LABLETTA & WALTERS LLC

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THE IMPORTANCE OF CLEAR POLICY LANGUAGE IN MULTI-PERIL LOSSES

Claims professionals are frequently confronted with claims in which damages are caused by more than one peril. If all perils, which contributed to a loss, are either covered or excluded, then the analysis remains simple. When a combination of covered and uncovered perils combine to cause a loss, however, the analysis becomes decidedly more complex.

Unfortunately, New Jersey common law only compounds the complexity involved in a multi-peril loss situation. Specifically, New Jersey law requires that an insurer determine whether the multiple perils occurred concurrently or sequentially in order to properly analyze coverage. If the multiple causes of loss occur concurrently, the loss is generally considered not to be recoverable under the policy. *See Brindley v. Fireman's Ins. Co. of Newark, N.J.*, 35 N.J. Super. 1 (1955). In these situations, however, the insured may still show by a fair preponderance of the evidence that certain damages were within the coverage provided by the policy and not encompassed by any exclusions. *Id.* at 7.

The rule regarding multi-peril losses when the perils occur sequentially is far more favorable to the insured. In sequential losses, it has been held that recovery may be allowed where the insured risk was either the last or the first step in the chain of causation. *See Stone v. Royal*, 511 A.2d 717 (N.J. App. Div. 1986).

While these rules may not appear complex in theory, application of the rules is far from straightforward in practice. For instance, whether multiple perils occurred concurrently or sequentially is itself an issue subject to investigation, dispute, and possibly litigation. In light of New Jersey's case law, insurers would be unwise to leave their claim professionals to wrestle with this confusing and disputed patchwork of common law rules.

A far better approach is to address the analysis of multi-peril losses in the insurance policy itself. An example of how such situations can be addressed is on clear display in the recent New Jersey Appellate Division case of *Maritime Park, LLC v. Nova Casualty* Company, CIV.A. *3554-17T2 (App. Div. 2019).*

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Maritime Park, LLC is the owner of a restaurant within Liberty State Park in New Jersey. The restaurant is located within a marina area in proximity to the Hudson River. On October 28, 2012, the New Jersey Department of Environmental Protection issued an order closing the park in anticipation of Superstorm Sandy. The park remained closed until November 16, 2012. After Sandy, the record established that it took a considerable period of time to allow the flood waters to recede and debris to be removed from the roads in order for the restaurant to reopen.

The insurer provided coverage for certain parts of the insured's claim. Other components of the claim were disputed. A central question in the litigation is whether coverage existed based on the "business income" provision in the policy. The policy provided coverage for the actual loss of business income that the insured sustained caused by an action of civil authority that prohibits access to the insured property. Under the policy, when a covered cause of loss causes damage to property other than property at the described premises, the insurer will pay for the actual loss of business income. Critically, in order for coverage to exist, the prohibition on access to the property experienced by the insured must be the result of a "covered cause of loss."

Like all property policies, the Nova Casualty policy contained exclusions. The lead-in language to the relevant exclusions stated as follows:

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

After the lead-in language, the policy expressed standard exclusions. These exclusions included damage caused by flood, surface water, and water that backs up or overflows from a sewer, drain, or sump pump.

Importantly, the insured sustained no direct water damage or flooding to the interior of the building. Instead, most of the physical damage occurred to the insured's outdoor patio and was described as "relatively minor wind damage and the loss of electrical power."

Relying on the expansive lead-in language cited above, the Appellate Division ruled that the insurer correctly rejected the insured's claim for additional coverage. Specifically, the Appellate Division noted that the lead-in language bars coverage when two identifiable causes of loss contribute to a single loss as long as one of the causes of loss are excluded. The Appellate Division observed that one of the reasons that the park was kept closed for several weeks, causing the restaurant to close for this time, was that flood waters overflowed portions of the park. Notably, the Appellate Division held that it was "inconsequential" that the insured property itself was not damaged by flooding. Instead, due to the lead-in language cited above, the Appellate Division held that the policy afforded no coverage where restrictions on park access, and therefore restaurant access, were produced, at least in part, by flooding. The Appellate Division further held that it was inconsequential that the property was not actually flooded when it closed in anticipation of the storm on October 28, 2012.

Maritime Park provides an excellent example of how an insurer can protect itself from New Jersey's odd patchwork of common law rules surrounding multi-peril losses. With clear policy language, insurers can provide clarity to their claims professionals and insureds alike.

OFFERS OF JUDMENT: A POTENT TOOL IN SUBROGATION

New Jersey Rule of Court 4:58 governs offers of judgment. Under the Rule, at any time more than twenty days before the actual trial date, any party may serve on any adverse party an offer to take judgment in a certain sum. If the offer is not accepted on or prior to the tenth day before the actual trial date or within ninety days of its service, whichever period expires first, the offer is deemed withdrawn. If the offer is not accepted and the insurer obtains a money judgment in an amount that is 120% or more of the offer, the insurer can recover all reasonable litigation expenses incurred following non-acceptance, prejudgment interest on favorable terms, and a reasonable attorney's fee for subsequent services compelled by the non-acceptance.

The Offer of Judgment Rule is a powerful and underutilized tool for insurers to deploy in subrogation actions. Provided that the insurer and its counsel are prepared to confer early in the litigation and agree to accept a reasonable settlement figure, an offer of judgment is generally well advised.

Once an offer of judgment is served, several positive outcomes are possible. First, the offer may be accepted. Given that damages in subrogation actions are generally fixed, subrogation matters are notorious for not generating pressure on the liability insurer to resolve the case early in the litigation. As a result, subrogation actions are well-known for languishing for extended periods of time. If an early offer of judgment is accepted by the liability insurer, the subrogating insurer obtains a reasonable recovery in an expedited fashion.

The second positive outcome occurs when the offer is not initially accepted. Notably, even non-acceptance of the offer provides powerful benefits to the subrogating insurer. If an offer is not accepted, then the liability insurer faces a dramatic increase in exposure in the event of an adverse verdict. Specifically, if the subrogating insurer obtains a verdict in excess of 120% of the offer of judgment, then the liability insurer will be liable not only for the judgment, but also for the subrogating insurer's attorney's fees and litigation expenses. In cases where a relatively modest amount is at issue, the sums recoverable pursuant to the Offer of Judgment Rule may far exceed the amount initially in dispute. Given these considerations, a liability insurer should be hesitant to try a case in which its exposure may be dramatically escalated. Thus, the Rule puts pressure on the liability insurer to resolve the case.

An additional possible outcome is that the case is tried and a favorable result is obtained. In the event that a verdict in excess of 120% of the offer is obtained, the subrogating insurer achieves total victory. The subrogating insurer recovers compensatory damages as well as the attorney's fees and litigation expenses provided by the Offer of Judgment Rule.

Naturally, a further possibility is that a case will be tried and the subrogating insurer may lose. In the event of a defeat, the service of an offer of judgment certainly caused no harm to the subrogating insurer. In fact, the very service of the offer of judgment increased the risk and exposure on the liability insurer.

In summary, if an insurer and its counsel perform an early analysis of the strengths and weaknesses of a subrogation claim, and are willing to accept a reasonable sum at the early stages of the litigation, the Offer of Judgment Rule provides an effective tool for subrogating insurers. Subrogating insurers should use the Rule to incentivize early settlements and, in the face of an obstinate liability insurer, improve the odds of a more significant recovery.

LaBletta & Walters LLC provides experienced and effective counsel to insurers. Please direct any inquiries to LaBletta & Walters at 732.387.1010 or 610.828.3339.