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FIRST PARTY COVERAGE BLOG

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NJ Transit's Superstorm Sandy Coverage Victory Highlights Complexities of Underwriting Property Insurance Towers

BY:

In *New Jersey Transit Corp. v. Certain Underwriters at Lloyd's, London*, 2019 WL 6109144 (N.J. App. Div. Nov. 18, 2019), New Jersey Transit ("NJT") defeated the claim of several of its insurers that a $100 million flood sublimit applied to its Superstorm Sandy damages and recovered the full $400 million limits of its property insurance tower. The decision is a big win for the beleaguered transit agency, and for insurance professionals working with complex insurance towers, the decision highlights critical underwriting issues that can dramatically affect the amount of risk transferred by the policyholder or assumed by the insurer.

In *NJ Transit,* NJT secured a multi-layered property insurance program providing $400 million in all-risk coverage. The first and second layers provided $50 million each, the third and fourth layers provided $175 million and $125 million, respectively, with several insurers issuing quota shares in each layer. The program contained a $100 million flood sublimit, and "flood" was defined to include a "surge" of water. The program did not contain a sublimit for damage caused by a "named windstorm," which was defined to include "storm surge" associated with a named storm. After NJT made its Superstorm-Sandy claim, some of the third- and fourth-layer insurers advised NJT that the $100 million flood sublimit applied to bar coverage under their policies. NJT sued these excess insurers and won at the trial and appellate levels.

In holding that the $100 million flood sublimit did not apply, the court applied the rule of construction that the specific definition of "named windstorm," which included the terms "storm surge" and "wind driven water," controlled over the policies' more general definition of "flood." In ascertaining the parties' intent, the court noted that the omission of the term "storm surge" in the definition of "flood" evidenced an intention that the flood sublimit would not apply to storm surges. Based on this finding, the court rejected several arguments made by the insurers that other policy provisions evidenced the parties' intent to apply the flood sublimit to all flood-related losses, regardless of whether the loss was caused by a storm surge.

In addition to holding that the flood sublimit did not apply to NJT's losses as a matter of law, the court also ruled that NJT would be entitled to recover the full program limits by virtue of New Jersey's efficient proximate cause doctrine. Generally applied to avoid the application of policy exclusions, this doctrine allows coverage when a covered peril was the efficient proximate cause of the loss, *i.e.*, when a covered peril "sets other causes in motion which, in an unbroken sequence and connection between the act and final loss, produces the result for which recovery is sought." In applying this doctrine, the court held that the named windstorm was the efficient proximate cause of NJT's loss because this peril directly caused the subsequent flooding, and therefore, the $400 million coverage limit applicable to named windstorms applied.

Finally, the court affirmed the dismissal of the insurers' reformation claims on the basis that NJT's broker had no duty to advise the insurers of the effect of the "named windstorm" definition on the flood sublimit.

Putting a multi-layered insurance program in place is a complex undertaking. Frequently, the policyholder or its broker will provide an outline of the program's terms to insurers willing to participate at certain levels. Almost without exception, insurers interested in participating will want certain alterations to the proposed program terms. *NJ Transit* counsels insurance professionals involved in such programs to familiarize themselves with the all of the proposed policy terms. In addition, because anti-concurrent causation provisions may not apply to policy sublimits, insurance professionals should comprehensively review the proposed sublimits not only for rating / premium considerations, but also for the scope of the coverage that may apply to the sublimited peril.