

ANDERSON KILL & OLICK

**PORT ADMINISTRATION AND LEGAL ISSUES
AMERICAN ASSOCIATION OF PORT AUTHORITIES
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**THE IMPACT OF 9/11 AND HURRICANE
KATRINA ON INSURANCE FOR
NATURAL DISASTERS**

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THE CHANGING LANDSCAPE

1. ADJUSTERS ARE NOW INSTRUCTED BY LAWYERS

- Less flexibility in settling claims
- Established custom and practice are replaced by strict contractual interpretations

THE CHANGING LANDSCAPE

2. So, Policyholders Must Change Their Approach to Handling Claims

- Respond to coverage positions
 - rebut policy interpretations
 - request the insurers' factual and legal support for their positions
- Document everything in the claim process
 - delays
 - Information requests and responses
 - Demands for coverage determinations, partial payments, etc.
- Do not fear upsetting the adjuster

THE CHANGING LANDSCAPE

3. AN UNPRECEDENTED NUMBER OF LAWSUITS
 - Defining and narrowing (or confusing!) coverages
 - e.g., impact of wider effects of disaster upon coverage
 - Will lead to new coverage exclusions

THE CHANGING LANDSCAPE

4. POLICY WORDINGS ARE MORE IMPORTANT

E.g.:

- Wider effects of the catastrophe

THE CHANGING LANDSCAPE

5. COVERAGES AND LIMITS SHOULD BE SCRUTINIZED

- The widespread scope of storms and wider effects coverage limitations make contingent BI coverage very important
- 9/11 BI claims dwarfed the property losses for many policyholders
 - \$ limits
 - time limits

IMPORTANT COVERAGE ISSUES

1. Wind vs. Water
2. The impact of damage to uninsured property on BI and CBI coverage
3. Idle periods exclusions
4. The impact of the wider effects of the storm upon coverage
5. When property is permanently replaced and ends BI coverage

IMPORTANT COVERAGE ISSUES

IMPACT OF DAMAGE TO UNINSURED PROPERTY UPON BI COVERAGE

Insurers' Position:

1. BI Coverage requires a covered cause of loss
2. If a non-covered cause of loss – e.g., flood – would have prevented operations, no coverage
 - even if there is also damage from a covered cause of loss

IMPORTANT COVERAGE ISSUES

Example:

- A Port's cranes are damaged in windstorm
 - will take 3 months to replace
- Port's warehouses were destroyed from flood (not covered)
 - will take 4 months to replace
- Insurer says no insured BI loss because operations were shut down for the entire period due to an uncovered cause of loss

IMPORTANT COVERAGE ISSUES

Analysis:

1. Does flood exclusion trump wind coverage?
 - ABM
 - RLI v. Wood Recycling
2. Argue sequential loss:
 - wind preceded flood
 - wind damage on its own caused BI loss

IMPORTANT COVERAGE ISSUES

3. Concurrent causation analysis

- Entire loss is covered unless divisible
- BUT – anti-concurrent causation clauses may void coverage
- So, stay away from this analysis
 - law is unsettled in most states

IMPORTANT COVERAGE ISSUES

IDLE PERIODS EXCLUSIONS

1. **For any time during which business would not or could not have been conducted had direct physical damage to the premises described in this Policy, as insured against hereunder not occurred;**
2. Resulting from loss or damages for breach of contract;
3. Resulting from the suspension, cancellation or lapse of any license, lease or order except that the Company will be liable under this Policy for only such loss as affects the Insured's earnings during, and limited to, the period of interruption covered under this policy.

IMPORTANT COVERAGE ISSUES

IDLE PERIODS (cont'd)

Insurers' Position:

- Exclusion applies regardless of why business could not have operated absent covered property damage
- Exclusion trumps wind coverage
- Manufacturers Mutual (9th Cir.)
 - Applied Exclusion to Hurricane Damage to Smelter
 - Insurer v. Insurer Dispute
 - On-Premises v. Off-Premises Damage
- Simkin Industries (Md. App. 1979)
 - Applied Exclusion When Flood Damage Shut Down Power Plant

IMPORTANT COVERAGE ISSUES

Analysis:

1. Intent
 - Deals with causes other than damage causing event
 - Ejusdem Generis
2. Intent to exclude coverage based upon damage to uncovered property must be clearly stated
3. Exclusion may not apply to all time element coverages
4. Priority of restoring non-covered damage first

IMPORTANT COVERAGE ISSUES

The Impact of the Wider Effects of the Storm

1. The law

- generally
 - Colleton (4th Cir. 1992)
 - Stamen (S.D. Fla. 1994)
- in Louisiana
 - Levitz Furniture Corp. (E.D. La. 1997)
 - Finger Furniture Co. (5th Cir. 2005)

IMPORTANT COVERAGE ISSUES

The Impact of the Wider Effects of the Storm

2. ISO's response: no coverage for

“net income that would likely have been earned as a result of an increase in the volume of business due to favorable business conditions caused by the impact of a covered cause of loss...”

– This is a one way street

CONCLUSIONS

- PROPERTY INSURANCE IS NOT A COMMODITY
- ASSUME YOU ARE NOT IN GOOD HANDS