

***GULF OIL SPILL INSURANCE COVERAGE ISSUES
FOR THE HOTEL AND GAMING INDUSTRIES***

By Joshua Gold and Marshall Gilinsky

The underwater oil spill in the Gulf of Mexico is catastrophic in every sense: loss of life, loss of livelihoods, and unprecedented environmental damage to a huge swath of coastal areas bordering several states. The oil spill also spells potential disaster for hospitality and gaming businesses on or near the Gulf Coast (and perhaps beyond). It does not take a great deal of insight to realize that during the summer vacation season, many travelers and businesses will avoid the areas affected by the oil spill. Indeed, significant cancellations of existing hotel and event reservations are occurring and are likely to get worse as the damage from the spill spreads.

Most hospitality and gaming businesses affected by the oil spill probably have so-called “time-element” insurance coverage that protects them from the perils and losses occurring as a result of the oil spill tragedy. For example, some of the better forms of property insurance policies will provide some degree of insurance coverage for losses stemming from environmental damage to either their own property or some other property (whether privately owned or public). Other policyholders have insurance coverage for business income losses which result from pollution by oil, chemical or other substance of any beach, river or waterway within a certain distance of the policyholder’s operations. For those

policyholders that are located on or close to the beach, this coverage may prove tremendously valuable.

Other common time element coverages that might respond to oil spill-related losses are “business interruption” and “contingent business interruption” coverage. Business interruption and contingent business interruption coverage are designed to protect businesses from losses stemming from unavoidable interruptions in their daily operations, and may apply in a variety of circumstances, such as a shutdown or downturn in business due to the damage from the oil spill. Business interruption losses typically occur where the policyholder’s downturn in business is due to property damage at or near the policyholder’s own property. Contingent business interruption losses typically occur where the downturn is due to property damage at customer’s or supplier’s property. Thus, a hotel suffering business income losses due to the presence of oil on or near its beaches may have coverage for those losses under its property insurance policy.

Many policyholders also purchase a form of time element insurance coverage known as civil authority insurance coverage, which protects against loss of business income when a civil authority prohibits access to the policyholder’s premises due to loss or damage within a certain distance of the policyholder’s operations. There are already ever-expanding bans on fishing activities in the Gulf and it may be a matter of time before beaches and other areas along the Gulf are restricted due to contamination with oil and chemical dispersants.

Many businesses hurt by the oil spill are planning on pursuing remedies from BP, Transocean, and others alleged to be responsible for the spill – via complicated dispute resolution procedures being set up to resolve such claims. But those businesses should consider the benefits of going directly to their property insurance companies to obtain the coverage provided under their property insurance, and then leave the task of pursuing those responsible for the spill to the insurance company and its team of subrogation experts.

Even if these favorable insurance coverages are purchased, there can be obstacles to insurance recovery that thwart even some of the most sophisticated businesses and risk management professionals. Some prudent steps that hotel and gaming companies can take to best protect themselves when it comes to pursuing their insurance coverage are set forth below.

1. Policyholders Should Take an Inventory of Their Insurance Coverage

Policyholders should be diligent in trying to identify potentially relevant insurance coverage that can respond to the Gulf oil spill. Some of this coverage is custom tailored to protect against risks unique to the gaming and hospitality businesses. As noted above, a number of specialized insurance products have been developed by the insurance industry under so-called “all-risk manuscript” property insurance policies to protect against risks to hotels and resorts.

Some manuscript insurance policies also protect against the loss of business income due to damage away from the premises which the policyholder is nevertheless reliant upon, such as conference centers, sports complexes, stadiums, convention centers, and amusement parks. In addition to “time

element” insurance coverage for pollution risks are time element insurance coverages for losses caused by an interruption in operations due to infectious or contagious disease, food or drink poisoning, vermin or pests. Furthermore, insurance coverage may be available to cover the costs of relocating guests as a result of a loss.

2. Beware of Misapplication of Exclusions and Other Limiting Policy Terms

Despite some of the good insurance coverage provisions that exist, it is important to be wary of the escape clauses that the insurance company might try to exploit to avoid coverage for a large claim. For example, insurance companies sometimes argue that their policies require a “complete and total” cessation of business for time element insurance coverage to be triggered. This can be a devastating position when a policyholder operates numerous business activities at a location and an insured peril only affects a portion of the operations. Even a partial interruption of business activities can have dire consequences for the hotel’s profitability.

Insurance companies might also argue that damage by oil and chemicals to a resort’s beach does not trigger business interruption coverage, since it merely is damage to “land,” which is excluded under many property insurance policies, as opposed to damage to “property” that is insured under the policy. But this argument ignores that fact that resort beaches rarely are in their natural state, and that the improvements and maintenance that go into such amenities are as much “property” as the establishment’s pools or patios. Insurance policy

traps such as these should be contested as they are counter to the purpose of purchasing the insurance in the first place.

3. Keep Good Records to Support Your Insurance Claim and Give Prompt Notice of All Claims Under All Potentially Applicable Policies

Many hotel and resort operators maintain large insurance programs with scores of different insurance companies because the property values they are insuring and the significant risks of catastrophe in certain locations (Caribbean hurricanes, California earthquakes). While it can be painstaking, policyholders should ask their broker to make sure that excess insurance companies also have notice of claims filed with the primary insurance companies – even if the loss is not presently expected to reach a certain claim threshold which would trigger some or all of the excess layers of coverage. This is because insurance companies routinely argue for a forfeiture of all insurance coverage where they do not receive immediate notice.

Also, it is important for policyholders preserve as much documentation as possible to support their losses claimed under their insurance policies. Insurance companies often attack the documentation used to support time-element insurance claims. Accordingly, it is important to keep close track of cancellations (including the reason for the cancellation, where available) as well as records of budgets and projections (and all versions of same) to help refute such insurance company assaults on the policyholder's damage or loss calculations.

Conclusion

Policyholders need to be thinking about their insurance coverage in dealing with the disaster in the Gulf. There are time-sensitive provisions in the

policies regarding notice, proofs of loss and suit limitations that could be at issue if the insurance company ends up denying insurance coverage. The extent of coverage will depend heavily on the quality of the insurance product purchased: some policyholders in the hotel and gaming industries may have tailor-made insurance coverage that will defray a significant portion of the losses being experienced (or soon to be experienced) as a result of the oil spill. Often, the key provisions that provide this valuable coverage are missed by employees or even brokers who are asked to determine whether coverage for such losses exists, and it pays to have an experienced eye review your policy to see if your property insurance will help you deal with the impact of this disaster on your business.

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