

Anti-Concurrent Causation Clauses May Play Major Role In Hurricane Sandy Claims

ACCORDING TO RECENT ESTIMATES, economic damages inflicted by Hurricane Sandy could reach \$30 to \$50 billion. The geographic

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scope of the storm was unprecedented and the impact on individuals and commerce is still largely unknown. The estimated economic damage includes all losses, regardless of whether those losses will ultimately be covered by insurance. As government officials, property owners, business owners, and insurance adjusters struggle to assess the destruction, the amount of damages and the portion of those damages that will be covered by insurance remain uncertain.

One of the most challenging issues with respect to property claims is determining which peril(s) actually caused the damage. When Sandy battered the East Coast with high winds and a massive storm surge, many homes in the Queens, New York neighborhood of Breezy Point were destroyed by a fast-spreading fire. In other areas, damage was caused by a number of other conditions, such as rain, power outages, looting, and vandalism. Which of these multiple conditions “caused” the loss and did the conditions work independently, concurrently, or “in a sequence” to cause the damage? These are the questions that insurers and insureds will face as they work their way through the Sandy claims.

This is because many policies exclude coverage for certain perils. Common exclusions include loss resulting from “acts of God,” flood, wind, falling trees, electrical outages, or sewer backups. Approximately 70 percent of New Yorkers in flood zones do not have flood insurance in place, putting their claims – including wind and fire claims – at risk. A careful analysis of the precise nature and cause of the damage to a policyholder’s property is necessary to determine whether coverage exists. Although many courts addressed issues involving similar policy exclusions and causation issues following Hurricane Katrina, there is limited legal authority concern-

ing these coverage issues since property claims are not frequently litigated.

Causation is a Key Factor in Determining Whether a Loss is Covered Under the Applicable Policy

Under what some courts have termed the “efficient proximate cause doctrine,” when a loss is caused by the combination of both covered and excluded perils, the loss is fully covered by the insurance policy if the covered risk proximately caused the loss. Under this doctrine, if a policy covers wind damage but excludes water damage, the insured may recover for damages if it can show that the wind (covered peril) proximately or efficiently caused the loss, notwithstanding that there were other excluded causes like flooding contributing to that loss. The “efficient proximate cause doctrine” is the default causation rule in some jurisdictions.

Many insurers have attempted to contract around the “efficient proximate cause doctrine” by including an “anti-concurrent causation” clause (an “ACC”) in their policies. Such a clause excludes damage caused by an excluded cause of loss even if it is partially caused by a covered cause of loss. When a policy contains an ACC, depending on the specific language of the clause, insurance carriers may deny an otherwise covered claim — like fire or wind — regardless of the sequence of events. They may also deny an otherwise covered claim even if both events are shown to have contributed to the loss at the same time.

Although the case law in this area is still developing, some courts that have addressed anti-concurrent causation clauses have found that exclusionary language designed to avoid the “efficient proximate cause” doctrine is unambiguous and enforceable. These clauses are particularly relevant in connection with Hurricane Sandy because much of the damage resulted from multiple perils.

Three of the leading cases in this area interpret anti-concurrent causation clauses under Mississippi law with differing outcomes. In *Leonard v. Nationwide*

Mutual Insurance Co., 499 F.3d 419 (5th Cir. 2007), the court concluded that the ACC in the policy prohibited recovery when covered and excluded perils each contributed to the policyholder's loss. The homeowner's policy at issue was a "comprehensive," or "all-risk," policy pursuant to which all damage to dwellings and personal property not otherwise excluded was covered. In addition, the policy, like most homeowner policies, covered only damage caused by certain perils and excluded damage causes by others. The policy covered losses caused by wind-related damage but excluded damage caused by water, including flooding. The ACC at issue provided that "[w]e 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 to the loss."

The destruction to the Leonards' home was caused by a concurrently caused peril, i.e., a tidal wave, or storm surge—essentially a massive wall of water—pushed ashore by Hurricane Katrina's winds. Accordingly, the insurer argued that losses attributable to storm surge-induced flooding were excluded under the ACC. The court held that the clause was unambiguous and excluded coverage for water damage "even if another peril" — e.g., wind — "contributed concurrently or in any sequence to cause the loss." The court further upheld the use of the ACC to circumvent the "efficient proximate cause doctrine."

However, in *Corban v. U.S. Auto Ins. Assoc.*, 20 So.3d 601 (Miss. 2009), the court held that a homeowner's insurer may be liable for a portion of the plaintiffs' damages to their home from Hurricane Katrina where the anti-concurrent language provided that "[w]e do not insure for loss caused directly or indirectly by any of the following . . . regardless of any other cause or event contributing concurrently or in any sequence to the loss."

The court focused on the terms "loss," "concurrently," and "in any sequence" in holding that the wind and flood acted in sequence, not "concurrently," resulting in separate losses. The court found the phrase "in any sequence" ambiguous as applied to water peril because of its location in the policy within an exclusion dealing solely with water damage. The court concluded that if the property suffered damage from wind, but separately was damaged by flood, the insured is entitled to be compensated for those losses caused by wind.

In *Robichaux v. Nationwide Mutual Fire Insurance Co.*, 81 So.3d 1030 (Miss. 2011), the court held

that the ACC did not eliminate coverage where the evidence showed that not all of the damage to the insured's home was caused by the simultaneous convergence of wind and water. A fact issue remained as to whether the insureds' home and personal property was damaged from windstorm during the hurricane prior to destruction of their home from flooding due to the storm surge.

In two recent Massachusetts cases, the court enforced anti-concurrent causation provisions contained in property policies. In both cases, the court construed surface water exclusions — both of which incorporated anti-concurrent causation language — to preclude coverage for property damage where surface water (an excluded peril) was a direct or indirect cause of the property damage. Significantly, the court observed that there is no overarching concern "to protect some aspect of the public welfare" that would prevent anti-concurrent causation provisions from being enforced as written under Massachusetts law.

Conclusion

Although some courts are willing to enforce anti-concurrent causation provisions, the case law in this area is still developing and there have not yet been any cases that specifically address Sandy-related causation coverage issues. Moreover, there is significant pressure from various government entities to block the application of the anti-concurrent causation clauses in cases involving Hurricane Sandy losses. It remains to be seen whether insurers will invoke those clauses as a result of the multiple conditions that resulted in widespread devastation, which would likely lead to Sandy-related insurance coverage litigation in 2013.

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