

## **Breadth of the Flood Exclusion: A Flood is a Flood, Including Storm Surge**

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A case involving an Alaska Native Corporation and property damage caused by a hurricane is bound to be of interest. *Arctic Slope Regional Corp. v. Affiliated FM Ins. Co.* did not disappoint.<sup>1</sup>

The Arctic Slope Regional Corporation, based in Barrow, Alaska, and one of the thirteen Corporations formed under the Alaska Native Claims Settlement Act of 1971, owned an office and construction yard in Iberia Parish, Louisiana. The property was inundated with three feet of water after Hurricane Rita's storm surge hit in September 2005.

Arctic Slope filed a claim for property damage with Affiliated. The claim was denied and suit was filed. Before the district court, the parties disputed which policy provisions applied to the storm surge related claims. The distinction was critical because the policy covered damage caused by "Wind and/or hail," but excluded damage caused by flood.

The policy defined "Wind and/or hail" as "direct and/or indirect action of wind and all loss or damage resulting there from whether caused by wind, by hail or by any other peril . . . when water . . . is carried, blown, driven, or otherwise transported by wind onto or into said location." "Flood," on the other hand, was defined as "surface water; tidal or seismic sea wave; rising (including overflowing or breaking of boundaries) of any body of water . . . all whether driven by wind or not. . . ."<sup>2</sup>

Arctic Slope argued that, because storm surge is caused by strong onshore winds, coverage was provided under the “Wind and/or hail” definition. The district court disagreed because the “Wind and/or hail” definition had to be considered in light of the entire policy. When read in conjunction with the definition of “Flood,” it was apparent that storm surge was not encompassed by the definition of “Wind and/or hail.” Instead, because storm surge involved the “rising (including overflowing or breaking of boundaries) of [a] body of water, . . . whether driven by wind or not,” it was appropriately classified as a “Flood.”<sup>3</sup> “Hurricane Rita’s storm surge was, in fact, the rising of the Gulf of Mexico, a body of water, that was driven by wind.”<sup>4</sup>

Affiliated submitted that even if the “Wind and/or hail” definition did encompass storm surge, coverage was still limited by the “perils excluded” section of the policy:

This policy excludes loss or damages if one or more of the following exclusions apply to the loss, regardless of other causes or events that contribute to or aggravate the loss, whether such causes or events act to produce the loss before, at the same time as, or after the excluded causes or events.

. . .

8. Flood, Seepage or Influx of water from natural underground sources below the surface of the ground.<sup>5</sup>

Arctic Slope countered that this provision excluded a “Flood . . . from natural underground sources below the surface of the ground.” Again, the district court disagreed. Because there was no comma after “Seepage,” the comma after “Flood” indicated a separation of ideas. Thus, the provision excluded damage from both “Flood,” as defined in the policy, and, separately, “Seepage or Influx of water from natural underground sources below the surface of the ground.”<sup>6</sup>

Therefore, because storm surge was properly classified as a “Flood,” the policy excluded the damage sustained by Arctic Slope. The district court noted this result was consistent with the Fifth Circuit’s decision in *In Re: Katrina Canal Breaches Litigation*,<sup>7</sup> where the plaintiffs argued the flood exclusion did not apply to damages sustained due to the negligent maintenance of the levees and not a natural flood. The Fifth Circuit disagreed with the *Katrina Canal Breaches* plaintiffs because a reasonable policyholder would expect a massive inundation of water from a breached levee to be excluded. Similarly, because the storm surge in *Arctic Slope* fit squarely within the definition of “Flood,” it was excluded from the general “all-risk” provision of the policy, including “Wind and/or hail” coverage.<sup>8</sup> Therefore, Arctic Slope’s motion for summary judgment was denied.<sup>9</sup> Notably, the district court’s decision did not focus on the policy’s anti-concurrent causation clause.

The Fifth Circuit, in a decision authored by Judge Edith Brown, affirmed the district court, but on slightly different grounds, including reference to the anti-concurrent causation clause. On appeal, Arctic Slope argued that the policy was ambiguous on two levels. First, the policy excluded coverage for storm surge damage within the flood definition while it authorized coverage for the same damage in the wind/hail provision. The Fifth Circuit rejected this argument. The policy explicitly stated it covered all risks of direct physical loss or damage "except as excluded under this policy." Therefore, the exclusion of storm surge as a flood event could not be reversed by its possible inclusion as a wind/hail event.<sup>10</sup>

Next, Arctic Slope argued the policy's anti-concurrent causation clause, preceding the excluded perils, was ambiguous because there was only one cause of damage, storm surge, and not separate causes defined as separate perils in the policy.<sup>11</sup>

The policy's anti-concurrent causation provision read:

This policy does not insure against loss or damage caused directly or indirectly or resulting from any of the following. Loss or damage is excluded regardless of any other cause or event whether or not insured under this policy that contributes concurrently or in any sequence to the loss or damage.

Judge Brown authored the Court's decision in *Leonard v. Nationwide Mutual Insurance Co.*,<sup>12</sup> wherein the court determined the anti-concurrent causation clause was not ambiguous as applied to damage caused by storm surge. Damage caused exclusively by wind was covered under the policy. But if wind and water "synergistically" caused the same damage, such damage was excluded.<sup>13</sup>

The *Leonard* analysis of the anti-concurrent causation has been criticized for its loose causation analysis. One critic suggests *Leonard* implies that the anti-concurrent causation clause language actually works like the media stereotype.<sup>14</sup> Under *Leonard*, the clause allows the insurer to escape payment for covered wind damage merely because of the fortuitous occurrence of uncovered floodwater acting on the same house. But this is an incorrect analysis of the anti-concurrent causation clause unless the two perils work together to cause the same damage.

Perhaps, in *Arctic Slope*, the court should have simply stated the anti-concurrent causation provision was not applicable because there was only one force causing damage, i.e., storm surge.<sup>15</sup> The court specifically noted that, unlike *Leonard*, all the damage here

was allegedly caused by storm surge. Moreover, Arctic Slope did not assert damages attributable separately and independently either to wind or flood.<sup>16</sup> Instead, Arctic Slope argued two policy provisions addressed the same peril, i.e., storm surge. Arctic Slope then submitted an ambiguity was created by the anti-concurrent causation clause because one provision appeared to afford coverage for storm surge while the other did not. This confuses the meaning of the anti-concurrent causation clause.

The clause applies where there is multiple causation, i.e., there are two or more forces combining to cause the exact same damage. If two or more forces cause different, distinct, divisible damage, only single causation exists. The forces are not working concurrently to cause the same damage, but separately; therefore, the anti-concurrent causation clause is not implicated. For example, it is possible for one house to suffer numerous losses, with each damage location caused by a single, distinct peril. Wind might damage the roof, while flood might damage the structure. Under this scenario, the anti-concurrent causation clause is not applicable. Even though damage caused by flood would not be covered, wind damage to the roof would be covered. In *Arctic Slope*, there was one force, storm surge, causing damage to the construction yard.

Nevertheless, the court addressed and rejected Arctic Slope's argument, determining the anti-concurrent causation clause was unequivocal and unyielding.<sup>17</sup> The storm surge, "whether driven by wind or not," was not covered by the policy.<sup>18</sup> Consequently, the court held the anti-concurrent causation clause precluded coverage of the loss or damages under the Wind/hail provision as water "carried, blown, driven or otherwise transported by wind."<sup>19</sup> Finally, the court noted the policy's anti-concurrent causation clause eliminated application of the efficient proximate causation rule,

“whereby a jury could be called upon to determine the relative contribution of the covered and the excluded perils.”<sup>20</sup> Consequently, the Fifth Circuit concluded, the anti-concurrent causation clause operated exactly as it was intended and was not ambiguous.<sup>21</sup>

The Fifth Circuit undoubtedly reached the correct result. Based on the flood exclusion, there is no coverage for the flood damage caused by the storm surge. Further, there was no ambiguity regarding the flood exclusion. The Fifth Circuit could have stopped there. Addressing the second alleged ambiguity under the anti-concurrent causation clause was probably not necessary and does not appear to be analytically correct.

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<sup>1</sup> *Arctic Slope Regional Corp. v. Affiliated FM Ins. Co.*, No. 08-30050, 2009 U.S. App. LEXIS 6900 (5<sup>th</sup> Cir. April 2, 2009), *aff’g*, No. 07-0476, 2007 U.S. Dist. LEXIS 64850 (W.D. La. Aug. 30, 2007).

<sup>2</sup> *Arctic Slope*, 2007 U.S. Dist. LEXIS 64850, at \*13 (emphasis added).

<sup>3</sup> *Arctic Slope*, 2007 U.S. Dist. LEXIS 64850, at \*15.

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- <sup>4</sup> *Arctic Slope*, 2007 U.S. Dist. LEXIS 64850, at \*15.
- <sup>5</sup> *Arctic Slope*, 2007 U.S. Dist. LEXIS 64850, at \*16.
- <sup>6</sup> *Arctic Slope*, 2007 U.S. Dist. LEXIS 64850, at \*19-20.
- <sup>7</sup> *In Re: Katrina Canal Breaches Litigation*, 495 F.3d 191 (5<sup>th</sup> Cir. 2007).
- <sup>8</sup> *Arctic Slope*, 2007 U.S. Dist. LEXIS 64850, at \*23.
- <sup>9</sup> *Arctic Slope*, 2007 U.S. Dist. LEXIS 64850, at \*24.
- <sup>10</sup> *Arctic Slope*, 2009 U.S. App. LEXIS 6900, at \*8.
- <sup>11</sup> *Arctic Slope*, 2009 U.S. App. LEXIS 6900, at \*8.
- <sup>12</sup> *Leonard v. Nationwide Mutual Insurance Co.*, 449 F.3d 419 (5<sup>th</sup> Cir. 2007).
- <sup>13</sup> *Leonard*, 449 F.3d at 430.
- <sup>14</sup> David P. Rossmiller, “Katrina in the Fifth Dimension: Hurricane Katrina Cases in the Fifth Circuit Court of Appeals,” *New Appleman on Insurance-Current Critical Issues in Insurance Law* (2008).
- <sup>15</sup> *Arctic Slope*, 2009 U.S. App. LEXIS 6900, at \*8, 9 (court notes only one cause of damage is present – storm surge).
- <sup>16</sup> *Arctic Slope*, 2009 U.S. App. LEXIS 6900, at \*10 n. 4.
- <sup>17</sup> *Arctic Slope*, 2009 U.S. App. LEXIS 6900, at \*9.
- <sup>18</sup> *Arctic Slope*, 2009 U.S. App. LEXIS 6900, at \*9.
- <sup>19</sup> *Arctic Slope*, 2009 U.S. App. LEXIS 6900, at \*9.
- <sup>20</sup> *Arctic Slope*, 2009 U.S. App. LEXIS 6900, at \*9.
- <sup>21</sup> *Arctic Slope*, 2009 U.S. App. LEXIS 6900, at \*9.