Lowenstein Sandler's Insurance Recovery Podcast: Don't Take No For An Answer

Episode 46
The Calm Before the Storm: Planning for Catastrophic Weather Events

By Lynda A. Bennett and Michael Lichtenstein

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Michael Lichtenstein: Hi, everyone. It's Michael Lichtenstein. And welcome to another episode of "Don't Take No for An Answer: An Insurance Recovery Podcast. Today, my partner, Lynda Bennett and I are going to talk about insurance relating to catastrophic weather events. Hey Lyn, how are you?

Lynda Bennett: Hey, Michael. Good to have the band back together today.

Michael Lichtenstein: Yeah, it's been a little while. Let's talk about insurance coverage and storms. Just as a first basic question, before you even know a storm is coming, what are the things that our listeners should be thinking about when it comes to preparing themselves in the event that a storm comes?

Lynda Bennett: I like to refer to first party property policies as Frankenstein policies a lot of times. There's actually a lot of detail that you need to get into to make sure that you've got the right coverage in place. Step number one for sure is make sure that all of your locations are scheduled on the policy. Believe it or not, we've had a couple of claims where a particular property that's owned by the company isn't specifically identified on the locations insured under the policy, or we've also had clients that have a miscellaneous catch-all. If your company is very involved in buying and selling off facilities on a regular basis, make sure that you've got a miscellaneous bucket to put in for those unscheduled locations.

Another really important thing to pay attention to, again, well in advance of a storm taking place, is once you've got those locations scheduled, make sure that you're looking at the valuation of those.

Again, if you're a company that has grown significantly over the last two, three years, make sure that during the renewal process, you're not just making it a rote exercise. You're making sure that you've captured all of the equipment, inventory. Really take a look at that with fresh eyes each year, so that you've got the valuation schedules up to date and properly valued.

Lynda Bennett: Another important thing with these first party property policies is pay attention to these sublimits. Because these policies have grown in complexity over the years, you may look at the face amount of your policy and say, "Oh, I've got $10 million of coverage," except that when the storm comes and it's a flood, turns out you have a $25,000 flood limit on the policy.

Again, particularly during the renewal cycle, take a look at those sublimits, go over it with your broker. See if there's flexibility in getting some of those increased, or even better yet, removed, because when you don't have a sublimit, then you do have access to the full policy limit. And also, take a look, one of the big surprises we find after claims get presented, is some of these policies have different types of coverage for named storms, or named hurricanes, or otherwise. Just have a pretty good working understanding of how this policy works before we flip on the nightly news and hear about the latest storm that's going to wreak havoc.

Michael Lichtenstein: All right. Let's say we know a storm is coming. You follow the weather report and the weather guy says a hurricane or a super storm is on the way. Are there particular things that our listeners should be thinking about and in fact doing in advance of a storm?

Lynda Bennett: Yep. Number one, for sure. When you think about and you know that this thing's coming, think about what you would do if you didn't have insurance, what would you do to preserve and protect your property? Certainly, if you're near a body of water and you've got a warehouse filled with inventory. If there are things that you can do to move that inventory to a higher elevation, sandbags, blocking off the windows with wood, to do those things that you can do to protect the property before the storm is going to come. Frankly, if you're going to be in the eye of a storm, one of the things I recommend to clients is, and you have sufficient advanced warning, now the weather guys are pretty good to give you 48 hours' notice that something might be coming, walk around the warehouse or the facilities and take a video of what you've got, because that will be very good proof later, if things blow away or blow up. Gather your insurance information, especially if most of that information is stored electronically now. You might want to print out a copy of your policy because power could be down. Sometimes it gets knocked out for days and weeks. To make sure that you've got that gathered up in a location and in a format that you'll be able to have instant access to that. And if you've got really important records, other important records, accounting information, your books and ledgers, again, put that onto a system that won't require you necessarily to have access into your computer system. And maybe even go old school and create paper copies of some of those really important records.

Michael Lichtenstein: When we talk about the primary insurance that our listeners might be looking to, would be their first party policy, right?

Lynda Bennett: Correct.

Michael Lichtenstein: If they have a loss. Can we talk a little bit about that? There are some terms that I've heard. This is not my area of specialty, it's yours. What does an all risk policy mean?

Lynda Bennett: Right. These first party policies are generally written in one of two ways. All risk is one which is every type of cause of loss will be covered under the policy, unless it is explicitly excluded. Whereas the other type of policy that could be issued is a named peril. It will identify only those specific types of loss that are covered, flood, fire, sewer backup, things of that nature. Most policy holders today tend to have an all-risk policy, which sounds incredibly inviting and broad, except actually it requires you to read the policy even more carefully because the exclusions tell more of the story sometimes than the coverage grant. As we always tell our listeners on "Don't Take No For An Answer," the devil's in the details and you have to really read the terms and conditions of each policy to understand the scope of coverage that you're going to get.

Michael Lichtenstein: You mentioned sublimits at the beginning. And sublimits are a way that the carrier can offer you say 20 million for total coverage, and then am I right? They start breaking out coverage for specific types of losses, and they provide a much lower limit. As you said, in some cases you might think you have 20 million and you might end up having only a hundred thousand dollars for a particular type of loss. Is that right?

Lynda Bennett: Right. And where we saw that most prominently in several of these storms over the last decade or so, flood coverage, if it's not excluded under some of these policies, oftentimes flood coverage will be subject to a sublimit. You may have a sublimit for sewer backup. Those sublimits really need to be carefully reviewed. As I said, hopefully well in advance of the storm, but once you get a loss, you've got to take a look at that because you may want to think about how you're going to characterize the losses and see if there's a way to move it away from a sublimited coverage offered in that policy.

Michael Lichtenstein: These policies often provide business interruption coverage, but also with something called "contingent business interruption coverage." Can you talk to our listeners about the difference between those concepts?

Lynda Bennett: Business interruption coverage is intended to smooth over the downtime that's going to follow a loss like this. One thing that's important to pay attention to there. I should have mentioned it at the top, is if there's a waiting period. In many instances to trigger that business interruption coverage, first of all, you're going to have to have direct physical loss that results in the business being down. But this idea of waiting periods, that's something that you'll find on the declarations page. 72 hours is something we'll see, 48 hours. That's a term that you should talk to your broker about. Try to negotiate that so that the waiting period is as short as possible to start getting that clock running. The business interruption coverage is when you've got a loss at your facility, your business is down for a period of time, you will then get coverage for keeping ordinary operations going, payroll. Those sorts of things.

Contingent business interruption is when a loss happens somewhere else. Somewhere in your supply chain, you need that widget to finish out making your product. And that widget manufacturer suffers a loss at their facility, which then interrupts your ability to continue with your process. There too, you ordinarily need to have evidence of direct physical loss at that facility.

And same thing, you've got to look at waiting periods to trigger that coverage, and contingent business interruption is another one of those types of coverages, where it's not uncommon to see a supplement applied to that coverage as well.

Michael Lichtenstein: Let's talk about what happens after the storm. Storms blown through, you've suffered a loss. Let's talk about notice. How quickly do you have to tell your insurance carrier that you've suffered some loss as a result of the storm?

Lynda Bennett: The first thing that you need to look at is what's called "A proof of loss requirement. Well, actually let me back up. As we always tell you on Don't Take No for an Answer, giving notice immediately and broadly is your best bet every time. As soon as the storm clears, and you've got lots of damage to your facility, get a notice letter out to your carrier right away. The second though important notice issue is this proof of loss concept. These policies, first party property policies, have proof of loss requirements, which is basically a sworn declaration identifying exactly how much you, the company, incurred by way of loss, what the cause of the loss was, and most policy holders don't pay particular attention to this. Those deadlines can be pretty short. Sometimes it could be 30 days, 60 days, that you've got to get that in.

If you are in a situation where the nature of the loss is so broad sweeping, and you've got that 60-day time clock ticking, you can reach out to the carrier and request either an extension of time. We typically will recommend just getting a tolling agreement in place until you have your arms around having to make that sworn statement.

The other important timing issue in these policies, which is somewhat unique to first party property policies is many of these policies have what's called a limitation of actions clause, and that limitation of actions clause... Ordinarily under many states's law, the statute of limitations to a breach of contract claim is six years. New York, New Jersey, it's six years from the date that the carrier denies the claim. That is not always the case with first party property policies. If they have a limitation of action provision in that policy, it can crunch down that statute of limitations period, to sometimes as short as one year, two years, and courts will enforce that shortening of the statute of limitations.

Again, that's one of the first things that I look for when a client contacts us and I put that on the calendar, again, you can manage that through getting a tolling agreement or an extension with the carrier in place, but boy, if you don't pay attention to that, you are putting yourself in peril. And I should note that the limitations of action clause, the clock may start to tick from the date of loss, not the date of denial of the claim. That's a really important deadline to keep track of.

Michael Lichtenstein: You mentioned that the proof of loss requirement may ask a policy holder to identify the cause of the loss. Are there pitfalls and any tips we can offer our listeners about how to address that issue?

Lynda Bennett: Absolutely. The first pitfall is many policy holders make the mistake when they send out that notice letter in the first week after this loss has occurred, they will get themselves in trouble by identifying a specific cause of loss or a singular cause of loss. And that's a big mistake. One because in the immediate wake after a storm, you don't really necessarily know the how and the why all of those losses were incurred. When you send that first notice letter, it really should be pretty plain vanilla. Just, "Dear insurance company, we've suffered a loss, more details to follow on amount and causation." And the reason for that is I mentioned before there are sublimits in these policies, some of these policies have specified causes of loss. Others do not. And understand that one storm event can actually have several different causes.

Lynda Bennett: And I'll give you an example of that. We've got a hurricane that comes in and rips the roof of a building. And as more water comes in, it ignites a fire inside of the boiler room. And you've got chemicals stored in that building that they topple over and it spills out into the yard. You've got three different potential buckets of loss and three different causes for each one of those losses. And these policies allow you and require you frankly, to break each one of those down and to have each of those different elements of loss evaluated through the policy language. If you wrongly identify a cause of loss, you may be walking yourself out of coverage entirely or possibly leaving some of the coverage on the table.

Michael Lichtenstein: It sounds like this is one of those issues where you need to talk to the professionals before you commit. Let's talk about documenting loss. What are the major issues that policy holders need to be thinking about in terms of how they're going to present their claim? The evident of the loss to an insurance carrier.

Lynda Bennett: Yep. Absolutely number one most important thing is if you can preserve the scene of the loss, that would be ideal. Again, we all have phones that have wonderful video capabilities now. Walk around. Before you start moving anything, before you start getting rid of debris and things of that nature on the site, make sure that you're taking a lot of pictures. I really encourage taking video clips as you walk around, certainly you should invite the carrier onto the site before you start to do any major debris removal. There may be certain aspects of this. If you've got a fire loss and you've got a large piece of equipment, you may actually have to find a storage facility to keep that evidence available for further inspection.

You certainly want to get engineers and other professionals on those sites. And there it's really important... And again, a lot of companies don't think about this. You got to be thinking about privilege right out of the gate. You're broker who's going to be helping you get the carrier on site and starting the initial documentation process. Keep in mind that they are not in the privileged circle with you. As you're looking at causes of loss, as you're looking at calculating your damages and things of that nature, you need to make sure they're not getting access to privileged communications with your in-house counsel, your outside counsel, and same with your professionals that are going to going to come onto this site. The best practices make sure that your general counsel or your outside counsel are the ones engaging those professionals to come onto the scene so that you can decide later whether they're going to be testifying for you or, or simply consulting with you as you're putting your lost materials together.

Michael Lichtenstein: It sounds like what we're saying here is that while it would be great to presume that you'll present your loss and a check will be shortly in the mail. The reality on these claims, especially large ones, is that you're likely to be into some type of coverage dispute with your carrier. And you need to prepare for that from the first moment so from the very beginning, you want to make sure that when you engage your contractors, engineers, accountants, whatever it is, that you can shield certain types of information from the carriers, if you're actually in a coverage dispute.

Lynda Bennett: And Michael, just a word on the accountants, they are an absolutely crucial member of your team here. They are going to be helping you to calculate the loss. Understand, because again, many policy holders overlook this, some of these policies provide coverage for the accountant to prepare that loss for you. That's another supplement that you're going to want to be looking for and certainly obtaining access to that coverage as part of your process.

Michael Lichtenstein: All right. I think we're at time. I hope this has been very useful for all of our listeners. Any last bits of advice, Lynn, for our public?

Lynda Bennett: Document, document, document, and notice, notice, notice. Absolutely the two most important things in the immediate wake of the storm, and get your coverage council involved sooner rather than later when you get that coverage position letter. Because as I said, these are Frankenstein policies and we're quite adept at unwinding them.

Michael Lichtenstein: Excellent advice. Well, I hope this has been informative for everyone and we'll hear you for our next podcast. Thanks everyone. Bye.

Lynda Bennett: Bye-bye.

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