

## **A “Flood” of Uncertainty; Massachusetts SJC Finds Policy Term Ambiguous**

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The highest court in Massachusetts recently held that term “Flood” and the associated phrase “surface waters,” as used in two all-risk insurance policies, is ambiguous in the context of water that accumulated on a parapet roof and rooftop courtyard, thereby negating the insurers’ attempt to limit coverage to a sublimited coverage for “Flood.”

### Background

In June 2020, a severe storm caused damage to Norwood Hospital, owned by Medical Properties Trust, Inc. (“MPT”) and leased to Steward Health Care System (“Steward”), the policyholders. The relevant portion of the damage included damage from rain that accumulated on the rooftop courtyard and seeped into the interior of the building causing damage to the building and its contents.

Zurich issued a commercial property insurance policy to MPT with a general limit of \$750 million. AGLIC issued a commercial property policy to Steward with a general limit of \$850 million. Both policies afforded sublimited coverage for damage caused by “Flood” (\$100 million in the Zurich policy and \$150 million in the AGLIC policy), which both policies defined in pertinent part as “[a] general and temporary condition of partial or complete inundation of normally dry land areas or structure(s) caused by[] [t]he unusual and rapid accumulation or runoff of surface waters.”

Based on the definition and its reference to “surface water,” the insurers limited coverage to only that available under the sublimited coverage for “Flood.” According to the insurers, water that collected on the surface of a roof and courtyard before entering the building constituted “surface water” and thus met the policies’ definition of “Flood.” MPT and Steward countered, arguing that the term “surface water,” as used in the context of the definition of “Flood,” should be limited to water that flows on the surface of the earth and emanates from the ground up, not rainwater that falls from the sky and pools on a roof or other raised surface.

The district court sided with the insurers and MPT appealed to the First Circuit, which certified to the Massachusetts Supreme Judicial Court the question of whether rainwater that accumulates on a roof or other raised surface can reasonably be understood to be “surface water” in the context of an all-risk insurance policy.

#### Holding and Analysis

The Massachusetts SJC rejected the insurers’ arguments and held that rainwater that accumulates on a raised surface and enters a building resulting in damage does not clearly constitute “surface water,” and, thus, does not clearly meet the definition of “Flood.”

In finding the term to be ambiguous, the court looked first to the definition of Flood contained in the policies. The court determined that both parties proposed plausible interpretations based on the policy language alone. For example, the court found that MPT’s interpretation of “surface water,” was reasonable because the Flood provision referenced “waves, tides . . . [and] the rising overflowing or breaking of boundaries of . . . bodies of water,” which supported the interpretation that it must be waters on the surface of the ground. The court also found the insurers’ more literal interpretation – that “surface waters” mean waters that accumulate on a surface—to be reasonable. Given the multiple reasonable interpretations, the court found the term to be ambiguous, but not before looking to caselaw from courts within Massachusetts and elsewhere to confirm the absence of a uniform interpretation of the phrase. The court likewise revisited its own earlier decisions addressing the meaning of Flood, only to conclude that in none of those prior decisions did the court’s analysis involve facts like those presented in this case.

Importantly, the court noted that the provisions at issue pertain to coverage sublimits rather than express exclusions to coverage. This, the court found, was a distinction without a difference. As the court explained, whether the provision is an express exclusion or merely a sublimited coverage, when the provision operates to “diminish the protection purchased by the insured,” the provision must be interpreted subject to the rules applicable to policy exclusions.

#### Conclusion

The MPT decision is a reminder that insurance coverage exclusions and, as here, other types of provisions that work to limit coverage, must be stated clearly and capable of one and only one reasonable interpretation. The decision also stands as a reminder of the potentially broad and far-reaching consequences that a single erroneous decision can have for policyholders. As illustrated by

amicus United Policyholders, the district court’s decision here, if left uncorrected, could have adversely affected coverage that is relied upon by millions of commercial and residential property owners and lenders in Massachusetts and beyond.

Accordingly, policyholders should be aware of how “Flood,” “surface water” and other defined and undefined policy terms are interpreted in their jurisdiction, and ensure that they are adequately protected against risks of loss. Experienced coverage counsel can help to explain how undefined policy terms can impact broad policy provisions and definitions and assist when an insurer acts unreasonably.