Helping the Region Rebuild: An Orientation to Property Insurance Coverage, Flood Insurance and FEMA
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In the aftermath of Hurricane Sandy, attorneys in New Jersey will be needed to assist consumers handling property damage claims with insurers. This outline covers issues related to commercial and homeowner's coverage. The National Flood Insurance Program ("NFIP" is a federally subsidized insurance program administered by the Federal Emergency Management Agency ("FEMA") and the Federal Insurance Mitigation Administration designed to provide access to affordable flood insurance that would be unavailable otherwise. [1] See 42 U.S.C. §§4001 & 4002 (2006). A Standard Flood Insurance Policy ("SFIP") is codified at 44 C.F.R. Pt. 61. FEMA authorizes private companies, known as "Write Your Own" ("WYO") Companies to issues SFIPs and adjust SFIP claims, in accordance with internal company standards in light of FEMA guidance. *Suopys v. Omaha Prop & Cas.,* 404 F.3d 805, 807 (3d Cir 2005).

Property insurance policies insure against direct physical damage to property. "All-risk" property policies provide coverage to all risk of physical loss but contain exclusions that limit loss coverage. An "all-risk" policy creates a "special type of insurance", extending to risks not usually contemplated, and recovery under the policy will generally be allowed, at least for all losses of a fortuitous nature, in the absence of fraud or other intentional misconduct of the insured, unless the policy contains a specific provision expressly excluding the loss from coverage." 43 *Am Jur. 2d Insurance* Section 505 (1982) If a loss follows multiple causes, such as hurricane and wind, rain and flood, a determination must be made whether the perils worked independently of or in sequence with one another and precisely where possible what damage each peril caused. A "named peril" policy of insurance insures against a specifically identified cause. 1-1 Appleman, Insurance Law and Practice, §1-06 (2012)

The insurer bears the burden of proving that an exclusion in a property insurance policy applies to the loss. If the insured offers sufficient credible evidence to establish a prima facie loss within the coverage of the policy, the burden of proving that the loss falls within the exclusionary provisions of the policy shifts to the insurer. *Kopp v. Newark Ins. Co*., 204 N.J. Super, 415, 421 (App. Div. 1985); see also *Wakefern Food Corp. v. Liberty Mut. Fire Ins. Co.*, 406 N.J. Super 524, 538, (App. Div.) certif. denied 2009 N.J. LEXIS 851 (N.J., July 16, 2009)

There are several rules that apply in New Jersey to property damage claims. If only one peril caused a specific loss, then if the loss is a covered loss, then coverage should be provided. This is even if there were other, multiple perils working at the same time to cause property damage in the same vicinity. Application of the multiple cause theory is necessary only when multiple perils work to cause the same loss (concurrent cause)

- "Efficient proximate cause" rule- the proximate cause of the loss must be a covered cause. Proximate cause means the risk that set the others

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in motion- it looks to the quality of the links in the chain of causation. The efficient proximate cause is the predominating cause of the loss. When the perils act in a sequence to cause the same loss, then the "efficient proximate cause" test is used.

For example, if a hurricane breaks a gas main that starts a fire, and the hurricane is an excluded cause of loss, then the loss would not be covered

- "Concurrent cause" rule- concurrent cause means that the perils acted independently of one another to simultaneously cause the same loss. The concurrent cause doctrine permits coverage when a loss results from multiple causes, as long as one of the causes is an insured risk. If any one of multiple non-remote causes of the same loss is a non-excluded peril (or a specific peril under a named peril policy) then the loss is covered. In this instance, prove that the loss would not have occurred but for the operation of a covered cause.

The evidence must be gathered to allocate the total loss based on the direct physical damage caused by covered and non covered causes. [2]

As a result of the far reaching application of the efficient proximate cause rule, anti-concurrent" cause language began to appear in policies, to avoid the use of this rule and force a close reading of the contractual language. Some states such as California (California Insurance Code §530) and North Dakota (North Dakota Century Code 26.1-32.01) have codified the "efficient proximate cause" rule by statute, regardless of the policy language, if the proximate cause of the loss is not an excluded peril, then the loss is covered under the policy. Although a court can bar the application of the anti-concurrent causation language as contrary to an insured' reasonable expectations (which has occurred in Washington and West Virginia) this has not occurred in NJ.

New Jersey Courts enforce the efficient proximate cause rule. *Assurance Co., 0f Am., Inc. v. Jay-Mar, Inc.* 38 F. Supp. 2d 349, 353 (D.N.J. 1999) (an insured is normally afforded coverage where an "included cause of loss is either the first or last step in the chain or causation which leads to the loss.") but if a policy is drafted to eliminate the efficient proximate cause doctrine, it will be upheld. *Um v. Cumberland Ins Group,* 2008 N.J. Super. Unpub. LEXIS 2800 (App. Div. Mar. 13, 2008). In *Um*, the Appellate Division held that "contrary to plaintiff's contention, the exclusion did not frustrate their reasonable expectations of coverage." *15. See also *Simonetti v. Selective Ins. Co*. 372 N.J. Super, 421, 428 859 A.2d 694 (App. Div. 2004) enforcing an "anti-concurrent clause"

"Generally, '[w]hen interpreting an insurance policy, courts should give the policy's words their plain, ordinary meaning." *Nav-Its Inc. v. Selective Ins. Co. of Am.* 183 N.J. 110, 118, 869 A.2d 929 (2005) (quoting *President v. Jenkins*, 180 N.J. 550, 562, (2004). Courts must give effect to their parties' reasonable expectations in contracting for insurance coverage. *Flomerfelt v. Cardiello*, 202 N.J. 432, 441, 997 A.2d 991 (2010)

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Exclusions in insurance policies are construed narrowly. *Princeton Ins. Co. v. Chunmuang*, 151 N.J. 80, 95, 698 A.2d 9 (1997) Exclusions will be enforced if the language is "specific, plain, clear, prominent, and not contrary to public policy." Ibid. Normally, "when an insurance policy uses an exclusion which bars coverage for losses caused by a particular peril, the exclusion applies only if the excluded peril was the "efficient proximate cause of the loss." *Zurich Am. Ins. Co. v. Keating Bldg. Corp,* 513 F. sup. 2d 55, 70 (D. N.J. 2007) (quoting *Auto Lenders Acceptance Corp. v. Gentilini Ford, Inc.,* 181 N.J. 245, 257 854 A.2d 378 (2004).

Because an insurance policy is a contract of adhesion, ambiguous policy language is interpreted in favor of the insured to give effect to the insured's reasonable expectations. *Doto v. Russo*, 140 N.J. 544, 559, 659 A.2d 1371 (1995). If the policy language is sufficiently ambiguous to support two meanings, one that favors the insurer and one that favors the insured, the policy should be construed to provide coverage. *President v. Jenkins*, 180 N.J. 550, 562, 563 853 A. 2d 247 (2004). Ambiguity is present when the "phrasing.. is so confusing that the average policyholder cannot make out the boundaries of coverage." *Weedo v. Stone-E-Brick, Inc.* 81 N.J. 233, 247, 405 A.2d 788 (1979)

"If the words used in an exclusionary clause are clear and unambiguous, a court should not engage in a straining construction to support the imposition of liability." The burden is on the insurer to bring the case within the exclusion. " *Flomerfelt,* supra , 202 N.J. at 442 (2010) (quoting *Longobardi v Chubb Ins. Co.*, 121 N.J. 530, 582 A.2d 1257 (1990) Coverage depends on the terms of the insurance policy, and because the policy is a contract, its interpretation is a question of law. *Adron, Inc. v. Home Ins. Co.,* 292 N.J.Super. 463, 473, 679 A.2d 160 (App. Div. 1996).

Sampling of Prominent Issues and Cases

- ***Mold developing following a covered cause of loss:***

Simonetti v. Selective Ins. Co. 372 N.J. Super. 421, 859 A.2d 694 (App.Div. 2004)
The appellate division reversed the entry of summary judgment to an insurer in action for coverage under a homeowner's policy because a question of fact was presented as to whether some or all of the damage, including mold in the home, was caused by a rainstorm and water leakage in the home. If the insured proves that the mold resulted from a covered peril (the rain) then the cost of removing the mold was not a loss separate from, or caused by, the mold itself, but rather was within the coverage provided under the policy. (there was an exclusion for mold in the policy)
*NOTE :there was no anti-concurrent or anti-sequential clause in the Selective policy

For an example of a situation where there is a mold endorsement for specified perils, and no coverage for the simple formation of mold unrelated to these enumerated perils, see ***Chadwell v. NJ Manufacturers*** 2011 N.J.Super. Unpub. LEXIS 31 (App. Div. Jan 6, 2011).

- ***Efficient Proximate Cause Tested***

Puhlovsky v. Rutgers Cas. Ins. Co., 2012 N.J.Super. Unpub. LEXIS 2091 (App. Div. Sept.7 2012)
Damage and Loss to a Building related to wall damage caused by demolition next door and other causes, contributed to by earth movement
Declaratory Judgment action for coverage since Rutgers denied coverage, relying on certain exclusions related to damage caused by ordinance or Laws as well as earth movements regardless of any other cause. On appeal, the court found that Rutgers had

not proven that the exclusions applied and that the fact finder must perform this analysis under the "efficient or proximate cause" of the loss rule. The court below erred in applying the "anti-concurrent clause" in the policy because it applied only to select exclusions and not the ones at issue here.

Victory Peach Group Inc., v. NY Mutual Ins Co., 310 N.J. Super 82, 707 A.2d 1383 (App.Div. 1998)
Roof under repair was covered by a tarpaulins and sustained damage from a heavy windstorm that ripped off the tarpaulins and securing shingles. Rainwater entered the building and caused water damage. The policy contained an exclusion for damage caused by rain to personal property in the open. The court also did not apply the provision that limits coverage for loss or damage caused by rain, since it was not the rain, but the damage to the roof that caused the loss.

- ***The Proof of Loss- Evidence- Is An Expert Required?***

Weshifesky v. State Farm Fire & Casualty Co., 2006 N.J.Super. Unpub. LEXIS 1207 (App. Div. May 4, 2006) Home damaged by heavy wind and rain that caused water to enter the house. State Farm denied roof repair, asserting that normal wear and tear are excluded. After the trial court barred Plaintiff's experts from testifying, he entered SJ for defendant, reasoning that Plaintiff's damages could not be submitted to a jury without expert testimony on the issue of causation. The Appellate Division reversed, finding that Plaintiff's own testimony, together with the reasonable inferences from the jury as to the cause of the loss would be sufficient.

Zions v. Essex Ins. Co., 2009 N.J. Super. Unpub. LEXIS 1318 (App. Div. May 29, 2009) Home undergoing repairs, tarpaulin on the roof and on a side wall to protect the contents. An exclusion exists for rain damage unless first wind causes damage to the roof or wall through which the rain enters. However, since the Plaintiff failed to show the rain entered the building through the roof or through walls that were first damaged by wind, the exclusion applied.

Petrick v. State Farm Fire & Cas. Co., 2010 NJ Super Unpub. LEXIS 1964 (App. Div. Aug. 13 2010)
Damage to home caused by Nor-easter storm included fungus damage and structural damage. Plaintiff alleged that force of wind had damaged the building and roof, causing water intrusion and loss of personal property. Plaintiff asserted that the moisture in the home could not have occurred absent water entering the home, but the Court held that since Plaintiff had not established that the opening was caused by a direct force of wind, their claim failed and the exclusion for rain applied. Plaintiff challenged the validity of the sequential loss provisions and the Appellate Division indicated that it is not contrary to public policy.

- ***Ambiguity in Policy Favored Coverage***

Wakefern Food Corp. v. Liberty Mut. Fire Ins. Co., 406 N.J. Super 524, 538, (App. Div.) certif. denied 2009 N.J. LEXIS 851 (N.J., July 16, 2009)

Consequential loss or damage resulting from an interruption of electrical power to supermarkets applied only if there is physical damage to off-premises electrical plant and equipment. On appeal, the court concluded the term "physical damage" in the policy was ambiguous and based on the evidence that power from the plant was interrupted for several days, concluded that the loss was covered.

- ***Standard Flood Insurance Policy***

Barmil v. The Standard Fire Insur. Co. 2011 U.S. Dist. LEXIS 135952 (D.N.J. Nov 28, 2011) Standard Flood Insurance policy issued by private carrier as per FEMA. Flood coverage provided for structure and contents. 60 day deadline for filing proof of loss will be enforced. Despite Standard's representations during the adjustment of the claim, and ongoing collection of data before the filing of the Proof of Claim, plaintiff had an absolute duty to file the Proof of Claim by the deadline. A private party can only estop government agents from strictly enforcing the law in those extraordinary cases and there is no affirmative misconduct in this case. Strict adherence to the conditions precedent to payment is required.
See also ***Vanschaik v. Allstate Ins. Co.,*** 2010 U.S.Dist. LEXIS 100285 (D.N.J. Sept 23, 2010); ***Miller v. Selective Insurance Co. of America*** 2009 U.S. Dist. LEXIS 116332 (D.N.J. Dec 15, 2009) ***Uddoh v. Selective Insurance Co. of America*** 2012 U.S.Dist. LEXIS 100905 (D.N.J. July 20, 2012)

- ***Bad Faith in a First Party Property Claim***

Bello v. Merrimack Mut. Fire Ins. Co., 2012 N.J. Super. Unpub. LEXIS 1654 (App.Div. July 12, 2012) Significant damage was sustained to a retaining wall of a multi-unit home caused by wind, a covered peril under the homeowners policy. Merrimack paid 1/10 of the estimated cost to repair, citing to deterioration of the wall, and a "pre-existing" condition of vegetation impacting the integrity of the wall as justification. During litigation, Merrimack tendered its entire policy following arbitration. At a trial for bad faith, Judge Suter determined there was no debatable reason for the denial of the claim and paved the way for a bad faith verdict. The verdict included compensatory and consequential damages for the full extent of the estimated loss ($>600,000) plus counsel fees ($195,000) and costs. The decision was affirmed in July and defense's petition for certification is scheduled for decision on December 4, 2012.

- ***Statute of Limitations in a First Party Property Claim***

Under New Jersey law, insurance actions come under the same six-year statute of limitation as contractual actions unless that period is shortened by the terms of the insurance contract or an express statute to the contrary. The Statute of Limitations runs from the date of the casualty but is tolled from the time the insured gives notice until liability is formally declined. *See Peloso v. Hartford Fire Ins. Co., 56 N.J. 514, 521, 267 A.2d 498 (1970); Gahnney v. State Farm Ins. Co.,* 56 F. Supp. 2d 491 (D.N.J. 1999) (limitations period began when plaintiff discovered the damages, stayed during negotiations but continues once settlement offer received.) *See also Azze v. Hanover Ins. Co.,* 765

A.2d 1093 (App.Div. 2001) A twelve month statute of limitations will apply to certain property loss claims, which are covered under a fire insurance policy. *Matos v. Farmers Mut. Fire Ins. Co. of Salem County*, 943 A.2d 917 (App.Div. 2008) See N.J.S.A. 17:36-5.20 "No suit or action in this policy for the recovery of any claim shall be sustainable in any court of law or equity . . . unless commenced within twelve months next after inception of the loss."