

Insurance Recovery Group

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Maximizing Insurance Recovery for Hurricane Harvey and Irma Losses

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In the wake of Hurricanes Harvey and Irma, many businesses have sustained substantial losses. As those companies begin the recovery process, they are evaluating whether, and how much of, their losses may be addressed by insurance. But many insurance companies are not keen on paying claims or paying them quickly. Therefore, policyholders must be well versed in the terms of their insurance and risk management programs to effectively challenge their insurers' claim determinations and obtain the maximum possible payout.

First-party property, business interruption, contingent business interruption, and flood insurance are the most likely sources of insurance recovery for Harvey and Irma losses. However, policyholders must still evaluate their entire coverage program to determine whether other policies such as these are also triggered:

- Commercial General Liability
- Cyber Liability
- Professional Liability
- Directors & Officers Liability
- Pollution Legal Liability
- Inland Marine
- OCIP – specific to construction industry
- Policies providing additional-insured coverage

Federal and state assistance may also be available for losses not otherwise compensated by insurance. In particular, hospitals, educational institutions, and other organizations that serve public functions should pursue available loans, grants, and other resources that may be available through FEMA and similar agencies.

Following a loss, policyholders should **provide immediate notice** to all insurers whose policies may **even potentially** apply to a loss. Lack of notice, or late notice, could eliminate coverage, but giving notice under an inapplicable policy will have no effect on coverage. When in doubt, provide notice. But when doing so, policyholders should not specify a cause of loss; doing so may give the insurer ammunition when it later seeks to apply an exclusion or an unfavorable sublimit. Rather, simply let the insurer know a loss has occurred and then await the insurer's inevitable inquiries about the loss to start formulating a coverage position.

The first-party property insurance that Harvey and Irma victims will look to access comes in a variety of shapes and sizes, but some basic types are "All Risk," which covers all loss and damage to covered property unless a specific exclusion applies, and "Named Peril," which provides coverage only if one of the particular perils insured against – e.g., fire, flood, hurricane – is the cause of the loss.

Policyholders should be aware of the scope of their business interruption coverage, often found in first-party property policies. (Policies often label their business interruption coverage as "Time Element" coverage.) Common business interruption coverages include lost profits, lost opportunities, extra expenses (incurred by the business as a result of the covered risk), logistics, and loss mitigation, and they may also include contingent business interruption coverage, e.g., when your company's supply chain has been interrupted as a result of the storms. To trigger business interruption coverage, the loss must result from an insured loss, i.e., physical damage to covered property. Following a broadscale catastrophe, identifying the appropriate (and most advantageous) business interruption coverage to apply can be complex and fact sensitive.

Once notice has been given, the claim process carries its own pitfalls. For instance, policyholders must give careful consideration to the cause of each type of loss that has been incurred. Hurricanes Harvey and Irma caused damages in a variety of ways – flood, storm surge, sewer backup, wind, fire, damage by debris, etc. Policyholders must evaluate each loss on an individual basis and conduct a separate causation analysis for each loss. This is critical; many property and business interruption policies include specific sublimits based on the type of loss. Policyholders cannot assume that their \$10 million aggregate limit is available if the policy, for instance, offers only \$1 million in coverage for flood and/or wind-related claims. Unsurprisingly, insurers try to shoehorn losses into categories with lower sublimits; therefore, policyholders should know their policies intimately and be prepared to argue facts that lead to maximum coverage.

Following the loss and both before and after notice is given, policyholders should take appropriate steps to protect persons and property from further injury and damage. The cost of

such measures is often covered. And if those efforts are not undertaken, the insurer may claim that the policyholder's "failure to mitigate" the loss reduces the amount of coverage.

Policyholders must also be cognizant of deadlines for submitting sworn proofs of loss and, in the event of a dispute, filing a lawsuit. Lawsuit deadlines in policies are almost always shorter than the applicable statute of limitations, and they can be enforceable. If a dispute is brewing, policyholders should ask the insurer for a tolling agreement; insurers rarely refuse, because they recognize the alternative is to be sued immediately.

Likewise, policyholders must also be aware of any statutory requirements governing their claim. For example, on September 1, 2017, a week after Harvey hit Houston, a Texas law took effect that requires property policyholders to, among other things, provide their insurer with written notice of the claim 61 days before they file suit. The notice must include a description of the claim, the amount claimed, *and* the "reasonable and necessary" amount of attorneys' fees incurred by the policyholder.

As the cleanup, repair, and reconstruction processes begin, policyholders should carefully document all losses and, to the extent feasible, keep damaged property and preserve the area of loss to allow for inspection. If this is not feasible, policyholders must take photographs and videos and keep an accurate record of the damage. Communication is also critical. Policyholders should invite the insurer to survey the damaged property before it is disposed of. Companies are also well served to secure the insurer's permission before discarding or altering the damaged property.

If pollution is a concern following these hurricanes, as it may be in Texas, where there are widespread media reports of contamination, policyholders should also evaluate coverage under pollution legal liability (PLL) policies, if they have such policies. Indeed, storm conditions can easily create new pollution

conditions or exacerbate historic pollution conditions, both of which may be covered by a PLL policy. PLL policies are often "claims made" – so it is essential to give notice immediately.

Finally, policyholders must remain mindful of applicable privileges, such as the attorney-client privilege. Many policyholders are currently in close and constant contact with their insurance brokers, but brokers are not agents for policyholders and they do not share a privileged relationship with policyholders. Therefore, policyholders should not provide insurance brokers with privileged and confidential information related to their claims – especially in communications between policyholders and their coverage counsel. Otherwise, insurers may discover those communications if there is a coverage dispute.

Likewise, policyholders should consider engaging all their professionals on a formal basis as soon as it appears that coverage litigation may ensue. Taking this step will facilitate the free flow of information and allow policyholders to evaluate claims without inadvertently waiving privileges that are designed to protect them.

Ultimately, recovering from Hurricanes Harvey and Irma will entail a lengthy, difficult, and expensive process. But with a focus on the ways to maximize coverage and an understanding of their obligations and "best practices," policyholders can work to offset these expenses and difficulties through insurance recovery.

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