

THOUGHT LEADERSHIP

News

## FIFTH CIRCUIT AFFIRMS DISTRICT COURT'S RULING GRANTING SUMMARY JUDGMENT IN FAVOR OF INSURED IN HURRICANE HARVEY DISPUTE

Newsbrief

05 APR 2021

Recently, the U.S. Appeals Court for the Fifth Circuit affirmed the summary judgment the district court granted in favor of Playa Vista Conroe ("Playa Vista") regarding a Hurricane-Harvey related property damage claim made by Playa Vista with its insurer. *Playa Vista Conroe v. Ins. Co. of the West*, No. 20-203, 2021 WL 836715 (5th Cir. March 5, 2021) centered on a coverage dispute that arose after Hurricane Harvey hit the Texas coast in August 2017.

To prevent the Lake Conroe Dam from overflowing and failing, the San Jacinto River Authority released massive amounts of water from the dam, which Playa Vista claimed destroyed 22 of its boat slips. Playa Vista filed a notice of loss and made a claim under its policy. The insurer denied coverage, stating that the policy did not cover flooding caused by a hurricane or tropical storm.

Playa Vista subsequently filed notice and sent its insurer a pre-litigation demand letter under Ch. 542A of the Texas Insurance Code. When the insurer reiterated its denial of coverage, Playa Vista filed suit in state court. The case was removed to federal court, where the parties filed cross-motions for summary judgment. The district court denied the insurer's motion and granted Playa Vista's, resolving the breach of contract claim but leaving the issue of damages and attorney's fees for trial.

Two weeks prior to trial, the parties entered a stipulation in which they agreed Playa Vista insured \$190,827.50 in damages and \$50,000 in attorney's fees. The district court approved of and entered the stipulation. Playa Vista moved for final judgment, and the district court awarded it the damages and fees pursuant to the stipulation. The insurer then sought leave to file a second motion for summary judgment, arguing that the stipulation rendered the policy's exclusion for "acts or decisions . . . of any person, organization or governmental body" applicable. The district court denied the motion, and the insurer appealed.

On appeal, the Fifth Circuit held that Playa Vista established coverage, and the insurer failed to prove an exclusion applied. Playa Vista pointed to provisions in the policy that stated the insurer would not pay for loss or damage to docks unless a stated value was listed in a certain subsection or if a sub-limit of insurance in the Declaration or in an

## FIFTH CIRCUIT AFFIRMS DISTRICT COURT'S RULING GRANTING SUMMARY JUDGMENT IN FAVOR OF INSURED IN HURRICANE HARVEY DISPUTE

endorsement to the policy existed. Next, Playa Vista showed that the Declaration included a provision that allocated a \$220,000 sublimit of insurance for coverage of boat slips. The Fifth Circuit concluded that such evidence established coverage, and the burden switched to the insurer to show an applicable exclusion.

The insurer pointed to three potential exclusions. The Fifth Circuit held them all to be irrelevant. First, the exclusion regarding “damage resulting from waterborne material involved in [a] flood” also included language that it was essentially inapplicable if flood coverage was endorsed or made a part of the policy, which was the case. Second, the exclusion regarding not paying for loss or damage caused by a flood arising from a hurricane or tropical storm did not apply because the policy’s definition of “flood” did not apply to Playa Vista’s boat slips because they existed on water, not on normally dry land—as the policy’s definition specified. Third, the exclusion for flood damage to boat slips and docks did not apply because it only applies to “floods,” and the policy’s definition of “flood” excluded flood damage to property that normally appears on water rather than dry land. As the Court stated, “[i]t was [the insurer’s] policy to draft, so [the insurer] must assume the perils of its chosen language.

Further, the Fifth Circuit held that, even if the “flood” exclusions applied, Playa Vista’s summary judgment evidence show that the boat slips were not destroyed by a “flood”; rather, they were destroyed by a suction effect created by the water being released from the dam at such a high volume, which caused debris from all over Lake Conroe to be violently whipped around and destroy the boat slips as water drained out of the Lake.

Finally, as to the insurer’s argument that the “governmental body” exclusion applied given that Playa Vista had agreed that the San Jacinto River Authority’s release of water from the Lake Conroe Dam at an unprecedented rate and volume caused the debris to collide into the boat slips and docks, the Fifth Circuit concluded that the insurer’s attempt at a legal “gotcha” must fail because the insurer failed to rely on the governmental body exclusion or raise it as an issue in its motion for summary judgment.

Given the above, the Fifth Circuit affirmed the district court’s decision to grant Playa Vista’s summary judgment.