

Chapter 6 FEMA Law

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.