

Earthquake and Tsunami in Japan – Global Impact

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The extraordinary images and reports of the devastation from the Japan earthquake and tsunami are staggering. While the focus has understandably and appropriately been on the human toll and concern for the well-being of friends, colleagues and business partners who may be personally affected by this disaster, its impact will extend far beyond those whose lives and businesses were immediately disrupted. A recent article in *The Wall Street Journal* reports that the earthquake alone may have caused \$15 to \$35 billion in insured property losses in Japan, and total economic losses are likely to be significantly more. We already are seeing assessments of the disaster's impact on businesses globally, not the least of which involves disruptions to the global transportation network for products, component parts and supplies.

What to do now: As soon as a potentially covered loss begins, experienced coverage professionals, such as the lawyers in Proskauer's Insurance Recovery Practice Group, should be consulted. Waiting too long to start assessing coverage and quantifying loss can lead to lost coverage as, for example, covered costs may not be recorded and evidence of loss may not be kept. In addition, insureds and others with potentially covered business losses should:

1. immediately obtain and review insurance policies;
2. confirm that evidence of loss is organized and maintained to support a claim under any applicable coverage provisions and track the expenses you incur in preparing the claim (including lawyers' fees) as many policies often cover such expenses;
3. adhere to any applicable notice and proof of loss provisions in the policies, including obtaining waivers or tolling agreements from insurers;
4. document loss by making sure to maintain proof of business performance prior to, during, and after loss;
5. create and maintain evidence of damage, including pictures if necessary.

What to think about in the near term: Given the increased seismological activity and its devastating effects that we've seen over the past few years and months, many companies will now be thinking about purchasing earthquake and tsunami coverage to handle property damage and business interruption. It is important to get the insurance you need at a cost you can afford. By all accounts, the cost of such insurance is likely to increase significantly, and the right coverage may not be available "off the shelf."

Businesses, for example, may find that flood exclusions and provisions that narrowly define when coverage is triggered that are found in typical policies mean that you aren't adequately insured in the event of an earthquake and tsunami. This is why it is critical to work with insurance counsel to assure that you are obtaining the coverage you want and need. Addressing the issue after a disaster strikes may be too late.

In the meantime, if your business does suffer the effects of the Japan earthquake and tsunami, be it property damage, limited availability of materials (and the resultant increase in price), or interruption of shipping channels leading to delivery delays, some of the key insurance policy coverage issues are discussed below. Although claims for such losses will be varied and involve different types of insurance coverage, they are likely to raise the same issues we deal with in almost all matters: causation, trigger, notice, quantification and, for insurance claims, number of occurrences, limits and deductibles, defenses and exclusions, among others.

Property Damage: If your property was damaged as a result of the earthquake or tsunami, an immediate review of your property policy to assess coverage is probably reflexive. Policyholders should be aware, however, that most first-party property policies cover much more than just physical damage to owned property. Many policies also define property damage to include loss of use of your property that has not been physically damaged and include additional coverage for debris removal, demolition and increased cost of construction in the event of physical loss to covered property.

Business Interruption: Lost profits are also often covered under one or more provisions of most property policies. Business interruption insurance is designed to do for the insured what the business itself would have done had no interruption occurred. This type of coverage usually comes into play to reimburse an insured for losses sustained due to the necessary total or partial suspension of the policyholder's operations during a period of interruption. For instance, a hotel in Hawaii that suffers damage to its property as a result of the tsunami could pursue, under its business interruption coverage, the profit it lost while repairing the property damage. While the exact wording and case law interpreting these provisions varies, business interruption provisions generally require: (a) loss or damage to insured property; (b) interruption of the business due to a covered loss; (c) loss of income or profits; and (d) the loss must occur within a "period of restoration." Business interruption losses often present tricky valuation and calculation issues that are best analyzed as the loss progresses, rather than after the fact. Your business interruption coverage may require you to expedite repairs, mitigate losses and/or track expenses in a way that is not consistent with your normal business practice. It also may provide coverage for the "extra expense" associated with maintaining production while property is being repaired. Covered extra expenses generally include such costs as rent, moving and hauling expenses, overtime, temporary labor, and even advertising. An early evaluation of your coverage can help smooth the path to making sure covered expenses are properly captured and presented to insurers. Fortunately, many policies also include coverage for professional fees incurred in quantifying the loss.

Contingent Business Interruption/Dependent Business Premises: Today's global economy operates along a network of transportation and transportation-related businesses that are highly interdependent. The network is likely to face significant disruptions over the coming days and weeks as airports, ports, rail operators and trucking companies adjust to closures caused by the earthquake and tsunami. That means increased costs and delivery delays for products and component parts that travel along the global supply chain. Interruption to suppliers' or customers' utility services would have a similar effect. If either your suppliers or your customers suffer loss or damage of the type your property damage policy covers, you may have a claim for contingent business interruption due to your inability to acquire or deliver materials or services. These provisions generally extend the business interruption coverage to include loss of gross earnings at the insured's premises as a result of a supplier's or customer's inability to deliver or receive goods or supplies as a result of damage to its property. Determining whether your policy has been triggered, the cost and requirement to purchase "cover," the appropriate period of restoration, and the anticipated revenue or income had the damage not occurred can all be complicated issues necessitating the help of experienced coverage counsel.

Service Interruption/Impounded Water: Many U.S. companies have facilities, or affiliates that operate facilities, in Japan that have been affected by the widespread power outages since last week's earthquake. When utility services to your premises are interrupted, service interruption coverage may be available to cover your loss of income or extra expense. Policies generally require damage to the property of a supplier of electricity, gas, water, steam, waste disposal, or similar services used by the insured to trigger this coverage. Impounded water coverage applies in the event that water used as a raw material, for power, or in a manufacturing process becomes unavailable due to damage to dams or reservoirs. These coverages often are limited in duration and subject to waiting periods or deductibles, and could be limited to damage to property of the supplier that occurs within 1000 feet of the insured premises. The results of such interruptions, however, can be far-reaching, from event cancellation, inability to deliver products and closure of facilities, to contractual penalties for non-completion of orders or loss of covered property, so a careful review of the policy is essential.

Civil Authority Restricting Access: Should a governmental entity issue an order restricting access to your property, the order may trigger your insurance coverage. Unlike the business interruption coverage in your policy, some cases have held that no physical damage is required to invoke the civil authority coverage. While the most common application of this coverage would be to situations, like floods and hurricanes, where an evacuation order inhibits your ability to access your property, more complicated situations may arise as well. Airport, beach and waterway closures, curfews, and closures of financial exchanges and borders, are all types of civil authority orders that could lead to insurance claims.

Sue-and-Labor Clause: Some policies include a sue-and-labor clause that permits a company to recover expenses incurred to minimize or prevent covered loss or damage, including business interruption loss, due to an actual or imminent insurance triggering event. A business, for example, that purchases and installs on-site emergency generators to prevent or minimize power outage losses, or takes other precautions to protect covered property against the aftershocks that invariably follow the main temblor, might be able to recover those expenses. Sue-and-labor clauses, however, ordinarily provide coverage in limited circumstances, so a business should not take action to minimize or prevent further losses based on the mistaken assumption that the incurred costs are covered.

Preparedness is essential to managing and mitigating the risks posed by natural disasters like last week's tragic events. Insurance should be a part of this preparation. Whether your business is coping with a loss today as a result of the Japan earthquake and tsunami or looking to protect itself from similar losses in the future, Proskauer's Insurance Recovery Group can help you work through your insurance issues.