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CAUSATION ISSUES – LOSS CAUSED BY MULTIPLE PERILS **NEW JERSEY INSURANCE LAW**

How an insurance policy will respond to loss or damage caused by multiple perils will depend on the specific language in the policy.

Perils Acting Concurrently

Under policies which exclude loss “caused directly or indirectly by an excluded peril,” when covered and excluded perils occur concurrently to cause the loss, the insured must prove which part of the damage was due to the included cause of loss.

Brindley v. Fireman’s Ins. Co. of Newark, 35 N.J. Super 1 (App. Div. 1955) – policy covered loss caused by windstorm but excluded loss caused directly or indirectly by waves or high water

- It was not possible to separate the damage caused by wind from that caused by water
- 2 causes of loss operated conjointly, and under the policy language, damage was excluded

Newman v. Great American Ins. Co., 86 N.J. Super. 391, 403 (App. Div. 1965) – policy covered loss caused by windstorm but excluded loss caused directly or indirectly by waves or high water

- 2 causes of loss occurred simultaneously
- Insured is required to show that damage incurred was caused by wind

Brindley involved a homeowner’s policy that insured against loss by windstorm but excluded loss caused directly or indirectly by waves or high water, whether or not driven by wind. The policy also excluded loss to the interior of the property caused by water, rain, snow or sand, whether driven by wind or not, unless the building first sustained an actual damage to roof or walls by the direct force of wind or hail and loss to the interior was caused by water, rain, snow or sand entering the building through the openings in the roof or walls made by the direct action of the wind.

The insureds’ shore house suffered damage during a storm which occurred while they were away. In most instances it was not possible to separate the damage caused by wind from that caused by water with any degree of certainty. The court stated that these types of policy provisions in windstorm and tornado policies have been construed to require, as the policy literally states, that the insured establish that a given loss was due to the direct effect of wind and not the action of water, directly or indirectly, whether or not wind driven, except solely where interior loss ensued from water which gained entry through an opening made by the direct action of wind. *Brindley*, 35 N.J. Super. at 6. In those circumstances, the court stated: “Loss due to the effect of causes both within and outside the coverage, operating conjointly, is generally considered not recoverable under this kind of provision.” *Id.* at 6. The insured’s “proofs must be

such as to enable the factfinder to find without resort to sheer conjecture the amount of the particular loss ascribable to the hazard assumed by the carrier.” *Id.*

Efficient Proximate Cause

Here again, the policy excludes loss caused directly or indirectly by an excluded peril and does not contain an anti-concurrent or anti-sequential causation clause.

When covered and excluded perils occur in a sequence of events that result in a loss, courts employ the efficient proximate cause doctrine to determine whether or not there is coverage. Pursuant to the efficient proximate cause doctrine, when an insurance policy uses an exclusion to bar coverage for losses caused by a particular peril, the exclusion applies only if the excluded peril was the “efficient proximate cause” of the loss. *Um v. Cumberland Ins. Group*, 2008 WL 656805, *5 (N.J. App. Div. 3/18/08). Under this doctrine, an insured is normally afforded coverage where an included cause of loss is either the first or last step in the chain of causation which leads to the loss. *Id.*

Stone v. Royal Ins. Co., 211 N.J.Super. 246 (App.Div. 1986) – policy covered loss caused by accidental discharge or overflow of water from within plumbing system or from within a household appliance but excluded loss caused directly or indirectly from water damage, including subsurface water

- 2 causes of loss operated sequentially and not concurrently

Franklin Packaging Co. v. Cal. Union Ins. Co., 171 N.J.Super. 188, 191 (App.Div.1979), *certif. denied*, 84 N.J. 434 (1980) – where vandals broke into insured’s warehouse and caused flood, resulting in damage to inventory, court held that vandalism, a covered cause of loss, was proximate cause even though water damage was excluded under the policy.

In *Stone*, the court found coverage under a homeowner’s insurance policy when the homeowner’s basement sustained water damage as a result of a rupture in a hose which connected their sump pump to a drain. The policy covered loss due to accidental discharge or overflow of water or steam from within a plumbing, heating or air conditioning system or from within a household appliance but excluded loss resulting directly or indirectly from water damage, meaning water below the surface of the ground. Rejecting the insurer’s contention that an included and excluded risk concurrently caused the loss, the court found that the events were sequential. The court relied on *Franklin Packaging Co. v. California Union Ins. Co.*, 171 N.J.Super. 188 (App.Div. 1979), *cert. denied* 84 N.J. 434 (1980), citing 5 *Appleman, Insurance Law and Practices* §3083 at 309-311 (1970) for the general principles in the context of a covered and excluded risk as follows:

Where a peril specifically insured against sets other causes in motion which, in an unbroken sequence and connection between the act and final loss, produced 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, therefore, regarded as the proximate cause, but the efficient or predominant cause which sets into motion the chain of events producing the loss. An incidental peril outside the policy,

contributing to the risk insured against, will not defeat recovery * * *. In other words, it has been held that recovery may be allowed 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 itself set into operation a chain of causation in which the last step may have been an excepted risk.

Stone, 211 N.J.Super. at 251. The court found coverage even though the exclusion clause purportedly disclaimed liability for losses caused “directly or indirectly.” *Id.* at 252. The court remanded to the trial court to determine the extent of the homeowners’ damage caused as a direct result of the ruptured hose as distinguished from any damage caused by water seepage alone.

Anti-Concurrent or Anti-Sequential Causation Clauses:

Most commercial and homeowners’ policies have anti-concurrent causation clauses that preface the exclusions. The ISO introduced the clause in 1983 in reaction to court decisions that refused to enforce earlier formulations of the anti-concurrent causation language. The clause typically provides, “we do not insure for loss caused 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 intent of this clause is to eliminate the need for any analysis of proximate causation or concurrent causation by eliminating coverage for a loss if a risk subject to the cause, *e.g.*, flood, contributes in any way or in any sequence to a loss. *Um v. Cumberland Ins. Group*, 2008 WL 656805, *5 (N.J. App. Div. 3/18/08) (the anti-concurrent causation language in the policy was drafted to eliminate the efficient proximate cause doctrine). Most states, including New Jersey, have found these clauses to be valid and enforceable. *See Assurance Co. of Am., Inc. v. Jay-Mar, Inc.*, 38 F.Supp.2d 349, 353 (D. N.J. 1999).

Cases wherein the anti-concurrent causation clause was used to exclude coverage include the following:

- even if the first event, backup or overflow of rainwater from storm sewers, in the sequence of events leading to the loss was a covered loss, there would be no coverage under the policy if a sequential event, surface water flooding which was an excluded cause of loss, caused any part of the loss – *Assurance Co. of Am., Inc., v. Jay-Mar, Inc.*, 38 F.Supp.2d 349 (D. N.J. 1999)
- insured claimed that damage to their home was caused by heavy construction vehicles operating on the neighboring property, but the court found that coverage was excluded under the earth movement exclusion, a sequential event following from the construction, which excluded coverage even when earth movement is aggravated by or results from natural or human causes - *Um v. Cumberland Ins. Group*, 2008 WL 656805, *5 (N.J. App. Div. 3/18/08)