
**United States Court of Appeals
For the First Circuit**

No. 23-1167

ZURICH AMERICAN INSURANCE COMPANY,
Plaintiff – Appellee,

v.

MEDICAL PROPERTIES TRUST, INC.,
Defendant – Appellant,

No. 23-1180

STEWARD HEALTH CARE SYSTEM, LLC,
Plaintiff – Appellant

v.

AMERICAN GUARANTEE AND LIABILITY INSURANCE COMPANY; ZURICH
AMERICAN INSURANCE COMPANY,
Defendants – Appellees

ON APPEAL FROM AN ORDER OF THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS (PATTI B. SARIS, J.)

***AMICUS CURIAE* BRIEF OF UNITED POLICYHOLDERS IN SUPPORT OF
DEFENDANT-APPELLANT MEDICAL PROPERTIES TRUST, INC., AND REVERSAL**

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CORPORATE DISCLOSURE STATEMENT

In accordance with Fed. R. App. P. 26.1, Amicus Curiae United Policyholders states that it is a nonprofit, 501(c)(3) corporation founded in 1991. United Policyholders is not publicly held and does not have any public company affiliates.

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INTEREST OF *AMICUS CURIAE*

United Policyholders submits the attached brief to address the question of whether rainwater that landed and accumulated on an enclosed rooftop one or more stories above ground constitutes “surface waters” for the purposes of an insurance policy’s “Flood” sublimit.¹

United Policyholders is uniquely qualified to address this question because it speaks on behalf of policyholders, has 32 years of experience reviewing and reporting on policies, claims and sales transactions, regulations, and laws, and focuses on upholding the indemnification principle that underlies the purchase of insurance. Since 1991, United Policyholders has served as an information resource and voice for individual and commercial insurance consumers throughout the United States. Its work is supported by grants, donations, and volunteers. It focuses on three programmatic areas: Roadmap to Recovery (disaster recovery and claim help), Roadmap to Preparedness (insurance and financial literacy; disaster preparedness), and Advocacy and Action (advancing pro-consumer laws and public policy). United Policyholders provides a consumer-oriented voice based on its institutional experience and perspective, which helps to fill a gap that otherwise

¹ Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), United Policyholders confirms that: (1) no party’s counsel authored any part of this brief; (2) no party or party’s counsel contributed any money to fund preparation of submission of this brief; and (3) no person, other than United Policyholders and its counsel, contributed any money to prepare or submit this brief.

would exist between the well-organized insurance industry on the one hand and insurance consumers on the other.

Public officials, state insurance regulators, academics, and journalists routinely seek United Policyholders’ input on insurance and legal matters. United Policyholders coordinates on a regular basis with state regulators on matters related to policy sales, claims, and consumer rights. Its Executive Director has been appointed for twelve consecutive terms to represent consumers in the proceedings of the National Association of Insurance Commissioners (“NAIC”). United Policyholders serves on the Federal Advisory Committee on Insurance, which briefs the Federal Insurance Office and in turn, the U.S. Treasury Department.

United Policyholders advances sound public policy on insurance matters by submitting *amicus curiae* briefs in numerous federal and state courts. It has submitted *amicus curiae* briefs in matters before this Court as well as the Massachusetts Supreme Judicial Court.² The U.S. Supreme Court and state

² See, e.g., *Legal Sea Foods, LLC v. Strathmore Ins. Co.*, 36 F.4th 29 (1st Cir. 2022); *Doe v. Harvard Pilgrim Health Care, Inc.*, 974 F.3d 69 (1st Cir. 2020); *Boston Gas Co. v. Century Indem. Co.*, 588 F.3d 20 (1st Cir. 2009); *Denmark v. Liberty Life Assur. Co. of Boston*, 566 F.3d 1 (1st Cir. 2009); see also *Foreign Car Ctr., Inc. v. Salem Suede, Inc.*, Civ.A. No. 97-12587-REK, *sub nom. In re Salem Suede, Inc.*, 221 B.R. 586 (D. Mass. 1998), *Verveine Corp. v. Strathmore Ins. Co.*, 489 Mass. 534 (2022); *Masonic Temple Ass’n of Quincy, Inc. v. Patel*, 489 Mass. 549 (2021); *Mount Vernon Fire Ins. Co. v. Visionaid, Inc.*, 477 Mass. 343 (2017); *Auto Flat Car Crushers, Inc. v. Hanover Ins. Co.*, 469 Mass. 813 (2014); *Allmerica Fin. Corp. v. Certain Underwriters at Lloyd’s, London*, 449 Mass. 621 (2007);

—footnote cont’d—

appellate courts have favorably cited United Policyholders' *amicus curiae* briefs.³

These briefs are invaluable because insurers are repeat players in insurance coverage litigation, but policyholders are not.

For all these reasons, United Policyholders respectfully asks this Court to consider this *amicus curiae* brief.

John Hancock Mut. Life Ins. Co. v. Banerji, 447 Mass. 875 (2006); *W. All. Ins. Co. v. Gill*, 426 Mass. 115 (1997); *Clark Equip. Co. v. Mass. Insurers Insolvency Fund*, 423 Mass. 165 (1996).

³ See, e.g., *Humana Inc. v. Forsyth*, 525 U.S. 299, 314 (1999); *Sproull v. State Farm Fire & Cas. Co.*, 2021 IL 126446 ¶ 53 (2021); *Cont'l Ins. Co. v. Honeywell Int'l, Inc.*, 234 N.J. 23, 64 (2018); *Allstate Prop. & Cas. Ins. Co. v. Wolfe*, 629 Pa. 444, 452–53 (2014); *Julian v. Hartford Underwriters Ins. Co.*, 45 Cal. 4th 747, 760 (2005).

PRELIMINARY STATEMENT

The Massachusetts Supreme Judicial Court has defined “surface waters” as waters “that lie or flow on the surface of the earth and naturally spread over the ground but do not form part of a natural watercourse or lake.” *Boazova v. Safety Ins. Co.*, 462 Mass. 346, 354, 968 N.E.2d 385 (2012), *quoting DeSanctis v. Lynn Water & Sewer Comm’n*, 423 Mass. 112, 115 n.6, 666 N.E.2d 1292 (1996). Zurich American Insurance Company (“Zurich”) would have this Court believe that that definition encompasses rainwater that collects on an enclosed roof one or more stories above the ground. As Defendant-Appellant Medical Properties Trust’s (“MPT”) brief explains in detail, Zurich’s position is contrary to Massachusetts law, which applies here.⁴

Zurich’s position is also incorrect for other reasons. It is belied by the way the insurance industry rates flood risk, it is belied by the terms of Zurich’s policy, and it undermines policyholders’ reasonable expectation that rainwater seeping through a roof is not “surface waters.”

For the last 60 years, the flood-insurance market has been dominated by the United States government via the National Flood Insurance Program (“NFIP”). While the market for private flood insurance, especially for commercial properties,

⁴ United Policyholders foregoes discussion of the relevant First Circuit and Massachusetts case law in light of MPT’s thorough treatment of the subject.

has grown steadily over the last several years, the NFIP and the flood-risk ratings it develops still impact and influence the way private insurers rate flood risk. In fact, the policy at issue in this case—an “all risks” property-insurance policy issued to MPT—establishes flood sublimits in accordance with NFIP ratings.

This matters because the way flood risk is rated informs flood coverage, and flood-risk ratings have nothing to do with rainwater collecting on a roof. In fact, to the extent flood risk is building specific, it is the *building’s* elevation off of the ground and the *basement* that inform the potential risk. The *roof* does not. Zurich’s attempt to paint “surface waters” as waters on any surface, including a roof one or more stories above the ground, is a transparent effort to limit the coverage it agreed to provide. Such a result would harm policyholders like MPT that bargained for and bought flood coverage based on the understanding that a flood constitutes water flowing onto the property at ground level, rather than rainwater seeping in from the roof above.

Viewed in light of history, policy language, and policyholders’ reasonable expectations, Zurich’s interpretation does not hold water. The decision below should be reversed.

ARGUMENT

I. Zurich’s Interpretation of “Surface Waters” Is Inconsistent with the Historical Development of Flood Insurance and How Insurers Rate Flood Risk.

The federal government has been the primary provider of flood insurance for 60 years, and has been so because of private insurers’ exodus from the market.

While private flood insurance was common between 1895 and 1927, the private market all but dried up in response to extensive flooding around the Mississippi River in 1927.⁵ Private insurers determined that flood peril was uninsurable because of the catastrophic nature of flooding, the difficulty of determining accurate rates, the risk of adverse selection, and the concern that they could not profitably provide risk-based flood coverage at an affordable price.⁶

In the years following the 1927 floods, political leaders like President Eisenhower called for a national system of flood insurance.⁷ In 1956, the Federal Flood Insurance Act was passed, but the program was defunded in 1957.⁸ Then, in

⁵ Scott Gabriel Knowles & Howard C. Kunreuther, “Trouble Waters: The National Flood Insurance Program in Historical Perspective,” 26 *J. Pol’y Hist.* 327, 332 (2014) (“Troubled Waters”).

⁶ Congressional Research Service, “Private Flood Insurance and the National Flood Insurance Program” (updated Jan. 9, 2023) at 10.

⁷ “Troubled Waters” at 327.

⁸ *Id.* at 332.

1965, Hurricane Betsy inundated New Orleans, becoming the country's first billion-dollar hurricane.⁹

Enter the National Flood Insurance Act of 1968. In recognition of the lack of coverage offered by the private market and in the face of Hurricane Betsy and other natural disasters, the U.S. Congress established the NFIP.¹⁰ The NFIP aims to provide access to primary flood insurance while also mitigating the nation's comprehensive flood risk through the development and implementation of floodplain-management standards.¹¹ And an essential component of the NFIP's mission is developing flood maps.

The Federal Emergency Management Agency ("FEMA"), NFIP's administrator, is responsible for developing nationwide flood maps that identify areas with special flood, mudslide, and flood-related erosion hazards.¹² In coordination with participating communities, FEMA develops Flood Insurance Rate Maps ("FIRMs") that depict an area's flood risk and flood plain. As the name

⁹ National Association of Insurance Commissioners & The Center for Insurance Policy Research, CIPR Study: Flood Risk and Insurance (April 2017) at 23.

¹⁰ "Troubled Waters" at 327.

¹¹ Congressional Research Service, "Introduction to the National Flood Insurance Program (NFIP)" (updated Jan. 6, 2023) at 2.

¹² *Id.* at 3.

suggests, the FIRM, in part, establishes the premium to be charged for flood insurance in a particular area.

The FIRM delineates the Special Flood Hazard Area (“SFHA”)—that is, an “area that will be inundated by the flood event having a 1-percent chance of being equaled or exceeded in any given year.”¹³ Within the SFHA, areas are divided into zones based on the type of flood risk, e.g., tidal flooding, mudslides, and undetermined risks.¹⁴ Critically, FIRM data is used by the private insurance industry to assess risk and establish premiums.¹⁵

Flood risk is determined primarily by a property’s location and how it is built, though variable inputs have changed over time.¹⁶ The property’s physical location is used to determine (1) its proximity relative to flood sources including the coast, ocean, rivers, and Great Lakes, (2) ground elevation, i.e., where the building is located relative to the elevation of the surrounding area and nearby

¹³ FEMA, “Flood Zones,” *available at* <https://www.fema.gov/glossary/flood-zones>.

¹⁴ Congressional Research Service, “Introduction to the National Flood Insurance Program (NFIP)” at 3-4 (updated Jan. 6, 2023).

¹⁵ Rebecca Williams *et al.*, “Flood Insurance Redesigned: Regulatory Considerations for a Viable and Sustainable Private Market,” *Journal of Insurance Regulation*, *available at* <https://content.naic.org/sites/default/files/cipr-jir-2023-1.pdf>.

¹⁶ FEMA, Rate Explanation Guide, *available at* <https://agents.floodsmart.gov/sites/default/files/fema-risk-rating-rate-explanation-guide.pdf>.

flood sources, and (3) other factors such as whether the property is located on a barrier island or situated near a dam or levee. Additionally, building characteristics are also important to determining flood risk. Among the building properties that FEMA considers are: (1) the type and use of the building, (2) the foundation type, (3) first-floor height, (4) number of floors, (5) unit location, (6) construction type, (7) flood openings, and (8) whether machinery and equipment are located on the ground floor.

Noticeably absent from this list is the property's roof type. And that makes good sense. The three most common types of floods, according to Zurich's own website, are fluvial (river floods), coastal floods, and pluvial floods (flash floods and surface-water floods).¹⁷ "Surface water floods occur when an urban drainage system is overwhelmed and water *flows out into streets and nearby structures.*"¹⁸ Areas most at risk for surface water flooding are where there is "run-off from surrounding areas into a central low-lying land."¹⁹

¹⁷ Zurich Insurance Group, "Three Common Types of Floods Explained" (Apr. 20, 2023), *available at* <https://www.zurich.com/en/knowledge/topics/flood-and-water-damage/three-common-types-of-flood>.

¹⁸ *Id.* (emphasis added).

¹⁹ Zurich Insurance Group, "The Threat From Above: Pluvial Flooding" (July 22, 2020), *available at* <https://www.zurich.com/en/knowledge/topics/flood-and-water-damage/the-threat-from-above>.

Based on Zurich’s own description of surface-water flooding, it would be quite difficult for water to “run-off” onto a roof elevated one or more stories above the ground. It is also impossible for water in an enclosed space such as a parapet roof like the one at Norwood Hospital to “flow” anywhere. The historical development of flood insurance and accompanying flood-risk rating counsel against Zurich’s attempt to define “surface waters” as water on any surface.

II. The Policy Language Demonstrates That Rain on a Roof Is Not “Surface Water.”

When Zurich’s policy is viewed as a whole—which it must be—it is evident that the term “surface waters” does not refer to rain that has collected on a roof. *See Massachusetts Property Ins. Underwriting Ass’n v. Wynn*, 60 Mass. App. Ct. 824, 828 (2004) (“The objective is to construe the [policy] as a whole, in a reasonable and practical way, consistent with its language, background and purpose.”). The policy sets forth various sublimits for Flood coverage that correspond to FEMA ratings. In addition, Zurich specifically excluded rain damage in another portion of the policy. Viewing all of this together indicates that the Flood sublimit was not intended to apply to rain that collects on a roof.

The policy’s Flood coverage sublimits correspond to FEMA ratings. In addition to the annual aggregate \$100 million Flood sublimit, the policy contains additional restrictions on coverage based on FEMA hazard ratings. For example, the policy contains a \$20 million sublimit for locations “with any part of the legal

description within a Special Flood Hazard Area (SFHA).” A-584. Certain locations within the SFHA have an even lower limit of \$10 million. *Id.* In contrast, locations in a Moderate Flood Hazard Area (“MFHA”) have a \$100 million limit, with specific locations subject to limits of \$20 million and \$10 million. *Id.*

This makes sense, of course. Because properties within a SFHA are the most at risk for flooding, Zurich would naturally limit its coverage obligations with respect to those properties. It is also natural for Zurich to consider federal flood-risk ratings in making its own risk assessments. Those flood-risk-rating factors make *no mention* of roof type. The higher the building is off the ground, the less likely the flood risk, and areas of the building on higher floors have lower flood risk than units on lower floors.²⁰ A building’s roof is least susceptible to flooding.

III. Zurich’s Interpretation Undermines Policyholders’ Reasonable Expectations.

It is a fundamental tenet of Massachusetts law that, when a term in an insurance policy is “‘susceptible of more than one meaning and reasonably intelligent persons would differ as to which meaning is the proper one,’ the term is ambiguous.” *U.S. Liab. Ins. Co. v. Benchmark Constr. Servs., Inc.*, 797 F.3d 116, 119 (1st Cir. 2015). Ambiguous terms must be construed against the insurer and in

²⁰ FEMA, Risk Explanation Guide, *available at* https://www.fema.gov/sites/default/files/documents/fema_rate-explanation-guide.pdf.

favor of the insured, especially in exclusionary provisions. *Id.* at 120. Because the Flood sublimit seeks to limit coverage, it must be interpreted in the same way as an exclusion. *Nelson v. Cambridge Mut. Fire Ins. Co.*, 30 Mass. App. Ct. 671, 672-73, (1991) (interpreting sublimit as an “exclusionary clause”).

Viewed in this light, “surface waters” does not encompass water enclosed on a building’s roof. The Zurich policy defines Flood as:

A general and temporary condition of partial or complete inundation of normally dry land areas or structure(s) caused by: The unusual and rapid accumulation or runoff of surface waters, waves, tides, tidal waves, tsunami, the release of water, the rising, overflowing or breaking of boundaries of nature or man-made bodies of water; or the spray there from all whether driven by wind or not[.]

A-634. A reasonable policyholder reading this definition would not conclude that surface waters encompass water on a building’s roof. *See Dorchester Mut. Ins. Co. v. Krusell*, 485 Mass. 431, 740 (2020) (“Words are, at least in part, defined by the company they keep . . .”).

And, limiting coverage in this way would undermine the coverage MPT and other policyholders like it bought and paid for. Such a result is unacceptable, especially in light of the increasing proliferation of private flood insurance.²¹ If

²¹ The National Association of Insurance Commissioners reports that in 2018, premiums for private flood coverage totaled \$644 million, up from \$589 million in 2017, and \$376 million in 2016. Congressional Research Service, Private Flood Insurance and the National Flood Insurance Program at 10 (updated Jan. 9, 2023).

Zurich wanted to exclude coverage for waters on any surface, it was required to do so in clear and unambiguous terms. *PTC, Inc. v. Charter Oak Fire Ins. Co.*, 123 F. Supp. 3d 206, 211-12 (D. Mass. 2015). It did not, and so it must be held to its bargain.

CONCLUSION

The insurer's position in this case is an egregious example of the "creative" denials on water damage claims that United Policyholders is currently seeing across the country. A clear statement from this Court that insurers cannot avoid honoring their contractual and legal obligations by using strained constructions of their own policy language to classify falling rain on roofs (long covered, not considered flood) as an excluded loss will benefit policyholders, lenders and preserve real estate values. The decision of the district court should be reversed. If the Court does not so rule, United Policyholders requests in the alternative that the Court certify the questions presented to the Supreme Judicial Court of Massachusetts pursuant to SJC Rule 1:03.

Dated: June 2, 2023

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CERTIFICATE OF COMPLIANCE UNDER FED. R. APP. P. 32(a)(7)

I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because: (1) this brief contains 2,793 words excluding the parts of the brief exempted by Fed. R. App. 32(f); and (2) this brief complies with the typeface requirements of Fed. R. App. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in 14-point, proportionally spaced Times New Roman font.

CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of June, 2023, this document was filed through the Electronic Case Filing system, and that copies will be sent electronically to the registered participants identified on the Notice of Electronic Filing.

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