Vacancy Provision Sinks Coverage For Burst Pipe: DC Circ.

By **Jeff Sistrunk**

The D.C. Circuit on July 31 upheld a lower court's ruling that Windsor-Mount Joy Mutual Insurance Co. doesn't have to cover a couple's costs to repair severe damage to their Delaware beach house from a burst pipe, holding that coverage is clearly barred because the homeowners failed to shut off water to the residence before leaving for 10 days.

A panel of the appellate court quickly upheld the judgment of U.S. District Judge Randolph D. Moss, who concluded in September 2016 that Windsor-Mount Joy was justified in denying coverage to homeowners Francesca Dahlgren and Vasilli Katopothis, who turned to the insurer after the 2013 incident devastated their house in Rehoboth Beach, Delaware.

Windsor-Mount Joy's property policy contained a provision — known as ML-508D — excluding coverage for any plumbing-related damage if the homeowners failed to turn off the building's water before leaving the premises for 72 hours or more. While the Dahlgrens argued that the provision was ambiguous, the D.C. Circuit panel was unconvinced.

"There is no dispute the Dahlgrens were away from their beach home for ten days and failed to shut off the water supply where it entered the house," Circuit Judge Thomas B. Griffith wrote.

Francesca Dahlgren returned to the beach house in February 2013 to find two inches of standing water throughout the main level and more water "gushing" from the ceiling, according to the opinion. During the Dahlgrens' 10-day absence, a pressurized hot water pipe in the upstairs bathroom had apparently burst and flooded the house, the decision says.

The Dahlgrens retained a cleaning and renovation to company to fix the house, but due to problems with the repair efforts, the couple wound up having to demolish the residence, according to the opinion. Windsor-Mount Joy refused to cover the Dahlgrens' claim, citing their failure to turn off the water when leaving the house "vacant" or "unoccupied" for more than 72 hours.

In response, the Dahlgrens filed suit against the insurer in District of Columbia federal court in March 2014. After Judge Moss sided with Windsor-Mount Joy, the couple appealed to the D.C. Circuit.

The appellate panel said the dispute presented a clear-cut case of policy interpretation.

"The Dahlgrens cannot recover under the clear and unambiguous terms of their insurance policy," Judge Griffin wrote. "If their house remained unoccupied 'in excess of 72 hours,' the Dahlgrens were required to '[m]aintain heat in the residence and shut off the water supply where it enters the residence,' or else the plain language of ML-508D excludes coverage for 'loss caused by ... discharge, leakage, or overflow from any plumbing … system.'"

The Dahlgrens suggested on appeal that the vacancy provision constituted an impermissible "hidden trap" or "pitfall" in the policy, but the panel said there is "nothing hidden or deceptive" about the provision.

"An unoccupied house presents a significant risk that leaking water will go unnoticed for some time, dramatically increasing the likelihood of extensive damage to property," Judge Griffin wrote. "What might be only a minor incident in an occupied house could escalate quickly into major damage if left unchecked, which is exactly what happened in this case."

Charles B. Peoples of Thomas Thomas & Hafer LLP, who represents Windsor-Mount Joy, told Law360 that "the D.C. Circuit got it right" in finding that "the clear and unambiguous language of the exclusion barred coverage in this case."

"This was self-evident to Windsor-Mount Joy, the district court, and the D.C. Circuit," Peoples said. Given the lack of ambiguity, the appellate court was also correct in rejecting the Dahlgrens' public policy arguments, he added.

"In these insurance coverage cases, the language of the insurance contract is the starting point of the analysis," Peoples said. "Here, the language was clear and unambiguous. The court understood that, and correctly avoided being distracted by arguments that ultimately were irrelevant to the facts, the insurance contract, and the law at hand."

The Dahlgrens' attorney, Erik Broch Lawson of Silver & Brown PC, told Law360, "it remains my opinion that the ML508D provision in the Windsor-Mount Joy policy is unconscionable both in how it is drafted and how it was added to policies including my clients'."

"Obviously I am disappointed that the District Court and the Circuit Court of Appeals each declined to hold the provision to be invalid or even to interpret it narrowly given the fact that my client did not have a water supply valve to turn off," Lawson said.

"I would hope that now the Delaware Insurance Commissioner would take action to review Windsor-Mount Joy's exclusion and their rate filings in that state to ensure that Windsor-Mount Joy is not enjoying an unfair advantage in the insurance marketplace by charging the same or similar rates as other insurers that offer more coverage," he added. "Perhaps the Insurance Commissioner will revisit its approvals of the repeated iterations of the ML-508D endorsement now that the Court has interpreted it as broadly as it has."

Senior Circuit Judge David B. Sentelle and Circuit Judge Thomas B. Griffith sat on the D.C. Circuit panel; Circuit Judge Brett Kavanaugh was member of the panel at the time the case was submitted but did not take part in the decision.

The plaintiffs are represented by Erik Broch Lawson and Glenn Hugh Silver of Silver & Brown PC.

Windsor is represented by Charles B. Peoples of Thomas Thomas & Hafer LLP.

The case is Vasilli Katopothis et al. v. Windsor-Mount Joy Mutual Insurance Co. et al., case number 16-7132, in the U.S. Court of Appeals for the District of Columbia Circuit.