Policyholder Lessons From Sandy No-Coverage Decision

By **Dennis Artese and Joshua Zelen** (April 21, 2023)

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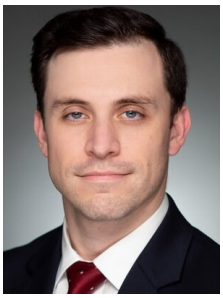

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In January, the U.S. District Court for the Eastern District of New York provided an interesting twist on the classic wind versus flood insurance coverage dispute, when it decided a case that featured policy provisions containing anti-concurrent causation language in both a flood exclusion and a windstorm coverage grant provision.

Anti-concurrent causation language typically is found as a preface to certain exclusions in commercial property insurance policies, and purports to exclude in their entirety losses caused by both covered and uncovered perils.

The case, Madelaine Chocolate Novelties Inc. v. Great Northern Insurance Co. — involving a well-known chocolatier — is the most recent insurance coverage decision stemming from the destruction caused by Hurricane Sandy over a decade earlier.[1]

The court's reasoning, which ultimately led to an unfavorable coverage outcome for Madelaine, provides important lessons for policyholders.

In particular, this case underscores the need for policyholders to carefully review their policy language, consider whether any ambiguities are contained in the provisions within, and do what they can to avoid the dreaded anti-concurrent causation clauses when procuring commercial property policies.

Although courts commonly construe ambiguous policy language in favor of policyholders under the doctrine of contra proferentem, certain factual circumstances may prevent this and induce a court to instead turn to extrinsic evidence to determine the parties' intentions.

On Oct. 29, 2012, Hurricane Sandy struck the East Coast of the U.S. and made landfall in New York City. The storm lasted nearly 48 hours and caused an estimated $19 billion in damages and lost economic activity across the city.

Located on the Rockaway Peninsula, only three blocks from the Atlantic Ocean, the facilities of Madelaine Chocolate Co. were inundated with several feet of storm surge pushed ashore by the storm's 80-mile-an-hour winds.

Madelaine claimed more than $50 million in physical and economic losses caused by Sandy. Madelaine sought coverage under an all-risks commercial property insurance policy it purchased in 2011 from Great Northern.

Great Northern covered $4 million of Madelaine's claimed losses, but declined to pay the remaining amount because it contended that those losses were excluded from coverage under the policy's flood exclusion, which provided:

This insurance does not apply to loss or damage caused by or resulting from: waves, tidal water or tidal waves; or rising, overflowing or breaking of any boundary, of any ... oceans or any other body of water or watercourse, whether driven by wind or not, regardless of any other cause or event that directly or indirectly: contributes concurrently to; or contributes in

any sequence to, the loss or damage, even if such other cause or event would otherwise be covered.

In 2015, Madelaine filed suit against Great Northern in the Eastern District of New York seeking damages for the insurance company's failure to pay the total claimed losses.

Madelaine argued that the "Policy's Windstorm Provision provided coverage for damage caused by wind-driven Sandy storm surge, in spite of the Flood Exclusion."

The policy's windstorm endorsement provided that:

Windstorm means: wind; [or] wind-driven rain; ... regardless of any other cause or event that directly or indirectly: contributes concurrently to; or contributes in any sequence to, the loss or damage, even if such other cause or event would otherwise be covered.[2]

In Madelaine I, the court granted summary judgment in favor of Great Northern.[3]

On appeal, the U.S. Court of Appeals for the Second Circuit concluded that "the Windstorm Endorsement adds an [anti-concurrent causation] clause to the definition of a covered peril for the entire Policy," noting "it is undisputed that, for purposes of the Policy, a 'windstorm' is a covered peril."[4]

On remand, the Second Circuit directed the district court to (1) "assess whether the Windstorm Endorsement's [anti-concurrent causation] clause conflicts with, or otherwise creates an ambiguity vis-à-vis, the Policy's Flood Exclusion," and (2) "to the extent [the district court] concludes an ambiguity exists, to consider 'interpretive materials relating to the Windstorm Endorsement and its relationship with the Policy's coverage provisions.'"[5]

Typically, under New York law, if a court finds that a policy's terms are susceptible to more than one reasonable interpretation, then an ambiguity arises, and the court generally construes the language in favor of coverage.[6] The rationale behind construing ambiguities in policy language in favor of the policyholder is derived from the doctrine of contra proferentem.[7]

Applying the directives from the Second Circuit, the district court held that the policy was ambiguous whether it covered windstorm loss or damage regardless of any other concurrent or contributing cause.[8]

Madelaine argued that the ambiguity required the court to construe the policy in its favor as a matter of law because "when an endorsement potentially conflicts with other provisions of the policy, the plain language of the endorsement is controlling."[9]

However, despite finding that the policy's provisions were ambiguous and agreeing with the settled principle underpinning Madelaine's argument, the court still declined to resolve the policy's ambiguity in its favor, because there was no evidence that the endorsement had been separately negotiated, and the evidence suggested that the endorsement had been executed simultaneously with the conflicting flood exclusion.

The court did not cite any authority for its holding in this regard, which is contrary to the well-settled principle that endorsements trump other conflicting policy provisions, particularly exclusionary clauses that must be clear and unmistakable and accorded a strict and narrow construction.

Ultimately, after considering extrinsic evidence, the court concluded that it could not resolve the ambiguity in the dueling anti-concurrent causation provisions as a matter of law. The court found that both parties provided conflicting conclusions from the limited extrinsic evidence, neither of which were "so incredible that the Court must find one side is entitled to summary judgement."[10]

Therefore, the court denied the parties' cross-motions for summary judgment, holding that the extrinsic evidence revealed triable issues of fact regarding the parties' intent.[11]

In July 2022, the court held a weeklong jury trial examining extrinsic evidence presented by both parties. After closing its case-in-chief, Madelaine moved for judgment as a matter of law, which the court denied. Ultimately, the jury returned a verdict in favor of Great Northern.

On Jan. 20, 2023, the court denied both Madelaine's renewed motion for judgment as a matter of law, pursuant to Rule 50(b), and its motion for a new trial pursuant to Rule 59.

Madelaine argued that Great Northern did not satisfy its burden to present sufficient extrinsic evidence to prove Madelaine intended and understood that the flood exclusion barred coverage for storm surge losses despite the windstorm provision. In rejecting this argument, the court found that the evidence presented at trial could permit a reasonable jury to find that Madelaine understood that the policy did not cover losses caused by storm surge.

In particular, two Madelaine executives testified that in 2001, the company decided to discontinue the $2.5 million in excess flood coverage it originally purchased with Great Northern.

In addition, the court pointed to a 2011 email from a Madelaine client that asked the company to disclose its flood coverage. In response, Madelaine disclosed only $3 million in flood coverage from the National Flood Insurance Program and not Great Northern.

Taken together, the court found that this extrinsic evidence was sufficient to satisfy Great Northern's burden. Madelaine is appealing the court's Jan. 24, 2023 decision.

As the Madelaine case demonstrates, every policyholder should carefully examine the language of its policy to determine whether any coverage granting provisions contain anti-concurrent causation clauses that may conflict with any coverage limiting terms or conditions.

In particular, if such a conflict between provisions is identified, policyholders should attempt to separately negotiate and clarify these provisions with its insurance company in order to maximize their insurance recoveries and avoid future coverage litigation.

Although not required under prior jurisprudence, the Madelaine Chocolate court suggests that evidence of separately negotiated endorsements that conflict with other policy terms is more likely to persuade a court that any ambiguities that arise should be resolved in favor of coverage and can help to avoid extensive litigation that Madelaine now finds itself involved in.

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[1] Madelaine Chocolate Novelties, Inc. v. Great N. Ins. Co., No. 1:15-CV-5830 (RJD), 2023 WL 375469 (E.D.N.Y. Jan. 24, 2023).

[2] Id. at n.2.

[3] Madelaine Chocolate Novelties v. Great N. Ins. Co., No. 15CV5830RJDSMGGRB, 2017 WL 4280550 (E.D.N.Y. Sept. 26, 2017), vacated and remanded sub nom. Madelaine Chocolate Novelties, Inc. v. Great N. Ins. Co., 752 F. App'x 47 (2d Cir. 2018).

[4] Madeleine Chocolate Novelties, Inc. v. Great N. Ins. Co., 752 F. App'x 47, 48, 50 (2d Cir. 2018).

[5] Madelaine Chocolate Novelties v. Great N. Ins. Co., 399 F. Supp. 3d 3, 7 (E.D.N.Y. 2019).

[6] See, e.g., Dalton v. Harleysville Worcester Mut. Ins. Co., 557 F.3d 88, 93 (2d Cir. 2009) ("Having found a genuine ambiguity, we must apply the rule that ambiguities in insurance policies are generally resolved in favor of the insured."); In re Ancillary Receivership of Reliance Ins. Co., 863 N.Y.S.2d 415,418 (App. Div. 2008) (construing ambiguity of undefined policy term in favor of policyholder), affd, 904 N.E.2d 495 (N.Y. 2009); In re New York Cent. Mut. Fire Ins. Co. v. Ward, 833 N.Y.S.2d 182, 183 (App. Div. 2007) (stating that examination of ambiguous language should liberally favor policyholder, with regard to the risk and subject matter of the policy).

[7] See, e.g., Liverpool & London & Globe Ins. Co. v. Kearney, 180 U.S. 132, 136 (1901) (the rule that policy language "should be interpreted most strongly against the insurer ... rests upon the ground that the company's attorneys, officers or agents prepared the policy, and it is its language that must be interpreted"); Matthews v. American Central Ins. Co., 48 N.E. 751, 752 (N.Y. 1897) ("The policy, although of the standard form, was prepared by insurers, who are presumed to have had their own interests primarily in view; and hence, when the meaning is doubtful, it should be construed most favorably to the insured, who had nothing to do with the preparation thereof.").

[8] See Madelaine Chocolate Novelties, 399 F. Supp. 3d at 9-12.

[9] Id.

[10] Id.

[11] Id.