

3rd Circ. Sandy Debris Ruling Vexes Policyholders

By **Jeff Sistrunk**

Law360, Los Angeles (April 01, 2015, 9:04 PM ET) -- The Third Circuit recently held that "insured property" as it appears in a Standard Flood Insurance Policy doesn't include land, a ruling attorneys say will restrict the ability of policyholders to recover the cost of removing debris swept onto their land by Superstorm Sandy and future storms.

In a March 26 opinion, the appellate court ruled that a SFIP issued to homeowners by Liberty Mutual Fire Insurance Co. included coverage for certain structures and items but not for the entire parcel of land. As a result, the court concluded that the homeowners weren't covered for the removal from their land of debris they didn't own.

Gary Thompson, managing partner of Reed Smith LLP's Washington, D.C., office, said the Third Circuit's decision "creates a ridiculous outcome" and leaves insurance adjusters with an "impossible task" in trying to distinguish between covered and noncovered debris removal costs. Attorneys noted that the situation faced by the homeowners in the case was fairly common following Sandy.

"So an owner or adjuster is somehow supposed to walk the grounds and decipher which debris is 'on or in' the building and then in the yard, and which debris came from the insured structure as opposed to somewhere else?" Thompson said. "That is a crazy outcome. How can the covered costs be sorted out in a debris-strewn yard? This ruling is disconnected from the real world."

Liberty and the homeowners, Michael and Geraldine Torre, had disputed the meaning of the term "insured property" in the SFIP's debris removal provision, which offered coverage for expenses tied to the removal of debris the Torres didn't own that was on or in an insured property.

The Torres claimed that "insured property" included not only the specific structures and items of property that are insured by the SFIP, such as their house, but their entire parcel of land.

According to the homeowners, interpreting the term to mean both buildings and the land is consistent with the purpose of the National Flood Insurance Act of 1968 to "protect real property which includes the land and any structure erected on the land."

The Third Circuit disagreed, saying the SFIP has long provided that it does not cover land.

"There is no reason to believe that the provision covering the removal of nonowned debris from 'insured property' covers the removal of debris from the land when the SFIP expressly disclaims coverage of the

land itself," a panel of the appellate court said.

The court's hypertechnical focus on the meaning of "insured property" created a "weird half-coverage situation for debris in the yard," Thompson said.

"This goes against the purpose of the flood insurance program," he said.

At minimum, there is an ambiguity in the policy that should have been construed in favor of coverage, according to Thompson.

Dan Healy, a partner in Anderson Kill PC's Washington, D.C., office, said it was unusual that the Third Circuit looked to the Federal Emergency Management Agency's flood adjuster's claims manual for the definition of insured property without first finding an ambiguity or interpreting ambiguous language against the insurer.

"That's something you usually wouldn't see with a typical policy," Healy said.

Sherilyn Pastor, practice group leader for McCarter & English LLP's insurance coverage group, said the decision leaves open more questions than it answers.

"The court found that the policy doesn't cover the entire parcel of land and as a result that parcel cannot be considered 'insured property,'" Pastor said. "OK, but then what does 'on insured property' mean? The policy doesn't define 'insured property,' but does define key terms, such as building. If the policy was supposedly intended to cover only removal of debris from on or in a building, why use the word 'insured property'?"

In addition, the decision leaves open issues of causation, according to Pastor.

"If the debris hits both the building as well as the land, or the building before or after it hits the land, is that covered?" she said.

While the ruling will affect debris removal claims under SFIP policies within the districts of the Third Circuit, it is unclear what impact it will have in other jurisdictions that have seen a large number of claims stemming from Sandy and other storms, according to attorneys.

"There is a question as to whether New York federal district judges will apply this decision and, if those rulings are appealed, whether the Second Circuit will follow the Third Circuit's analysis," said Glenn Jacobson, a partner at Abrams Gorelick Friedman & Jacobson LLP.

Joseph D. Jean, a Pillsbury Winthrop Shaw Pittman LLP partner, said he doesn't think the ruling will impact property insurance cases as a whole because the SFIP provides narrow coverage.

"I think it's unfortunate in events like Sandy and other disasters where homeowners like the Torres are saddled with expensive debris removal costs, but it is my understanding these policies provide limited coverage," he said.

"I don't think adjusters or homeowners will have trouble applying this decision as the court clearly delineated between the structures it viewed as 'insured property' and land that it viewed as not insured," Jean continued. "An adjuster should be able to easily separate covered and uncovered debris."

To be sure, Jean added, "the policy language is not at all clear, so it is possible that we could see a different decision from another court coming out the other way regarding the interpretation of 'insured property.'"

The Torres represented themselves.

Liberty Mutual is represented by Keith M. Detweiler and Gerald J. Nielsen of the Nielsen Law Firm.

The case is Michael Torre et al. v. Liberty Mutual Fire Insurance Co. et al., case number 14-2733, in the U.S. Court of Appeals for the Third Circuit.

--Editing by Katherine Rautenberg and Kelly Duncan.

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