SUPER STORM SANDY AND THE INEVITABLE ISSUES WITH ANTI-CONCURRENT CAUSATION

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NEW JERSEY, NEW YORK AND PENNSYLVANIA ALLOW FOR ANTI-CONCURRENT CAUSATION LANGUAGE IN INSURANCE POLICIES BUT SUBJECT TO NARROW JUDICIAL INTERPRETATION

1. Introduction

In the aftermath of Super Storm Sandy, insurers are facing an onslaught of property claims. One of the major issues facing insurers in New York, New Jersey and Pennsylvania will be concurrent causation and the anti-concurrent causation clauses and endorsements found in their policies. The anti-concurrent clauses found in many insurance policies will undoubtedly be given a closer look and put to the test.

A number of different anti-concurrent causation clauses are in use today. These clauses intend, among other things, to be a response to most jurisdictions where, in instances of concurrent causation, (i.e. where multiple factors independently cause a loss, one of which is covered and the other is not) oftentimes the insurance policy must respond, even for the uncovered loss. One of the more commonly used anti-concurrent clauses is found in ISO Causes of Loss-Special Form (CP 10 30 04 02), which specifically excludes coverage for loss or damage:

We will not pay for loss or damage caused directly or indirectly by any of the following…. [lists a number of factors]. Such loss or damage is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss.

[Emphasis added].

In general terms, in jurisdictions that follow a concurrent cause analysis, coverage is allowed whenever two or more causes contribute to a risk and at least one of them is covered under the policy. On the other hand, in jurisdictions that employ the doctrine of efficient proximate cause (discussed further below) to determine if there is coverage for a loss, the leading or predominant cause of loss will determine coverage. As noted above, inserting anti-concurrent causation language into a policy seeks to redress the issue of broadened coverage. An overview of key cases reveals that New Jersey, New York and Pennsylvania allow for anti-concurrent causation language in insurance policies, albeit subject to a high level of judicial scrutiny and any ambiguity is interpreted against the insurer and in favor of the insured.

2. Case Law Analysis
A. New Jersey

i. Concurrent Causes of Damages


ii. Anti-Concurrent Clauses

In New Jersey, the anti-concurrent clause in an insurance policy must be clear and unambiguous. In *Petrick v. State Farm Fire and Casualty Company*, 2010 NJ Super LEXIS 1964 (2010), Plaintiffs William and Tanja Petrick submitted claims for damage to their home and personal property arising from a Nor'easter storm on November 10, 2005 to their insurer, State Farm. Apparently, water infiltrated the home, causing water damage to the interior of the structure and contents and subsequently the development of a severe mold condition that impaired the building’s structural integrity. At the time of the storm, a homeowner policy issued by State Farm providing coverage for accidental direct physical loss to the property was in effect. The policy, however, contained a “Fungus (Including Mold) Exclusion Endorsement” with an exclusion pertaining only to wet or dry rot. However the endorsement also modified the language of Section 1 – Losses Not Insured so that it read:
We do not insure under any coverage for any loss which would not have occurred in the absence of one or more of the following excluded events. We do not insure for such loss regardless of: (a) the cause of the excluded event; or (b) other causes of the loss; or (c) whether other causes acted concurrently or in any sequence with the excluded event to produce the loss; or (d) whether the event occurs suddenly or gradually, involves isolated or widespread damage, arises from natural or external forces, or occurs as a result of any combination of these:

g. Fungus, including:

* * *

(2) any remediation of fungus from covered property or to repair, restore or replace that property;

* * *

Nonetheless, limited coverage for damage caused by fungus was restored by a coverage endorsement entitled “Fungus (Including Mold) Limited Coverage Endorsement” which provided:

Remediation of Fungus.

a. If fungus is the result of a covered caused of loss other than fire or lightening, we will pay for:

* * *

(2) any remediation of fungus, including the cost or expense to:

(a) remove the fungus from the covered property or to repair, restore or replace that property.

The policy’s Declaration Page disclosed “Fungus (Including Mold) Limited Coverage” in the amount of $50,000.

The Petricks made a property claim under the policy and, State Farm, following an inspection of the premises, paid the policy limits of $50,000, pursuant to the Fungus Limited Coverage Endorsement, in addition to living expenses for the Petricks while work was being performed on the home. In August 2006, upon the completion of the home repairs, the Petricks retained an engineering firm to perform an inspection of the home. In an engineering report dated August 29, 2006, it was opined, “Storm water remediation was not performed in a timely manner and as a result mold formed and attacked finish materials and underlying timber structural members.” Apparently, mold
remediation had been performed two times, effectively removing most of the surface mold, but some mold spores remained. Based upon the engineering findings, it was opined that the most cost effective method to get rid of the mold was to demolish the entire structure to the foundation and then rebuild the house.

This report was furnished to State Farm on September 27, 2006. State Farm denied further coverage, stating that it had paid its full $50,000 limit for mold remediation. On December 18, 2006, the Petricks filed suit against State Farm, demanding coverage under the dwelling portions of the policy. State Farm moved for summary judgment. The motion judge found for State Farm, ruling that the Petricks’ claim was limited to the $50,000 as provided by the Fungus Limited Coverage Endorsement, and since State Farm had paid that amount, it granted State Farm partial summary judgment on August 3, 2007.

There were several procedural issues following the foregoing ruling, however, the case eventually made its way to the Superior Court of New Jersey, Appellate Division. On appeal, the Appellate Division took into consideration the engineering report issued in September 2006, concluding that the home should be razed and rebuilt based upon an alleged lack of structural integrity caused by mold or fungus. The court also took note that the State Farm Policy included an endorsement containing a sequential loss provision excluding damage caused by fungus regardless of “other causes of the loss” or “whether other causes acted concurrently or in any sequence with the excluded events to produce the loss.” In addressing the validity of sequential loss provisions for the first time in New Jersey, the court relied on a reference made to such a provision in Simonetti v. Selective Ins. Co., 372 N.J. Super 421, 431, 859 A.2d 694 (App. Div. 2004).

In Simonetti, the court found homeowner’s insurance coverage for a policy that did “not contain an anti-concurrent or anti-sequential clause….., which would exclude coverage when a prescribed excluded peril, alongside a covered peril, either simultaneously or sequentially, causes damage to the insured.” Simonetti relies on Assurance Co. of America, Inc. v. Jay-Mar, Inc., 38 F. Supp. 2d 349, 352-354 (D.N.J. 1999) where the federal district court recognized the lack of statutory or judicial prohibitions against the existence of anti-concurrent causation clauses in New Jersey and therefore determined such clauses to be enforceable:

*Because the New Jersey Supreme Court has not given this Court reason to believe otherwise, this Court finds that New Jersey would follow the majority rule regarding loss due to sequential losses: there is no violation of public policy when parties to an insurance contract agree that there will be no coverage for loss due to sequential causes even where the first or the last cause is an included cause of loss.*

Thus, relying on Simonetti and Jay-Mar, the Court in Petrick found the anti-sequential clause contained in State Farm’s policy enforceable and not contrary to public policy.
B. Pennsylvania

i. Concurrent Causes of Damage

In the absence of an anti-concurrent clause, Pennsylvania law provides that “where the insured risk was the last step in the chain of causation set in motion by an uninsured peril, or where the insured risk set into operation a chain of causation in which the last step may have been an excepted risk’ the insured recovers.” O’Neill v. State Farm Ins. Co., 1995 U.S. Dist. LEXIS 4790, 1995 WL 214409, 3 (E.D. Pa)(E.D. Pa., 1995)(quoting from 5 Appleman, Insurance Law and practice §3083 at 311 (1969)). In reaching its decision the court in O’Neill cites to and relies on a Delaware case, Cavalier Group v. Strescon Indus., Inc., 782 F. Supp. 946 (D.Del., 1992). Cavalier Group in turn cites to two leading treatises, Appleman and Couch, in support of the view that absent an anti-concurrent clause, a chain of causation that includes covered and non-covered events will result in a covered loss. Cavalier Group. 782 F. Supp. at 956.

In Mongar v. Windsor-Mount Joy Mut. Ins. Co., 2011 Pa. Dist. & Cnty. Dec. LEXIS 520 (Pa. County Ct. 2011), the court found that vandals breaking into a property set in motion an uninterrupted chain of events, which included the release of water inside of the property. One of the vandals opened faucets inside the property, but because the two events (opening of faucet and release of water) happened at the same moment, in absence of an anti-concurrent clause, the loss is covered.

Mongar relies on Spece v. Erie Insurance Group. 2004 PA Super. 154, 850 A.2d 679 (Pa. Super. Ct., 2004) where a transformer near the homeowner’s residence was hit by lightening, resulting in a power outage. As a result of the power outage, the homeowner’s sump pump stopped working, resulting in interior water damage to the finished basement. The insurer denied coverage because the policy excluded damage caused by water that overflowed from within a sump pump and excluded claims due to power interruption if the interruption took place away from the residence. The court found that because a covered cause of loss (lightening strike) contributed to the flooding of the basement combined with the two exclusions relied upon by the insurer to be ambiguous and granted summary judgment in favor of the homeowners.

ii. Anti–concurrent clauses

In Bishops, Inc. v. Penn Nat’l Ins., 2009 PA Super 225, 984 A.2d 982, 993-94 (Pa. Super. Ct., 2009), the insured, a fabric wholesaler, sustained sewer and drain back-up damages to its business premises as a result of extensive flooding caused by Hurricane Ivan on September 17, 2004. Bishops suffered a total loss of inventory and office equipment when water runoff backed up through the municipal drainage system during torrential rains and when nearby bodies of water overflowed and inundated the town. The insurer proffered coverage for damaged office equipment under an electronic data processing endorsement but denied coverage for the physical damage, relying on several exclusions related to generalized flooding and ground water. The policy issued to Bishops contained exclusions for, among other causes of loss, “ground water” but also
contained a “Penn Pac Endorsement”, which specifically provided coverage for water that backs up from a sewer or drain.

The insured challenged the limitation on coverage. In response, Penn National filed a motion for partial summary judgment, requesting that the court enforce the concurrent cause exclusion in the all-risk policy which provided under Section B - Exclusions:

1. *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.*

   * * *

   g. *Water*

   * * *

   (3) *Water that backs up or overflows from a sewer, drain or pump.*

The trial court denied Penn National’s motion and entered judgment in favor of Bishops, but limited the insured’s recovery to the $5,000 afforded by an extra cost endorsement to the all-risk policy. Both sides, being dissatisfied with the result, appealed.

On appeal, the court found that the insurer’s concurrent cause exclusion was unenforceable and the insured was entitled to coverage under both the sewer/drain back up endorsement and the business income and extra expense coverage form of the underlying policy. Specifically, the court found the intent embodied in the Penn Pac Endorsement extending coverage to water backing up from a sewer or drain to be uncertain when applied to the anti-concurrent causation language and subject to more than one reasonable interpretation. Because the Penn Pac Endorsement and the anti-concurrent causation language in Exclusion B.1.g.(3) of the policy was found to be ambiguous, it was construed in favor of the insured and against the insurer.

C. New York

i. Concurrent Causes of Damage

Providence Washington, the insurer, rejected the insured’s claim based upon the exclusion for vandalism and malicious mischief in the policy. The trial court dismissed Plaintiff’s complaint on the ground that the loss sustained was an indirect rather than a direct loss.

The appellate court reversed the lower court’s ruling, finding that in the context of insurance, where a peril specifically insured against sets other causes in motion which, in an unbroken sequence and connection between the act and the final loss, produces the result for which recovery is sought, the insured peril is regarded as the proximate cause of the entire loss. It is not necessarily the last act in a chain of events, which is regarded as the proximate cause, but the efficient or predominant cause, which sets into the motion the chain of events producing the loss. An incidental peril outside the policy, contributing to the risk insured against, will not defeat recovery. Citing to 5 Appleman, Insurance Law and Practice, §3083, pp. 309-311.

Later, in Kula v. State Farm Fire & Cas. Co., 212 AD 2d 16, 628 N.Y.S. 2d 988, 1995 N.Y. App. Div. LEXIS 7234 (N.Y. App. Div. 4th Dep’t 1995), the court found that New York has not adopted the efficient proximate causation doctrine. Instead, “[o]nly the most direct and obvious cause should be looked to for purposes of [applying an] exclusionary clause…”. However, six weeks later in Kosich v. Metropolitan Prop. and Cas. Ins. Co., 626 N.Y.S. 2d 618, 619 (App. Div., 4th Dep’t 1995), the same court stated that “[t]o determine causation, one looks to the ‘efficient or dominant cause’ of the loss….”

In Throgs Neck Bagels v. GA Ins. Co., 241 A.D. 2d 66, 671 N.Y.S.2d 66, 1998 N.Y. App. Div. LEXIS 3848 (N.Y. App. Div. 1st Dep’t 1998), the court noted that in determining whether a particular loss was caused by an event covered by an insurance where other, non-covered events operate more closely in time or space in producing the loss, the question of whether the covered event was sufficiently proximate to the loss to require that the insurer compensate the insured will depend on whether it was the dominant and efficient cause. See also, Home Ins. Co. v. American Ins. Co., 147 A.D. 2d 353, 537 N.Y.S. 2d 516, 1989 N.Y. App. Div. LEXIS 765 (N.Y. App. Div. 1st Dep’t 1989).

However, it appears that New York may not now be following the efficient proximate cause test in determining whether to grant coverage or not. In the 2001 case of Bebber v. CNA Ins. Co., 189 Misc. 2d 42, 729 N.Y.S.2d 844, 2001 N.Y. Misc. LEXIS 288 (N.Y. Sup. Ct. 2001), the court applied a concurrent causation approach in determining whether coverage should be granted to the insured (Plaintiff) homeowner. The Plaintiff homeowner sought to recover under his homeowner’s policy, when his in-ground swimming pool lifted out of the ground about two feet after it was drained in order to clean the pool. The insurer denied coverage based upon a policy exclusion for property damage caused by water, meaning water below the surface of the ground, including water which exerted pressure on swimming pools or other structures. The court held that but for the drainage of the pool, the damage would not have occurred. The draining set in motion subsequent natural processes, which resulted in the damage. When the natural force (underground water and soil conditions) is present before or concurrent with the affirmative act (draining the pool), the natural force cannot be considered an intervening
or concurrent cause of the damage in determining legal liability.

ii. Anti-concurrent Clauses of Loss

In Jahier v. Liberty Mutual Group, 64 AD 3d 683, 883 N.Y.S.2d 283, 2009 N.Y. App. Div. LEXIS 5803, 2009 NY Slip Op 5948 (NY. App. Div. 2d Dep’t 2009), Liberty Mutual appealed a judgment declaring it obligated to provide coverage for certain damage to the insured Plaintiff’s property pursuant to a Deluxe Homeowners Insurance policy, insuring, inter alia, the plaintiffs’ residence and other structures located on the property. In April 2007, the Plaintiffs’ in-ground swimming pool, the surrounding patio area, and the plumbing that serviced the pool sustained damage when the pool lifted up several inches out of the ground. At the time of the loss the pool was not filled with water as a contractor hired by Plaintiffs to perform maintenance work had drained it. During the time the pool was empty, and shortly before the plaintiffs discovered the damage, heavy rains had fallen over the area. Plaintiffs made a claim pursuant to the policy but the insurer denied coverage based upon excluded losses due to “earth movement” and “water damage.”

The appellate court found that the trial court had erred in denying the insurer’s motion for summary judgment and in granting plaintiffs’ cross motion for summary judgment because the insurer, Liberty Mutual, met its initial burden of establishing its entitlement to judgment as a matter of law by demonstrating that the “water damage” exclusion clearly and unambiguously applied to the loss. The plain language of the exclusion relieved Liberty Mutual from loss caused:

“directly or indirectly” by “[w]ater damage, meaning….[w]ater below the surface of the ground, including water which exerts pressure on…a building…swimming pool or other structure.” Furthermore, losses due to “water damage” are excluded “regardless of any other cause of event contributing concurrently or in any sequence to the loss.”


3. In Summary

Insurance carriers have already been inundated with claims from Super Storm Sandy. Because of the significant financial impact that Sandy has wrought to the Mid-Atlantic States, insurers should anticipate significant policyholder, regulatory and legal push back when handling a policyholder’s claim. Where an anti-causation clause is
written in unambiguous and clear language, it should be upheld, albeit subject to strict scrutiny in New Jersey, New York and Pennsylvania. Where insurance policies do not contain anti-concurrent causation language, the result is less certain, since the tendency in the courts has been to broaden coverage in favor of the policyholder.

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