

January 23, 2020

# Idaho Supreme Court Address Water Exclusion in Commercial Property Exclusion

BY: James M. Eastham

In *ABK, LLC v. Mid-Century Ins. Co.*, 2019 WL 7046393 (Idaho Dec. 23, 2019) an insured gas station owner sued its property insurance carrier for breach of contract and bad faith after the carrier denied coverage for loss caused by water contamination of the insured's underground storage tanks. Mid-Century had denied coverage because the underground storage tanks were damaged by water -- which was an excluded peril under the policy. Mid-Century issued Business Owners Special Property Coverage to the insured which provided all-risk coverage for physical loss or damage. The policy contained a number of exclusionary provisions including a water exclusion which provided that the policy did not pay for loss or damage caused directly or indirectly by:

1. Flood, surface water, waves, tides, tidal waves, overflow or any body of water, or their spray, all whether driven by wind or not; ...
2. Water under the ground surface pressing on, or flowing or seeping through:
  - Foundations, walls, floors or paved surfaces:
  - Basements, whether paved or not; or
  - Doors, windows or other openings.

In upholding the District Court's ruling in favor of Mid-Century, the Idaho Supreme Court held that a clear reading of the unambiguous policy provides damage caused by surface water or water under the ground when flowing or seeping through other openings is excluded from coverage.

In addressing the cause of the asserted damage, the Court stated that the insured had failed to sufficiently dispute that the cause of its damage was water that accumulated from melted snow above the storage tanks. Citing Idaho precedent, Black's Law Dictionary and cases from other jurisdictions, the court held that water from melting snow clearly constituted surface water. Correspondingly, the Court held that the damage at issue was precluded by the policy's water exclusion.

In disputing the application of the water exclusion, the insured argued that precluding coverage based upon the water exclusion was erroneous because the District Court failed to consider evidence that the source of the water infiltration was ground water, not surface water. The insured likewise argued that the District Court erred in declining to perform an efficient proximate cause analysis.

The Court disagreed with the insured's contentions in this regard for a number of reasons, including the anti-concurrent cause language of the policy which states that Mid-Century "will not pay for loss or damage caused directly or indirectly by any of the following. Such loss or damage is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss." Per the Court, under this language "an insurer need only show an excluded cause is a cause of the damage, not the only or sole cause". Because the fact that surface water was a cause of the insured's damages was unrefuted, the policy's anti-concurrent causation language made it unnecessary to undertake an efficient proximate cause analysis because the parties contracted out of its application.

Although the holding was ultimately unremarkable based on the facts developed at the District Court level, the case is an important reminder of the importance of anti-concurrent cause language in coverage determinations.