

Superstorm Sandy: In Case of Apparent First Impression, New York Trial Court Finds that Delay-in-Completion Losses Were Subject to Policy's Flood Limits

July 2, 2014 Steven A. Meyerowitz, Esq., Director, FC&S Legal

A trial court in New York, in a case of apparent first impression, has ruled that a builder's claim for delay-in-completion damages following Superstorm Sandy was subject to the policy's flood limits and deductible.

The Case

El-Ad 250 West LLC was in the middle of constructing a building at 250 West Street in Manhattan when the property was damaged by Superstorm Sandy and, as a result, it suffered delay-in-completion losses. El-Ad notified Zurich American Insurance Company, the insurance company that had issued El-Ad an all-risk builders risk insurance policy.

Thereafter, El-Ad filed a partial proof of loss for \$5 million. Zurich rejected El-Ad's claim and El-Ad sued.

The parties disputed whether delay-in-completion losses arising from a flood were subject to the policy's flood limits and deductible. El-Ad argued that the flood loss aggregate limit and deductible only applied to physical damage to the property caused by a flood and not to so-called "downstream" financial losses, such as delay-in-completion losses.

Zurich countered that nothing in the policy supported El-Ad's physical/non-physical damage distinction and that delay-in-completion losses resulting from a flood were subject to the policy's flood limitations.

The parties moved for partial summary judgment.

The Policy

Declaration 7.C.(2) of the policy stated:

The maximum amount [Zurich] will pay for loss or damage in any one **OCCURRENCE**, and/or in the aggregate annually for loss or damage from all **OCCURRENCES**, shall not exceed [\$5 million] by the peril of **FLOOD**.

The policy provided in Section III.7 that:

As respects the peril of **FLOOD**, **OCCURRENCE** shall mean all losses or damages arising during a continuous condition as defined in the definition of **FLOOD**.