NOT FOR PUBLICATION

WITHOUT THE APPROVAL OF THE COMMITTEE ON OPINIONS

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION – ESSEX COUNTY
DOCKET NO.: **ESX-L-4951-13**

PUBLIC SERVICE ENTERPRISE GROUP, INC.; PUBLIC SERVICE ELECTRIC AND GAS COMPANY; PSEG POWER, LLC; and PSEG FOSSIL, LLC,

Plaintiff,

v.

O P I N I O N

ACE AMERICAN INSURANCE COMPANY; ALLIANZ GLOBAL RISKS U.S. INSURANCE COMPANY; AMERICAN ALTERNATIVE INSURANCE CORPORATION; ASSOCIATED ELECTRIC & GAS INSURANCE SERVICES, LIMITED; CERTAIN UNDERWRITERS AT LLOYD'S, LONDON; ENERGY INSURANCE MUTUAL LIMITED; GENERAL SECURITY INDEMNITY COMPANY OF ARIZONA; LIBERTY MUTUAL INSURANCE COMPANY; NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA; SWISS RE INTERNATIONAL SE; TORUS INSURANCE (UK) LTD; and DOES 1-100

Defendants.

Decided: March 23, 2015

By: Thomas R. Vena, J.S.C.

Oral argument was held before this Court on March 23, 2015. The following attorneys appeared:

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These are cross motions for summary judgment brought on behalf of Plaintiff Public Service Enterprise Group, Inc.[1] (hereinafter "Plaintiff" or "PSEG") and by Defendants Certain Underwriters at Lloyd's, London; General Security Indemnity Company of Arizona; Torus Insurance (UK) LTD; and Torus Insurance (UK) Ltd. (hereinafter "Defendants") pursuant to R. 4:46-2(c). Plaintiff and Defendants both filed opposition and reply to the respective cross motion.

Facts

On October 29, 2012, Superstorm Sandy made landfall near Atlantic City, New Jersey, which brought about a storm surge of record-breaking height. This storm surge inundated and damaged PSEG's property throughout the State of New Jersey, including eight large generating stations that are used to make electricity, as well as a number of substations and switching stations that are used to distribute electricity to consumers. As a result of the damage it suffered, PSEG made an insurance claim under its first-party property policies.

At the time Superstorm Sandy occurred, PSEG was insured under primary and excess property policies that were issued by Ace American and the other named defendants in the case for the 2011-2012 period. The total amount of coverage available under the policies is $1 billion. There is no sublimit in the policies for "named windstorms," other than named windstorms in Florida. There is, however, a $250 million submit in the 2011-2012 policies for losses caused by "flood," and a $50 million limit for losses to property "located in Flood Zones A & V."

To date, Defendants have paid out on some of PSEG's claim, but PSEG's current estimate of its total damages exceeds $500 million.

[1] "PSEG" collectively refers to Public Service Enterprise Group, Inc., Public Service Electric and Gas Company, PSEG Power, LLC, and PSEG Fossil, LLC.

Summary of Parties' Arguments

Both Plaintiff and Defendants move for summary judgment with respect to the coverage disputes at issue. This dispute concerns the meaning of certain language in the first party property policies issued by the insurer-Defendants that allegedly provides coverage for losses that Plaintiff incurred as a result of property damage caused by Superstorm Sandy.

In support of its motion for summary judgment, Plaintiff makes two arguments. First, Plaintiff contends that coverage for losses caused by Sandy is available up to the full $1 billion limit of the policies, and that coverage for such losses is not subject to the lower flood sublimits under the language of the applicable policies. According to Plaintiff, a "storm surge" is included in the definition of "named windstorm," and there is no sublimit in the policies for losses caused by a named windstorm outside of Florida. Indeed, there is no reference to a "storm surge" or "wind-driven water" in the definition of "flood" in the policies. Plaintiff points to the applicable case law, as well as the prior practice of the parties, to support its argument that this difference in the wording of the definitions in the policies mean that a storm surge is not subject to the flood limits. Moreover, Plaintiff contends that New Jersey's proximate cause doctrine, coupled with the last sentence of the flood definition, provide two independent reasons for concluding that losses caused by storm surge are not subject to the flood sublimits: one, under New Jersey case law, if there are multiple causes of a loss, a restriction in an insurance policy does not apply so long as the efficient proximate cause of the loss is not subject to that restriction (and here, Plaintiff submits that wind was the proximate cause of the storm surge that caused the damage); and two, under the last sentence of the flood definition in the policies, loss "not otherwise excluded from resulting from flood will not be considered loss by flood within the terms and conditions of [the] policy," which

other courts have held can be reasonably interpreted to mean that damage caused by a named windstorm is not subject to the flood sublimit of a policy.

Secondly, Plaintiff argues that assuming *arguendo* that the flood sublimits apply to losses caused by a storm surge, the reference in the $50 million flood sublimit to "Flood Zones A & V" applies only to flood damage to property located in Flood Zone A & V in accordance with the plain meaning of the policy language and the FEMA Flood Insurance Rate Maps ("FIRMs"), which contain the official FEMA designations of the flood zones in which PSEG's facilities are located. PSEG avers that there is no support in the language of the policies, FEMA documents, insurance industry customs and practices, or otherwise for the argument that Flood Zone A & V includes any of the areas in which PSEG's damaged facilities are located.

Conversely, Defendants maintain that the court should grant summary judgment in its favor against Plaintiff, based principally on the argument that a storm surge is a type of "flood" under the policy, and, as such, the policy's flood sublimits apply. This is because, according to Defendants, the plain language of the policy defines flood as "the overflowing or breaking of boundaries of natural or man-made bodies of waters." Though not addressed by any courts in the State of New Jersey, Defendants cite courts of other jurisdictions, which have interpreted substantially similar language to mean that a hurricane's storm surge *is* a type of flood for insurance purposes.

Legal Analysis

A motion for summary judgment should be granted whenever the record before the court shows that "there is no genuine issue as to any material fact challenged and that the moving party is entitled to judgment as a matter of law." R. 4:46-2(c). The appropriate inquiry must determine "whether the evidence presents a sufficient disagreement to require submission to a jury or whether

it is so one-sided that one party must prevail as a matter of law." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 523 (1995) (internal citations and quotation marks omitted). The court must review the evidence presented "in the light most favorable to the non-moving party." Id. at 540. If there is a "single, unavoidable resolution of the alleged disputed issue of fact, then the issue is not "genuine." Ibid. The thrust of Brill, therefore, is that "when the evidence 'is so one-sided that one party must prevail as a matter of law,' the court should not hesitate to grant summary judgment." Ibid. (internal citations omitted). Where, however, the competent evidence, when viewed in the light most favorable to the non-movant, is sufficient to permit a rational fact-finder to resolve disputed issues in favor of the party in opposition, summary judgment should not be granted. Ibid.

The issue presented here—the interpretation of language on PSEG's insurance policies—is routinely resolved through summary judgment. See Adron v. Home Ins. Co., 292 N.J. Super. 463, 473 (App. Div. 1996) ("The interpretation of an insurance contract is a question of law for the court to determine, and can be resolved on summary judgment."). "[U]nless the meaning is both unclear and dependent on conflicting testimony," the court interprets the terms of a contract as a matter of law. Celanese Ltd. V. Essex Cnty. Improvement Auth., 404 N.J. Super. 514, 528 (App. Div. 2009) (internal citations and quotation marks omitted).

Whether the terms of a contract are "clear or ambiguous is . . . a question of law." Nester v. O'Donnell, 301 N.J. Super. 198, 210 (App. Div. 1997) (internal citations and quotations marks omitted). An ambiguity exists only if "the terms of the policy are susceptible to at least two reasonable alternative interpretations." Willey v. DD Transport, 2013 WL 4516039, at *5 (App. Div. Aug. 27, 2013). "Stated another way, an ambiguity exists when the 'phrasing of the policy is so confusing that the average policyholder cannot make out the boundaries of coverage.'" Id. (internal citations omitted). Any ambiguity is to be construed in favor of the insured. Great Lakes

Intern. Trading, Inc. v. Travelers Property Casualty Co. of Am., 201 WL 6686633 (D. Conn. Nov. 26, 2014), at *2 (applying New Jersey law). However, in the absence of any ambiguity, it is well settled in New Jersey that the terms of an insurance policy will be interpreted in accordance with their plain and ordinary meaning. See Zacarias v. Allstate Ins. Co., 168 N.J. 590, 595 (2001); President v. Jenkins, 180 N.J. 550 (2004) ("When interpreting an insurance policy, courts should give the policy's words 'their plain, ordinary meaning.'" (internal citations omitted)). Indeed, the New Jersey Supreme Court has stated that "[i]n attempting to discern the meaning of a provision in an insurance contract, the plain language is ordinarily the most direct route. If the language is clear, that is the end of the inquiry." Chubb Custom Ins. Co. v. Prudential Ins. Co. of Am., 195 N.J. 231, 238 (2008) (internal citations omitted). While it is true that "evidence of the circumstances are always admissible in aid of the interpretation in an integrated agreement, even where the contract is free from ambiguity . . . to secure light by which its actual significance may be measured," such extrinsic evidence must be relevant to the meaning of the policy language in dispute. See Newark Publishers' Ass'n v. Newark Typographical Union, 22 N.J. 419, 427 (1956; see also Atlantic Northern Airlines, Inc. v. Schwimmer, 12 N.J. 293 (1953). Thus, "a secret, unexpressed intent that the language should have an interpretation contrary to the words' plain meaning" does not relieve a party from unambiguous terms in a contract. Schor v. FMS Financial Corp., 357 N.J. Super. 185, 191 (App. Div. 2002). Moreover, an exclusion from coverage is to be strictly construed against the insurer, and the burden remains on the insurer to show that a policy exclusion applies. Flomerfelt v. Cardiello, 202 N.J. 432, 441 (2010).

I. The Flood Sublimits Do Not Apply to Losses Caused by Storm Surge

a. The Explicit Language of the Policy

Plaintiff and Defendants agree that there was a storm surge—a hurricane-generated inundation of water—onto PSEG's property; however, the parties disagree over whether this constituted a "flood" under the applicable insurance policies, and, accordingly, whether the policy's aggregate "per occurrence" flood limits apply.

There are no reported cases that have considered whether storm surge is included in the flood definition of an insurance policy under New Jersey law. There are, however, cases from other jurisdictions that have interpreted policies where "named windstorm" was defined or interpreted to include a "storm surge," but there was no reference to storm surge in the applicable flood definition. Two cases, on which both Plaintiff and Defendants rely, held that losses caused by a storm surge are not subject to flood sublimits. See SEACOR Holdings, Inc. v. Commonwealth Ins. Co., 635 F.3d 675, 683 (5th Cir. 2011); Pinnacle Entertainment, Inc. v. Allianz Global Risks U.S. Ins. Co., 2008 WL 6874270, at *6 (D. Nev. March 26, 2008).

In SEACOR, the Fifth Circuit held that a flood limit did not apply to hurricane-generated water damage. SEACOR, supra, 635 F.3d at 678. The applicable policies included definitions of "flood," "windstorm," and "named windstorm," and there was a policy sublimit for "flood" but not for "windstorm" or "named windstorm." Id. at 678-79. The Fifth Circuit determined that the definition of "named windstorm" included all damage caused by a hurricane, including storm surge, based on both the language of the definition and applicable case law. Id. at 681. The court reasoned that all of the damage caused by Hurricane Katrina was the result of a "named windstorm," and, as such the only deductible that applied to damage caused by Hurricane Katrina's storm surge was the deductible for "named windstorm." Id. at 682-83. Therefore, the flood sublimit did not apply.

Id. at 683. Importantly, the court held: "[t]here is nothing to indicate that the limit for the peril of Flood should apply when, under the policy, all damages were under the umbrella of a Named Windstorm." Id. at 684.

While the policy in SEACOR Holdings and the policy of PSEG in this case are similar, there are some key differences. For one, in SEACOR Holdings, the definitions of "windstorm" and "named windstorm" did not contain the phrase "storm surge," but the definition of "flood" included "wind driven water." SEACOR Holdings, supra, 635 F.3d at 678-79. The court, finding that the definition of "windstorm" was incomplete because it did not define what a windstorm was, held that in absence of a definition in the policy, the word "windstorm" ought to include both wind and wind-driven objects. Id. at 681. Under such a definition, "windstorm" included *all* damage caused directly by a "named windstorm," including water damage (attributable to both rain and storm surge). This definition was based on both the dictionary entry for "hurricane," defining it to be tropical cyclones that usually involve heavy rains, as well as the explicit absence of an exclusion for water damage in the definition of "named windstorm." Ibid. As such, the flood sublimit did not apply to the water damage caused by Hurricane Katrina. Id. at 683. It is true that in this case, the PSEG policy defines "named windstorm" to expressly include "storm surge," and does not include "storm surge" or wind-driven water in the definition of "flood." However, under the reasoning of the Fifth Circuit in SEACOR Holdings, the flood sublimits would similarly not apply under the terms of PSEG's policy to the damage caused by Hurricane Sandy's storm surge.

Secondly, in SEACOR Holdings, the flood sublimit applied only to losses caused by the peril of "flood," and in the PSEG policy, the flood sublimits do not apply to the peril of flood but rather apply "per occurrence." Defendant points to this distinction in the policy language to argue that

the flood limit can apply regardless of whether a hurricane caused the flood. However, Defendant's argument is misplaced. The applicable provision in PSEG's policy provides:

$250,000,000	Flood—per occurrence, in the Aggregate During Any Policy Year, but not to exceed a $50,000,000 limit in the Aggregate During Any Policy Year for property located Flood Zone A & V

As Plaintiff rightly points out, under this definition, the flood sublimits do not apply to anything that is not included in the definition of "flood," just as the policy in SEACOR Holdings.

Defendants also argue that SEACOR Holdings is inapplicable because the Fifth Circuit partially relied on Louisiana's efficient proximate cause doctrine in determining that wind was the proximate cause of all of SEACOR's water-related damages. See SEACOR Holdings, supra, 635 F.3d at 682 (finding that, under Louisiana law, "windstorm policies may cover damage from affiliated heavy rains, if the wind was the proximate cause of the damages."). In opposition, Plaintiff contends that this is a "distinction without difference" because under New Jersey law of efficient proximate cause, also known as Appleman's Rule, "all of the damage caused by storm surge was caused by a named windstorm under a policy that—like the [PSEG] policies—defines named windstorm to include storm surge." Defendants counter that under New Jersey insurance law, a proximate causation analysis pursuant to Appleman's Rule does not apply outside the context of coverage versus no coverage disputes. See Wakefern Food Corp. v. Lexington Ins. Co., Docket No. L-6483-13, slip op. at 4-5 (Jan. 23, 2015). However, as will be discussed below, the case law in New Jersey has not in fact limited the doctrine to exclusions in the insurance context. See I.d, infra. Therefore, like the court in SEACOR Holdings, this court too can rely on the proximate cause doctrine in order to hold that the "named windstorm" portion of PSEG's policy may apply where wind was the efficient proximate cause of all of the water-related damage in this case.

The second case on which the parties primarily rely is Pinnacle Entertainment, Inc. v. Allianz Global Risks, supra, 2008 WL 6874270. In Pinnacle, the court interpreted the contract language of a policy with a flood exclusion and a definition of a "weather catastrophe occurrence" (synonymous with "named windstorm"). 2008 WL 6874270, at *1. The definition of a "weather catastrophe occurrence" did not include a reference to "flood," or, alternatively, "wind-driven water." Id. at *2. The court ultimately held that the flood exclusion did not apply to damage caused by a storm surge, concluding that the flood definition did not include a reference to "wind-driven water," while the definition of "weather catastrophe occurrence" *did* include a reference to flood "associated with or occurring in conjunction with" a named storm. Id. at *5. While noting that "storm surge . . . is a specific type of flood," the court reasoned that the differences in the language of the definitions meant that flood damage signaled that the parties did not intend that flood damage associated with a named windstorm was not intended to be subjected to the flood exclusion. Ibid.

Plaintiff cites to Pinnacle to bolster its argument that "[w]here an insurance policy provides coverage for the peril of named windstorm and that peril is defined or interpreted to include storm surge . . . courts have held that losses caused by storm surge are not subject to flood sublimits." In response, Defendant points to two other cases: Six Flags, Inc. v. Westchester Surplus Lines Ins. Co., 565 F.3d 948 (5th Cir. 2009) (stating that the Fifth Circuit would "give no credence to [the insured's] citation to Pinnacle Entertainment . . . an unpublished district court decision"), and Northrop Grumman Corp. v. Factory Mutual Ins. Co., 563 F.3d 777 (9th Cir. 2009) (reversing the holding of the district court, which was consistent with Pinnacle and rejecting the Pinnacle court's reasoning). However, the policies at issue in Six Flags and Northrop Grumman are decidedly different than the one in Pinnacle. For one, in Six Flags, the definition of "weather catastrophe occurrence" referred to the defined term "flood," whereas in Pinnacle, the definition of "weather

catastrophe occurrence" included "all weather phenomenon associated with or occurring in conjunction with the [named] storm or weather disturbance, including but not limited to . . . flood." See Six Flags, supra, 565 F.3d at 957 n.12; see also Pinnacle, supra, 2008 WL 6874270, at *2. It was not clear, therefore, whether that reference to "flood" in the definition of "weather catastrophe occurrence" was intended to be a reference to the defined word "flood." Secondly, in Northrop, the court was interpreting a flood definition in an excess policy that did not have a definition or "named windstorm" or "weather catastrophe occurrence." 563 F.3d at 787 n.8.

Here, the court does not have the benefit of any New Jersey cases that have interpreted policies that define "named windstorm" to include "storm surge" but do not include any reference to "storm surge" or "wind-driven water" in their definition of flood. However, as noted above, there are two out-of-state cases that have interpreted such policies, both of which have held that losses caused by storm surge are not subject to the flood sublimits. The reasoning employed by these courts are sound, and both are consistent with New Jersey's rules of contract construction that "when two provisions dealing with the same subject matter are present, the more specific provision controls over the more general." See I.b., infra.

b. Canons of Contract Interpretation

Plaintiff argues that the specific-over-general maxim of contract interpretation should be applied in the present case. That is, because the specific term "storm surge" is included in the definition of "named windstorm" but not in the definition of "flood," storm surge losses are not subject to the flood sublimits. Conversely, Defendants argue that the specific-over-general principle applies only where two provisions present a "clear conflict" in need of resolution. In any event, according to Defendants, the specific-over-general principle of contract interpretation has been explicitly rejected in a case where the court rejected the insured's argument that the more

"specific" among two insurance policy provisions should be applied to the insured's Hurricane Sandy-related losses. See Wakefern, supra, Docket No. MID-L-6483-13, Slip Op. at 22-23.

Generally, the specific-over-general principle states that "when two provisions dealing with the same subject matter are present, the more specific provision controls over the more general." Homesite Ins. Co. v. Hindman, 413 N.J. Super. 41, 49 (App. Div. 2010) (quoting Burley v. Prudential Ins. Co. of Am., 251 N.J. Super. 493, 500 (App. Div. 1991) ("Where two clauses in a contract *clearly conflict*, the more specific provision . . . usually controls over the more general) (emphasis added))). In Homesite, the Appellate Division held that a general exclusion for business pursuits gave way to a more specific exclusion relating to a property rental, in which the more specific exclusion had exceptions permitting coverage. Homesite, supra, 413 N.J. Super. at 48.

Specifically, Defendants assert that although the "flood" and "named windstorm" definitions overlap, there is nevertheless no "clear conflict" in the policy language. However, there is in fact a conflict in this case. To determine whether the flood sublimits apply to "storm surge," it is necessary to determine whether the definitions in the policies should be interpreted to include "storm surge" only in the definition of "named windstorm," or in both the definitions of "named windstorm" and "flood." Under the former interpretation, the flood sublimits of the policy do not apply, and under the latter they do. Therefore, there is a "clear conflict," one whose resolution will determine how much coverage Defendants owe PSEG under the policy. While it is true that at least one court in New Jersey has rejected such an argument made on behalf on the insured, that decision cites neither to New Jersey case law to support its position, nor to any of the extrinsic evidence in the record on the prior practice of the parties. See Wakefern, supra, Docket No. MID-L-6483-13, Slip Op. at 22-23.

c. Parties' Past Practices

In this case, both Plaintiff and Defendants offer a substantial amount of extrinsic evidence to support their arguments. The court may consider extrinsic evidence in order to determine whether the meaning of the relevant policy language is ambiguous if the extrinsic evidence sheds light on the meaning of that language. See Newark Publishers' Ass'n v. Newark Typographical Union, supra, 22 N.J. at 427. However, when parties seek to introduce extrinsic evidence, the evidence must be relevant to the meaning of the policy language at issue. Thus, extrinsic evidence that "tends to show, not the meaning of the writing, but an intention wholly unexpressed in the writing [is] irrelevant." Atlantic Northern Airlines, Inc. v. Schwimmer, supra, 12 N.J. at 303. Ultimately, "the polestar of contract construction is the intention of the parties to the contract as revealed by the language used, taken as an entirety." Schwimmer, supra, 12 N.J. at 301.

Defendants assert that the documents and testimony offered by the underwriters state that "there is $1 billion limit for named windstorm losses," and that this is not inconsistent with their current position on the $250 million sublimit because the flood sublimit "would not prevent PSEG from recovering up to $1 billion for named windstorm losses where the flood limits would not play a role, such as for damage caused purely by wind." In opposition, Plaintiff states that the underwriters' statements also indicate that the insurers understood that, under PSEG's policies, storm surge *was* included in "named windstorm" and was not subject to the flood sublimits of the policies. The parties conducted depositions of no fewer than twenty-one underwriters and volumes of underwriting documents in order to establish the parties' understanding of the policy prior to Hurricane Sandy. The parties primarily disagree over how the other categorizes two important pieces of extrinsic evidence: one, the deposition testimony of Mr. Lawrence Baccari, an Energy

Mutual Insurance underwriter; and two, underwriting pricing forms created by AEGIS underwriters. Each will be addressed in turn.

First, Plaintiff points to the deposition testimony of Mr. Baccari to make the point that the parties were both under the belief that the flood sublimits would not apply. For instance, Mr. Baccari stated during his deposition:

> Q. Is it your understanding that storm surge as a result of named windstorm is a separate peril that's only subject to the policy limit?
>
> A. Yeah, and the way it looks to me that the storm surge is included under the named windstorm and if the named windstorm is sublimited, then that would be submitted . . .
>
> Q. Apart from the sublimits for named windstorm in Florida and named windstorm for unscheduled locations, are there any other sublimits that apply to named windstorm in the policy? . . .
>
> A. I don't see any.

Citing this same testimony, Defendants assert that Mr. Baccari provided "simply a negative answer" to the above question. However, this answer must be considered in the broader context of the deposition. That is, the negative answer was a response to a question that storm surge is only sublimited where a named windstorm is sublimited. In fact, Mr. Baccari testified that storm surge is *not* subject to the flood sublimit under the language in the PSEG policies.

Second, Plaintiff points to the underwriting pricing forms by AEGIS underwriters, which it claims stated that the limit that applied to losses caused by a named windstorm is $1 billion. According to Plaintiff, these pricing forms were prepared by AEGIS underwriters for the purpose of providing information to AEGIS risk analysts about the policy limits that should be used in estimating the magnitude of the losses that would be covered under the PSEG policy in the event of a named windstorm. Defendants contend that "PSEG's *sole claim* regarding AEGIS underwriters appears to be that various documents and testimony excerpts confirm that non-Florida

named windstorm losses are subject to the overall policy limit of $1 billion." (emphasis added). However, Matthew Stephens, the Head of Exposure Analysis at AEGIS London, stated during his deposition that AEGIS (along with the other insurers) used RMS software that had the capability to provide separate estimates of wind losses and storm surge losses caused by named windstorms, and the insurers chose to obtain combined estimates that included both wind and storm surge losses in a single dollar figure and that did not reflect the application of any flood sublimits.

Though the parties disagree on the other extrinsic evidence, a closer examination of the cited evidence from the other insurers shows that the evidence tends to support Plaintiff's, rather than Defendants' position, and that the insurers knew that storm surge was not subject to the flood sublimits under the policies.

In sum, the applicable language of PSEG's policy, canons of contract interpretation, the extrinsic evidence proffered by both parties, as well as the relevant case law, all point to the conclusion that storm surge losses are not subject to the flood sublimits.

d. New Jersey's Efficient Proximate Cause Doctrine

In the alternative, Plaintiff urges the court to employ New Jersey's efficient proximate cause doctrine, also known as "Appleman's Rule," in order to hold that the flood sublimits do not apply to damage caused by Hurricane Sandy. Under New Jersey's efficient proximate cause doctrine, "[i]n situations in which multiple events, one of which is covered, occur sequentially in a chain of causation to produce a loss, [the New Jersey Supreme Court has] adopted the approach known as 'Appleman's Rule,' pursuant to which the loss is covered if a covered cause starts or ends the sequence of events leading to the loss." Flomerfelt, supra, 202 N.J. at 447. As such, a restriction in an insurance policy does not apply if either the first or the last cause of the loss is not subject to the restriction. Auto Lenders Acceptance Corp. v. Gentilini Ford, Inc., 181 N.J. 245, 257 (2004).

In essence, Plaintiff argues that its storm surge losses are not subject to the flood sublimit because the efficient proximate cause of the losses was wind. In opposition, Defendants assert that the court may not apply Appleman's Rule for a number of reasons, each which will be considered in turn.

Defendants contend first that the efficient proximate cause doctrine must be applied "with common sense." Plaintiff agrees with this proposition, but the parties differ as to what common sense application of the Rule should control in this case. Plaintiff maintains that "it is simply common sense to conclude that named windstorm is a different peril than flood under a policy that includes storm surge in the definition of named windstorm and does not include storm surge in the definition of flood," and such an understanding is consistent with the extrinsic evidence demonstrating that the insurers believed that storm surge was not subject to the flood sublimits prior to Hurricane Sandy. Conversely, Defendants' contention is as follows: "flood is always caused by something else, such as excessive rainfall, snowmelt, or a windstorm. If Appleman's [R]ule allowed insureds to avoid a policy's flood limits every time the insured can point to an earlier cause of the flood, then insureds would avoid the flood limits every time." However, there is no peril defined in the policies to include "excessive rainfall" or "snow melt," as Defendants assert. Thus, it would not make sense to argue that floods caused by those events are not floods for the purposes of the policies. As such, Plaintiff's reasoning is more sensical in the present context.

Second, Defendants argue that Appleman's Rule applies "to disputes over *exclusions*, which involve the risk of forfeiture, to reconcile them with conflicting coverage-granting provisions." (emphasis in original). In Auto Lenders, the New Jersey Supreme Court held: "New Jersey decisions applying a proximate-cause test to find coverage under an insurance policy did so in circumstances where the loss ultimately sustained would have been covered by the policy except

for an exclusionary clause . . . . In those circumstances, courts applied a proximate-cause analysis to resolve an apparent conflict in the policy language to fulfill the reasonable expectations of the insured." Auto Lenders, supra, 181 N.J. at 257-58. However, the case law does not in fact indicate that Appleman's Rule has been used only in the exclusion context. In Auto Lenders, the Court applied the efficient proximate cause doctrine to resolve a dispute about an insuring agreement, not an exclusion. Id. at 258-59. Rather, although the doctrine "has primarily been employed" in the exclusion context, it has been employed in other contexts as well. See Carlin v. Cornell, Hegarty & Koch, 2011 WL 3503146, at *9 (N.J. App. Div. Aug. 11, 2011); see also Franklin Packaging Co. v. California Union Ins. Co., 171 N.J. Super. 188, 191 (App. Div. 1979) (applying the Rule to a dispute about an exclusion, but not limiting the Rule to that context).In the present case, there is no exclusion against which to apply Appleman's Rule. However, because the case law does not require an exclusion in order to apply the Rule, Defendants' argument is unpersuasive.

Next, Defendants aver that Appleman's Rule applies only to disputes regarding multiple sequential causes of loss, and not to multiple combined causes of loss. See Flomerfelt, supra, 202 N.J. at 447 (holding that Appleman's Rule applies when "multiple events, one of which is covered, occur sequentially in a chain of causation to produce a loss. . . . On the other hand, if the claimed causes, one covered and one not, combine to produce an indivisible loss, our appellate courts have rejected claims for coverage largely because of the allocation of the burden of proof on the insured to demonstrate a covered cause for a loss."). As described by Defendants, "Hurricane Sandy had initially begun as wind alone," but that wind later "combined with water." However, there is no support in the record for this factual contention. Rather, all of the experts in the case agree that "wind caused the storm surge." It was the storm surge, not wind, which caused most of the property

damage at PSEG's sites. Instead, what has been gleaned from the record is that wind damaged *different* property (roofs and other property located at higher elevations) than the storm surge (equipment and other property that was submerged under the storm surge waters). As such, there is no evidence to suggest that any property was damaged by the combined effects of wind and storm surge at the same time. Indeed, Defendants themselves admit that Hurricane Sandy "initially" began as wind alone, and *then* included water, which necessarily means that the damage done to PSEG's property was sequential in nature. As such, this argument is also unavailing.

Lastly, Defendants argue that Appleman's Rule is only applied when policies use specific language calling for a causation analysis. See Auto Lenders, supra, 181 N.J. at 256-58. Indeed, in SEACOR Holdings, the court partially relied on Louisiana's efficient proximate cause rule to determine that a flood limit did not apply on the grounds that the policy's flood "Limit of Liability expressly applie[d] only to '[l]oss caused by the peril of Flood." SEACOR Holdings, supra, 635 F.3d at 683. However, the language of the policy at issue in this case, while not identical, is similar and also requires a causation analysis. Under the policy, the flood sublimits apply only to losses caused by flood. Therefore, it is necessary to determine which losses were caused by flood and which losses were caused by wind or named windstorm, which in turn makes it necessary to analysis what caused the damage to the property in question.

It should also be noted that Defendants further argue that one, anti-concurrent-causation provisions are enforceable under New Jersey law, which Plaintiff does not dispute; and two, that the anti-concurrent-causation language in the flood definition applies to everything in the flood definition, and not just to "sewer back-up." While conceding that under the last antecedent doctrine, the anti-concurrent-causation language in the flood definition would be interpreted as applying only to "sewer back-up," the doctrine may be overcome by "other indicia of intent."

However, because the record before the court is bare of any evidence that provides any indicia that the anti-concurrent-causation language was intended to apply to anything other than "sewer back-up," this argument is without merit. In addition, Plaintiff and Defendants both point to the last sentence of the flood definition, which states: "However, physical loss or damage not otherwise excluded resulting from flood will not be considered loss by flood within the terms and conditions of this policy." As discussed above, Appleman's Rule in New Jersey allows the "covered peril" to occur either before or after the peril that is the subject of a coverage restriction. See Puhlovsky v. Rutgers Cas. Ins. Co., 2012 WL 3870408, at *9 (App. Div. Sep. 7, 2012) (holding that "an insured is normally afforded coverage where an included cause of loss is either the first or last step in the chain of causation which leads to the loss." (internal quotations and citations omitted). In the present case, wind caused the storm surge and wind is a covered peril other the flood. As such, storm surge is not subject to the flood sublimits under the last sentence of the flood definition.

For all of the reasons set forth above, the flood sublimits do not apply to Plaintiff's losses caused by storm surge.

II. The Sublimit for Property Located in Flood Zone A & V Does Not Apply to Any Property Outside Flood Zone A & V

In the alternative, Plaintiff argues that should the court conclude that losses caused by storm surge are subject to the flood sublimits in the PSEG policy, it should find that the $50 million sublimit applies only to property located in Flood Zones A & V, as those zones are defined in FEMA's flood insurance rate maps. However, because, for the reasons stated above, the court finds that the flood sublimits do *not* apply, the court need not address this argument.

Conclusion

For the reasons set forth above, Plaintiff's motion for summary judgment is **GRANTED**, and Defendant's motion for summary judgment is **DENIED**.