

## Fate Of Significant Sandy-Inspired Bills Still Uncertain

By **Bibeka Shrestha**

*Law360, New York (October 29, 2013, 9:14 PM ET)* -- Galvanized by Superstorm Sandy, state lawmakers hit the ground running with a slew of measures designed to alleviate storm victims' insurance troubles. A year later, a few uncontroversial bills have been signed into law, but the future of high-impact pieces of legislation remains foggy.

As insurers expected, proposals began pouring into legislatures in the months after Superstorm Sandy pounded the Northeast, much like they had after disasters struck in other states. But the most eye-catching changes that lawmakers have introduced since Sandy remain pending a year out.

"Most of them ran out of steam, and very few of them have been signed into law," said Gary Thompson, a Reed Smith LLP partner.

Lawmakers in New York and New Jersey have sounded the call for a ban on anti-concurrent clauses, which insurers use to deny coverage for losses that stem from both insured and excluded causes. State representatives in those states also pushed controversial measures that would give policyholders the express right to take insurers to court if they act in bad faith and to win punitive damages and legal fees.

The New York State Assembly in June resoundingly approved bills that would outlaw anti-concurrent clauses and create a private right of action for unfair claims settlement practices by insurers, but the state's Senate has yet to take action.

Meanwhile, New Jersey lawmakers continue to mull two measures that would create a private cause of action for bad faith, including a more limited proposal that was floated in September.

Some of the legislation inspired by Sandy has stuck, however.

Connecticut in June greenlighted a law that lets the state's insurance department set up a mediation program for property insurance claims from catastrophes.

New Jersey now has a law on the books that requires insurers to give policyholders a one-page summary of notable coverages and exclusions, after Sandy left many shocked about the losses that their insurers would not cover.

And in early May, Maryland adopted a law that forces insurers to annually tell consumers about anti-concurrent clauses in their homeowners policies.

William Krekstein, a partner at Nelson Levine de Luca & Hamilton LLC who counsels insurers, said those

measures weren't as likely to make waves as the others that have been proposed, however.

"The notice requirements are one thing, the mediation requirements are another thing, but when you're legislating against specific clauses in the policy and when you're legislating for new causes of action, those have more of an impact," Krekstein said.

Thompson said the most important development that could come out of Sandy is the passage of legislation that would require insurers that act in bad faith to pay exemplary damages and attorneys' fees.

"Having a one-page summary of your policy, gee that's nice, but where's the teeth?" Thompson said. "Policyholders need something they can fight with."

Dennis Artese, an Anderson Kill PC shareholder who counsels policyholders, said lawmakers are on the right track. They have honed in on some of the key issues that storm victims face after disasters such as Sandy, including anti-concurrent clauses and the ability to bring bad faith actions, Artese said.

Though New York lawmakers have watered down the bill banning anti-concurrent causation clauses so that it applies only when flood exclusions are in play, they nonetheless are realizing that the policy provisions are "inherently unfair," according to Artese.

"Any pro-policyholder legislation in New York is challenging. You're up against a massive insurance lobby," Artese said. But "if there's ever a time something like this would pass, this is it."

The insurance industry has lobbied hard against the anti-concurrent bill, but elected officials might approve it anyway, according to Barry Weissman, a partner at Edwards Wildman Palmer LLP.

"They want to have good sound bites, good things that they've done to protect homeowners and companies when the next one hits, because we all know the next one is going to hit," Weissman said.

If the bill is passed, insurers will struggle to underwrite the new risks they will face, Weissman added.

Doing away with anti-concurrent clauses will also come with trade-offs for policyholders, said Lawrence Mirel, a Nelson Levine de Luca & Hamilton LLC partner who was formerly the insurance commissioner for the District of Columbia.

"The anti-concurrent clauses are designed to keep costs down," Mirel said. "If you get rid of them, costs for premiums will go up because there will be more losses to pay."

The other major type of legislation that policyholders are cheering on are the bills that would create a private cause of action for bad faith conduct by insurers.

According to Thompson, Florida, Louisiana, Texas and other storm-prone states have handed bad faith rights to policyholders.

"After [hurricanes] Katrina and Wilma, policyholders in Louisiana and Florida kept insurers honest," Thompson said. "Without that bad faith option, it's the opposite."

New York has traditionally been an unfriendly state to policyholders that try to bring bad faith actions, and any changes will be met with strong opposition by insurers.

"The insurance industry will fight that tooth and nail, as the plaintiff's industry is going to fight it tooth and nail," Weissman said.

But New Jersey, known as one of the most liberal and consumer-oriented states when it comes to insurance, could be more open to passing changes to its bad faith law, attorneys say.

“I think that we will see more support for this given that representatives' constituents remain unhappy with the insurers' handling of their claims,” said Sherilyn Pastor, the leader of McCarter & English LLP's insurance coverage group. “The victims of Sandy have been vocal about their displeasure with insurers.”

Robert Chesler, an Anderson Kill shareholder, expressed more skepticism about the future of the bad faith bill in New Jersey, however.

“People are a little wary about giving such broad insurance bad faith powers to people,” Chesler said. “Senators and assemblymen don't seem to be jumping on this.”

--Editing by Jeremy Barker and Chris Yates.

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