

RE: **Coordination of Adjusters and Experts**

STEPS FOR PROTECTING AND MAXIMIZING INSURANCE COVERAGE

Copies of all insurance policies covering property in the disaster area should be forwarded to you attorneys immediately. This includes primary coverage policies as well as any umbrella policies that might be applicable and any specialty policies or riders (wind, flood, etc.). This will allow your attorneys to review and evaluate the notice, coverage, and exclusion provisions of the relevant policies.

All carriers should be put on notice of loss pursuant to the terms of the insurance policies.

Other steps should also be taken immediately in anticipation of the damage area being reopened. Specifically:

- A private insurance adjusting company should be contacted so that you have an independent adjuster present to document the extent and type of damage as soon as the hotels are re-opened;
- An engineering firm, and specifically a structural engineer, can be retained to evaluate possible structural damage to the hotels. (An insurance carrier may be inclined to dispute this type of damage claim. It is also possible that the insurance carrier will assert that construction defects contributed to the damage.)

When the area is reopened, it is paramount that steps be taken to document and preserve evidence of the damage. To this end, you should have a lawyer and private adjuster with you when you return to the property. **The extent of damage needs to be documented before, and/or in connection with, clean-up and recovery efforts.** Records of business interruption losses should also be collected and preserved to the extent possible in order to support any available business interruption claims. This may require coordination with your information technology personnel.

Depending upon the local circumstances and availability, and considering the potential interference with rescue efforts, getting aerial photography as soon as possible may also help document the extent of damage.

Insurance Action Checklist

- **Collect All Insurance Policies And Forward Copies to Attorneys**
- **Backup All Electronic Information Available re: Lost Orders, Cancellations, etc. for Damaged Properties**
- **Retain Private Insurance Adjuster to Support Adjustment Claims**
- **Retain Engineering Firm to Evaluate Possible Structural Damage**
- **Request Lawyer and Private Adjuster to Accompany You on Return to Property**
- **Obtain Aerial Photography of Your Property (if/when available)**

The following are the types of issues that frequently arise in natural disaster coverage situations:

- Do the insurer and insured agree on the form of policy that is in effect? Given the archaic business practices of the insurers, this question frequently spurs litigation.
- What is the cause of the damage - windstorm, flood, environmental contamination, etc.? Policies frequently have exclusions for various causes and limits on coverage for other causes that significantly affect the insured's capacity to recover. In this case, insurers are likely to focus on damages being caused by the flood because these typically are excluded or limited. There still might be coverage, however, if the water damage was wind-driven, i.e., from the storm surge. The same distinction will likely apply to damage caused by looting. Did the looting occur as a result of the hurricane or the levee break? One might be covered while the other might not. Another issue is mold. Mold damage is likely to be covered if it was caused by the flood, but it might not be covered if it resulted from the hurricane. These are esoteric distinctions, but they are very important in the insurance context. The distinctions can also be very important in connection with the application of varying deductible levels and policy sublimits tied to certain coverages or types of damage.
- Restoration vs. improvements. It is quite likely that New Orleans will require rebuilding in ways that require modifications to the property as it existed prior to the destruction. If the federal or local governments do not finance that, a dispute with the insurer is likely.
- Business interruption amount and scope: This is frequently a bone of contention since the amount of business interruption is inherently uncertain.
- What mitigation efforts are being undertaken by the insured, and has the insurer agreed to or been properly notified about ongoing costs?

Records Preservation and the Business Interruption Claim

As you know, business interruption ("BI") insurance is designed to protect the earnings that the insured entity would have enjoyed had the event or occurrence insured against not intervened. The goal is to place the insured in exactly the position it would have enjoyed had there been no event.

A key element of any business interruption claim is establishing the benchmark from which the interruption is measured. In other words, what would the business have been earning in a "normal" year during the time of the interruption? Preservation and timely collection of data becomes absolutely critical in this regard. Lawyers and experts alike will have to review budgets and forecasts, capital and non-capital expenditures, local industry data and trends, etc., all with the eye of setting the benchmark. Keep in mind also that the business interruption does not necessarily end once the business re-starts. There is going to be a cost to stabilized sales that must be calculated and included. Capturing and monitoring all expenses both pre- and post-start are important.

There can be two types of policies: "open," where the value of the claim is to be determined, and "valued," which stipulates a value for the claim in advance. Also, some BI policies render the insurer liable for the insured's fixed charges and necessarily continuing expenses during the interruption.

These can include payroll expenses, interest on loans, taxes, insurance, licenses, utilities, etc. Although it is highly likely that Client ("C") has "open" BI insurance, it will be important to confirm this quickly. It will be equally important to understand the policies' notice and proof of loss provisions and to determine what is covered by property as opposed to BI insurance.

The very first and most important thing on C's global agenda right now regarding its possible claims is to gather and preserve its financial and accounting data. In asserting a BI claim, the burden will be on C to prove the amount of the loss sustained. Our experience with complex operations such as hospitals and universities compels an immediate focus on IT systems and core applications, especially proprietary ones, to make sure that data is not lost through this interruption.

The Team

C should also consider assembling its own claims team. This team will consist of personnel from at least the following functions: financial and accounting; IT; in-house legal; insurance; property and facility administrators; operations; maintenance; human resources; and security. Assembling this team to work with the attorneys and experts will be important for a number of reasons, one of which is that BI insurance sometimes excludes certain specified perils, such as, for example, loss due to water damage, theft, etc. Therefore, documenting conditions extant will be critically important and, hence, our recommendation that the outside and inside expert teams include facility and construction experts. It will also be important to work with this team to anticipate any argument that the insurers might make regarding C's duty to mitigate its losses. Just as important will be identifying mitigation-of-loss expenses that C might be entitled to recover, and to establish the "period of restoration," i.e., the time required to rebuild, repair or replace the destroyed or damaged property with the exercise of due diligence and dispatch.

Insurance Brokers

C's insurance brokers are going to be a very important part of the process going forward, but the relationship between an insured and an insurance broker is not privileged. Accordingly, this relationship should be closely managed and monitored by counsel for C.

Taking Action

There are several things C should do immediately to help expedite and prepare for future insurance claims. First, you should take aggressive action to document the current condition of the property as soon as possible. This should be done using both still and video photography. In this regard, obtaining the asset list is critical.

Second, C should make every effort to capture its expenditures to satisfy its deductibles. An internal cost accountant should be assigned to this task ASAP. There are many costs that can be attributed to satisfying the deductibles. There is almost always an argument with the insurers about this, but steps to capture the costs should be taken now.

Third, C must address notice. This applies not only to the primary insurers but also to the excess insurers. C will need to retrieve those excess policies quickly as we need the primary policies. This is something that C's internal insurance people as well as its brokers should be working on right now.