

Superstorm Sandy Claims and The Anti-Concurrent Causation Clause

RELATED ATTORNEYS

Dennis T. Smith

RELATED PRACTICE AREAS

Insurance & Indemnification

9.5.14

Many of the homeowner Superstorm Sandy cases will be ripe for judicial resolution. One issue that has not been definitively decided by this State is how New Jersey Courts will interpret a policy containing a clause that denies coverage for a covered cause of loss when accompanied by an excluded cause of loss regardless of the sequence. Such Anti-Concurrent Causation clauses (ACC) are frequently contained in homeowners' insurance policies. Usually, the provision is included as the first paragraph under the Exclusion Section of the policy and provides:

"We will not pay for loss or damage caused directly or indirectly by any of the following. Such loss or damage is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss."

Insurance companies have attempted to eliminate the need for courts to search for the efficient proximate cause of a loss by incorporating ACC clauses into their policies. These clauses attempt to preclude any claim that involves the particular excluded peril, even if that is only one of multiple causes of the loss. Such clauses were challenged and examined in courts following Hurricane Katrina. Until the New Jersey Supreme Court tackles this issue, we are left with an educated guess as to how the ACC clauses will play out in New Jersey. New Jersey courts have historically been protective of its insureds reading exclusionary provisions narrowly, coverage provisions broadly and have sought to interpret insurance policy provisions to meet the insured's reasonable expectations. With this in mind, the rationale of the Mississippi Supreme Court in *Corbin v. U.S.A.A.* may provide insight as to how a New Jersey Supreme Court may weigh in on this issue.

In *Corbin v. United Services Automobile Association*, 20 So.3d 601 (Miss. 2009), the Mississippi Supreme Court considered an ACC clause providing: “We do not insure for loss cause directly or indirectly by any of the following. Such loss is excluded regardless of any other cause or event contributing concurrently or in any sequence to the loss.” The Court interpreted the word “loss” in the ACC clause as occurring when the insured suffers deprivation, physical damage, or destruction of his property and most significantly, held “[t]he insured’s right to be indemnified for a covered loss rests at the time of loss. Once the duty to indemnify arises, it cannot be extinguished by a successive [sequential] cause or event.” Id. at 613. Thus, the Court found that the ACC clause only applied when covered peril, (such as wind) and an excluded peril, (such as water) truly act “concurrently” meaning “in conjunction, as an indivisible force occurring at the same time to cause direct physical damage resulting in loss.” Id. at 614. The court found that the “in any sequence” language contained in the ACC clause created an ambiguity and may not be used to divest an insured of his right to be indemnified for covered losses. Thus, the court rejected the proposition that under the ACC clause, damage caused by both excluded and covered perils or other causes is not covered. The Court explained:

“[t]he ACC clause applies only if and when covered and excluded perils contemporaneously converge, operating in conjunction, to cause damage resulting in loss to the insured property. If the insured property is separately damaged by a covered or excluded peril, the ACC clause is inapplicable. If damage is caused by a covered peril, the insured is entitled to indemnification for the covered loss, as the insured’s right to recover for the loss has vested. Conversely, if the damage is caused by an excluded peril, the insured is not entitled to indemnification for that uncovered loss. Based on the evidence thus far presented, the same loss with multiple causes is not an issue here. Thus, a finder of fact must determine what losses, if any were caused by wind, and what losses, if any were caused by flood. If the property suffered damage from wind, and separately was damaged by flood, the insured is entitled to be compensated for those losses caused by wind. Any loss caused by “[flood] damage” is excluded. If the property first suffers damage from wind, resulting in a loss, whether additional “[flood] damage” occurs is of no consequence, as the insured has suffered a compensable wind-damage loss. Conversely, if the property first suffers damage from flood, resulting in a loss, and then wind damage occurs, the insured can only recover for losses attributable to wind. Id. 618”

Clearly, as Hurricane Sandy claims continue to be evaluated, the ACC clause will remain a source of debate. While many property damage policies exclude damages for flooding, if it can be established that property damage was caused by wind, including wind-driven rain, recovery can be obtained. The cause of damage to a particular home and the dollar value of the damage will generally be fact questions for the jury based on battling expert reports.