

## Appeals Court Sides With NJ Transit in \$400M Hurricane Sandy Insurance Fight

At issue was whether the damage was caused by flooding or a "named windstorm" under the policy language.

By Charles Toutant

A state appeals court has ruled that New Jersey Transit is entitled to coverage up to its \$400 million policy limit for water damage from Hurricane Sandy, rejecting insurers' claims that a \$100 million limit on flood-related coverage applies.

The panel upheld an Essex County Superior Court judge's ruling that policy language providing coverage for a "named windstorm" applies to damage at the agency's properties, and rejected claims by several of the agency's insurance companies that policy language providing coverage for "losses caused by flood" applied to the damage.

The appeals court also rejected a claim by one of New Jersey Transit's insurers, Torus Specialty Insurance Co., now known as StarStone Insurance Co., for reformation of New Jersey Transit's insurance policies based on allegedly misleading statements to it by the agency's insurance broker, Marsh.



NJ Transit bus

(Photo: Shutterstock.com)

The dispute revolved around a multilayered property insurance program involving policies from 11 companies. The plan had \$400 million in coverage overall but included 27 categories of losses for which coverage was subject to sublimits of less than \$400 million, including flood damage.

In addition, section two of the standard policy form, titled "limit of liability," sets forth 27

categories of losses for which coverage is subject to "100% per occurrence ground-up sublimits."

After Sandy struck in October 2012, causing extensive damage to NJ Transit's properties, an adjuster notified it on behalf of several excess carriers that the \$100 million limit for flood losses would apply to the agency's claimed losses. Marsh, the broker, disagreed, claiming

NJ Transit was entitled to the full \$400 million policy limit because the losses were caused by a named windstorm.

New Jersey Transit filed the suit in 2014, naming seven insurance companies as defendants, and sought a judgment that the \$100 million limit did not apply to its claims for property damage from Sandy. In September 2017, Superior Court Judge Dennis Carey of Essex County granted NJ Transit's motion for summary judgment and denied summary judgment motions by underwriters at Lloyd's, Maiden Specialty Insurance Co., RSUI Indemnity Co., Specialty Insurance Co. and Westport Insurance Corp., and Torus Specialty Insurance.

On appeal, the insurance companies claimed that Sandy-related damage to NJ Transit's properties met the policy definition of flood—either the “overflow, release, rising, back-up, runoff or surge of surface water,” or “the unusual or rapid accumulation or runoff of surface water from any source.”

But Judges Joseph Yannotti, Heidi Currier and Lisa Firko disagreed. They found the damage in question met the policy definition of a named windstorm to include “wind driven water, storm surge and flood associated

with, or which occurs with, a ‘named windstorm’” or the “direct action of wind including storm surge when such wind/storm surge is associated with or occurs in conjunction with” a named windstorm.

“Where, as here, two provisions of an insurance policy address the same subject, the more specific provision controls over the more general,” Yannotti wrote for the court. In addition, if the parties had intended that damage from a “storm surge” would be subject to the flood sublimit, the policies would have said so in plain language, Yannotti wrote.

And if the term “flood” already included damage from a “storm surge” associated with a “named windstorm,” as the defendants claim, there would have been no need for the parties to include the “named windstorm” provision in the policies, Yannotti wrote.

Torus sought reformation of the policy on the basis of fraud, a claim that was rejected. Torus argued that a Marsh underwriter sought to include the named windstorm definition policy language as a way to increase coverage limits. Torus said Marsh's underwriter said the named windstorm language was added to the policies for “concurrency purposes.”

Yannotti wrote that that statement was “not a factual representation regarding the scope of coverage, and it was not false.” Torus' claim was not based on any affirmative misrepresentations, but on the allegation that Marsh failed to disclose material facts about the “named windstorm” definition.

“Here, there is no basis for recognizing a duty on the part of Marsh to make any specific disclosures regarding the effect of the addition of the ‘named windstorm’ definition would have on the flood sublimit,” Yannotti wrote. “Marsh and Torus did not have a principal and agency relationship. Moreover, Marsh and Torus did not have a relationship in which either reposed ‘trust and confidence’ in the other,” the judge said.

Shawn Kelly of Denton in Short Hills, who represented StarStone, and a New Jersey Transit spokeswoman declined to comment.

**Kenneth Frenchman of McKool Smith in New York, who represented New Jersey Transit,** and Robert Fisher of Clyde & Co in Atlanta, who represented certain underwriters at Lloyd's, Maiden Specialty, RSUI Indemnity and Westport, did not respond to requests for comment.