

8th Circ. Backs Insurers' Win Over \$27M In Flood Claims

By **Megan Stride**

Law360, Chicago (November 29, 2011, 7:01 PM ET) -- The Eighth Circuit on Tuesday affirmed a decision letting National Union Fire Insurance Co. of Pittsburgh, Pa., and Ace American Insurance Co. off the hook in an industrial ingredient maker's Iowa suit alleging they owed nearly \$27 million in flood damage coverage.

The appeals court upheld the lower court's August 2010 order that granted the insurers judgment as a matter of law, shooting down Colorado-based Penford Corp.'s argument that its policy should be construed in its favor because it is ambiguous. The doctrine cited by Penford on that point "is inapplicable here," given Penford's own participation in the drafting of the policy, the appeals panel held.

The suit stems from a severe flood that struck Cedar Rapids, Iowa, in 2008 and damaged Penford's manufacturing facility, where it produces gasoline additive ethanol as well as starch for the paper industry.

Penford submitted claims to its insurers, National Union and ACE, which paid out \$20.5 million but denied Penford's request for more money.

The insurers said that certain sublimits in Penford's policy capped reimbursement for flood damages, and that those sublimits applied to both property damage and business interruption losses, according to court documents.

Penford alleged that the sublimits applied only to property damage, however, and followed up with the immediate suit in January 2009, demanding that the insurers pay an extra \$26.5 million as well as punitive damages for their supposed bad-faith handling of the claim.

The lower court granted to the insurers' judgment as a matter of law first on Penford's bad faith claim and then, after a jury trial, on the plaintiff's remaining declaratory judgment and breach of contract claims, and Penford followed up with the Eighth Circuit challenge.

On appeal, Penford argued that the lower court erred in granting the insurers judgment as a matter of law on its bad faith claim because it presented sufficient evidence for a jury to find that the insurers failed to investigate its insurance claim properly and failed to make timely payments.

But the Eighth Circuit panel found that the insurers had a reasonable basis for interpreting the policy's sublimits as they did, and that their payment schedule complied with the policy's requirements.

Penford also told the Eighth Circuit that it should have won its bid for judgment as a matter of law on its remaining claims because the evidence presented at trial did not resolve ambiguity in the policy's language, and that under the doctrine of *contra proferentem*, the ambiguity should have then been construed against the insurers as the policy's drafters.

The appeals court found, however, that that doctrine did not apply, noting that the parties had "relatively equal bargaining power" during the policy drafting process, and ruled that the district court properly denied Penford judgment as a matter of law.

Finally, the Eighth Circuit panel upheld the district court's order granting judgment to the insurers on the remaining claims. It found there was no factual dispute regarding whether the policy's underwriters and an insurance broker Penford hired agreed on the flood sublimits' application and whether that agreement bound Penford.

Attorneys for the parties did not immediately respond to requests for comment Tuesday.

Judges Roger L. Wollman, Ronald L. Gilman and Michael J. Melloy sat on the panel for the Eighth Circuit.

Thomas M. Reiter, Douglas J. Simmons and Paul C. Fuener of K&L Gates LLP and Stephn J. Holtman of Simmons Perrine Moyer Bergman PLC represent Penford.

Matthew S. Ponzi, Thomas B. Orlando and Richard A. Buchanan of Foran Glennon Palandech Ponzi & Rudloff PC and David E. Bland of Robins Kaplan Miller & Ciresi LLP represent the insurers.

The case is *Penford Corp. et al. v. National Union Fire Insurance Co. et al.*, case number 10-3068, in the U.S. Court of Appeals for the Eighth Circuit.

--Additional reporting by Christopher Norton and Richard Vanderford. Editing by Eydie Cubarrubia.