

# Insurance Considerations for Superstorm Sandy

**November 2, 2012**

This week's storms and the remnants of Superstorm Sandy pounded the East Coast shutting down entire mass transit systems and stock exchanges, leaving millions without electricity, and causing damage that has been estimated at \$50 billion and higher. The Governors of New York and Connecticut warned carriers this week not to charge hurricane deductibles for claims arising from the storm because the storm was not a hurricane when it made landfall.

Businesses impacted by the storm should look to their insurance policies for funds to help rebuild and cover losses, including business interruption, resulting from the storm. Some covered losses may precede damage from the storm itself, including costs associated with shutdowns in advance of the impending wind, rain and flooding. As discussed below, notice to insurers and careful review of policies are important first steps in preserving rights to coverage.

While there are many issues arising from claims made in connection with storm losses, including causation, trigger, notice, number of occurrences, limits, defenses and exclusions, there are some key coverage provisions to review and consider when analyzing claims. They are discussed below:

## **Property Damage**

If your property is damaged as a result of a natural or, for that matter, man-made, disaster, an immediate review of your property policy to assess coverage in light of the facts of your loss is critical. Policyholders should be aware that most first-party property policies cover much more than just physical damage to owned property. Many policies define property damage to include loss of use of your property that has not been physically damaged. The property covered often includes inventory as well as 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 associated with expediting repairs are often also included. While such provisions vary significantly, "preservation of property" and "sue and labor" clauses often cover costs incurred to prevent or minimize actual or threatened loss. In the case of Superstorm Sandy, many businesses shut down in anticipation of the impending storm, and resulting costs and losses may be covered. The causes and type of loss or damage covered by an "all-risk" policy are limited by only the express exclusions in the policy, which should be read carefully and discussed with experienced insurance counsel.

### **Business Interruption**

Lost profits are commonly 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 total or partial suspension of the policyholder's operations during a period of interruption. For instance, a shoreline casino or retail operation that suffers storm or flood damage to its property could pursue, under its business interruption coverage, the profit it lost while repairing the damaged property. While policy wordings 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 occur within a "period of restoration" which may be subject to a waiting period. Business interruption losses often present tricky valuation and calculation issues that are best analyzed soon after the loss or even as the loss progresses, rather than long after-the-fact when it may be difficult to obtain important supporting data. 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. Depending on relevant policy language, these provisions may also provide coverage for "extra expense" associated with maintaining production while property is being repaired or for certain expenses incurred before physical damage to property. 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 include coverage for outside professional fees incurred in quantifying the loss.

### **Contingent Business Interruption/Dependent Business Premises**

If your suppliers or your customers suffer loss or damage of the type insured by your property damage insurance policy, 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 property. For instance, a restaurant that cannot acquire fish because of damage to fishing docks and distribution centers on the Atlantic coast may be able to pursue contingent business interruption coverage for its resulting lost profits. Determining whether your policy has been triggered, the requirement to purchase replacement supplies ("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 and accounting professionals.

### **Service Interruption/Impounded Water**

When utility services to your premises are interrupted, service interruption coverage may be available to cover damage to property (e.g., spoilage of refrigerated goods) and your loss of income or extra expense. In connection with Superstorm Sandy, millions of customers were without electricity, and others have lost water, gas or sewage services. Service interruption coverage generally requires damage to the property of a utility supplier used by the insured and sometimes includes requirements that the damage occur within a specified distance of your property. 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. Service interruption coverage could apply to power outages where power lines downed by a storm or physical disruption to a transformer or generating station prevent a manufacturing plant or hotel from operating normally. These coverages are often limited in duration and subject to waiting periods or deductibles. The coverage for such interruptions can nonetheless be substantial, including 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. Some cases have held that no physical damage is required to invoke the civil authority coverage, and the "order" of civil authorities likely needs not to be in writing. The governmental response to Superstorm Sandy may provide a classic basis for application of this coverage because there have been evacuation orders which may inhibit the ability to access your property. Airport and mass transit closures, beach and waterway closures, curfews, and evacuation directives are each types of civil authority orders that could lead to insurance claims.

### **Ingress/Egress**

In addition to orders of civil authority that restrict access to your property, physical damage as a result of natural or man-made disasters may limit your ability, or the ability of customers or employees, to enter or exit your property. Even if the government does not issue an evacuation order, storm or flood damage may limit access to your business or property and result in business loss. Ingress/egress clauses can extend the business interruption coverage provided in your policy at least where property damage "in the vicinity" that restricts access to or egress from 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 or requisite causation 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, including photographs and video, is collected, organized and maintained to support a claim under any applicable coverage provisions;
- (3) adhere to any applicable notice provisions in the policies; and
- (4) document loss by making sure to maintain proof of business performance prior to loss, during and after loss.

Proskauer's Insurance Recovery & Counseling Group can help you to evaluate your insurance coverage, organize your team, value your losses, and present your claim to insurers. If you are impacted by Superstorm Sandy and its after-effects or any other natural or man-made disaster, please feel free to reach out to your Proskauer lawyer or contact the Insurance Recovery team.

#### [Related Professionals](#)

---

- **John E. Failla**

Partner