



# New York Law Journal

ALM Properties, Inc.

Page printed from: [New York Law Journal](#)

[Back to Article](#)

---

## Businesses Damaged by Sandy Face Knotty Insurance Issues

Christine Simmons

New York Law Journal

12-05-2012

As businesses and property owners assess damage from Superstorm Sandy, lawyers who have been fielding calls from insurers and policyholders say they are seeing areas of potential conflict and while most disputes could be settled out of court, they predict some lengthy and substantial litigation.

"The amount of loss is so significant that I think both sides will be ready to fight for their positions," said Jared Zola, a Dickstein Shapiro partner who represents policyholders.

Lawyers said the most common questions raised by policyholders are whether flood damage is covered by a specific policy, whether non-flood damage is covered, and whether business interruption insurance is available.

On the insurer side, attorneys said their clients have asked for help in evaluating policy language to determine the extent of coverage. Common issues faced by insurers are assessing flood versus wind damage and whether exclusions apply, especially in cases where damage was caused by a combination of factors.

### Cause of Loss

Standard homeowners and commercial insurance policies typically don't cover flood damage, said Michael Troisi, a partner in Rivkin Radler's insurance coverage and litigation practice, which represents insurers.

About 70 percent of New Yorkers in flood zones do not have flood insurance in place, according to the Consumer Federation of America.

"A lot of insureds didn't realize their policies have exclusions for flood, so they're kind of shocked to know carriers" are questioning whether the policyholder is covered and if so, the extent of that coverage, said Seth Schafler, a partner in Proskauer Rose's insurance recovery and counseling group.

Some insurers have already rejected damage claims, Schafler said.

"There's going to be a lot of litigation over the type of damage, what caused the damage: was it wind, was it the flood, which came first," said Gregory Katz, managing partner of Lewis Brisbois Bisgaard & Smith's New York office, which represents insurance carriers.

Policyholders who do have flood exclusions may have other options.

Kenneth Frenchman, a partner at Kasowitz, Benson, Torres & Friedman, said, "You really have to look at the damage, even in the particular area. There are some areas that had heavy flooding, but other areas where the loss doesn't relate to flooding."

If there are appropriate exclusions, Frenchman added, they should be construed narrowly so they apply to the correct portion of the loss.

"You have to see if the causes for the loss can be characterized as something other than flood. You're going to get push-back on that, but you try to make the arguments as best as you can," said Mark Garbowski of Anderson Kill & Olick.

One obstacle to this argument is an anti-concurrent causation clause, which is becoming more common, Garbowski said. This clause provides that if a loss could be considered to be caused by two different events, such as wind and water, the excluded event overrides a covered one, and coverage is denied, Garbowski said.

Courts in New York have generally upheld the language in anti-concurrent causation clauses, Troisi said.

Lawyers say characterizing the loss early on, such as whether it is damage from wind or flood, is crucial.

"There are decisions that you make now, including how you start characterizing causes and losses, that can affect you down the road and you have to be careful about how you stake out your positions," said Garbowski, who estimated a couple dozen people so far have contacted the firm in the weeks after Sandy for insurance questions.

J. Robert Hunter, insurance director of the Consumer Federation of America who sits on a committee charged with making recommendations on improving storm preparedness to Governor Andrew Cuomo, said Nov. 30 that one reform being considered is a ban on anti-concurrent causation clauses.

Lawyers also say a lot of money will ride on how Sandy was classified. The storm was eventually downgraded from a hurricane.

In the days after Sandy hit, New York state officials announced that homeowners would not have to pay large hurricane deductibles stemming from Sandy damage.

"We have informed the insurance industry that hurricane deductibles are not triggered because Sandy did not have sustained hurricane-force winds when it made land in New York," said Benjamin Lawsky, superintendent of financial services, in a press release.

#### Business Interruption

"The biggest question we're hearing," Zola said, is "whether there's insurance coverage for losses sustained without any [direct] physical damage to property," such as business interruption insurance.

Before Sandy hit, New York City officials set up evacuation zones and after the storm, many businesses weren't able to return to their offices.

Zola said many commercial property policies have coverage for situations in which the policyholder loses business income or pays extra expenses because of governmental orders, such as an evacuation or curfew. Those so-called civil authority provisions may trigger business interruption insurance, he said.

Another type of coverage, contingent business interruption, which provides coverage for business interruption losses due to physical loss or damage to the property of the policyholder's customers or suppliers, will likely be raised, Zola said.

Submitting proof of business interruption can get complicated. The business may have to submit proof of its revenue before the storm and what it would have generated in revenue if not for the storm, attorneys said.

For instance, a law firm submitting a claim for business interruption may have to submit affidavits attesting to its hourly rates for the affected attorneys, what attorneys would have billed if not for the storm and what they billed directly after the storm, Garbowski said. The firm may have to submit billing records as part of its evidence, he said.

## All Tagged Buildings

Unsafe To Enter	Restricted Access
Manhattan	
10	278
Bronx	
10	58
Brooklyn	
51	315
Queens	
452	422
Staten Island	
234	5,646

SOURCE: NYC Buildings Department, as of last week, includes commercial and residential

"Anytime you're dealing with the hypothetical, 'if this had not happened, things would have gone that way,'...there's always room to argue," he added.

Meanwhile, the insurance company may hire forensic accountants to evaluate the business interruption claims, Troisi said.

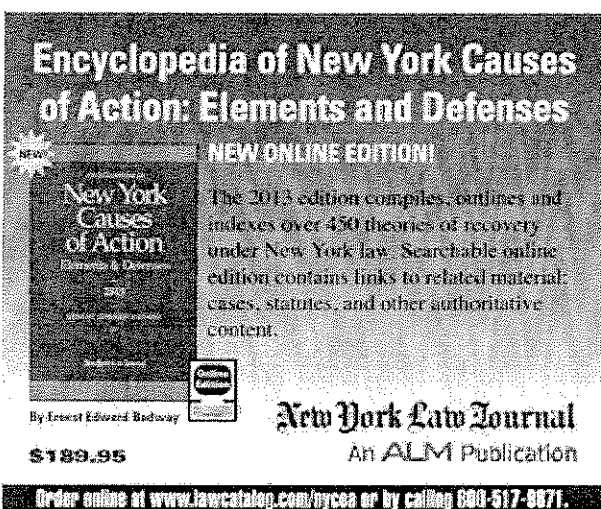
Frenchman said litigation over Sandy-related damage could go on for years, "but the first thing we try to do...is get the claims resolved outside of court to the best of our ability."

Lawyers stress that each policy varies, and many claims will be resolved without litigation.

But for those with disputes, many policies require suits to be filed within a specified period from date of the loss, such as one or two years, Garbowski said.

In a letter to the New York congressional delegation, New York City Mayor Michael Bloomberg said the estimated total public and private loss to the city from Sandy is \$19 billion, including \$3.8 billion in insured private losses, \$4.8 billion in uninsured private losses and \$5.7 billion in lost gross product.

@|Christine Simmons can be contacted at [csimmons@alm.com](mailto:csimmons@alm.com).



**Encyclopedia of New York Causes of Action: Elements and Defenses**

**NEW ONLINE EDITION!**

The 2013 edition compiles, outlines and indexes over 450 theories of recovery under New York law. Searchable online edition contains links to related material: cases, statutes, and other authoritative content.

**New York Causes of Action: Elements & Defenses**

By **Edward Bedway**

**\$189.95**

**New York Law Journal**  
An ALM Publication

Order online at [www.lawcatalog.com/nycea](http://www.lawcatalog.com/nycea) or by calling 800-517-9871.

Copyright 2012. ALM Media Properties, LLC. All rights reserved.