

BB REVIEW

Business Litigation News Bulletin *For Immediate Release*

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5 STEPS A BUSINESS OWNER SHOULD
TAKE IN SECURING INSURANCE
COVERAGE FOR BP-RELATED LOSSES

INTRODUCTION

BP-licensed drilling rig Deepwater Horizon's explosion on April 20, 2010 may have initiated an oil leak 5,000 feet below the water's surface, but the environmental disaster's unprecedented scale has left businesses across the region bracing for impact. As the oil slick continues to consume the Gulf of Mexico, BP officials have told the Senate that the company will pay all "legitimate claims" for damages resulting from the spill.

In addition to bringing claims directly against BP, many business owners will seek coverage under their commercial property insurance policies. As damage caused by the oil continues to grow daily, there are five basic steps that will assist business owners in evaluating and preserving their insurance coverage.

1. Identify, Review and Assess Available Coverage

The first step for any business owner is identifying and analyzing its insurance portfolio. The most common means businesses use to insure against BP-like losses is the commercial property policy. Foremost, these policies insure against "direct physical loss or damage" to insured property. Some courts have found that this coverage includes the loss of use, value or function of the property.

The commercial property policy often includes coverage for lost profits due to

business interruption and the extra expense associated with resuming and continuing operations. The type and extent of this coverage will depend on the language of the policy. For instance, some policies require a total suspension of operations in order to recover business interruption losses while others require only a partial shutdown. This distinction may be of special significance for businesses such as seafood processing plants that are forced to partially shut down their operations as fishing halts and supplies drop, or condominium, hotel and rental property owners that lose significant rental income as a result of cancellations.

Furthermore, some policies cover business interruption losses even if it is not the insured property that has been harmed. "Ingress/egress" provisions cover damages when a covered cause of loss blocks access to the insured property. Coverage may also be available for losses when an order or act of a civil or military authority prevents access to the insured property, actions which may include closing coastal land affected by oil or implementing a fishing ban.

Finally, contingent business interruption coverage insures against loss caused by harm to another property that is essential to the insured's business operations. This type of coverage may protect businesses such as restaurants whose deliveries are delayed by spill-related interruptions in shipping as well as hotels facing guest cancellations to the extent the oil spill has blocked access to public parks and beaches. Because policy provisions and forms vary, whether coverage exists will

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depend on specific policy language. Therefore, understanding the policy's coverage is critical.

2. Comply With Your Policy Provisions

Once potentially applicable policies are identified, business owners should consider and comply with the policy's notification, proof of loss and other requirements.

Insurance policies often contain deadlines by which the policyholder must notify the insurer of potential claims. Policies may require written notice within a specified period or "as soon as practicable" after discovery of the loss. If notification is not received within the time required, an insurance carrier may decline coverage on the basis that the policy requirements have not been met.

Many property policies require, in addition to the notification requirements, that sworn proof of loss statements be submitted describing the loss and amount being claimed. Often insurers require the proof of loss to be submitted within 30 to 90 days, though filing deadlines are sometimes extended on request. It is essential that the proof of loss be submitted or an extension in writing be obtained before the deadline passes.

It is also important that policyholders review their policy and applicable state law to identify contractual suit limitations as well as the state's statute of limitations, if any, for bringing suit. State legislatures may extend the statute of limitations deadline, as done in Louisiana following Hurricanes Katrina and Rita. Likewise, be aware of bulletins from your state's insurance department. Often, the state regulatory authority will seek to protect its insured citizens from unintentionally forfeiting coverage in the wake of a catastrophe.

3. Document Your Losses and Maintain Records

Complete records are crucial to property insurance claims. Policyholders should record, document

and photograph any losses immediately, keeping in mind the broader ways in which the business has been damaged. Property policies generally cover "extra costs" to mitigate losses and expenses. When calculating damage, do not assume that any damage is excluded.

4. Beware of Your Insurer's Subrogation Rights

A settlement with BP that releases any claims against it may compromise the insurer's subrogation rights, and, therefore, the right to coverage under the policy. While this may not be a concern for any settlement that fully compensates the injured party, the settling business owner should be mindful of the subrogation provision to the extent that the business owner also seeks a recovery under its insurance policy.

5. Know the Law

Insurance policies are governed by state law and it is important to know which law applies. Some courts will give effect to the "reasonable expectations" of the policyholder when interpreting a policy. In addition, courts will give undefined terms their ordinary meaning and ambiguities typically are interpreted in favor of coverage. Involving counsel early to assist in identifying available coverage and evaluating a policy to determine potential claims can also help businesses navigate the complicated insurance maze.

Conclusion

As the massive plume of oil continues to surge from the sea floor, damage in the Gulf region will continue to grow. Understanding property insurance coverage is essential for businesses that may have claims to recover for losses caused by the spill. Following these steps can help the business owner navigate even the most mired waters.