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Superstorm Sandy Insurance Cases Finally Moving to Judgment

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Superstorm Sandy's aftermath is still with us, and unfortunately many issues remain either partly or wholly unaddressed. The seven insurance coverage cases discussed here are all recent, and address a variety of issues: the Consumer Fraud Act (CFA); professional standards for attorneys; the effect of sub-limits; and whether Superstorm Sandy was a flood, a tidal surge, a hurricane, a named storm or none of the above. We expect that Sandy decisions will continue to appear throughout this year.

Bannon v. Allstate Ins. Co., No. 14-1229, 2015 U.S. Dist. LEXIS 21591 (D.N.J. Feb. 24, 2015), demonstrates that extra-contractual damages may still be available against an insurance company in New Jersey. In *Bannon*, an Allstate adjuster inspected a house destroyed by Superstorm Sandy, and allegedly told the plaintiff that wind damaged the house. Witness statements, photographs and professional opinions allegedly confirmed wind as the cause of the damage. While flood was an excluded peril under the applicable homeowners' insurance policy, wind was not. Allstate denied the claim. Allstate moved to dismiss the plaintiff's claims for breach of the covenant of good faith and fair dealing, violation of the CFA and punitive damages.

Allstate argued that the court should dismiss the plaintiff's breach of the covenant of good faith and fair dealing count because the claim's decision was "fairly debatable"; in other words, the policyholder could not establish a right to summary judgment on the substantive claim. Based principally on the evidence of wind damage, the court found that Allstate's coverage denial may not have been "fairly debatable." While the court recognized that Allstate could possibly win on summary judgment, it found that sufficient facts existed, on the basis of the complaint and the facts alleged in it, to permit the claim to go forward.

The court next denied Allstate's motion to dismiss the CFA claim. The court found that while the New Jersey Supreme Court had recognized that the CFA applied to the sale of insurance, it had not addressed whether it applied to the payment of insurance benefits. However, the Third Circuit held that the CFA did apply to the payment of benefits, even though the New Jersey Appellate Division held that it did not. The court opted to "follow the Third Circuit's lead by predicting that the New Jersey Supreme Court would find that the New Jersey CFA applies to the payment of insurance benefits."

The court did grant Allstate's motion to dismiss the punitive damages claim, holding that the plaintiff did not allege facts showing "egregious circumstances," "actual malice" or "wanton willful disregard of persons." It held that even if the plaintiff could prove bad faith, it could not establish sufficient "egregiousness" to support punitive damages.

Abbas v. PennyMac Corp., No. A-3466-13T2, 2015 N.J. Super. Unpub. LEXIS 1694 (App. Div. July 16, 2015), is another CFA case in which the Appellate Division ruled favorably for the policyholder. In *Abbas*, the policyholder sustained Sandy damages in the amount of $12,277.43. The homeowner's insurance company, GEICO, apparently timely issued a check to the policyholder's mortgage company. However, the mortgage company failed to remit payment to the policyholder. The decision is sparse on details. Still, the opinion mentions that the mortgage company ignored numerous requests by Abbas for the insurance proceeds. Finally, the policyholder filed suit, alleging fraud and a violation of the CFA. Ironically, between the time of filing and service, the mortgage company made payment, but the policyholder rejected the settlement offer.

The mortgage company moved to dismiss the complaint, arguing that the policyholder was unable to demonstrate that he suffered an "ascertainable loss." The trial court agreed and dismissed the case with prejudice. The Appellate Division reversed and remanded for further proceedings. It found that the loss was easily ascertainable—$12,277.43—and reasoned that this sum became an "ascertainable loss" when the mortgage company wrongfully withheld GEICO's check. The Appellate Division found that the mortgage company "failed to forward the insurance proceeds to [Abbas] in a timely fashion, without having a good-faith basis for such a prolonged delay."

In *Senft v. Fireman's Fund Ins. Co.*, Civ. No. 14-07805, 2015 U.S. Dist. LEXIS 61870 (D.N.J. May 12, 2015), the Senfts owned a house which was customized to accommodate the disabilities of Dr. Senft. The Senfts testified that they purchased Fireman's Fund's "Prestige Home Premier Policy" because of Fireman's Fund's promises of the "highest level of protection" and "'exceptional' services in the event of a catastrophe." Then Superstorm Sandy hit.

The Senfts presented eye-witness testimony from a neighbor, who witnessed the damage done to the Senfts' house by the wind and rain that preceded the storm surge. Fireman's Fund rejected the claim in its entirety without inspecting the property.

The Senfts sued Fireman's Fund for bad faith, breach of contract, breach of the implied covenant of good faith and fair dealing, breach of fiduciary duty, unjust enrichment and attorney fees. Fireman's Fund moved to dismiss several of these counts.

The court granted the motion to dismiss the breach of the implied covenant of good faith and fair dealing, finding that it was duplicative of the bad faith claim. The court also found that there was no unjust enrichment.

However, the court refused to dismiss the breach of fiduciary duty count, finding that the Senfts' complaint adequately stated a claim for such breach. The court reviewed New Jersey law, and found that in certain instances a fiduciary duty does exist between an insurance company and its policyholder. That duty was based on Fireman's Fund's pre-Sandy representations.

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Hundreds of Sandy cases are still pending, a sad fact attributable not only to insurance recovery recalcitrance but, in some cases, to ineffective claims pursuit. *Lighthouse Point Marina & Yacht Club v. International Marine Underwriters*, No. 14-2974, 2015 U.S. Dist. LEXIS 3827 (D.N.J. Jan. 13, 2015), concerned a Texas law firm and its New Jersey local counsel that represented 250 Sandy claimants in coverage disputes. The firms filed nearly identical complaints for each claimant—suggesting that the firms were filing unsupported claims, without conducting any independent investigation. The insurance adjuster for Lighthouse Point's claim determined the loss at $1,612. Lighthouse Point made a demand of $540,000, with an additional $135,000 in attorney fees. The insurance policy required the policyholder to allow the insurance company's adjuster to inspect the property. Lighthouse Point repeatedly ignored the insurance company's demands for an inspection. This included ignoring the joint discovery plan. Finally, Judge Walls issued an order to show cause as to why the plaintiff should not be penalized. The plaintiff ignored the order.

The court revoked Texas counsel's pro hac vice admission, and ordered that they submit a letter in each case in which they were counsel attaching the decision and order and inform each client. The court referred New Jersey counsel to the disciplinary committee and awarded the defendant its attorney fees. Sandy victims must be savvy to avoid being victimized again. See also *Liguori v. Allstate Ins. Co.*, Civ. No. 14-636, 2015 U.S. Dist. LEXIS 957 (D.N.J. 2015) (affirming dismissal of Sandy complaint with prejudice for failure to prosecute).

Torre v. Liberty Mutual Fire Ins. Co., No. 14-2733, 2015 U.S. App. LEXIS 4902 (3d Cir. Mar. 26, 2015),concerns a Standard Flood Insurance Policy (SFIP). Liberty did not dispute coverage for the cost of removing third-party debris from the Torres' house, but denied coverage for expenses incurred for removing third-party debris from the Torres' land. The SFIP's debris removal clause stated, "[w]e will pay the expense to remove *non-owned debris that is on or in insured property* and debris of insured property anywhere." The issue was the meaning of "insured property." The Torres argued, in part, that the term "property" should be given its ordinary meaning, which included land. The Third Circuit disagreed. The court reasoned that if the SFIP was ambiguous and susceptible to two constructions it would adopt the one more favorable to coverage. However, it found that the term "insured property" was unambiguous. The Court held that the SFIP covered only specified buildings, while the policy excluded coverage for "land."

Public Service Enterprise Group v. Ace American Ins. Co., No. ESX-L4951-13, 2015 N.J. Super. Unpub. LEXIS 620 (Law Div. Mar. 23, 2015), involved a $1 billion tower of insurance coverage with a $250 million flood sublimit, but no sublimit for "named windstorms." The case concerned whether a storm surge was a flood or a "windstorm." The court ruled that the storm surge was a windstorm. The insurance companies argued that it was intrinsic to the insurance policy that "storm surge" was subsumed by the definition of "flood"—"the overflowing or breaking of boundaries of natural or man-made bodies of waters."

The court adopted the plaintiff's "specific-over-general maxim" of contract interpretation approach—"because the specific term 'storm surge' is included in the definition of 'named windstorm' but not in the definition of 'flood,' storm surge losses are not subject to the flood sublimits." Next, the court reviewed the parties' extrinsic evidence, and found that both parties' evidence supported the plaintiff's position, not the defendant's. Lastly, the court applied the Appleman's Rule or proximate cause doctrine, holding that "wind caused the storm surge and wind is a covered peril" such that "storm surge is not subject to the flood sublimits[.]"

In *Wakefern Food Corp. v. Lexington Ins. Co.*, No. L-6483-13 (N.J. Super. Ct., Middlesex Cty., Oct. 29, 2014), a buying cooperative of supermarkets sought coverage for damage. The court analyzed the application of the Named Storm deductible versus the deductible for spoilage. Wakefern argued that while Superstorm Sandy was originally a Named Storm ("a storm that has been declared by the National Weather Service to be a Hurricane, Typhoon, Tropical Cyclone, Tropical Storm or Tropical Depression"), it was downgraded approximately an hour before it made landfall. The court did not agree. It found that Hurricane Sandy hit before it was downgraded to a "post-tropical cyclone." The court placed particular emphasis on the policy's "arising out of" language—which it reasoned should be "treated liberally." The court held the Named Storm deductible applicable. The court reasoned that damage occurred while Sandy was a hurricane and before it was downgraded, such that there was a significant nexus between Sandy as a Named Storm and the damage to the Wakefern facilities.

The Named Storm deductible was defined as "2 percent of Total Insurable Values [("TIV")] at the time of loss at each location involved in the loss or damage arising out of a Named Storm[.]" The court analyzed how to calculate the TIV. Wakefern asserted that since the "Wind and Hail sublimit" was $150 million, the Named Storm deductible would be no more than $3 million. Lexington argued there was no "Wind and Hail sublimit." Instead, it asserted that TIV applied to the total value of all of Wakefern's insurable interests. While TIV was not defined, the court applied its common meaning and found the term unambiguous. The court agreed with Lexington and held that "[t]he Named Storm deductible should be 2 percent of the aggregate Statement of Values at the stores for which [Wakefern] submitted a claim." This produced a deductible of $22 million.

New Jersey courts will continue to review insurance companies' handling of Superstorm Sandy claims. Whether based in bad faith, consumer fraud, breach of the covenant of good faith and fair dealing or breach of fiduciary duty, courts are not granting early dismissals of policyholders' claims of mistreatment. Much has been written about insurance company abuses in handling Superstorm Sandy claims, and much of it is accurate. However, Sandy victims need to pay careful attention to the strength of their claims, and the handling of their insurance litigation. ■

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