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ANDERSON KILL'S
POLICYHOLDER ADVISOR
CONFERENCE WEBINAR SERIES

October 25, 2023
1:00 pm – 2:00 pm

FLOODS, FIRES, HURRICANES: EMERGING ISSUES IN CLIMATE CHANGE INSURANCE COVERAGE

Source: gbrionline.org

Disclaimer

The views expressed by the participants in this program are not those of the participants' employers, their clients, or any other organization. The opinions expressed do not constitute legal advice, or risk management advice. The views discussed are for educational purposes only, and provided only for use during this session.

SPEAKER:

Rhonda D. Orin, Esq.
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Rhonda D. Orin is the Managing Shareholder of the firm's D.C. office.

Rhonda represents policyholders in coverage cases nationwide, She is experienced in all aspects of insurance, varying from cyber liability third-party claims to alternative risk transfer arrangements for employee benefit plans. She has served as lead counsel in multiple jury and bench trials, argued before the highest courts of several states, and appeared in two cases before U.S. Supreme Court. Through jury verdicts, dispositive decisions and confidential settlements, she has recovered close to a billion dollars for policyholders, including nine-figure recoveries.

Rhonda has received multiple honors, including being one of the Top 50 women attorneys in D.C.; a Fellow of the American Bar Foundation; Ranked in Chambers USA; a Fellow of the Litigation Counsel of America; a Star of the Bar by the Women’s Bar Association of D.C., a member of the Legal 500 for Advice to Policyholders, and a Best Lawyer and Super Lawyer continuously since 2011.

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SPEAKER:

Cameron R. Argetsinger, Esq.
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Cameron Argetsinger is a Shareholder in the D.C. office of Anderson Kill. He focuses his practice on insurance recovery counseling and dispute resolution.

Cameron has represented corporate policyholders in a broad range of insurance coverage disputes, including claims involving coverage for cyber liability, directors' and officers' liability, employment practices liability, environmental contamination, antitrust litigation, flood and hurricane damage, intellectual property liability, false advertising, lead-based paint, asbestos, the False Claims Act and overseas tort liabilities. In the past, Cameron has advised clients in the placement and negotiation of the terms of various types of insurance coverage, including cyber and D&O insurance.

In addition to insurance recovery, Cameron has represented clients in a wide range of administrative and commercial disputes, including false advertising, construction design defects, international trade and class action litigation.

SPEAKER:

Dennis J. Artese, Esq.
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Dennis Artese is a shareholder in the New York office of Anderson Kill and Chair of the firm’s Climate Change and Disaster Recovery practice group. He is also co-chair of the firm's Construction Industry practice group. Dennis's national practice concentrates on all types of insurance recovery litigation, with an emphasis on securing insurance coverage for property and business interruption losses stemming from natural disasters and other perils as well as for construction-related first-party property losses and third-party liability claims. Dennis has substantial experience in all phases of litigation, arbitration and property insurance appraisals, and has recovered hundreds of millions of dollars of insurance proceeds on behalf of policyholders in connection with a variety of property, builder's risk, commercial general liability, umbrella and excess liability, D&O, E&O, crime, and political risk insurance claims. Dennis also has extensive experience in litigating insurance broker malpractice cases and other general commercial litigation disputes, including construction-related disputes.

Dennis is the General and Climate Change Insurance Editor of the Journal of Emerging Issues in Litigation. He has been recognized by Super Lawyers for Insurance Coverage since 2012. He also has been recognized by Legal 500 for Insurance Advice to Policyholders and singled out as being a "superb lawyer and subject-matter expert."

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SPEAKER:

Ronald J. Papa, SPPA
President
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Ron has been instrumental in NFA's growth for more than 30 years. He has successfully adjusted more than 2,000 insurance losses working for a wide range of clients. Ron earned the prestigious designation of Senior Professional Public Adjuster and is accredited by the National Association of Public Insurance Adjusters (NAPIA), of which he is past president.

He was named Person of the Year by NAPIA for "outstanding leadership" and recently addressed the National Symposium of Insurance Commissioners at their conference in Florida. Ron is approved as an instructor by numerous State Insurance Departments, the New York State Bar Association, and the Society of CPAs. He graduated from Niagara University.

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INTRODUCTION

- Pre-Storm Preparedness
- Key Property Insurance Provisions
- Key Insurance Coverage Issues
- Property Insurance Claims Process
- "New" Climate Change-Related Suits

Source: postandcourier.com

PRE-STORM PREPAREDNESS

- Assemble Response and Claim Teams
- Don't be outgunned from the start
  - Emergency restoration/response companies
  - Risk Manager, CFO, GC
  - Coverage counsel
  - Broker
  - Public adjuster
  - Building consultant
  - Construction expert – critical path
  - Structural engineer
  - Forensic accountant

BUILDINGS

- Replacement Cost Coverage – elsewhere!

- Actual Cash Value (ACV) until Replaced
  - Notify within 180 days ?

    – not book value – not market value

- Blanket Coverage
  - Avoid Margin Clause
  - Watch out for Loss Occurrence Limit

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BLANKET VS. SPECIFIC

Building #1	$10,000,000
Building #2	$10,000,000
Building #3	$10,000,000
Building #4	$10,000,000
Building #5	$10,000,000
Total	**$50,000,000**

Watch out for a MARGIN CLAUSE or Loss Occurrence Limit

LAW OR ORDINANCE COVERAGE (BUILDING CODES)

- Increase Cost of Construction
  - check the sublimit
- As if Rebuilt at the Same Site
- As determined by the Agency with Jurisdiction – with architects, etc.
- Older buildings a must have it – newer ones too!

PERSONAL PROPERTY

- Determine Scope of Loss
  - Replacement Cost
  - Cost to Repair (if applicable)
  - Actual Cash Value – Replacement Cost

- Cost to Procure, Freight & Set Up
- Selling price – mfg goods or sold goods
- What Constitutes Replacement
- Property of Others – bailee – care, custody & control

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BUSINESS INCOME & EXTRA EXPENSE

- Extra Expenses to Resume Operations – Not Necessarily Reducing the Loss
- Lost Revenues – Rents
- Ordinary Payroll Coverage
- Coinsurance – 80% Beware
  - You want agreed amount – BI Worksheet

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Joplin Schools


JOPLIN
HIGH
SCHOOL

KEY PROPERTY INSURANCE COVERAGE ISSUES

- Insurance Causation
- Application of flood sublimits beyond physical damage losses
- Application of deductibles and sublimits – downgraded storms
- Application of “named storm” deductibles as a percentage of values “at risk”

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CAUSATION

Proximate Cause and Concurrent Causation

- **Two general rules:**
  - *Efficient Proximate Cause Rule:* Loss is insured if the efficient proximate cause of the loss was a covered peril.
  - *Concurrent Cause Rule:* Loss is insured if at least one of the causes of loss is a covered peril.
- Interpretation varies by state – majority of states adopt Efficient Proximate Cause Rule.
- Courts have not reached consensus on what "proximate cause" means (*e.g.,* substantial factor, most direct and obvious, predominate, prime cause, moving cause, cause that triggers chain of events).

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CAUSATION (CONT'D)

Anti-concurrent causation:

- "We will not pay for loss or damage caused directly or indirectly by any of the following. Such loss or damage is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss."

ISO Cause of Loss – Special Form (CP 10 30 04 02); ISO Building and Personal Property Form (CP 00 10 04 02)

Source: archive.constantcontac.com

CAUSATION (CONT'D)

- Wind vs. Flood
  - ACC = Significant coverage implications

Are they enforceable?

NJ: Appellate Division dicta and Federal District Court decision recognizing enforceability/enforcing ACC

- *Simonetti v. Selective Ins. Co.*, 859 A.2d 694 (N.J. Super. 2004); *Assurance Co. Am., Inc. v. Jay-Mar, Inc.*, 38 F. Supp. 2d 349 (D. N.J. 1999)

NY: ACC Enforced

- *Kosich v. Metropolitan Property & Cas. Ins. Co.*, 214 A.D.2d 992 (N.Y. 4th Dep't 1995); *Kula v. State Farm Fire & Cas. Co.*, 212 A.D.2d 16 (N.Y. 4th Dep't 1995)

Source: agents.floodsmart.gov

CAUSATION (CONT'D)

- What To Do About Anti-Concurrent Causation Clauses?
  - i. avoid entirely – broker forms
  - ii. if necessary, choose the least onerous
  - iii. submit claims with the clauses in mind
  - iv. challenge enforceability
    - based upon state law proximate causation rule
      - California, Washington, North Dakota, West Virginia
    - based upon reasonable expectations doctrine
      - Mississippi – *Corban v. United Services Automobile Association*, 20 So. 3d 601 (Miss. 2009)
    - But, provisions have been upheld in New York and other states
    - Choice-of-laws is important

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FLOOD SUBLIMIT LIMITATIONS

➢ Policy language is key:

- Flood sublimits often are tied to "physical loss or damage" which is different from a Time Element loss
- BI and other Time Element limits are often specified separately from flood sublimits
- Tremendous variations from one policy to the next
- Many confusing interactions among complicated clauses
- Ambiguity is resolved in favor of coverage

Source: quotewizard.com

FLOOD SUBLIMIT LIMITATIONS (CONT'D)

- Flood sublimit N/A to Time Element loss where:
  - Flood sublimit refers only to "physical loss or damage" and does not refer to "all loss caused by physical loss or damage";
  - Flood sublimit does not specify what type of loss is limited by flood;
  - Limits of Liability section includes separate sublimits for perils (e.g., flood, earthquake) and coverages (e.g., time element, accounts receivable);
  - Definition of "flood" incorporates phrase "physical loss or damage" and does not refer to non-physical loss or "loss caused by physical loss or damage"; or
  - Other coverage limits (e.g., Terrorism) expressly state that they limit coverage for Property Damage **and** Time Element.

DEDUCTIBLES AND SUBLIMITS – DOWNGRADED STORMS

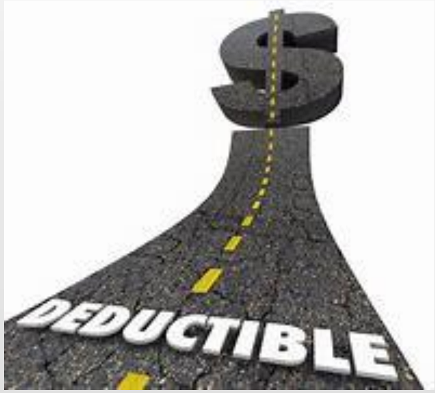
- Typically vary by peril
- Perils often but not always defined in policies
- Common perils
  - Flood
  - Named Storm
  - Windstorm
  - Storm surge
- Current Claims:
  - Remnants of Irma (NY and NJ)
  - Ian (FL)

Source: thenewyorktimes.com

Source: visibleearth.nasa.gov

NAMED STORM DEDUCTIBLES – VALUES "AT RISK"

- May be expressed as a percentage of values "involved in the loss" or "at risk"
- Issues can arise in connection with damage from successive storms
  - Irma – Maria
  - Ian – Nicole



Source: propertyinsurancecoveragelaw.com

- Ambiguity should be construed in favor of coverage

STRATEGIES FOR PURSUING CLAIMS TO QUICK RESOLUTION

A. Be Proactive in Presenting the Claim

- Provide relevant information without waiting to be asked.
- Give the insurance company a reasonable deadline for resolving the claim.
- Request partial payments.
- Submit a “hostile” proof of loss if necessary.

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STRATEGIES FOR PURSUING CLAIMS TO QUICK RESOLUTION (CONT'D)

B. Document everything that does or does not happen in the adjustment.
   - Make a written record in correspondence with the insurance company.
   - Keeps them on their toes.
   - Lay a foundation for a possible bad faith claim if necessary.

Source: startsmallthinkbig.org

STRATEGIES FOR PURSUING CLAIMS TO QUICK RESOLUTION (CONT'D)

C. Be prepared to commence legal action if need be.

- If choice-of-laws is an issue, be ready to file quickly.

Source: newmarkettoday.ca

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STRATEGIES FOR PURSUING CLAIMS TO QUICK RESOLUTION (CONT'D)

D. Consider Alternatives to Litigation

- Appraisal
- Mediation
- Arbitration

Source: thestrategydistillery.com

"NEW" CLIMATE CHANGE LITIGATION

- Plaintiffs have been trying for years to hold corporate America liable for climate change.

- Thus far, the question has been whether such claims can be brought at all.

- As claims increase, the focus is turning to coverage.
  - Are greenhouse gas emissions an accident or occurrence?
  - Do they constitute "traditional pollution"?
  - Do they involve actual "damages" or just regulations?

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EXAMPLES OF CLIMATE CHANGE LITIGATION

- *People v. General Motors (damages sought)*
  - Class action by State of California against General Motors on grounds that auto sales caused excessive releases of carbon dioxide, leading to climate change and actual BI/PD.
  - Action was brought under tort theory of "public nuisance".
  - Case dismissed because it arose from "political questions".

- *Massachusetts v. EPA (regulatory only)*
  - Attorney generals sued EPA for failing to take action against the release of greenhouse gases.
  - U.S. Supreme Court ruled that EPA can regulate these substances and remanded for the EPA to decide.

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EXAMPLES OF CLIMATE CHANGE LITIGATION (CONT'D)

- *American Elec. Power Co. v. Connecticut*
  - U.S. Supreme Court next held that corporations cannot be sued for greenhouse gas emissions under federal common law, as such authority is reserved to the EPA. The federal common law of nuisance was displaced by Clean Air Act.
  - The result was regulatory only (a decree limiting emissions).

- *Native Village of Kivalina v. ExxonMobil Corp.*
  - Action by Alaskan village against 24 oil, energy and utility companies for reducing the Arctic ice pack through greenhouse gas emissions and sinking the village.
  - Action dismissed because it was for public nuisance.

INITIAL RULINGS ABOUT COVERAGE

- *Aloha Petroleum Ltd. v. National Union Fire (2022)*
  - Energy company sued insurance cos for failing to defend and indemnify against climate change cases brought by Honolulu and Maui.
  - In September 2023, fed. dist. ct. certified two questions of Hawai'i law to Hawai'i Supreme Ct: (1) can "accident" include recklessness; and (2) are greenhouse gases "pollutants" under the pollution exclusion or are they different from "traditional environmental pollution".
  - Briefing is underway; case is being watched closely.

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INITIAL RULINGS ABOUT COVERAGE (CONT'D)

- *Everest Premier Ins. Co. v. Gulf Oil LP (2022)*
  - Insurance cos sought declaration they were not obligated to defend or indemnity Gulf Oil LP against allegations by Conservation Law Foundation that it failed to prepare a bulk petroleum terminal for climate change impacts.
  - They argued no coverage because no allegations of "bodily injury" or "property damage." Allegations were only of "a risk of potential property damage from ongoing and future weather events related to global warming and climate-change." Also, pollution exclusion.
  - Filed vol. dismissal without prejudice in Mass Super. Ct.

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INITIAL RULINGS ABOUT COVERAGE (CONT'D)

- *Illinois Farmers Ins. Co. v. Metropolitan Water Reclamation District of Greater Chicago (2014)*
  - Insurance cos filed putative class action in Illinois state ct against municipal entities in Illinois for failing to implement adequate stormwater management plans to prevent flooding that impaired policyholder property.
  - Filed notices of dismissal when removal to federal court, saying, "[W]e believe our lawsuit brought important issues to the attention of the respective cities and counties, and that our policyholders' interests will be protected by the local governments going forward."

INITIAL RULINGS ABOUT COVERAGE (CONT'D)

- *Steadfast Ins. Co. v. AES Corp. (2014)*
  - Insurance co won a declaration in Virginia state court that it had no duty to defend or indemnify energy company against lawsuit alleging its greenhouse gas emissions had destroyed an Alaskan village.
  - Virginia Supreme Court affirmed declaration of no coverage, finding that the release of greenhouse gases was intentional and therefore was neither an accident nor an occurrence.

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HOPEFULLY, NO ONE HERE WILL BE NEXT!

QUESTIONS?

Source: pinterest

THANK YOU.

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