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Insurance Coverage Issues Arising from Superstorm Sandy

By Finley Harckham and Dennis J. Artese

The devastation left in the wake of Superstorm Sandy was unprecedented in the Northeastern United States. There were widespread power outages affecting approximately eight and half million customers. In anticipation of the storm, governors and other officials declared states of emergency and issued mandatory evacuation orders. Major highways, bridges and public transportation were closed in New York, New Jersey and other areas. It has been called the worst disaster in the 108-year history of the New York Metropolitan Transportation Authority.

Each of these events has important implications for coverage under commercial property insurance policies. Like many natural disasters that preceded it, Superstorm Sandy has given rise to a number of unique and important commercial property insurance coverage issues. Nearly a year and half after the storm, most of these issues are just starting to wind their way through the courts.

Named Storm Deductibles

Many commercial property insurance policies provide for higher "named storm" deductibles than standard per occurrence deductibles. How the policy defines "named storm" can often be critical in determining whether a named storm deductible applies to a Sandy-related loss.

Finley Harckham is a senior litigation shareholder in Anderson Kill's New York office and serves on the firm's Executive Committee. Mr. Harckham regularly represents and advises corporate policyholders in insurance coverage matters. He has successfully litigated, arbitrated and settled hundreds of complex coverage claims. His areas of particular focus include property loss, business interruption, directors and officers liability, construction, professional liability and general liability claims.
212-278-1543 | fharckham@andersonkill.com

Dennis J. Artese is a shareholder in Anderson Kill's New York office. His practice concentrates on insurance recovery litigation, with an emphasis on securing insurance coverage for first-party property losses, third-party liability claims and construction disputes. Mr. Artese has recovered millions of dollars of insurance proceeds on behalf of policyholders in connection with claims for fire losses, equipment breakdowns, property damage and business income losses resulting from natural disasters, aircraft property damage, construction liabilities, asbestos bodily injuries and economic losses resulting from political corruption, among others. Additionally, Mr. Artese represents a wide variety of clients in general commercial disputes and complex Chapter 11 bankruptcy litigations.
212-278-1246 | dartese@andersonkill.com

While Sandy did at one time possess hurricane characteristics, it lost those traits prior to making landfall in New Jersey, and the National Weather Service downgraded it to a post-tropical cyclone hours before it came on shore in Brigantine, New Jersey. This is significant for coverage purposes because some policies define "named storm" to mean a hurricane, tropical cyclone or tropical depression, none of which accurately describe Superstorm Sandy.

Some insurance companies nonetheless have set out to apply so-called "hurricane" or "named storm" deductibles to covered Sandy losses despite the National Weather Service's classification of Sandy as a post-tropical cyclone and admonishments by the governors of affected states not to do so. In A*FP 104 Corp. v. Columbia Casualty Company,* United States District Court for the District of New Jersey (Civ. Action No. 13-4077), plaintiff policyholder, a resort and spa located in Long Branch, New Jersey, suffered about $800,000 worth of damage as a result of Sandy. The property insurance policy at issue contained a minimum $1 million named storm deductible. Named storm was defined in the policy as follows:

> A storm that has been declared to be a named tropical storm or hurricane by the U.S. National Weather Service or other government authority including hurricane or tropical storm spawned tornado(s) or microburst(s). The named tropical storm or hurricane … ends when the National Weather Service officially declares the named tropical storm or hurricane permanently downgraded to a tropical depression.

The court denied the insurance company's motion to dismiss, holding that, if later proven to be true, plaintiff's allegation that "[u]pon landfall in New Jersey, Sandy was characterized as a post-tropical storm," easily establishes that the named storm deductible is not applicable to plaintiff's claim.

Civil Authority Coverage

Many businesses that did not suffer property damage at their insured locations resulting from Superstorm Sandy did nonetheless suffer a loss of business income resulting from the storm. While "standard" business interruption coverage would not apply under such circumstances, other time element overages, such as "civil authority" coverage, may apply. Civil authority coverage typically is triggered where access to the insured premises is prohibited, prevented or impaired by the action/order of a civil authority, such as a city's mayor. While direct physical loss or damage caused by a covered cause of loss still is required in order to trigger civil authority coverage, that loss or damage can occur away from the insured premises, and the damaged property need not be owned by the insured. However, policyholders who do not have flood coverage may not be able to take advantage of an order of civil authority if the order to vacate was related solely to flooding, and not also to concerns about wind damage. Non-specific orders can lead to coverage disputes.

Executive orders in New York City have given rise to some disputes regarding the period of time during which insurance companies will cover civil authority losses. Some insurance companies have argued that coverage is terminated at the time of former Mayor Bloomberg's Executive Order 165, which permitted reoccupation of premises in lower Manhattan only after the Buildings Department certified it was safe to do so. In many cases, however, policyholders were not permitted to reoccupy their premises for weeks and even months after Executive Order 165 was issued. The theoretical time in which such policyholders could have reoccupied their premises had the Buildings Department allowed it should have little bearing on the insurance companies' obligations to pay civil authority claims for the entire period of time such policyholders were forced to vacate their premises, as long as the order was related to a covered cause of loss.

In other cities, evacuated policyholders are facing challenges proving up orders of evacuation. In those areas, local police made rounds forcing those in harm's way to evacuate. With no written record of the evacuation order, policyholders are resorting to obtaining affidavits from local authorities concerning the forced evacuations in order to trigger civil authority coverage.

Service Interruption Coverage and Ensuing Loss

Another form of "off premises" time element coverage relied on by many businesses in the wake of Superstorm Sandy is known as service interruption coverage. This covers business interruption losses resulting from damage to personal property of a utility necessary to supply the insured premises with things such as power, water, communication, natural gas, sewage and Internet access. Typically, the property damage at the utility must be caused by a covered cause of loss under the policy.

In some areas of New York City and other locations affected by Sandy, certain utilities preemptively shut down power in order to preserve the integrity of the electrical system during the storm. While there is little authority on the subject, there is some support that a shutdown of this nature constitutes a covered event under a property insurance policy. See *Wakefern Food Corp. v. Liberty Mut. Fire Ins. Co.,* 406 N.J. Super. 524, 540, 968 A.2d 724, 734 (App. Div. 2009) (blackout case; holding that a power plant's inability to perform its essential function of providing electricity constitutes "physical loss or damage" for purposes of coverage under a property insurance policy). Some insurance companies, however, are challenging coverage.

Moreover, although it has been widely reported in the media that a massive transformer explosion occurred at the 14th Street Con Edison plant, knocking out power to tens of thousands of customers in Lower Manhattan on the evening of October 29, 2012, many insurance companies have argued that this was mere electrical arcing caused by flood, which is excluded under many policies, not an "ensuing loss" in the form of an explosion that triggered service interruption coverage. That issue is currently making its way through the New York courts in a number of different cases involving losses of several millions of dollars.

Conclusion

It should hardly come as a surprise that a storm as massive and unique as Sandy has given rise to unique and complex insurance coverage issues. For some claimants, these issues are being negotiated behind the scenes and out of the courts, while other claimants, typically those with more substantial losses, have been forced to bring suit to have these and other issues resolved. With perseverance and strong coverage counsel, policyholders stand an excellent chance of succeeding on the unique coverage issues arising out of Superstorm Sandy. ▲

About Anderson Kill

Anderson Kill practices law in the areas of Insurance Recovery, Commercial Litigation, Environmental Law, Estate, Trusts and Tax Services, Corporate and Securities, Antitrust, Bankruptcy, Real Estate and Construction, Public Law, Government Affairs, Anti-Counterfeiting, Employment and Labor Law, Captives, Intellectual Property, Corporate Tax and Health Reform. Recognized nationwide by Chambers USA for Client Service and Commercial Awareness, and best-known for its work in insurance recovery, the firm represents policyholders only in insurance coverage disputes — with no ties to insurance companies and has no conflicts of interest. Clients include Fortune 1000 companies, small- and medium-sized businesses, governmental entities, and nonprofits as well as personal estates. Based in New York City, the firm also has offices in Ventura, CA, Dallas, TX, Stamford, CT, Washington, DC, Newark, NJ, and Philadelphia, PA.