



POLICYHOLDER INSURANCE COVERAGE E-UPDATE

INSURANCE COVERAGE ISSUES FOR STORM-RELATED DAMAGE MAXIMIZING YOUR COVERAGE

By Henry L. Goldberg

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The “one-two punch” of Super Storm Sandy and the recent nor’easter have left widespread damage.

For those of you who have suffered losses and delays on projects, full knowledge of your rights under all available insurance policies is crucial. Furthermore, to maximize insurance recoveries, you may need to think creatively and “push the envelope” of contemplated coverages.

Insurance Coverage for Your Construction Site “Storm” Losses:

Damage to construction company property, construction site damage, repair costs and other direct losses, as well as delay-related damage and lost business income, are all potentially covered under various property-type policies. To secure the maximum recovery of all losses suffered, keep in mind the following tips:

Important “Must Do’s” for Insurance Claims:

- If you do not regularly do residential work, do not proceed with storm recovery or repair work without addressing any residential or pollution (most of the flood waters were contaminated) exclusions that might be in your CGL policy. Also, review the “covered property” and “covered causes of loss” provisions of your Builders Risk policy to assure they properly cover this type of work.
- New York law requires that insurers send out annual notices that property insurance does not typically provide coverage for floods and that separate flood insurance must be obtained. If you are without flood insurance, confirm that such notices were sent to you.

- Review all of your policies’ endorsements (get copies from your broker if necessary) to identify what risks are covered and/or specifically excluded from coverage. Damages caused by flooding are only covered under separate flood insurance. However, certain water and/or wind caused damages (e.g., trees falling on a “covered” building due to wind and/or rain or flood water) might be recoverable under property insurance policies.

[Note: In a future memo we will explore where “flood” insurance coverage might end and the federal National Flood Insurance Program through FEMA, or other government-sponsored coverages, could pick up the slack.]

- Track and make a record of all damages and all communications with insurers and adjusters (including taking pictures or videos).
- Make permanent repairs only if your insurer confirms coverage in writing, otherwise consider only making temporary repairs, if possible, until your insurer can inspect the damage. Do not take actions that might compromise your coverages by frustrating a reasonable investigation by your carrier.

Builders Risk Claims:

- Builders risk coverage will be provided only if the specific property damaged is included in the policy and if the specific cause of the loss is covered (e.g., water damage to stored lumber caused by failed pumps). In addition to checking your policy to determine what causes and what property are covered for storm-caused damage, you should



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check the policy to confirm that the flood, hurricane, and/or storm occurrence is listed in the (dollar) “limits” section on your declarations page. If not listed, your “commercial” property policy needs to be reviewed, as an alternative, to see if it might provide coverage instead.

- Review the details of your deductibles. The size of the deductible may influence whether you decide to pursue the specific insurance claim. You apparently will not have to be concerned about the significantly larger “hurricane”-type deductibles because, at New York Governor Andrew Cuomo’s “urging”, it appears that most insurance companies in New York State will not seek to collect the higher deductible because Sandy did not contain hurricane-strength, sustained winds. However, damages to new, but unfinished, work often entail large deductibles based on a percentage of the insurable value of the property, and often with a minimum deductible (dollar) value. Confirm what your specific builders risk deductible is for your particular situation. There might also be a way to have a lesser deductible apply based upon how you present the specific causes of loss, which might enable a different coverage section to be invoked.
- Only property that will become a permanent part of the finished project will typically be “covered property” under a builders risk policy. Therefore, for damaged contractor equipment, a claim might be submitted, preferably against a contractor’s commercial property policy, rather than its builders risk policy. Alternatively, you also might have a separate construction equipment floater or a vehicle-related policy that applies.
- Physical damages to unfinished project work are typically covered, including interior damage, provided that the peril causing the damage is a covered cause of loss (e.g., wind-caused damage). Keep in mind that such damages may have more than one cause (wind, water, falling structures, etc.), with some covered and others not. Therefore, in such instances, you may need to argue for at least proportionate coverage.
- Coverage for damages will shift from a builders risk policy to an owner’s property-type policy when the work is “completed”. The exact definition of when “completion” is accomplished and, therefore, the shift occurs (i.e., substantial completion, occupancy, declaration by owner, etc.) will depend upon the particular language of the policy.
- For damaged materials, both contractors and owners have “insurable interests” in physically damaged materials at the construction site (and off-site), so both the builders risk policy and an owner’s commercial property policy may provide coverage. For example, storm-caused destruction of a fabricated piece to be incorporated into a new, unfinished construction project, which was still situated at the fabricator’s location at the time of the casualty, may still be covered under a builders risk policy. Review all the policies for covered “locations” and “items” of loss.
- Economic harm from delays caused by storm damage may also be covered in the builders risk policy as “soft costs.” Be aware that such coverage usually excludes coverage for a 30-day delay or less. Be creative. For instance, lost time



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and labor shortages (and resultant project delay) incurred because your workers were home dealing with their own storm-related problems might be covered. You should review your policy, as well as your specific arguments, with your broker.

Business Interruption Claims:

- Insurance will cover costs incurred by a storm-damaged construction company to stay open (fully or partially) for business. For example, if extra expenses are needed to purchase fuel or other necessities to support the business operation, then a business interruption policy may provide coverage.
- Storm-caused delays to business operations resulting in lost income may be covered under business interruption policies. For example, should the storm have damaged a key fabricator's facility, such that components to be incorporated into the finished project are destroyed and/or completion delayed, a business interruption policy might provide coverage for resultant economic losses.
- Business interruption insurance coverage can also be used to recover net profits lost due to storm damage. Note, however, that if the policyholder does not take all reasonable steps to reduce or mitigate its losses, coverage may be compromised.
- The costs you incurred to "batten down" your business against an oncoming storm may be recoverable under a business interruption policy.

Contractor's Commercial Property Claims :

- Under the terms of your commercial property policy, you may have coverage for damages to your own commercial property (such as your plant, facility, office, equipment, etc.), as distinguished from your work on the project, or your lost business income.
- These commercial property policies are known as "manuscript" policies because each carrier creates their own, different coverage and exclusion language in their particular policy documents. Therefore, you need to carefully review your specific policy with your insurance advisors to determine the best manner in which to pursue the recovery of your storm-caused property damage.

In the risk-burdened construction industry, storm-related damages frequently involve first-party property damage claims by contractors, subcontractors, CM's and/or owners for fire, flood, builders' risk, business interruption and project delays. In addition, CGL policies provide protection against third-party liability claims for personal injury and wrongful death. G&C's Policyholder Insurance Coverage Group possesses an in depth familiarity with both construction-related insurance coverage issues and the construction industry itself. This enables us to help our clients maximize their recovery for storm-related damages both on a site and/or on their company's own property.