Property Insurance Issues Linger at Sandy's One-Year Mark

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Superstorm Sandy devastated the east coast last Oct. 29, causing billions of dollars of damage to New York. Businesses suffered extensive property and business interruption losses. As the one-year anniversary of the storm has just passed, businesses and communities are still struggling with their insurers while trying to get back on their feet. This article addresses some of the key issues that policyholders affected by Sandy need to consider at this one-year juncture.

Not All Losses Were Caused by Flood

Insureds with flood exclusions or even flood sublimits in their policies may be told by their insurers that their losses were entirely caused by flood. However, this is not necessarily the case. Some losses may have been caused by service interruption, faulty workmanship or defective design, rain, explosion or other causes. Many commercial policies also provide additional coverage for losses from, for example, service interruption, debris removal, decontamination costs, civil authority, and protection and preservation of property.

Under New York law, identifying the "cause" of a loss for purposes of a first-party insurance policy often requires application of the doctrine of the "efficient proximate cause."[1] Where two causes lead to a loss, one that is covered and one that is not, the relevant inquiry is to determine which of the two was the dominant and efficient cause of the loss. This determination is generally an issue of fact.[2]

The loss should be thoroughly investigated to determine the timing and sequence, as well as the actual cause of damage to maximize the potentially available coverage. Just because flooding may have caused some damage does not mean that all of the damage was caused by flooding. Fire, wind, explosion, design defects, faulty workmanship and service interruption are just a sampling of other potential causes of losses sustained by insureds in connection with Sandy.

Anti-Concurrent Causation Clauses

Most insurance policies contain what is known as an "anti-concurrent causation" clause (ACC), which is designed to limit the insurer's liability when an otherwise covered peril combines with an excluded peril to create a loss. These clauses usually appear in a preamble to the exclusions section of the policy and may bar coverage when an excluded cause of loss contributes in any way, even insignificantly, to the resulting loss. In the aftermath of a storm such as Sandy, understanding the impact

of these clauses is important because when an ACC is enforced, an insurer may be able to avoid liability for both the covered and the excluded perils, depending upon how a court interprets the exclusionary language.

A typical ACC clause reads as follows:

> We do not cover loss to any property resulting directly or indirectly from any of the following. *Such a loss is excluded even if another peril or event contributed concurrently or in any sequence of the loss.*

Most New York courts enforce ACCs as long as they are clear and unambiguous. Policyholders should not automatically assume that an insurer is correct when it asserts that an ACC bars coverage. Indeed, not every policy has them for every coverage. What's more, ACCs are not always unassailably clear and unambiguous. The point is that policyholders should carefully scrutinize their policies to ensure that their insurer's reliance on an ACC is correct and supported by both the law and the facts.[3]

Notably, there is legislation in the New York Senate to prohibit ACC clauses. The Bill (S05581) was referred to the Insurance Committee, and seeks to prevent an insurer from denying or excluding coverage for a claim that would otherwise be covered by a policy solely because an event or peril that is not covered (or excluded) was a contributing factor in such loss or damage.

Service of Suit Limitations

In New York, the statute of limitations for contract actions is six years. However, parties to an insurance contract may agree in writing to a shorter (but reasonable) period of time.[4] It is not infrequent for an insurance policy to reduce the time in which an insured may institute litigation in the event of a coverage dispute. If these limitations are not carefully followed, an insured may be precluded from having a court resolve a dispute over an insurance claim.

New York law can be more stringent on this issue than the laws of many other states. For example, the Court of Appeals strongly cautioned policyholders to read their policies in *Blitman Const. v. Ins. Co. of North America*.[5] In that case, the policy shortened the insured's period to institute litigation to just 12 months. The insured argued that since the insurance carrier had 12 months to investigate the claim, it made no sense to file a lawsuit during that time. The court rejected this argument, and stated that not only was the insured bound by the terms of the insurance contract, but it could have protected itself by either beginning an action before the expiration of the limitation period, or by obtaining an extension from the carrier.

An insurance company's actions such as inspecting property, requesting documentation about the claim, issuing small payments and conducting an examination under oath, may not constitute a waiver of the insurer's contractual limitations defense.[6] Similarly, an insurer's participation in settlement negotiations, either before or after the expiration of the limitations period, may not, without more, be sufficient to prove waiver or estoppel.[7] Since the one-year anniversary of Sandy has just passed, an insured must be aware of the terms of all applicable policies.

Maximizing Number of Occurrences

Most property policies provide coverage for property damage and business interruption. Many of these policies appear to provide a high-dollar coverage limit, but can create a false sense of security due to "sublimits" of coverage. Courts throughout the United States have limited insureds' recoveries as a result of these sublimits, often resulting in a recovery that does not place the insured in the position it was before the event occurred.

In connection with Superstorm Sandy, the number of "occurrences" that caused damage to the insured must be analyzed if an insurer seeks to reduce an insured's recovery as a result of a sublimit. New York courts have determined that, with regard to first party property insurance, fact finders should consider a multitude of factors, including expectation of the parties to the coverage at issue; the circumstances under which the property damage occurred; the period of time over which the damage occurred; and the spatial proximity of the damage.[8] A deep understanding of the facts surrounding the loss is essential to maximize recovery.

For example, in *Arthur A. Johnson v. Indemnity Ins.*,[9] the court held that the collapses of separate walls, of separate buildings at separate times, were separate events and thus two different accidents within the meaning of the policy, even though the collapses were caused by one heavy rainfall.

Of course, having separate occurrences usually means that an additional deductible will apply. It is critical, therefore, to determine what deductible(s) apply, and

compare the deductible to the dollar value of the loss. In some situations, multiple occurrences may inhibit an insured's recovery.

Know Your Deductibles

Because Sandy did not have hurricane-force winds when the storm made landfall in New York, Gov. Andrew M. Cuomo declared that insurance companies could not apply hurricane deductibles to their insureds' claims. (See N.Y. Governor's Press Office, Governor Cuomo Announces Homeowners Will Not Have to Pay Hurricane Deductibles, Oct. 31, 2012, available at http://www.governor.ny.gov/press/10312012Hurricane-Deductibles). Since hurricane deductibles are usually between 2 to 5 percent of the value of damaged property, this saved insureds a substantial amount of money. However, many insureds sustained damage caused by wind, and some policies contain windstorm or "named storm" deductibles. Windstorm deductibles, which are also usually a percentage of a property's value, apply to all covered losses resulting from wind, while hurricane deductibles apply only to hurricane-related losses. Windstorm deductibles are not the same thing as hurricane deductibles and are frequently applied more broadly than are hurricane deductibles.

In many policies, "named storm" is defined as a weather-related event involving wind that has been assigned a formal name by the National Hurricane Center, National Weather Service, World Meteorological Association or any other generally recognized scientific or meteorological association that provides formal names for public use and reference, and includes hurricanes, tropical depressions, tropical storms, cyclones and typhoons.

Substation Explosion

Consolidated Edison's (Con Ed) 14th Street substation experienced a transformer explosion the evening of Sandy, causing many businesses and residents to lose power in lower Manhattan. Con Ed has blamed flood water for the explosion, and is taking measures to prevent the substation from being flooded in the future.

The Moreland Commission, appointed by Cuomo, was directed to investigate New York utility companies' preparation and response to Sandy. The Moreland Commission issued a report on June 22, 2013, opining that Con Ed was not prepared to respond to a storm with significant surge flooding such as Sandy. The Commission noted that flooding resulted in an explosion-like arcing of a piece of equipment at the substation, and that additional flooding resulted in the automatic shutdown of the 14th Street and East River Transmission Substations, which caused a loss of power to over 220,000 customers in lower Manhattan.

For those that experienced a loss of utility services, insurers will undoubtedly take the position that any business interruption is a flood-related loss, and depending upon the provisions of an insured's policy, this determination could prove to be devastating. Policyholders should review their policies to determine whether they have coverage for service interruption, whether the coverage applies to the insured's situation, and whether flood to a service provider's facility is actually flood under the insured's policy.

Conclusion

Policyholders must scrutinize their insurance policies to ensure that they comply with any service of suit limitations, but also to determine all applicable coverages and exclusions in order to maximize recovery. Not all policies are identical, and not all claims occurred in the same manner. As such, a careful evaluation of the cause or causes of loss is also necessary.

Endnotes

1 *Throgs Neck Bagels v. GA Ins. Co. of New York*, 241 A.D.2d 66, 69 (1st Dep't 1998).

2 *Molycorp v. Aetna Cas. & Surety*, 78 A.D.2d 510, 510-11 (1st Dep't 1980) (citing *Harris v. All State Ins.*, 127 N.E.2d 816 (1955)

3 See, e.g., *Molycorp*, 78 A.D.2d at 510-11 (construing anti-concurrent cause language in favor of insured where language was ambiguous).

4 CPLR §201.

5 66 N.Y.2d 820 (1985).

6 *Penna v. Peerless Ins.*, 510 F. Supp. 2d 199, 207 (W.D.N.Y. 2007).

7 *Beekman Regent Condo. Ass'n v. Greater New York Mut. Ins.*, 45 A.D.3d 311 (1st Dep't 2007).

8 *World Trade Center Properties v. Hartford Fire Ins.*, 345 F.3d 154, 190 (2d. Cir. 2003)

9 7 N.Y.2d 222, 230 (1959)

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