Chapter 6 How to make claims under NFIP Policies

In the event of loss, the insured is required to:

- give written notice of loss to the insurer, as soon as practicable, using the National Flood Insurance Program (NFIP) Notice of Loss form or similar form;
- exhibit all remains of the property, as required;
- if requested, submit to an examination under oath, as required;
- provide evidence and documentation to substantiate the loss, as required; and
- file a Proof of Loss within 60 days of the loss, unless this requirement is waived by the Federal Emergency Management Agency (FEMA).

The NFIP has a standard Proof of Loss form that the adjuster assigned to the loss may provide to the insured. The adjuster may assist in completion of the form. However, independent adjusters do not have the authority either to approve or to deny claims. Adjusters' recommendations for payment or denial are not binding on the insurer and are subject to approval and correction by the insurer staff.

The Proof of Loss form may be waived on claims for less than $7,500. In this case, the insured will be required to sign the NFIP Final Report form, which summarizes the loss and claim figures.

The following passages and tips for insureds making flood insurance claims are excerpted from the NFIP *Flood Insurance Claims Handbook*:

The NFIP provides you with a process to appeal decisions regarding your flood insurance claim. This process will help you resolve claim issues, but it cannot give you added coverage or claim limits beyond those in your NFIP policy.

In filing and completing your insurance claim, you may have questions, or need further explanations of decisions that have been made, especially with regard to coverage, dollar amount of damages, or your Proof of Loss. Before you may appeal, your insurer must make a final determination and send you a written denial of your claim or any part of it.

Four Steps to Appealing Your Claim

Step 1

Talk with your adjuster, who has more knowledge about your claim than anyone. If you don't understand certain decisions regarding, for example, application of coverage, timing of the filing of Proof of Loss, or the damage estimate, contact your adjuster first.

Step 2

If you are not satisfied with the adjuster's answers, or do not agree with decisions, get contact information for the adjuster's supervisor.

Step 3

If the adjuster's supervisor can't resolve your issues, contact the insurance company's claim representative. Ask your insurance agent/producer or your insurance company representative for assistance. Please refer to your flood policy for more information on appeals; see General Conditions, Paragraph R.

Step 4

If you still have questions or concerns after following steps 1 through 3, contact FEMA. Write to:

Federal Emergency Management Agency

Mitigation Directorate

Federal Insurance Administrator

1800 S. Bell Street

Arlington, VA 20598-3010

This letter should be written by the Named Insured (as it appears on your NFIP policy) or by a legal representative, if necessary. The representative should clearly identify his or her relationship to the Named Insured. (For example, a son or daughter could be handling a claim for an elderly parent.) A legal representative may be asked to provide authorization from the Named Insured or other legal documents verifying the relationship.

Your letter of appeal must be submitted to FEMA within 60 days from the date of the denial letter that you receive from your flood insurer.

The following six items should be in your letter to FEMA in order to address your questions (If for some reason your policy is not available, your insurance agent/producer can provide details for the first three items.):

1. The Policy Number, as shown on your NFIP policy's declarations page.
2. The policyholder's name, as shown as the Named Insured on the declarations page.
3. The property address, as shown on the declarations page. (Not your mailing address, if it is different from the property address.)
4. How you can be contacted, if you are out of your home.
5. The details of your concern. (Please be as complete as possible.)
6. The dates of contact and contact details for the persons with whom you have spoken in steps 1 through 3 above.

Enclose documentation of everything that supports your appeal.

Provide a copy of the insurer's written denial, in whole or in part, of the claim;

Identify relevant policy and claim information and state the basis for the appeal; and

Submit relevant documentation to support the appeal, but only documentation that directly pertains to your claim.

The following are examples of the kinds of documentation that FEMA will require:

- a copy of the Proof of Loss submitted to the insurer, as required in the policy;
- a re-inspection of your property may be conducted at the discretion of FEMA to gather more information.
- adjuster's Final Report;
- adjuster's Preliminary Report;
- advance payment information;
- any assignment of interest in a claim; and
- any other pertinent information that FEMA may request in processing a claim.
- architectural plans and drawings;
- clear photographs (exterior and interior) confirming damage that resulted from direct physical loss by or from flood;
- completed Mobile Home Worksheet;
- condominium association by-laws;
- current lienholder information;
- current loss payee information;
- death certificates;
- detailed damaged personal property inventories that include the approximate ages of the items;
- detailed engineering reports specifically addressing flood-related damage and pre-existing damage;
- divorce decree;
- documentation of Flood Insurance Rate Map (FIRM) dates;

•documentation reflecting date(s) of construction and substantial improvement;
•elevation Certificate, if the building is elevated;
•emergency (911) address change information;
•engineering surveys;
•evidence of insurability as a Residential Condominium Association;
•evidence of insurance and policy information, i.e., declarations page;
•financial statements;
•franchise agreements;
•information regarding substantial improvement;
•last will and testament;
•letters of representation, i.e., attorneys and public adjusters;
•loan documents including closings;
•market values;
•mobile home title, including salvage title;
•paid receipts and invoices documenting damaged stock;
•paid receipts and invoices, including canceled checks that support an insured's out-of-pocket expenses pertaining to the claim;
•power of attorney;
•pre-loss and post-loss inventories;
•proof of other insurance, including homeowners or wind policies, and any claim information submitted to the other companies;
•proof that prior flood damage has been repaired;
•real estate appraisals that exclude land values;
•replacement cost Proofs of Loss;
•room-by-room itemized estimates from the adjuster (include contractors' estimates), detailing unit costs and quantities for the items needing repair or replacement;
•salvage information (proceeds and sales);
•tax records, lease agreements, sales contracts, settlement papers, deed, etc.;
•the community's determination concerning substantial damage;
•underwriting decisions;
•waiver, Letter of Map Revision (LOMR), or Letter of Map Amendment (LOMA) information;
•zone determinations;

A request by FEMA for additional information will include the date by which the information must be provided, which shall in no case be less than 14 calendar days. Failure to provide the requested information in full within 14 calendar days may result in dismissal of your appeal. FEMA will ensure that all information necessary to rule on the appeal has been provided prior to making an appeal decision.

The appeals process is intended to resolve claim issues and is not intended to grant coverage or limits that are not provided by the Standard Flood Insurance Policy (SFIP). Filing an appeal does not waive any of the requirements for perfecting a claim under the SFIP or extend any of the time limitations set forth in the SFIP.

1.Disputes that are or have been subject to appraisal as provided for in the SFIP cannot be appealed.
2.If you file an appeal on any issue, that issue is no longer subject to resolution by appraisal or other pre-litigation remedies.
3.If you file suit against an insurer on the flood insurance claim issue, you are prohibited from filing an appeal. All appeals submitted for decision but not resolved shall be terminated upon notice of the commencement of litigation regarding the claim.

FEMA will review the appeal documents, including any re-inspection report, if appropriate. FEMA will provide specific information on what grounds the claim was initially denied.

FEMA will provide an appeal decision in writing to the policyholder and insurer within 90 days from the date that all information has been submitted by the policyholder and will include specific information for the resolution of the appeal. No further administrative review will be provided to the insured.

If you do not agree with the final decision, please refer to your flood insurance policy. See the "GENERAL CONDITIONS" Section, Paragraph R. "Suit Against Us." The one-year period to file suit commences with the written denial from the insurer and is not extended by the appeals process.

Agents/producers may request that any NFIP Direct claim be assigned to an NFIP-approved independent adjuster. The NFIP Direct makes all NFIP Direct claim assignments, except:

- when, in major flooding disasters, the Flood Insurance Claims Office (FICO) makes all assignments;
- when an Adjuster Control Office is established;
- when a Claims Coordinating Office (CCO) is established.

Failure to indicate the assigned adjuster on the loss notice, or assignment of an adjuster who is not authorized by the NFIP, will delay the adjustment process and may result in duplicate adjuster assignments.

When it appears that a situation is serious enough that a FICO may be necessary, the NFIP will notify agents/producers and agent/producer trade associations in the affected area (using the broadcast media and press releases) as soon as possible to hold their loss notices unassigned until further instructions are received.

In the case of a WYO Company claim, the WYO Company's agent/producer will follow the established procedures when assigning an adjuster.

Disputes over NFIP Insurance Claims

The 2010 federal court decision *Florida Farm Bureau General Insurance Co. v. Voncille Jernigan* is a good example of the coverage issues common to WYO policies.

In the case, Florida Farm Bureau General sued Jernigan to recover benefits paid under a flood insurance policy.

Farm Bureau General, in its capacity as a WYO Program Carrier, issued a Standard Flood Insurance Policy ("SFIP") covering the Jernigan's property located at 645 South Garcon Point Road, Milton, Florida. As usual, the policy was effective for one year - beginning on July 24, 2004 - and covered any direct physical loss by or from a flood, as defined in the policy, to limits of $250,000 for Jernigan's dwelling and $44,041 for its contents.

On or about September 16, 2004, Hurricane Ivan struck Northwest Florida, causing extensive damage to the Jernigan's property. Following the hurricane, Jernigan notified Farm Bureau General of the loss.

Farm Bureau General assigned an adjuster, Richard Kellerman, to assist Jernigan with her claim. Kellerman inspected the property and determined it was a total loss due to flooding. Based on Kellerman's estimate of damage and the fact that the estimated actual cash value of the home exceeded $250,000, Farm Bureau General paid the policy limits for the dwelling and contents.

At the time of the hurricane, Jernigan's property was insured under a separate homeowner's policy issued by Farm Bureau Casualty Insurance Company (Farm Bureau Casualty). The homeowner's policy provided $138,500 in coverage for damage due to a covered peril, which included wind but excluded flood.

After receiving payment of the limits of the SFIP, Jernigan's husband filed a claim under the homeowner's policy seeking to recover for wind damage to the home.

Rather than pay the claim, Farm Bureau Casualty filed a Complaint in Santa Rosa County Circuit Court requesting a declaratory judgment that it was not liable for any amount under the homeowner's policy covering Jernigan's property for wind damage allegedly sustained as a result of Hurricane Ivan.

In response, Jernigan asserted a counterclaim against Farm Bureau Casualty for breach of contract based on its failure to pay.

At trial, Jernigan argued that her home was a total loss due to wind damage. Although she introduced evidence that the appraised actual cash value of her home at the time of Hurricane Ivan was $95,000, she requested policy limits under Florida's Valued Policy Law. After a two-day trial on March 9 and 10, 2009, the jury found Jernigan's property a total loss as a result of wind damage and returned a verdict in her favor for $138,500, the maximum amount allowed under her homeowner's policy. Based on the jury's verdict, Farm Bureau General filed this action, asserting a claim for unjust enrichment and seeking to recover the proceeds it paid the defendant under the SFIP.

Farm Bureau General filed a motion for summary judgment, arguing that it was required, under the NFIP and supporting regulations, to seek recovery of the amount paid to the defendant under the SFIP. Florida Farm Bureau also argued that Jernigan should be judicially estopped from denying that she was not entitled to the proceeds of the SFIP given the position she took in the state court matter, i.e., that her home was a total loss due to wind damage.

Jernigan filed a cross-motion for summary judgment, claiming there was no genuine issue of material fact because there is no recognizable cause of action for "reimbursement of overpayment of insurance proceeds" and that, even if there was, any such claim is barred by the economic loss doctrine, judicial estoppel, a prior settlement, and the doctrines of laches and unclean hands.

The court found there was no cause of action for unjust enrichment under which Farm Bureau General could recover. According to Florida insurance law:

[i]n the event of a total loss of any . . . structure . . . located in this state and insured by any insurer as to a covered peril, in the absence of any change increasing the risk without the insurer's consent and in the absence of fraudulent or criminal fault on the part of the insured or one acting in her or his behalf, the insurer's liability under the policy for such total loss, if caused by a covered peril, shall be in the amount of money for which such property was so insured as specified in the policy and for which a premium has been charged or paid.

SFIPs are not subject to Florida's Valued Policy Law.

Farm Bureau General asserted a cause of action for unjust enrichment, seeking to recoup the money it erroneously paid the defendant under her SFIP. Although it invoked the court's federal question jurisdiction, Farm Bureau General did not specify whether it is asserting a claim under state or federal law but assumed federal law because of the federal nature of the funds. In any event, because Farm Bureau General's claim arose under the NFIP, any state law claim for unjust enrichment was preempted by federal law.

As a result, in order to proceed in this matter, Farm Bureau General must provide a basis for its claim under federal law, whether statutory or common law. Neither the NFIA nor the SFIP explicitly contemplates a cause of action for unjust enrichment, and Farm Bureau General has not cited any cases recognizing such a cause of action in this context. Although an argument could be made for recognition of an implied private right of action under the SFIP, Federal Farm Bureau has not raised this argument, much less pled this cause of action in its Complaint, and the court thus need not address its viability here. In short, Farm Bureau General may proceed in this matter only if the court recognizes a federal common law claim for unjust enrichment under the circumstances of this case.

The Eleventh Circuit has not addressed whether the NFIA authorizes federal common law causes of action; it has, however, addressed whether another federal statutory scheme - ERISA - authorizes such causes of action under analogous circumstances. The court finds such decisions instructive in this matter.

In *Sanson v. General Motors Corp.* (11th Cir. 1992), the Eleventh Circuit determined that ERISA preempts a state law cause of action for fraudulent misrepresentation. The court then addressed the appellant's alternative argument that it should create a federal common law cause of action for fraud. In declining to do so, the court noted that the Supreme Court had recently "rejected such an extension of the remedies guaranteed under ERISA."

As the Eleventh Circuit observed,

As the Fifth Circuit explained in *Wright v. Allstate Ins. Co.* (5th Cir. 2007), "the reference to federal common law in the SFIP directs courts to employ standard insurance principles when deciding coverage issues under the policy. It does not confer on policyholders the right to assert extra-contractual claims against WYO insurers - which claims, if successful, would likely be paid with government funds." This construction does not change based on the WYO carrier's status as a plaintiff, as opposed to a defendant. Moreover, courts have recognized a distinction between disputes stemming from claims handling and policy procurement, finding the former, but not the latter, to be preempted by federal law.

The SFIP, as set forth in the Code of Federal Regulations, specifically provides that all disputes arising from the handling of any claim thereunder are governed exclusively by the federal flood insurance regulations, the NFIA, and federal common law. The SFIP also contains a comprehensive regulatory scheme to resolve such disputes.

Considering that Farm Bureau General is seeking to recoup funds paid under an SFIP, its claim clearly arises under an SFIP; its remedy is thus limited to those set forth by FEMA in the federal flood insurance regulations and the NFIA, as interpreted under federal common law insurance principles. Nowhere in that framework is there a provision for the relief requested by Farm Bureau General. As a result, the court cannot provide for such relief through the creation of a federal common law cause of action for unjust enrichment.

In designing NFIP, Congress required that premiums for certain properties be offered at prices below those for full-risk premiums to encourage participation in the program and to ensure that premiums were affordable for existing structures in the floodplain. However, the statute does not provide a formula or methodology for setting the subsidies, leaving it up to the program to develop one.

When the program began, NFIP administrators set the subsidized rates on the basis of what they believed would be affordable, but this process resulted in losses that had to be covered by borrowings as discussed previously. Some of the resulting deficit was later forgiven by Congress.

In 1981, NFIP administrators, after discussions with congress, started setting NFIP's subsidized premium rates based on the average historical loss year calculations.

According to FEMA, this change allowed the agency to resist external pressures in setting premium rates and provided a more objective standard for determining subsidized rates. FEMA documents from most years between 2001 and 2006 state that the average historical loss year target, which is based on losses from previous years averaged over time, generally is considered a floor for premium collection.

To account for the potential of catastrophic losses, and the additional funds required to pay such losses, FEMA sets premium rates so that the total premiums collected will be approximately 15 to 25 percent greater than the average historical loss year estimate.

However, FEMA can adjust - and has recently adjusted - the way it calculates the average historical loss year.

According to FEMA officials, including the 2005 losses in calculations of the average historical loss year would have resulted in premium increases well above the 10 percent statutory limit. As a result, FEMA officials instituted a weighting factor for the 2005 losses, and as a result the full amount of the losses was not incorporated into the rate-setting model. According to FEMA officials, they incorporated losses of $2.1 billion of the estimated $23.2 billion in losses from 2005.

In its review of the NFIP's operations, the GAO noted:

FEMA raised rates by an average of more than 9 percent on about one percent of all NFIP policies - specifically, on certain subsidized policies located in high-risk coastal zones. In contrast, FEMA raised rates by an average of around two percent on 40 percent of total policies in high-risk zones that were paying full-risk rates. Ultimately, the generally small increases will not help ensure NFIP's financial stability and may in fact decrease it by adding to its operating deficit.

The processes and policies that FEMA uses to set both full-risk and subsidized premium rates have contributed to NFIP's inability to generate enough in premiums to cover the program's operating costs, claims losses, and debt to the Treasury.

From 1978 through 2004, NFIP had a net loss of $2 billion. These years had historically low flooding, but NFIP had yearly deficits for about half of these years. Over that period, Congress retired about $1.2 billion of this total debt. However, the introduction of average historical loss year targets in the 1980s resulted in a series of rate increases that contributed to a sizeable reduction of the net loss.

The 2005 hurricanes significantly altered NFIP's financial landscape. The 2005 hurricanes, especially Katrina, left the program with debt of more than $17.4 billion as of June 2008. To service the debt to the Treasury, FEMA owes two annual interest payments of around $365 million that are generally due in April and October of each year. FEMA officials told us that they were able to make the two payments in 2007 without borrowing because, according to FEMA documents, NFIP faced unusually light flooding in 2006 and 2007. In addition, FEMA made an unscheduled principal payment of $225 million in November 2007. However, in April 2008, FEMA borrowed $50 million to pay the $364 million interest payment owed to the Treasury.

"Concurrent Causation" exclusions

The 2007 Pennsylvania Court of Common Pleas decision *Bishops, Inc., v. Penn National Insurance* dealt with several SFIP issues - including "concurrent causation," a hot topic in claims disputes that we've considered in other course texts.

The trial court granted summary judgment and awarded damages in favor of Bishops limited to the $5000 in coverage afforded by an extra-cost endorsement (the Penn Pac Endorsement) to an all-risks insurance policy that Bishops had purchased from Penn National.

Both sides appealed.

In its cross-appeal, Penn National asserts that Bishops' claim is precluded by the concurrent cause provision of the basic policy to which the Penn Pac Endorsement was added because the damage for which Bishops claimed coverage was jointly caused by flooding.

In its cross appeal, Bishops rejoins that this Court has rendered concurrent causation clauses unenforceable, declining to recognize them in the presence of an affirmative grant of coverage for which the insured paid an added premium. Bishops argues further that the Penn Pac Endorsement, which provided coverage for sewer or drain back up, changed the definition of a "covered cause of loss" in the underlying policy to provide coverage to both physical losses contemplated by the endorsement itself and losses sustained by business interruption occasioned by the events that caused the physical loss.

Upon review, we find Penn National's concurrent cause exclusion unenforceable. Moreover, we conclude that Bishops is entitled to coverage under both the Penn Pac Endorsement and the Business Income (and Extra Expense) Coverage Form of the underlying policy. Accordingly, we affirm in part, vacate in part, and remand this case for additional proceedings consistent with this disposition.

Bishops was a fabric wholesaler located in the Borough of Millvale. It was owned by Sal and Rhea Nicotra, husband and wife, who'd purchased the business from its retiring founders in the 1990s. Sal Nicotra had been, until the purchase, a long-term employee of the business.

Rhea Nicotra became involved pursuant to the terms of the sale and now serves as Bishops' president.

Bishops' claim arose out of sewer and drain back-up followed by extensive flooding of its business premises on September 17, 2004, during Hurricane Ivan.

During the hurricane, Bishops suffered a total loss of inventory and office equipment when water runoff backed up through the municipal drainage system during torrential rains and nearby bodies of water overflowed their banks, inundating much of the town.

When, subsequently, Bishops filed its claim with Penn National, the insurer tendered coverage for damaged office equipment under an Electronic Data Processing Endorsement Bishops had purchased at extra cost but refused to pay any amount for the physical damage sustained by Bishops' premises and inventory.

In a first letter to Bishops' president Rhea Nicotra, dated October 8, 2004, Penn National asserted only the policy exclusions in the basic policy relating to generalized flooding and ground water.

Those exclusions, as cited by Penn National's claims representative, provide as follows:

B. EXCLUSIONS
1. We will not pay for loss or damage caused directly or indirectly by any of the following. Such loss or damage is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss.

...g.

Water

(1) Flood, surface water, waves, tides, tidal waves, overflow of any body of water, or their spray, all whether driven by wind or not.

(2) Mudslide or mudflow;

(3) Water that backs up or overflows from a sewer, drain or sump;

(4) Water under the ground surface pressing on, or flowing or seeping through:

(a) Foundations, walls, floors or paved surfaces;

(b) Basements, whether paved or not; or

(c) Doors, windows or other openings.

In a follow-up letter dated October 13, 2004, following a telephone conversation with Mrs. Nicotra, Penn National asserted policy definitions to reinforce the surface and ground water exclusions found in the basic policy. The letter noted specifically that "Ground Water" meant:

a. water that backs up through a sewer or drain; or

b. water below the surface of the ground. This includes water that exerts pressure on or flows, seeps, or leaks through or into a building, sidewalk, driveway, foundation, swimming pool, or other structure.

Significantly, neither letter acknowledged Bishops' coverage for sewer and drain backup under the Penn Pac Endorsement or business interruption under the Business Income (and Extra Expense) Coverage Form.

In follow-up correspondence, Mrs. Nicotra informed Penn National expressly that Bishops had purchased the Penn Pac Endorsement and noted that the endorsement specifically removes from the language you cite . . . exclusion B(1)(g)(3), i.e., water that backs up from a sewer or drain.

In response, Penn National acknowledged the Penn Pac Endorsement but declined to extend coverage, asserting that the damage Bishops suffered was caused concurrently by generalized flooding, which is excluded as a covered cause of loss under the basic policy.

In support, Penn National cited the "Causes of Loss - Special Form" as quoted above.

Applying the concurrent cause limitation of that provision, Penn National asserted that the policy excludes from coverage even covered causes of loss if the damage at issue is caused concurrently by any excluded cause. Penn National then explained that although it had re-evaluated its earlier analysis of the policy provisions, it had concluded that "the coverage opinions expressed in our October 8th and October 16th, 2004 letters are correct and on point with the cause of loss occurring on September 17, 2004."

Following Penn National's final refusal, Bishops retained counsel and commenced this action, asserting that its purchase of the Penn Pac Endorsement provided an affirmative grant of coverage for the losses it suffered and rendered the concurrent cause exclusion of the basic policy unenforceable.

In its complaint, Bishops pled causes of action for breach of contract and insurance bad faith. After the parties completed discovery, Penn National filed a motion for partial summary judgment on Bishops' breach of contract claim, requesting that the court enforce the concurrent cause exclusion. In response, Bishops filed a cross-motion requesting that the court deem its losses subject to coverage under the Penn Pac Endorsement and find further that sewer and drain back-up, as a covered cause of loss, entitled Bishops to coverage under the Business Income (and Extra Expense) Coverage Form up to the policy limits of $600,000.

In preparation for argument, the parties entered an extensive set of Stipulated Facts, which appear in pertinent part as follows:

3. [Bishops'] action is based upon the interpretation of commercial insurance policy No. CX90603879 (hereafter referred to as the "Policy"), including endorsements and forms [issued to Bishops by Penn National].

...

6. On or about September 17, 2004, a substantial amount of rain fell in the Pittsburgh area, specifically in Millvale, as a consequence of Hurricane Ivan.

7. Because of the significant rainfall of September 17, 2004, the sewer system in the Millvale area generally, and specifically near the location of Plaintiff's place of business, was subject to water and sewage backup through sewers, drains and pipes, causing some degree of damage to the Plaintiff's premises.

8. Subsequent to the initial backup of sewage, the significant rainfall of September 17, 2004 also caused outside flood waters to rise and enter the Plaintiff's building through windows, doors and other openings, causing additional damage to Plaintiff's building and premises.

9. It is not possible to divide or separate the damage sustained at the time of the initial sewer backup from the damage done as a result of the subsequent flood.

...

12. The Policy provides "all risks" property damage coverage. Accordingly, all property damage to the insured premises is a "Covered Cause of Loss" unless it is specifically excluded. If an exclusion applies to a particular type of property damage, that damage is removed from the Policy's definition of "Covered Cause of Loss." The parties agree that all of the property damage suffered by Plaintiff would be covered under the Policy if there was no applicable exclusion.

13. [The primary property damage protection is set forth in a policy form entitled "Causes Of Loss - Special Form".] The "Causes of Loss - Special Form" of the Policy sets forth the following exclusions . . . :

1. We will not pay for loss or damage caused directly or indirectly by any of the following. Such loss or damage is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss.

g. Water

Flood, surface water, waves, tides, tidal waves, overflow of any body of water, or their spray, all whether driven by wind or not;

Water that backs up or overflows from a sewer, drain or sump;

...

14. If there was no additional coverage, the exclusions in the Causes of Loss -Special Form would remove the property damage suffered by Bishops from the definition of "Covered Cause of Loss," and Bishops would not be entitled to indemnification under the Policy.

15. The parties agree that the Policy contains two endorsements that may provide such additional coverage, but dispute the effect of those endorsements. The endorsements are known as the Penn Pac Endorsement, which provides additional insurance coverage for "Backup of sewers and drains," and the Electronic Data Processing Endorsement, which provides additional insurance coverage triggered by harm to the defined terms "hardware" and/or "software."

16. The Penn Pac Endorsement includes the following provisions . . . .

II.

Additional Coverages

The following Additional Coverages are added;

f. Back Up of Sewers and Drains

We will pay for loss or damage to Covered Property caused by a back up from a sewer or drain or an overflow from a sump within the building at the described premises.

The most we will pay for each location under this Additional Coverage is $5,000 for the sum of all expenses arising from back up or overflow during each 12 month period of the policy.

Exclusion B.1.9.(3) does not apply to this Additional Coverage.

The parties agree that any damage caused solely by the backup or overflow from the sewers and drains at Plaintiff's building would be a "Covered Cause of Loss" under the Policy; provided, however, that Penn National contends this "Covered Cause of Loss" would extend only to the $5,000 limit set forth in the Penn Pac Endorsement.

Following argument, trial court judge Michael A. Della Vecchia denied Penn National's motion and entered judgment in favor of Bishops, finding that "Plaintiff is entitled to receive coverage provided by the Pennpac [sic] Endorsement up to [$]5,000."

Nevertheless, the court struck additional language that Bishops had included in the order that stated:

[t]he damage suffered by Plaintiff was a 'Covered Cause of Loss' under the Policy including without limitation the Business Income Endorsement [i.e., the Business Income (and Extra Expense) Coverage Form].

Because Della Vecchia's order had not disposed of all claims raised in the plaintiff's complaint, Bishops filed a second motion for summary judgment requesting that the court find that its claim arose out of a "covered cause of loss" as that term applies to the Business Income (and Extra Expense) Coverage Form, thereby making up to $600,000 available to satisfy Bishops' claim for business interruption under the policy.

Penn National countered with a cross-motion requesting that the court enter summary judgment limiting the insurer's exposure to $5,000 with respect to the contracts claim in Count I and entering judgment in its favor on the bad faith claim in Count II. The second trial court declined to find any further exposure under the policy and denied Bishops' motion. It granted Penn National's motion with the following direction:

> 1.This Court enters a final order with respect to the claims asserted in Count I of the Complaint, declaring that Defendants' exposure for breach of contract is limited to a maximum of $5,000 and thereby enters judgment in favor of Plaintiff and against Defendant in the amount of $5,000; and
> 2.Count II of the Complaint, seeking damages for bad faith pursuant to 42 Pa.C.S. 8371 is hereby Dismissed with prejudice.

Bishops and Penn National then filed the cross-appeals.

Consistent with its argument, Penn National emphasized the concurrent cause provision on which it relied to deny Bishops' claim. Bishops framed the issues somewhat differently, but also consistent with its argument, to emphasize the effect of the Penn Pac Endorsement in establishing sewer and drain back-up as a covered cause of loss for the purpose of property damage and business interruption coverage.

The appeals court concluded that their questions merely presented alternative facets of the same issues - i.e., whether the Penn Pac Endorsement rendered sewer and drain back-up a covered cause of loss such as to supersede or invalidate the concurrent cause exclusion in the basic policy and to make available the $600,000 coverage that Bishops sought for losses incurred by reason of the business interruption that followed its physical loss.

It concluded:

In this case, the parties' claims test the construction of the insurance policy issued to Bishops by Penn National. "Generally, the proper construction of a policy of insurance is a matter of law which may properly be resolved by a court pursuant to a motion for summary judgment."

Thus, the issue of whether a claim is within a policy's coverage or barred by an exclusion is properly determined provided that the policy's terms are clear and unambiguous so as to preclude any issue of material fact.

The appeals court cited the state supreme court decision *Collister v. Nationwide Life Ins. Co.* (Pa. 1978). In that case, the Court observed that

Because the insurer is in the business of writing insurance agreements, the recent trend in insurance cases has been away from strict contractual approaches towards a view that insurance policies (and other insurance contracts) are no longer private contracts in the traditional sense (if they ever were)." The traditional contractual approach fails to consider the true nature of the relationship between the insurer and its insureds. Only through the recognition that insurance contracts are not freely negotiated agreements entered into by parties of equal status; only by acknowledging that the conditions of an insurance contract are for the most part dictated by the insurance companies and that the insured cannot "bargain" over anything more than the monetary amount of coverage purchased, "does our analysis approach the realities of an insurance transaction."

Because the policy at issue insured for "all risks" and Penn National sought to deny coverage on the basis of an exclusion in the policy, the insurer had to bear the burden of proof to show that the exclusion is unambiguous under the circumstances so as to comport with the reasonable expectations of the insured.

In support of its decision to deny coverage under the Penn Pac Endorsement and Business Income (and Extra Expense) Coverage Form, Penn National relied on the language of the concurrent cause exclusion, which provided that Penn National "will not pay for loss or damage caused directly or indirectly" by "water," either through flooding or through back-up from a sewer or drain.

The appeals court noted that, if the content of this exclusion had remained unaltered, application of its terms to the facts of the case would exclude coverage of both of the causes of Bishops' loss - and the matter of concurrent causation language would be moot.

With Bishops' purchase of the Penn Pac Endorsement, however, loss or damage caused by sewer or drain back-up became a covered cause of loss without qualification pursuant to the following language:

We will pay for loss or damage to Covered Property caused by a back up from a sewer or drain or an overflow from a sump within the building at the described premises.

The most we will pay for each location under this Additional Coverage is $5,000 for the sum of all expenses arising from back up or overflow during each 12 month period of the policy.

Significantly, this language removed Exclusion B.1.g.(3) of the basic policy as a bar to coverage for damage caused by sewer and drain back-up and makes no effort to restate the language that bars coverage on the ground of concurrent causation by another excluded cause of loss. This omission created some ambiguity unlikely to appear until the insured files a claim, confident in the notion that the endorsement he purchased rendered all aspects of the former exclusion void only to find that the insurer interprets his coverage far more narrowly.

That ambiguity became evident upon consideration of Exclusion B.1.g.(3) in its entirety:

B. EXCLUSIONS

1. We will not pay for loss or damage caused directly or indirectly by any of the following. Such loss or damage is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss. ...

g. Water ...

(3) Water that backs up or overflows from a sewer, drain or sump;

Based on this language, the insured might reasonably conclude that the coverage he had purchased eliminated both the specified limitation in subsection g.(3), concerning sewer and drain back-up, as well as the preliminary language in section B.1., concerning concurrent causation. Nevertheless, the insurer might concur only as to subsection g.(3) and, as Penn National did, deny coverage on the basis of the concurrent cause language.

Yet, Penn National's interpretation was not necessarily dispositive. Both section B.1. and subsection g.(3) were component parts of "Exclusion B.1.g.(3)." Although section B.1. retained meaning so long as any specific exclusion followed it, the language of subsection g.(3) depended on section B.1. for any semblance of linguistic coherence. On its own, subsection g.(3) was meaningless.

The appeals court concluded:

Thus, we can discern no reason why an insured who purchased the Penn Pac Endorsement in reliance on the sewer and drain back-up it provided might not conclude, quite reasonably, that the elimination of "Exclusion B.1.g.(3)" should not include elimination of the concurrent cause language as it applies to sewer and drain back-up.

Accordingly, we find the intent embodied in the Penn Pac Endorsement uncertain when applied to Exclusion B.1.g.(3), and subject to more than one reasonable interpretation even if the language it uses appears clear.

Consequently, we find both the Penn Pac Endorsement and Exclusion B.1.g.(3) latently ambiguous as they relate to one another. In view of this ambiguity, the failure of the Penn Pac Endorsement to restate the concurrent cause endorsement - or to otherwise delineate a portion of the Exclusion remaining - is highly probative of the manner in which we proceed and requires that we interpret the relevant provisions in favor of the insured.

In view of what the appeals court called "the evident linguistic joust between these controlling provisions of Penn National's policy," it found a significant indicator of the parties' intent - and the insured's expectations - in the fact that the insured paid an added premium for the coverage the Penn Pac Endorsement purported to unlock because the basic policy, in which the concurrent cause language appeared, would otherwise exclude coverage.

Thus, the insured purchased additional coverage ostensibly to make up for deficiencies in the basic policy only to find its claim denied not by virtue of any limitation on the coverage it bought but because ancillary language in the basic policy barred coverage for another excluded loss. Such a result struck the appeals court as a variant of the "sleight of hand" it had rejected in earlier decisions - in which

an insurer creates the appearance of coverage using an amendatory endorsement tailored to cover a stated risk only to deny coverage when that risk comes to fruition by citing language not suggested by the endorsement.

Given that the concurrent causes of loss, flooding and sewer and drain back-up, were ineluctably linked by the effect of a hurricane on a municipal drainage system, the appeals court found this point particularly salient.

No insured would purchase extra coverage for an added premium in the expectation that its claim under that coverage would be denied because the covered cause of loss, i.e., sewer and drain back-up, was itself caused by an excluded cause of loss, i.e. flood, when the two would naturally occur together. Nevertheless, the interpretation Penn National urges would validate just such an unseemly result and in so doing undermine the reasonable expectations of the insured.

In an earlier decision, the appeals court had apportioned the burden of proof to the insurer to disprove coverage under an "all risks" policy with a concurrent cause exclusion reasoning that

[a]ny other construct would merely encourage insurers to orchestrate a shell game of exclusions and exceptions to exclusions (or "named peril coverage extensions"), ...in full recognition that the ultimate risk of loss would rest upon the insured notwithstanding his payment of an extra premium for coverage he reasonably thought he was getting.

The appeals court's analysis, based on the express language of the Penn Pac Endorsement, found little basis for the continued viability of the concurrent cause exclusion to sewer and drain back-up under the policy.

The court also noted that the decisions Penn National cited in defense of its position had involved situations in which the concurrent causation language appeared in the basic policies; in the Bishops case, the language appeared in the Endorsement. According to the court:

Given our determination that the concurrent cause language of Exclusion B.1.g.(3) is not enforceable to exclude coverage of the loss Bishops sustained, our inquiry shifts to the extent of coverage available to Bishops under both the Penn Pac Endorsement and the Business Income (and Extra Expense) Coverage Form. This issue grounds Bishops' second question on appeal. Bishops contends that "once it is [established] that sewer back-up is a 'covered cause of loss," coverage follows automatically to the limits of both the [Penn Pac] Endorsement ($5,000 for physical damage and $25,000 for extra expenses) and the Business Income (and Extra Expense) Coverage Form ($600,000)."

The court's analysis recognized that Bishops had purchased an "all risks" policy. Accordingly, the policy's definition of a "covered cause of loss" was broad, as stated in the policy's "Causes of Loss - Special Form:"

A. COVERED CAUSES OF LOSS

When Special is shown in the Declarations, Covered Causes of Loss means RISKS OF DIRECT PHYSICAL LOSS unless the loss is:

1. Excluded in Section B., Exclusions; or

2. Limited in Section C., Limitations; that follow

Although loss by "back[] up from a sewer, drain or sump" was initially excluded by "Section B., Exclusions," Bishops' purchase of the Penn Pac Endorsement rendered such an event covered subject to a limitation on the amount of "expenses" incurred which resulted from "loss or damage to Covered Property" and a further limitation on "Extra Expense."

As recognized by the parties in their Stipulations, the applicable language of the Penn Pac Endorsement specified the scope and limitations of its coverage as follows:

II. ADDITIONAL COVERAGES

The following Additional Coverages are added:

e. Back Up of Sewers and Drains

We will pay for loss or damage to Covered Property caused by a back up from a sewer or drain or an overflow from a sump within the building at the described premises.

The most we will pay for each location under this Additional Coverage is $5,000 for the sum of all expenses arising from back up or overflow during each 12 month period of the policy.

II. ADDITIONAL COVERAGES

g. Extra Expense

We will pay up to $25,000 for the actual and necessary Extra Expense you sustain due to direct physical loss or damage to property, including personal property in the open (or in a vehicle) within 100 feet, at premises which are described in the Declarations caused by or resulting from any Covered Cause of Loss.

Although the Endorsement offered no definition of "expense," as that term was used in section II.e. (Back Up of Sewers and Drains), it did provide the following definition for "Extra Expense":

g. Extra Expense

Extra Expense means necessary expenses you incur during the "period of restoration" that you would not have incurred if there had been no direct physical loss or damage to property caused by or resulting from a Covered Cause of Loss.

On the basis of this definition, the appeals court concluded that the foregoing provisions of the Endorsement address coverage for "business expenditure[s] chargeable against revenue[.]" Such expenditures must have been incurred either "due to direct physical loss or damage to [covered] property [from a covered cause of loss];" i.e. expense, or "would not have [been] incurred if there had been no direct physical loss or damage to [covered] property [from a covered cause of loss];" i.e., extra expense.

Indeed, these definitions comported seamlessly with the Endorsement's delineation of the remaining elements of "extra expense," which describe the "specific period" for which such "expenses" remain covered under the policy.

Significantly, the Endorsement's descriptions made no reference to any form of detriment suffered by the insured other than expenditures. If the endorsement's descriptions were in fact intended to address other forms of detriment, the court would expect the use of more inclusive language. On this matter, it concluded:

Therefore, we conclude that the provisions of the Endorsement at issue provide no coverage for other forms of detriment and cannot be interpreted to limit coverage of them. Thus, while the Penn Pac Endorsement covers "expenditures" as costs incurred by the insured up to $5000 as "expenses" and an additional $25,000 as "extra expenses," other forms of loss remain recoverable under other provisions or endorsements of the policy. We conclude accordingly that the trial court ruled correctly in awarding coverage for Bishops in the amount of $5000 but erred in failing to award further coverage for "extra expenses."

Bishops argued that coverage for other forms of loss, i.e., loss of revenue through business interruption occasioned by the drain and sewer back-up, were eligible for coverage under the policy's Business Income (and Extra Expense) Coverage Form. And, under this Business Income Form, the policy covered loss of business income up to $600,000 - provided that the loss arose from a "Covered Cause of Loss."

The policy defined "Business Income" as follows:

A. COVERAGE

Business Income

Business Income means the:

a. Net Income (Net Profit or Loss before income taxes) that would have been earned or incurred; and

b. Continuing normal operating expenses incurred, including payroll.

Significantly, the Business Income (and Extra Expense) Coverage Form did not define "covered cause of loss" in a way unique to this provision of the policy but incorporated the definition that appeared in the Causes of Loss - Special Form, which appeared to provide default definitions for the remainder of the policy. The court wrote:

As we discussed, supra, the Causes of Loss - Special Form defines a "covered cause of loss" to include all "risks of direct physical loss" unless the loss is excluded in "Section B., Exclusions."

Although the risk of loss by sewer and drain back-up had been excluded pursuant to Section B.1.g.(3), that exclusion ceased upon Bishops' purchase of the Penn Pac Endorsement, which, as we have discussed, deactivated the sewer and drain back-up exclusion and affirmatively granted coverage for sewer and drain back-up. Accordingly, sewer and drain back up was rendered a "risk of direct physical loss," see Causes of Loss - Special Form, not "excluded in Section B., Exclusions[,]" and therefore, a "Covered Cause of Loss" under the Causes of Loss - Special Form. As the Business Income (and Extra Expense) Coverage Form relies expressly on that Causes of Loss - Special Form to define covered causes of loss, sewer and drain back-up was rendered covered upon Bishops' purchase of the Penn Pac Endorsement.

So, it affirmed the orders of the respective trial judges to the extent they had found a right to coverage for "expenses" under the Penn Pac Endorsement, but vacated those orders to the extent that they found no coverage for "extra expenses" under the Penn Pac Endorsement or under any provision of the Business Income (and Extra Expense) Coverage Form.

It was a big win for the insured.

The Bunning-Bereuter-Blumenauer Flood Insurance Reform Act of 2004

Authorized grant programs to mitigate properties that experienced repetitive flooding losses.

Owners of these repetitive loss properties who do not mitigate face higher premiums.

Biggert–Waters Flood Insurance Reform Act of 2012

The Biggert–Waters Flood Insurance Reform Act of 2012 was "designed to allow premiums to rise to reflect the true risk of living in high-flood areas." The bill was supposed to deal with the "insolvency" of the National Flood Insurance Program by requiring the premiums to reflect real flood risks. The result was a 10 fold increase in premiums. At present, $527 billion worth of property is in the coastal floodplain. The federal government heavily underwrites the flood insurance rates for these areas. The law "ordered FEMA to stop subsidizing flood insurance for second homes and businesses, and for properties that had been swamped multiple times." These changes were to occur gradually over the course of five years. FEMA was also instructed to do a study on the affordability of this process, a study which it has failed to complete.

Homeowner Flood Insurance Affordability Act of 2014

The Homeowner Flood Insurance Affordability Act of 2014 (S. 1926) was a United States Congress bill that would have delayed the increases in flood insurance premiums that were part of the Biggert–Waters Flood Insurance Reform Act of 2012. The reforms from that law were meant to require flood insurance premiums to actually reflect the real risk of flooding, which led to an increase in premiums. At the time of the bill, the National Flood Insurance Program was $24 billion in debt.

The bill passed in the United States Senate during the 113th United States Congress, but was superseded by a similar bill which had originated in the United States House of Representatives. That bill ultimately became law as the Homeowner Flood Insurance Affordability Act of 2013.