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Lawyer Insights

October 10, 2019

Flood Coverage and High Hazard Zones: Issues Policyholders Should Be Aware Of

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Published in ABA's Insurance Coverage, Vol. 29, Issue 3

Flood insurance usually is the last thing on the minds of most property owners, especially those with property in locations that rarely or never experience significant flooding. Rising sea levels, expanding development, and the effects of climate change, however, already are creating the potential for flooding in areas previously considered impervious to the peril. For the same reason, many of the Federal Emergency Management Agency's ("FEMA") flood maps are outdated and fail to show current high-risk flood zones. Consequently, property owners may want to purchase flood insurance, even if they haven't experienced a prior flood loss, to address the expanded risks. When doing so, policyholders should be mindful of the pitfalls that frequently fall upon the unwary holder of flood insurance. This article discusses several of the points of contention that frequently arise between a policyholder and its insurer after a flood loss.

Coverage for flood damage is usually excluded under standard homeowners and commercial property policies. Policyholders whose property has a flood risk can obtain coverage under a separate policy from insurers participating in the National Flood Insurance Program. These policies provide primary coverage up to $500,000 for commercial property owners. Policyholders must turn to excess flood coverage for higher limits. In order to limit exposure, excess flood policies often have sublimits, which operate to reduce the amount a policyholder can recover in the event of a loss in a higher-risk flood zone. The type and amount of sublimit is often tied to the property's FEMA flood zone location. For example, a policy may provide $200 million worth of flood coverage, but that coverage may be sublimited to $50 million for property located in a Special Flood Hazard Area ("SFHA"), or "High Hazard" flood zone, as determined by FEMA. The assignment of a property to a SFHA could substantially reduce a policyholder's possible insurance recovery in the event of a flood loss. As discussed below, the confusing language of these policies and FEMA's changing, and often outdated, flood maps have spawned multiple insurance litigation disputes containing issues that policyholders purchasing flood insurance need to be aware of.

Flood Coverage Language

As discussed above, a commercial property policy that provides flood coverage may contain a sublimit that applies if the insured property is located in a "High Hazard" flood zone. Examples of High Hazard flood zone property definitions are: (1) "all property at a 'location' that is partially or totally situated in an area which at the time of loss or damage has been designated on a Flood Insurance Rate Map to be a Special Flood Hazard Area"; (2) "all property in areas where the National Flood Insurance Program is not in effect, and where all property at a 'location' is partially or totally situated in an area which is within a one hundred (100) year flood plain or its worldwide equivalent"; or (3) "all property at a 'location' that is partially or totally protected by dams, dikes, levees or walls which were intended to protect such property from the level of a one hundred (100) year flood or its worldwide equivalent, regardless of any Zone or Area designation or assignment by Federal Insurance and Mitigation Administration (FIMA) or other recognized authority having jurisdiction."[i] What these definitions have in common is that they rely on a Flood Insurance Rate Map promulgated by FEMA.[ii]

Flood hazard areas identified by FEMA on its Flood Insurance Rate Map are labeled Special Flood Hazard Areas.[iii] Special Flood Hazard Areas "are defined as the area that will be inundated by the flood event having a 1-percent chance of being equaled or exceeded in any given year."[iv] This 1-percent annual chance of flood is called the "base flood" or "100-year flood".[v] Special Flood Hazard Areas are labeled as different zones, such as Zone A, Zone AO, Zone AH, Zones A1-A30, or Zone AE, each of which represents a specific type of High Risk Area.[vi] As discussed above, policies may specifically refer to these zones when defining a High Hazard flood zone, or a policy may define High Hazard flood zone more generally as any locations within Special Flood Hazard Areas.

FEMA's Flood Maps Are Out Of Date: What Does That Mean for Policyholders

Given the potential for catastrophic losses due to flooding, FEMA's classification of a location as a Special Flood Hazard Area can have serious implications on a policyholder's ability to fully recover. Policyholders and insurers alike expect certainty and accuracy from FEMA's flood maps. For that reason, among others, FEMA is required to update flood maps every five years.[vii] And, where FEMA does not analyze a map within that five-year time span, the flood risk is considered to be "unknown" by FEMA.[viii]

FEMA must reassess flood maps regularly because flood risks may change over time due to a variety of factors, such as changing land use patterns.[ix] In addition, "[c]limate change impacts, like rising sea levels and more intense rain storms," can also alter previously established flood risks.[x] As sea levels rise, property previously not located in a location prone to flooding may now find itself within a flood zone, despite no history of flooding in the past. Problematically, however, FEMA's flood are based on conditions at the time of the last assessment; they do not depict future conditions. Rather, FEMA's flood maps "look backwards in time and determine the size of the 100-year and 500-year floodplain based on past events."[xi] This backwards-looking approach is unable to keep up with rapidly changing conditions. In fact, a recent investigation by the Department of Homeland Security's Inspector General revealed that 58% of all FEMA flood maps are considered inaccurate or out-of-date.[xii] In addition, a study published in the scientific journal of Environmental Research Letters concluded that more than 40 million Americans are exposed to serious flood risk at the 100-year-flood or 1 percent level, roughly three times more than appears on FEMA's flood maps.[xiii]

Furthermore, it is not just climate change and expanding development that creates inaccurate flood maps. Local politicians often can exert control over the size and shape of flood maps. As observed by Sarah Pralle, a political scientist at Syracuse University, politicians prefer to keep flood zones small to save their constituents money and allow for more development.[xiv] Specifically, Pralle says that "[t]he overriding concern of local officials is to reduce the size of flood maps and to reduce base flood levels."[xv] This is because the 100-year flood crest level dictates the level at which buildings must be built.[xvi] As a result, local politicians and their constituents are incentivized to make the flood zones as small and low as possible to help keep construction costs in check.

Faulty information about an area's flood risk creates problems for insurers because premiums may not reflect the actual risk. Similarly, inaccurate flood maps leave property owners vulnerable, especially if their property locations are incorrectly mapped out of the 100-year flood plain. Property owners may have a false sense of security and, thus, underappreciate the risk of flooding, causing risky behavior that can have consequences when a flood loss damages an uninsured or underinsured location. In addition, a policyholder that purchases flood insurance with a High Hazard flood sublimit may find its property rezoned as a High Risk Area when the location's flood map is updated. The possibility of a zoning change creates uncertainty for both the insurer and policyholder, exposing both parties to potentially higher risks and costs. Accordingly, a policyholder placing flood coverage should review whether its policy contains a High Hazard sublimit and if so, whether the property is in a High Risk Area and when FEMA last updated the relevant flood map.

Common Coverage Issues

Putting aside the accuracy of FEMA's flood charts, policyholders may encounter several other issues when attempting to recover in the event of a flood loss. For example, properties that span a large area may have only a portion of the property is in a SFHA, but the insurer may contend that the entire property should be treated as a High Risk Area – even those parts of the property that are not in a SFHA. In *City of Atlanta v. Allianz Global Risks US Insurance Co.*, the City of Atlanta owned a wastewater treatment facility that encompassed approximately 77 acres of property.[xvii] The property consisted of detached buildings and structures, in-ground and above-ground tanks, conduits, reservoirs, pumps, electrical equipment and other machinery.[xviii] Upon issuing the City's property insurance, and at least three times thereafter, the insurer conducted so-called loss control inspections and issued comprehensive reports to the City identifying the various risks located at the facility. Among those risks was the risk of flood, to which the insurer stated that the property was subject to a low risk of flood and not located in a SFHA. After the facility experienced a catastrophic flood loss, however, Allianz paid the full amount of the policy's "High Hazard" sublimit, but not the higher full limits of the flood coverage, contending that part of the property was located in a SFHA.[xix] The City sued Allianz, arguing that the policy's "High Hazard" flood limit did not apply because the facility was originally identified (several times) as *not* being in a SFHA.[xx]

The dispute centered over the definition of "High Hazard" flood limit, which the policy defined as "all property at a 'location' that is partially or totally situated in an area which at the time of loss or damage has been designated on the Flood Insurance Rate Map (FIRM) to be a Special Flood Hazard Area (SFHA)."[xxi] Allianz contended that the "location" was the entire 77-acre facility, even though its flood assessment was based only on the flood map designation for the single building that bore the facility's street address. The City of Atlanta contended that the "High Hazard" definition was ambiguous because it was unclear whether the phrase "partially or totally situated in an area" modifies "property" or "location." The court agreed with the City of Atlanta, finding that whether "partially or totally situated" was intended to modify "property" or "location" was a critical question not resolved by a plain reading of the definition.[xxii]

A different issue arose in *Opry Mills Mall Ltd. Partnership v. Arch Insurance Co.*, where a shopping mall sought to recover for a catastrophic flood loss in Nashville, Tennessee.[xxiii] The relevant policy provided coverage up to $200 million for flood losses, except for losses caused by a flood in "High Hazard Flood Zones," which was defined as "all property at a 'location' that is partially or totally situated in an area which at the time of loss or damage has been designated on a Flood Insurance Rate Map (FIRM) to be a Special Flood Hazard Area (SFHA) . . . ."[xxiv] An issue arose because the policy contained an endorsement that stated, "High Hazard Flood Locations are defined as follows," and then listed several locations.[xxv] The property at issue was not listed as a "High Hazard Flood Location."[xxvi] Also relevant was a provision in the policy that stated "[i]n the event of property damage and/or time element loss as respect flood occurring in High Hazard Flood Locations, the sum to be deducted shall be the greater of $500,000 per occurrence or the amount collectible under the National Flood Insurance Program."[xxvii]

Opry Mills Mall argued that since the Nashville location was not listed in the "High Hazard Flood Location" endorsement, the $50 million High Hazard sub-limit should not apply to the loss. Its insurer, Arch Insurance Company, argued that the "High Hazard Flood Location" list was only relevant as it pertained to the modification of the policy's deductible. Thus, Arch asserted, the application of limits was controlled by the "High Hazard Flood Zones" definition but deductibles were controlled by the "High Hazard Flood Locations" endorsement. The Court of Appeals of Tennessee agreed, holding that the "High Hazard Flood Locations" endorsement altered the deductible for floods occurring at those locations but did not alter the limits. The "High Hazard" sub-limit therefore applied.[xxviii]

Flooding not only causes physical damage, but can result in lost future profits if a company must close down or operate at reduced efficiency due to flooding. An issue may arise as to whether a flood sublimit caps *all* damages resulting from a flood or only the resulting physical damage. The Eastern District of Michigan encountered this issue in *Federal-Mogul Corp. v. Insurance Co. of the State of Pennsylvania*.[xxix]. In that case, a flood loss caused Federal-Mogul $39,406,467 in property damage and $25,093,533 of "time element loss," i.e., economic loss due to an inability to maintain normal operations.[xxx] The insurer paid the $30 million High Hazard sublimit, taking the position that the sublimit applied to the entirety of Federal-Mogul's loss, not to the property damage loss alone.[xxxi] Federal-Mogul sued, arguing that the High Hazard sub-limit only applied to physical loss and damage, not to time element loss.[xxxii] The court agreed, finding that the High Hazard sub-limit did not apply to the time element loss.[xxxiii] In reaching that conclusion, the court noted that other limits of the policy specifically mentioned time element loss.[xxxiv] Because the High Hazard sub-limit did not mention time element loss, it was reasonable to conclude that the insurer did not intend for the sub-limit to apply to that category of Federal-Mogul's flood loss.

Conclusion

Inaccurate and changing FEMA flood maps render the expectations of both policyholders and insurers uncertain. That uncertainty is exacerbated by unclear policy language that is keyed off of FEMA flood maps and zones. Insurers and policyholders can reduce these uncertainties, and alleviate possible coverage disputes, by understanding the flood risks the policyholder is attempting to insure, clarifying and rewriting flood coverage wording, and determining the accuracy of the property's flood maps.

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[i] *See City of Atlanta v. Allianz Glob. Risks US Ins. Co.*, No. 1:13-CV-2249-ODE, 2014 WL 12061535, at *2 (N.D. Ga. Aug. 8, 2014); *Opry Mills Mall Ltd. P'ship v. Arch Ins. Co.*, No. M2016-01763-COA-R3-CV, 2018 Tenn. App. LEXIS 40, at *7 (Tenn. Ct. App. Jan. 26, 2018), *appeal denied*, not for citation (May 17, 2018).

[ii] FEMA, U.S. DEP'T OF HOMELAND SECURITY, *Flood Insurance Rate Map (FIRM)*, https://www.fema.gov/flood-insurance-rate-map-firm.

[iii] FEMA, U.S. DEP'T OF HOMELAND SECURITY, *Flood Zones*,, https://www.fema.gov/flood-zones.

[iv] FEMA, U.S. DEP'T OF HOMELAND SECURITY, *Flood Zones*,, https://www.fema.gov/flood-zones.

[v] FEMA, U.S. DEP'T OF HOMELAND SECURITY, *Flood Zones*,, https://www.fema.gov/flood-zones.

[vi] SHAWNEE COUNTY, KAN., *Definitions of FEMA Flood Zone Designations*, https://snmapmod.snco.us/fmm/document/fema-flood-zone-definitions.pdf

[vii] Joel Scata, *FEMA's Outdated and Backward-Looking Flood Maps*, NAT. RES. DEF. COUNCIL: EXPERT BLOG (Oct. 12, 2017), https://www.nrdc.org/experts/joel-scata/femas-outdated-and-backward-looking-flood-maps.

[viii] Joel Scata, *FEMA's Outdated and Backward-Looking Flood Maps*, NAT. RES. DEF. COUNCIL: EXPERT BLOG (Oct. 12, 2017), https://www.nrdc.org/experts/joel-scata/femas-outdated-and-backward-looking-flood-maps.

[ix] Joel Scata, *FEMA's Outdated and Backward-Looking Flood Maps*, NAT. RES. DEF. COUNCIL: EXPERT BLOG (Oct. 12, 2017), https://www.nrdc.org/experts/joel-scata/femas-outdated-and-backward-looking-flood-maps..

[x] Joel Scata, *FEMA's Outdated and Backward-Looking Flood Maps*, NAT. RES. DEF. COUNCIL: EXPERT BLOG (Oct. 12, 2017), https://www.nrdc.org/experts/joel-scata/femas-outdated-and-backward-looking-flood-maps.

[xi] Joel Scata, *FEMA's Outdated and Backward-Looking Flood Maps*, NAT. RES. DEF. COUNCIL: EXPERT BLOG (Oct. 12, 2017), https://www.nrdc.org/experts/joel-scata/femas-outdated-and-backward-looking-flood-maps.

[xii] OFF. OF INSPECTOR GEN., U.S. DEP'T OF HOMELAND SECURITY, *FEMA Needs to Improve Management of Its Flood Mapping Programs* at 3-4 (Sept. 27, 2017), https://www.oig.dhs.gov/sites/default/files/assets/2017/OIG-17-110-Sep17.pdf.

[xiii] Oliver EJ Wing, et al., *Estimates of Present and Future Flood Risk in the Conterminous United States*, ENVTL. RES. LETTERS 13 (2018) 034023, https://iopscience.iop.org/article/10.1088/1748-9326/aaac65.

[xiv] Ramin Skibba, SLATE, Why Are FEMA's Flood Maps So Horribly Flawed?, (Sept. 06, 2017), https://slate.com/technology/2017/09/heres-why-femas-flood-maps-are-so-terrible.html.

[xv] Ramin Skibba, SLATE, Why Are FEMA's Flood Maps So Horribly Flawed?, (Sept. 06, 2017), https://slate.com/technology/2017/09/heres-why-femas-flood-maps-are-so-terrible.html.

[xvi] Ramin Skibba, SLATE, Why Are FEMA's Flood Maps So Horribly Flawed?, (Sept. 06, 2017), https://slate.com/technology/2017/09/heres-why-femas-flood-maps-are-so-terrible.html.

[xvii] *City of Atlanta v. Allianz Global Risks US Insurance Co.*, No. 1:13-cv-2249, at 2 (N.D. Ga. Aug. 8, 2014.)

[xviii] *City of Atlanta*, No. 1:13-cv-2249, at 2.

[xix] *City of Atlanta*, No. 1:13-cv-2249, at 3-4.

[xx] *City of Atlanta*, No. 1:13-cv-2249, at 14-15.

[xxi] *City of Atlanta*, No. 1:13-cv-2249, at 14-15.

[xxii] *City of Atlanta*, No. 1:13-cv-2249, at 16.

[xxiii] *Opry Mills Mall Ltd. Partnership v. Arch Insurance Co.*, No. M2016-01763-COA-R3-CV, 2018 Tenn. App. LEXIS 40, at *1 (Tenn. Ct. App. Sept. 6, 2017).

[xxiv] *Opry Mills Mall*, 2018 Tenn. App. LEXIS 40, at *14.

[xxv] *Opry Mills Mall*, 2018 Tenn. App. LEXIS 40, at *15-16.

[xxvi] *Opry Mills Mall*, 2018 Tenn. App. LEXIS 40, at *16-17.

[xxvii] *Opry Mills Mall*, 2018 Tenn. App. LEXIS 40, at *16.

[xxviii] *Opry Mills Mall*, 2018 Tenn. App. LEXIS 40, at *24.

[xxix] *Federal-Mogul Corp. v. Insurance Co. of the State of Pennsylvania*, No. 12-12005, 2015 U.S. Dist. LEXIS 137394, at *2 (E.D. Mich. Oct. 8, 2015).

[xxx] *Federal-Mogul*, 2015 U.S. Dist. LEXIS 137394, at *2.

[xxxi] *Federal-Mogul*, 2015 U.S. Dist. LEXIS 137394, at *5.

[xxxii] *Federal-Mogul*, 2015 U.S. Dist. LEXIS 137394, at *5.

[xxxiii] *Federal-Mogul*, 2015 U.S. Dist. LEXIS 137394, at *13.

[xxxiv] *Federal-Mogul*, 2015 U.S. Dist. LEXIS 137394, at *13.

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