Update on Superstorm Sandy and the Inevitable Issues with Concurrent Causation

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THIS paper incorporates and updates previous analysis undertaken on November 20, 2012, in the aftermath of Superstorm Sandy (Sandy). It focuses on concurrent causation and anti-concurrent causation clauses focused on the states of New York, New Jersey and Pennsylvania.

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 to determine if there is coverage for a loss, the leading or predominant cause of loss will determine coverage. Inserting anti-concurrent causation language into a policy seeks to redress the issue of broadened coverage. An overview of key cases since Sandy reveals that New Jersey, New York and Pennsylvania still allow for anti-concurrent causation language in insurance policies, albeit subject to a high level of judicial scrutiny. Any ambiguity is interpreted against the insurer and in favor of the insured.

I. Case Law Analysis

A. New Jersey

1. Concurrent Causes of Damages

New Jersey courts have generally considered questions evaluating multiple or concurrent causes of damages in the context of first-party claims against insurers for coverage.[1] In New Jersey, first-party coverage decisions generally yield two applicable rules. In situations in which multiple events occur sequentially in a chain of causation to produce a loss, New Jersey has adopted the approach known as "Appleman's Rule" pursuant to which the loss is covered if a covered cause starts or

[1] Flomerfelt v. Cardiello, 202 N.J. 432, 997 A.2d 991, 2010 N.J. LEXIS 546 (N.J. 2010).

ends the sequence of events leading to the loss.[2]

On the other hand, if the fact finder cannot partition the damages between covered and uncovered losses, New Jersey appellate courts have rejected claims for coverage largely because the burden of proof is on the insured to demonstrate a covered loss.[3]

2. 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,*[4] 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. 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

[2] *See e.g.* Auto Lenders Acceptance Corp. v. Gentilini Ford, Inc., 181 NJ 245, 257, 854 A.2d 378 (N.J. 2004) (quoting 5 APPLEMAN, INSURANCE LAW & PRACTICE §3083 at 309-311(1970)); Stone v. Royal Ins. Co., 211 N.J. Super. 246, 252, 511 A.2d 717 (N.J. App. Div. 1986) *(*applying Appleman's rule; coverage attaches because final step in causative chain in covered); Franklin Packaging Co. v. Cal. Union Ins. Co., 171 N.J. Super. 188, 191, 408 A.2d 448 (N.J. App. Div. 1979) (applying Appleman's rule; coverage attaches because first event in causative chain is covered), *certif. denied*, 84 NJ 434, 420 A.2d 340 (1980)).

[3] Simonetti v. Selective Ins. Co., 372 N.J. Super. 421, 859 A.2d 694, 2004 N.J. Super. LEXIS 384 (N.J. App. Div. 2004) citing Newman v. Great Am. Ins. Co., 86 N.J. Super 391, 403-404, 207 A.2d 167 (N.J. App. Div. 1965); Brindley v. Fireman's Ins. Co., 35 N.J. Super 1, 6, 113 A.2d 53 (N.J. App. Div. 1955) (concluding that where the insured cannot provide the fact finder with any proof of loss other than inferences and where giving notice of loss and furnishing proofs of loss is a condition precedent of liability under the insurance contract, noncompliance is fatal to recovery).

[4] 2010 NJ Super LEXIS 1964 (N.J. App. Div. 2010).

> 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 cause 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, the inspectors opined, "[s]torm 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, the report 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, and 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.*[5]

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.*[6] 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

[5] *Simonetti*, 372 N.J. Super. at 431.
[6] 38 F. Supp.2d 349, 352-354 (D.N.J. 1999).

> 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.

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.

3. The Sandy Effect

In *Public Serv. Enter. Grp., Inc. v. Ace Am. Ins. Co.,*[7] the Superior Court of Essex County had the opportunity to visit this issue in a Superstorm Sandy case context. In this matter, a storm surge brought on by Superstorm Sandy damaged PSE&G's property throughout the State of New Jersey, including eight large generating stations that were used to distribute electricity to consumers. The estimated damages were about $500 million. Ace American and other insurers provided coverage to PSE&G pursuant to primary and excess policies. The total amount of coverage available was $1 billion; however, there was a $250 million sublimit for losses caused by flood; a $50 million sublimit for property in Flood Zones A & V and no sublimit for named windstorms other than those occurring in Florida.

Both PSE&G and ACE sought summary judgment regarding coverage issues. PSE&G argued that it had full coverage not subject to the flood sublimit because:

> a "storm surge" is included in the definition of "named windstorm". . . Indeed, there is no reference to "storm surge" or "wind-driven water" in the definition of "flood" in the policies… Moreover, Plaintiff contends that New Jersey's proximate cause doctrine, coupled with the last sentence of the flood definition, provide two independent reasons for concluding that the losses caused by the storm surge are not subject to the flood sublimits: one, under New Jersey case law, if there are multiple causes of loss, a restriction in an insurance policy does not apply so long as the efficient proximate cause of the loss is not subject to that restriction (and here Plaintiff submits that wind was the proximate cause of the storm surge that caused the damage); and

[7] 2015 N.J. Super. Unpub. LEXIS 620 (N.J. Law Div. Mar. 23, 2015).

> two, the last sentence of the flood definition in the policies, loss "not otherwise excluded from resulting from flood will not be considered loss by flood within the terms and conditions of [the] policy," which other courts have held can be reasonably interpreted to mean that damage caused by a named windstorm is not subject to the flood sublimit of the policy.[8]

PSE&G also argued that if the $50 million flood sublimits apply to storm surge, they did not apply to the locations of PSE&G's damaged facilities.

Defendant insurers argued that the storm surge is a type of "flood" under their policies and, as such, the flood sublimits apply.

In this unpublished decision,[9] the court noted that while there were no reported cases in New Jersey that have considered whether a storm surge is included in the flood definition, other jurisdictions have included storm surge in the applicable flood definition. The court concluded that "the applicable language of PSEG's policy, canons of contract interpretation, the extrinsic evidence proffered by both parties, as well as the relevant case law, all point to the conclusion that storm surge losses are not subject to the flood sublimits."[10]

The court next looked at *Flomerfelt* and New Jersey's efficient proximate cause doctrine. It concluded that:

1. The plaintiff's argument that the surge losses are not subject to the flood sublimit because the efficient proximate cause was wind makes more sense than the defendants' argument that "windstorm is a different peril than flood";

2. There was no exclusion in favor of the defendants to apply the Appleman's Rule to preclude coverage for the plaintiff;

3. While the Appleman's Rule applies to multiple sequential causes of loss and New Jersey Appellate Courts have rejected claims for an indivisible loss, part of which was covered and part of which was not, this did not happen to the case at hand. There is no evidence that the property was damage by the combined effects of wind and storm at the same time. Therefore,

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[8] *Id.* at*3-4.

[9] Generally, unpublished decisions cannot be cited with precedential effect.

[10] *Id.* at *22.

the defendants' arguments are unavailing; and

4. While admitting that New Jersey courts will enforce anti-concurrent causation language in a policy, because the record before the court was lacking any evidence that such language was intended for anything other than sewer back up, the court found that storm surge is not subject to the flood sublimits.

In another unpublished decision involving Sandy, *Carevel, LLC v. Aspen Ins. Co.*, [11] the United States District Court for the District of New Jersey reached a different result. In this case, Aspen moved for summary judgment against Carevel for water damage to its property, which it alleged came from a sewer back up due to Sandy. While the policy provided coverage for direct physical loss as a result of sewer backups or overflows, it excluded coverage for:

g. Water

(1) Flood, surface water, waves, tidal waves, overflow of any body of water, or their spray, all whether wind driven or not;

* * *

(2) Water under the ground surface pressing on or flowing or seeping through:
(a) Foundations, walls, floors or paved surfaces;
(b) Basements, whether paved or not; or
(c) Doors, windows or other openings.[12]

The Court noted that in order to establish coverage, the plaintiff must demonstrate that its damages flowed directly and solely from the sewer backup.[13] The Court found that the plaintiff did not meet the burden and granted Aspen summary judgment.

[11] No. 2:13-cv-7581, 2016 U.S. Dist. LEXIS 157919 (D. N.J. Nov. 15, 2016),

[12] *Id*. at *3.

[13] *Id*. at *13 (citing Grossberg v. Chubb Ins. Co. of New Jersey, No. A-3724-10T4, 2012 N.J. Super. Unpub. LEXIS 1982, 2012 WL 3553002 at *6. (N.J. Super. Ct. Aug. 20, 2012)).

B. Pennsylvania

1. 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."[14] In reaching its decision, the court in *O'Neill* cited to and relied upon a Delaware case, *Cavalier Group v. Strescon Indus., Inc.*[15] *Cavalier Group,* in turn, cited 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.[16]

In *Mongar v. Windsor-Mount Joy Mut. Ins. Co.*,[17] 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 court found the loss was covered.

Mongar relied upon *Spece v. Erie Insurance Group*,[18] where a transformer near the homeowner's residence was hit by lightning, 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 (lightning 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 homeowner.

2. Anti-concurrent clauses

In *Bishops. Inc. v. Penn Nat'l Ins.,*[19] the insured, a fabric wholesaler, sustained sewer and drain back-up damages to its business premises as a result of

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[14] O'Neill v. State Farm Ins. Co., 1995 U.S. Dist. LEXIS 4790, 1995 WL 214409, 3 (E.D. Pa. 1995) (quoting 5 APPLEMAN, INSURANCE LAW AND PRACTICE §3083 at 311 (1969)).
[15] 782 F. Supp. 946 (D. Del. 1992).
[16] *Id.* at 956.
[17] 2011 Pa. Dist. & Cnty. Dec. LEXIS 520 (Pa. Common Pleas Ct. 2011).
[18] 2004 PA Super. 154, 850 A.2d 679 (Pa. Super. Ct. 2004).
[19] 2009 PA Super 225, 984 A.2d 982, 993-994 (Pa. Super. Ct. 2009).

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 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 causation 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 ambiguous, and it

was construed in favor of the insured and against the insurer.

3. The Sandy Effect

Sandy has had no effect in Pennsylvania. The foregoing is still good law.

C. New York

1. Concurrent Causes of Damage

New York courts first addressed the issue of concurrent causation clauses in *Cresthill Industries, Inc. v. Providence Washington Ins. Co.*[20] The plaintiff, the insured, leased a portion of the ground floor of a three-story warehouse. When someone broke into the unoccupied third floor of the insured premises, uncoupled water pipes and carried away the fixtures, water was left running from the severed connections.

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 the 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.[21]

Later, in *Kula v. State Farm Fire & Cas. Co.*, [22] 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*., [23] the same court stated that

[20] 53 A.D.2d 488, 385, N.Y.S.2d 797, 1976 N.Y. App. Div. LEXIS 13080 (N.Y. Sup. Ct. App. Div. 1976).

[21] Citing 5 APPLEMAN, INSURANCE LAW AND PRACTICE, §3083, 309-311.

[22] 212 AD 2d 16, 628 N.Y.S. 2d 988, 1995 N.Y. App. Div. LEXIS 7234 (N.Y. Sup. Ct. App. Div. 1995).

[23] 626 N.Y.S. 2d 618, 619 (N.Y. Sup. Ct. App. Div. 1995).

"[t]o determine causation, one looks to the 'efficient or dominant cause' of the loss…."

In *Throgs Neck Bagels v. GA Ins. Co.*,[24] 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.[25]

However, it is a bit unsettled whether New York is following the efficient proximate cause test in determining whether to grant coverage. In the 2001 case of *Bebber v. CNA Ins. Co.*,[26] 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.

2. Anti-concurrent Causes of Loss

In *Jahier v. Liberty Mutual Group*,[27] Liberty Mutual appealed a judgment declaring it was obligated to provide coverage for certain damage to the insured'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

[24] 241 A.D. 2d 66, 671 N.Y.S.2d 66, 1998 N.Y. App. Div. LEXIS 3848 (N.Y. Sup. Ct. App. Div. 1998).

[25] *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. Sup. Ct. App. Div. 1989).

[26] 189 Misc. 2d 42, 729 N.Y.S.2d 844, 2001 N.Y. Misc. LEXIS 288 (N.Y. Sup. Ct. 2001).

[27] 64 AD 3d 683, 883 N.Y.S.2d 283, 2009 N.Y. App. Div. LEXIS 5803, 2009 NY Slip Op 5948 (NY. Sup. Ct. App. Div. 2009).

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 the 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. The 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."[28]

The court upheld the anti-concurrent causation clause, noting that the evidence demonstrated that the plaintiffs' loss was attributable to the subsurface water pressure that was exerted upon the empty swimming pool, even though it was precipitated by the drainage of the pool and heavy rainfall.[29]

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[28] *Jahier*, 64 AD 3d at 685.

[29] *Id.* at 685 (citing Cali v. Merrimack Mut. Fire Ins. Co., 43 AD 3d 415, 417-418 (N.Y. Sup. Ct. 2007); Sheehan v. State Farm Fire & Cas. Co., 239, AD 2d 486, 487 (N.Y. Sup. Ct. App. Div. 1997); Reynolds v. Standard Fire Ins. Co., *2*21 AD 2d 616, 617, 634 NYS 2d 163 (N.Y. Sup. Ct. App. Div. 1995)*; Kula*, 212 AD 2d at 20-21*;* Hipper v. CNA Ins. Co., 2002 NY Slip Op 40109[U] (N.Y. Sup. Ct. App Term 2002)*;* South Carolina Farm Bur. Mut. Ins. Co. v. Durham*,* 380 SC 506, 671 SE 2d 610 (S.C. 2009))*.*

3. The Sandy Effect

In *AMTRAK v. Aspen Specialty Ins. Co.*,[30] Amtrak sought $675 million of available coverage for flood damage caused by Sandy. Seawater from the flooding caused extensive damage to equipment in the tunnels under the East River and Hudson River. The District Court granted summary judgment to the insurers finding: (1) the damage caused by an inundation of water in the tunnels was subject to the policies' $125 million flood sublimit; and (2) the corrosion of equipment after Amtrak pumped out the seawater was not an "ensuing loss" triggering the flood sublimit. Amtrak appealed.

The insurers had three definitions of "flood" in their policies, which in the majority of the policies was defined as "a rising and overflow of a body of water onto normally dry land." The second definition defined "flood" was:

> [A] temporary condition of partial or complete inundation or normally dry land from
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> > (1) the overflow of inland or tidal waves outside the normal watercourse or natural boundaries
> > (2) the overflow, release, rising, back-up, runoff or surge of surface water; or
> >
> > (3) [t]he unusual or rapid accumulation or runoff of surface water from any sour[ce].[31]

The definition of flood in one (1) policy was:

> surface water, flood waters, waves, tide or tidal waters, sea surge, tsunami, the release of water, the rising, overflowing or breaking of defenses of natural or manmade bodies of water, or wind driven water regardless of any other cause or [e]vent contributing concurrently or in any other sequence.[32]

Amtrak conceded that the loss was excluded in the last policy but argued that the wind driven storm surge was covered by the remaining policies.

The Second Circuit held that the first two definitions of "flood" was sufficiently broad to include the inundation of seawater, therefore, the $125 million flood sublimit applied.

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[30] Nat'l Railroad Passenger Corp. *v.* Aspen Specialty Ins. Co., 2016 U.S. App. LEXIS 16074, 661 Fed. Appx. 10 (2d Cir. 2016).

[31] *Id.* at *3-4.

[32] *Id.* at *4.

The "ensuing loss" portion of the Amtrak policy provided that, "Even in the peril of flood… is the predominant cause of the damage, any ensuing loss or damage not otherwise excluded herein shall not be subject to sublimits."[33] The court held:

> The corrosion of Amtrak's metal equipment cannot meaningfully be separated from water damage that is plainly subject to the flood sublimit, nor can it be attributed to a distinct "covered peril," arising from the original, sublimited peril (the flood).[34]

The Second Circuit found that the corrosion could not be distinguished from the water damage resulting from the flood; therefore, only the $125 million flood sublimit applied. It was not a separate loss.

II. Summary

Case law following Superstorm Sandy has had little to no effect regarding the law on concurrent causation in these states. When an anti-causation clause is written in unambiguous and clear language, it should be upheld, subject to strict scrutiny in New Jersey, New York and Pennsylvania.

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[33] *Id.* at *5-6.

[34] *Id.* at *6-7 (citations omitted).