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WHAT LAW APPLIES WHEN A FLOOD-RELATED DISASTER HITS? *By Dana Windisch Chilson*

In June 2011, we discussed the rising cost of a flood-related disaster and the difficulties insureds often face when trying to obtain flood insurance. In that article, we noted how, despite the potential hardships in acquiring flood insurance, flood insurance may be a necessity for many homeowners and businesses, since flood insurance is the only policy that covers direct damage from flooding. We also discussed that the National Flood Insurance Program (NFIP) is responsible for paying claims submitted under a flood insurance policy.

Since the federal government, through the NFIP, subsidizes the vast majority of flood insurance policies, and since private insurance companies generally only sell and administer these policies, it seems axiomatic that only federal law would apply when a dispute in regard to a flood insurance policy arises between the insured and the insurer. In fact, the standard NFIP flood insurance policy includes a provision that expressly states that "all disputes arising from the handling of any claim under the policy are governed exclusively by the flood insurance regulations issued by FEMA, the National Flood Insurance Act of 1968 . . . and Federal common law." So all flood insurance disputes must be analyzed under federal law, right?

Not quite. In the recent case of *Williams v. Standard Fire Insurance Company*, the United States District Court for the Middle District of Pennsylvania made a distinction between disputes involving the handling of a flood insurance policy versus the procurement of the policy itself. In *Williams*, the plaintiffs were issued a flood insurance policy by Standard Fire Insurance Company. Such issuance was based on the premise that the insured property was located in a fairly low risk area for flooding. Upon discovering that the risk of flooding was greater than originally believed, Standard Fire revoked plaintiffs' flood insurance policy and returned their premiums. At that point, plaintiffs could not insure their property.

Plaintiffs sued Standard Fire for detrimental reliance and negligence, alleging that Standard Fire failed to properly investigate the insurability of the property and that plaintiffs' relied upon Standard Fire to insure their property (a requirement under the term of their mortgage). Standard Fire sought dismissal of plaintiffs' claims on the basis that the alleged causes of action, all of which were based on state common law, were preempted by federal law.

The court, however, disagreed with Standard Fire and held that plaintiffs could proceed with their claims. To arrive at its conclusion, the court analyzed the three types of preemption: express, federal, and conflict. At each turn, the court held that the plaintiffs' claims, which dealt with the procurement of their flood insurance policy as opposed to the handling of a claim under the policy, were not preempted by federal law; thus, the plaintiffs were permitted to proceed with their state court claims.

While well reasoned and thoughtful, the court's decision may come as a surprise to many insurance companies and their lawyers who have almost always operated under the assumption that all flood related claims must be analyzed under federal law and brought in federal court. The *Williams* decision opens up the state court and state law avenue for plaintiffs who have flood insurance claims related to the procurement of their flood policy. Every insurance policy contains different and specific exclusions.

The McNees Insurance Recovery & Counseling group works to help clients understand their insurance policies, submit claims and, where appropriate, sue insurance companies for failing to honor legitimate claims, whether that be in state or federal court. Please contact the McNees Insurance Recovery and Counseling group for more information. ■

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FARM ODORS AND COVERAGE ISSUES ARISING FROM "POLLUTANT" PROPERTY DAMAGES

By Michael R. Kelley

You may want to hold your nose while considering this coverage issue!

Many McNees clients own farms in several states. In one case, a number of homeowners sued a farm claiming that the odor emanating from the farm was a nuisance and damaged the use and value of their properties. The claimants were seeking more than just "nuisance value," as the homeowners looked for significant damages.

Like virtually all businesses, the farm had a Commercial General Liability policy ("CGL") with a reputable insurer that covered the defense and liability for claims seeking damages due to alleged property damage. The insurer was well aware that this policyholder operated farms in multiple states, and specifically listed all of the farm properties in the policy documents.

Like all modern CGL policies, the policy issued here also excluded coverage for claims arising from "pollutants." The Policy defined "pollutant" as "any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste. Waste includes materials to be recycled, reconditioned or reclaimed."

The farm submitted a claim to its insurer, and the insurer denied coverage on the basis of the pollution exclusion. The insurer then filed a declaratory judgment action in federal court in Pennsylvania (where the farmer is headquartered and operates some of its farms).

Are farm odors pollutants under the policy?

According to the recent opinion of the federal court, the answer is "Yes" under Pennsylvania law and "No" under another state's law. In the end, the court determined that Pennsylvania law applies. Why the difference? The court ruled that the policy language excluding claims arising from waste and irritants clearly and unambiguously included farm odors, while the other state has found this same language to be ambiguous because the policy does not specifically exclude coverage for farm odors.

The practical takeaway is that many insurance policies are written on standard forms that are sold to a wide range of businesses. The standard exclusions in these policies can remove coverage for the very liabilities that businesses face. Clients should assess their liabilities and then seek coverages for those liabilities. ■

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