Hurricane Irene pile up, companies doing business on the East Coast will begin seeking coverage for interruptions caused by flooding, power outages and the preparatory shutdowns of mass transit, among other things.

Companies should know the ins and outs of their policies, back coverage demands with meticulous record keeping and understand how state law impacts their claims, experts say.

“It's like anything else, diligence in the outset sometimes pays great dividends down the road when you're in the claims process,” said Ira Gottlieb, a partner with McCarter & English LLP.

Business interruption claims will likely spring up in eastern areas of the U.S. directly affected by the storm, but companies elsewhere in the country or overseas could mount contingent business interruption claims because, say, the storm has blocked a supplier from manufacturing or delivering products, according to experts.

While the storm caused billions of dollars in property damage, its impact was not limited to winds, rain and flooding. Mass power outages, official evacuations and the closures of numerous roads, bridges and airports took a heavy toll on businesses across the spectrum.

In New York City, subway service and other public transportation was suspended, leading to the cancellation of all Broadway shows that weekend, among other effects. New Jersey shut down the casinos in Atlantic City that Saturday — just the third time gaming there was suspended in more than three decades, The Associated Press reported.

For companies in the storm's path, claims could stem from direct damage from wind or flooding. The latter can be covered in commercial property policies but may be subject to different sublimits and deductibles, according to Barry Buchman, a partner with Gilbert LLP.

Companies could also recoup losses under civil authority provisions in their policies, based on widespread government closures of critical transportation and economic infrastructure to prepare for the storm.

A civil authority claim can hinge, for example, on whether the specific policy ties coverage

to actual damage or risk of damage, according to Buchman. Policies may also have different waiting periods before coverage is triggered, which can range from hours to days, experts said.

Companies may also be able to take advantage of other policy provisions in the absence of direct, physical damage to a facility. They include so-called ingress/egress coverage that kicks in when a business location becomes inaccessible for reasons other than a civil authority order, as well as service interruption coverage related to power losses, Buchman said.

Know Your Coverage

Policyholders should read their policies carefully, and not mistakenly assume they aren't covered, said Sherilyn Pastor, a partner with McCarter & English LLP. A professional can help them make their way through the jargon of those agreements, especially if they have purchased all risk or broad form coverage, she added.

Companies should also see what other insurances policies may cover them, such as those held by vendors, suppliers or affiliates, according to Pastor.

For attorneys representing claimants, Gottlieb said it's important to obtain and analyze all the insurance policies that have potentially been triggered as soon as possible.

Gottlieb further suggested that companies should understand the conditions that actually spur business interruption coverage, which can often mean proving a direct physical loss to covered property.

“The big ticket thing that normally gets in the way of a business interruption claim is the failure to show property damage,” Gottlieb said.

Keep Diligent Records

Good record keeping will be key to mounting business interruption claims and proving losses, experts say.

Companies should be as thorough as possible in recording losses as they happen with photographs and video and even communications with suppliers or entities they're supposed to be supplying, according to Gottlieb.

Attorneys representing claimants should work to collect and preserve proof of damages, including evidence of physical loss before repairs take place, and instruct their clients to protect such records, Gottlieb said.

Those records could include documents from contractors who helped with debris removal or repairs or, in the event of a civil authority claim, the relevant government orders or directives, he said.

Attorneys will avoid spoliation allegations by notifying insurers before repairs or replacements occur, so they can make any inspections that they think are necessary, Pastor said.

When a claim involves lost income, it helps to keep detailed information on customers who are turned away, she added.

“The more specific the proofs, the more likely they will be accepted,” Pastor said.

Don't Get Snagged By Technicalities

Companies must preserve their claims by meeting policy requirements, which can be easier said than done in the midst of trying to recover from a disaster and gathering the necessary information, experts say.

It's important to meet basic policy notice provisions, according to Buchman. “Don't give the carrier a technical forfeiture argument by not complying with that provision of the policy,” he said.

Buchman also said that, in the case of first-party policies, companies should be aware of the deadlines for submitting a more detailed proof of loss, which can be as short as 60 to 90 days after an event.

He said a company can try to put off that deadline through a tolling agreement with their insurer or establish that any submission within that initial time frame will be preliminary, with the right to amend it later.

Buchman also cautioned that many first-party policies have their own contractual limitation periods that cap how long an insured has to bring suit, which in some cases can be as short as one year.

Because of the time it can take to process a claim, companies may also want to extend such periods through tolling agreements, he said.

Know The State Law

It's also important for companies and attorneys to understand how state law can shape a business interruption claim, experts say.

State law can sometimes trump a policy's contractual limitation period, Buchman said. Attorneys should determine as early as possible which state's law applies to a claim, since different states can vary in how they handle potentially significant coverage issues, he said.

With a contingent business interruption claim, state law can differ on who qualifies as a supplier or customer, he said. States can also view concurrent causation and efficient proximate cause doctrines differently, which impacts cases in which both covered and excluded perils contribute to a loss, Buchman said.

Some courts require that property be tangibly destroyed, while others may consider property damaged when it loses its use, value and function, Pastor noted.

But it may not take a full-blown legal battle to secure coverage. Companies may get the results

they want by promptly communicating with carriers and filing their claims in a timely manner, according to Gottlieb, who added that insurers realize a catastrophic event has taken place.

“I think they're prepared and at least partially receptive to taking claims,” Gottlieb said.

--Editing by Kat Laskowski.

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