



SUPERSTORMS, VANISHING DEDUCTIBLES, AND FLOODS THAT ARE NOT FLOODS

HOW CLIMATE IS CHANGING THE LEGAL LANDSCAPE OF INSURANCE COVERAGE

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Climate change, once widely viewed as a myth, is now a scientifically accepted reality. Unlike many skeptics, however, the insurance industry has long taken notice. Indeed, the very viability of insurance companies compels them to pay close attention to climate change, the evolving risks it presents, and legal developments that follow. Catastrophic weather-related events such as hurricanes, tornados, wildfires, droughts, and floods pose major challenges for the insurance industry. Moreover, such events inevitably change the legal landscape in which insurers and their counsel operate. Legal developments in the U.S. stemming from recent climate change-related catastrophes provide a glimpse into what the future of climate change holds for the insurance industry.

Although no single event can be attributed to climate change, a look at a “typical” climate change-related event is useful. Hurricanes Katrina and Sandy are examples of the types of catastrophic events climatologists predict will occur more frequently due to climate change. Hurricane Katrina, which devastated Louisiana and Mississippi in 2005, was the costliest natural disaster in U.S. history. It produced the greatest coastal flood heights ever recorded in the U.S., caused more than \$100 billion in losses, and resulted in about 2,000 casualties.

Hurricane Sandy, which struck the U.S. in October 2012 with record storm surges, caused 110 fatalities and an estimated \$65 billion in losses. Understanding how recent climate-related catastrophes of historic proportion have brought legal changes will help to predict and prepare for legal challenges that result from climate change.

Legal developments arising from climate change take a variety of forms. Some happen immediately after a storm as an edict from a governor or insurance regulator. Others take years of deliberation by legislative bodies. Still others occur by judicial fiat in the courts. Taken together, the panoply of legal developments affecting the insurance industry that can be traced to climate change are significant and are changing the face of insurance coverage and coverage litigation today.

New insurance regulations, laws, and executive orders enacted or mandated after major storms are obvious developments. Following Sandy, for example, New York, New Jersey, and Connecticut mandated mediation of disputed insurance claims. The mediations were conducted at the insurers’ expense. These mandatory mediations followed similar programs that followed Katrina and which were deemed to be largely successful in resolving disputed claims. After

Sandy, New York shortened the time in which insurers were required to begin and complete a coverage investigation, make a decision on a claim, and issue payment or a denial. The state also eased requirements for licensure of insurance adjusters from out-of-state to adjust New York claims, thereby helping to expedite adjustment of the millions of claims that resulted from Sandy.

One of the most notable, and most publicly discussed, developments from Sandy was the official declaration from states where Sandy made landfall that Sandy was a “superstorm,” not a hurricane, when it made landfall. Not merely semantics or word games, the official recognition of Sandy as a superstorm meant that homeowners’ hurricane deductibles, usually between \$500 and \$1,000, did not apply to damage from Sandy. This single declaration had a major impact on insured losses. In another potentially significant development, the New York legislature continues to consider a bill that would prohibit concurrent causation exclusions, common in many insurance policies. As major storms involve wind (a covered loss) and water (an excluded loss) damages, insurers are closely monitoring this potential new law.

Insurers are also realizing changes in the arena of insurance coverage litigation.

One of the most significant developments traceable to climate change is the use of mass action and increasing use of class action lawsuits in the context of otherwise straight-forward insurance coverage disputes following major catastrophes. Typically, disputes between an insurer and a policy-holder over an insurance claim are highly fact-intensive and unsuitable for class or mass actions. The magnitude of recent catastrophic storms and the sheer volume of resulting insurance claims, however, create conditions for courts to consolidate litigation out of sheer necessity.

Following Katrina, insurers dealt with an estimated 1.7 million insurance claims. The Eastern District of Louisiana, in *In Re Katrina Canal Breaches Consolidated Litigation*, organized all cases related to the levee breaches in New Orleans following Katrina and organized those cases into related subgroups. One group included insurance coverage lawsuits. The post-Katrina consolidated litigation is, in all likelihood, a harbinger of things to come due, in large part, to climate change. With massive weather-related catastrophes expected to occur with greater frequency, insurance coverage litigation is expected to increase in step along with it.

Very recently, the Eastern District of New York began following in the post-Katrina consolidation footsteps. On January 10, 2014, the court created an *In Re Hurricane Sandy Cases* docket.¹ The court created this docket for pretrial case administration in all actions seeking insurance coverage for damage caused by Sandy. The docket will provide a means to efficiently conduct discovery and settlement negotiations in Sandy-related suits.

Large-scale consolidated coverage litigation is a relatively recent development in insurance coverage litigation. Although mass and consolidated actions have been more common in mass tort areas such as product liability litigation (for example, defective Chinese manufactured drywall and FEMA trailer formaldehyde cases), they will likely become more commonplace in the future as the frequency and magnitude of catastrophic events increase.

Another development is the advent of a new specialized practice area – storm-related coverage litigation. The spate of recent weather events of historic size (e.g., Hurricanes Rita, Katrina, Irene, and Sandy), and the sheer volume of insurance claims that followed, created a niche for counsel specialized in representing policyholders,

and in particular homeowners, in coverage litigation after catastrophic storms. With more frequent catastrophic storms, climate change is creating an environment conducive to attorneys specializing in homeowner coverage litigation on a large, recurring scale. With the expected trajectory of such storms only increasing, this is expected to be a growing area of practice rather than merely a passing fad.

Another aspect of insurance currently in a state of upheaval is the manner in which flood risks and flood losses are assessed, underwritten, and even scrutinized by courts. The historic storm surges that accompanied Sandy forced FEMA to update its flood maps, the fundamental tools used for rating flood risk hazards. The effects of climate change are altering the underwriting of flood risks on an unprecedented scale. Vivid examples of this type of flooding are the flooding of the Ninth Ward in New Orleans following the levee breaches during Hurricane Katrina and the flooding of New York's subway system from Sandy storm surge, the first flooding of its kind in the subway's 108-year history. As a result, the insurability of properties, especially coastal properties, is changing and flood insurance premiums are increasing, impacting millions of homeowners with federally backed mortgages in flood areas.

Courts are also looking closely at what constitutes a flood, occasionally with surprising results. In 2006, the Eastern District of Louisiana caused shock-waves by ruling that the term "flood," as used in typical homeowners' policies, was ambiguous and unenforceable.² The issue was whether a typical homeowners policy exclusion for water damage caused by flood precluded coverage for homes that were inundated by water after a levee breach. The exclusions precluded water damage resulting from "flood, surface water, waves, tidal water, overflow of a body of water, or spray from any of these all whether driven by wind or not." Defying established precedent, the court determined the exclusion was susceptible to two reasonable interpretations – it could exclude either floods caused by man or floods caused by nature, and was thus ambiguous. A state court reached a similar ruling the same year.³

In 2007, to the relief of insurers and the chagrin of policyholders, the Fifth Circuit reversed, finding the term "flood" unambiguous. The Louisiana Supreme Court also ruled unequivocally that "flood" is unambiguous, explaining:

The plain, ordinary and generally prevailing meaning of the word "flood" is the overflow of a body of water causing a large amount of water to cover an area that is usually dry. This definition does not depend on locality, culture, or even national origin – the entire English-speaking world recognizes that a flood is the overflow of a body of water causing a large amount of water to cover an area that is usually dry land.⁴

Although both rulings that flood was ambiguous were ultimately overturned, the dispute over what constitutes a flood for insurance purposes illustrates that sympathetic courts are open to rewriting insurance policies after catastrophes. The massive property damage that climate change-fueled catastrophes will likely cause, when confronted by a sympathetic court, create a landscape ripe for similar rewriting of insurance policies.

As post-Katrina and post-Sandy changes to insurance law illustrate, the legal landscape of insurance coverage is evolving along with climate change. Mass coverage litigation, post-event rewriting of policy language by courts and policymakers, and counsel specializing in storm-related coverage litigation are but a few of the changes insurers should expect in the future of climate change.



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¹ Case No. 1:14-mc-00041-CLP-GRB-RER.

² *In re Katrina Canal Breaches Consolidated Litigation*, 466 F.Supp.2d 729.

³ *Sher v. Lafayette Ins. Co.*, 973 So.2d 39 (Ct. App. La. 2007).

⁴ *Sher v. Lafayette Ins. Co.*, 988 So.2d 186, 193-194 (La. 2008).

