

NJ Panel Questions 'Flood' And 'Storm' Insurance Distinction

By **Bill Wichert**

Law360, Newark (October 8, 2019, 8:29 PM EDT) -- A New Jersey appeals panel on Tuesday questioned the point of having a “named windstorm” definition in policies affording \$400 million in coverage to New Jersey Transit Corp., challenging insurers’ assertion that a “flood” definition meant they only had to pay \$100 million for Superstorm Sandy damage.

During a hearing in Newark, attorneys representing Certain Underwriters at Lloyd's of London, Torus Specialty Insurance Co. and other insurers urged the panel to overturn a 2017 trial court ruling that a \$100 million sublimit for flood losses did not apply to NJ Transit’s claim, noting that the policies define a flood in part as a “surge of surface water.”

“Storm surge is a type of surge. It’s defined right in the flood definition,” Torus attorney Shawn L. Kelly of Dentons told the panel.

But Appellate Division Judge Joseph L. Yannotti soon interjected, “What is the point of the definition of ‘named windstorm’? What’s the point of having this separate definition if everything’s covered by the definition of ‘flood’?”

Kelly argued that the purpose of the named windstorm definition was to provide another “peril” subject to a clause entitling NJ Transit to receive coverage on a per-occurrence basis. That provision accumulates multiple perils into a single occurrence, Kelly said.

The accumulation clause defines perils in part as “cyclone, hurricane, windstorm,” all of which have been used to describe what occurred during Sandy, Kelly noted.

“We think the only thing that makes sense, when you review the accumulation clause ... is that all related weather events have to be thrown into that,” Kelly said. “You can’t specifically carve out named windstorm, because it’s also a hurricane, it’s also a cyclone, it’s also a windstorm. How do you slice and dice that?”

Lloyd’s of London attorney Robert W. Fisher of Clyde & Co. later told the panel, “In sum, the policies as written here simply do not do what New Jersey Transit wants,” adding that the claimed losses “are a clear result of flood damage, plain and simple.”

NJ Transit attorney Kenneth H. Frenchman of McKool Smith PC countered Tuesday that the Sandy damage fell under the named windstorm definition and thus outside the flood sublimit.

In the policies, named windstorm is defined in part as “wind or wind driven water, storm surge and flood associated with, or which occurs in conjunction with, a storm or weather disturbance which is named by the National Weather Service or any other recognized meteorological authority,” court documents state.

Frenchman noted that the policies’ flood definition does not include “storm surge” or “wind driven water.”

The appellate panel, however, questioned Frenchman about how the flood definition includes “surge of surface water.”

“Can you have a surge of surface water without a storm?” Appellate Division Judge Heidi Willis Currier asked Frenchman. Frenchman said yes, citing excessive rainfall, an iceberg melting and a dam breaking.

Judge Yannotti then asked him why “surge of surface water” would not encompass “storm surge.”

“We don’t necessarily dispute that, without more, it could arguably be encompassed within this flood definition,” Frenchman said.

But Frenchman stressed that the named windstorm definition is more specific than the flood definition, adding that “there’s no dispute this is a named windstorm under the policy and there’s no dispute that storm surge is part of that.”

“It’s the more specific provision and it has to have meaning,” said Frenchman, later adding that “ignoring the ‘named windstorm’ provision would be absurd when this whole thing arises out of a named windstorm.”

Judges Joseph L. Yannotti, Heidi Willis Currier and Lisa A. Firko sat on the panel for the Appellate Division.

Arguing for NJ Transit was Kenneth H. Frenchman and Marc T. Ladd of McKool Smith PC.

Arguing for the insurers were Robert W. Fisher of Clyde & Co., Shawn L. Kelly of Dentons and Michael J. Smith of Stewart Smith.

The cases are New Jersey Transit Corp. v. Certain Underwriters at Lloyd's London and New Jersey Transit Corp. v. Certain Underwriters at Lloyd's London et al., case numbers A-001026-17 and A-001027-17, in the Superior Court of New Jersey, Appellate Division.

--Editing by Haylee Pearl.