

What Practitioners Must Know About Flood Exclusion

Law360, New York (September 6, 2011) -- Flood claims usually follow storms with heavy rainfall like Hurricane Irene. Some of these claims will include allegations of contributory human conduct, such as negligent design or construction of flood protection structures, or the intentional operation of flood control devices. Does such human activity impact the coverage under a property policy that excludes flood? The analysis starts with the flood exclusion in the policy under review.

A typical flood insurance exclusion provides in part:

PERILS EXCLUDED

This policy does not insure against loss or damage caused by, resulting from, contributed to, or aggravated by:

(a)(2) Flood meaning surface water, waves, tide or tidal water, and the rising (including the overflowing or breaking of boundaries) of lakes, ponds, reservoirs, rivers, harbors, streams and other similar bodies of water, whether driven by wind or not;

Similar flood exclusions were analyzed in both state and federal court decisions regarding Hurricane Katrina. In *Sher v. Lafayette Insurance Company* (decided April 8, 2008), the Louisiana Supreme Court rejected an insured's argument that the flood exclusion is ambiguous when applied to flooding caused in part by the failure of man-made dams or levees:

"The plain, ordinary and generally prevailing meaning of the word 'flood' is the overflow of a body of water causing a large amount of water to cover an area that is usually dry ... this definition does not change or depend on whether the event is a natural disaster or a man-made one—in either case, a large amount of water covers an area that is usually dry."

The statement in *Sher* that the "definition does not change or depend on whether the event is a natural disaster or a man-made one" suggests that human intervention does not vitiate the exclusion. On balance the language employed by the court seems to favor a broad application of the flood exclusion to "man-made" or "artificial" situations:

"The generally accepted meaning of the term 'flood' does not include a distinction between artificial and natural floods ... The inundation of insureds' normally dry land falls squarely within these generally accepted definitions of the term 'flood.'" *Id.* at 15, quoting *Kane v. Royal Insurance Company*, 768 P.2d 678 (Colo. 1989).

The language is encouraging for insurers facing claims including negligent design or faulty workmanship, but not really dispositive in a claim involving an intentional act such as the opening of a flood relief valve. The Sher court was neither considering nor deciding this kind of an intentional release scenario.

Courts in other jurisdictions have reached the same conclusion as the Sher court on the “man-made flood” arguments. Eight months before the Sher decision, the United States Court of Appeals for the Fifth Circuit upheld the flood exclusion in *In Re: Katrina Canal Breaches Litigation*, 495 F.3d 191 (5th Cir. 2007). In a very thorough decision rejecting the argument that the flood exclusion is ambiguous as applied to flooding from negligently constructed levees, the Fifth Circuit held that 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 ... we disagree that the term 'flood' in this context is limited to natural events ... a flood may result from the bursting of a levee ... inherent in the definition of 'flood' is the concept of inundation or deluge, and it seems apparent that the greater the inundation involved in an event, the more clearly that event is a flood." *Id.* at 215-217.

Supporting a broad view of the exclusion is also the fact that flood, as defined, includes not just overflow, but all surface water. The opinion's language is encouraging, but as in Sher the Fifth Circuit in making its statements was neither considering nor deciding an intentional release scenario.

There are a number of other well known pre-Katrina flood exclusion decisions dealing with dam failures, storm surge, broken water mains, and the question of when surface water is no longer surface water. With the exception of claims involving broken water mains, most of these cases take a broad view of what is excluded as “flood,” but do not address the “intentional release” scenario.

See, *Tuepker v. State Farm Fire & Cas. Co.*, 507 F.3d 346, 353 (5th Cir. 2007)(storm surge held excluded because it is “little more than a synonym for a tidal wave or wind-driven flood”); *Northrop Grumman Corp. v. Factory Mutual Ins. Co.* (C.D. Cal 2007)(unpublished decision holding the flood exclusion in an excess policy ambiguous and covering wind-driven storm surge); *State of North Dakota v. North Dakota State University*, 2005 N.D. 75, 694 S.W.2d 225, 233 (2005)(surface water excluded; “surface water does not lose its character as surface water simply by being artificially channeled”); *Valley Forge Ins. Co. v. Hicks Thomas & Lilienstern LLP*, 174 S.W.3d 254, 258-59 (Tex.Civ.App. 1st Dist. 2004)(excluding floodwater flowing into insured's law firm and citing anti-concurrent cause language); *Selective Way Ins. Co. v. LTI*, 606 S.E.2d 68, 69-70 (Ga.Ct.App. 2004)(holding water accumulating in pit and entering building through a sewer pipe to no longer be “surface water” and awarding coverage); *Industrial Enclosure Corp. v. Northern Ins. Co. of New York* (N.D. Ill. 2000)(unpublished decision finding flood unambiguous and excluding floodwater flowing onto insured's property after collapse of a nearby building); *Georgetown Square v. U.S. Fid. & Guar. Co.*, 3 Neb. App. 49, 523 N.W.2d 380, 387 (1994)(holding water diverted by underground drainage pipe to no longer be “surface water” and awarding coverage); *Heller v. Fire Ins. Exchange*, 800 P.2d 1006, 1009 (Colo. 1990)(holding water diverted by manmade trenches to no longer be “surface water” and awarding coverage); *Rovelli v. Allstate Insurance Company*, 831 N.Y.S2d 150, (N.Y. App. Div. 1st Dist. 2007)(holding water main loss not a natural event within scope of the flood exclusion and awarding coverage); *Kane v. Royal Ins. Co. of America*, 768 P.2d 678, 681 (Colo. 1989)(rejecting argument that “efficient moving cause” of loss was design negligence, citing policy's anti-concurrent cause language). Compare, *TNT Speed & Sport Center Inc. v. American States Ins. Co.*, 114 F.2d 731, (8th Cir. 1997)(anti-concurrent cause flood exclusion bars coverage for flood caused in part by vandalism of levees; court, however, criticizes as inadequate the same anti-concurrent cause language quoted on Page 1 above).

While none of the reported cases in this area provides a direct answer to the intentional release question, an unpublished Massachusetts decision recently found that the presence of intentional acts in the causation chain will not circumvent the exclusion. In *Cortina Realty Trust v. Pacific Insurance Company Ltd.*, a Massachusetts Superior Court was asked to decide if the flood exclusion barred coverage for water damage caused or significantly aggravated by the decision of town officials to open a flood valve. The court summarized the insured's reasoning as a "concurrent cause" argument to the effect that the opening of the valve was a fortuitous event separate from the rains that plagued the area. Plaintiff's argument did not persuade the court. In holding the insured's flood claim excluded by its property insurance policy, the court relied on the relationship between the natural flooding and the town's actions.

Finding the anti-concurrent cause language preceding the exclusion unambiguous, the court said "even if the opening of the flood valve by the Lynn Water & Sewer Commission increased the flooding of the plaintiff's property, the calculated decision to open the valve was not an accident. Rather, it was deemed a necessary decision caused by and resulting from actual surface flooding, and thus, would not be covered under the policy." *Id.* at 6.

Policy language and the facts of each loss are always critical to the outcome of any coverage evaluation. However, recent case law strongly supports the conclusion that a flood exclusion with clear, anti-concurrent causation language will bar flood claims even if human negligence or intentional flood management actions are alleged to contribute to the flooding.

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