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Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

When The Flood Valves Open ...

Law360, New York (February 4, 2011) -- When Hurricane Katrina struck, the big legal question was whether negligence in the construction of dams or levees constituted "the" cause of loss such that the flood exclusion in property insurance policies would not apply. In a series of decisions, federal and state courts rejected the negligence argument and upheld the flood exclusion.

The next generation of flood exclusion cases is approaching. The question now will be whether the intentional act of a third party — often a municipality — in opening a flood relief valve or flood gate constitutes "the" cause of loss such that the flood exclusion will not apply. A recent Massachusetts court decision suggests that the answer again will be "no" and the flood exclusion will still apply.

Hurricane Katrina and Earlier Flood Cases

In Sher v. Lafayette Insurance Company, the Louisiana Supreme Court held that flood damage during Hurricane Katrina allegedly caused by the negligent design of the New Orleans levee system was nevertheless excluded by flood exclusion.

The Louisiana Supreme Court explained that the "meaning of the word 'flood' ... does not change or depend on whether the event is a natural disaster or a man-made one." Whether a human intervenes in the causal chain or not, as long as "a large amount of water covers an area that is usually dry," there has been a flood and the flood exclusion applies. As the Louisiana Supreme Court explained, the "meaning of the term 'flood' does not include a distinction between artificial and natural floods." Sher soundly rejected the negligence argument and upheld the flood exclusion.

In In re Katrina Canal Breaches Litigation, the U.S. Court of Appeals for the Fifth Circuit similarly held that the flood exclusion applies whenever a large amount of water inundates a property because "in common parlance, the event is known as a flood."

Despite allegations of negligence in the design of a flood control system, the Fifth Circuit concluded that the exclusion applies because negligence "does not change the character of the water escaping through the levee's breach; the waters are still floodwater, and the result is a flood."

Other Katrina flood decisions reached similar results. See, e.g., Northrop Grumman Corp. v. Factory Mutual Ins. Co. (9th Cir. 2008) (storm surge held excluded because flood exclusion bars all coverage for inundation by water); Tuepker v. State Farm Fire & Cas. Co. (5th Cir. 2007) (storm surge excluded because it is "little more than a synonym for a tidal wave or wind-driven flood").

A number of earlier flood exclusion decisions rejected precursors of the negligence argument, noting that calling a flood something else to try to get around the flood exclusion cannot change the reality that there has been a flood. See e.g. State of North Dakota v. North Dakota State University, (N.D. 2005) ("surface water does not lose its character as surface water simply by being artificially channeled"); Valley Forge Ins. Co. v. Hicks Thomas & Lilienstern LLP, (Tex. Civ. App. 1st Dist. 2004) (excluding floodwater flowing into insured's law firm); Industrial Enclosure Corp. v. Northern Ins. Co. of New York, (N.D. Ill. 2000)(excluding floodwater flowing onto insured's property after collapse of a nearby building).

The result in these cases is not surprising in view of the broad anti-concurrent cause language of flood exclusions in property insurance policies. Although the exact anti-concurrent language may vary, the intent reflected in the flood exclusion is to bar coverage if flood causes, contributes to or plays a role in the loss. All but a handful of jurisdictions recognize and enforce anti-concurrent causation exclusions broadly. See e.g. Kane v. Royal Ins. Co. of America (Colorado Supreme Court enforcing broad anti-concurrent cause language in flood exclusion).

The Next Generation and the Massachusetts Case

The Infrastructure Report Card of the American Society of Civil Engineers gives our nation's dams a failing grade of "D," noting that there are now 1,819 high-hazard-potential dams in the U.S. America's deficient dams and levees need more than $12 billion in repairs, but adequate funds are just not available. See http://www.infrastructurereportcard.org/ sites/default/files/rc2009_dams.pdf.

When rising water threatens an older dam, the dam owners increasingly must release water to protect the dam. See e.g. White v. West Amer. Ins. Co., (M.D. Pa. 2008)(water released from lake to protect dam). As a result of these intentional releases, some properties without flood insurance are experiencing flooding for the first time.

Property owners caught in this trend may argue that the dam owner's intentional act in opening a relief valve to flood the area is "the" cause of loss and the flood exclusion should not apply. That was exactly the argument made by the insured in CRT v. Pacific Insurance Co. (Mass. Super. 2010).

Relying on the anti-concurrent cause language of the flood exclusion, Judge David A. Lowy held that because "city officials had to make a determination pursuant to their official duties, does not change the fact that the damage to the plaintiff's property was 'caused by, and resulted from' flooding throughout eastern Massachusetts." The court concluded on summary judgment that the flood exclusion unambiguously barred all coverage.

Conclusion

Because of its anti-concurrent cause language, the flood exclusion in property insurance policies applies broadly when water inundates dry land. As intentional releases of floodwater to protect dams become more common, the flood exclusion will again be challenged. The CRT v. Pacific decision in Massachusetts suggests that the exclusion will bar coverage for properties inundated by water even if intentionally released from a dam or levee.

--By James S. Harrington, Robins Kaplan Miller & Ciresi LLP

James Harrington (jsharrington@rkmc.com) is a partner in Robins Kaplan's Boston office.

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