A TALE OF THREE DEDUCTIBLES AND SIX WORDS: FLORIDA FEDERAL COURT UPHOLDS INSURERS' INTERPRETATION OF HURRICANE DEDUCTIBLES IN ABSENCE OF GENUINE POLICY AMBIGUITY[1]

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Within a 30-day period, the U.S. District Court for the Southern District of Florida addressed the application of hurricane deductibles in three different coverage matters. Although the policies at issue insured different types of risks and the policy language varied in each case, the court reemphasized the basic principles of interpretation of insurance contracts under Florida law: (1) ambiguous policy language is that which is susceptible to more than one reasonable interpretation and will be construed against the insurer; (2) in determining whether policy language is ambiguous, the inquiry is whether there is a genuine inconsistency in the policy, reading it as a whole; and (3) the mere absence of a definition for a word or phrase in a policy does *not* render it ambiguous.

On February 1, 2007, the Southern District rejected an insureds' interpretation of "total insurable values" for purposes of calculating its 5% hurricane deductible under a condominium association policy. *Beverly Hills Condominium 1-12, Inc., et al v. Aspen Specialty Insurance Company*, 2007 WL 1183939 (2007). Beverly Hills Condo owns a retirement condominium complex in Hollywood, Florida, which sustained windstorm damage from Hurricane Wilma on October 24, 2005. At the time, Aspen insured the property under an "all risk" policy which specifically covered hurricane force wind losses. The policy contained a $5 million per occurrence/location limitation but covered an unlimited number of occurrences during the coverage period. The total limits of coverage for all 24 buildings on the property was $30,967,930.

The windstorm deductible stated in the policy's "Summary of Insurance and Special Provisions" was "5% of TIV Location". The policy's Special Conditions section stated: "The application of a 'per location' deductible, if shown above, is intended to apply to the TIV (total insurable values) of the entire premises, inclusive of all buildings, and is not applicable to a series of individual buildings regardless of the labeling in the statement of values on file with the Company." *Beverly Hills*, 2007 WL 1183939 at 2.

Following Hurricane Wilma, the insured submitted a claim for windstorm damage which Aspen's independent adjuster estimated to $1,028,956.00 on a replacement cost basis. Aspen subsequently acknowledged to the insured it had suffered a covered loss but that no payment would be made as the damages did not exceed the windstorm deductible of $1,548,396.50 or 5% of the total insurable value of all insured structures. Beverly Hills contended the deductible should be calculated on the $5 million per occurrence limitation, which would lower the deductible to $250,000.00.

In addressing the parties' cross-motions for partial summary judgment, the court applied the principles of Florida contract interpretation discussed above, as well as section 627.701(8), Florida Statutes in effect at the time of Hurricane Wilma which provided that an insurer could

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offer a deductible in an amount not to exceed 5% of the insured value of a condominium or cooperative association. *Beverly Hills*, *Id.* at 4, fn.2.

The court then rejected the insured's argument and granted partial summary judgment for Aspen, finding that the specific provision at issue clearly stated the TIV was based on the value of the *entire premises*, and not limited to the per occurrence limit as urged by Beverly Hills. The court stated: "If the policy deductible for windstorm or hail was meant to be a percentage of the occurrence limit, the policy certainly would have used those words rather than the terms 'total insurable values.'" *Id.* at 4. The court also pointed out that the similarity between the policy language and applicable statutory provision made it unnecessary for Aspen to specifically define the term "total insurable values" in the policy for the court to discern the plain meaning of the term.

A week after the *Beverly Hills* decision, the Southern District again foreclosed an insured's attempt to minimize the effect of a policy's deductible provision by claiming an ambiguity existed. In *Fabricant v. Kemper Independence Insurance Company*, 474 F.Supp.2d 1328 (2007), the insureds brought a breach of contract class action on behalf of all similarly situated insureds against the insurer of their Delray Beach condominium based on the application of the subject policy's windstorm deductible. Kemper provided homeowner's insurance coverage for the insureds' condominium against loss of damage to the dwelling and personal property from windstorm, as well as coverage up to $50,000 of the insureds' share of any special assessments imposed by their condominium association imposed due to a covered loss, the latter by special endorsement. The policy had a $500 non-hurricane deductible and a special hurricane deductible of $2,800.

After Hurricane Wilma damaged the common areas of the insureds' complex, the Board of Directors assessed the Fabricants $2,225.45 for their share of the repair costs. The insureds' paid the assessment, then submitted it to Kemper which denied the assessment claim because it did not exceed the $2,800 deductible. In the ensuing lawsuit, the Fabricants contended only the general $500 deductible should have been applied as the hurricane deductible was limited to property damage coverage and not the additional coverages, including their special assessment coverage.

In granting Kemper's Motion to Dismiss, the Southern District sharply disagreed with the policyholder's position noting that the policy's hurricane deductible definition clearly provided it applied to *all* covered losses caused by a hurricane and would be calculated by applying the hurricane percentage deductible to the Coverage A liability limit. *Id.* at 1332. Furthermore, reading the policy as a whole, including the declarations and endorsements, the additional coverages section was unquestionably a subsection of the property coverage part. *Id.* at 1332. Most importantly, the subject provision unambiguously stated: "No other deductible in the policy applies to loss or damage caused by windstorm during a hurricane". *Id.* at 1332.

Then on March 1, 2007, the Southern District *did* find an ambiguity in a windstorm deductible provision when it addressed competing motions for summary judgment in *Terra-ADI International Dadeland, LLC, et al v. Zurich American Insurance Company*, 2007 WL 675971 (2007). Zurich issued a builder's risk policy affording economic and property damage coverage for the Metropolis I and II real estate projects in Miami-Dade County, from windstorm and other perils. As in *Beverly Hills* and *Fabricant*, during the claims process for

both Hurricanes Katrina and Wilma, a dispute arose between the insurer and the insured revolving around the application and calculation of the policy's 5% windstorm deductible. The windstorm deductible clause in contention stated: "From the amount of each claim for insured loss or damage arising out of one occurrence, there shall be deducted the applicable amount shown below ... D. 5% of the total insured values at risk at the time and place of loss subject to a minimum deduction of $250,000, as respects the peril of WINDSTORM." Nearly identical clauses for 5% flood and 3% earthquake deductibles were also contained in the above section.

While the insurer argued "total insured values at risk" meant the insured value of the *entire* construction project ($31.5 million for Metropolis I and $47,899,756 for Metropolis II), the plaintiffs claimed "total insured values at risk" could reasonably be interpreted to mean the $10 million sublimit on windstorm damage. The plaintiffs reasoned the sublimit represented the maximum insured value for the peril of *windstorm*, as opposed to the sublimits for flood, and earthquake and other perils. Under plaintiff's argument, the deductible should be $500,000 per project instead of the $1,575,000 and $2,394,287.80 deductibles advocated by Zurich.

The court sided with the plaintiff, holding that while Zurich's argument was, as plaintiff's, reasonable, it would be contrary to the purpose and calculation of insurance deductibles held by Florida courts to apply a deductible to a loss (in this case, anything over the $10 million windstorm sublimit) not covered by the policy. *See General Star Indemnity Co. V. West Florida Village Inn, Inc.*, 874 So. 2d 26, 32 (Fla. 2d DCA 2004). The court went on to distinguish the case from *Beverly Hills*, relied upon by Zurich, because the *Terra-Adi* policy contained the term "as respects the peril of windstorm" which effectively modified the term "total insured values". These six words, in the court's opinion, created a sufficient enough ambiguity to compel the court to grant partial summary judgment for the insured on that issue.

Notwithstanding the above, the *Terra-Adi* court granted partial summary judgment for Zurich on the issue of its application of the windstorm deductible *and* a 60-day deductible period to plaintiff's claim for economic losses under its "Delay in Completion Endorsement." While the insured argued the policy's prohibition against application of multiple deductibles under the property coverage part controlled, the court agreed with Zurich that the "multiple deductible prohibition" only applied to "physical loss" and not "economic loss" claims.

The above three decisions illustrate that seemingly minor or insignificant differences in policy language may trigger a viable ambiguity argument resulting in a significant increase in a carrier's exposure following a covered windstorm loss.