



POLICYHOLDER INSURANCE COVERAGE E-UPDATE

SUPER STORM SANDY INSURANCE COVERAGE FOR BUSINESSES – “No” is Just the Beginning

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MARCH 2013

While we are always hopeful insurers will pay fairly on their commercial insured's claims, now with four months having passed since super-storm Sandy, certain commercial insureds are, or soon will be, receiving their insurer's denials of those claims. Even those who have been diligently pursuing their storm-related commercial loss claims may be at risk.

Business owners denied a business property loss and/or business interruption claim should not necessarily believe or accept that their claim process is over. Rather, it is likely only the beginning of a new, more important process: the pursuit of coverage rightfully due.

To secure maximum recovery of all losses suffered, full knowledge of your rights is paramount, as we discuss below.

Insurers Are Also Bound by Deadlines and Rules

New York's insurance regulations generally require the insurers investigating the Sandy claims to accept or reject of the commercial insured's stated claim within 90 days, adjustable upon notice for more complex claims. These regulations compel insurers to complete their investigation of the claim within a reasonable time after the proof of loss is submitted by the insured. As soon as the investigation is completed, these regulations compel the insurer to notify the insured in writing if the claim is denied. Keep track of such passage of time and do not accept disclaimers of coverage that are late.

Once the investigation is completed, the insurer might offer only partial payment of the claim and try to expressly or impliedly condition acceptance of this payment on the release of all claims under the policy(ies). However, New York regulations don't allow for such a release. An insured may accept this partial payment and continue to pursue those claims not paid, with a two-year time limit (perhaps reduced to one year by the policy) from the date of the loss, before having to file a lawsuit.

Burden of Proof

While the insured has the initial burden of proving a loss that is covered by a provision of the insurance policy, once met, this burden then shifts to the insurer to prove that the particular claim is expressly and unambiguously excluded from coverage. Make the insurer meet this burden.

Causation

Most often, an insurer's primary excuse for denial of coverage is that the loss was caused by an uncovered peril, such as water damage or storm surge. However, the rule in New York is that coverage cannot be denied simply because the loss was caused by an uncovered peril if the loss was also caused by a covered peril (e.g. wind). Coverage must be provided if the loss was substantially caused by a covered peril, even if an uncovered peril substantially contributed to the occurrence of the loss. This is the efficient proximate cause doctrine followed in New

York.

Flood/Specialized Property Claims

Typical property insurance policies often exclude coverage for flood damage, but non-residential flood insurance is available under FEMA's National Flood Insurance Program, providing up to \$500,000/\$500,000 limits of coverage for damaged commercial buildings and damaged commercial contents of the buildings.

In addition, specialized commercial property insurance policies tend to have broader coverage, including coverage for flood damage. Examples of such specialized insurance would be inland marine insurance, manufacturer's output insurance and boiler and machinery insurance, which policies provide coverage for damage to property in transit from seller to buyer, property being warehoused or held on behalf of others, property being manufactured for others, and special equipment (such as pressure and refrigeration, mechanical, electrical and turbine equipment, known otherwise as "objects"), which would be listed on a schedule in the policy. Make certain to see if you have such coverage.

Builder's Risk Claims

When Sandy hit shore, those commercial insureds in the process of building a new structure or renovating or repairing an old structure would have been able to file claims for any property and/or business earnings losses with the insurer who issued the builder's risk policy for the project. Here is an illustrative list of losses that are often covered under such policies:

- Physical damage to the structure being built;
- Physical damage to the equipment (on site/off site) being used to build the structure;
- Physical damage to the materials (on site/off site) being incorporated into the structure being built;
- Physical damage to temporary structures, such as scaffolds or warehouses, that are used to assist with the building of the structure;
- Physical damage to merchandise or machinery being stored in the structure being built;
- Physical damage to landscaping items, such as trees and shrubs, if these are part of the structure being built;
- Physical damage to property in transit to be incorporated into the structure to be built;
- Physical damage to valuable papers and records (incl.

computerized records);

- Costs incurred ahead of storm to reduce or mitigate the losses;
- Increased hard costs for completion of the project;
- Costs to remove debris or costs for emergency worker charges;
- "Extra Expenses" coverage for restoring the normal business operations of building the structure (e.g. acceleration of construction to get back on schedule);
- Soft costs incurred due to delay in the completion of the building of the structure; and/or
- Expenses to prepare the claim, including public adjuster's costs.

Pursuit of coverage should involve a constant and persistent review of the nature of the losses and every provision of the policy. (These losses are also often covered in the specialized property insurance policies such as inland marine, etc.).

Pursuit of coverage for these losses often also includes taking account of deductibles, not only as to dollar amounts, but also as to percentage of total insurable value of the project, and as to time-frames of delays or acceleration involved. Remember, Sandy was not a hurricane when it came to shore and, therefore, the hurricane percentage deductible is not enforceable by your insurer for this storm. It is important to calculate all dollars correctly and include all you are entitled to include.

Business Interruption Claims:

As we all experienced here in the tri-state area, after Sandy hit shore, our communities and businesses were left damaged and partially or totally closed for weeks. Business interruption insurance provides coverage for losses arising from the inability to continue normal business operations due to physical damage sustained by, not only the commercial insured, but also by the commercial insured's customers, suppliers or other partners in the business operations. The basic standard of coverage is for "all losses actually sustained by the insured directly resulting from such interruption of business." Here is an illustrative list of losses often covered under such policies:

- Lost profits during period of restoration to normal business operations because of physical damage to insured's property or to insured's customer's, supplier's, or partner's property;
- Charges and expenses that persist in the event of damage to physical property, such as payroll to keep high-

level employees, utility bills and taxes, rent, insurance premiums, professional fees;

- Debris removal;
- Costs incurred ahead of storm to mitigate or reduce damage to property (“sue and labor” costs);
- Extra expenses needed for temporary duration necessary to continue normal operation of business;
- Consequential losses from inability to use or occupy a building or structure that is a necessary part of the business operations;
- Lost business revenue from inability to engage in business operation planned but not begun pre-storm;
- Lost profits and costs incurred due to order of civil authority preventing, temporarily, business from commencing the process of restoring normal business operations;
- Lost profits and costs incurred due to physical inability to ingress/egress the business property on account of storm damage;
- Expenses to prepare the claim, including public adjuster’s costs.

Again, pursuit of coverage should involve a constant and persistent review of the nature of the losses and every provision of the policy. (These losses are also often covered in

the specialized property policies, such as inland marine, etc.).

Also, pursuit of coverage for these losses often involves taking account of the diligence of the commercial insured in restoring normal business operations (although the policy might provide a suspension of the running of this time-frame to allow for the initial disaster response to run its course), deductibles dealing with initial post-storm time-frame, in which no coverage is provided (e.g., 24-72 hours), and coverage limits qualified by the duration of coverage (e.g., three weeks coverage to allow restoration of normal business operations). Again be precise with your calculations.

Goldberg & Connolly Commentary

G&C advises that the above insurance coverage for businesses can, ultimately, provide for recoupment of many losses caused by Super Storm Sandy, despite an insurer’s initial response of “No” to the claim. Therefore, we advise all businesses: persist and pursue your claim and know all your rights.

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