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THE IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

IN RE: YEAGER AIRPORT LITIGATION **Civil Action No. 16-C-7000**

THIS DOCUMENT APPLIES TO:

THEODORE CARTER and
REBECCA CARTER, husband
and wife,

Plaintiffs,

v. Civil Action No.: 15-C-1074 KAN

CENTRAL REGIONAL WEST
VIRGINIA AIRPORT AUTHORITY,
COROTOMAN, INC., a West Virginia Corporation,
JOHN WELLFORD, individually and as Agent for
COROTOMAN, INC., and NATIONWIDE MUTUAL
FIRE INSURANCE COMPANY,
an Ohio corporation,

Defendants.

**ORDER DENYING DISMISSAL UNDER RULE 12(B)(6)
SUMMARY JUDGMENT AND OTHER RULINGS**

On the 14th day of April, 2017, the Presiding Judges of the Mass Litigation Panel entered a preliminary order announcing rulings on certain pending dispositive motions filed by Defendant Nationwide Mutual Fire Insurance Company. (Transaction ID 60476877) In that order, the Court ordered Plaintiffs Theodore and Rebecca Carter ("the Carters") to file and serve a proposed final order with detailed findings of fact and conclusions of law. The Court also ordered Defendant Nationwide Mutual Fire Insurance Company ("Nationwide") to file and serve any objections to the proposed final order.

The Court has reviewed and maturely considered the proposed order submitted by the Carters (Transaction ID 60598886) and Nationwide's objections, exhibits and proposed revisions to the proposed order (Transaction ID 60653068). The Court has also reviewed and maturely considered the memorandum opinion and order entered by federal district court Judge Thomas E.

Johnston on June 9, 2017, in *Nationwide Mutual Fire Insurance Co. v. Theodore A. Carter, et al.,* Civil Action No. 2:15-cv-05359, ECF Document 55, (U.S.D.C. S.D.W.Va.) Having conferred with one another to insure uniformity of their decision, as contemplated by Rule 26.07(a) of the West Virginia Trial Court Rules, the Presiding Judges make the following findings of fact and conclusions of law:

Facts Presented

1. The Carters own residential property located at 151 Keystone Drive, Charleston, Kanawha County, West Virginia.

2. On March 11, 2015, the Carters and other residents of Keystone Drive were evacuated from their homes at the request of Central West Virginia Regional Airport Authority ("Airport Authority") representatives because of concern that a man-made Engineered Material Arresting System ("EMAS") located on the property of the Yeager Airport in Charleston, West Virginia, might collapse and cause harm to them and/or their property.

3. On or about March 12, 2015, the EMAS collapsed, resulting in fill material from the EMAS covering a portion of Keystone Drive and a stream located in front of the Carters' home. The fill material from the EMAS did not reach the Carter home. However, there is conflicting evidence as to whether EMAS material caused direct damage to other structures on the Carter property.

4. Following the collapse of the EMAS, an attorney representing the Airport Authority negotiated an easement across the Carters' property that would allow the Airport Authority to address rising floodwaters. The handwritten easement states:

> I, Ted Carter & his wife Rebecca Carter do hereby grant & convey to Central West Virginia Regional Airport Authority "Yeager Airport" to dig & escavate [*sic*] a ditch of undetermined width & dimension in the yard of my property to potentially stop flooding resulting from a slip on the Yeager side of the hill that

> has created an emergency situation. Yeager will pay the sum of $5,000.00 for permission to obtain the easement which may be permanent in nature. Yeager will also compensate you for any other damages or injuries to your property resulting from the constructin [*sic*] of the easement.

Contractors hired by the Airport Authority began to dig a channel altering the course of the creek in front of the Carters' property on March 12, 2015, and continued into the following day, although evidence is conflicting as to when the free flow of water through the altered course of the creek permitted a significant reduction of water levels upstream.

5. On or about March 13, 2015, after the Airport Authority's contractors on the scene removed some of the contents from the Carters' home, they demolished the home and any remaining contents using heavy machinery.

6. There is conflicting evidence as to whether the Carters' received notification their home was to be demolished. However, earlier in the day on March 13, 2015, the Carters were allowed to provide a list of certain items of value they wanted removed from their home by Airport personnel in case there was additional flooding.

7. There is also conflicting evidence as to whether the Airport Authority's contractors demolished the Carters' home and any remaining contents on March 13, 2015, because of the Airport Authority's mistaken belief that it actually purchased the Carters' property when the Carters signed the easement.

8. Additionally, there is conflicting evidence as to whether John Wellford, as agent and/or apparent agent for Corotoman, Inc., was also acting as agent for the Airport Authority, and was the person who ordered the demolition of the Carters' home on the afternoon of March 13, 2015, at the direction of the Airport Authority and/or on authority of the Airport Authority, although the Executive Director of the Airport Authority denies that he granted such authority to Wellford.

9. The Carters' home was insured by Nationwide Homeowner's Policy No. 9247HO 610211 ("the Policy") at the time the Carters' home was demolished. The Carters promptly filed a claim for the loss of their home under the Policy.

10. On April 28, 2015, Nationwide filed a complaint for declaratory relief in federal district court seeking a declaration that Nationwide was not required to provide insurance coverage for losses resulting from the destruction of the Carters' home pursuant to the "earth movement" and "government acts" exclusions contained in the Policy. *Nationwide Mutual Fire Insurance Company v. Theodore Carter, et al.*, Civil Action No. 2:15-cv-05359 (S.D. W.Va.), pending before Judge Thomas E. Johnston.

11. The Carters answered Nationwide's federal declaratory judgment action, and asserted counterclaims for: (1) breach of contract; (2) common-law bad faith and breach of fiduciary duty; (3) unfair trade practices; and (4) punitive damages.

12. On June 1, 2015, the Carters filed this civil action against the Airport Authority, Triad Engineering, Inc. ("Triad"), Cast & Baker Corporation ("Cast & Baker"), and Nationwide Mutual Fire Insurance Company ("Nationwide").

13. The Carters' state court action alleged negligence against the Airport Authority, Triad, and Cast & Baker, and requested a declaration of coverage under the insurance policy issued by Nationwide. The Carters' declaratory judgment claims against Nationwide mirrored their counterclaims against Nationwide in the federal declaratory judgment action. The Carters' complaint seeks a declaration that Nationwide is legally obligated to pay the claim of the Carters and the contractual damages due to the Carters under the Policy.

14. The Carters' state court action was removed to federal court on September 14, 2015. *Carter v. Central Regional W.Va. Airport Auth., et al.,* Civil Action No. 2:15-cv-13155 (S.D. W.Va.), pending before Judge John T. Copenhaver, Jr.

15. On October 14, 2015, the Carters filed a motion to remand their case to the Circuit Court of Kanawha County, West Virginia. ECF No. 17. The Airport Authority also filed a motion to remand on the same date. ECF No. 19.

16. On February 26, 2016, Judge Johnston ordered a stay of all discovery, proceedings and schedule dates in the federal declaratory judgment action pending a ruling on the remand motion. ECF No. 54.

17. Judge Copenhaver granted the Carters' and the Airport Authority's motions to remand the Carters' state court action to the Circuit Court of Kanawha County, West Virginia, for lack of subject-matter jurisdiction. ECF 82.

18. On June 9, 2017, Judge Johnston exercised discretion to abstain from deciding the federal declaratory judgment action, granted the Carters' Motion to Dismiss or Stay, dismissed Nationwide's Complaint for Declaratory Relief, and ordered the Clerk to remove *Nationwide Mutual Fire Insurance Company v. Theodore Carter, et al.*, Civil Action No. 2:15-cv-05359 (S.D. W.Va.) from the Court's docket. ECF 55.

19. The Carters settled with Defendants Triad and Cast & Baker, who were dismissed from this case on December 14, 2016. *Agreed Order Dismissing Triad Engineering, Inc. and Cast & Baker Corporation with Prejudice* (Transaction ID 60199227)

20. On December 16, 2016, the Carters' civil action along with several other civil actions arising from the collapse of the EMAS at the end of Runway 5 of the Yeager Airport

were referred to the Mass Litigation Panel ("the Panel") for further proceedings by Administrative Order of the Supreme Court of Appeals of West Virginia.

21. Thereafter, the Carters requested permission to amend their complaint to pursue new theories of liability against the Airport Authority, and to assert claims against two new Defendants, Corotoman, Inc. and John Wellford, consistent with facts developed through discovery. *Supplemental Motion to Amend Complaint to Conform to the Evidence* (Transaction ID 60513775) The Airport Authority and Nationwide stipulated their consent to the amendment, and the Court granted the Carters' motion. *Stipulation of Consent to Amendment* (Transaction ID 60513869) and *Order Granting Supplemental Motion to Amend Complaint to Conform to the Evidence* (Transaction ID 60522082) The Carters now claim the Airport Authority negligently demolished their home on March 13, 2015, based on the mistaken belief that it had purchased the Carters' home at the time the Airport Authority had obtained an easement to dig a trench on the Carters' property.

22. There is conflicting evidence as to whether, within days after the demolition of the Carters' home, the Airport Authority decided to "cover up" their alleged negligence by falsely stating that an "emergency" existed that necessitated demolition of the Carters' home on the afternoon of March 13, 2015. There also is conflicting evidence as to whether Triad's and Cast & Baker's engineers agreed that an emergency existed on March 13, 2015, that necessitated the Airport Authority's decision to demolish the Carters' home. The Carters have also presented evidence that the Airport Authority's public relations person announced to the media for several days after the demolition of their home that the Airport Authority purchased the home from the Carters before it was demolished.

23. There is conflicting evidence as to whether John Wellford, individually and as an agent of Corotoman, Inc., precipitously ordered the demolition of the Carters' home for his own purposes, rather than for government purposes. It appears the Airport Authority drafted a written consulting agreement for Wellford that was never executed. However, the Airport Authority has not disclosed the contents of the draft, asserting attorney client privilege and the work product doctrine.

24. There is also conflicting evidence as to whether the Airport Authority's Emergency Operations Center Log for the EMAS collapse response contained false entries on March 13, 2015, suggesting that a decision to demolish the Carter home was made by Incident Commander Terry Sayre, and County Homeland Security Director David Armstrong, and that about two hours later David Armstrong met with Mr. Carter and informed him that his home was to be demolished that afternoon. The Carters contend there was no such meeting because Terry Sayre's personal log contained no reference to the demolition of the Carters' home.

25. There is conflicting evidence as to whether, prior to the demolition of the Carters' home on the afternoon of March 13, 2015, the creek in front of their home was flowing freely and rapidly and the water level was approximately 10 feet below the top of the altered creek bank.

26. There is conflicting evidence as to whether it was not a governmental "order" or an "emergency" that lead to the demolition of the Carters' home, but, instead, a mistaken belief by Airport Authority Executive Director Rick Atkinson and his Assistant, Terry Sayre, that the Airport Authority had purchased the property when the Airport Authority's attorney allegedly informed them on March 12, 2015, that he had purchased the property. The Carters contend the

Airport Authority Assistant Director then gave that information to the Airport Authority's spokesman who conveyed it to the media in the form of a press release.

27. There is no documented evidence that a "state of emergency" was ever declared by a court or an administrative agency through an "order" or otherwise. Although there is evidence the Airport Authority was operating pursuant to the Airport Emergency Plan for Yeager Airport approved by the Federal Aviation Administration on September 12, 2012, the Court has not seen any evidence that the Airport Emergency Plan was formally adopted by the Airport Authority or its authorizing body.

28. Affidavits were presented by the Carters signed by Triad Engineers David Meadows and Jeffrey T. Huffman, and Michael Baker of Cast & Baker, to the effect that they did not participate in any decision to demolish the Carter home on March 13, 2015, and saw no emergency justifying demolition at that time. However, Mr. Meadows and Mr. Huffman have not been deposed and there is conflicting evidence as to the statements contained in their Affidavits.

Nationwide's Motion to Dismiss Plaintiffs' Amended Complaint or for Stay

Nationwide argues Plaintiffs' Amended Complaint should be dismissed or, in the alternative, Plaintiffs' state court declaratory judgment proceedings should be stayed pending resolution of the earlier-filed declaratory judgment action initiated by Nationwide in the federal district court for the Southern District of West Virginia. *Nationwide Mutual Fire Insurance Company v. Theodore Carter, et al.*, Civil Action No. 2:15-cv-05359 (S.D. W.Va.). The Carters' Amended Complaint, which includes a tort action against the Airport Authority and other Defendants, as well as a declaratory judgment action against Nationwide, has been referred to the Panel for further proceedings. In the interest of judicial economy, the Presiding Judges find it is

appropriate for the Carters' declaratory judgment action against Nationwide to proceed in state court before the Panel, along with the Carters' tort action. Moreover, the federal district court has now abstained from deciding the federal declaratory judgment action and has granted the Carters' motion to dismiss Nationwide's complaint for declaratory relief. Memorandum Opinion and Order entered on June 9, 2017, ECF 55.

The purpose of a motion to dismiss pursuant to Rule 12(b)(6) of the West Virginia Rules of Civil Procedure is to test the formal sufficiency of the complaint. *John W. Lodge Distrib. Co. v. Texaco, Inc.*, 161 W. Va. 603, 604-05, 245 S.E.2d 157, 158 (1978). For purposes of the motion, the complaint is construed in the light most favorable to plaintiff, and its allegations are to be taken as true. *Id.* Thus, Rule 12(b)(6) is designed to "weed out unfounded suits." *Harrison v. Davis*, 197 W. Va. 651, 658, 478 S.E.2d 104, 111 (1996) (emphasis added); *McGraw v. Scott Runyan Pontiac-Buick, Inc.*, 194 W. Va. 770, 776, 461 S.E.2d 516, 522 (1995).

To survive a motion to dismiss pursuant to Rule 12(b)(6), "[a]ll that the pleader is required to do is to set forth sufficient information to outline the elements of his claim or to permit inferences to be drawn that these elements exist. The trial court should not dismiss a complaint merely because it doubts that the plaintiff will prevail in the action, and whether the plaintiff can prevail is a matter properly determined on the basis of proof and not merely on the pleadings." *Lodge*, 161 W. Va. at 605-06, 245 S.E.2d at 159, quoting Wright & Miller, Federal Practice and Procedure: Civil § 1216 (1969). However, a plaintiff must plead more than bald statements or conclusory allegations to withstand a motion to dismiss. *Fass v. Nowsco Well Service*, 177 W. Va. 50, 53, 350 S.E.2d 562, 564 (1986).

Construing Plaintiffs' Amended Complaint in the light most favorable to Plaintiffs, and taking the allegations to be true, the Court finds that Plaintiffs' Amended Complaint does not fail

to state a claim upon with relief may be granted pursuant to Rule 12(b)(6) of the West Virginia Rules of Civil Procedure. Therefore, *Nationwide Mutual Fire Insurance Company's Motion to Dismiss or Stay Plaintiffs' Claims Against Nationwide in Amended Complaint* (Transaction ID 60276020) is **DENIED**.

Motions for Summary Judgment on the Declaratory Judgment Action

"The interpretation of an insurance contract, including the question of whether the contract is ambiguous, is a legal determination which . . . is reviewed *de novo* on appeal." *Dairyland Ins. Co. v. Fox,* 209 W.Va. 601, 550 S.E.2d 388, 391 (2001)(quoting *Payne v. Weston,* 195 W.Va. 502, 506-07, 466 S.E.2d 161, 165-66 (1995)).

> Only if the court makes the determination that the contract cannot be given a certain and definite legal meaning, and is therefore ambiguous, can a question of *fact* be submitted to the jury as to the meaning of the contract. It is only when the document has been found to be ambiguous that the determination of intent through extrinsic evidence becomes a question of fact.

Payne, 195 W.Va. at 507, 466.S.E.2d at 166.

The West Virginia Supreme Court of Appeals has repeatedly held that "[l]anguage in an insurance policy should be given its plain, ordinary meaning." Syl. Pt. 1, *Murray v. State Farm Fire and Casualty Co.,* 203 W.Va. 477, 509 S.E.2d 1 (1998); Syl. Pt. 1., *Soliva v. Shand, Morahan & Co., Inc.,* 176 W.Va. 430, 345 S.E.2d 441 (1976). However, "[w]henever the language of an insurance policy provision is reasonably susceptible of two different meanings or is of such doubtful meaning that reasonable minds might be uncertain or disagree as to its meaning, it is ambiguous." Syl. Pt. 3, *Erie Ins. Property and Casualty Co. v. Dimitri Chaber, et al.,* No. 16-0490 (June 1, 2017, Supreme Court of Appeals of West Virginia), quoting Syl. Pt. 1, *Surbaugh v. Stonewall Casualty Co.,* 171 W.Va. 390, 283 S.E.2d 859 (1981), quoting Syl. Pt. 1, *Prete v. Merchants Property Ins. Co.,* 159 W.Va. 508, 223 S.E.2d 441 (1976).

"It is well settled law in West Virginia that ambiguous terms in insurance contracts are to be strictly construed against the insurance company and in favor of the insured." Syl. Pt. 3, *Murray*; Syl. Pt. 4. *National Mut. Ins. Co. v. McMahon & Sons, Inc.*, 177 W.Va. 734, 356 S.e.2d 488 (1987). Furthermore, "[a]n insurance company seeking to avoid liability through the operation of an exclusion has the burden of proving the facts necessary to the operation of that exclusion." Syl. Pt. 6, *Murray*; Syl. Pt. 7, *McMahon*.

The Earth Movement Exclusion

Nationwide argues the "earth movement" exclusion in the Policy excludes coverage for the Carters' loss. The Policy states:

> 1. **We** do not cover loss to any property resulting directly or indirectly from any of the following. Such a loss is excluded if it is the preeminent or efficient proximate cause even if another peril or event contributed concurrently or in any sequence to cause the loss.
>   a) earth movement and volcanic eruption. Earth movement means: earth movement due to natural or unnatural causes, including mine subsidence; earthquake; landslide; mudslide; earth shifting, rising or sinking. Volcanic eruption means: eruption; or discharge from a volcano.

Policy, Section I, Page D1, 1.a)

The Supreme Court of Appeals of West Virginia recently held in *Erie Ins. Property and Casualty Co. v. Dimitri Chaber, et al.*, No. 16-0490 (June 1, 2017, Supreme Court of Appeals of West Virginia) that, "A provision in an insurance policy that excludes a loss regardless of whether such loss is 'caused by an act of nature or is <u>otherwise caused</u>' is not ambiguous and excludes coverage for the loss whether it is caused by a man-made or a naturally-occurring event." (emphasis added) Syl. Pt. 4., *Chaber*. The Court distinguished its prior decision in *Murray* from *Chaber* on the ground that the exclusionary language found to be ambiguous in *Murray* was nonexistent in *Chaber* and, therefore, the *Murray* analysis was not dispositive of *Chaber*. *Id.* at 9. As the Court explained, "[t]his Court found the exclusionary language in

Murray ambiguous because the policy excluded certain losses regardless of whether the event 'arises from natural or *external forces*, or occurs as a result of any combination of these.'" *Id.* at 8 (internal citations omitted). The Court in *Murray* focused on the term "external," concluded it was ambiguous and refused to define the term to include man-made forces. *Id.* In analyzing the *Chaber* policy, the Court found the exclusionary language "caused by an act of nature or is otherwise caused" to be unambiguous and not subject to interpertation. *Id.*

In this case, the Mass Litigation Panel must analyze exclusionary language that is different from the exclusionary language analyzed by the Supreme Court in both *Murray* and *Chaber*. Here, the Panel must determine whether the language, "natural or unnatural causes" is ambiguous and, if not, whether that language includes man-made causes. Policy, Section I, Page D1, 1.a).

In *Liebel v. Nationwide Ins. Co. of Florida,* 22 So.3d 111 (2009), exclusionary language that is practically identical to the exclusionary language at issue in the Carter policy was challenged. The insured whose home was damaged when soil erosion from a ruptured water line beneath the home caused the foundation to settle brought a breach of contract action against the insurer arising out of its denial of coverage under an all-risk policy pursuant to the policy's earth movement exclusion.[1] The circuit court awarded summary judgment to the insurer and the insured appealed. On appeal, the District Court of Appeal of Florida held that the earth

[1] The earth movement exclusion in the policy at issue in *Liebel* stated:

> 1. We do not cover loss to any property resulting directly or indirectly from any of the following. Such a loss is excluded even if another cause or event contributed concurrently or in any sequence to cause the loss.
>
> a) Earth Movement and Volcanic Eruption. Earth movement means: earth movement due to natural or *unnatural* causes, including mine subsidence; earthquake; landslide; mudslide; earth shifting, rising or sinking (other than sinkhole collapse). Volcanic eruption means: eruption; or discharge from a volcano.

(emphasis added in *Liebel*), 22 So.3d at 113.

movement exclusion in the policy unambiguously excluded coverage of damage to the insured's home, although the policy was ambiguous as to whether it covered the cost to repair the water line rupture. As the *Liebel* Court explained,

> [T]he trial court was correct in holding that the Policy's earth movement exclusion included the loss to Liebel's home, as the plain and unambiguous meaning of the Policy and its earth movement exclusion warrant that result. In particular, the Policy's earth movement exclusion excepts from coverage "loss to any property resulting directly or indirectly" from "earth movement due to natural or *unnatural* causes," (emphasis added), with earth movement including, "earth shifting, rising, or sinking." The loss to Liebel's home was caused by the shifting of earth under the home that was, in turn, caused by earth shifting from unnatural causes, i.e., the water line rupturing.

Id. at 115. Likewise, in *Alamia v. Nationwide Mut. Fire Ins. Co.*, 495 F. Supp.2d 362 (U.S.D.C. S.D. NY 2007), the New York District Court held the same earth movement exclusion unambiguously applied to preclude coverage for damage to the insured's residence where the damage was caused by settlement to the house's foundation, even if the earth movement itself was caused by water leaking from a broken pipe.

Having reviewed the Supreme Court's analysis in *Chaber* and *Murray* in conjunction with *Liebel*, the Panel finds the exclusionary language in the *Carter* case is unambiguous and the term "unnatural" includes man-made causes. The Panel finds that the Engineered Material Arresting System or EMAS is a man-made structure that includes rocks and fill material. The failure of the EMAS resulted in a "landslide" as defined in *Murray,* and the failure of the EMAS meets the definition of an "unnatural" cause under the Policy.[2]

Having found the earth movement exclusionary language to be unambiguous, the question is whether the earth movement exclusion applies to exclude coverage for the Carters' loss. Under the terms of the policy, "a loss is excluded if it is the preeminent or efficient

[2] In Syllabus Point 4 of *Murray*, the Supreme Court held that, "[t]he plain, ordinary meaning of the word 'landslide' in an insurance policy contemplates a sliding down of a mass of soil or rock on or from a steep slope." In this case, the EMAS failed, sending soil and rocks down a steep slope at the end of a runway at Yeager Airport.

proximate cause even if another peril or event contributed concurrently or in any sequence to cause the loss." Policy, Section I, Page D1, 1.

In Syllabus Point 8 of *Murray*, the Supreme Court explained that,

> The efficient proximate cause is the risk that sets others in motion. It is not necessarily the last act in a chain of events, nor is it the triggering cause. The efficient proximate cause doctrine looks to the quality of the links in the chain of causation. The efficient proximate cause is the predominating cause of the loss.

Thus, the question that ultimately needs factual development is whether the landslide that emanated from the failure of the EMAS located on the Yeager Airport property was the pre-eminent or efficient proximate cause of the destruction of the Carter home and/or other structures located on the Carters' property.

Nationwide argues the "earth movement" exclusion in the Policy should apply because the Carters allege that a "man-made Engineered Material Arresting System (EMAS) located on the property of the Yeager Airport" "collapsed, resulting in fill material from the EMAS covering a portion of Keystone Drive and a stream located in front of the home of the Carters." Am. Complt. D.J., ¶¶3,6. However, the Carters assert that, "[t]he fill material from the EMAS did not reach the Carter home and caused no harm to the structures on the Carter property." Am. Complt. D.J., ¶ 7.

Nationwide contends that deposition testimony in the record directly contradicts the Carters' allegation that the EMAS material caused no direct damage to structures on the Carter's property. Having reviewed certain deposition testimony of Rodney Loftis, the lead excavator onsite after the EMAS collapse, the Court finds there is conflicting evidence on this point. While there appears to be no dispute that the rock and fill material from the EMAS did not touch or directly damage the home owned by the Carters, there is some evidence the excavators were preventing fill material from moving toward the Carters' home. There is also a factual dispute

regarding whether the rock and fill material from the EMAS damaged any other structure on the Carters' property.

Further factual development is also required to determine if the earth movement exclusion would apply to the entire property if only part of the property was damaged by the rock and fill material from the failure of the EMAS. If a shed or outbuilding was damaged by the rock and fill material from the EMAS, but not the home, would the earth movement exclusion apply to the entire property?

In an attempt to apply the earth movement exclusion to the Carters' loss, Nationwide simply ignores the Carters' claim that it was not the EMAS collapse at the end of Runway 5 that destroyed the Carters' home, but instead demolition by heavy equipment. Although there is conflicting evidence regarding whether EMAS material from the landslide caused direct damage to other structures on the Carters' property, there is no dispute that the Carter's home and remaining contents were destroyed by heavy equipment. The Carters assert that "[t]he efficient proximate cause of the demolition of Plaintiffs' home was its demolition by heavy equipment based on the Airport's mistaken belief that the Airport owned the Plaintiffs' property, and not because of any alleged 'emergency.'" Am. Complt. D.J., ¶ 22.

Because there is a material issue of fact regarding whether the failure of the EMAS was the "the pre-eminent or efficient proximate cause" of the demolition of the Carters' home and/or the destruction of other structures on the Carters' property, the Presiding Judges find the earth movement exclusion of the Policy does not **as a matter of law**, apply as a defense and, therefore, Nationwide's motion for summary judgment is **DENIED**. A trier of fact must determine whether the earth movement exclusion applies to other structures on the Carters' property and, thereafter, decide if damage caused by earth movement to part of the property precludes

coverage to all of the property and whether or not the failure of the EMAS system was the pre-eminent or efficient proximate cause of the damage to any of the property and if so which portions.

The Government Acts Exclusion

Next, Nationwide argues the "government acts" exclusion in the Policy excludes coverage of the Carters' loss. The Policy states:

> 1. **We** do not cover loss to any property resulting directly or indirectly from any of the following. Such a loss is excluded if it is the preeminent or efficient proximate cause even if another peril or event contributed concurrently or in any sequence to cause the loss.
>
> ***
>
> l) government acts, meaning any loss caused by seizure, destruction, or confiscation by order of any government or public entity.

Policy, Section I, Page D-2, 1. l)

The evidence in the record is conflicting as to whether it was an order of a government or public entity that lead to the demolition of the Carter's home. Although there is no dispute that Airport Authority representatives demolished the Carters home, and the Carters admit the Airport Authority is "a political subdivision of the State of West Virginia" (Am. Complt. ¶2), the Carters' contend there was a mistaken belief by the Airport Authority that it had purchased the Carter property before the Carter home was demolished.[3]

No evidence has been presented of a "state of emergency" declared by a court, an administrative agency or the Governor of the State of West Virginia, although there is evidence that the Airport Authority was operating pursuant to the Airport Emergency Plan for Yeager Airport approved by the Federal Aviation Administration on September 12, 2012, and the

[3] Although the sum of $5,000.00 was obviously insufficient to purchase the Carters' home and property at 151 Keystone Drive, the handwritten easement agreement also states that, "Yeager will also compensate you for any other damages or injuries to your property from the constructin [*sic*] of the easement."

handwritten easement agreement signed by the Carters states that flooding from a slip on the Yeager side of the hill "created an emergency situation." Furthermore, the language in the policy does not appear to require a "state of emergency" to be declared by a court, the governor or a state agency. The only requirement is that the loss be caused "by order of any government or public entity."

The Carters contend that their home was either demolished because Airport Director Rick Atkinson was misinformed by the Airport Authority's attorney that the Airport owned the Carter property, or because Mr. Atkinson misunderstood the communication from the Airport Authority's attorney that only an easement had been obtained from the Carters. However, the key inquiry under the terms of the policy is whether the preeminent or efficient proximate cause of the Carter's loss was by order of any government or public entity.

When district court Judge Thomas E. Johnston exercised his discretion to abstain from deciding the federal declaratory judgment action he spent a significant amount of time discussing the "governmental acts" exclusion. Judge Johnston's decision to abstain was based in large part upon his belief that this particular exclusion had not been addressed by the West Virginia Supreme Court of Appeals. When he determined that interpretation of the "earth movement" exclusion was not a complex or novel issue such that the state of West Virginia would have a strong interest in having it decided in its own courts he clearly recognize that "the government acts exclusion in the instant case presents a different scenario." *Nationwide Mutual Fire Insurance Co. v. Theodore A. Carter, et al.* at page 8. As Judge Johnston noted, "The Carters contend that the WVSCA has never addressed this exclusion before, and the Court has not found a published case addressing it. Additionally, there is limited guidance from other courts on interpreting this type of exclusion." *Id.* Having reviewed all of the cases referenced by Judge

Johnston from other jurisdictions regarding the government acts exclusion, the Panel finds that a variety of interpretations have been applied to this exclusion.

The U.S. District Court for the Eastern District of Pennsylvania has determined that "in order for a government acts exclusion to apply, "the government order must have been lawful, and authorities must have acted within the bounds of the governmental order." *Kao v. Markel Ins. Co.*, 708 F.Supp.2d 472 (2010). This interpretation differs slightly from that espoused in *California Cafe Restaurant v. Nationwide Mut. Ins. Co.*, where the court determined:

> The Governmental Acts Exclusion in an insurance policy requires that to constitute governmental authority, the actions of the government must fall within its administrative discretion.
>
> > In order to bring an act ... within the concept of an 'act of civil authority' *it is not necessary to show that [the] act was expressly authorized,* it being sufficient that the act falls within the administrative *discretion* to perform or commit the act in question. Accordingly, an order made by the County Supervisors to burn the grass on pasture lands, to destroy grasshoppers ... is an act of civil authority, whether it is expressly within their power or not, so as to relieve an insurer from liability ... (Couch on Insurance 2d § 42:191 at 576 (emphasis added), *citing, Conner v. Manchester Assur. Co.*, 130 F. 743 (9th Cir.1904).)
>
> Couch articulated the discretion standard in direct reliance on *Conner v. Manchester Assur. Co.*, supra,1 which held that a loss caused by a governmental order requires application of the exclusion whether or not there was de jure authority for the order which brought about the loss, so long as, de facto, the government, qua government,created the loss. *Conner*, 130 F. at 745–46.

Not Reported in F.Supp. (1994), 1994 WL 519449 at *1.

Other courts have found that the government acts exclusion does not apply where the order was without legal authority. In *Am. Cent. Ins. Co. v. Stearns Lumber Co.*, 140 S.W. 148, (Ky. 1911), the Court of Appeals of Kentucky held that an exclusion for losses due to an "order of any civil authority" did not preclude coverage for a hotel that burned down because a marshal set it on fire to drive suspects out of the building, even though the marshal and his posse were

engaged in a gunfight with the suspects. Because the direct cause of the loss was the marshal's unauthorized act, the insurer was not released from liability.

Similarly, in *In re West Electronics, Inc.,* 128 B.R. 905 (1991), the United States Bankruptcy Court for the District of New Jersey held that, under New Jersey law, an all risk policy's governmental acts exclusion did not preclude coverage for damage to property subsequent to the Government's seizure of the property, where exigent circumstances did not exist at the time of the warrantless seizure of property which would relieve the Government of its duty to obtain a warrant, and the warrantless seizure was in violation of Internal Revenue Service regulations.

The Supreme Judicial Court of Massachusetts, held in *Alton v. Manufacturers and Merchants Mut. Ins. Co.,* 416 Mass. 611, 624 N.E.2d 545 (1993) that the insured's loss was precluded by the policy's governmental authority exclusion where police caused damage to the insured's premises during the execution of two separate search warrants. In that case, the trial court correctly ruled that the damage fell within the policy's governmental authority exclusion because the damage to the insured's building was the indirect result of orders of governmental authority – the search warrants. The police officers were ordered to search the insured's building and any damage to the building resulted from the police carrying out that order. *Alton,* p. 2.

The Policy in this case excludes losses from "governmental acts, meaning any loss caused by seizure, destruction, or confiscation by order of any government or public entity." Policy, Section I, Page D-2, 1. l) The Panel finds that the term "government acts" as defined in the Policy is ambiguous because the language is, "reasonably susceptible of two different meanings or is of such doubtful meaning that reasonable minds might be uncertain or disagree as to its meaning." Syl. Pt. 3, *Erie Ins. Property and Casualty Co. v. Dimitri Chaber, et al.,* No. 16-

0490 (June 1, 2017, Supreme Court of Appeals of West Virginia). Because the language of the government acts exclusion is ambiguous, the Panel must interpret the scope of the exclusion in West Virginia. As has been previously stated, there must first be a determination of ambiguity before any interpretation can be made. A review of Judge Johnston's dismissal order and all the cases cited therein as well as review of the internal citations contained in those cases clearly indicates a need for a determination of the scope of the government acts exclusion based upon a review of West Virginia jurisprudence.

As has been previously stated, "[i]t is well settled law in West Virginia that ambiguous terms in insurance contracts are to be strictly construed against the insurance company and in favor of the insured." Syl. Pt. 3, *Murray*; Syl. Pt. 4. *McMahon*. However, construing a contract strictly against the insurance company does not permit a construction so limiting as to render the words in the contract without meaning. The Panel finds that for the "government acts" exclusion in the Policy to apply, the government or public entity exercising its authority and ordering, as in this case, the destruction of private property must do so only when it has the lawful authority to issue the order of destruction, and the conduct undertaken must clearly be within the bounds of the order.

Before Nationwide Mutual Fire Insurance Company can have the benefit of the "government acts" exclusion for the Carters' loss there must be a clear showing that:

1. A government or public entity issued the order to demolish the Carter's home.

2. The government or public entity had lawful authority to issue the order.

3. The scope of the order of demolition.

4. The conduct undertaken by the government or public entity was within the bounds of the order of demolition.

Without reasonable limitation on the scope of the exclusion, the possibility could exist that an unlawful or even malicious "governmental act" could result in an unrecoverable loss to an insured. Consider the absurd example of a publicly employed trash collector who is having difficulty accessing disposal containers placed behind a building on private property. Further consider that the trash collector who was employed by a public entity, ordered a nearby construction worker to destroy the building obstructing the trash collector's access. If the construction worker agreed to destroy the building without necessity of the order being lawful and within the authority of the public entity, as written, the governmental exclusion in this policy would free Nationwide Mutual Fire Insurance Company from any liability.

Accordingly, Nationwide Mutual Fire Insurance Company's *Motion to Dismiss or Stay Plaintiffs' Claims Against Nationwide in Amended Complaint* (Transaction ID 60276020) is **DENIED**. Furthermore, the *Coverage Brief and Motion for Summary Judgment of Nationwide Mutual Fire Insurance Company* (Transaction ID 60344583) is also **DENIED**, as there are heavily contested material issues of fact regarding: 1) application of the "government acts" exclusion; and 2) the application of the earth movement exclusion. Based on the foregoing rulings, and on the basis that no discovery has been completed as to Nationwide's claim-handling conduct or acts of bad faith, those causes of action are not addressed herein.

It is so **ORDERED.**

ENTER: June 26, 2017.

/s/ John A. Hutchison
Lead Presiding Judge
Yeager Airport Litigation