

## Determining the Cause of the Loss from a Named Windstorm when there is Water Damage – New Jersey

Water damage, while one of the leading causes of loss under a property policy, often results in some of the most complex claims due to the intersection of exclusions, sublimits, and complex wording within the policy. One particularly difficult issue is whether water damage caused by a storm surge is covered by the flood sublimit, or under the general policy or water limit. In *New Jersey Transit Corp. v. Certain Underwriters at Lloyd's* (“NJTC v. Lloyd’s”), the New Jersey Appeals Court found that the “flood” sublimit of the policy should not apply as the cause of the loss was a “named windstorm” and not a “flood”.

In *NJTC v Lloyd’s* the court was asked to determine whether a flood sublimit applied to losses sustained during Superstorm Sandy. The court found that although there was “flooding,” the water damage was more closely related to the “named windstorm”, and therefore, the \$400 million policy limits should apply. The court focused its analysis on the definitions for “flood” and “named windstorm” and by applying the efficient proximate cause doctrine to determine which would apply.

When reviewing the definitions within the property policies, the court determined that although the loss would qualify under the definition of “flood,” the policy also contained a definition for “named windstorm” which “more specifically encompasses the wind driven water or storm surge associated with a ‘named windstorm’<sup>1</sup>. In addition, the policy did not specifically state that “storm surge” associated with a “named windstorm” should be considered a “flood” event and fall under the “flood” sublimit.

The court then looked to the “Occurrence Limit of Liability Endorsement” (OLLE), which defined “occurrence” in such a way as to group all losses caused by specifically named perils as a single event or “occurrence.” However, while the OLLE groups similar losses, it does not specify which cause of loss predominates if there are multiple causes of loss that qualify as specifically named perils.

After reviewing the policy as a whole, and specifically looking at the definitions reviewed above, the court found that the plain language of the policy clearly stated that “water damage resulting from a ‘storm surge’ associated with a ‘named windstorm’ does not fall within the definition of ‘flood,’”<sup>2</sup> resulting in the “flood” sublimit not applying to the loss and the New Jersey Transit having access to the full policy limits for this loss.

The court then affirmed that in New Jersey the “efficient proximate cause” doctrine applies to losses where there is more than one cause of loss. Under the “efficient proximate cause”

<sup>1</sup>New Jersey Transit Corp. v. Certain Underwriters at Lloyd’s London, No. A-1026-17T1, 2019 WL 6109144, at \*5 (N.J. Super. Ct. App. Div. Nov. 18, 2019)

<sup>2</sup>New Jersey Transit Corp. v. Certain Underwriters at Lloyd’s London, No. A-1026-17T1, 2019 WL 6109144, at \*6 (N.J. Super. Ct. App. Div. Nov. 18, 2019)

doctrine, the entire loss will be considered a covered loss as a covered peril “sets other causes in motion which, in an unbroken sequence and connection between the act and the final loss”<sup>3</sup> causes that final loss. The covered cause of loss here was the surge of water, which falls under both definitions of “flood” and “named windstorm.” Using the “efficient proximate cause” doctrine, the court must look to the first peril in the unbroken sequence of events for the loss sustained by the New Jersey Transit, which in this case was the “named windstorm.” Under this analysis, the entire loss is deemed to be caused by the “named windstorm” and not the “flood.” Even if a portion of the loss is found to be covered only under the “flood” sublimit, the remainder of the loss will fall within the “named windstorm” cause of loss which does not have an applicable sublimit under the policy.

The Insurers argued that the “efficient proximate cause” doctrine should not apply to this loss, despite clear New Jersey precedent. The Insurers argued that because the policy was negotiated by a professional insurance broker and because the Insured is sophisticated in business and insurance matters, the doctrine should not apply. The court found that the Insurers were free to draft the policies as they intended and could have clearly stated that the “efficient proximate cause” doctrine does not apply to the policy when specifically named perils were the cause of the loss.

When a property loss occurs, it is important to not only read the policy but determine how the applicable state’s law determines the cause of loss. As can be seen in *NJTC v Lloyd’s*, the cause of loss doctrine within the applicable state may be key in establishing coverage under the policy and determining the limit that applies to the loss. A key takeaway is that policyholders should always read their policy and not just rely on the law of a specific state because the Insurer may clearly state that a specific doctrine, previously determined by the court, does not apply to losses under the policy.

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<sup>3</sup>New Jersey Transit Corp. v. Certain Underwriters at Lloyd’s London, No. A-1026-17T1, 2019 WL 6109144, at \*8 (N.J. Super. Ct. App. Div. Nov. 18, 2019)