

I. Factual Background

It is undisputed that the insurance policy² between Narricot and Fireman's Fund was in full force and effect during and in the aftermath of Hurricane Floyd, and covered the Tarboro and Boykins facilities. We describe the facts pertinent to Narricot's claims at Tarboro and Boykins below.

A. Tarboro, North Carolina

Hurricane Floyd reached Tarboro, North Carolina, on September 16, 1999. The hurricane brought severe wind and rain which caused wind damage and flooding. Am. Joint Stip. at ¶ 11. Noble Dep., at 8-9. "The radio system was down, water treatment plant was down, water plant was flooded, and [there were] extensive power outages." Id. at 10. Roads were flooded and houses suffered water damage. Id. The raw water pump station and waste water treatment plant were flooded as well. Id. at 9, 11.

The Town took several measures. Mayor Donald A. Morris declared a state of emergency. Am. Joint Stip. ¶ 12; id., Ex. D. The declaration was coupled with a moratorium on the sale, consumption, and trafficking of alcohol. Id.

The Town suspended the operation of all plants, including Narricot's. Am. Joint Stip at ¶ 17; Noble Dep. at 11, 14. According to Town Manager Sam W. Noble, Jr., who was in charge of sewage, policing, and fire for the Town, and shared

² Policy No. S 16 DXX 80719161

with Mayor Morris the authority to institute orders closing businesses, id. at 13, 28, "We had our employees...hand-deliver a letter to each industrial plant saying that they could not operate because of the water system being down." Id. at 18. Narricot obeyed Tarboro's order and did not resume operations until allowed by the Town. Am. Joint Stip. at ¶ 21; Noble Dep. at 20.

Tarboro prohibited access to Anaconda Road, on which Narricot's facility is located, to all but emergency personnel. Am. Joint Stip. at ¶ 18; Noble Dep. at 12, 16-17. Law enforcement and highway patrol officers stationed at each entrance to the road barred travel. Id. at 16-17.

It is worthwhile to note what it was that led to these measures. The raw water pump station and waste water treatment plant were flooded, suspending industry, rationing limited drinking water and preventing industrial waste from making its way into the Tar River. Id. at 9 - 11; see also id. at 35-36. On Anaconda Road, an emergency services center was set up, and the electrical lines near Narricot were damaged. Id. at 12, 31. The Town also adopted the measures described above for reasons of public safety, including fire prevention. Id. at 11, 31, 35-36.

Narricot claims it suffered business income and extra expense losses of \$162,328.00 due to Tarboro's prohibition of access to its facility.

B. Boykins, Virginia

Hurricane Floyd also swept through Southampton, Virginia, where Narricot's other plant is located at the outskirts of Boykins, on September 15 and 16, 1999. Johnson Dep. at 10; Am. Joint Stip. at ¶ 22.

The County of Southampton declared a state of local emergency on September 15, 1999. Am. Joint Stip. at ¶ 29; id., Ex. H. "[C]ommunication was minimal. Electricity was down. Our local radio station was down. All the telephone service was out. Cellular communication was virtually non-existent because that was the only way anybody tried to call, and the cell towers were just jammed." Id. at ¶ 27; Johnson Dep. at 13. On September 16, 1999, the hurricane brought severe floods, making all roads into and out of Boykins impassable for several days. Johnson Dep. at 24-25.

Southampton limited roadway travel to emergency personnel, a restriction that was still in place on September 20, 1999. Am. Joint Stip. at ¶¶ 31-32; Johnson Dep. at 12, 14-15, 33. The County issued advisories telling the public not to use the roads because of flooding. Johnson Dep., Exs. 4-6. The prohibitions were never formally rescinded, id. at 14, but when the roads became passable, the public started using them again. Id. at 12-16.

Because the County's waste water treatment system was ravaged by the floods, the County was unable to process the industrial waste of Narricot, Southampton's "primary industrial

contributor of waste water." Johnson Dep. at 17. The County, through public official Bob Croaker, ordered Narricot to suspend operations. It did not allow Narricot to resume them until September 23, 1999, when the waste water system was repaired. Id. at 17-18, 20-24. Am. Joint Stip. at ¶¶ 33-35.

Narricot claims that it sustained business income and extra expense losses at Boykins of \$99,569.00.

II. Governing Standards

Summary judgment is appropriate if "there is no genuine issue as to any material fact and...the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). In considering a motion for summary judgment, the Court must view the evidence, and any inferences from it, in the light most favorable to the nonmoving party. Groman v. Township of Manalapan, 47 F.3d 628, 633 (3d Cir. 1995). The moving party bears the initial burden of proving there is no genuine issue of material fact that is in dispute. Matsushita Elec. Indus. Co. Ltd. v. Zenith Radio Corp., 475 U.S. 574, 585 n.10 (1986). Once the moving party satisfies this initial burden, the nonmoving party must "come forward with 'specific facts showing there is a genuine issue for trial.'" Id. at 587 (quoting Fed. R. Civ. P. 56(e)). The nonmoving party cannot produce a "mere scintilla of evidence," but must present enough evidence to allow a reasonable jury to find in its favor. Groman, 47 F.3d at 633; Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986).

We agree with Narricot and Fireman's Fund that Pennsylvania law controls. Since this is a diversity case, we must also apply the choice-of-law rules of the forum state, Pennsylvania. Klaxon Co. v. Stentor Elec. Mfg. Co., Inc., 313 U.S. 487 (1941). Pennsylvania endorses a "flexible [choice-of-law] rule which permits analysis of the policies and interests underlying the particular issue before the Court." Griffith v. United Air Lines, Inc., 203 A.2d 796, 805 (Pa. 1964). The test is which state has the greatest interest in the application of its law; in comparing states' interests, a court may consider the states' contacts with the controversy. Cipolla v. Shaposka, 267 A.2d 854, 856 (Pa. 1970); Myers v. Commercial Union Assurance Cos., 485 A.2d 1113, 1115-16 (Pa. 1984).

Narricot, the insured, is a Pennsylvania corporation. Since the insurance policy at issue covers Narricot's plants in several states, there is no state which contains the principal place of the risks insured, ordinarily the state with the most significant interests in an insurance controversy. United Brass Works, Inc. v. Amer. Guar. and Liab. Ins. Co., 819 F. Supp. 465, 469 (W.D. Pa. 1992). This leaves us for choice of law purposes with Pennsylvania (the principal place of business of the insured, Narricot), Virginia (the location of the Boykins facility), and North Carolina (the location of the Tarboro facility). Because the substantive law of insurance contract interpretation does not differ materially among these three states, we have a "false conflict" of law, and may use the

substantive law of Pennsylvania. Lucker Mfg. v. Home Ins. Co., 23 F.3d 808, 813 (3d Cir. 1994).

The interpretation of an insurance policy is within the province of the Court. Standard Venetian Blind Co. v. Amer. Empire Ins. Co., 469 A.2d 563, 566 (Pa. 1983); Doylestown Elec. Supply Co. v. Maryland Casualty Ins. Co., 1996 U.S. Dist. LEXIS 20599, at *7-8 (E.D. Pa. Dec. 31, 1996). The goal is to "ascertain the intent of the parties as manifested by the language of the written instrument." Standard Venetian Blind, 469 A.2d at 566. Words not defined in the contract "are to be construed in their natural, plain, and ordinary sense." Madison Constr. Co. v. Harleysville Mut. Ins. Co., 735 A.2d 100, 108 (Pa. 1999). "Where a provision of a policy is ambiguous, the policy provision is to be construed in favor of the insured and against the insurer, the drafter of the agreement." Id. at 106. See also Med. Protective Co. v. Watkins, 198 F.3d 100, 104 (3d Cir. 1999) ("Ambiguous provisions in an insurance policy must be construed against the insurer ...; any reasonable interpretation offered by the insured, therefore, must control.") (quoting McMillan v. State Mut. Life Assurance Co., 922 F.2d 1073, 1075 (3d Cir. 1990)). "Where, however, the language of a contract is clear and unambiguous, a court is required to give effect to that language." Standard Venetian Blind, 469 A.2d at 566. In assessing whether there is ambiguity, the entire insurance policy must be considered. Med. Protective Co., 198 F.3d at 103. "Ambiguity exists if the language at issue could reasonably be

construed in more than one way." Lititz Mut. Ins. Co. v. Steely, 785 A.2d 975, 978 (Pa. 2001).

III. Analysis

A. Tarboro, North Carolina

Narricot claims it is insured for business income and extra expense losses at Tarboro under the Civil Authority Clause of the policy. We agree that a covered event occurred. However, because there is a genuine issue of material fact as to the magnitude of business income and extra expense losses Narricot sustained, we will grant summary judgment to Narricot on liability but not damages.

As to liability, the Civil Authority Clause states:
We will pay for the actual loss of "Business Income" you sustain and necessary "Extra Expense" caused by action of civil authority that prohibits access to the described premises due to a direct physical loss of or damage to property, other than at the described premises, caused by or resulting from any "covered cause of loss". This coverage will apply for a period of up to 30 consecutive days from the date of that action.

Am. Joint Stip., Ex. A [hereinafter Insurance Policy], at PR-31, § C.2. The Clause can be distilled into four elements:

- (1) The losses must be caused by an action of a civil authority that
- (2) prohibits access to the described premises
- (3) due to a direct physical loss or damage to property other than at the described premises, and

(4) the loss or damage to the property other than at the described premises must be caused by or result from a "covered cause of loss".

There is no genuine issue of material fact that a civil authority action occurred within the meaning of the Civil Authority Clause. The Town of Tarboro hand-delivered a letter to each industrial facility, including Narricot, prohibiting it from operating. Am. Joint Stip. at ¶ 19. The Town sent police officers to bar access to Anaconda Road, on which Narricot is located. Id. at ¶ 18; Noble Dep. at 16-17. These initiatives were "action[s] of civil authority that prohibit[ed] access to the described premises," the premises of the insured. The actions stemmed directly from "damage to property, other than at the described premises," such as electrical lines, waste water treatment plant, and raw water pump station. The damage to the other property resulted from flood and hurricane, "covered cause[s] of loss" under the insurance policy. See Insurance Policy, at PR-27, § N.2; id. at PR-6, § A; id. at PR-9, § D.1(e); id. at PR-43, § A.³

Fireman's Fund contends that Tarboro's actions were not formal. The Civil Authority Clause does not, however, require a formal order. It does not require a written order. Indeed, the

³ These provisions, read together, provide that a "covered cause of loss" under the Civil Authority Clause encompasses "all risks of direct physical loss or damage," id. at PR-6, § A, except as excluded or limited in the policy; flood is excluded, but an endorsement adds flood by deleting the flood exclusion at the Tarboro plant.

Civil Authority Clause does not mention an order at all, but rather an "action of civil authority".

Words not defined in a contract -- as the words "civil authority clause" are not -- are construed according to their ordinary English meaning. As one Circuit has construed it, "civil authority" encompasses "civil officers in whom a portion of the sovereignty is vested and in whom the enforcement of municipal regulations or the control of the general interest of society is confided....".⁴ This definition is in keeping with the ordinary English meaning of the words⁵ and our understanding of the two words together. Coming within the ambit of this definition would be police officers, highway patrol officers, and other Town employees the Town manager sends to conduct public affairs.⁶

⁴ Princess Garment Co. v. Fireman's Fund Ins. Co. of S.F., 115 F.2d 380, 382 (6th Cir. 1940).

⁵ "Civil" means in relevant part "1 a: of or relating to citizens... b: of or relating to the state or its citizenry...3 a: of, relating to, or based on civil law...c: established by law...5. of, relating to, or involving the general public, their activities, needs, or ways, or civic affairs as distinguished from special (as military or religious) affairs." Webster's Ninth New Collegiate Dictionary, at 244 (Merriam-Webster Inc. 1990).

"Action" is defined in relevant part as "2 : The bringing about of an alteration by force or through a natural agency 3 : the manner or method of performing...4 : an act of will 5 a: a thing done: DEED." Id. at 54.

⁶ In its stipulation, Fireman's Fund admits that the closure of industry was accomplished by civil authorities. Am. Joint Stip. at ¶ 17 ("Tarboro instituted a curfew and did not allow its industrial plants, including Narricot, to operate.").

If the word "action" is ambiguous, that ambiguity must be resolved in favor of the insured. Stopping people from entering a road and instructing business to halt operations plainly are "actions" in any ordinary use of English. If Fireman's Fund wanted to be more exacting about what type of behavior qualifies, it could have been. For instance, in Altru Health System v. American Protection Insurance Company, 238 F.3d 961, 963 (8th Cir. 2001), the Civil Authority Clause there provided that "access to such described premises is specifically prohibited by order of civil authority."

Fireman's Fund also argues that because Tarboro's actions were preventative they somehow did not result from a covered cause of loss. As we have stated, covered causes of loss under the insurance policy are both hurricane and flood. It is true that some of Tarboro's actions were preventative in nature. For instance, Tarboro suspended industry to ration drinking water made limited by the flooding of the raw water pump, and to stop industrial waste from overwhelming the flooded waste water treatment plant. Nevertheless, they were not "preventative" in any material sense since they did not prevent a covered cause of loss, namely a hurricane or flood. Regardless of whether Tarboro took the measures to prevent hurricane and flood damage or alleviate the perils caused by hurricane and flood damage, the measures still resulted from hurricane and flood.

Cleland Simpson, on which Fireman's Fund heavily relies, is inapposite. There, the civil authority actions were

preventative in the sense that they prevented a covered peril. On that basis, the Court ruled the civil authority's actions did not result from a covered cause of loss. Cleland Simpson Co. v. Fireman's Ins. Co., 11 Pa.D.&C.2d 607 (Lackawanna Ct. of Common Pl. 1957), aff'd without opinion, 140 A.2d 41 (Pa. 1958) (holding city order closing businesses after hurricane and flood to prevent fire does not result from a covered cause of loss, where fire is the peril).

Thus, Narricot's business and extra income expense losses caused by Tarboro's prohibition of access to its premises are covered. But because a genuine issue of fact exists as to the extent of those losses, Narricot is entitled to summary judgment on liability but not on damages.

On summary judgment, the dispositive question is whether, based on the evidence of record, any reasonable trier of fact could find against the moving party and for the party opposing summary judgment. Narricot, as plaintiff, bears the burden of proving every element of its case, including insurance loss⁷, at trial. Because the evidence which Narricot presented on the magnitude of loss is speculative and incomplete, it is possible that a reasonable jury -- even considering that

⁷ Berkeley Inn, Inc. v. Centennial Ins. Co., 422 A.2d 1078, 1080 (Pa. Super. 1980).

defendant has not proffered any evidence of its own -- could fail to be persuaded by Narricot's evidence of damages.⁸

Since a triable issue of fact remains as to the amount of business loss, summary judgment will be denied to both parties on damages.

B. Boykins, Virginia

At the Boykins, Virginia facility, Narricot also maintains it is covered for business income and extra expense losses under the Civil Authority Clause of the insurance contract. The contract at Boykins differs from that at Tarboro in one important respect. Flood is not a covered cause of loss. Because of the flood exclusion, and a concurrent loss causation clause, the Civil Authority Clause does not insure Narricot's business income and extra expense losses.

⁸ The only evidence Narricot presents to substantiate its claim of \$162,368.00 in business losses are spreadsheets. The documents are not annexed to affidavits as Rule 56 requires. Moreover, the spreadsheets do not disclose plaintiff's method for calculating loss, and why that method is accurate.

For example, the spreadsheets calculate sales loss due to the civil authority order by extrapolating from the sales Narricot made in the two months prior to the hurricane. However, there is no testimony or evidence for why that particular two-month period represents an accurate baseline. Also, Narricot appears to calculate business losses for the period September 17, 1999 to November 4, 1999 (without explanation), even though the closure of its facility did not last for as long a period and the Civil Authority Clause limits coverage of business losses to "30 consecutive days" from the date of the civil authority action.

We are not deciding that Narricot did not sustain \$162,368.00 in business losses. We simply cannot say that any reasonable jury would find that amount to be proved.

Under the Civil Authority Clause, quoted supra at Part III.B, it a condition of coverage that the damage to property other than the premises of the insured that precipitates the civil authority action be "caused by or resulting from any 'covered cause of loss.'" The parties agree that the civil authority actions assertedly taken here -- prohibiting road travel and closing the Narricot facility -- resulted from hurricane and flood. Hurricane is covered, but flood is excluded. The question of law is whether damage to other property that results from a covered risk and an excluded risk is a "'covered cause of loss'" under the Civil Authority Clause. We conclude that it is not.

Initially we note that the damage to the other property that was the focus of the civil authority actions was caused, at least in part, by flood. One property, the public waste water treatment system, was inundated, causing the County of Southampton to order Narricot to cease industrial operations until Narricot's waste could be handled. The other, the public roads, were inundated to the point of being impassable. The County accordingly limited travel. There is no evidence of record from which a trier of fact could conclude that property damaged by something other than flood, such as wind-damaged electrical lines, caused the County of Southampton to take the civil authority actions forbidding access to Narricot's facility.

Several provisions in the contract bear on the question of whether a combination of a covered peril and an excluded peril is a "'covered cause of loss'" under the Civil Authority Clause.

"Covered Cause of Loss" means a cause of loss or damage insured against by the "covered cause of loss" clause of the Coverage Section and not excluded or limited elsewhere in the Coverage Section.

Id., at PR-27, § N.2;

"Covered Causes of Loss"

This Coverage Section insures all risks of direct physical loss or damage, except as excluded or limited elsewhere in this Coverage Section....

Id., at PR-6, § A; and,

"Exclusions"

This Coverage Section does not insure against 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 any sequence to the loss.

...

"Flood"

....

Id. at PR-8, § D.1 (emphasis added).

The insurance policy's terms, read together, show that the conjunction of a covered peril and an excluded peril is not a "covered cause of loss". Although Hurricane Floyd caused the damage to the other property, because flood here also caused the damage, the damage to the other property was not caused by a covered cause of loss. This is so whether hurricane caused the

floods which in "sequence" damaged the property or the floods came "concurrently" with the hurricane to damage the property. Id. at § D.1. Because Boykins's actions prohibiting access to Narricot's premises did not result from a "'covered cause of loss'" the Civil Authority Clause does not provide coverage.

This conclusion -- that a combination of covered and excluded perils is not a "covered cause of loss" -- is fortified by a decision of Judge Padova construing a policy with a similarly worded exclusion. Doylestown Elec. Supply Co. v. Md. Casualty Ins. Co., No. 96-632, 1996 U.S. Dist. LEXIS, 20599, at *13 (E.D. Pa. Dec. 31, 1996), aff'd without opinion, 133 F.3d 909 (3d. Cir. 1997) ("[B]ecause damage to the Premises was caused by both [']surface water['] and 'water that backed up from a sewer or drain,' the Policy precludes coverage."). See also Rorer Group Inc. v. Ins. Co. of N. Amer., 655 A.2d 123, 125 n.1 (Pa. Super. 1995) ("Cracking is covered, so long as it was not caused in whole or in part by an excluded peril.").

Narricot claims that the concurrent loss causation provision (§ D.1) does not modify the Civil Authority Clause because it applies only to "this Coverage Section". The Civil Authority Clause is found in a different coverage section. This argument is unavailing because the endorsement containing the Civil Authority Clause is, on its face, "subject to all terms,

conditions, provisions, and stipulations" of the Coverage Section.⁹ Id. at PR-29.

Since the insurance policy makes unambiguous that a combination of hurricane and flood is not a covered cause of loss, triggering protection under the Civil Authority Clause, we must give it effect. We will therefore grant summary judgment to Fireman's Fund as to this claim.

IV. Conclusion

At Tarboro, we will grant summary judgment to Narricot on liability, but not on damages. Tarboro's action prohibiting access to Narricot's facility by closing Anaconda Road and suspending industry is a covered event. However, since a genuine issue of material fact exists as to the business losses resulting therefrom, we will deny summary judgment to both parties on damages.

At Boykins, we will grant summary judgment to Fireman's Fund.

⁹ Narricot makes another argument that because it had flood insurance with a different insurer that somehow hurricane and flood are a "covered cause of loss". This argument is unavailing because "covered cause of loss" is a contractual term between these parties, and their agreement does not reasonably allow Narricot's reading. "Covered cause of loss" does not include any force consisting in whole or part of a listed exclusion. Regardless of whether covered by a different insurer, flood is a listed exclusion in this policy.

Stewart Dalzell, J.