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Solving Tough Insurance Problems

By

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For discussion purposes, the Panel will address two scenarios. The first is a catastrophic health issue involving multiple deaths. The second is a hypothetical property insurance claim.

For the first hypothetical, we address insurance issues relating to the outbreak of a virus. bacteria or other health issue at a property, resulting in multiple deaths. We start the hypothetical at its early stage; multiple people are hospitalized, several have died, and public health investigators have reported that the only link between the injured individuals is that they all stayed at the same hotel, at the same time.

The second is a hypothetical property insurance claim. Here we will address a catastrophic property loss. This hypothetical starts just after a hurricane hits a Caribbean hotel complex. The facility has been partially destroyed, and its resulting impact on revenues is imminent.

Each of these scenarios raises complex multifaceted legal issues. This paper addresses some of those legal issues, and offers some practical advice for lawyers tasked with understanding insurance claims.

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I. SCENARIO 1 – Virus or Bacteria Outbreak Resulting in Multiple Deaths. History is filled with health scare examples, including, SARS, Bird Flu, Swine Flu, Mad Cow Disease, Anthrax, and Legionnaires Disease. If any of these health issues are linked to a specific hotel property, the resulting impact can be catastrophic. An outline of suggested steps to be followed following health scare at a property is set forth below.

- **a. <u>Step 1 -- Locate Applicable Insurance Policies.</u>** The first step with any insurance claim is to locate the relevant insurance policies. Here, two kinds of policies might respond: liability insurance policies with respect to third-party claims, and property policies with respect to lost income.
  - i. **Liability Policies.** There are two types of liability insurance policies: occurrence and claims made.
    1. **Occurrence Policies.** General Liability Policies are typically occurrence policies. They are triggered by an "occurrence" during the policy period, which is defined to include, among other things, bodily injury or property damage.
       - a. General liability policies in place at the time of injury are triggered. When injury occurs over a brief period of time, such as for a virus outbreak, current policies are generally the only ones implicated.
       - b. With injuries that take place over multiple years, multiple insurance policies must respond. This opens the door to multiple limits, and multiple deductibles. *See Keene Corp. v. Ins. Co. of North America*, 667 F.2d 1034 (D.C. Cir. 1981)

(asbestos bodily injury). Other examples include:

i. Lead paint ingestion. *United States Liability Ins. Co. v. Farley*, 626 N.Y.S.2d 238 (N.Y. App. Div. 1995) (any insurance policy in place at time of injuries must provide a complete defense).

ii. Pollution. *Montrose Chem. Corp. v. Admiral Ins. Co.*, 42 Cal. Rptr. 2d 324, 1995 WL 389860 (July 3, 1995), *aff'd* 3 Cal. App. 4th 1480 (Ct. App. 2d Dist. 1002). (bodily injury and property damage during policy period trigger coverage).

iii. Fear of Injury. Multiple years may also be triggered with "fear of injury" cases when trauma is alleged to have taken place over a period of time. *Loewenthal v. Security Ins. Co. of Hartford*, 50 MD. App. 112, 436 A.2d 493 (1981) ("bodily injury" coverage encompasses a claim for pain, suffering and mental anguish).

2. **Claims Made Policies.** Pollution, Errors and Omissions, and D&O policies are typically claims made. Here, the policy in place when a third-party claim is made must generally respond.

b. <u>Step 2 -- Preserve Privilege</u>. One of the most important issues with insurance claims is protecting privilege. It can be tempting to discuss the underlying claims with brokers and insurers. Rules need to be

implemented at the start of any claim to address what can be said, and who is authorized to say it.

i. Privilege with Brokers. Two issues need to be addressed with respect to insurance broker privilege.

1. First, conversations with insurance brokers may not be legally privileged. *See SR International v. World Trade Center Properties LLC*, 2002 WL 1334821 (S.D.N.Y.). In that case, the court held that post loss communications between attorneys for the Silverstein Parties and the broker, Willis, were not privileged. The Court analyzed, and flatly rejected the concepts of: (1) attorney-client privilege, (2) common interest privilege, and (3) work product privilege.

2. Second, using insurance brokers as claims advocates magnifies privilege issues and has lead to disastrous consequences. *See Penford Corp. v. National Union Fire Ins. Co. of Pittsburgh, PA*., No. 10-3068 (8th Cir. , Nov. 29, 2011). In that case, the policyholder used its insurance broker to place coverage, and to handle claims. The broker was called to testify about its opinion on the claim. That testimony, although both incorrect and counter to its client's position, defeated coverage because the broker was considered the policyholder's agent. Given the brokers testimony, the 8th Circuit reasoned, "no reasonable jury would have a legally sufficient evidentiary basis for finding" otherwise. At a minimum, this case illustrates the significant legal challenges that need to be addressed <u>before</u> an insurance broker can assist with claims.

a. The most viable solution to this problem is for an outside law firm to retain the broker "in anticipation of litigation."

b. Without a separate retention between an outside law firm, and the insurance broker, an insurance broker cannot take on the role of claims advocate.

ii. Privilege with Insurers. A considerable body of law has developed with respect to what information must be provided to insurers. It is generally accepted that there is no duty for a policyholder to waive the attorney-client privilege when the insurer is defending. *See Rockwell International Corp. v. Superior Court*, 32 Cal. Rptr. 2d 153 (Cal. Ct. App. 1994) (a contractual duty to cooperate with insurers does not require that a policyholder provide information to the insurer that would waive the attorney-client privilege). Yet, insurance carriers routinely ask for privileged information. They do this for at least two reasons. First, it is the almost universal practice of insurers to ask for more than is humanly possible to produce. They do this to build a failure to cooperate defense. Second, some insurers ask for privileged information intentionally, hoping that it will provide information that could allow them to defeat coverage. Either way, this practice puts the insurance carriers interests in front of the policyholders interests, which is a classic breach of their fiduciary duties.

1. Everything from legal bills of defense counsel, to case status reports may contain privileged information.

2. The general rule is that the insurance carrier policyholder relationship does not create privilege. *See,*

e.g., Linde Thomson Langworthy Kohn & Van Dyke v. RTC, 5 F.3d. at *1515 (D.C. Cir. 1993) (rejecting notion that there is an attorney-client privilege in insured-insurer communications). This, however, is not universally the case. *See American Special Risk Ins. Co. v. The Greyhound Dial Corp*., No. 90 Civ. 2066, 1995 WL 442151 at *2 (S.D.N.Y. July 26, 1995) (post-claim disclosures were privileged).

3. Accordingly, rules of privilege should be analyzed before anything is provided to an insurance carrier.
4. Depending on the law, a joint defense agreement with the insurance carrier may provide additional comfort with respect to privilege.

c. **<u>Step 3 -- Evaluate Policies for Coverage</u>.** Potential issues vary from policy to policy and claim to claim.

i. General Liability

1. Choice of Law – since coverage issues vary from state to state, the threshold issue is what state's law applies to a given dispute with an insurer. Resolution of this issue might not provide a bright line answer, given that most standard-form policies do not contain choice of law provisions.

2. Two general approaches may be applied, depending on where a coverage action against an insurer is initiated.

a. <u>Restatement approach or most significant relationship test</u>. Here the court weighs a number of factors outlined in Section 188 of Conflicts of Laws. Factors considered include location of the parties, place of contracting, place

of negotiation of the contract, place of performance, and other factors. This standard never provides a bright line answer to the question of what state's law may apply, but certain courts have held that the most significant factor is where the property is located. *See, e.g.*, *Bank of Darien v. Badger Mut. Ins. Co.*, 141 F.3d 720 (7th Cir. 1998).

b. Lex Loci Contractus or the last act test. Here, the court looks to the "last act essential to the completion of the [insurance] contract" and applies the law of that jurisdiction. *See Johnson v. Occidental Fire & Cas. Co.*, 954 F.2d 1583 (11th Cir. 2002). This test, designed to provide a bright line answer to what state's law applies, seldom delivers on that intent.

3. Coverage Grants. All specific coverage grants contained in the policy should be analyzed including:

   a. Bodily injury

   b. Property damage

   c. Personal and advertising injury

      i. Personal injury coverage may include "wrongful entry or eviction or other invasion of the right of private occupancy."

      ii. Personal injury coverage is particularly valuable, because it is not subjected to the exclusions applicable to bodily injury coverage, such as pollution exclusions. *See Millers Mut. Ins. Ass'n of Ill. v. Graham*

Oil Co., 668 N.E.2d 223 (1996) (finding coverage for gasoline seepage from underground storage tank onto neighbor's property).

iii. Courts have rejected insurance carrier arguments that there must be actual physical interference with property in order for coverage to apply. *See Town of Goshen v. Grange Mut. Ins. Co.,* 424 A.2d 822 (N.H. 1980)

4. Duty to Defend. It is generally accepted that the duty to defend is broader than the duty to indemnify, or pay judgments. In determining the duty to defend, the following tenants may prove valuable:

   a. The existence of the duty to defend is determined by the allegations of the complaint. This is generally known as the "four corners test". *See Danek v. Hommer*, 100 A.2d 198 (N.J. App. 1953). This widely followed standard compares the four corners of the complaint and the four corners of the insurance policy.

   b. Under this standard, an insurer is obligated to defend any claim that may rationally fall within policy coverage. *See, e.g. Seaboard Sur. Co. v. Gillette Co.*, 476 N.E.2d 272, 275 (N.Y. 1984).

   c. In other words, if the underlying complaint creates a possibility of coverage under an insurance policy, the insurer must defend. *See* ***Union Ins. Co. v. Soleil Group, Inc.*, No. 2:07-CV-**

3995-PMD, 2009 WL 8652923 (D.S.C. 2009) (finding a duty to defend lawsuits arising out of Legionnaires disease).

5. Exclusions.

   a. Pollution Exclusions. Most current general liability insurance policies contain pollution exclusions. Common language excludes claims caused by pollution, which is defined to include "irritants or contaminants". Insurance carriers have argued that virtually everything under the sun, including sunlight, is a pollutant.

      i. Numerous courts have rejected the insurance carriers' overly broad application of the exclusions, holding them inapplicable to claims involving:

         1. Lead. *See Sullins v. Allstate Ins. Co.*, 667 A.2d 617 (Md. 1995).

         2. Pesticides. *See MacKinnon v. Truck Ins. Exch.*, 73 P.3d 1205 (Cal. 2003).

         3. Fumes from floor sealant. *Nav-its, Inc. v. Selective Ins. Co.*, 869 A.2d 929 (N.J. 2005)

         4. Inhalation of smoke. *Allstate Ins. Co. v. Barron*, 848 A.2d 1165 (Conn. 2004).

         5. Acid. *Karroll v. Atomergic Chem. Corp.*, 194 A.d2d 715 N.Y. 1993).

6. Carbon monoxide. *See Allstate Ins. Co., v. Barron*, 848 A.2d 1165 (Conn. 2004).

ii. Many courts also apply pollution exclusions only to traditional environmental polluters. *See Firemen's Ins. Co. v. Kline & Son Cement Repair*, 474 F. Supp. 2d 779 (E.D. Va. 2007) (providing survey of case law at n. 5).

iii. Some courts hold that pollution exclusions apply only to "active polluters" or traditional environmental polluters. *See e.g*. *Avondale Indus., Inc. v. Travelers Indem. Co*., 87 F.2d 1200 (2d Cir. 1989).

iv. **Legionella bacteria have been held not to be pollutants by a number of courts. *See, e.g., Westport Ins. Corp. v. VN Hotel Group, LLC.,* 513 Fed. Appx. 827 (11th Cir. 2013)**.

b. Fungi / Bacteria exclusions. Many general liability policies also contain bacteria exclusions. Case law has addressed two kinds of bacteria exclusions in the context of Legionnaire's disease.

i. The first excludes coverage for "[t]he actual, alleged or threatened inhalation of, ingestion of, contact with, exposure to, existence of, or presence of any fungi or bacteria on or within a building or structure. . . ." One Court held that such an

exclusion precluded coverage for Legionnaire's disease claims. *See AMCO Ins. Co. v. Swagat Group, LLC.*, 2009 WL 331539 (C.D. Ill. 2009) (Ligionella bacteria in swimming pool and hot tub at hotel).

ii. The second kind of exclusion is similar, but contains an exception to the exclusion stating that the bacteria exclusion does not "apply to any fungi or bacteria that are, are on, or are contained in a good or product intended for bodily consumption." **Courts have held that this exception to the exclusion renders the exclusion inapplicable to hospitality-related Legionnaire's disease claims. *See Westport Ins. Corp. v. VN Hotel Group, LLC.,* 513 Fed. Appx. 827 (11th Cir. 2013); *Nationwide Mut. Fire Ins. Co. v. Dillard House, Inc.*, 651 F. Supp. 2d 1367 (N.D. Ga. 2009); *Union Ins. Co. v. Soleil Group, Inc.,* 2:07-CV-3995-PMD, 2009 WL 8652923 (D.S.C. 2009)**.

ii. Pollution liability policies

1. Pollution liability (PLL) insurance cover the gaps, if any, created with standard general liability insurance policies.

2. PLL Policies need to be evaluated, because, as the name implies, they do not contain pollution exclusions. In

addition, they typically do not contain fungi or bacteria exclusions.

d. **<u>Step 4 -- Provide Notice</u>**. Best practice is to notify all potential insurance carriers as soon as possible. Nonetheless, failure to provide timely notice under an occurrence policy, in most jurisdictions, will not defeat coverage. *See e.g.* New York Ins. Law sec. 3420 (McKinney 2011); *Nationwide Mut. Ins. Co. v. Starr*, 575 A.2d 1083 (Del. 1990); *Clemmer v. Hartford Ins. Co*., 587 P.2d 1098 (Cal. 1979); *Darch v. Hartford Ins. Co*., 554 N.E.2d 28 (Mass. 1990); *Cooper v. Government Employers Ins. Co*., 237 A.2d 870 (N.J. 1968); *Aigist v. Stasak*, 424 A.2d 1328 (P.A. 1981).

e. **<u>Step 5 – Secure Defense Counsel of Your Choice.</u>**

i. One of the most important issues faced by clients is the selection of defense counsel. Most CGL insurers appoint counsel to defend a policyholder. This raises two important issues: (1) competency, and (2) loyalty.

1. Competency. Given the impact of these kinds of claims on an enterprise, it may not make sense to utilize insurance company appointed "slip and fall" counsel.

2. Loyalty. Insurance company appointed counsel may be loyal to the insurers who provide them with ongoing business.

ii. Fortunately, case law generally addresses these issues favorably for policyholders. Where there is a conflict of interest between the insurance carrier and the policyholder, many jurisdictions hold that the policyholder has a right to select private counsel, to be paid for by the insurer, and that such counsel must be allowed to control the defense. *See, e.g.*, *Grube v. Daun*, 496 NW2d 106, 123 (Wis. Ct. App. 1992); *Am.*

Family Life Assurance Co. v. United States Fire Co., 885 F.2d 826 (11th Cir. 1989); *Previews, Inc. v. California Union Ins. Co.*, 640 F.2d 1026, 1028 (9th Cir. 1981); *Aetna Cas. & Sur. Co. v. Spancrete, Inc*., 726 F. Supp. 204 (N.D. Ill. 1989); *Cunniff v. Westfield, Inc*., 829 F. Supp. 55 (E.D.N.Y. 1993); *see also*, *San Diego Navy Fed. Credit Union v. Cumis Ins. Society, Inc.*, 208 Cal. Rptr. 494 (Cal. Ct. App. 1984) (insurer must pay for independent counsel).

f. **Step 6 – Demand and Receive 100 percent Reimbursement for Defense Counsel Fees and Expenses.**

i. If one count of the complaint is covered, but others are not, a full and complete defense must still be provided. *See e.g. Great American Ins. Co. v. Riso, Inc.*, 470 F.3d 158 (1st Cir. 2007).

ii. An insurer can refuse to defend only when no cause of action or facts have the potential for coverage under the policy. *See e.g. Western World Inc. Co. v. Hartford Mut. Ins. Co*., 784 F.2d 647 (8th Cir. 1984).

iii. All doubt as to the existence of the duty to defend must be resolved in the policyholder's favor. *See Mount Vernon Ins. Co. v. Scottsdale Ins. Co.*, 638 A2d 1196 (Md. App. 1994).

g. **Step 7 -- Pursue Lost Income.** Lost income coverage may be found under first party property policies under various different policy provisions.

i. Insurers contend that business interruption coverage is inapplicable unless there has been "direct physical loss" to covered property. Courts have held that this direct physical loss requirement is met where property is rendered uninhabitable. *See, e.g, TRAVCO Ins. Co. v. Ward*, 715 F.2d. 699 (E.D. Va. 2010) (presence of Chinese Drywall, and resulting

odor, made home uninhabitable, triggering property coverage). Other courts have been more restrictive. *See Source Food Tech. Inc. v. U.S. Fidelity & Guar. Co*., No. 06-1166 (8th Cir. Oct. 13, 2006) (inability to transport product because of restrictions pertaining to "mad cow disease" did not trigger coverage).

ii. In addition, policyholders should look to other insuring agreements, including:

1. Ingress Egress. Ingress Egress coverage provides business income coverage for losses arising from the inability to enter or exit the property. Physical damage to the facility is not necessary in order to trigger coverage. *See Fountain Powerboat v. Reliance Ins. Co*., 119 F. Supp. 2d 552 (E.D. N.C. 2000).

2. Civil Authority. Property policies also commonly contain coverage for lost income resulting from interruption by Civil or Military Authority. Here as well, there is no requirement of physical damage to property. *See Sloan v. Phoenix of Hartford Ins. Co*., 207 N.W.2d 434 (Mich. App. 1973).

3. Contingent Business Interruption. Covers loss of income caused by property damage to the property of others. *See Zurich American Ins. Co. v. ABM Indus. Inc*., 397 F.3d 158 (2d Cir. 2005) (holding that coverage applies even if covered property was not damaged).

II. SCENARIO 2 – Catastrophic Hurricane Damage. This kind of scenario is addressed where property has been destroyed by a hurricane, tsunami, flood, massive fire, or some other kind of disaster.

a. Step 1 – Locate Applicable Insurance Policies. All property policies in force at the time of loss are implicated.

b. Step 2 – Evaluate Coverage. Once policies have been located, they should be reviewed for coverage. Particular areas of interest include:

i. PD Coverage Grant. Most policies cover "all risks of direct physical loss or damage to property." This coverage grant covers more than just the physical destruction of property.

1. It covers diminution in the value of property. *See Edwards v. Maryland Motorcar Ins. Co.*, 197 N.Y.S. 460 (App. Div. 2d Dept. 1922) ("[w]e think diminution in value is damage embraced the clause of the policy insuring plaintiff 'against direct loss or damage'").

2. It covers property that is rendered unusable. *See Hampton Foods Inc. v. Aetna Cas. & Sur. Co.*, 843 F.2d 1140 (8th Cir); *Westchester Fire Ins. Co. v. First Presbyterian Church*, 437 P.2d 52 (Colo. 1968).

3. It covers consequential losses.

ii. Business Interruption (BI) and other Time Element Coverage. BI calculations are probably one of the least understood areas of insurance. This issue is compounded by the fact that most accountants that are hired to calculate BI loss are insurance industry trained. As a result, it is common for policyholder hired accountants to calculate business interruption losses in a manner that minimizes, rather than maximizes, coverage.

1. One common BI coverage grant provides coverage for "Net Income . . . and continuing normal operating expenses, including ordinary payroll." By its terms, business interruption loss should be calculated as loss of income plus continuing expenses (or fixed expenses).
2. Despite this, most accountants calculate BI loss as the loss of income minus saved expenses, an approach promulgated and accepted by the insurance industry.
3. This standard insurance company accounting approach minimizes loss, as it subtracts something from lost income (saved expenses), rather than adding something (continuing fixed expenses of the business).
4. The implications of this error are magnified for businesses operating with either a negative net income, or a close to break-even financial position.
5. Case law addressing the proper calculation of business interruption loss diverges drastically from common industry custom and practice.
    a. *Amerigraphics, Inc. v. Mercury Cas. Co.*, 107 Cal. Rptr.3d 307 (Cal. App. 2010) (permitting recovery of continuing expenses without deduction)
    b. *Continental Ins. Co. v. DNE Corp.*, 834 S.W.2d 930 (Tenn. 1992) (requiring the addition of continuing expenses to negative net income);
    c. *HTI Holdings, Inc. v. Hartford Cas. Ins. Co.*, 2011 WL 6205903. (D. Or. Dec. 8, 2011) (under standard ISO form language, the relevant formula is net income plus continuing expenses).

d. *Washington Restaurant Corp. v. General Ins. Co. of Am.*, 390 P.2d 970 (Wash. 1964). In that case, the Washington Supreme Court disagreed with the insurance company's characterization because it contradicted an ordinary business person's expectations and the specific coverage requested by the insured in this case. The court flatly rejected the insurance carriers' notion of loss, "[w]hile an accountant might consider the end result as a ***reduction*** in net operating ***loss*** . . . , no business man would call it a ***saving*** in the sense that positive and affirmative business benefits accrued to the insured." *Id.* at 972 (emphasis in original).

iii. Limits and Sub-limits. There is also considerable room for confusion regarding applicable limits and sub-limits. Because coverage grants typically contain sub-limits and overlapping coverage grants, claims can be compromised if they are presented without a full and complete understanding of legal and factual issues pertaining to limits. Particular sub-limits may include.

1. Flood. But, it is often overlooked that the flood sub-limit does not apply to business interruption losses. *See Northrop Grumman Corp. v. Factory Mut. Ins. Co.*, 805 F. Spp.2d 945 (C.D. Cal. 2011).
2. Contingent Business Interruption (covers loss of income due to the loss of property of others)
3. Debris Removal (often overlaps with Extra Expense)

4. Ingress/Egress. Typically applies if access to property is prevented, even without damage to the insured property.

5. Civil or Military Authority. Governmental order prohibiting access can trigger coverage absent physical injury to property.

6. Land improvements or Betterments. This is generally known as code upgrade coverage. It can be critical for the full recovery of post-hurricane rebuilding costs.

7. Mold

8. Pollution

iv. <u>Deductibles and Waiting Periods</u>. There are basically two kinds of clauses that insurers will contend function as deductibles.

1. Dollar deductibles. Here, the most commonly misapplied deductible is the hurricane deductible. Hurricane deductibles are often specified as a percentage of total insured values, such as "5 percent of TIV". With most programs, hurricane coverage does not extend all the way through the program. For example, if the property program is for $100 million, hurricane coverage may only be provided within the first $20 million of the total insurance tower. Here, the question is whether the deductible is 5 percent of 20 million (the total insured values for hurricanes) or 5 percent of the full $100 million. Industry custom and practice is to apply the larger deductible, a practice that has been rejected by the courts. *See Terra-ADI Int'l. Dadeland v. Zurich Am. Ins. Co.*, 2007 WL 675971 (S.D.

Fla. Mar. 1, 2007) (unpublished) (correctly applying the smaller deductible).

2. Time deductibles and waiting periods. These kinds of limitations are common with so-called "time element" coverage grants. For example, business interruption loss may not be recoverable unless business is interrupted for 24 or 48 hours. The critical question is whether losses incurred during that time period are recoverable after the waiting period has passed, or if the waiting period functions as a deductible, meaning that losses during that period are uncovered. Insurance company accountants most always calculate waiting periods as deductibles, minimizing available coverage. Specific case law and policy language needs to be consulted to determine whether the policyholder loses coverage for losses during the waiting period or not.

v. Ingress Egress. Ingress Egress coverage provides business income coverage for losses arising from the inability to enter or exit the property. Physical damage to the facility is not necessary in order to trigger coverage. *See Fountain Powerboat v. Reliance Ins. Co.*, 119 F. Supp. 2d 552 (E.D. N.C. 2000).

vi. Civil Authority. Property policies also commonly contain coverage for lost income resulting from interruption by Civil or Military Authority. Here as well, there is no requirement of physical damage to property. *See Sloan v. Phoenix of Hartford Ins. Co.*, 207 NW2d 434 (Mich. App. 1973).

vii. Contingent Business Interruption. Covers loss of income caused by property damage to the property of others. *See*

Zurich Am. Ins. Co. v. ABM Indus. Inc., 397 F.3d 158 (2d Cir. 2005) (holding that coverage applies even if covered property was not damaged).

viii. Sue and Labor or Protection and Preservation of Property. The purpose of sue and labor coverage is to bind the policyholder to take steps to prevent a threatened loss for which the underwriter would be liable if a loss occurred. *See White Star Steamship Co. v. North British & Mercantile Ins. Co.*, 48 F. Supp. 808 (E.D. Mich. 1943). Sue and labor coverage is separate and distinct to other coverage provided under the policy, and is not generally subject to any policy exclusions. *See Witcher Constr. Co. v. Saint Paul Fire & Marine Ins. Co.*, 550 N.W.2d 1 (Minn. Ct. App. 1996).

c. **Step 3 – Provide Notice**. Notice should be provided to applicable insurer as soon as practicable, but late notice, in most jurisdictions, should not defeat coverage.

d. **Step 4 -- Calendar Policy Deadlines**. Typical property insurance policies contain a myriad of overlapping and sometimes contradictory deadlines that, if missed or misinterpreted, can nullify a claim.

i. Deadline to file a **proof of loss** – policies typically require the submission of a proof of loss within a certain time period after the loss, for example, 180 days.

1. For large claims, it is virtually impossible to comply with policy provisions. Business interruption can continue for years.
2. Deadlines are often extended, but only if extensions are requested long before expiration of the deadline.
3. Poorly drafted proofs of loss can do more harm than good. Insurance companies often use poorly drafted

proofs of loss as leverage to minimize claims, as insurers often contend that signing a poorly thought-out proof of loss is insurance fraud.

4. It is not at all uncommon for policies to contain two different proof of loss deadlines (one mandated by statute, and the other by policy language).

ii. **Suit Limitation Deadlines –** Property policies often attempt to shorten applicable statutes of limitations, by providing that coverage is void unless a lawsuit is brought within a specified period of time. Suit limitations may be specified as one or two years from the date of loss.

1. Some jurisdictions hold that a missed deadline results in forfeiture of a claim. *Blitman Constr. Corp. v. Ins. Co. of N. Am.*, 489 N.E. 2d 236 (N.Y. 1985).

2. Other jurisdictions hold that these provisions are invalid to the extent that they shorten applicable statutes of limitations periods. *See* Fla. Stat. Ann. Sec. 95.03 (West 2013).

3. Resolving claims in the prescribed time period can be impossible.

4. Extensions and tolling agreements present complex legal and factual issues that can compromise a claim.

    a. Example: Tower of coverage. Broker asked for extensions of suit limitation and proof of loss deadline. Certain carriers responded with extensions to proof of loss deadline, which was imminent, but not to suit deadline, which was some time away. The broker never clarified e-mail communications as to certain insurers.

b. Rules applicable to tolling are subject to applicable law, and vary widely from jurisdiction to jurisdiction.

e. **Step 5 – Present the Claim in a Manner that Maximizes Coverage –** A claim should not be submitted until policy language and the law is fully and completely understood. Only then can a claim be properly submitted. Moreover, industry custom and practice with property claims favors minimizing coverage. Without a proper analysis of case law, claims will be compromised.