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REBUTTAL: Flood Insurance Is Different For Businesses

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Prolonged and torrential rains have caused widespread flooding in Texas, Oklahoma and surrounding areas. Business policyholders should remain mindful of the substantial benefits that may be available for resulting economic and physical losses under ordinary commercial insurance policies. Contrary to arguments made in a recent Law360 guest article, business owners may not be subject to the same stringent limitations on coverage faced by homeowners.

Homeowners Policies and Commercial Property Policies Are Not Necessarily the Same, Particularly When it Comes to Flood

The June 5 article uses incorrect generalizations about exclusions that might preclude coverage for flood-related loss. Policyholders should avoid such generalizations when considering their specific losses, as insurance policies can vary greatly in terms of coverage and exclusions. The best approach is to read the relevant policies in context to determine whether coverage is available.

A business owner should not simply assume that the exclusions that will apply to their home will apply to their business. For example, the standard water-related exclusions in homeowners' policies are unlikely to be present in many commercial property policies.[1] Indeed, one common form used by many large multinational property insurers explicitly covers flood loss as well as ensuing time element losses, such as gross earnings, extra expense, ingress/egress and service interruption.[2] Note that flood coverage in such circumstances may be subject to a sublimit or sublimits that offer different coverage levels based on discrete criteria, such as the flood zone(s) in which the affected property is located.[3] Working with experienced coverage counsel is critical to determine the extent to which your property may be covered for flood damage and what, if any, flood zones and sublimits apply.

With coverage for the peril of flood afforded, so too will there be coverage for consequential pecuniary loss, as well as other physical loss or damage to property. In the context of commercial property policies, this means that lost business income caused by flooding or loss caused by flood-related actions by civil authorities may be covered. These time element and other specialized coverages that may come into play, include:

> **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 goes up during the time when the business is affected by the storm or its aftermath. Extra expense coverage is intended to indemnify the insured 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: Property policies generally cover lost income or profits caused by the interruptions (including slowdowns) of business activities due to physical damage to the insured's property. The basic purpose of the coverage is to make the insured whole during the period it takes to rebuild or replace the property destroyed.

Contingent Business Interruption Coverage: Even if a company's own property has not been damaged, its business may be interrupted by damage to the property of others, such as suppliers, customers or other business partners. In such circumstances the company's lost income often is covered by contingent business interruption coverage.

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 come into play in the event of 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.

Collapse: Some property policies will cover damage caused by collapse, others do not and still others may do so at reduced sublimits.

Expenses Incurred in Attempting to Mitigate or Stop the Damage: Property policies typically cover expenses incurred in taking preventative measures to avoid loss. Indeed, many policies contain an affirmative requirement that the insured take steps to safeguard the damaged property and prevent further damage. Those steps should be reimbursed under the insurance policy.

Builders' Risk Losses: Contractors, building owners and developers may sustain losses potentially covered under builders' risk insurance. Such losses may arise from damage to buildings under construction or renovation, damage to staged construction materials, contamination caused by hazardous materials on the job site or general soft-cost losses caused by construction delays attributable to weather conditions or storm damage.

Landlord Liability: Landlords may also face claims asserted by tenants for bodily injuries, damage to personal property and loss of use and related losses of rent. Likewise, claims may be asserted by third parties injured on leased or managed properties as a consequence of storm-related conditions. Such claims may be covered under landlord liability policies and/or general liability policies.

Building Association Liabilities: Condo- and building-owners associations may also face storm-related claims in the context of alleged failures to properly maintain roofs, doors, windows and walls in a manner that could weather the storm. Such claims may implicate coverages under associations' errors and omissions policies and directors and officers liability policies as well as property policies maintained by the associations for common building elements and systems.

In short, business owners and risk managers should look to their specific commercial insurance policies to determine what types of coverages are available and should not assume lack of coverage simply because their own homeowners' policies have left them personally exposed.

Policyholders Should not Assume Anything

Moreover, even if a flood exclusion exists, policyholders should not assume that damage from flood events, like the Texas storms, will not be covered. Each set of facts is different and, therefore, the availability of coverage can differ between and within different sets of circumstances. For example, what appears, at first glance, to be flood-related loss may actually be caused in whole or in part by wind or other perils for which there may be coverage. For example, property loss due to rain driven by hurricane-force winds, even with subsequent flooding, may be covered.[4] Or, property losses may be entirely wind-related — such as when wind blows out windows, damages a roof or knocks out power — and, therefore, covered. Thus, what actually causes the loss is an important element, especially for coastal businesses in Texas which may have separate windstorm coverage through a Texas Windstorm Insurance Association policy.[5]

Further, if covered and not covered events both cause damage, an insurance policy still may be implicated. This will depend on whether the policy contains a concurrent (or anti-concurrent) loss provision.[6] Again, the specific language of a business's policy will be determinative.

Quick Action is Key

Quick action after any loss has occurred is critical to ensuring that timely and appropriate steps are taken, since any delay in reporting a covered loss may limit or altogether jeopardize otherwise available coverage. This is particularly the case with flooding, where prompt action can help avoid additional loss or damage caused by mold, collapse or other perils. Policyholders should promptly, and thoroughly, document losses and work with counsel to review policies with an eye toward the businesses' damages.

Remember that the burden will be on the carrier to prove the terms and applicability of any exclusion of coverage in a policy. 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. Insureds are therefore best served by a careful analysis of the terms of their policies, the controlling law governing their insurer's obligations and a precise documentation and presentation of their loss during the claim process.

Notes

[1] But see Valley Forge Ins. Co. v. Hicks Thomas & Lilienstern LLP, 174 S.W.3d 254 (Tex. App. 2004) (business income losses not covered because damages resulting from flood/surface water were excluded by policy).

[2] See, e.g., Penford Corp. v. Nat'l Union Fire Ins. Co. of Pittsburgh, No. 09-CV-13-LRR, 2010 WL 300838, at *6 n.2 (N.D. Iowa Jan. 19, 2010) ("This 'policy' covers direct physical loss or damage caused by or resulting from Flood. . . . Flood [means]: Flood; rising waters, surface waters; waves; tide or tidal water; rain accumulation; runoff from natural or man made objects; the release of water, the rising, overflowing or breaking of boundaries or natural or man-made bodies of water; or the spray there from, surface waters or sewer back-up resulting from any of the foregoing; regardless of any other cause or event contributing concurrently or in any other sequence of loss. However, direct physical damage by fire, explosion or sprinkler leakage resulting from Flood is not considered to be loss by Flood within the terms and conditions of this 'policy.'").

[3] Six Flags Inc. v. Westchester Surplus Lines Ins. Co., 565 F.3d 948, 952 (5th Cir. 2009) (discussing flood submits and zones, generally).

[4] See, e.g., U. S. Fidelity & Guaranty Co. v. Morgan, 389 S.W.2d 516 (Tex. Civ. App. 1965) (evidence was sufficient to support jury's finding in favor of policyholder where warehouse and contents of warehouse were destroyed by wind during hurricane, despite subsequent flooding), judgment aff'd as revised by 399 S.W.2d 537 (Tex. 1966) (no showing whether missing items had been blown rather than washed away by water or that damage had been caused by rain rather than rising water or a combination of the two).

[5] Coverage and Eligibility, Texas Windstorm Insurance Association, (last visited June 11, 2015) (generally describing coverage and eligibility for properties located in 14 first-tier coastal counties — Aransas, Brazoria, Calhoun, Cameron, Chambers, Galveston, Jefferson, Kenedy, Kleberg, Matagorda, Nueces, Refugio, San Patricio and Willacy — and parts of Harris County east of Highway 146). Notably, some TWIA insureds are required to obtain flood insurance as a precondition of TWIA coverage. Id.

[6] Compare Travelers Indemnity Co. v. McKillip, 469 S.W.2d 160, 163 (Tex. 1971) (verdict for insured reversed and case remanded where insured failed to establish proportion of loss attributable to covered independent wind damage as opposed to excluded snow-weight damage) with Nat'l Fire Ins. Co. of Pittsburgh, Pa. v. Valero Energy Corp., 777 S.W.2d 501, 506 (Tex. App. 1989) (rust and corrosion damage to citrate scrubber resulting from faulty design covered by policy, despite rust exclusion, because exclusion excepted rust/corrosion loss "resulting from a peril insured against"), writ denied (Tex. May 23, 1990).