

Wide-Ranging Recovery Possibilities for Businesses Affected by Man-made and Natural Disasters

May 11, 2010

Sticky birds covered in tar. Black beaches strewn with fish. These are the most obvious, and, likely, the most ominous effects of the oil spill in the Gulf of Mexico as oil heads toward a landing somewhere onshore. But like the other man-made and natural disasters currently gripping North America – from the power outage in Boston to the flooding in Nashville to the rapidly approaching hurricane season – the oil spill will also undoubtedly wreak havoc on businesses as well as individuals and environments. Financial losses suffered by your company may be covered by insurance, even if your property is not directly damaged.

In addition, even businesses that do not carry insurance for such disasters may be reimbursed for their losses associated with these events, as BP itself has stated that it will pay compensation for “legitimate and objectively verifiable” claims, which may include claims for property damage, personal injury and commercial losses resulting from the oil spill. Therefore, it is important to take action as soon as your business starts to experience damages — be they property damage, limited availability of materials (and the resultant increase in price), or interruption of shipping channels leading to delivery delays. Claims for economic losses resulting from the oil spill in the Gulf of Mexico and similar events are varied, as are the types of insurance coverage you may have to cover them.

Regardless of the source of recovery, claims arising from natural and man-made disasters are likely to raise the same issues we deal with in almost all of our matters: causation, trigger, notice, quantification and, for insurance claims, number of occurrences, limits, deductibles, defenses and exclusions, among others. Some of the key insurance policy provisions are discussed below.

Property Damage: If your property is damaged as a result of a natural or man-made disaster, an immediate review of your property policy to assess coverage is probably reflexive. Policyholders should be aware, however, that 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 your property that has not been physically damaged. The property covered often includes property you lease, property within your care, custody or control, and property for which you are liable or in which you have an insurable interest. Many policies also include additional coverage for debris removal, demolition and increased cost of construction in the event of physical loss to covered property. Costs incurred in preventing loss, or minimizing loss, are also often covered under the policies' "sue and labor" provisions. The causes of loss or damage and the type of property damage covered by an "all-risk" policy are limited only by the exclusions in the policy, which should be read carefully and discussed in advance with your insurance and legal counsel.

Business Interruption: Lost profits are also often covered under one or more provisions of most property policies. Business interruption insurance is designed to do for the insured what the business itself would have done had no interruption occurred. This type of coverage usually comes into play to reimburse an insured for losses sustained due to the necessary total or partial suspension of the policyholders' operations during a period of interruption. For instance, a shoreline casino that suffers oil damage to its property could pursue under its business interruption coverage the gaming profit it lost while repairing the property damage. While the exact wording and case law interpreting these provisions varies, 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) that the loss must occur within a "period of restoration."

Business interruption losses often present tricky valuation and calculation issues that are best analyzed as the loss progresses rather than after-the-fact. Your business interruption coverage may require you to expedite repairs, mitigate losses and/or track expenses in a way that is not consistent with your normal business practice. It may also provide coverage for the "extra expense" associated with maintaining production while property is being repaired. Covered extra expenses generally include such costs as rent, moving and hauling expenses, overtime, temporary labor, and even advertising. An early evaluation of your coverage can help smooth the path to making sure covered expenses are properly captured and presented to insurers. Fortunately, many policies also include coverage for professional fees incurred in quantifying the loss.

Contingent Business Interruption/Dependent Business Premises: If either your suppliers or your customers suffer loss or damage of the type your property damage policy covers, you may have a claim for contingent business interruption due to your 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 due to damage to its own property. For instance, a restaurant that cannot acquire fish because of damage to fishing boats in the Gulf of Mexico could pursue contingent business interruption coverage for its resulting lost profits. Determining whether your policy has been triggered, the cost and requirement to purchase "cover," the appropriate period of restoration and the anticipated revenue or income had the damage not occurred can all be complicated issues necessitating the help of experienced coverage counsel.

Service Interruption/Impounded Water: When utility services to your premises are interrupted, service interruption coverage may be available to cover your loss of income or extra expense. Policies generally require damage to the property of a supplier of electricity, gas, water, steam, waste disposal, or similar services used by the insured to trigger this coverage. Impounded water coverage applies in the event that water used as a raw material, for power, or in a manufacturing process becomes unavailable due to damage to dams or reservoirs. This coverage could apply to the recent situation in Boston where coffee shops lost profits due to their inability to acquire the water necessary for making (and selling) coffee. These coverages are often limited in duration and subject to waiting periods or deductibles. The results of such interruptions, however, can be far-reaching, from event cancellation, inability to deliver products, closure of facilities, contractual penalties for non-completion of orders or loss of covered property.

Civil Authority Restricting Access: Should a governmental entity issue an order restricting access to your property, the order may trigger your insurance coverage. Unlike the business interruption coverage in your policy, some cases have held that no physical damage is required to invoke the civil authority coverage. While the most common application of this coverage would be to situations, like floods and hurricanes, where an evacuation order inhibits your ability to access your property, more complicated situations may arise as well. Airport closures, beach and waterway closures, curfews, closures of financial exchanges and border closures are all the types of civil authority orders that could lead to insurance claims. Although it has not yet, the oil spill in the Gulf of Mexico could lead to any number of orders of civil authority that impact business profits, from the closure of shipping lanes to the evacuation of casinos.

Ingress/Egress: In addition orders of civil authority that restrict access to your property, there may be other issues that arise as a result of natural or man-made disasters that limit your ability to enter or exit your property. Although the government may not issue an evacuation order, the oil spill in the Gulf of Mexico or the floods in Nashville might have already limited your access to property and resulted in business loss. These clauses similarly extend the business interruption coverage provided in your policy and likely require only property damage “in the vicinity” that results in the inability of you or your customers to reach your premises.

Next Steps: As soon as a potentially covered loss begins, experienced coverage professionals should be consulted. Waiting too long to start assessing coverage and quantifying loss can lead to lost coverage as, for example, covered costs may not be recorded and evidence of loss may not be kept. In addition, insureds and others with potentially covered business losses should:

- (1) immediately obtain and review insurance policies;
- (2) confirm that evidence of loss is organized and maintained to support a claim under any applicable coverage provisions;
- (3) adhere to any applicable notice provisions in the policies;
- (4) document loss by making sure to maintain proof of business performance prior to loss, during and after loss;
- (5) create and maintain evidence of damage, including pictures, if necessary.

Proskauer's Insurance Recovery practice can help navigate the waters by evaluating your insurance coverage, assisting in valuing your losses, and presenting your claim to insurers. If you have been affected by the Gulf oil spill or any other natural or man-made disaster, please feel free to reach out to your Proskauer lawyer or contact the Insurance Recovery team.