

After Sandy, NY Insurers May Lose Favored Litigation Tool

By Bibeka Shrestha

Law360, New York (May 21, 2013, 8:43 PM ET) -- A New York Democrat on Friday proposed outlawing policy language that insurers use to deny coverage for losses that stem from both insured and excluded causes, legislation inspired by Superstorm Sandy that would nix insurer-friendly precedent in New York and bring it in line with more catastrophe-prone states.

New York Assemblyman Phil Goldfeder, D-Rockaway Beach, introduced a bill that would prevent insurance companies from using anti-concurrent clauses, which wipe out coverage when a loss has several causes and one of those causes is excluded under a policy.

The anti-concurrent clause often comes into play when there's property damage from both wind, which is typically covered by private insurers, and flooding, which is covered by the government if policyholders have taken out coverage with the National Flood Insurance Program.

Although the anti-concurrent policy language has been the source of much confusion and led to mixed results in courts, New York is one state that hasn't shied away from enforcing it, according to Sharon Angelino, a partner at Goldberg Segalla LLP.

"New York and New Jersey have a particularly favorable body of case law, and courts have been enforcing those provisions," Angelino said. "In other states, not insignificantly, some of the states more commonly affected by catastrophes, those clauses don't have the same teeth for an insurer that they do in New York and New Jersey."

Some states, like North Carolina and Texas, have said that as long as one of the causes of a loss is insured, a claim is covered, according to Joseph Fields, special counsel at McCarter & English LLP.

Other jurisdictions have adopted a less policyholder-friendly standard that allows for coverage when the predominant cause of the loss is insured, Fields said.

Courts in New York, New Jersey and most other states affected by Sandy have strictly enforced anti-concurrent causation clauses, according to William Krekstein, a partner at Nelson Levine de Luca & Hamilton LLC.

"It's no secret that those clauses are in there, and those clauses have been in there for a while now," Krekstein said.

But Marshall Gilinsky, a shareholder at Anderson Kill & Olick PC, said anti-concurrent clauses have a way of sneaking up on policyholders when they're facing losses that they expect to be covered by traditional policies.

Catastrophes like Sandy and Hurricane Katrina have pushed lawmakers to put anti-concurrent clauses under the microscope.

"Unfortunately it takes horrible things like Sandy to highlight the need for things like this," Gilinsky said. "Hopefully, given what we all know happened after Sandy, it's something that's going to have traction in Albany."

Krekstein said he viewed Goldfeder's bill, A. 7455, as a "kneejerk reaction" to Sandy, which caused devastating flooding and property damage in New York, New Jersey and neighboring states.

Since the October storm, legislation revolving around anti-concurrent clauses has been introduced in other states. Earlier this month, Maryland **approved a law** requiring insurers to inform consumers about the anti-concurrent clause annually, though these notices do not create a private right of action.

"I think they're probably coming out with it because they're getting complaints from consumers who are questioning why their claims are being denied," Krekstein said.

Fields said he would expect considerable voter support for the New York bill, but that the arcane subject matter could be an obstacle in getting the legislation passed. And according to Angelino, while the law would prevent confusion and give greater protection to policyholders, those benefits will likely come at a price.

"If something like this happens where anti-concurrent clauses are prohibited, the market will react," Angelino said. "The market is not going to bear the cost of that itself. It's going to find a way to pass the cost on to the customer."

But policyholders have much to gain if the legislation succeeds, as it would provide certainty about the type of coverage they are buying, Fields said.

"If New York state were to enact a statute, it would not be anything outlandish or extraordinary. It would merely bring New York in line with a number of other states," Fields said. "To the extent the Legislature can make it more understandable for people, I think it's all a step in the right direction."

--Editing by Elizabeth Bowen and Richard McVay.

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