Maximizing Recovery for Superstorm Sandy Claims

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As the first anniversary of the storm approaches, insureds should consult their policies.

Superstorm Sandy devastated the east coast last Oct. 29, causing billions of dollars of damage to New Jersey. As a result, businesses suffered extensive property and economic damages, including damage to their buildings and contents and business interruption losses. Policyholders turned to their insurance carriers, thinking that they had coverage, but soon learned that they did not have the coverage they thought they had.

The one-year anniversary of Sandy is almost here. Insureds must carefully review all applicable policies to assess and evaluate coverage, and watch out for any "service of suit" limitations that may prescribe the period in which a suit can be brought against the insurer.

CHECK FOR A SERVICE OF SUIT LIMITATION

Many insurance policies contain limitation provisions that may contractually shorten the time in which an insured can bring a lawsuit against the insurer for issues arising out of the policy. Of course, the statute of limitations in New Jersey for a contract claim is six years, but it is not uncommon for a policy to shorten the limitations period. For example, a Lloyd's of London commercial property policy contains the following language:

> *D. Legal Action Against Us.*
>
> *No one may bring a legal action against us under this Coverage Part unless:*
>
> 1. *There has been full compliance with all of the terms of this Coverage Part; and*
> 2. *The action is brought within 2 years after the date on which the direct physical loss or damage occurred.*

Northridge Tenants Corp. v. Certain Underwriters at Lloyd's of London, 2009 N.J. Super. Unpub. LEXIS 1559 (App. Div., June 17, 2009). Courts have interpreted New Jersey law to permit insurance companies to shorten the time to bring a lawsuit to as brief as one year. *Id.; Azze v. Hanover Ins. Co.*, 336 N.J. Super. 630 (App. Div. 2001).

Although any limitations period begins to run on the date of the casualty, it could be tolled from the time the insured gives notice to the insurer until the time the insurer declines liability in writing. *Gahney v. State Farm Ins. Co.*, 56 F.Supp. 2d 491, 495-96 (D. N.J. 1999); *Northridge Tenants Corp. v. Certain Underwriters*

at Lloyd's of London, 2009 WL 1675715, at *1 (App. Div., June 17, 2009). Insurers will take the position that the clock on Sandy-related damage started to run on the date that the storm first caused damage. But courts have held that any time spent by the insurer investigating the claim may not count against the policyholder. For example, under cases like *Peloso*, if a claim was reported on Nov. 15, 2012, and the insurer investigated but did not deny the claim until Dec. 30, 2012, the time between those two dates should not count against the policyholder in calculating whether the suit was brought within the time limitation.

However, most insurers issued denials fairly quickly following Sandy, and as a result, policyholders must pay close attention to the limitation period in their particular policy.

NOT ALL DAMAGE WAS CAUSED BY FLOOD

Insureds with flood exclusions or even flood sublimits in their policy 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 and other causes. Many commercial policies also provide additional coverage for losses from, for example, service interruption, decontamination costs, civil authority, and protection and preservation of property.

The loss should be thoroughly investigated to determine the timing and sequence, as well as the actual cause of a policyholder's damages 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.

BE AWARE OF ANTI-CONCURRENT CAUSATION CLAUSES

In the aftermath of a storm such as Sandy, these clauses may become important because, in many situations, losses may be caused by more than one peril, e.g., flooding and wind. Most insurance policies contain what is known as an "anti-concurrent causation" clause, which is designed to limit the insurer's liability when an otherwise covered risk combines with an excluded peril to create a loss. When an anti-concurrent causation (ACC) clause 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.

There are few published cases in New Jersey addressing ACC clauses, and the New Jersey Supreme Court has not yet fully decided the issue of whether these clauses are enforceable. However, it does appear that where such clauses are properly drafted and not ambiguous, they will be upheld. See *Assurance Co. of Am. v. Jay-Mar*, 28 F.Supp. 2d 349, 353-54 (D. N.J. 1999) ("Where included and excluded causes of loss occur concurrently, it appears that New Jersey's lower courts have not been predisposed to find coverage."); *Petrick v. State Farm Fire and Cas. Co.*, No. A-1152-09T3, 2010 WL 3257894, at **6-7 (App. Div. Aug. 13, 2010) (upholding anti-concurrent causation clause).

In *Franklin Packaging Co. v. California Union Ins. Co.*, 171 N.J. Super. 188, 256-57 (App. Div. 1979) *certif. denied*, 84 N.J. 434 (1980), the court applied "Appleman's rule" in a situation where multiple events occurred sequentially to produce a loss. There, the court found that damage to inventory was a loss proximately caused by vandalism, when that damage resulted from a sequence of events beginning with vandalism to a water valve, and ending with damaged inventory because of a clogged drainpipe.

Under Appleman's rule: "[R]ecovery may be allowed where the insured risk was the last step in the chain of causation set in motion by an uninsured peril, or where the insured risk itself set into operation a chain of causation in which the last step may have been an excepted risk." *Auto Lenders Acceptance Corp. v. Gentilini Ford*, 181 N.J. 245, 257 (N.J. 2004), citing 5 John Alan Appleman, *Insurance Law& Practice*, §1383, at 309-11 (1970). This means that an insured has coverage "where the included cause of loss is either the first or last step in the chain of causation which leads to the loss." *Simonetti v. Selective Ins. Co.*, 372 N.J. Super 421, 431 (N.J. App. Div. 2004). But, where covered and excluded perils act concurrently to cause a loss, "it is for the factfinder to determine which part of the damage was due to the included loss and for which the insured can recover."

KNOW THE APPLICABLE DEDUCTIBLE

On Nov. 2, 2012, the New Jersey Governor's Office issued Executive Order Number 107 to aid policyholders in the wake of Sandy. Executive Order 107 provides that because Sandy was categorized by the National Weather Service as a post-tropical storm, "it shall be a violation of [the New Jersey Administrative Code] for any insurer

to apply a mandatory or optional hurricane deductible to the payment of claims for property damage attributable to Sandy." Since hurricane deductibles are typically calculated between two to five percent of the value of the damaged property, New Jersey policyholders saved thousands of dollars in deductibles.

Although the hurricane deductible should not apply to those affected by Sandy, many policies contain windstorm or "named storm" deductibles. Windstorm deductibles apply to all covered losses resulting from wind and hail, 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. Some policies do not define "wind." The following example from an FM Global policy, however, is an example of a definition of "wind" in a commercial insurance policy: "Direct action of wind including substance driven by wind. Wind does not mean or include anything defined as flood in this Policy."

Typically, "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.

CONSIDER TAKING ADVANTAGE OF METHODS FOR RESOLUTION

New Jersey also established a nonbinding mediation program for insureds with unresolved claims. See, generally, *In re Establishment of a Mediation Program to Aid in the Resolution of Claims Related to Storm Sandy*, N.J. Dep't Banking & Ins. Order No. A13-106. The mediation program, overseen by the American Arbitration Association, is available for any commercial or residential insured whose property claim was denied, and where the amount in controversy exceeds $1,000. The insurers must provide notice to the policyholder regarding the availability of mediation, and also bear the cost of the mediation. The authors of this article have participated in some successful mediations in New Jersey, although the program overall has achieved mixed results. Nevertheless, it provides the opportunity for a policyholder to resolve its Sandy claim without litigation.

In sum, 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.

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