

Closing the Deal on Katrina Coverage Claims—

Eight Things You Should Know to Ensure the Largest Possible Recovery

by Finley T. Harckham

Over a year and a half after Hurricane Katrina and Hurricane Rita roared through the Gulf Coast, many businesses' coverage claims remain unresolved. Policyholders' frustrations have reached the boiling point as they try to contend with insurance company adjusters who are nonresponsive, intractable in their low estimates of covered losses, or both. There is no easy solution to these problems, but policyholders can take a number of steps to bring the adjustment process to an end and receive the largest possible recovery.

Establish A Settlement Deadline

Force the insurance company to focus upon your claim by deciding upon a reasonable deadline, and telling the carrier that a settlement must be reached by that date. Some policyholders are reluctant to take a hard line with the insurance adjuster for fear of biting the hand that feeds them, but that attitude will only result in a claim being ignored. Insurance companies pay claims when they feel compelled to, not based upon the quality of the relationship between the adjuster and the policyholder. So, assertiveness in pursuing claims is a good thing.

Thirty days before the second anniversary of Hurricane Katrina—August 28, 2007, is a logical deadline for resolving claims, because many insurance policies contain provisions which bar lawsuits against the insurer after two years. Those contractual deadlines can be adjourned by agreement of the parties, but in Louisiana a special form of undertaking is required and may not be feasible for every claim. So, many policyholders will have to file suit in August to protect their rights even if they are still attempting to reach an amicable settlement.

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The Insurance Company Should Pay All Undisputed Amounts

Insist that the insurance company pay all undisputed amounts before negotiating over the contested portion of the claim. Typically, the insurer will make a good faith partial payment and then pay little or nothing more until a final

ANDERSON KILL LOSS ADVISORS
1251 Avenue of the Americas
New York, NY 10020-1182
(212) 278-1000
Fax: (212) 278-1733

1600 Market Street
Philadelphia, PA 19103
(267) 216-2700
Fax: (215) 568-4573

One Gateway Center
Suite 1510
Newark, NJ 07102
(973) 642-5858
Fax: (973) 621-6361

2100 M Street, N.W.
Suite 650
Washington, DC 20037
(202) 218-0040
Fax: (202) 218-0055

230 West Monroe Street
Suite 2540
Chicago, IL 60606-4902
(312) 201-9516
Fax: (312) 201-9548

ANDERSON KILL & OLICK, P.C.
Two Sound View Drive
Suite 100
Greenwich, CT 06830
(203) 622-7668 Fax: (203) 622-0321

www.andersonkill-la.com



who's who

Finley T. Harckham is a member of Anderson Kill Loss Advisor

(AKLA). AKLA provides policyholders the most powerful array of services available to maximize insurance recoveries for property damage and business interruption losses. In addition to being a senior shareholder in the New York office of Anderson Kill & Olick, P.C. (AKO), Mr. Harckham is the president of Anderson Kill Insurance Services (AKIS), a non-legal subsidiary of AKO which assists clients with risk management services. For more information on AKLA, please visit www.andersonkill-la.com.

(212) 278-1733

fharcckham@andersonkill.com

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negotiation over all of the open issues. This allows the insurer to hold onto funds that should be paid out for undisputed portions of the claim and increases its leverage for later negotiations. Counter this strategy by forcing the insurance company to commit to a position on coverage and to pay the amounts due under its own analysis of the claim. Start by demanding a coverage determination. Typically, insurers issue vague reservations of rights letters which quote numerous policy provisions without explaining how those clauses apply to the claim. Such a letter is intended to protect the insurance company from a waiver of defenses, but does not fulfill its obligation to provide a timely coverage determination. Respond to the reservation of rights with a demand for a detailed and specific coverage determination, reminding the insurer that its failure to do so may constitute bad faith. Also, demand payment of the undisputed amount of each element of the claim. For example, a dispute over the period of restoration for business interruption coverage should not delay payment for property loss. If the insurance company will not agree to make partial payments, submit partial proofs of loss which will trigger the deadlines for payment under most states' unfair claims handling statutes.

Document Everything!

Keep a written record of everything that transpires with respect to the claim in correspondence to the insurance company. This may deter dilatory claims handling by putting the insurer on notice that its actions—or inaction—are being preserved for a possible bad faith claim later on.

Claim Losses Resulting for Untimely Handling of the Claim

Do not be shy about claiming losses that result from an insurance company's dilatory handling of the claim. Under Louisiana law, and possibly that of other states, the period of restoration for a business interruption loss may be extended by the insurer's untimely payment of the property loss. Business interruption coverage is provided for a hypothetical period of time reasonably necessary to restore the damaged property, but it should take into account the reality faced by the policyholder, including the delayed payment of insurance proceeds. The insurance company may also be liable for consequential damages flowing from its breach by failing to make timely payments. Those damages might include lost profits or extra expenses that exceed the limits of coverage, and lost value of the enterprise if it could not resume operations because the insurance company improperly withheld, or delayed, payment.

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Assemble Your "Recovery" Team

Assemble a claim team with all of the skills needed to maximize the recovery. Although most policyholders only communicate with an adjuster, the insurance company has a team of attorneys, accountants and in-house claims personnel who are working hard to minimize the payment of your claim, through coverage defenses and the calculation of the loss. The policyholder's knowledge of its own business goes a long way to leveling the playing field, but there are many arcane coverage issues and claims adjustment practices which require special expertise.

Know What Your Claim is Worth

Before sitting down with the insurance company to try to resolve the difficult issues, have a clear idea of what the claim will be worth if it ends up in litigation. This analysis must include the likelihood of success on the disputed coverage and quantification issues, as well as anticipated legal fees and the time and aggravation associated with a lawsuit. Unless you are willing to sacrifice dollars over principle, be prepared to settle based upon a realistic value of the claim, not what is fair. On the other hand, a professional evaluation of your claim may reveal that it is more valuable than you think, and raise your settlement goal. Also, keep in mind that it is possible to settle some aspects of the claim and leave others for appraisal or litigation.

Be Aware of Claims Filing Deadlines

Be mindful of all deadlines imposed under the insurance policy. As discussed above, many policies limit the time in which suit may be brought against the insurer. Also, in many instances there are limitations upon the policyholder's right to recover full replacement cost for damaged property. Often, policies require that property be replaced within two years of the loss, or that the policyholder notify the insurer of its intent to replace within a certain period of time. If those

requirements are not met, the policyholder may be limited to a recovery based upon the actual cash value of the damaged property, which is the cost of replacing the item less depreciation. The enforceability of such provisions is questionable when a widespread disaster has made rebuilding difficult and insurance payments have been delayed, but try to get the insurer's agreement to adjourn those deadlines if necessary.

Know When to Arbitrate or Litigation

If the claim cannot be resolved through negotiation, you may have a choice of proceeding either to appraisal or litigation. Appraisal is a form of arbitration provided for under many insurance policies that either party can demand to resolve disputes over the amount of the loss. It can be a quick and inexpensive way to quantify the claim. However, appraisal is not required, and may not be appropriate, when there are coverage issues to be resolved. For example, if the parties disagree over the amount of a business interruption loss because of a dispute over whether market conditions after the hurricane should be considered when calculating damages, the policyholder would be entitled to have that coverage issue decided in court. Appraisers, who typically are in the building trades, generally are not qualified to address such issues. Also, bad faith claims fall outside the scope of an appraisal clause and will have much greater value if placed before a jury. So, the policyholder must carefully consider its options and not necessarily feel compelled to agree to an appraisal simply because the amount of damages is one issue in dispute.

Conclusion

A key to getting insurance claims satisfactorily resolved is an effort by the policyholders to take control of the process to the extent possible and to demonstrate a resolve to secure the coverage they paid for. Now is the time to push Katrina claims to resolution. ■

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Marvin Milton, SPPA	Swerling Milton Winnick 36 Washington St., Suite 310 Wellesley Hills, MA 02481	(781) 416-1000 marvin@swerling.com www.swerling.com
Ronald J. Papa, SPPA President	National Fire Adjustment Company One NFA Park Amherst, NY 14228	(716) 632-7272 rpapa@nfa.com www.nfa.com
Charles (Dick) R. Tutwiler, CPCLA	Charles R. Tutwiler & Associates Inc. 5401 W. Kennedy Blvd., Suite 757 Tampa, FL 33609	(813) 287-8090 ext. 105 tutwiler@publicadjuster.com www.publicadjuster.com
John Apicella, SPPA	Apicella Adjusters, Inc. 284 S. Lambert Road Orange, CT 06477	(203) 795-3111 x314 John@ApicellaAdjusters.com www.apicellaadjusters.com
Jack H. Kunz President and Director	Alex N. Sill Company The Genesis Building 6000 Lombardo Ctr., Suite 600 Cleveland, OH 44131	(216) 524-9999 jkunz@sill.com www.sill.com
Richard Cohen	Clarke and Cohen 425 Belmont Avenue Bala Cynwyd, PA 19004	(610) 668-0144 rcohen@clarkeandcohen.com www.clarkeandcohen.com
Michael Rubin, SPPA	Rubin, Palache & Associates, LLC 16542 Ventura Blvd., Suite 310 Encino, CA 91436	(818) 728-0900 mrubin@9adjust.com www.9adjust.com
Finley T. Harckham President	Anderson Kill Insurance Services 1251 Avenue of the Americas New York, NY 10020-1182	(212) 278-1543 Fax: (212) 278-1733 fharckham@andersonkill.com www.andersonkill-la.com