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Insurance Coverage For California Fire Losses

By Richard P. Lewis and Luma Al-Shibib

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The California wildfires raging from Mexico to Los Angeles devastated five counties, razed 3000 structures, and destroyed 750,000 acres of land, an area roughly the size of Rhode Island. Given this devastation, property damage insurance claims likely will be in the millions of dollars. Indeed, an excess of seven thousand insurance claims already have been filed.

Although homes constituted the majority of properties affected by the fires, some commercial structures such as mini-malls, mom-and-pop stores, and other small businesses were also damaged. Additionally, roughly 3,050 acres of farmland were destroyed by the brushfires.

Moreover, losses from these brushfires are not confined solely to physical property damage, but also, include damage resulting from business interruption, implicating civil authority and ingress/egress coverages. For example, one San Diego based company experienced a forced shutdown of its facilities for more than a day. The company's air conditioning system was damaged by soot and ash from one of the brushfires, causing air quality problems to its facilities. Similarly, freight trains carrying cargo interstate were halted as a result of fires along a major rail line. Finally, business interruptions were experienced by businesses forced to shut down at the direction of local government officials who urged residents to stay home. These losses of income and business interruptions caused by the California fires are potentially very significant.

Potential Areas of Recovery Under Property Insurance Policies

Policyholders who have suffered physical damage including, but not limited to, fire damage, smoke damage, water damage, and damage from brushfire ash, should turn to their property insurance to seek recovery for their losses, including business interruption losses. In addition, policyholders who did not suffer physical damage but who were prevented from operating their business may have insurance coverage for loss of business income.

"...Business Interruption or Business Income, is designed to protect policyholders who have to suspend their business or production, resulting in lost sales and loss of profits."

Typical property insurance policies, in addition to providing coverage for physical damage, also promise to pay for financial loss caused by direct physical damage to insured property or loss of use of insured property. This type of coverage, known as Business Interruption or Business Income, is designed to protect policyholders who have to suspend their business or production, resulting in lost sales and loss of profits. It is also designed to reimburse policyholders for expenses that continue despite the cessation of income, such as salaries, taxes, rent, professional fees, certain utility charges and insurance premiums. Business Income coverage is intended to do, financially for the policyholder, just what the business would have done had the business interruption never occurred.

A typical Business Income clause reads as follows:

> We will pay for the actual loss of Business Income you sustain due to the necessary suspension of your "operations" during the "period of restoration." The suspension must be caused by direct physical loss of or damage to property . . . . The loss or damage must be caused by or result from a Covered Cause of Loss.

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Pollution Clause Inapplicable Where Claims Are Based On Business Transactions. *John S. Danis v. Great American Insurance Co.* The Danis Companies ("TDC") a holding company formed in 1988, sought coverage under the Great American Insurance Company's ("Great American") D & O policy claiming that they are entitled to the costs they have incurred in the defense of the underlying action brought against them by Waste Management, Inc. ("Waste Management"). Great American maintained that it was not obligated to provide coverage, because the Great American policy included a provision precluding coverage for the costs of defending claims related to pollution. In the underlying action, as a result of a corporate restructuring, TDC was left with insufficient assets to satisfy their indemnification obligations to Waste Management. TDC relied on *Owens Corning v. National Union Fire Insurance Co.*, which arose from underlying stockholders' allegations that *Owens Corning* misrepresented its future financial exposure to asbestos claims and misled investors as to the impact of asbestos claims on the company's future financial condition. The Sixth Circuit U.S. Court of Appeals found that the claims were not based or did not arise out of the use of asbestos. TDC held that the Sixth Circuit Court relied on *Kish v. Central National Insurance Group* for the proposition that a "but for" analysis is not an appropriate test for deter-

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Another potential coverage is provided by the civil authority clause, often listed as an "additional coverage" in property insurance policies. This clause is designed to provide coverage for business income losses incurred as a result of an order by a civil authority preventing access to the policyholder's place of business. Businesses in the areas of California which were impacted by the brushfires may have coverage under such clauses if they can demonstrate that their losses stemmed from the inability to operate their businesses because of the orders of civil authorities, including orders of evacuation.

Can I Trust Insurance Company Promises to "Pay" Property Insurance Claims?

Many affected policyholders may have heard promises from their insurance companies that their claims will be paid. Insurance company assurances that property claims will be "paid" concede little. Property insurance disputes tend to be about amounts of coverage and not coverage itself. It is too soon to tell whether the insurance companies themselves will back down or fight with their policyholders over coverage and amounts due. But history shows that if the claims are significant, insurance companies will take a hard line with regard to paying the policyholder the full amount owed under the policy.

How Do I Make a Claim?

If you are affected by the fires and have not done so already, you must give notice of your claim, preferably by instructing your broker to give notice under all policies that conceivably could be implicated, and to copying you on the letter. If they fail to do so, send notice to your insurance company directly, preferably "Return Receipt Requested."

When Do I Make a Claim?

If you feel there is any possibility that you may have a claim, you should give notice NOW. Give notice even if you do not have a handle on all the particulars of your claim; you can always supplement the notice later.

Do I Need Help in Pressing My Claim?

If your claim involves the complex issues of business interruption or inventory valuation, you should consider hiring a public adjuster and/or an accounting firm that specializes in property insurance coverage accounting. The insurance company will almost certainly hire an "independent" adjuster, and one or more accounting firms that

"For more than 300 years Lloyd's of London has never failed to pay a valid claim."

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specialize in representing insurance companies; it will also probably hire, and conceal the hiring of, a law firm. If the insurance company presents an adjuster or accounting firm as "your" or an "independent" adjuster or accountant, do not hesitate to do a little research on that firm. Insurance companies typically hire one of five or six accounting firms that specialize in representing insurance companies in property insurance disputes. Your insurance company's engagement of such a firm may give you an early indication of how it is treating your claim. Further, an insurance company may suggest that you should not hire accountants, adjusters or law firms. You should try to get the insurance company to put such improper suggestions in writing.

What Do I Do If My Insurance Company Says No?

Often, insurance companies offer less then the amount the policyholder is truly entitled to or they deny claims and do all they can to discourage policyholders, finally paying only the persistent policyholders who do not take "no" for an answer. Accordingly, you should do everything in your power to demonstrate to the insurance company that you will not simply go away. For instance, write letters and demand information and positions on, and explanations of, coverage. If unanswered, write further letters incorporating all previous requests for information and demanding immediate responses.

Further, try to force your insurance company to commit its positions to writing. Insurance company claims handlers and adjusters frequently will try to change positions they have taken as the parameters of the loss become more clear. For instance, an insurance company may take the position that a policyholder's business income loss from the destruction of one factory should be examined by looking at the performance of all the policyholder's factories, because the insurance company assumes the other factories would pick up the business lost by the destroyed factory. Later, after determining that the other factories also suffered business income losses due to collateral effects of the loss, the insurance company may argue that only the income stream of the destroyed factory is relevant. To protect against such shifting positions, and to take full advantage of them if the claim is litigated, you should try to make the insurance company commit in writing to every position it takes.

As a last resort, if tenacity alone is insufficient to compel the insurance company to pay the entire claim, policyholders should consider legal avenues to secure their rights under their insurance policies. ■

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mining whether one event "arises out of" another event. Great American moved for Summary Judgment and relied on *High Voltage Engineering Corp. v. Federal Insurance Co.* to argue that the pollution exclusion applies. Montgomery County Common Pleas Court Judge Michael T. Hall found that the pollution exclusion would bar coverage for indemnity to the extent damages arise out of or somehow involve pollution but that summary judgment is not appropriate because of existing fact issues. Judge Hall noted that *High Voltage* case was based on allegations that *High Voltage* prevented the removal of contaminants as opposed to this action, in which the claims are based on business transactions carried out by TDC. The judge also held "Furthermore, The Court finds that the issue of indemnity cannot be resolved until the Waste Management action has been adjudicated. Therefore, the proceedings with respect to indemnification will be stayed in this action pending the outcome of the Waste Management action." ■

—Claudia Ilie

a WHO SAID WHAT?

Lloyd's, MAP Underwriting at Lloyd's (2000) at 4.

INDUSTRY NEWS

Time's Up For Delaying Insurance Companies

On November 20, 2003, the New York Court of Appeals in *First Financial Insurance Co. v. Jetco Contracting Corp.* answered two certified questions involving prompt denial of liability insurance coverage in a way that benefits New York policyholders.

The United States Court of Appeals for the Second Circuit essentially sought a determination under New York law as to whether an insurance company could either: 1) use the investigation of other potentially applicable insurance as a valid excuse for delaying disclaimer of coverage; or 2) successfully assert that a more than six-week delay in disclaiming coverage was reasonable without coming up with a better excuse than that it was exploring other coverage to off-set any potential loss. New York's highest court answered no to both questions.

Holding that the insurance company has the burden of justifying its delay, the Court of Appeals found that an unexcused 48-day delay in disclaiming coverage is unreasonable as a matter of law. New York Insurance Law § 3420(d) requires that disclaimers or denials by liability insurance companies be provided in writing as soon as is reasonably possible. This timeliness requirement is measured from the point in time an insurance company first learns of the grounds for disclaimer or denial. The Court held that the insurance company in this case might simply have been looking after its own interests in attempting to reduce its ultimate risk. The Court also found that prompt disclaimer of coverage is important to allow the policyholder—who otherwise might delay its own search for other coverage—to explore alternative avenues of protection.

The Court of Appeal's decision effectively overturned the United States District Court for the Southern District of New York which had held that the insurance company's delay was reasonable. New York law on notice of an insurance claim is draconian, involving forfeiture, and is not in accord with the large majority of states. ■

—John G. Nevius

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