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## Hurricane Irma: Florida Commercial Insurance Claims for Loss of Power Damages



Hurricane Irma left millions of businesses in the Southeastern United States without electricity for days and in some instances more than a week. This undoubtedly impacted the more than 2,000 aerospace and aviation companies in Florida, and their production of billions of dollars of aircraft, engines, and parts.

When a windstorm causes a power failure, a company can suffer financial losses in a variety of ways. The sudden loss of power can stall industrial equipment mid-process, damaging the equipment or causing waste and downtime. Air quality and contamination control systems for maintenance clean rooms may be jeopardized. Computers and programmed industrial processors may suffer data losses. Environmental control equipment can go off-line, causing spoilage or degradation of temperature-sensitive material. And a company may lose income from the suspension of operations, including during the subsequent restoration period.

Those in the aviation industry should look to their commercial property insurance policies to provide coverage for the damages they suffer from the loss of power, but whether their losses are covered, and to what extent, will depend upon a number of variables. Factors influencing whether coverage exists under a particular policy include the issuing insurer and the policy form. In addition, amendments to

insurance policies, known as endorsements or riders, may specifically address utility service interruption. Companies affected by power outages should carefully consider the coverage available under their existing policies, including any excess-layer policies, to maximize their recovery.

When wind or a hurricane causes your business to lose power, consider these questions when analyzing a potential insurance claim:

## **Do the Company's Insurance Policies Cover Losses Caused by Wind?**

In Florida, property insurers are not required to provide windstorm coverage for non-residential properties. A particular policy may or may not include windstorm coverage in the policy form or through an endorsement. Accordingly, the first thing to review is whether the company's policy includes wind or windstorm as a "Covered Cause of Loss."

## **Did the Power Failure Occur On or Off the Insured Premises?**

Many commercial property insurance policies purport to exclude from coverage losses that result from power failures that occur away from the insured premises. Relying on that exclusion, an insurer may argue that there is no coverage for losses resulting from damaged transmission lines, substations, transformers, or utility poles, located outside of the insured premises. But the specific facts of the loss and the specific policy language will govern whether the exclusion applies. For example, there are often exceptions to the exclusion when an off-premises power failure causes a Covered Cause of Loss, such as a fire. Further complicating the analysis, courts in different states are divided as to whether, under certain circumstances, off-premises exclusions are enforceable or impermissibly vague. This is an open question in Florida.

## **Did the Company Suffer Direct Physical Loss or Damage?**

Typical commercial property policies require a "direct physical loss of or damage to Covered Property at the premises." Direct physical loss or damage is widely interpreted as a change in the property's condition or structure. If a sudden loss of power causes a piece of machinery to stall and break, that would typically be considered a direct loss. Mold growth from the loss of air conditioning and dehumidification equipment could likewise be considered direct damage, but insurers may seek to avoid paying on a mold claim arguing a more narrow view of "direct damage" or invoking a policy exclusion related to mold.

Outside of Florida, some courts have broadly interpreted “direct physical loss or damage” to encompass the loss of use or access to computer data. But that remains an open issue in Florida.

## **Does the Policy Cover Business Interruption Losses Resulting from a Power Outage?**

Many commercial property insurance policies provide coverage for business income a company loses when it suspends operations due to a hurricane caused power outage. But the business income claim cannot exceed the profit the company would have earned less its normal operating expenses. In addition, business interruption, or “time element,” provisions may include a requirement that the suspension be caused by a direct physical loss of or damage to the insured premises. When that is the case, a company must take special care in analyzing the impact of the power loss on the company, and in presenting the claim, if the physical impact to the insured premises is not obvious.

If the company has power and can operate, but a key vendor, supplier or customer has suspended its business due to the outage, a “contingent business interruption” provision or endorsement may still cover the company’s resulting business income loss.

## **Evaluating Claims and Challenging Insurer Positions**

Commercial property insurance policies are not easy to parse, and the law governing the policies may not be settled. Companies often benefit from the support experienced insurance coverage attorneys provide to assess the viability and strength of claims for coverage, to monitor and deal with the insurer’s loss adjusters, and to maximize the company’s potential insurance recovery.

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