

Trial

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Shelter from the Storm?

When weather-related disaster strikes, many insureds are shocked to find out their policy precludes coverage. When this happens, the only recourse may be against the agent for breach of professional responsibility.

Although "acts of God," natural conditions, and nature-driven catastrophes often provide a defense to tort liability, this does not mean there is no recourse for damages resulting from those phenomena. But while first-party insurance coverages are available for acts of God, natural disasters, and weather damage, they are a hit-and-miss patchwork of covered and noncovered perils.

For example, coverage may be available for a particular natural peril in some parts of the country but not in others. Some weather-related damage is covered under standard forms, some perils require additional premiums for broader form coverage, and some perils are only covered through government-required or government-sponsored plans. Common throughout all forms of coverage, however, is the insurance industry's desire to limit and restrict the coverage promised and paid for.

Indeed, this is an area of insurance where knowledge and planning before loss strikes are imperative. Standard form policies typically contain coverage for, say, windstorm or hail damage. But in parts of the country where tornadoes or hailstorms are common, insurers typically endorse out or severely restrict standard coverage, depriving the residents of the coverage they are most likely to need. In this situation, "caveat emptor" is a rule to live by.

When disaster has struck and the insured finds out the coverage needed is not included in the policy, the only recourse may be against the agent for breach of professional responsibility to provide the extent and nature of coverage that the insured would foreseeably need.

When disaster strikes in the form of a natural catastrophe, the coverage to look to is generally first-party property insurance. This is the type of insurance a person or business buys for protection against loss to the insured's own property.

Property insurance policies are most commonly written on a "perils" basis. The policy either promises to cover "all perils" except those specifically excluded, or specifically lists the perils that will be covered. A "peril" is something that causes a loss or damage to the property. Causes may include fire, theft, lightning and explosion. In other words, something unrelated to the insured's conduct causes the loss.

Depending on the circumstances, however, third-party liability coverage may be at issue. Liability coverage is insurance purchased by an insured to protect against claims by third persons for the insured's alleged negligence in causing-or contributing to-the damage.

Unlike property insurance, liability insurance focuses on the conduct of the insured that causes bodily injury or property damage to a third party. Most commonly, in the context of natural phenomena, liability coverage is implicated in cases involving domesticated animals. But a liability policy may be implicated when the insured's negligence is coupled with a loss that was caused by or was partly attributable to a "natural" event.

For example, when a subcontractor defectively installs a skylight and rainwater leaks into a building, causing

damage to the walls, carpeting, and contents, the general contractor's liability coverage may provide indemnification for the water damage caused to the nondefective parts of the building.

This article, however, discusses the first-party coverages available for losses caused by natural disasters.

LEGAL PRINCIPLES

The Insurance Services Office (ISO) provides insurers nationwide with standard form policy forms and provisions. These standard policies are the most common ones on the market, although insurance companies can--and often do--modify these forms with endorsements, both standardized and nonstandardized. Some insurers issue nonstandard or manuscripted policies that are drafted by the insurer for a particular client or for a particular category of risks. While these policies typically contain negotiated terms, they also commonly include some standardized language.

The discussion below regarding the various natural disaster and weather-related coverages is based on the kinds of insurance generally available under standard form policies. But because endorsements control over the main text of a policy, insurers often use them to limit certain risks in particular geographic areas.

For example, a standard form policy that covers damage resulting from volcanic eruption may well be endorsed to exclude that coverage in Hawaii. Similarly, a policy that covers windstorms may be endorsed to exclude that coverage in Florida, where hurricanes are common. Thus, endorsements give insurers flexibility to limit their risks based on the geographic area involved. This flexibility, of course, requires insureds to be vigilant about understanding the coverage when they buy the policy and may require payment of an additional premium to obtain coverage they might otherwise think they have.

A critical factor to keep in mind when reviewing a policy to determine if coverage exists for a particular loss is the various causation doctrines applied by the different courts.

For example, some courts apply a concurrent causation analysis. Under this principle, a loss caused by two or more perils, some of which are covered and some of which are not, may still be covered. In California, if the efficient proximate cause of the loss is a covered peril, the loss is still covered even if noncovered causes triggered, contributed to, or were the immediate causes of the loss. Other courts cast the analysis in terms of whether the dominant cause of the loss was a covered peril.

Some states use a different, but equivalent, analysis to find coverage. Many policies provide coverage only for direct losses caused by the named peril. The courts, however, are often liberal in assessing what constitutes a direct loss

For example, under a hail insurance policy, the court in one case held that a direct loss is one proximately caused by the peril insured against. When an insured's chicken house collapsed due to the weight of the sleet on the roof, the insurer denied coverage, arguing that a direct loss by hail occurs only when the property is damaged by the direct impact of the hail. The court disagreed and found coverage. This is a common analysis running through many cases dealing with perils covered by property insurance.

Other states follow the reasoning that even when a covered peril is nothing more than a contributing cause of the loss, the loss should be covered. As a Wisconsin appellate court stated, "If there is any evidence that any included peril is a cause of damage, then it is assumed that the insured paid to be protected from that loss, and it would be unfair to the insured to deny the benefits as paid for."

These varying causation doctrines provide extraordinary flexibility in the coverage determination. So it is

critical that all the potential causes of a loss be explored.

Also helpful to insureds is the conclusion of most courts that the determination of which peril caused or contributed to the damage is a question of fact to be left to the jury.

PERIL COVERAGE

Lightning. Damage caused by lightning is normally included in most standard form policies as a covered peril. The ISO standard form policy simply covers lightning as a peril, without limitation or qualification. But some policies limit coverage for damage caused by lightning only when explosion or fire ensues as the result of the lightning, and not for the lightning strike itself. Under those policies, even if a building is torn apart by the lightning strike, coverage is precluded if no fire is triggered as a result.

It would seem to be a fairly straightforward determination as to whether the damage claimed was the result of lightning and is thus covered. Lightning cases, however, demonstrate a broad array of situations in which insurers contend the damage is caused not by lightning but by a noncovered peril.

There are also conflicting rulings by courts. In one case, when the lightning strike was followed immediately by a violent wind (a noncovered peril), the court held the claim was covered because the wind would not have caused the extreme damage that occurred if the lightning strike had not opened the building. Another court found coverage was limited only to the damage caused by the lightning itself and not to the loss caused by the wind.

Similarly, insurers attempt to attribute losses to perils other than lightning, such as wind, tornadoes, structural defects, flood undermining, improper construction and even arson.

Windstorms. Many property policies provide coverage for damage caused by wind or windstorms. Again, as long as the predominating cause of the loss is wind, the coverage usually applies even if some other peril contributed to the loss. This fact does not stop insurers from trying to limit or restrict the coverage, however.

For example, when there is windstorm coverage, insurers argue that mere gusts of strong wind are not sufficient to constitute a storm --thereby negating coverage. Some courts, however, have noted that if an insurer wants to limit coverage to particular types of storms or to wind velocities at certain levels, the policy must state those limitations.

Similarly, disputes arise over whether cyclones, tornadoes, and hurricanes are covered as windstorms. Since each of these involves high winds, it is only logical that losses caused by them would be covered under windstorm coverage. But this reasoning does not stop insurers from trying to limit their exposure.

In fact, in one notable case brought in California by the American Samoa government, the insurer argued that even though the insured expressly requested hurricane coverage, damage caused by wind-driven water and wave wash was excluded by an endorsement never provided to the insured prior to the loss. The trial court ruled against the insurer on its coverage arguments, and the jury awarded not only the full contractual benefits of \$27.8 million but imposed punitive damages of twice that amount.

This case sounds a warning bell to insureds in hurricane-prone areas, however, because insurers in those areas may provide windstorm coverage but try to exclude damage caused by water--either alone or in conjunction with a windstorm or other storm. Residents in those areas must be vigilant to ensure that the coverage they need is actually provided. Residents should put the onus on their agents when purchasing coverage by requesting in writing that coverage for all damages likely to result from weather events be

included in the policy.

Hail, snow, ice, frost. Like windstorm damage, the standard forms of policies often list hail as a covered peril. And like windstorm coverage, damage resulting to the interior of the building from rain, snow, sleet, sand, or dust is covered if those elements entered the building because of an opening created by the hail. Not surprisingly, in Midwestern states where crop damage from hailstorms is common, hail insurance is specifically regulated. Many forms also provide coverage for damage caused to a building or its contents as the result of the weight of ice, snow or sleet.

Earthquakes, earth movements, landslides. Obviously, this is a form of coverage important to California residents. But earthquakes occur in virtually every part of the country, though with limited frequency and intensity in most areas. Earthquake coverage is not normally included in any standard form property policy. If covered at all, coverage is normally acquire through an additional endorsement or under a "stand-alone" policy.

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