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When the Going Gets Tough: Getting Paid in Full on Your Superstorm Sandy Insurance Claim

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Policyholders and insurance companies are getting down to brass tacks on complex commercial insurance claims arising out of Superstorm Sandy. Although there are many areas where policyholders have been able to reach consensus with their insurance companies on how losses are to be adjusted, a handful of legal and factual issues are creating standoffs and holding up the resolution of large insurance claims. Because large amounts are at stake in many of these claims, these issues may result in litigation.

Policyholders should undertake a detailed analysis of the policy language and facts involved when determining what they are owed on their Sandy insurance claim and deciding whether or not their claim is being handled properly. The analysis should encompass the points below.

Application of Sublimits (and Deductibles) for Named Storm, Windstorm, Storm Surge and Flood

Many commercial property insurance policies have deductibles and sublimits that apply to losses caused by certain perils. For example, a policy might generally provide $20 million in limits, subject to a 5 percent deductible, but only provide $2 million in coverage for flood losses. Is the deductible 5 percent of $2 million, or 5 percent of the total value? Exactly what limits are available and what sublimits apply depends on the specific terms in your insurance policy — and virtually every large commercial property policy that we have reviewed following Sandy is worded differently. Some policies define and set sublimits for things like “Named Storm,” “Windstorm” and “Flood.” Others do not. Some include “Flood” losses within the “Named Storm” sublimit when such losses happen concurrently, while others treat such losses in the reverse. Accordingly, obtaining a full and proper recovery on your Sandy claim depends on a very careful analysis of all the relevant terms in your property insurance policy.

It is especially important that policyholders realize the differences between Named Storm, Windstorm, Storm Surge, and Flood. Although Superstorm Sandy was not a “Hurricane” when

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it made landfall in New York and New Jersey, it still was a Named Storm, as it was a post-tropical depression at the time. Therefore, an insurance policy's Named Storm or Windstorm deductible might apply, but the Hurricane deductibles would not.

We have recently seen several commercial property insurance policies that will cover or exclude a named storm or a flood. We have also dealt with Sandy losses where flooding occurred concurrently with the named storm, but where the insurance policy excluded only ensuing floods. In those cases, since the floodwaters either preceded or were concurrent with Sandy's landfall, the flooding was not an *ensuing* loss and coverage was required.

We have also had cases where the insurance policy included one sublimit for "Named Storm" and a different sublimit for "Flood." Depending on the policy wording, in situations where both types of loss occurred, the policyholder might be able to add the two sublimits together, since both types of loss occurred and they are not mutually exclusive. That said, some policies contain an "anti-stacking clause," which often specifies that in such situations only the highest sublimit for the various covered perils applies. Others do not.

Whether a particular sublimit applies also might depend on the sequence of events that resulted in the damage. If the windstorm preceded the flood, and it was the windstorm that caused a loss, coverage for the windstorm should be afforded, even if the policy contains an anti-concurrent causation clause (discussed in more detail below). We had one instance where a fire preceded the flooding and, therefore, the resulting loss had to be covered in full (although the additional damage caused solely by the flood was subject to the policy's flood sublimit).

Interpretation and Application of Anti-Concurrent Causation Clauses

Many policyholders with flood exclusions and "anti-concurrent causation" clauses in their policies are being told by their insurance companies that the clauses eliminate all or most of the coverage for their losses. Although anti-concurrent causation clauses generally are onerous and broad, in a practical sense they are not necessarily a bar to coverage. It is the adjuster's job to separate what damage was caused by which peril, i.e., wind versus water. Where covered property damage occurred before the excluded damage, there should be coverage for the covered damage. For example, if wind damaged the insured property's roof and allowed water to enter, such damage would be covered, whether or not the property subsequently was damaged by floodwaters.

For most large storms, the wind damage occurs first, followed by flooding. In many hurricanes (which involve wind gusts much stronger than those experienced on land during Sandy), where property was damaged or destroyed by wind prior to the flood, all of the wind loss damage generally should be covered. A building could be destroyed by wind, then be flooded. In such a situation, because the floodwaters cause no additional damage, no excluded loss occurred. As the saying goes: you can't spoil a rotten egg.

In some states, anti-concurrent causation clauses are not enforced because they undermine a policyholder's reasonable expectations of coverage or are contrary to state statutes. *See* California Insurance Code §§ 530, 532; N.D. Code Ann. §§ 26.1-32-01, 26.1-32-03; *West National Mut. Ins. Co. v. University of North Dakota,* 643 N.W.2d 4 (N.D. 2002); *Murray v. State Farm Fire & Cas. Co.,* 509 S.E.2d 1, (W. Va. 1998); I*n Vision One, LLC v. Philadelphia Indem. Ins. Co.,* 276 P.3d 300 (Wash. 2012). Although decisions in intermediate appellate courts have enforced anti-concurrent causation clauses in New York and New Jersey, neither states' highest court has ruled on the issue, and the fact patterns involved in many Sandy losses might provide a context for the establishment of pro-policyholder law on the issue in these two states. A similar result would also follow if a bill now before the New York State Legislature, prohibiting generally the use of anti-concurrent causation clauses in New York state, passes. *See* N.Y. Assembly Bill No. A07455A; N.Y. Senate Bill No. S5581.

Coverage for Losses Due to Service Interruption (aka What Caused the Power To Go Out?)

Many policies promise to cover the policyholder's business interruption losses due to off-premises power interruption. Obviously, many businesses suffered significant losses due to Sandy-related power outages, but policies typically only cover service interruption losses if the outage was caused by a covered peril. Furthermore, most flood exclusions have an exception for losses where the flooding leads to an "explosion" that causes loss or damage. So, for many policyholders with service interruption losses, a key question is: Why did the power go out?

For policyholders with flood coverage, the question generally is academic since an outage due to either flooding or explosion would lead to a covered service interruption loss. But for policyholders that don't have flood coverage, a lot depends upon the nature and impact of the explosions at power generation and transfer facilities that may have contributed to the widespread power outages in the Northeast region. Insurance companies have been pushing a story that the explosions reported on the news and Internet were not actually *explosions*. According to insurance companies, these explosions were simply electrical arcing occurring when many circuit breakers flipped simultaneously, without causing or contributing to the power outages. This self-serving description of events, however, seems questionable on several levels and will be subjected to a significant amount of scrutiny before it is accepted as a basis for the denial of what surely is millions of dollars in otherwise covered service interruption claims. Indeed, one lawsuit challenging the insurance industry's position about the ConEd "explosion" already has been filed — pitting a hotel owned by Donald Trump against one the country's biggest property insurance companies (*see Bayrock/Sapir Organization LLC v. Affiliated FM Ins. Co. et al.*, filed in the Supreme Court of the State of New York, County of New York).

Coverage for Losses Due to Closures by Order of Civil Authority

Businesses located in mandatory evacuation zones were significantly impacted by Superstorm Sandy — not just because property was damaged, but also because evacuations made it difficult or impossible for customers to access their businesses. Other businesses outside the evacuation zones faced lesser but similar problems due to the shutdown of the mass transit system and area bridges and tunnels. Business interruption losses under such circumstances generally are covered under civil authority provisions included in most commercial property insurance policies. Nevertheless, many insurance companies are trying to limit the amounts being paid on such claims on two fronts.

First, insurance companies are requiring a heightened prohibition on access to the insured premises in order to trigger the civil authority coverage. For example, insurance companies are arguing that access needs to be "prohibited" even though the policy language promises coverage based on a more liberal standard.

Second, insurance companies are limiting the duration of coverage to a period measured from the mandatory evacuation on October 28, 2013, until a subsequent executive order was issued by Mayor Bloomberg on October 31, which allowed reoccupation of buildings once New York's Buildings Department determined they were safe.

Policyholders should be vigilant in pursuing a full recovery despite these insurance company arguments. Regarding the heightened triggers urged by some insurance companies, policyholders should insist that the language in their policy be applied to fulfill the insurance company's contractual obligation to pay. If the policy explicitly requires a total prohibition of access in order for coverage to apply, then so be it. If, however, the policy promises coverage based on a lesser impairment of access, then the claim should be adjusted on that basis.

Similarly, we have not seen any civil authority language that restricts coverage based on post-loss interim phases of reoccupation of affected areas. Rather, civil authority coverage is triggered by the mandatory evacuation (based on Executive Order 163, issued on October 28) and continues *at least* until the property at issue is allowed to be reoccupied — not when the property theoretically could have been reoccupied if only the Buildings Department had inspected it and approved such re-occupancy.

All in all, many policyholders are facing improper pushback from their insurance companies and as a result, still have not been able to finalize their insurance claims and move forward from the disruptions caused by Superstorm Sandy. Policyholders should carefully review and understand exactly what coverage their insurance policy provides and should insist on a full and fair payment on their business interruption insurance claims.▲

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