

Amtrak Can Pursue Sandy Repair Coverage, 2nd Circ. Rules

By **Jeff Sistrunk**

Law360, Los Angeles (August 31, 2016, 2:42 PM ET) -- The Second Circuit on Wednesday upheld U.S. District Judge Jed Rakoff's ruling that salt damage to Amtrak's Penn Station tunnels after Hurricane Sandy is subject to a \$125 million flood sublimit in its insurance policies, but found that the rail giant may be entitled to additional coverage for the replacement of undamaged components of the tunnels.

In an unpublished opinion, a panel of the appellate court said that Judge Rakoff properly held that salt damage to the tunnels after floodwaters from Sandy receded was not a covered "ensuing loss" above and beyond flooding.

But the panel said that the district judge had prematurely ruled that Amtrak will never be entitled to coverage under a so-called "demolition and increased cost of construction," or DICC, policy provision for the possible replacement of undamaged portions of bench walls in the tunnels, as the rail company may be required to make such repairs in the future to comply with Federal Railroad Administration directives or the Americans With Disabilities Act.

"The DICC clause does not have a time limit, and a directive from the FRA or a requirement of the ADA may obligate Amtrak to make changes to undamaged portions of the tunnels in the future," the panel wrote. "In the event that the FRA does require Amtrak to replace undamaged portions of its tunnels — and a covered peril caused the FRA to issue such a directive — Amtrak should be able to file a claim with its insurers seeking DICC coverage."

The case dates to September 2014, when Amtrak sued more than a dozen insurance companies in New York federal court over \$1.1 billion in losses from Sandy, asserting that the insurers had only paid a small fraction of its claims.

Amtrak's series of all-risk policies collectively provide up to \$675 million in coverage per occurrence, including \$125 million for flood losses, according to court papers.

The insurance companies moved for summary judgment in March 2015, asserting that all the damage tied to the storm constituted a single flood event and that the \$125 million sublimit applies. In addition, the carriers argued that Amtrak's losses due to saltwater inundation cannot be divided into salt damage and water damage.

Amtrak shot back that the salt and water damage were separate occurrences and that the salt-related corrosion of the metal equipment in the tunnels qualifies as ensuing loss, which the insurers are obligated

to cover.

Judge Rakoff found in favor of the insurers in June 2015, holding that the inundation of Amtrak's property in Sandy's aftermath fell within the "unambiguous scope" of the definitions of flood in the relevant policies, and that Amtrak did not suffer a separate ensuing loss in the form of salt damage. He further determined that Amtrak was not entitled to coverage for the cost to replace undamaged portions of its tunnels under the DICC provision because no government entity had required the company to make such repairs.

Following Judge Rakoff's decision, Amtrak reached a confidential settlement with its primary insurers in July 2015, setting up a battle in the Second Circuit with the excess carriers.

As a preliminary matter, the Second Circuit panel agreed with Judge Rakoff's conclusion that the inundation of Amtrak's tunnels with sea water constituted a flood within all three definitions of the term included in the policies, thereby implicating the \$125 million sublimit.

With respect to the ensuing loss question, the panel said that Amtrak's interpretation of the phrase is so broad that it would completely defeat the purpose of the flood sublimit. Damage can only constitute ensuing loss if it is caused by a peril that is truly independent of another excluded or sublimited cause of loss, according to the panel's decision.

"The corrosion of Amtrak's metal equipment cannot meaningfully be separated from water damage that is plainly subject to the flood sublimit, nor can it be attributed to a distinct 'covered peril,' arising from the original, sublimited peril (the flood)," the panel wrote.

The panel accepted Amtrak's contention that Judge Rakoff acted too hastily in barring any recovery under the DICC provision, noting the possibility that the rail company will have to make repairs to comply with future FRA orders or the ADA. However, the panel pointed out that it was taking no position on whether Amtrak's claim under the provision would be successful, and said that, on remand, the parties can litigate further the question of whether the DICC clause's \$125 million sublimit would be available in addition to the \$125 million flood sublimit.

Representatives of Amtrak and the insurance companies did not immediately respond to requests for comment.

U.S. Circuit Judges Gerard E. Lynch, Susan L. Carney and Alvin K. Hellerstein sat on the panel for the Second Circuit.

Amtrak is represented by Rhonda D. Orin, Daniel J. Healy, Marshall Gilinsky and Peter A. Halprin of Anderson Kill PC and Paul M. Smith, Jessica Ring Amunson, Matthew L. Jacobs, Joshua M. Parker and Caroline M. DeCell of Jenner & Block LLP.

The excess carriers are represented by Douglas Hallward-Driemeier and Matthew M. Burke of Ropes & Gray LLP and Costantino P. Suriano of Mound Cotton Wollan & Greengrass LLP.

The case is National Railroad Passenger Corp. v. Aspen Specialty Insurance Co. et al., case number 15-2358, in the U.S. Court of Appeals for the Second Circuit.

--Editing by Kelly Duncan.

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