UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

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Case Number 14-2733

Michael S. Torre and Geraldine A. Torre,

Appellants – Plaintiffs-Petitioners,

Civil Action No. 3:13-cv-0665-AET-DEA

v.

PETITION FOR HEARING AND REHEARING EN BANC

Liberty Mutual Fire Insurance Company and Federal Emergency Management Agency (FEMA)

Appellee - Defendants

Pro Se Appellants-Plaintiffs-Petitioners under FRAP 35 hereby petition the Court for Hearing and Rehearing En Banc of their Appeal which resulted in the Court's Judgment entered March 26, 2015.

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This lawsuit results from the effect Super Storm Sandy had on the Petitioner's property and their claim for coverage under their flood insurance policy. In particular, the provision at issue is the removal of debris from their property as specified in Coverage C – Other Coverage of the policy. The term at issue is the meaning of "insured property" as used in Coverage C and which the policy does not define. As the Court noted, it is the first Court of Appeals to define this term. As the Court is aware, there are literally thousands of claims and lawsuits arising out of Super Storm Sandy in both New Jersey and New York and the issue will arise again in both the Third and Second Circuit Courts of Appeal. In addition, since the flood insurance policy at issue is national the decision will affect every jurisdiction in the United States.

In addition, in Dickson v. Am. Bankers Ins. Co. of Fla., No. 1:12-cv-022, 2013 U.S. Dist. LEXIS 183163 (D.N.D. Mar. 18, 2013), rev'd on other grounds, 739 F.3d 397 (8th Cir. 2014), the Court found that Coverage C does cover the removal of non-owned debris from the land. Implicit in the *Dickson* Court of Appeals decision is its agreement with the District Court that Coverage C does indeed cover

removal of debris from the land; i.e. that the term "insured property" includes the land. Thus, there are other decisions that conflict with this Court's decision.

Petitioners are aware of the admonition in FRAP 35 that "An en banc or rehearing is not favored". They have carefully considered the Court's Opinion, their argument, and the cited cases. They have not lightly undertaken this Petition. They feel their position has merit and that the Judgment entered should be vacated and judgment entered in their favor. They believe that the results have dramatic effect because of the number of pending claims and lawsuits arising from Super Storm Sandy.

In summary, the Court held that the term "insured property" in the policy means just the "building" because the Property Not Covered provision of the policy states that the policy does not cover land. The court interpreted the last provision to mean that the policy excludes all damage to the land and thus the policy only covers damage to the building and its contents. Also, implicit in the Court's finding is that debris removal is "direct physical loss" to the land. As will be explained below the policy does cover "direct physical loss" to the land and debris removal is not "direct physical loss".

At page 5 of its Opinion this Court stated that because the SFIP does not define "insured property" it must use standard law principles and interpret the policy in accordance with its plain, unambiguous meaning. That is, its ordinary meaning. This is exactly what the Court did in *Dicksons*, (supra). The plain and ordinary meaning of property can be found in the 2015 edition of Merriam-Webster Dictionary which defines property as "a piece of land often with buildings on it that is owned by a person, business, etc.". Black's Law Dictionary defines "property" as "The right to possess, use, and enjoy a determinate thing (either a tract of land or a chattel)". This Court's decision flies in the face of the plain, common and unambiguous use of the term property.

In coming to its conclusion, this Court looked at the terms of the policy and in particular the Property Not Covered provision which states that the policy does not cover land. The Court concluded that this means that the policy only covers the building and thus the debris must be in or on the building. In essence, the Court said the policy only covers the building and its contents and nothing else. But the policy does cover direct physical loss to the land. For example, the Exclusions Section of the policy provides in part, "We do, however, pay for losses from **mudflow** and land subsidence as a result of erosion that are specifically covered under our definition of **flood** (see **II.A.1.c. and II.A.2)" (Exhibit D to**

Appellants-Plaintiffs' Brief) Clearly, contrary to the Court's Opinion, the policy does cover "direct physical loss" to the land.

Consider also section III. Property Covered of the policy and the difference in the language used for Coverage A – Building Property, Coverage B – Personal Property and Coverage C- Other Coverages. Coverage A states "We insure against **direct physical loss by or from flood** to: ..." Likewise Coverage B states, "...we insure against **direct physical loss by or from flood** to personal property inside a **building** ...."Coverage C does not include the limiter "direct physical loss by or from flood" that is included in Coverages A and B. Rather, it simply says, "we will pay the expense to remove non-owned debris on or in insured property..." The plain, unambiguous meaning of "debris" as defined in Merriam-Webster Dictionary is "rubbish, trash, remains of something broken or discarded". Since the direct physical loss language in Coverages A and B is not found in Coverage C the debris need not have caused damage to the "insured property". Rather, the debris needs only to be in or on the "insured property". This interpretation is totally consistent with section IV. Property Not Covered of the policy that excludes physical damage caused to the land, except as provided otherwise, such as in the Exclusions Section of the policy.

The Petitioners are not claiming damage to the land. They are only claiming the cost of removal of debris from their property. There is no claim for repairs to the land. It must also be noted that FEMA acknowledged its obligation for removal of this debris. Immediately after Sandy it advised all residents of Mantoloking that that because of insurance and liability concerns it would not enter private property to remove the debris. Rather, it advised them to place the debris on the curb next to the street abutting their property and FEMA would then continue to dispose of the debris. (Michael Torre Certification in Opposition to Cross Motion, paragraph 6) This is exactly what Petitioners did; i.e. they moved the debris from the limits of their property to the street curb in front of the house. But for its liability concerns, FEMA would have removed the debris from the Petitioners' property to the street curb.

The above is best summarized in the following from the District Court's decision in *Dickson* (supra):

> It is apparent from the record that American Bankers interprets the "debris removal" coverage provision of the policy to only apply to debris which is located on or in the insured *building*. However, the policy language expressly provides coverage for the removal of "non-owned debris that is on or in inured property." 44 C.F.R. pt. 61, app. A(1), III(C)(1)(a) (emphasis added). The term "insured property" is nowhere defined in the policy. The term obviously does not equate with "insured building." ... The declaration page of the policy shows

> the "insured property" to be 9922 Island Road. See Docket No. 28-3. The insurance policy expressly states there is coverage for "the expense to remove non-owned debris on or in insured property." There is no factual or legal dispute that the Dicksons' claim is for the removal of non-owned debris from the "insured property" located at 9922 Island Road.
>
> The flood insurance policy language at issue is clear on its face that it provides coverage for costs incurred to remove debris and, specifically, non-owned debris that is on or in the insured property. The removal of "non-owned debris" from the Dicksons' property – located at 9922 Island Road – is a cost item which is clearly covered under the terms and conditions of the flood insurance policy. Common sense leads to no other reasonable conclusion. Suffice it to say that it requires a great deal of stretching of the English language to find any other meaning in a policy that is ambiguous and poorly drafted... 2013 U.S. Dist. LEXIS 183163 at 18-22.

(The Petitioners' Declaration Page, like the Dicksons, identifies the "insured property address as 1234 Ocean Avenue, Mantoloking, N.J. 08738") . The 8th Circuit Court of Appeals reversed on other grounds. (supra). However, that Court did not disagree with the District Court's interpretation of the policy. Rather, it held that the denial of a claim under such a clear policy provision does not equate to "affirmative misconduct" that excuses the need to file a proof of loss. In the this case there is no question that the Petitioners filed a proper proof of loss claim for the cost of the debris removal and that is not an issue.

The Court cited to 44 C.F.R. 62.23 for the proposition that the Adjuster's Claims Manual is incorporated by reference into the SFIP. But 44 C.F.R.62.23 (i) states:

> (i) To facilitate the adjustment of flood insurance claims by WYO Companies, the following procedures will be used by WYO Companies.
> (1) Under the terms of the Agreement set forth at appendix A of this part, WYO Companies will adjust claims in accordance with general Company standards, *guided by NFIP Claims manuals..* (emphasis added)

Clearly, the manual is just a guide and it cannot and does not change the terms of the policy. To the extent that the claims manual conflicts with the policy, the policy will govern. The Court said that statute incorporates the manual into the policy. It does not. Rather, the statute tells the WYO that they are to adjust claims in accordance with their own standards, but that they should be guided by the NFIP claims manuals. But, neither the WYO standards nor the claims manuals can change the terms of the policy.

For the above reasons it is respectfully requested that the Court grant this Petition, vacate the March 26, 2015 Judgment, and enter a judgment in favor of Petitioners against Liberty Mutual Fire Insurance Company.

Michael S. Torre

Geraldine A. Torre

CERTIFICATE OF SERVICE

I hereby certify that on this date a copy of the foregoing Petition for Hearing and Rehearing En Banc was served upon the following persons by United States mail:

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April 7, 2015

Michael S. Torre