

## Cautionary Coverage Tales from the Trenches: Sewer/Drain backup

An Illinois business purchased a commercial insurance policy from Hartford Insurance. The policy had the following exclusion for damage caused by water:

### **B. EXCLUSIONS**

1. We will not pay for loss or damage caused directly or indirectly by any of the following. Such loss or damage is excluded regardless of any other cause or event that contributes concurrently or in sequence to the loss.

f. Water

(1) flood, including the accumulation of surface water, waves, tides, tidal waves, overflow of streams or any other bodies of water, or their spray, all whether driven by wind or not;

(3) Water that backs up from a sewer or drain

The business purchased a separate endorsement with the following sewer back up coverage and exclusion:

We will pay for direct physical loss or physical damage to Covered Property at the “scheduled premises” solely caused by water that backs up from a sewer or drain.

We will not pay for water or other materials that back up from any sewer or drain when it is caused by any flood. This applies regardless of the proximity of the flood to Covered Property. Flood includes the accumulation of surface water, waves, tides, tidal waves, overflow of streams or other

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Source: <https://uphelp.org/claim-guidance-publications/cautionary-coverage-tales-from-the-trenches-sewer-drain-backup/> Date:

November 24, 2024

bodies of water, or their spray, all whether driven by wind or not.

In 2008 a severe rainstorm dropped 7" of rain over the weekend. When the owner came back on Monday, there was 18" of water backed up inside the building that damaged \$1.5million of equipment. He called the insurer expecting coverage. Insurer's adjuster interviewed the owner and asked if the drains were blocked. Unaware of the later policy implications, the owner answered no and the adjuster noted it in the claim file.

The insurer hired an outside expert whose report noted that while some of the water inside the premises had indeed come through the inside drains, the water that had accumulated outside the premises in the street had likely overtopped the doorsill and contributed to the water inside.

Insurers denied the claim stating that the water outside the building was a "flood" under the "surface water" definition in the exclusion noted above.

The owner sued the insurer for breach of contract. Additional investigation by the owner's attorneys found that the water on the street outside was the result of the storm sewer and drains backing up, unable to drain into the nearby river because of a shutoff valve installed by the city to prevent the river backing up onto the street.

The owner raised the issue with the court that because the outside water was also the result of sewers and drains backing up, and because the policy does not distinguish between backup of internal or external sewers and drains, there was coverage even if the outside water was a concurrent cause (i.e. the internal drains backing up was not the sole cause of the damage). The trial court disagreed, citing Illinois cases that an accumulation of water, even from the back up of a sewer and drain, fits the definition of flood and is thereby an excluded cause.

The owner appealed, raising the issue that those Illinois cases did not have a separate endorsement for sewer and drain backup coverage, which he had specifically contracted for. The definition of flood he argued, while appropriately excluding coverage for surface water under the exclusion in the main policy in those cases, had to change where, as here, there was an endorsement for sewer and drain backup, and the surface water was caused by sewer and drain back up. Otherwise the endorsement fraudulently asserted coverage because a sewer and drain backup always causes an accumulation of surface water

that both causes damage and can be defined as a flood.

The appellate court disagreed, holding that the common definition of flood would prevail and need not be modified by a sewer and drain backup endorsement. The court reasoned that the coverage was not fraudulent because the endorsement would cover damage caused by sewer and drain blockage. Blockage, however, is nowhere mentioned in the policy. The court therefore read in the term blockage as the only thing covered under the endorsement.

Recall the poor owner who was asked two days after the incident if the drains had been blocked, and without knowing, answered no.

The result is that anyone with a sewer and drain backup endorsement must immediately hire a contractor to obtain video evidence of sewer and drain blockage, or else risk denial of the claim because the insurer may later argue some chain of causation that includes flood.

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