

## **Our Insurance Coverage Team**

**Helping Policyholders Maximize Insurance Recoveries Nationwide**

**Aligned with your business.**

## About Hunton Andrews Kurth's Insurance Coverage Team

For decades, the insurance litigation and counseling lawyers at Hunton Andrews Kurth LLP have kept pace with changes in the law and industry, addressing all aspects of insurance coverage, helping our clients maximize insurance recoveries through insurance program reviews, claims presentation and negotiation, litigation, alternate dispute resolution, trials and appeals. From our offices in Washington, DC, Los Angeles, Miami, New York, Atlanta, Dallas, London and other key commercial centers, we have advised policyholders with traditional and emerging insurance products in virtually every sector of the economy, including financial services, utilities, energy, natural resources, health care, chemicals, pharmaceuticals, consumer products, telecommunications, technology, e-commerce, manufacturing and more.

Our lawyers counsel clients on the full range of insurance products and coverages, including:

- First-Party Property Coverage
- Casualty Insurance, Including Bodily Injury, Personal Injury and Property Damage Coverage
- Business Interruption and Extra Expense Coverage
- Cyber and Data Breach Coverage
- Directors and Officers Liability Coverage
- Transactional Insurance, Including Representation & Warranties Insurance
- Employment Practices Liability Insurance
- Credit Risk and Financial Guaranty Insurance
- Fidelity Bonds and other Crime Coverage
- Professional Liability, Errors and Omissions Liability, Bankers Professional Liability and Technology E&O Liability
- Product Liability, Environmental and Complex Torts
- Trademarks, Copyrights and Other Forms of Intellectual Property
- Reinsurance

We keep pace with insurance products and regulations as they expand and adapt to fast-developing technologies and rising concerns related to privacy, intellectual property theft, corporate social responsibility, sophisticated financial products, credit risks and terrorism, among others, while still addressing traditional areas such as property and casualty, product liability, environmental issues and business torts. As the law adjusts to emerging issues, it is more critical than ever that policyholders retain knowledgeable, skilled counsel, capable of understanding new and evolving insurance products, to resolve coverage disputes, maximize recoveries and avoid unnecessary litigation.

Our lawyers have a wealth of experience dealing with these and other coverages in connection with a wide range of complex contexts, including those relating to products liability, environmental and complex torts, privacy breaches and other technology failures, subprime mortgage disputes and bond transactions.

### Counseling and Risk Assessment

Successful insurance recovery often begins long before the actual loss occurs. Our lawyers work with clients to review, maintain and manage coverage, underwriting and policy manuscripting and developing assessments of future risk that recognize financial and operational constraints. Based on these assessments and our experience dealing with insurers, we develop strategies for clients that may include identification of risks and alternate sources of recovery, project planning, document collection and advice on mitigation steps. Our creative approach and coverage plans for clients have resulted in precedent-setting financial, business and legal outcomes.

### Litigation and Arbitration

Recovery litigation and arbitration are cornerstones of our practice. Our team has achieved successful results in insurance coverage matters worldwide. We offer clients the team and experience that is necessary even in the most complex litigation matters, including multidistrict litigation, class actions, mass torts and international and national forum disputes.

### International Reach

In addition to a strong presence throughout the United States, our lawyers have experience with foreign insurers, reinsurance pools and managing general agents and issues of international reach, including disputes in Latin America, the Caribbean, London and Canada. When necessary and appropriate, we collaborate with our colleagues in the firm's international offices and our strong network of international contacts.

### Client Service

Client service extends far beyond litigation victories. We offer a wide range of tools that reduce the costs and streamline the processes typically associated with insurance recovery litigation. For instance, the firm offers sophisticated litigation management and electronic discovery strategies that enable simplified document collection and management, a benefit that counters the familiar tactic of overloading recovery counsel with documents in an effort to derail a case. We also use advanced technology to communicate with clients and manage the overall plan for each case, through Client Workrooms — customized, secure extranets. Most importantly, we take the time to understand each client's

unique needs, and develop a strategy that is tailored to their business and legal goals. This forward-thinking approach not only reflects our desire to communicate with clients and forge long-term relationships, but to bring value and cost-effectiveness to each representation. In that regard, we welcome the use of appropriate alternative fee arrangements for insurance matters.

### Team Rankings and Honors

Our successful approach to handling insurance recovery matters has been noted by numerous publications. Hunton Andrews Kurth has been named as a leader by publications such as Chambers USA and Legal 500 and we were named as a leading insurance practice by the 2014 BTI Consulting Client Relationship Scorecard. In addition, team members serve in leadership positions at leading insurance-related publications and associations, and regularly speak before legal and industry associations on emerging insurance issues and their impact and significance to policyholders. While we appreciate the honors bestowed upon us by outside sources, we are most proud of our consistent record of success on behalf of our clients.



## Court Concludes That COVID-19 Losses Can Qualify as “Direct Physical Loss”

By Lorelie S. Masters & Jorge R. Aviles on August 14, 2020

In a victory for policyholders, a federal district court found that COVID-19 can cause physical loss under business-interruption policies. In *Studio 417, Inc., et al. v. The Cincinnati Insurance Co.*, No. 20-cv-03127-SRB (W.D. Mo. Aug. 12, 2020), the court rejected the argument often advanced by insurers that “all-risks” property insurance policies require a physical, structural alteration to trigger coverage. This decision shows that, with correct application of policy-interpretation principles and strategic use of pleading and evidence, policyholders can defeat the insurance industry’s “party line” arguments that business-interruption insurance somehow cannot apply to pay for the unprecedented losses businesses are experiencing from COVID-19, public-safety orders, loss of use of business assets, and other governmental edicts.

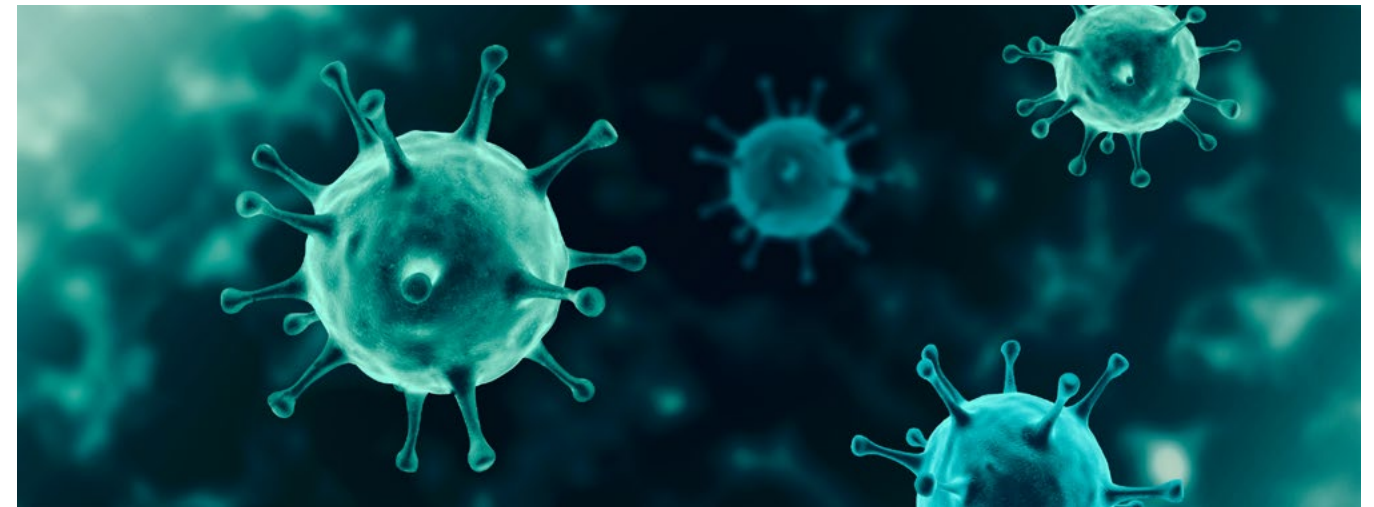
The policyholders in *Studio 417* operate hair salons and restaurants asserting claims for business interruption. In suing to enforce their coverage, the policyholders allege that, over the last several months, it is likely that customers, employees, and/or other visitors to the insured properties were infected with COVID-19 and thereby infected the insured properties with the virus. Their complaint asserts that the presence of COVID-19 “renders physical property in their vicinity unsafe and unusable.” Unlike some other complaints seeking to enforce such coverage, it also alleges that the presence of COVID-19 and government “Closure Orders” “caused a direct physical loss or direct physical damage” to their premises “by denying use of and damaging the covered property, and by causing a necessary suspension of operations during a period of restoration.”

The court concluded, after “a review of the record,” that the plaintiffs had “adequately stated a claim for direct physical loss” and thus denied the insurer’s motion to dismiss. The court pointed to the plaintiffs’ allegations of a “causal relationship between COVID-19 and their alleged losses” and allegations that COVID-19 “is a physical substance” that allegedly attached to plaintiffs’ property, making it unsafe and unusable and thus resulting in direct physical loss. The court point to Missouri cases holding that “a loss may occur when the property is uninhabitable and unusable for its intended purpose.”

The *Studio 417* decision stands in sharp contrast to earlier decisions regarding COVID-19 claims. Notably, the court

explicitly declined to follow the recent COVID-19 decision trumpeted by insurers in *Social Life Magazine, Inc. v. Sentinel Insurance Co.*, No. 1:20-cv-03311-VEC (S.D.N.Y. 2020). While the defendant, Cincinnati Insurance Co., argued that “*Social Life* famously states that the virus damages lungs, not printing presses,” the *Studio 417* court swiftly dismissed this position, reasoning instead that the policyholders had plausibly alleged that malign COVID-19 particles attached to and damaged their property, which made their premises unsafe and unusable. *Suite 417* also specifically differs from two prior seemingly pro-insurer decisions, *Gavrilides Mgmt. Co. v. Michigan Insurance Co.*, No. 20-258-CB-C30 (Mich. Co. Ct. July 1, 2020), and *Rose’s 1 LLC, et al. v. Erie Insurance Exchange*, No. 2020-CA-002424-B (D.C. Super. Ct. Aug. 6, 2020) (which we have previously discussed [here](#)), where the trial courts held that COVID-19 did not constitute physical loss or damage. Namely, the courts in both *Gavrilides* and *Rose’s* stated that the plaintiffs there, unlike those in *Studio 417*, failed to allege or proffer evidence that COVID-19 was present at or had physically damaged their properties.

The *Studio 417* decision points out that, in pursuing such coverage, it is key for policyholders to tie the elements of the coverage to the facts of the damage and loss, allegations that a court can use in denying facile arguments by insurers that somehow business-interruption coverages cannot be triggered. The early decisions, both *Studio 417* supporting coverage and those thus far that have rejected it, all show that careful analysis of policy language, married to an analysis of the facts and evidence of the loss in question, will help courts recognize that the coverage should apply.



## DC Decision Finding No “Direct Physical Loss” for COVID-19 Closures Is Not Without Severe Limitations

By Michael S. Levine & Michael L. Huggins on August 7, 2020

On August 6, 2020, in *Rose’s 1 LLC, et al. v. Erie Insurance Exchange*, Civ. Case No. 2020 CA 002424 B, a District of Columbia trial court [found](#) in favor of an insurer on cross motions for summary judgment on the issue of whether COVID-19 closure orders constitute a “direct physical loss” under a commercial property policy.

At its core, the decision ignores key arguments raised in the summary judgment briefing and is narrowly premised on certain dictionary definitions of the terms, “direct,” “physical,” and “loss.” Relying almost entirely on those definitions – each supplied by the insureds in their opening brief – the court set the stage for its ultimate conclusion by finding “direct” to mean “without intervening persons, conditions, or agencies; immediate”; and “physical” to mean “of or pertaining to matter ....” The court then apparently accepted the policy’s circular definition of “loss” as meaning “direct and accidental loss of or damage to covered property.” Importantly, however, despite recognizing the fundamental rule of insurance policy construction that the court “must interpret the contract ‘as a whole, giving reasonable, lawful, and effective meaning to all its terms, and ascertaining the meaning in light of all the circumstances surrounding the parties at the time the contract was made,’” the court apparently ignored the insureds’ argument that the term “property damage” is specifically defined in the policy to include “loss of use” without any specific reference to physical or tangible damage.

Based on their supplied definitions and those from the

policy, the insureds asserted that the “direct physical loss” sustained was the loss of use of their restaurant properties. The insureds argued that the loss was “direct” because the closures were the direct result of the mayor’s orders without intervening action. The insureds further asserted that the loss was “physical” because “the COVID-19 virus is ‘material’ and ‘tangible,’ and because the harm they experienced was caused by the mayor’s orders rather than ‘some abstract mental phenomenon such as irrational fear causing diners to refrain from eating out.’” As would prove critical, however, the insureds did not argue that COVID-19 was actually present on the insured properties at the time when the properties were forced to close, nor did the insureds argue that the pandemic nature of COVID-19 necessarily means that COVID-19 is present globally. Finally, the insureds argued that the term “loss” includes loss of use, and the insureds were deprived of the use of their properties.

The court rejected each of the insureds’ supplied definitions as a basis to trigger coverage under the facts alleged. The court concluded that, standing alone and absent intervening actions by individuals and business, the orders did not effect any direct changes to the properties. The court next concluded that, because no evidence was offered that COVID-19 actually was present on the insured properties or that the orders had any effect on the material or tangible structure of the insured properties, the effect of the orders was not “physical.” Finally, the court concluded that the terms “direct” and “physical” modify the term “loss” in the phrase “direct physical loss” and that, therefore, the loss of use of the restaurants would need to have been caused, without intervention of other persons or conditions, by something pertaining to matter – “in other words, a direct physical intrusion on to the insured property.”

In short, the *Roses 1, LLC* decision holds that, under the very narrow facts and definitions presented in that case, municipal orders closing restaurants in connection with COVID-19 did not, without more, constitute a “direct physical loss” under the policies at issue in that case. But the decision is not without significant and unique limitations.

First, the court adopted particular dictionary definitions of “direct” and “physical” that were proposed by the insureds but which are not uniformly accepted definitions of those terms. For example, in other cases, “direct” has been defined to mean the proximate cause.

Second, as noted, the court apparently ignored the policy’s own definition of “property damage,” and in doing so, ignored the fundamental rule that the *policy* and not just the particular *coverage part* must be read as a whole.

Third, and critically, the insureds offered no evidence that COVID-19 was present in their restaurants. Medical science has found that COVID-19 has a direct, physical impact on property and that the communicable disease remains on property rendering that property hazardous and unusable long after it is deposited by an infected person. Likewise, medical science is increasingly of the opinion that COVID-19 directly affects indoor air and renders premises uninhabitable for extended durations due to the airborne transmissibility of the disease. The insureds in *Rose 1, LLC* apparently failed to allege or present evidence of these significant facts. Indeed, direct and/or circumstantial evidence of the presence of COVID-19 in other instances might yield a different result as

to whether loss of use constitutes “direct physical loss.” And, while the court distinguished cases in which some physical alteration to property rendered the property substantially or completely unfit for use, the court’s discussion leaves open the possibility that the presence of COVID-19 on a property may result in covered loss of use.

Fourth, the court cited, but failed to substantively address, the case in which the threat of a landslide constituted direct physical damage to homes by virtue of rendering them uninhabitable, *Murray v. State Farm Fire & Casualty Co.*, 509 S.E.2d 1, 16-17 (W. Va. 1998). In fact, no court to consider this issue to date appears to have provided any careful analysis of the circumstance that the threat of COVID-19 becoming present at a premises may, on its own, constitute direct physical damage, much as the threat of a landslide, because it renders the property unfit for use. In other words, with a widespread pandemic like COVID-19, a property owner cannot open its doors without substantial risk of workers and patrons bringing COVID-19 onto the premises, especially at present, when record-breaking numbers of COVID-19 cases are reported daily. The court in *Rose’s 1 LLC* did not fully address such circumstances.

In sum, while the decision in *Rose’s 1 LLC* appears facially to favor insurers and is certain to be trumpeted as a victory for the insurance industry, the decision addresses only a narrow circumstance and fails to fully address the myriad issues raised by the more than one thousand cases seeking business interruption coverage for COVID-19 losses.

## Riot-Related Damage and Income Losses are Covered under Most Business Owners’ Policies

By [Andrea DeField](#), [Latosha M. Ellis](#) & [Rachel E. Hudgins](#) on June 16, 2020

Following the deaths of George Floyd, Breonna Taylor, Ahmaud Arbery, Tony McDade, and Rayshard Brooks, protests against systematic racism in general, and police brutality in particular, have swept the globe. These protests have largely been peaceful, but a small, fractious group of individuals has used the protests as cover to incite violence, damage property, and loot businesses. While it might be cold comfort to the affected business owners to hear that property damage is not the norm, most have insurance that protects their pecuniary interest.<sup>[1]</sup>

First-party property insurance policies generally include riot and civil commotion as covered causes of loss, unless there is a specific exclusion in the policy. Although courts have acknowledged that defining a “riot” can be difficult because they can vary in size, courts have identified at least four elements:

1. unlawful assembly of three or more people (or lawful assembly that due to its violence and tumult becomes unlawful);
2. acts of violence;
3. intent to mutually assist against lawful authority where “lawful authority” is not limited to official law enforcement, but extends to those whose rights are or may be injured and who seek to protect those rights; and
4. some degree of public terror (i.e., any minor public disturbance does not rise to the level of “riot”).

## ***Blackledge v. Omega Ins. Co.*, 740 So. 2d 295, 299 (Miss. 1999).**

Civil commotion likewise is undefined in most property policies. As a starting point, the term necessarily means something other than “riot,” since each term in an insurance policy is presumed to have its own meaning. See, e.g., *Portland Sch. Dist. No. 1J v. Great Am. Ins. Co.*, 241 Or. App. 161, 171 (2011). Thus, while “civil commotion” may be similar to a riot, courts have construed the term more broadly, finding that civil commotion entails “either a more serious disturbance or one that is a part of a broader series of disturbances.” *Pan Am. World Airways, Inc. v. Aetna Cas. & Sur. Co.*, 368 F. Supp. 1098, 1138 (S.D.N.Y. 1973), *aff’d*, 505 F.2d 989 (2d Cir. 1974). In fact, most property policies contain no limitation on the breadth of commotion or the type of harm that it might pose to person or property.

In many policies, riot, civil commotion, vandalism, and malicious mischief are “specified causes of loss.” The practical effect of this designation is that numerous exclusions will contain exceptions for loss caused by these situations. For example, while damage to a business’s electronic data may be excluded, the exclusion may contain an exception for damage to electronic data resulting from specified causes of loss, such as riot or civil commotion. Similarly, even where the policy contains a pollution exclusion – purportedly excluding loss, damage, cost, or expense caused by or contributed to or made worse by the release of “pollutants,” which could include tear gas – that exclusion may not apply to loss or damage caused by riot, civil commotion, or vandalism.

If a policy covers riot or civil commotion, covered losses may include property damage to the building and its contents, and lost income while the building is under repair or subject to government orders affecting the business’s operations (e.g., curfews limiting hours of operation) where the order is



the result of property damage elsewhere. Business insurance policies may also cover costs incurred in protecting insured property from future, imminent harm or continued damage. These costs might include hiring (or increasing) security personnel, boarding up windows and doors, securing inventory in place or moving inventory and operations off-site.

Prior to the riots in Minneapolis, Minnesota, the costliest US civil disorder occurred after the acquittal of police officers involved with the arrest and beating of a black American, Rodney King, from April 29 through May 4, 1992, causing \$775 million in insured losses.<sup>[2]</sup> More recently, there were approximately \$24 million in insured losses following the death of Freddie Gray, a black American who died in police custody after suffering a spinal cord injury.<sup>[3]</sup> Insured losses are not yet available for the riots in Minneapolis, but the Property Claims Services (“PCS”) unit of Verisk Analytics designated the event as a catastrophe. On June 4, 2020, PCS included over 20 other states, making the civil unrest that started in Minnesota a multi-state catastrophic event.<sup>[4]</sup>

If your business has experienced or may experience a loss because of civil unrest or riots, you should begin keeping track of these losses – and costs incurred to avoid them – immediately. Save receipts and inventory damages. Contact your insurance company as soon as you experience a loss to report your claim and diligently log your interactions with your insurer and its representatives. If you feel your insurer wrongfully denied your claim or delayed payment, contact experienced insurance coverage counsel.

<sup>[1]</sup> The authors by no means intend to equate property damage and a lost life. Quite the opposite. One is recoverable (and insurable); the other is irreplaceable.

<sup>[2]</sup> <https://www.iii.org/fact-statistic/facts-statistics-civil-disorders> (last viewed June 15, 2020).

<sup>[3]</sup> *Id.*

<sup>[4]</sup> *Id.* By June 4, 2020, at least 40 cities in 23 states had imposed curfews. National Guard were called in Washington, DC and at least 21 states.

## Three Key Insurance Issues to Consider In Securing Coverage for Coronavirus Losses

By *Lorelie S. Masters, Michael S. Levine & Geoffrey B. Fehling* on March 2, 2020

The CDC reports that, as of the end of last week, the coronavirus disease had spread through China and to 31 other countries and territories, including the United States, which has now seen its first two related deaths. The public health response in the United States has been swift and includes travel advisories, heightened airport screening, and repatriation and quarantine of potentially infected individuals. Outside the United States, countries like China, Italy, and South Korea have implemented more severe measures to combat the disease. From smart phones to automobiles, coronavirus has major short- and long-term implications for public and private companies facing potentially significant supply chain disruptions, store and office closures, and other logistical issues. These business losses, however, may be covered by insurance. Below are several key insurance considerations for policyholders to contemplate when evaluating the availability of insurance coverage for coronavirus-driven losses.

### D&O

Directors’ and officers’ policies may respond to securities lawsuits arising out of coronavirus-related disclosure obligations. With global stock markets now in “correction” territory, investors will be asking whether steps could have been taken to avoid substantial losses in value. Federal regulators, such as the US Securities and Exchange Commission, impose various disclosure obligations on public companies in annual reports, securities offerings, and other filings. As a result, business must contend not only with recouping direct losses from diminished business operations, but also with potential securities lawsuits related to the alleged failure to disclose actual or potential coronavirus concerns.

In addition, the recent market volatility and economic disruptions, coronavirus may also have a significant impact on pending mergers, acquisitions, IPOs, and other business transactions. These fluctuations can lead to both increased (where potential buyers may take advantage of decreased stock prices) and decreased (such as postponing or scuttling deals involving impacted companies) financial transactions, all of which can lead to more claim activity from shareholders, buyers, and other potentially impacted parties.

As with other recent adverse events, these coronavirus scenarios can lead to so-called “event-driven” litigation triggering coverage under D&O or similar professional or management liability policies. Heightened government involvement in minimizing the public impact of coronavirus and increasing risk of unscrupulous individuals taking advantage of the public health emergency may also lead to an uptick in government investigations and regulatory scrutiny in the wake of coronavirus.

### Cross-Border

The large-scale economic, political, and social impact of coronavirus across the globe highlights numerous cross-border insurance concerns. For example, coronavirus losses may originate abroad or may result in claims against policyholders in foreign jurisdictions. For companies with international reach, does it matter where their loss occurred?

Even if insurance policies provide worldwide coverage, government authority, political activity, and other regulatory environments related to coronavirus may vary greatly across jurisdictions and can complicate insurance coverage issues more so than other domestic public health emergencies. Companies may also have insurance policies affording repatriation or medical evacuation coverages for executives abroad who may be impacted by coronavirus.

### Supply and Demand

Finally, businesses should look to property and other first-party policies to determine whether they provide business interruption coverage for any coronavirus-related disruptions to supply chains or other business operations. Traditional business interruption coverage under those policies may cover not only lost income, fixed costs, and extra expense, but also losses due to forced closures because of government-mandated curfews, street closures, or quarantines or costs incurred in temporarily relocating operations to a new location.

Insurance known as “contingent business interruption” coverage (which we have reported on previously in the wake of coronavirus and other public emergencies) may also pay for loss of income due to coronavirus-driven disruptions to suppliers, customers, vendors, transporters, or other entities upon which a policyholder relies to operate its business.

Adopting strategies to address coronavirus-related exposures that include evaluating insurance considerations can help mitigate risk and maximize recovery in the event of a business loss or claim.



## Policyholders Prepare for the 2019 Hurricane Season, Part 1 of 3

By [Michael S. Levine](#) on July 15, 2019

In the first part of a 3-part series, the Hunton Andrews Kurth insurance team discusses how policyholders can plan for this year's hurricane season. Part 2 will address how to prepare a claim after a loss in order to maximize the potential recovery, including by taking photographs of any damage and tracking curfews that affect your operations. Part 3 will discuss how to prevent denials of pending claims based on suit limitations periods. The team's goal is to provide a comprehensive outline that will guide policyholders before and after a loss. Read below for more information.

### Plan, Prepare, Prevent: How to Smoothly Navigate This Year's Anticipated Active Hurricane Season

With hurricane season here, it is important to have a plan in place to mitigate the extent of financial losses from a storm. This year, forecasters are concerned about unusually warm water near the east coast of the United States and the Bahamas. Specifically, they are alarmed because warmer waters cause storms to increase in intensity rapidly—leaving individuals and businesses with less time to prepare for a severe storm. Below, we address how to plan for this year's hurricane season.

### How to Plan for This Year's Storms by Ensuring Adequate Insurance Coverage

This year, the National Oceanic and Atmospheric Administration predicts up to 15 named storms. Undoubtedly, these storms will have a significant impact on business activity. For instance, damage to tangible assets from these storms will result in business interruption losses, which consequently include revenue declines and lost profits and, in certain cases, result in fractured customer relationships. Even if your business makes it through a storm without any significant adverse impact, damage to your supply chain can lead to production slowdowns and delays. Because damage

from a single storm can be catastrophic, it is critical for policyholders to review their existing insurance programs to determine whether their coverage adequately protects them based on their unique business operations and overall risk profile. A comprehensive coverage review will give policyholders a snapshot that will allow them to identify areas of vulnerability—whether due to lack of insurance, insufficient insurance or a gap in coverage that was difficult to detect.

#### *Examples of the Types of Losses Generally Covered by Commercial Property Insurance*

Corporate policyholders should ensure they have critical coverages *before* a storm hits. Key coverages include:

**Physical Loss or Damage to Insured Property:** There is generally coverage for the cost to repair, replace or rebuild property that suffers physical loss or damage. Covered premises are usually listed or scheduled in the policy and may include not only buildings, but also equipment and business personal property such as furniture, machinery and stock.

**Wind v. Flood:** Many property policies contain substantially reduced sublimits, or exclusions, for flood damage. Commercial property policies in coastal regions, for example, may also exclude windstorm or provide a sublimit applicable to windstorm damage. Some businesses, however, may have separate windstorm-specific policies that complement their commercial property insurance program. Thus, prior to submitting a claim, it is important that policyholders carefully examine the “cause” of their loss and evaluate whether there are multiple causes.

**Debris Removal:** Generally, commercial property policies provide coverage for the costs incurred in the removal of debris from covered property damaged by an insured peril such as windstorm. The maximum policy benefit for this coverage is usually expressed as a percentage of the total loss.

**Expenses Incurred in Attempting to Mitigate or Stop the Damage:** Property policies typically cover expenses incurred by policyholders to prevent or minimize loss or, where some loss has already occurred, to mitigate additional loss. In fact, many policies say the policyholder must take steps to safeguard the property and prevent further damage. A failure to do so could jeopardize coverage.

**Extra Expense Coverage:** Repairing or replacing damaged property is not the only expense item when property is damaged. Often the cost of operating the business also increases as a result of a storm or its aftermath. Extra expense coverage is intended to indemnify the policyholder for above-the-norm expenses caused by the insured event. Examples may include the cost of a generator when electricity is lost or costs incurred to operate at a temporary location.

**Business Interruption Coverage:** Business interruption insurance is designed to cover lost income and profits resulting from the suspension of operations due to covered property damage. This would also include operating expenses that must be paid even if the business is not operational. Typically, this coverage does not apply until the expiration of a “waiting period” designated in the policy—usually 72 hours after the property damage occurs.

**Orders of Civil Authority:** Coverage may also be available when business income is lost as a result of governmental directives preventing or restricting access to property. These losses may be recoverable even if the company's own property has not been damaged.

**Ingress/Egress Coverage:** Similarly, many policies cover losses when ingress to or egress from a covered property is prevented or hindered by the event. This coverage may be implicated by road closures, the closing of mass transportation and other transportation problems.

**Service and Utility Interruptions:** Losses and expenses caused by power, water and telecom outages can also have a significant impact on business operations, and resulting losses may be covered under property insurance policies. This type of coverage, however, is generally not included in a standard commercial property policy. The policyholder will typically have to request the coverage from the insurer by endorsement. What we have seen is that many insureds are unaware that their policies contain exclusions or sublimits applicable to loss from damage to infrastructure such as power lines. For instance, loss from damage to a transformer

on the main line is generally subject to higher limits than loss from damage to your individual power line that connects to the overhead line.

**Contingent Business Interruption Coverage (CBI):** From our observations following Hurricanes Irma, Harvey and Maria, there was a lack of explicit business interruption coverage when the policyholder's insured property has not sustained extended physical damage. Indeed, insureds were surprised to learn of this gap in their commercial property coverage. Contingent business interruption insurance and contingent extra expense coverage can fill this gap. These common extensions to other insurance reimburse lost profits and extra expenses resulting from an interruption of business at the premises of a customer or supplier of the insured. In other words, the physical damage is not sustained by the insured. Rather, that damage is sustained by some entity with whom the insured has a business relationship and upon whom the insured relied prior to the loss event for a key aspect of the insured's business. The third party could be a supplier of critical materials or components; a transporter of goods, materials or resources; or a wholesaler or retailer who purchases or consumes the insured's goods on a regular basis.

**Spoilage Coverage:** Commercial property policies generally contain endorsements that provide coverage for loss from perishable stock at the premises of the policyholder. Perishable stock, for example, can include food at a restaurant, grocery store or bakery that spoils due to lack of refrigeration during or after a storm.

**Extended Period of Indemnity:** Under the typical commercial property policy, the period of indemnity ends when the policyholder repairs damaged property. Your policy, however, might include an extended period of indemnity endorsement. That endorsement is extremely important because it extends the period during which you are entitled to indemnity under your insurance policy beyond the time it takes you to restore your damaged property after a storm. Generally, sales and productivity decline even after you have restored your property. The purpose of an extended period of indemnity is to protect the policyholder from that decline in revenue and consequential lost profits.

Thus, to ensure that you are adequately planning for a storm, ensure that you obtain copies of your relevant property insurance policies and review them. Understanding your coverage, even on a general level, will help you identify the steps you need to take immediately following a loss.

## Plan, Prepare, Prevent: How to Smoothly Navigate this Year's Anticipated Active Hurricane Season (Part 2)

With hurricane season here, it is important to have a plan in place to mitigate the extent of financial losses from a storm. This year, forecasters are concerned about unusually warm water near the East Coast of the United States and the Bahamas. Specifically, they are alarmed because warmer waters cause storms to increase in intensity rapidly—leaving individuals and businesses with less time to prepare for a severe storm. Below, we address how to prepare a claim designed to maximize insurance recovery in the aftermath of a storm.

### Preparing an Insurance Claim to Maximize Recovery

#### *Provide Prompt Notice*

Promptly giving written notice to your insurance company of a loss is critical. Indeed, the volume of claims following a hurricane will quickly overwhelm an insurance company, but your prompt notice of a loss can put you ahead in the adjustment process. Your notice should contain a basic description of the loss, including where, when and how the loss occurred, as well as your contact information. Your broker or agent can assist you in reporting the claim. After successfully reporting the loss, the insurance company will assign an adjuster to handle your claim.

#### *In Conjunction with Providing Notice, Begin Preparing a Proof of Loss*

Your proof of loss should contain a description of the property damaged by the storm. In addition to any specific requirements by your insurance company, you should use photographs, receipts, videos, and any other available records in order to substantiate your claim. A pre-loss inventory of insured assets will provide your insurer with a roadmap for adjusting your covered loss, even if adjusters are unable to reach your property for an extended period of time after the storm, such as was the case in Puerto Rico following Hurricane Maria.

Specifically for policyholders with commercial operations, ensure that you have a team in place before a loss in order to minimize recovery time and avoid the frenzied competition for scarcely available expertise after the loss. Additionally, ensure that you define action plans for reopening or relocating and under what conditions; log evacuation orders or applicable curfews that impact your business after the

storm to support any business interruption claim; continue checking and logging power outages post-storm; identify temporary measures needed to resume operations and any extra expenses that you will incur as a result of those efforts, such as the costs of generators or even the cost to rent additional property to run your business while repairs are made to your primary location; ensure that all property damage is photographed or recorded on video and that all repair costs, even if seemingly insignificant, are logged; appoint one person to represent your company with the insurance adjuster, and make sure they keep track of all adjuster communications; and assign a special accounting code or establish a ledger to account for all losses related to the storm.

#### *Keep a Record of the Insurance Adjustment Process*

During the loss adjustment process, it is important to keep a record of all documents sent to and received from your insurance company, as well as a log of your phone calls or other communications with the insurer or your assigned adjuster. The insurance or unfair trade practices statutes of many states require your insurer to communicate with you in a timely manner after you report a loss, including issuing a prompt coverage determination and paying any undisputed amounts of the loss. Accordingly, it is crucial to keep a detailed record of communications with your insurer(s) in case you need to rely on them should your claim end up in litigation.

#### *Understand the Insurer's Position and Pushback on Delays or Denials Where Appropriate*

The precise terms of an insurance policy and applicable law govern the existence and extent of coverage. In addition, policies are often endorsed or contain exclusions that may expand or reduce coverage. Some applicable limitations on policies include sublimits on certain losses that limit the total available insurance for a particular type of damage, as well as flood or water damage exclusions, earth movement exclusions, and government action exclusions that may not permit recovery for interruptions in business where government authorities limit access, etc. The burden is always upon the carrier to prove the terms and applicability of any exclusion of coverage in a policy. Additionally, exclusions are read narrowly and, where found to be ambiguous or not sufficiently notorious in the policy, they will be disregarded or construed in the light most favorable to the insured and in favor of coverage.

Ultimately, policyholders are always best served by a careful analysis of the terms of their policies and the controlling law governing their insurer's obligations, as well as precise documentation and presentation of their loss during the claim adjustment process. Retaining experienced coverage counsel to help you analyze your policies is critical to understanding your rights and the obligations of the insurance company, as well as to guide you through the claims-adjustment process and hold the insurer accountable when needed in order to maximize recovery of the available insurance.

## Plan, Prepare, Prevent: How to Smoothly Navigate This Year's Anticipated Active Hurricane Season (Part 3)

With hurricane season underway, it is important to have a plan in place to mitigate the extent of financial losses from a storm. This year, forecasters are concerned about unusually warm water near the east coast of the United States and the Bahamas. Specifically, they are alarmed because warmer waters cause storms to increase in intensity rapidly—leaving individuals and businesses with less time to prepare for a severe storm. Below, we address how to prevent claim denials based on existing claims remaining since Hurricanes Harvey, Irma, Maria or Michael.

### Prevent Denials of Pending Claims Based on Suit Limitations Periods

The Florida Office of Insurance Regulation estimates that the insured losses from Hurricane Michael exceed \$6.3 billion. That amount is sure to increase since, almost one year after the storm, over 16 percent of the claims made in Florida are still open. In comparison, the insured losses from Hurricane Irma exceed \$11 billion, with roughly 7 percent of claims pending resolution nearly two years later. To give you a sense of the volume of claims reported to insurance companies following a storm, policyholders made over 1,000,000 claims

for insurance proceeds from damage caused by Hurricane Irma alone, and numerous claims remain open.

First-party insurance policies generally include provisions requiring policyholders to make claims within one year from the time of a loss. State officials and legislative bodies, however, have extended the time prescribed by those provisions for claims arising from hurricane activity. For example, in 2006 in response to Hurricane Katrina, the Louisiana legislature enacted Rev. Stat. Ann. § 22:658.3, which provided in relevant part that “any person or entity having a claim for damages pursuant to a ... personal property insurance policy ... or commercial property insurance policy, and resulting from Hurricane Katrina shall have through September 1, 2007, within which to file a claim with their insurer[.]” Hurricane Katrina made landfall in the United States on August 29, 2005. Louisiana essentially granted policyholders an extra year within which to make their claims to the insurance company.

Florida's Office of Insurance Regulation (the Office) has done the same. For instance, following Hurricane Matthew, the Office communicated the extensions that the Federal Emergency Management Agency (FEMA) granted to policyholders in Florida to file proof of loss statements in connection with their flood claims under its National Flood Insurance Program. In total, policyholders had an extra 180 days to file their proof of loss statements. Under normal conditions, policyholders have just 60 days to file the statement after submitting a claim.

Similarly, following Hurricane Irma, the Office issued an emergency order, which extended claims-reporting periods and grace periods for the payment of premiums, as well as addressed the performance of other duties by policyholders. Specifically, under the order, any time limit imposed by a policy provision upon a policyholder to perform any act on or after September 4, 2017, was extended until



December 3, 2017. In Executive Order 17-330 on December 29, 2017, then-Governor Rick Scott extended his declaration of a state of emergency for the third time, effectively extending the emergency period for an additional 60 days.

Other states have issued similar orders affecting insurance-related deadlines. For instance, the Office of the Commissioner of Insurance for Puerto Rico issued an order granting a premium payment grace period and suspending insurance companies' ability to cancel policies for lack of payment. In response to Hurricane Harvey, the Texas insurance commissioner issued a bulletin urging insurers to provide relief to policyholders, including by suspending premium payments but allowing for continued coverage. The commissioner clarified that the suspension of premiums was not intended as a forgiveness of premiums, but encouraged insurers to enter into payment plans with policyholders if necessary.

In addition, your policy may contain a provision requiring that you file suit against the insurer within a certain time period after the loss or after the claim is made. Because courts have generally enforced suit limitation provisions, it is important to know whether your policy contains such a clause and its potential implications. See, e.g., *A+ Restorations, Inc. v. Liberty Mut. Fire Ins. Co.*, 714 Fed. Appx. 923, 924 (11th Cir. 2017) (applying Georgia law and affirming the trial court's decision that the action was barred by the suit limitation provision in the insurance policy); and *Davidson v. Brethren Mut. Ins. Co.*, 2007 WL 2007991, at \*1 (M.D. Pa. July 5, 2007) (applying Pennsylvania law and granting the insurer's motion for summary judgment based on the argument that the action against it was barred by the policy's one-year suit limitation clause).

In Florida, suit limitation provisions are generally void as against public policy under § 95.03 of Florida Statutes. Under that statute, any provision in a contract fixing the period of time within which an action may be filed is void if it fixes a period shorter than the applicable statute of limitations. In Florida, policyholders generally have five years, from the date of loss, within which to sue an insurer for breach of a property insurance policy. See § 95.11 (2)(e) of Florida Statutes.

Because your policy might contain a suit limitation provision that is unenforceable, it is important that you understand the implications of such provision before giving up on your insurance recovery efforts and absorbing a loss.

Accordingly, if your business experiences any losses from this year's storms, do not rely solely on the provisions of and the time periods stated in your policy, as these are generally extended or suspended following catastrophic events such as hurricanes—and, in some jurisdictions, may even be void as a matter of public policy. Competent coverage counsel can help guide you through this process.

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## HUNTON INSURANCE RECOVERY BLOG

UPDATES, ANALYSIS AND BREAKING NEWS FOR COMMERCIAL POLICYHOLDERS

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