

***A GUIDE TO INSURANCE COVERAGE FOR  
LOSSES FROM HURRICANE KATRINA***

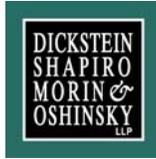
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INSURANCE COVERAGE FOR LOSSES  
FROM HURRICANE KATRINA*

By Kirk Pasich, Barry Fleishman, and Randy Paar\*

**Introduction**

The scope of Hurricane Katrina's toll is not yet known. However, the financial damages are estimated to exceed \$100 billion. Many families have lost their homes or had severe damage done to them. Many businesses, including small businesses, also have been severely damaged with some not being able to reopen, if at all, for months. The states impacted include Alabama, Georgia, Louisiana, Mississippi, and Tennessee.

As communities and businesses seek to rebuild, their financial needs will be tremendous. Many have a valuable resource available in the form of property insurance. This insurance may provide coverage not only for physical damage to and loss of property, but also for financial losses arising from an inability to conduct business (either at all or at the same levels as before), the extra expenses incurred in dealing with the effects of the hurricane, including expenses incurred in advance to minimize any damages and loss, and the costs incurred in establishing the extent of the loss itself.

It is of paramount importance to assess as quickly as possible (i) the extent of one's losses, and (ii) the scope of coverage for those losses. Insurance carriers will seek detailed proof of the loss claimed under the policy, and documented evidence of the expenses incurred in responding to that loss. Insureds will need to understand fully the

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scope of coverage afforded by their policies in order to maximize the potential for recovering for all covered losses.

Unfortunately, many insurance policies have been lost or destroyed by Hurricane Katrina or in its aftermath. Many insurance policies also are written in a complicated, and often unclear fashion. The problem is magnified by the fact that the losses involved may trigger different coverage provisions, be subject to different requirements, and may involve different exclusions from coverage. Therefore, it is critical that insureds review their policies carefully and seek help in understanding their rights and duties as needed.

This Guide is intended to provide assistance to insureds and those working with them as they engage in the rebuilding process. Because of the many variations in policy language, it does not address all of the issues. This Guide also does not replace, and should not be relied on instead of, legal advice based on the specific policy language involved and an insured's particular situation. However, it does provide a starting point and is intended to be an aid in considering what sometimes is a maze of factual and legal issues.

### **Basic Categories of Coverage under Property Policies**

Insurance for losses caused by disasters can be provided under several different types of insurance policies. This coverage not only is provided under a "property" policy, but also may be provided under other policies, such as homeowners policies, renters policies, and comprehensive or package policies sold to businesses. Thus, it is important for an insured to review all of its policies in order to determine the extent of its coverage.

Many property insurance policies cover losses to real property caused by all perils. Some policies cover all causes of loss not expressly excluded. Because of the breadth of coverage afforded by an "all risk" policy, once an insured shows that it has suffered a loss, the burden of proof shifts to the insurance carrier to show that the loss is not covered.

By comparison, a second type of property insurance—a "named perils" policy—covers only those perils expressly listed. Both types of policies may contain exclusions for

weather conditions. Thus, it is important to carefully review all aspects of a policy to determine if coverage for Katrina-related losses is clearly excluded. Absent a clear exclusion, coverage may be afforded.

Property insurance policies usually cover the structures that are listed and scheduled in the policy. Therefore, in determining whether a particular building may be insured, it is necessary to check not just the types of losses that are covered, but also to check the schedule of structures to make sure that a particular building is covered. In addition, the policy should be reviewed to determine whether it contains a provision insuring “newly acquired” property. Under such a provision, an insured may have coverage for newly acquired property, even though that property is not listed on a schedule of structures.

Most property insurance policies also insure personal property. This coverage usually is provided under an “unscheduled personal property” provision. This provision typically provides coverage for unscheduled personal property that is “usual or incidental to the occupancy of the premises” or “used by an insured while on the described premises.” However, certain types of property that are easily movable usually will be covered only under “floater” policies or “floater” endorsements to the property policy. These policies or endorsements will cover business personal property, including furniture, machinery, and stock, at least to the extent that these items are found within 100 feet of the insured premises.

### **Coverage for Costs Incurred to Prevent Loss**

Property policies also typically contain provisions that not only pay for preventative measures taken by the insured to avoid loss, but which also may require such measures. These provisions are called “sue and labor” provisions (the word “sue” has the now-obsolete meaning of “to go in pursuit of”). In essence, “sue and labor” provisions apply whenever the insured spends money to protect otherwise covered property from damage or destruction by a covered peril. This provision is intended to encourage the insured to take steps to protect threatened property in order to avoid a larger expense to the insurer of a greater loss of the covered property. It commonly applies when, for example, an insured boards up its windows to prevent damage.

The “sue and labor” clause typically is regarded as a separate contract of insurance. Therefore, exclusions found in other parts of the policy may not apply to the “sue and labor” coverage. For example, in *Witcher Construction Co. v. St. Paul Fire & Marine Insurance Co.*, 550 N.W.2d 1 (Minn. Ct. App. 1966), the court interpreted language in a policy that was similar to a “sue and labor” clause. The court held that the provision was separate coverage that was not subject to exclusions. The court held that as long as the steps were reasonable and calculated to mitigate, the insurance carrier would be held liable for its share of such costs. *Id.* at 20.

Insureds also may be able to rely on the common law of mitigation of damages or loss to recover costs they incurred to avoid losses. Courts long have recognized that if an insured takes steps to prevent or minimize damage to insured property, its carrier should pay. See, e.g., *Slay Warehousing Co. v. Reliance Ins. Co.*, 471 F.2d 1364, 1367-68 (8th Cir. 1973) (“[T]he obligation to pay the expenses of protecting the exposed property may arise from either the insurance agreement itself . . . or an implied duty under the policy contract based upon general principles of law and equity . . . .”); *Winkler v. Great Am. Ins. Co.*, 447 F. Supp. 135, 142 (E.D.N.Y. 1978) (if insured had raised house to avoid flood damage, carrier would have to pay expenses because “the duty to protect the property from further damage implies a responsibility on the insurer’s part to pay for the costs of reasonable protective measures.”).

### **Additional Living Expenses**

Many homeowners and renters insurance policies provide coverage for “additional living expenses” (“ALE”). ALE often are defined in policies to be any necessary increase in living expenses incurred by you so that your household can maintain its normal standard of living. Homeowners 3 Special Form, Coverage D (Insurance Services Office, Inc. 1990). The coverage typically is provided for the shortest time required to repair or replace the damage or, if you permanently relocate, the shortest time required for your household to settle elsewhere. *Id.*

ALE coverage also may have a financial limit in addition to a time limit. One common financial limit is 20% of the dwelling coverage. Thus, for example, if the dwelling has coverage of \$100,000, then the ALE coverage would provide a maximum of \$20,000. Insurance carriers often will ask for receipts and other evidence of living expenses as a

condition for payment. However, an insured should request an “advance” if needed to help pay expenses as they are incurred.

## **Business Interruption Coverage**

Many property insurance policies also provide “business interruption” coverage—insurance that protects against many types of economic losses.

- ◆ **“Contingent Business Interruption”** coverage protects against economic losses caused by the inability to get a supplier’s goods to the insured, thereby preventing the insured from producing and then selling its product to the marketplace.
- ◆ **“Gross Earnings”** coverage reimburses the insured for the amount of gross earnings minus normal expenses that the insured would have earned but for the interruption of its business (that is, its profits). In making this calculation, carriers may reduce the amount to be paid by any savings that an insured gains because of the business interruption.
- ◆ **“Profit and Commission”** coverage applies when an insured’s inventory has been destroyed or damaged and, therefore, the insured has been deprived of the opportunity to sell that inventory to the public.
- ◆ **“Extra Expense”** coverage indemnifies the insured for any increased cost of business operations above the norm because of a peril insured against. One example would be the purchase of a generator to continue to operate because of an interruption of power caused by the hurricane.
- ◆ **“Civil authority”** coverage often applies whenever the insured loses business income because access to its premises is prohibited as the direct result of damage to or destruction of property belonging to others caused by a covered cause of loss. However, this coverage usually is limited to a specified period of time, which often is two weeks.

Business interruption coverage usually includes the costs that an insured incurs in relocating or reopening a business for a specified period of “restoration.”

Finally, coverage may be available if access to or from an insured's premises has been stopped or made more difficult because of the hurricane. Many insurance policies also cover losses when "ingress" to or "egress" from insured premises is "prevented" because of a covered peril. In *National Children's Exposition Corp. v. Anchor Insurance Co.*, 279 F.2d 428, 431 (2d Cir. 1960), the court indicated that when "prevent" is used with respect to actions (as in, to prevent actions), rather than with respect to existence (as in, to prevent the existence of), "prevent" may mean "hinder." In insurance policies, the word "prevent" clearly refers to people's actions of ingress to or egress from the premises, rather than some kind of existence. Thus, the word "prevent" should be read to mean "hinder." And, ingress or egress clearly was hindered for many insureds because of Hurricane Katrina.

### **The Period Covered**

When an insured completely ceases business activities and subsequently resumes operation to the extent possible, business interruption coverage ordinarily extends to cover the resumption period until business returns to normal. For example, in *Lexington Insurance Co. v. Island Recreational Development Corp.*, 706 S.W.2d 754 (Tex. App. 1986), the insured owned a restaurant that was severely damaged in a storm. Once the restaurant reopened, it did not return to the same volume of business for another nine months. The insured sought to recover not only for the time it was closed, but also for the time it took to return to its prior business volume. The court broadly interpreted the policy to protect the reasonable expectations of the insured. Because the insurance policy did not explicitly exclude the period of recovery after resumption of operation, the court held that the insured was entitled to recover for the loss it suffered during its closure and also during the months that followed until it recovered its lost business volume. *Id.* at 755-56.

### **Making a Claim for Coverage**

Insurance policies typically impose a variety of obligations upon an insured that must be satisfied before an insured will be able to collect payment for the losses it has suffered. In seeking the benefits of insurance, many businesses may overlook, or not be aware, of their duties. To preserve their insurance benefits, it is important that these duties be recognized and performed. While an insurance carrier may waive its right to insist on performance, no insured should place itself in the position of having to ask its

carrier to give up a legal right to deny coverage because the insured forgot to comply with its duties.

#### ◆ The Duty To Provide Notice

Most insurance policies require that an insured notify the insurance carrier “as soon as possible” or “as soon as practicable” after a loss or other insured event. As part of this notice (which should be in writing), the insured usually must identify itself and provide information about the time, place, and circumstances of the loss. This notice requirement is intended to give an insurance carrier a chance to investigate a loss or claim while the evidence is still fresh. It also provides some assurance to the carrier that it can take steps on behalf of the insured to minimize future damage and helps the carrier to assess its obligations and determine whether the policy applies to the particular loss or claim.

Notice provisions usually have been construed by courts to require that an insured provide notice within a reasonable time after an insured event occurs. *See, e.g., Provident Life & Accident Ins. Co. v. Bertman*, 151 F.2d 1001 (6th Cir. 1945). If an insured fails to do so, the carrier may be excused from its obligations. Therefore, an insured should do just what the policy calls for it to do—give notice as soon as possible. Nonetheless, there may be many legitimate reasons why notice cannot be given immediately after a loss, including the lack of power and telephone services, the lack of insurance information (because, for example, the information was destroyed or was kept in safe deposit boxes at banks that were closed), and the need to concentrate on efforts to protect life or property. However, if an insured has not yet given notice of loss at least to its insurance agent or broker, it should take immediate steps to give notice.

#### ◆ Proofs Of Loss

Most first-party insurance policies require that an insured provide a “proof of loss, signed and sworn to by the insured,” including statements of the time and origin of the loss; the interest of the insured and others in the property; the actual cash value of the property damaged; all encumbrances on the property; all other contracts of insurance potentially covering any of the property; all changes in the title, use, occupation, location, and possession of the property since the policy was issued; by whom and for

what purpose any buildings were occupied at the time of the loss; and plans and specifications for all buildings, fixtures, and machinery destroyed or damaged. Proofs of loss usually must be submitted within a relatively short time—often within 60 days after the loss incepts or within 60 days after the insurance carrier requests a proof of loss. However, if an insured does not fully comply, it still may be entitled to coverage if it substantially complied with the requirement. *See Brookins v. State Farm Fire & Cas. Co.*, 529 F. Supp. 386, 390 (S.D. Ga. 1982).

◆ Examinations Under Oath

Most first-party insurance policies also give the insurance carrier the right to conduct, by any person it names (including outside counsel), an examination under oath “as often as may be reasonably required” about any matter relating to the insurance or the loss and require that the insured produce relevant books and records for examination. An insured’s failure to submit to an examination under oath may be enough to excuse an insurance carrier from performing its duties under a policy. *See Gould Investors, L.P. v. Gen Ins. Co.*, 737 F. Supp. 812 (S.D.N.Y. 1990) (“Failure to comply with a policy provision requiring submission to an examination under oath is a material breach of that policy, precluding recovery under it.”). However, the circumstances giving rise to the failure must be examined and a carrier must exercise its rights to an examination in a reasonable manner. *See Hickman v. London Assurance Corp.*, 184 Cal. 524, 195 P. 45 (1920).

◆ The Duty To Cooperate

While the duties outlined above may be set out specifically in an insurance policy, almost all policies also contain a more general “cooperation” provision obligating the insured to cooperate with the carrier in its investigation of a loss and otherwise. This duty of cooperation obligates the insured to provide access to relevant books and records, provide the carriers with an opportunity to interview witnesses and employees, not commit fraud or perjury, not release claims against other parties to which the carrier may have a right of subrogation, not enter into unauthorized settlements with other parties, and assist the carrier in procuring evidence and securing the attendance of witnesses at depositions, hearings, and trial.

An insured's breach of its duty to cooperate could relieve an insurance carrier of its policy obligations. However, most courts require that the carrier prove that it has been prejudiced by the breach. See *Billington v. Interins. Exch.*, 71 Cal. 2d 778, 456 P.2d 982, 987 (1969) (“[A]n insurer, in order to establish it was prejudiced by the failure of the insured to cooperate in his defense, must establish at the very least that if the cooperation clause had not been breached there was a substantial likelihood the trier of fact would have found in the insured's favor”); *Twin City Fire Ins. Co. v. King County*, 749 F. Supp. 230 (W.D. Wash. 1990) (carrier must show both breach of duty to cooperate by the insured and prejudice to be relieved of its duties).

In spite of the fact that it may be difficult for a carrier to prove that it has been prejudiced, an insured should try to comply with its duty to cooperate and should honor reasonable requests from its insurance carrier to facilitate reimbursement for its losses. Most provisions requiring the cooperation of the insured also provide that the insurer will pay for all additional costs incurred by the insured to comply with requests of the insurer.

### **Lost or Destroyed Insurance Policies**

Absent a waiver from the insurance carrier, it typically is the obligation of the insured to prove the existence and terms of its insurance policies. Given the nature of catastrophic damage, some insureds may find themselves unable to locate their policies because they have been destroyed or lost.

There are many ways to locate or identify policies and their terms. The insured should exhaust all of the likely places that the policy may have been kept. Obviously, the insured should check any home office or off-site storage facility where records may be kept. Insurance-related information may be kept in files other than an “insurance” file, such as any file relating to previous claims that may have been made by the insured, or a file for billing invoices kept in the accounts payable files that may show the purchase of the insurance.

If the secondary sources or other files are not helpful, or if these files were destroyed, the insured should contact the broker or agent who sold the insured the policy. The agent or broker may have records of the policy terms and sale. It is not, however,

certain that the broker or agent will retain the policy (in the future an insured should inquire about the document retention policy of the agent or broker).

Bank and accounting records are another potential source of information about insurance. Entries in these documents often show the purchase of insurance and often show the insurance carrier, the policy number, premium, and other relevant information.

In addition, depending upon the type of business engaged in by the insured, the insured also may have had to give proof of insurance to third parties with whom it did business. For example, a business may have to show insurance in connection with real estate and lease transactions or for transport of its goods. These other parties may have needed insurance information.

Finally, an insured should consider the possibility that it may be entitled insured under policies issued to other persons or companies. Many contracts require that one party add the other as an “additional insured” under its own insurance policies.

### **Proving the Amount of the Loss**

Once the terms of the insurance have been determined, it is the burden of the insured to prove that the loss it suffered is within the terms of the policy. The first step for an insured is to review its policies to determine whether the *cause* of loss is covered. Next, the insured must determine from the policies whether the *type* of loss suffered is covered—for example, damage to physical property (buildings and structures), personal property (stock, furniture and fixtures, machinery and equipment), personal property of others; the costs of cleanup and debris removal costs; or losses from business interruption. If a policy may cover the loss, then the insured should consider whether any exclusions may apply to eliminate coverage. It often is advisable to seek the assistance of (i) attorneys to determine the scope of coverage to which the insured is entitled, and (ii) forensic accountants to assist in categorizing and documenting the extent of the loss for presentation to the insurance company. Under many policies, these types of “loss adjustment” expenses are covered, and sometimes covered “outside the limits” of the policy.

If a policy might provide coverage, then the insured immediately should notify the carrier. If there is *any* doubt, the insured always should give notice to the carrier—the carrier may not resist coverage, or may elect not to assert coverage defenses, or the insured may have overlooked something creating a right to coverage.

As a general rule, an insured should retain all receipts, estimates, and documents. Immediately after the loss, an insured should (1) develop an inventory of all damaged property; (2) determine what property can be repaired and what cannot be repaired; (3) determine salvage value, if any, of property that cannot be repaired; (4) identify quantities, costs and values of damaged property, and the amount of loss claimed (replacement cost versus actual cash value or like-kind repair and replacement); and (5) keep a record of all expenses (such as invoices and receipts). The insured also should document the damage and loss by taking photographs and, if possible, videotaping the property.

If a disagreement between the carrier and the insured arises over the *amount* of liability, most insurance policies provide for an appraisal to occur to establish the amount. Generally, upon either party's written demand, the insured and the carrier each appoint an appraiser. These two appraisers then select an impartial umpire. The appraisers then set the amount of the loss. If the appraisers agree on the amount of loss, that amount is established as the amount of loss. If the appraisers fail to agree within a reasonable time, each submits an appraisal to the umpire and a written agreement signed by any two of the three establishes the amount of loss.

## **Conclusion**

Those who have suffered losses because of Hurricane Katrina may have substantial financial protection through their insurance policies. Insureds promptly should consider their coverage possibilities and act to recover all benefits available under that coverage.

## Checklist

1. Contact insurance agent or broker to report claim.
2. Locate copy of policy or request copy from agent or broker.
3. If possible, take photographs and/or videotape of property.
4. Confirm in writing notice to insurance agent or broker.
5. Check policy to locate address to which any formal written notice is to be provided and send notice to that address.
6. Prepare inventory of damaged or lost property; check with insurance broker or agent for forms or insurance company requirements.
7. Keep receipts regarding all expenses incurred, including expenses to protect or repair property and any additional or extra living expenses.
8. Keep a list of all expenses incurred and advise insurance company/agent/broker on regular basis. Also check with insurance agent/broker/company to determine if advance approval is needed for any expenses.
9. Review policy to determine if there are any time deadlines or procedural requirements. Comply, to the extent possible, with all requirements and deadlines.
10. Submit proof of loss and other documents required by policy to obtain coverage and payments from insurance company.
11. Request partial or advance payments from insurance company as needed.
12. Keep notes of communications with insurance agent/broker/company, including date and time of conversation and person with whom talked. Keep copies of all written communications to and from insurance agent/broker/company.
13. Review checks and other written communications and payments from insurance company to determine if there is any language releasing or giving up any claims. Delete or modify that language as appropriate or discuss with insurance agent/broker/company.
14. Seek specific legal advice as appropriate.



## *ABOUT THE AUTHORS*

**Kirk A. Pasich** is a partner in Dickstein Shapiro Morin & Oshinsky LLP's Insurance Coverage Practice, and serves on the Firm's Executive Committee. According to *Chambers USA: America's Leading Lawyers for Business* (2005), Mr. Pasich "is an unmistakable feature of California's insurance landscape" and is "the policyholder lawyer most likely to come up with a new argument or perspective concerning policy language." Mr. Pasich conducts an active trial and appellate practice, representing insureds in complex insurance coverage matters. He has represented many insureds in procuring coverage for losses caused by civil unrest, earthquakes, explosions, fires, floods, hurricanes, and terrorism. He is the co-author of the insurance section of the *Los Angeles Disaster Assistance Manual* and served as a member of the Los Angeles City Attorney's Task Force for Economic Recovery. He has negotiated large insurance recoveries for his clients, including recoveries of \$100 million and more, and has served as lead trial counsel in jury trials in which his clients have obtained verdicts that ranked among the ten largest verdicts of the year in California.

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