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Press Release

For Immediate Release

Insurance Company Goes 0 for 4, Gets Swept By Insured; Court Finds Coverage For Commercial Loss Following Bench Trial

PHILADELPHIA, October 13, 2009.

Going 0 for 4 is not good in baseball. It can be even worse in a courtroom.

Not even the Phillies earned the sweep won by a commercial insured in the verdict rendered by The Honorable Howland A. Abramson on October 8, 2009, against Erie Insurance Exchange following a September 2008 bench trial in the Commerce Program in Philadelphia.

Charles K. Graber, the principal behind Graber Law with offices in King of Prussia, represented 1804-14 Green Street Associates in the non-jury trial before Judge Abramson. The case arose from damages to a 32,240 square-foot, one-story commercial building in Fort Washington on September 28, 2004, following a strong storm earlier in the day, when a tenant heard a loud bang and later observed water from the roof pouring into the building. The source

of the water was an open hole on the roof that formed when a PVC pipe, located above the ceiling tiles and connected to a roof drain, dislodged.

Erie Insurance Exchange insured the building and, in a letter of December 6, 2004, claimed that the loss was caused by a drain fastener, which was intended to connect the PVC pipe to the roof drain, rusting away, and relied upon the insurance policy's exclusion for rust and corrosion to deny coverage. Erie raised three more policy exclusions to deny coverage after Graber filed suit. Now, after a two day bench trial in September 2008, the Court has sided with Graber's client, expressly rejecting all four (4) exclusions raised by the insurance company and finding the damages to be covered under the policy.

In his October 8, 2009, written verdict, Judge Abramson found the insurance company failed to prove that the loss was caused by rust or corrosion, as it originally contended. Following a review the testimony of Erie's engineering expert, Judge Abramson found "there was no credible evidence" that the pronounced stain on the PVC pipe referenced by Erie "was rust or corrosion or that the PVC pipe became dislodged from the drain due to the rust or corrosion." (Findings at pg. 9, Conclusions of Law at ¶ 3). The Court rejected the contention that deterioration caused the loss for the same reason.

"This was an all-risk policy. We felt it was important to emphasize that it was the insurance company which had the burden to prove, through expert testimony, that the loss was excluded from coverage," says Graber, whose firm specializes in representing individuals and businesses in litigation against insurance companies. After examining the report of the insurance

company's expert, Graber concluded it was better to undermine the expert's opinions through cross-examination, rather than retain and present the testimony of another engineer. "We were confident," added Graber, "that we could show in cross-examination that the insurance company's own expert was speculating and had not received critically important information available about the loss. Erie's expert acknowledged on cross that a complete understanding of the facts was crucial. Showing he didn't have one in this case undermined his entire opinion. Having a battle of the experts was not something we wanted or needed to do."

"But Erie kept coming up with new reasons why the claim was not covered," added Graber. "Everyone in the courtroom knew Erie's expert had not been particularly effective, especially on cross-examination. Then Erie claimed the water entering the building was either rain or surface water, both of which were excluded perils in the policy." These exclusions did not require the Court rely upon Erie's expert, added Erie's counsel during closing argument. However, Graber argued, and the Court has now found in a case of first impression in Pennsylvania, that water accumulating as the result of rainfall is not "rain" when it stops falling from the sky. Nor is water on a roof "surface water," as that phrase is used in Erie's insurance policy, according to Graber and now Judge Abramson.

"The 'surface water' argument was creative," said Graber, "but as Judge Abramson pointed out at trial, all water that is not falling is on the surface of something." 'Surface water' has historically referred to water on land, although there are cases from other jurisdictions holding to the contrary. We distinguished those cases in our post-trial submission."

And now Graber knows he did so successfully in his fifty page submission. Judge Abramson's verdict should close the five year-old case, because the parties stipulated to a damage award, not disclosed to the Court, in the event of a finding against the insurer. Graber prefers to keep that figure under wraps, adding only that it is larger than the amount expended by the insured to restore its 32,400 square foot facility "by a significant amount."

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