

Expert Analysis

Securing Insurance Recoveries for Hurricane Sandy Property and Business Interruption Coverage Claims

*By Finley Harckham, Esq.
Anderson Kill & Olick*

Initial estimates of property damage and business interruption losses resulting from Hurricane Sandy exceed \$50 billion. Unfortunately, many of the businesses that are suffering those losses are heading into another phase of this disaster: the slow and painful effort to recover under their insurance policies.

In addition to the normal problem of lack of responsiveness from insurers, which can be frustrating even in the absence of thousands of catastrophe claims competing for attention, Hurricane Sandy claims will present a number of complex coverage issues resulting from the interplay of wind and flood damage, and the role of transportation shutdowns and power outages in business income losses. To overcome these obstacles, policyholders should take the following steps to move the claim adjustment process to as quick and successful a resolution as possible.

First, don't wait to be asked before you start providing information to the insurance company. Early in the process ask the insurance company adjuster what information he or she will need, so it can be gathered and provided as soon as possible. Collect and submit loss data as it is developed, without waiting until it is complete. The period of restoration for a business interruption loss might be several months, or longer. A lot can be done during that period to move a claim to resolution.

Second, determine a reasonable deadline for resolving the claim, and tell the insurance company that agreement must be reached by that date. Some policyholders are reluctant to take a hard line with the insurance adjuster for fear of biting the hand that feeds them, but that attitude will only result in a claim being assigned a low priority. Insurance companies pay claims when they feel compelled to, not based upon the quality of the relationship between the adjuster and the policyholder. So, assertiveness in pursuing claims is a good thing.

The deadline should provide the insurance company sufficient time to evaluate the claim after all relevant information has been submitted. In some states, by submitting

Respond to a reservation of rights with a demand for a detailed and specific coverage determination, reminding the insurer that its failure to do so may constitute bad faith.

proofs of loss the policyholder can trigger 30- or 60-day periods in which the insurer must provide a coverage determination. Some insurance companies complain that submitting a proof of loss during their adjustment of a claim is a hostile act. While insisting upon timely payment of a claim should not be viewed as inflammatory, telling the adjuster that a schedule for resolving the claim must be agreed to or proofs will have to be filed can achieve the same result.

Third, insist that the insurance company pay all undisputed amounts before negotiating over the contested portion of the claim. Typically, the insurer will make a “good faith” partial payment and then pay little or nothing more until a final negotiation over all the open issues. This allows the insurer to hold on to funds that should be paid out for undisputed portions of the claim and increases its leverage for later negotiations. Counter this strategy by forcing the insurance company to commit to a position on coverage and to pay the amounts due under its own analysis of the claim.

Start by demanding a coverage determination. Typically, insurers issue vague reservation-of-rights letters that quote numerous policy provisions without explaining how those clauses apply to the claim. Such a letter is intended to protect the insurance company from a waiver of defenses, but does not fulfill its obligation to provide a timely coverage determination. Respond to the reservation of rights with a demand for a detailed and specific coverage determination, reminding the insurer that its failure to do so may constitute bad faith.

Also, demand payment of the undisputed amount of each element of the claim. For example, a dispute over the period of restoration for business interruption coverage should not delay payment for property loss. If the insurance company will not agree to make partial payments, submit partial proofs of loss, which will trigger the deadlines for payment under most states’ unfair-claims-handling statutes.

Fourth, make a written record of everything that transpires with respect to the claim in correspondence to the insurance company. This may deter dilatory claims handling by putting the insurer on notice that its actions — or inaction — are being preserved for a possible bad-faith claim later on.

Fifth, do not be shy about claiming losses that result from an insurance company’s dilatory handling of the claim. Such delays may result either in the period of covered business interruption loss being extended or an award of consequential damages for lost profits that can be tied to an insurer’s untimely payment.

Business interruption coverage is provided for a hypothetical period of time reasonably necessary to restore the damaged property, but it should take into account the reality faced by the policyholder, including the delayed payment of insurance proceeds.

The insurance company may also be liable for consequential damages flowing from its breach by failing to make timely payments. Those damages might include lost profits or extra expenses that exceed the limits of coverage, and lost value of the enterprise if it could not resume operations because the insurance company improperly withheld, or delayed, payment.

Sixth, assemble a claim team with all the skills needed to maximize the recovery. Although most policyholders only communicate with an adjuster, the insurance company has a team of attorneys, accountants and in-house claims personnel who are working hard to minimize the payment of your claim, through coverage defenses and the calculation of the loss. The policyholder's knowledge of its own business goes a long way to leveling the playing field, but there are many arcane coverage issues and claims adjustment practices that require special expertise.

In particular, Sandy claims are likely to involve unusual issues concerning seldom-used coverages, including contingent business interruption, order of civil authority and service interruption. Also, flood exclusions in many policies will give rise to issues that require an understanding of relevant legal precedent.

Seventh, before sitting down with the insurance company to try to resolve the difficult issues, have a clear idea of what the claim will be worth if it ends up in litigation. This analysis must include the likelihood of success on the disputed coverage and quantification issues, as well as anticipated legal fees and the time and aggravation associated with a lawsuit.

Unless you are willing to sacrifice dollars over principle, be prepared to settle based upon a realistic value of the claim, not what is fair. On the other hand, a professional evaluation of your claim may reveal that it is more valuable than you think and raise your settlement goal.

Eighth, be mindful of all deadlines imposed under the insurance policy. As discussed above, many policies limit the time in which suit may be brought against the insurer. Also, in many instances there are limitations on the policyholder's right to recover full replacement cost for damaged property.

Often, policies require that property be replaced within two years of the loss or that the policyholder notify the insurer of its intent to replace within a certain period of time. If those requirements are not met, the policyholder may be limited to a recovery based upon the actual cash value of the damaged property, which is the cost of replacing the item less depreciation.

The enforceability of such provisions is questionable when a widespread disaster has made rebuilding difficult and insurance payments have been delayed, but try to get the insurer's agreement to adjourn those deadlines if necessary.

Finally, if the claim cannot be resolved through negotiation, you may have a choice of proceeding either to appraisal or litigation. Appraisal is a form of arbitration provided for under many insurance policies that either party can demand to resolve disputes over the amount of the loss. It can be a quick and inexpensive way to quantify the claim.

However, appraisal is not required, and may not be appropriate, when there are coverage issues to be resolved. For example, if the parties disagree over the amount of a business interruption loss because of a dispute over whether market conditions after the hurricane should be considered when calculating damages, the policyholder would be entitled to have that coverage issue decided in court.

Sandy claims are likely to involve unusual issues concerning seldom-used coverages, including contingent business interruption, order of civil authority and service interruption.

Appraisers, who typically are in the building trades, generally are not qualified to address such issues. Also, bad-faith claims fall outside the scope of an appraisal clause and will have much greater value if placed before a jury. So, the policyholder must carefully consider its options and not necessarily feel compelled to agree to an appraisal simply because the amount of damages is one issue in dispute.

The key to getting insurance claims satisfactorily resolved within a reasonable period of time is for policyholders to take control of the process and to demonstrate a resolve to secure the coverage they paid for. This requires hard work, but it will pay handsome dividends. **WJ**



Finley Harckham is a senior shareholder at **Anderson Kill & Olick** in New York. He is the president of Anderson Kill Insurance Services, a non-legal subsidiary of the law firm that assists clients with risk management services, and Anderson Kill Loss Advisors, a non-legal subsidiary of AKIS that assists policyholders with property loss and business interruption claims. He can be reached at 212-278-1543 or fharcckham@andersonkill.com.

©2012 Thomson Reuters. This publication was created to provide you with accurate and authoritative information concerning the subject matter covered, however it may not necessarily have been prepared by persons licensed to practice law in a particular jurisdiction. The publisher is not engaged in rendering legal or other professional advice, and this publication is not a substitute for the advice of an attorney. If you require legal or other expert advice, you should seek the services of a competent attorney or other professional. For subscription information, please visit www.West.Thomson.com.