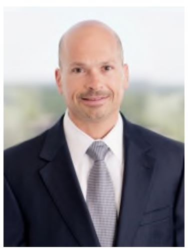
Lawyer Insights

November 1, 2017

Protect Your Insurance Recovery After California Fires

by Michael Levine and Lorelie Masters

Published in Law360



For almost a month, much of Northern California has been besieged by wildfires. Hunton & Williams offers our sympathies and condolences to those affected.

As the fires in Northern California are now coming under control, the loss of life tragically continues to climb while property loss estimates are now in excess of $3 billion dollars. Thousands of homes have been destroyed; dozens of well-known Napa Valley wineries and other businesses are in ruin and acres of vineyards are destroyed. The property and business interruption losses alone could be staggering.

Although there is no way to replace lost lives, as with other catastrophes, there are likely to be numerous financial issues that will need to be addressed to rebuild and replace property. Maximizing insurance recoveries is one component. This is true for businesses, both local and those far removed whose profits may depend upon locations and properties damaged by the fires.

Unlike some of the losses stemming from the storms that ravaged the southeast and Caribbean, and other west coast catastrophes such as earthquakes, losses from wildfires should be largely covered by insurance. Although it may be difficult to contemplate insurance recoveries in the face of tragedy, policyholders affected by any disaster should take prompt steps to determine whether and to what extent their insurance policies cover their physical, economic and other losses. Failing to act prudently in the wake of the fires could jeopardize insurance recoveries.

Losses Caused by Wildfires are Typically Covered by Insurance

As an initial matter, it is important to recap the various coverage that may come to bear in the wake of the wildfires. Because wildfires and other natural disasters cause many different types of losses, business should be aware of the variety of potentially implicated coverages. The coverages are often contained with broader commercial property policies. Some coverages may be easily identifiable within that policy; others may be more obscure and require review of the policy by a trained coverage advisor or attorney.

Physical Loss Coverage — Many policies cover physical loss, such as damage to insured property. These policies will cover costs incurred in repairing, replacing or rebuilding damaged or lost property. The policies will also generally cover the cost of preventative measures taken to avoid further loss or damage.

Business Interruption Coverage — Business interruption coverage may provide coverage for lost income due to property damage. This coverage is intended to make a business whole while it rebuilds or replaces the lost or damaged property. For example, a national retailer with a local outlet in the affected area may recover lost income associated with the local outlet while that location rebuilds and while customers are kept from the area due to the fire damage.

Contingent Business Interruption Coverage — Contingent business interruption coverage typically applies to an insured business whose operations are interrupted by damage to the property of others, such as suppliers, attractive properties of others or other business partners. Claims under contingent business interruption coverage may exist where an insured business located far from Northern California sustains a business loss that is attributable to physical damage to the property of others and on whom the insured business relies, such as a wine maker who relies on Napa Valley grapes, a customer who relies on the wine made from those grapes, a supplier whose customers are waiting on the delivery of the wine, and restaurants who patrons enjoy consuming the wine.

Extra Expense Coverage — Extra expense coverage typically covers the additional or increased costs a business incurs in order to continue its operations while the business is still affected by the loss event or physical damage.

Protecting Your Right to Insurance Recovery

Identify All Potentially Applicable Policies: When dealing with catastrophic losses, businesses should identify potentially applicable insurance policies promptly, keeping in mind that they may also be covered by insurance policies issued to others. For instance, an insurance policy issued to a contractor, a lessee or a customer may provide coverage to your business as well as to the policyholder.

Give Prompt Notice: After identifying potentially applicable policies, the insured should notify all insurance companies who issued potentially applicable coverage of the actual or potential losses. Notice should be provided consistent with the terms of each policy, keeping in mind that carriers may require different information. Identifying all potentially applicable insurance policies and providing notice to each of those insurance companies are important steps in preserving rights under the policies. In addition, providing immediate notice may provide access to insurance company representatives on the ground at the disaster sites who may be able to provide emergency funds.

Provide Reasonable Cooperation: Following notice of the loss, insurers will usually have questions about the circumstances of the loss as well as the property damage and any lost business income. Do your best to answer questions and provide available information **—** it is your duty to do so and carriers will use a policyholder's silence or evasiveness against them when adjusting the loss. In some instances, it could lead to a denial of coverage based on an alleged breach of the policyholder's duty to cooperate. On the other hand, carriers may not demand that policyholders take extraordinary steps to provide or recreate information. If you find that your carrier is making unreasonable demands, consult with a coverage lawyer right away.

Beware Public Adjusters: Policyholders should also beware of the so-called public adjusters. These companies and individuals purport to represent the interests of the insured in assisting with the preparation and presentation of the policyholder's insurance claim. Public adjusters charge upwards of 10 percent (or more!) of any insurance recovery obtained. Thus, if you hired a public adjuster to assist with the insurance claim for your $10 million winery and $2 million business interruption claim, the public adjuster will take $1.2 million of that recovery, leaving you with substantially less than the value of your claim.

Collect and Maintain Records: Businesses should also keep records regarding the losses suffered, including documenting physical damage, amounts paid to prevent further damage or remedy existing damage, and amounts lost due to the disruption of business activities and the period of time when the losses will be incurred. Maintaining these records will prove helpful in seeking recoveries under insurance policies.

Don't Assume your Insurer is Correct: As confident as they may seem, insurers are not always right when it comes to calculating insurable losses. Insurance companies handle thousands of claims each day — yours is just one of them. Claims are often triaged amount multiple adjuster "teams" and financial data is input by data entry clerks. The process is ripe for error.

Be Careful What You Say: When dealing with insurers, the rule of thumb should be, as Joe Friday would say, "just the facts, ma'am." It is important to remember that claim adjusters are trained to ask loaded questions and capture everything a policyholder relates to them in a file memo that is updated with every successive interaction. While, as noted previously, a policyholder must cooperate and be forthright with its carrier, so too should policyholders be careful not to speculate about facts that might be used to limit or deny the claim.

As with all coverages, each coverage applicable to the California wildfire losses is subject to its own actual terms and conditions. The interpretation of those terms and conditions can depend largely on which state's law applies to the insurance policy. Any available coverages are also typically subject to limits, and certain coverages, such as those above, may be subject to sublimits. A thorough review of any potentially applicable coverage is strongly recommended. How the claim is initially presented to an insurer may have long-term consequences regarding its adjustment and any ultimate recovery. Moreover, while insurers typically engage counsel immediately in the face of a catastrophe to address the complicated issues that may arise, policyholders, naturally more focused on the immediate needs of recovery, may not seek immediate advice.

In sum, businesses in the location of the wildfires and those dependent on businesses in that area should document their losses, carefully consider available insurance coverage (including for lost business income) by looking closely at the applicable terms and conditions as interpreted under the governing law, and promptly provide notice to any and all insurers who might owe coverage for fire-related losses. Consultation with experienced coverage counsel also is advisable.

Michael S Levine and Lorelie Masters are partners at Hunton & Williams LLP in the Washington, DC office. Michael has more than 20 years of experience managing, negotiating and litigating insurance disputes and advising clients on insurance coverage matters. He can be reached at (202) 955-1857 or mlevine@hunton.com. Lorelie is a prominent insurance litigator and handles all aspects of complex commercial litigation and arbitration. She can be reached at (202) 955-1851 or lmasters@hunton.com.