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FREEZE-UP CLAIMS IN THE WAKE OF “SANDY”

In the wake of “Sandy” and the Nor’easter that hit New Jersey and New York on November 7, 2012, concern has arisen in the insurance industry over not only flood claims, but also freeze-up claims, given how many insureds in these states remain without power and with limited or no access to their homes. As such, this memo will analyze the relevant policy provisions in both MSO and ISO forms, as well as issues that carriers will face.

The relevant MSO and ISO policy provisions follow at the end of this memo.

ANALYSIS OF POST-SANDY/NOR’EASTER FREEZE-UP CLAIMS UNDER MSO POLICIES

Carriers issuing MSO policies must evaluate post-“Sandy”/Nor’easter freeze-up claims with knowledge of the applicable policy language to make a valid determination whether coverage exists, and if so, to what extent. The plain language of Section I – D, subsection 4., for example, expressly indicates that no coverage for freeze-ups will ensue unless the exception is satisfied. Significantly, the freeze-up provision is located beneath the concurrent exclusions section, which further justifies a denial of coverage if the freeze-up is concurrently caused by “Sandy”-related flooding.

Additionally, carriers issuing MSO policies may also be in a position to rely on the water damage exclusion, under Section I – D, subsection 10. An argument can be made—assuming a flooding loss caused by “Sandy” exists—that any losses caused by freeze-ups are causally related to the flooding loss, which is clearly not covered under the policy.

The potential challenge to some coverage defenses would be establishing a nexus between any flood losses and subsequent freeze-up losses. Specifically, the freeze-up might occur several days or longer after the flood, and courts might find the freeze-up sufficiently attenuated from the flooding to break the causal link and trigger coverage. As such, carriers should not reflexively deny coverage solely on the basis that flooding may have put in motion the events that culminated in a freeze-up. The amount of time between the uncovered flood loss and the (potentially uncovered) freeze-up loss may be significant, as may be other relevant factors, including the action or inaction of the insured. These provisions clearly support a protocol of thoroughly examining the circumstances surrounding each claim to determine whether the insured has coverage or whether the claim should be denied.

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ANALYSIS OF POST-“SANDY”/NOR’EASTER FREEZE-UP CLAIMS UNDER ISO POLICIES

Carriers issuing ISO policies must evaluate post-“Sandy”/Nor’easter freeze-up claims, based on the language of Section I, Perils Insured Against, Coverage A – Dwelling and Coverage B – Other Structures, subsection 2.c.(1), which provides for no coverage for freeze-ups unless the insured has taken reasonable efforts to maintain heat and winterize pipes. Again, close scrutiny must be given to the facts of all freeze-up claims submitted subsequent to these events, to reach a determination as to whether coverage exists or whether the claim should be denied.

Coverage disputes under ISO forms based on the exclusion *may* be susceptible to an assertion of ambiguity, as the exclusion for freeze-ups is not located beneath the concurrent causation exclusions section. However, the water damage exclusion, under Section I –Exclusions, subsection A.3, *is* in fact located under the concurrent causation exclusions section. As discussed above, an argument can be made—assuming a flooding loss caused by “Sandy” has occurred—that any losses caused by freeze-ups are causally related to the flooding loss, which is clearly not covered under the policy.

Again, there are potential issues in establishing a nexus between any flood losses and subsequent freeze-up losses. Specifically, a freeze-up occurring several days or longer after the flood may prompt a finding of coverage, as the freeze-up could be deemed too attenuated from the flood to fall within the exclusion. As such, carriers should not reflexively deny freeze-up claims solely on the basis that they were precipitated by a flooding event. The lapse of time between the uncovered flood loss and the freeze-up loss, as well as the action or inaction of the insured, may be significant in determining whether and to what extent coverage may exist.

LEVEL OF ACCESS PROVIDED TO INSURED

Both MSO and ISO policies contain general mitigation of damages provisions requiring insureds to take reasonable efforts to prevent further losses from occurring. One issue carriers will face is the level of access insureds have to their homes.

Currently, thousands of insureds in New Jersey and New York do not have access—or at least regular access—to their homes. There are currently several towns, mainly along the barrier island from Bay Head, N.J. to Seaside Park, N.J., (about an 11 mile stretch) that are “locked-down” by local and national authorities. Residents of Sea Bright were permitted access to their homes on November 5, 2012 to collect essential items, but were ordered to evacuate by 3:30 P.M. on that date and will not be able to return thereafter for an estimated 30 days, if not longer. The Midland Beach section of Staten Island, while not formally off-limits to homeowners, is reportedly overrun by looters, and residents who are present are undoubtedly focused first on securing the property that they have left.

Access to homeowners, when it has been granted, has only been for hours at a time, and no contractors have been expressly granted access. However, some homeowners have been able to utilize that time to winterize, and others have ensured that a contractor has been able to gain access, requiring fact-sensitive inquiries to determine the potential impact of a policyholder’s failure to mitigate damages. Clearly if an insured is aware that his/her only significant access might come for a few hours and then not again for an extended period of time, the focus of that homeowner should be to take all steps possible to safeguard the home from the elements.

On the other hand, areas like Long Beach Island in New Jersey, as well as some of the bay towns, are now permitting daily access, with few restrictions, and there seem to be few reasons why insureds cannot take steps to winterize and otherwise secure their property.

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One other factor in favor of the industry and its insureds is that in several areas, including the barrier island from Bay Head to Seaside, water service has been shut off, so that a freeze-up and thaw will not result in damage which would be as widespread as that caused by water flowing from the main.

Under both MSO and ISO policies, even where coverage for freeze-ups is provided, such coverage is available only to the extent that the policyholder takes reasonable steps to maintain heat and winterize the pipes within the home. The level of available access will be significant in determining whether or not an insured has taken the requisite “*reasonable*” efforts to maintain heat, winterize the pipes, and/or otherwise mitigate damages.

This issue in particular demonstrates the fact-sensitive nature of freeze-up claims in the wake of “Sandy” and the November 7, 2012 nor’easter. For example, if an insured is only granted access to his or her home for a few hours in order to collect essentials, and thereafter cannot return for weeks or even months, “reasonable” efforts may be limited to shutting off their water, as hiring a contractor to winterize the pipes and having the contractor actually accomplish this task in the span of a few hours would be impracticable, if not impossible, particularly if access is limited to the homeowner.

At the same time, an insured with unfettered access to his or her home as of November 5, 2012 (or, of course, an insured who never lost access to his or her home) reasonably could be expected to turn off the water *and* hire a contractor to winterize the pipes in order to satisfy the duty to mitigate damage under the applicable homeowners policy. The determination of whether there should be coverage of these claims, or whether they should be denied or reduced because of the insured’s breach of the policy terms and conditions, will be fact-specific and individualized. The level of access available will be a significant factor in the determination.

RECOMMENDATIONS

At this time, given the fact-sensitive nature of these claims, we cannot give an overarching coverage opinion on freeze-up claims related to “Sandy” or any subsequent weather-related event. We urge all claims personnel to be aware of the issues which we have raised, as they will be significant factors informing your coverage determinations.

We do, however, recommend one proactive measure that would inure to the benefit of both the carriers and policyholders: the sending of a notice to policyholders in those zip codes where power is not expected to return for several weeks or more advising of the duty to shut off water. In these areas, where access to one’s home is feasible, shutting off the water for the home is an easy means of substantially reducing the number of freeze-up claims. The notice should also advise insureds that if the town has shut off water service, the service to the house should be shut down and the home should be winterized as well. Thereafter the system should be reinspected before service to the home is restored. We suspect that a number of claims will arise at some point in the spring when service is restored in situations where insureds have assumed erroneously that their system is intact.

The precautionary notice we recommend should emphasize that the recommended measures are necessary to demonstrate “reasonable” efforts to prevent freeze-up losses from occurring, and to mitigate damages, under the above-cited language in both MSO and ISO policies.

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CONCLUSION

Because of the fact-sensitive nature of flood-related freeze-up claims, no universal coverage position is warranted in response to claims following “Sandy” and this week’s subsequent Nor’easter. In reviewing such claims, focus on the reasonableness of the efforts of the insureds (in part depending on the level of access available) and the temporal proximity between flood losses caused by Hurricane Sandy and subsequent freeze-up losses.

Our office has already accumulated a vast amount of data around the storms, including warnings prior to the storm, local conditions before, during, and after the storms, and restrictions on access and movement on a town by town basis, together with damage reports and photographs, video and other documentation. We are available to respond to any Sandy or Nor’easter-related claims questions. As Methfessel & Werbel has been involved in more published insurance law-related cases than any other law firm in New Jersey, we are uniquely prepared to assist you in the handling of storm-related claims.

CASE ALERT

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RELEVANT MSO POLICY PROVISIONS

I. MPL 01 01 11

Under Section I D, "Losses Not Insured," MSO Form MPL 01 01 11 provides in relevant part:

We do not provide insurance under Section I for any sort of damage or loss directly or indirectly, wholly or partially, aggravated by, consisting of, or resulting from the following – even if loss otherwise covered contributes to such concurrently or in any sequence.

....

4. FREEZING OF APPLIANCES OR OTHER EQUIPMENT EXCLUSION

Leakage or overflow from air conditioning, heating, plumbing, or other appliances or equipment, or damage to such appliances or equipment caused by freezing that occurs while the building or any living unit (that is controlled by any insured) within the building is unoccupied, vacant, or under construction. To the extent that coverage is provided by the applicable coverage form, this exclusion is waived if necessary and ongoing care is exercised to maintain adequate heat in the building or any living unit (that is controlled by any insured) within the building, or such appliances or equipment are drained and the water supply shut off.

....

10. WATER DAMAGE EXCLUSION (See Note)

- A.** Underground, subsurface or surface water that exerts pressure on or flows, seeps or leaks through doors, driveways, floors, foundations, sidewalks, swimming pools, walls, windows, or other openings.
- B.** Water or sewage that backs up through sewers or drains; overflow of sump; or the discharge of sewers or water mains originating off the residence premises.

But, if loss resulting from fire, explosion, glass breakage, or theft, to the extent coverage is specifically described in the

applicable coverage form ensues, we insure such ensuing loss.

(Emphasis added). Further, Under Section I E, “Conditions,” MSO Form MPL 01 01 11 provides in relevant part:

B. Protect Property

Protect property from a covered loss or further damage. For example: taking exposed property indoors, covering openings or windows, or making temporary repairs. We cover reasonable necessary expenses that you incur for such temporary repairs or safeguards.

But, it is your obligation, as soon as feasible after you, or those you authorize to act on your behalf, become aware of any condition under your control that could lead to loss while this policy is in force, to undertake all reasonable construction, maintenance or repair necessary to protect property from such covered loss

Listing of all such conditions is not feasible, but example would be to repair a leaking roof or repair a sagging foundation. Any construction, maintenance, or repairs are done at your expense.

Any additional or subsequent loss resulting from your neglect of this duty is not covered by this policy, and you must either rely on other insurance or absorb such loss yourself.

(Emphasis added).

II. MPL 03 01 11

The language of MSO Form MPL 03 01 11 is virtually identical to the above cited language of MSO Form MPL 01 01 11, the only difference being that the last two paragraphs of the provision entitled “Protected Property” under Section I E, “Conditions,” of MPL 01 01 11 are combined into one paragraph in MPL 03 01 11.

III. MHO 02 01 05, MHO 03 01 05, MHO 04 01 05, MHO 05 01 05, and MHO 6 07 07

Under “Covered Causes of Loss,” MHO 02 01 05, MHO 03 01 05, MHO 04 01 05, MHO 05 01 05, and MHO 6 07 07 all provide, in relevant part, as follows:

Subject to all applicable provisions of this policy, property covered under Coverage C is insured for fortuitous direct physical loss that results from the following causes of loss:

....

- **Water Damage:** accidental discharge or overflow of water or steam – other than that caused by freezing – from within air conditioning, heating, or plumbing equipment, or home appliances on the residence premises.

(Emphasis added).

RELEVANT ISO POLICY PROVISIONS

I. HO-3 (10-06)

Under Section I, “Perils Insured Against,” within “Coverage A – Dwelling and Coverage B – Other Structures,” ISO Form HO-3 (10-06) provides in relevant part:

2. We do not insure, however, for loss:
 - c. Caused by:

- (1) Freezing of a plumbing, heating, air conditioning or automatic fire protective sprinkler system or of a household appliance, or by discharge, leakage or overflow from within the system or appliance caused by freezing. This exclusion does not apply if you have used reasonable care to:

- (a) Maintain heat in the building; or
 - (b) Shut off the water supply and drain all systems and appliances of water.

However, if the building is protected by an automatic fire protective sprinkler system, you must use reasonable care to continue the water supply and maintain heat in the building for coverage to apply.

For purposes of this provision a plumbing system or household appliance does not include a sump, sump pump or related equipment or a roof drain, gutter, downspout or similar fixtures or equipment

(Emphasis added). Further, within “Coverage C – Personal Property,” ISO Form HO-3 (10-06) provides in relevant part:

We insure for direct physical loss to the property described in Coverage C caused by any of the following perils, unless the loss is excluded in Section I - Exclusions.

14. Freezing.

a. This peril means freezing of a plumbing, heating, air conditioning or automatic fire protective sprinkler system or of a household appliance but only if you have used reasonable care to:

- (1)** Maintain heat in the building; or
- (2)** Shut off the water supply and drain all systems and appliances of water.

However, if the building is protected by an automatic fire protective sprinkler system, you must use reasonable care to continue the water supply and maintain heat in the building for coverage to apply.

b. In this peril, a plumbing system or household appliance does not include a sump, sump pump or related equipment or a roof drain, gutter, downspout or similar fixtures or equipment.

(Emphasis added). Additionally, under “Section I –Exclusions,” ISO Form HO-3 (10-06) provides in relevant part:

A. We do not insure for loss caused directly or indirectly by any of the following. Such loss is excluded regardless of any other cause or event contributing concurrently or in any sequence to the loss. These exclusions apply whether or not the loss event results in widespread damage or affects a substantial area.

. . . .

3. Water Damage, meaning:

- a. Flood, surface water, waves, tidal water, overflow of a body of water, or spray from any of these, whether or not driven by wind;
- b. Water or water-borne material which backs up through sewers or drains or which overflows or is discharged from a sump, sump pump or related equipment; or
- c. Water or water-borne material below the surface of the ground, including water which exerts pressure on or seeps or leaks through a building, sidewalk, driveway, foundation, swimming pool or other structure;

caused by or resulting from human or animal forces or any act of nature.

Direct loss by fire, explosion or theft resulting from water damage is covered.

- 5. **Neglect**, meaning neglect of an "insured" to use all reasonable means to save and preserve property at and after the time of a loss.

....

(Emphasis added). Finally, under "Section I – Conditions," ISO Form HO-3 (10-06) provides in relevant part:

- 2. **Duties After Loss.** In case of a loss to covered property, we have no duty to provide coverage under this policy if the failure to comply with the following duties is prejudicial to us. These duties must be performed either by you, an "insured" seeking coverage, or a representative of either.

....

- d. Protect the property from further damage. If repairs to the property are required, you must:
 - (1) Make reasonable and necessary repairs to protect the property; and
 - (2) Keep an accurate record of repair expenses

(Emphasis added).