



## Breaking The Ice: A Policyholder's Guide to Insurance Coverage for Texas Winter Storm Uri Claims

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The devastating extreme cold weather event in Texas often referred to as Winter Storm Uri, which lasted from February 14 to February 18, 2021, caused significant damages to homes and businesses in the region. Temperatures during the winter storm were the coldest on record since 1883, with some areas reaching as low as negative 6 degrees.<sup>4</sup> Millions of Texans were impacted and many lives were lost.

Insurance analysts predict that Uri will lead to the largest number of insurance claims in the state, totaling \$20 billion in claimed losses.<sup>5</sup> In fact, Uri is set to surpass Hurricane Harvey as the most devastating natural disaster in Texas, which resulted in \$19 billion in insured losses. Further, Uri will be the largest insured loss from a United States winter storm in the industry's history.<sup>6</sup>

The catastrophic Uri losses range from damage to property caused by the bursting of frozen pipes, collapsed roofs, weakened structures, loss of power, lack of public utility services, and the expenses incurred in the disruption of normal business operations. In addition, some commercial businesses were unable to operate due to bad weather conditions on the roads, while others were forced to halt operations due to power outages.

The physical damages caused by the storm were compounded by widespread power and electric failures across the state, as the Electric Reliability Council of Texas ("ERCOT") underwent systematic reliability failures for the ten-day period surrounding the storm.

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<sup>2</sup>The Natural Disaster Recovery Group was created by SDV to provide specifically tailored content and expertise to policyholders who suffer these types of losses.

<sup>3</sup>The author would like to acknowledge and thank Andres Rosero for his contributions to this commentary.

<sup>4</sup>John Egan, *Insurance Strategies For Texans With Winter-Weather Problems*, Forbes (2021) (<https://www.forbes.com/advisor/homeowners-insurance/texas-winter-weather/>).

<sup>5</sup>*Id.*

<sup>6</sup>*Id.*

ERCOT is an Independent System Operator subject to oversight by the Public Utility Commission of Texas and the Texas Legislature, which operates an independent and isolated intrastate grid that is not connected to the rest of the United States.<sup>7</sup> Given that the ERCOT grid operates outside of the Federal Energy Regulatory Commission's jurisdiction, there was no possibility for federal assistance in the provision of necessary electrical supply or maintenance support in conjunction with the storm.<sup>8</sup>

Additionally, ERCOT implemented and carried out forced and deliberate power outages throughout the winter storm, significantly increasing Texans' risk exposure and resultant losses.<sup>9</sup> Despite Texas undergoing a similar weather event in 2011, ERCOT failed to implement enforcement mechanisms to ensure that electricity generator and power plant owners sufficiently weatherized their facilities.<sup>10</sup>

With the extensive and significant damages Texans have suffered in Uri's wake, it is important for policyholders to fully realize the insurance coverages available to minimize their losses and maximize their recovery for claims made in connection to the winter storm. For this reason, this guide seeks to provide Texas policyholders with a general overview of potential insurance coverages available for Winter Storm Uri claims, and provide practical recommendations for preparing and pursuing such claims to ensure they will be covered.

## I. DO YOU HAVE COVERAGE FOR WINTER STORM URI LOSSES?

As a general matter, most first-party natural disaster coverage will come from a property insurance policy that covers damage or destruction to insured property from a covered peril. The scope of insured property will vary in the homeowner and commercial context, but will typically include buildings, structures, equipment, supplies, and other personal property. With Uri, the most common losses covered under these policies are water damage to property caused by burst pipes or roof leaks from record low temperatures, in addition to the loss of any business income associated with such property damages.

### a. Business Interruption Coverage

Business Interruption coverage, or "Business Income Insurance" ("BI"), can be included in a commercial property policy or added by endorsement. This policy typically covers lost earnings or revenue that resulted from a disruption to the insured's business due to a weather-related peril. Since there are no standardized BI forms, policyholders should always review the specific language of their policies prior to a business interruption occurrence to be sure they are expansively and adequately insured. Burst pipes, wind damage, and electric instability are just some ways Winter Storm Uri disrupted Texas business operations.

- The most important consideration in recovering a BI claim is establishing a connection between the physical loss or damage and the monetary loss. Without establishing this direct link, insurance claims will often lead to contentious coverage disputes. Almost all BI policies will require that the insured's business sustain direct physical loss or damage. Additionally, under Texas law, it is

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<sup>7</sup>JS Held University, Assessment of Energy System Reliability Failures During the Extreme Cold Weather Event in the ERCOT Region, 1st ed. (2021).

<sup>8</sup>Id.

<sup>9</sup>Id.

<sup>10</sup>Id.

well-established that BI coverage requires a physical loss, evidenced by a “distinct, demonstrable, physical alteration of the property.”<sup>11</sup> As such, it is important for Texas policyholders to heavily document the physical damage to property resulting from Winter Storm Uri to properly recover lost income or earnings under a BI policy in relation to the storm.

- Many insurers will attempt to take a narrow view of qualifying business interruptions by either disputing the cause of or necessity of the interruption. For example, carriers may take the position that the loss of income was caused by the policyholder’s decision to cease operations for the safety of their employees instead of actual damage to property due to Winter Storm Uri.
- SDV recommends policyholders prepare their BI claims to show not only the amount of revenue that was lost because of Uri but also to establish how those losses are directly linked to physical damage to covered property that resulted from the storm.

### b. Contingent Business Interruption Coverage

Contingent Business Interruption Coverage (“CBI”) is an extension of BI insurance, typically added by endorsement. CBI covers earnings lost because of damage to facilities that are not owned, operated, or controlled by the insured but upon which the insured depends on conducting its own business. For example, when a cold-weather event disrupts a supply chain that a business relies on for product or raw materials, this insurance could cover the lost earnings caused by that disruption.

- CBI coverage is usually written to apply even when the policyholder’s property has not been physically damaged. However, the coverage still requires that one of the insured’s suppliers suffer physical property losses or damage.
- “Attraction Property” coverage is a sub-category of CBI coverage that may apply when an insured business suffers loss as a result of damage to an attraction property on which the insured is dependent. For example, coverage may apply in the event of winter storm damage to a stadium, museum, convention center, or theme park, which an insured restaurant or hotel relies upon for income and revenue.
- In the context of Winter Storm Uri, insured businesses may have a covered CBI claim if their operations relied upon any Texas suppliers for goods or services – as long as the supplier was in the affected region and physically impacted by Uri, which in turn caused a disruption in the insured’s business operations. CBI coverage may be triggered to recover any lost income the insured business suffered as a result.

### c. Loss of Utilities or Services Coverage

This insurance expands BI coverage to specifically include loss of utilities or public services, which may otherwise be excluded because of the “direct physical loss or damage” requirement in most BI policies. Utilities and services coverage typically applies to losses caused by the failure of power, water, communication, or other essential services.

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<sup>11</sup>Hartford Ins. Co. of Midwest v. Miss. Valley Gas Co., 181 Fed. Appx. 465, 470 (5th Cir. 2006); see also de Laurentis v. United Servs. Auto. Ass’n., 162 S.W.3d 714, 722-23 (Tex. App. 2005) (holding that physical loss under a BI policy requires a tangible damage or loss).

- It is important to note that these provisions typically only cover damage for service interruptions caused by actual, physical damage to the service provider's property and that the service provider is in proximate distance to the insured's location. For example, if an outage was caused by physical loss or damage to an ERCOT power generator, there may be coverage. However, if the outage was caused by a deliberate or intentional act by ERCOT to shut off power temporarily, coverage will likely not apply. In that situation, a fact-sensitive review will be required to determine what, if any, physical loss or damage actually occurred to the physical power grid and whether that damage can somehow be connected to the power outage suffered by the insured. There are two types of potential coverage avenues here:
- Time Element Coverage: This endorsement helps cover lost business income during the time that electricity or other utilities were interrupted. For example, if Winter Storm Uri damaged a power plant, thus cutting power to a grocery store, that store would remain closed until power is restored. This coverage would pay for any lost revenue due to the closure, and potentially, any spoiled food.
  - One crucial issue that arises for time element coverage in the Winter Storm Uri context is the definition of an insured "occurrence." This coverage usually requires a waiting period on a "per occurrence" basis. For example, suppose the loss or damage was caused by several interruptions in ERCOT service over the course of the weather event. In that case, the "clock" may "reset" with each outage requiring a new waiting period and may be reviewed as separate "occurrences" by the insurer. Specifically, insurers may take the position that the business's loss resulted from multiple freeze and thaw cycles or involved multiple cycles of power outages. Carriers will adopt this view in order to collect per-occurrence deductibles or to reduce the overall amount of available coverage.
- Direct Physical Damage Coverage: This coverage insures specific property (often listed in the policy) from direct physical damage to the property caused by an interruption in services. For example, after a Uri-related power outage, power is restored, and a power surge damages the grocery store's electrical system. This insurance would cover the repair or replacement of any such damaged utility systems identified as insured property in the policy.

#### d. Civil Authority

Natural disasters often cause governmental authorities to order road closures or restrict access to specific areas or infrastructures. These closures can damage an insured's business by preventing customers, employees, and/or goods from reaching the business location. Adding civil authority coverage to a policy provides insurance for such business revenue losses when government actions prohibit access to the insured premises. The primary issue associated with this coverage is the requirement that the government action be tied to physical property damage.

- In the Winter Storm Uri context, policyholders may have a colorable claim that ERCOT's deliberate, rolling outages implicate civil authority coverage, in that ERCOT is afforded the civil power to unilaterally effect such intentional outages, which resulted in damages to the insured's property and/or business. While this is a creative argument, most Civil Authority coverage still requires physical damage to the insured's own property or property in proximity to the insured that caused a civil order to issue. For example, in the context of COVID-19 claims based on municipal

"shutdown" orders ceasing business operations, Texas courts have reaffirmed that civil orders must be issued because of an actual physical loss to trigger Civil Authority coverage under a commercial property policy.<sup>12</sup>

#### e. Ingress/Egress Coverage

Business owners can also purchase ingress/egress coverage to protect businesses in those circumstances when a natural disaster limits access to the business, but no orders have been issued by civil authorities mandating closures. This coverage is designed to pay for the loss of income resulting from physical damage caused by a covered peril to non-covered property that prevents or hinders access to an insured's business location. Even though there is no requirement for a government shutdown or closure order, there is generally still a requirement that a covered peril, like an extreme weather event, cause the closure of access to the insured's business.

- Frequently, ingress/egress coverage will require that the loss be caused by the "necessary interruption" of the insured's business due to the prevention of access to the property. In the context of Winter Storm Uri, it is currently unclear to what extent the closing of businesses was "necessary," but policyholders can make a persuasive claim for coverage based on frozen-over and snowed-in roadways preventing access to their business property.

#### f. Texas Law and Anti-Concurrent Causation Implications Following Winter Storm Uri

Policyholders should eliminate anti-concurrent causation ("ACC") provisions from their property policies. An ACC clause indicates that the policy will not cover a loss caused by a combination of covered and excluded perils.<sup>13</sup> ACC provisions apply in concurrent-cause situations, where two or more causes of loss happen simultaneously to produce the same injury or damage to the insured (i.e., a combination of simultaneous independent events). Typically, if any cause of loss is excluded from coverage in a policy that contains ACC language, the loss will be excluded in its entirety, regardless of whether another covered cause of loss qualifies as the predominant cause.

- Where the policy does not contain an ACC provision, Texas has a unique doctrine governing concurrent causes. In Texas, an insured's recovery is limited to the amount caused solely by the insured peril. Thus, the policyholder will carry the burden of proof for separating and establishing the damages attributed solely to the covered cause of loss.<sup>14</sup> In the context of Winter Storm Uri claims, it is important that policyholders document the discrete causes of loss and make every effort to allocate the damages attributable to each. This will likely require isolating the various damages caused by power outages versus those attributable to the weather itself.

## II. WHAT SHOULD YOU DO IF YOU HAVE A CLAIM FOR WINTER STORM URI LOSSES?

Policyholders should take immediate action to document all possible Uri-related damages with photographs and video. Further, insureds must make their best effort to mitigate any additional damages as safely as possible and communicate with the insurer as soon as practicable. Policyholders should also inquire about the possibility of "Advance Payment" and "Claim Preparation" coverage. The insurer may have to make advance coverage payments per the terms of the policy,

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<sup>12</sup>See, e.g., *Terry Black's Barbecue, LLC. V. State Automobile Ins. Co.*, 2002 WL 7351246 (N.D. Tex. Dec. 14, 2020) (finding that civil authority orders to close businesses did not cause tangible losses, so no coverage was triggered).

<sup>13</sup>A handful of states refuse to enforce ACC clauses: CA, ND, WA, and WV.

<sup>14</sup>*Seahawk Liquidating Tr. v. Certain Underwriters at Lloyds London*, 810 F.3d 986 (5th Cir. 2016).

even if the full extent of the loss is still being adjusted. Also, the policy may provide coverage for any costs associated with documenting and preparing a proper claim submission.

- As a general matter, Texas policyholders should review their various policies; take extensive documentation of the damage; compile any transactions and receipts that serve as a record for temporary repairs; and obtain repair bids from various contractors as a baseline comparison to the insurance adjuster's report.
- Timely Notice: Most policies require that an insured timely notify the carrier of a loss. When the policy does not explicitly define that period, it may be determined by the time it would reasonably take a policyholder to identify and mitigate losses, as well as the reasonable time period to resume normal business operations. Given the vast impact of Winter Storm Uri, the "reasonable" time period may be extended based on the amount of time it will take to secure the property or resume business operations. Nevertheless, notice to any carrier and any excess or umbrella carriers should be submitted as soon as the policyholder discovers a potentially covered loss. SDV recommends immediately submitting written notice of a claim to the insurer according to the policy's notice provisions and keeping a copy for the insured's records. Accurate and thorough record-keeping is invaluable in pursuing a Winter Storm Uri (or any other) claim.

**TAKEAWAY:**

In light of the extreme Winter Storm Uri damages, it is important that policyholders fully evaluate and understand the coverages afforded by their insurance policies and act as quickly as possible in filing a claim. Additionally, policyholders who have suffered due to the storm should rely on the financial support provided by their existing insurance policies and develop a risk transfer strategy for future extreme events. For more information, please get in touch with SDV's Natural Disaster Recovery Group at [naturaldisasters@sdvlaw.com](mailto:naturaldisasters@sdvlaw.com).