Staying Covered in Wind v. Flood Property Insurance Disputes

by John G. Nevius and Joshua Gold

Many policyholders have wind coverage, but not flood coverage. With some insurance policies, the distinction between the two and the timing of resulting damage can be crucial in successfully obtaining insurance dollars to offset losses when the worst happens. Unfortunately, reports commissioned by insurance companies too often overlook facts that could give rise to coverage (e.g., instances where the actual cause of the loss was wind-derived damage that may have subsequently allowed flooding).

Competing causes are of particular concern when it comes to property insurance policies that contain so-called anti-concurrent causation clauses, which insurance companies often rely on to deny coverage when wind and flood are in play. Where wind and water combine, therefore, policyholders are well advised to take a close look at how two or more causes interact. Even in insurance policies without anti-concurrent causation clauses, some insurance policies contain provisions that purport to both provide coverage and exclude coverage stemming from flooding with complicated (and often unclear) terms that focus on the sequence of the damage and the interplay of two or more perils. Thus, policyholders are wise to inspect these policy terms closely when considering the circumstances of their property loss or damage.

Anti-concurrent clauses stand traditional policyholder protections on their head by purporting to preclude all coverage where at least one uncovered cause allegedly contributes to a loss. These clauses are so questionable that draft legislation is presently circulating in New York to curtail their use, if not ban them altogether. Some courts have held that they violate public policy.

Even in those jurisdictions that permit the use of such clauses, where damage can be separated in time or causally, a thorough review of the facts by a neutral engineer or meteorologist may establish insurance coverage for a claim even where flooding was a factor and the policy does not include flood coverage.

Efficient Proximate Cause

Over the years, courts generally have looked to the "efficient proximate cause" in evaluating what caused a loss. Efficient proximate cause may sound complicated, but is really just a fancy way of saying that for coverage to apply, a "covered peril," such as wind, had to be the actual cause of all or part of the loss, not merely one link in an extended chain of causation leading up to damage.

For the reasons mentioned above, coverage disputes involving wind and water may boil down to the competing testimony of one "expert" against another. Many experts obtain their bread and butter through the insurance business they generate. Recently, a policyholder significantly helped support its own claim following a substantial Sandy loss by hiring a meteorologist to address the assertions of the insurance company's expert. The meteorologist's report showed that the initial insurance company report did not rely upon official data. In fact, some of the data was not even derived from nearby collection points. The insurance company report also ignored the timing of the actual storm development and minimized the potential damage from wind shear, despite evidence of high winds near the ground and whipping around structures.

That Asserted Coverage Defense May Be Indefensible

The fundamental points, as with almost all coverage disputes: 1) do not just take no for an answer; 2) review the insurance company rationales with an appropriate air of skepticism and consider retaining your own expert; 3) always re-read the policy language. Denial letters have been known to selectively quote policy terms and conditions and may also take exclusionary language out of context. A fact that appears to favor a coverage defense at first blush often can be construed in a way favorable to coverage.

A favorable interpretation where insurance policy language is unclear is your right as a policyholder, especially when it comes to terms that seek to limit or bar coverage. Such policy provisions must also be set forth clearly and are to be construed narrowly. Ambiguities in policy language or structure (e.g., conflicting language in two or more places) must be interpreted in the policyholder's favor. Most insurance policy language is essentially offered on a take-it-or-leave-it basis and thus insurance policies are routinely referred to as contracts of adhesion. The law in almost

every state requires that unclear policy language be construed against the insurance company. In fact, the Florida Supreme Court recently reaffirmed this point in an important insurance coverage ruling.

Storm claims can be particularly complicated where certain evidence is not readily available or is otherwise in dispute, such as when wind damage precedes water damage. You and your property may be all wet after a loss, but you need not stay that way. Dry yourself off, stick to your guns and show your insurance company that you have the same kind of resolve in pursuing your claim as it may have in finding reasons to deny it.

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