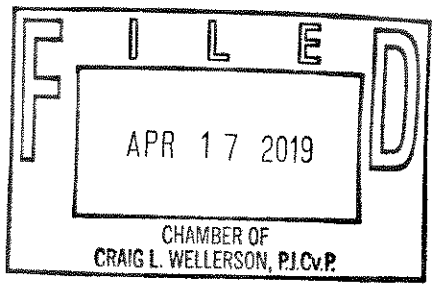
Prepared by the Court

ESTATE OF RONALD DOERFLER	Superior Court of New Jersey
AND STEPHANIE DOERFLER,	Ocean County
Plaintiff	Law Division
Vs.	Docket No. OCN-L-2960-14
FEDERAL INSURANCE COMPANY,	
Defendant	Civil Action
STEPHANIE DOERFLER,	
Plaintiff	
Vs.	Docket No. OCN-L-00483-14
CHUBB INSURANCE COMPANY OF	
NEW JERSEY,	Civil Action
Defendant	
	ORDER



This matter having come before this court on remand from the Appellate Division of the Superior Court for more specific findings pursuant to Rule 1:7-4, the trial court reconsiders the arguments of each party

It is on this 17 day of April 2019,

ORDERED that Plaintiffs motions for summary judgment against defendant Federal Insurance Company is denied. It is

FURTHER ORDERED Plaintiff's motion for summary judgment against defendant Chubb Insurance Company is denied. It is

FURTHER ORDERED Defendant Federal Insurance Company's cross motion for summary judgment is granted. It is

FURTHER ORDERED Defendant Chubb Ins. Co. of New Jersey's motion for summary judgment in granted.

CRAIG L. WELLERSON, P.J. Civ.

DOERFLER vs. CHUBB INSURANCE COMPANY

DOCKET NO.: OCN-L-2960-14

In this decision, this Court determines whether the flood damage to the plaintiffs' oceanfront homes caused by storm tide and waves from Superstorm Sandy is excluded under the surface water exclusions in the defendants' insurance policies.

Statement of Facts

This matter has its genesis in the denial of two separate insurance claims submitted by plaintiffs Stephanie Doerfler and the Estate of Ronald Doerfler ("Plaintiffs"). The claims were made under Plaintiffs' homeowners insurance policies, which were issued by Defendants Federal Insurance Company ("Federal") and Chubb Insurance Company of New Jersey ("Chubb") covering Plaintiffs' two Mantoloking beachfront houses.

On October 29, 2012, Superstorm Sandy struck Plaintiffs' homes causing severe damage, which ultimately resulted in the collapse of both structures.

Both Chubb policies included Chubb's Deluxe House Coverage and Chubb's Deluxe Contents Coverage *"unless stated otherwise or an exclusion applies." See* Excerpts from the Chubb Policy at Executive Summary-PA000010. Specifically, the policies' "Surface Water Exclusion" contains language which excludes coverage and provides in pertinent part that the policy does not:

> ". . .cover any loss caused by: flood, surface water, waves, tidal water, overflow of water from a body of water, or water borne material from any of these. . . ."

Analysis

The Court denies Plaintiffs' motion for summary judgment and grants Defendants' cross-motions for summary judgment. In doing so, the Court concludes that Plaintiffs' interpretation of the Surface Water Exclusion, *Appleman's* Rule, and the efficient proximate cause doctrine, is misapplied to the facts and policies of the instant case. Further, Defendants have met their burden in proving that the collapse of the homes was a direct result of the force of the floodwaters and waves from the storm, thus falling within the scope of the Surface Water Exclusion. Plaintiffs' position that the wind was the force behind the waters, thus skirting the surface water exclusion, is rejected.

I. Efficient Proximate Cause

Plaintiffs assert that the Surface Water Exclusion does not apply, arguing that wind was the first step in the chain of causation, as it was the initial force which pushed the water into the houses. Plaintiffs' theory proposes that the wind acted as a catalyst to move the water with sufficient force to cause each home to collapse. New Jersey insurance law dictates that a loss is covered whenever an insured cause of loss is either the first or last cause in the chain of causation bringing about the loss. *Franklin Packaging Co. v. Cal. Union Ins. Co.*, 171 N.J. Super. 188, 191 (App. Div. 1979).

The Court does not agree that the wind and the floodwaters in this matter can be considered two separate events. Rather, the wind and the water acted in unison to create a flood. Plaintiffs rely heavily on *Franklin Packaging Co.* and *Stone* in order to bolster Judge Fall's unpublished opinion in *Birchler* but they remain distinguishable. *Birchler Real Estate LLC v. Farmers Insurance Co.*, Nos. OCN-L-2670-13 and OCN-L-3730-14 (N.J. Super. Law Div. Jan. 20, 2015). Unlike *Franklin Packaging Co.* and *Stone*, there are no sequential causes of loss for the Court to consider. *Franklin Packaging Co. v. Cal. Union Insurance Co.*, 171 N.J. Super. 188

(App. Div. 1979) *cert. denied*, 84 N.J. 434 (1980); *Stone v. Royal Ins. Co.*, 211 N.J. Super. 246, 251 (App. Div. 1986).

In both of those cases, the causes of loss were distinct and separate from one another. In *Franklin Packaging Co.*, vandals broke into the insured's warehouse. During the intrusion, the vandalism resulted in a flood, causing damage to inventory. The insured's coverage precluded water damage, but the court held that the vandalism was a proximate cause of the damage. In *Franklin Packaging Co.*, the inventory damage was caused by vandalism, which was the first link in the chain involving the loss. Because the initial occurrence of vandalism was insurable under the policy, the loss of inventory was covered. *See Franklin Packaging*, 171 N.J. Super. 191. There, the vandalism and the water damage were two separate and distinct acts. In the case before the Court today, the wind cannot be considered a separate event from the storm surge and floodwaters. Rather, the wind was an element of the storm surge.

In *Stone*, the damage was the result of a broken sump pump hose, which flooded the insured's basement. The court there held that the broken house appliance was the proximate cause of that damage. The court in *Stone* recognized the subsurface water exclusion in the homeowners' insurance policy, however, the court made the distinction that the initial event which caused the loss was the broken house appliance. The *Stone* court found that the underground water, an excluded peril, started the loss-producing chain of causation. However, the last event, the ruptured hose on the appliance, was a covered risk. The insurance carrier's motion for summary judgment in *Stone* was denied to permit the trial court to determine the extent of plaintiffs' damages caused as a direct result of the ruptured hose as distinguished from any non-insurable damage caused by water seepage alone. *See Stone*, 211 N.J. Super. 251.

Again, there were two separate causes of loss. First, the sump pump hose broke which was a covered loss under the policy language. Second, there was an intrusion of subsurface floodwaters, which was an excluded risk under the policy. Both separate and distinct occurrences caused a flood in the basement. Ultimately a factual determination must be declared as to the extent of damage caused by each independent occurrence. While destructive wind forces may be considered a separate cause of loss in the absence of damage to their home from floodwaters, here Plaintiffs present no evidence that the wind caused any damage separate and apart from the floodwaters. Accordingly, under the terms of the policy language the wind cannot be considered a separate cause of loss, and therefore certainly cannot be established as a proximate cause of the destruction.

The efficient proximate cause rule applies only where two or more independent forces operate to cause a loss. "When, however, the evidence shows the loss was in fact occasioned by only a single cause, albeit one susceptible to various characterizations, the efficient proximate cause analysis has no application. An insured may not avoid a contractual exclusion merely by affixing an additional label or separate characterization to the act or event causing the loss." *Chadwick v. Fire Ins. Exch.,* 17 Cal. App. 4th 1112, 1117 (1993); *Zurich Am. Ins. Co. v. Keating Bldg. Corp.,* 513 F.Supp. 2d. 55 (D.N.J. 2007); *Auto Lenders Acceptance Corp. v. Gentilini Ford, Inc.,* 181 N.J. 245 (2004). An insured is normally afforded coverage where an "included cause of loss is either the first or last step in the chain of causation which leads to the loss." *Assurance Co. of Am., Inc. v. Jay-Mar, Inc.,* 38 F. Supp. 2d 349, 353 (D.N.J. 1999) (*citing Franklin Packaging Co. v. Cal. Union Ins. Co.,* 171 N.J. Super. 188, 191 (App. Div. 1979).

Since Hurricane Katrina, reviewing courts have adopted the rationale that the term "flood" encompasses storm surge, despite definitions contained within homeowners'

insurance policies which do not expressly use the words "storm surge." Recent cases following Superstorm Sandy have continued to adopt the same practice. *See Nat'l R.R. Passenger Corp. v. Aspen Specialty Ins. Co.*, 124 F.Supp.3d 264 (S.D.N.Y. 2015). Therefore, when parties urge the court to adopt a novel interpretation of policy conditions, the court may look outside of the language of the policy to provide further support for the intent of the language when the court is called upon to interpret its meaning. However, where the language of the policy remains *unambiguous*, as it does here, there is no need to look outside of the exception in question.

In the aftermath of Hurricane Katrina, Louisiana homeowners sought to obtain insurance coverage for flood damage claiming that the damage was precipitated by a collapsing levee which allowed Mississippi River water to pour into their neighborhoods. The district court concluded that the flood exclusions are unambiguous in the context of this storm and that what occurred fits squarely within the generally prevailing meaning of the term "flood." When a body of water overflows its normal boundaries and inundates an area of land that is normally dry, the event is a flood.

The district court further considered the anti-concurrent-causation clauses in this case and concluded that they are inapplicable here because there were not two separate causes of the plaintiffs' damage. The court remarked that this case does not present a combination of forces that caused damage and that it therefore is not analogous to cases where Hurricane Katrina may have damaged property through both wind and water. Cf. *Tuepker v. State Farm Fire & Cas. Co.*, 2006 U.S. Dist. LEXIS 34710 (S.D. Miss. May 24, 2006) (unpublished opinion) Instead, the court stated that "in this case the 'cause' conflates to the flood," meaning

that the alleged negligent design, construction, or maintenance of the levees and the resulting flood were not separate causes of the plaintiffs' losses.

On the pleadings before the Court, there are not two independent causes of Plaintiffs' damages at play and the efficient proximate cause doctrine does not apply. *See Pieper v. Commercial Underwriters Ins. Co.,* 69 Cal. Rptr. 2d 551, 557 (Cal. Ct. App. 1997) ("For the efficient proximate cause theory to apply, . . . there must be two separate or distinct perils . . . ."); *Kish* 883 P.2d at 311 ("The efficient proximate cause rule applies only where two or more independent forces operate to cause the loss.").

A. *Appleman's* Rule

The general rule applicable to a factual context which presents a facial conflict between the risk covered and an exclusion is found in 5 *Appleman*, Insurance Law and Practice § 3083 at 309-311 (1970):

> Where a peril specifically insured against sets other causes in motion which, in an unbroken sequence and connection between the act and final loss, produced the result for which recovery is sought, the insured peril is regarded as the proximate cause of the entire loss. It is not necessarily the last act in a chain of events which is, therefore, regarded as the proximate cause, but the efficient or predominant cause which sets into motion the chain of events producing the loss. An incidental peril outside the policy, contributing to the risk insured against, will not defeat recovery * * *. In other words, it has been held that recovery may be allowed where the insured risk was the last step in the chain of causation set in motion by an uninsured peril, or where the insured risk itself set into operation a chain of causation in which the last step may have been an excepted risk (emphasis omitted).

Appleman's Rule is a sequential cause rule, requiring the court to find coverage for a loss, so long as the first step or last step in the chain of causation is anything other than a specifically excluded peril. Conversely, it has been well established that *Appleman's* Rule does not apply to

flood losses caused by coastal storms. For the purposes of determining coverage for the losses caused by the impact of floodwater, the flood itself is considered the sole cause of loss and, therefore, the only possible proximate cause. *See In Re Katrina Canal Breaches Litigation*, supra, 495 F.3d 191, 222-23 (5th Cir. 2007). In that case, the Fifth Circuit held that:

> "[t]o the extent negligent design, construction, or maintenance of the levees contributed to the plaintiffs' losses, *it was only one factor in bringing about the flood; the peril of negligence did not act apart from the flood, to bring about the damage to the insureds' properties*" (emphasis added).

The cases relied on by Chubb in support of its contention that *Appleman*'s general rule is not authority in New Jersey are inapposite and not within the purview of the rule. In both *Newman v. Great American Ins. Co.,* 86 N.J. Super. 391 (App. Div. 1965), and *Brindley v. Firemen's Ins. Co. of Newark,* 35 N.J. Super. 1 (App. Div. 1955), plaintiffs had extended coverage for direct loss by windstorm under policies which excluded wave and high water damage whether driven by wind or not. In both, wind and high water occurred simultaneously, and plaintiffs were required to show that damage incurred was caused by wind.

Further, in *Kish*, the court held that where a policy covered loss caused by rain but excluded coverage for floodwaters, the insured could not avoid the operation of the flood exclusion by re-characterizing the flood as rain. *Kish v. Insurance Co. of North American*, 883 P.2d 308, 311-13 (Wash. 1994).

Although not binding, the Court finds *In Re Canal Reaches Litigation* and *Kish* instructive. This Court recognizes that under different circumstances rainwater may cause damage which would be a covered loss under the policy. However, in the instant case, Plaintiffs have no evidence that the damage to their homes was caused by the force of wind in the absence of tidal waters. Tidal flooding always involves wind as a precipitating event. In the absence of

the wind, the ebb and flow of the tides would not cause flooding. Tidal flooding contemplates abnormal wind speeds to generate the rise in surface water levels. Tidal flooding cannot occur in the absences of the wind. There is no other force in nature which will cause tidal waters to rise above the sea levels as measured in conjunction with the phases of the moon, other than the force of the wind. Because tidal flooding is inextricably tied with wind forces, the Court concludes that there was one cause of Plaintiffs' loss – floodwaters, which are an excluded peril within the policy language.

B. Anti-Concurrent Clause

This Court stresses the fact that Superstorm Sandy was an event consisting of ocean storm water flooding. On barrier islands in New Jersey, flood damage occurs when the sea level rises high enough to come in contact with the existing residential homes. There is no event in the recorded history of New Jersey where the sea level has risen beyond high tide by any phenomena other than that of the force of wind. Every recorded event of barrier island flooding in New Jersey has been the result of a storm surge from high winds. Tsunamis, which are generated by earthquakes rather than wind, have been reported in other areas of the world. However, even if a Tsunami damaged Plaintiffs' property, the damage would be a non-insurable event as the Chubb policy contains a specific notice to homeowners that their policy does not provide insurance coverage for damage due to earthquakes.

Plaintiffs go on to dispute the definition of the words "caused by" as used in the Chubb Policies. The Chubb policies state:

> "[t]he words 'caused by' mean any loss that is contributed to, made worse by or in any way results from that peril." *See* Chubb Policy at ES-PA000017.

Plaintiffs take issue with the ambiguity as to whether the two words exclude a loss that is the product of multiple sequential perils. The Court finds that the definition of "caused by provides sufficient explanation to be readily understood by the policyholder. The policy language defines the term "caused by" so as to eliminate any interpretation that occurrence must be a sole, independent and exclusive event. The policy language indicates that other causes may contribute to the loss without divesting the exclusion language of its ability to prohibit coverage for the loss. Had Chubb intended to include sequential perils, it would have explicitly provided for a remedy within the language of the policy.

Plaintiffs request that the Court analyze the October 23, 2018 opinion in *Madelaine Chocolate Novelties, Inc. v. Great N. Ins. Co.*, case number 17-3396 in the U.S. Court of Appeals for the Second Circuit. The Court has been urged to consider the anti-concurrent language of Plaintiffs' policy to determine whether storm surge coverage is available when applying the guidance provided by the Second Circuit.

In *Madelaine*, the plaintiff's business suffered flood damage as a result of Superstorm Sandy. *Id.* at 1. The plaintiff there was covered by an "all-risk" insurance policy, however, the defendant insurance company relied upon the "Exceptions" within the policy to refuse coverage for the payment of most of the plaintiff's claim. *Id.* The policy at issue contained an exclusion for storm surge damage. *Madelaine's* policy included a "Windstorm Endorsement" that stated:

Windstorm means:

- wind;
- wind-driven rain;
- erosion of soil or other land caused by or resulting from wind or wind-driven rain;
- hail; or
- collapse of a building or other structure caused by or resulting from wind, *regardless of any other cause or event that directly or indirectly*;
- *contributes concurrently to; or*

- *contributed to any sequence to, the loss or damage, even if such other cause or event would otherwise be covered* (emphasis added). *Id.* at 2.

The Second Circuit recognized the Windstorm Endorsement in *Madelaine's* policy, contains an ACC clause. Despite the presence of the ACC clause, the defendant in *Madelaine* directed the court's attention to the policy's flood exclusion provision which states:

> The insurance does not apply to loss or damage caused by or resulting from:
>
> - waves, tidal water or tidal waves; or
> - rising, overflowing or breaking any boundary, of any natural or man-made lakes. . . whether driven by wind or not, regardless of any other cause or event that would otherwise be covered.
>
> This Flood exclusion does not apply to ensuing loss or damage caused by or resulting from a **specified peril**. *Id.* at 3.

In analyzing whether the flood exclusion preempted the ACC language, the District Court relied on post-Hurricane Katrina cases, finding that similar endorsements "shift[ed] the risk" rather than denying coverage altogether. However, the Hurricane Katrina cases were deemed distinguishable from *Madelaine*, because the Katrina policies did not contain ACCs. *Id.* at 5. The Second Circuit noted:

> "the District Court erred by analogizing the Windstorm Endorsement to the hurricane deductible endorsements in the Katrina cases without further analyzing the function of an ACC clause **when added to the definition of a covered peril for the entire [p]olicy"** (emphasis added). *Id.*

The language of the Chubb policy is free from ambiguity. Plaintiffs assert that the damage to their homes was of a different form. There is no claim that the Chubb policy is ambiguous. In fact, the language is so "unmistakable" that it even excludes damage under circumstances where water may be "sprayed" onto the house. The Surface Water Exclusion that is found in the Deluxe House Coverage prohibits coverage when:

"any loss caused by. . .spray [of] flood, surface water, waves, tidal water, overflow of water from a body of water, or water borne material from any of these . . . ."

Because the Chubb policy explicitly states that it does not afford insurance coverage for spray, a miniscule form of water, a fair interpretation of the Chubb policy language would compel the conclusion that floodwaters are not a covered risk under the policy. The language of the exclusion in the policies here specifically excludes loss "caused by, resulting from, contributed to, or aggravated by any of the following: . . . flood." The Court would be rewriting the policy if it were to hold that the "efficient cause ... is the cause to which the loss is to be attributed." The language of this exclusion qualifies or enlarges the phrase "caused by" with "contributed to" and "aggravated by." There is no doubt that the flood "contributed to" or "aggravated" the insured's loss. Therefore, the Court declines to apply the "efficient moving cause" rule where it abrogates the language to which the parties agreed.

This Court further finds *Madelaine* distinguishable from the case at bar because the presence of an ACC clause and the presence of a hurricane deductible in a policy are not analogous to one another. The court will apply a different analysis based upon the language within the ACC clause, the language of the deductible, placement of the language within the policy, and the language of the Exceptions contained within the policy. The Chubb policy includes a 2% hurricane deductible which indicates:

> "the amount for which [the policyholder] is responsible in the event of a covered loss caused by wind, wind gusts, hail, rain, tornadoes or cyclones caused by a hurricane." See Executive Summary-PA000015.

As suggested by the Second Circuit in *Madelaine*, a hurricane deductible clause contained within an all risk policy is not analogous to the coverage implications of an ACC clause. Despite the presence of anti-concurrent language contained within the "Wind Endorsement" section of *Madelaine's* policy, the Second Circuit declined to extend coverage for damage caused by Flood Waters because of the specified Flood Waters exceptions contained within the policy. This Court is similarly reluctant to permit an insured wind damage claim to boot strap a floodwaters exception into a covered peril.

Additionally, the ACC language that is included in the Chubb policy can only be found under the "Exclusions" section of the Deluxe House Coverage. *See* CIC-Cert.Pol. -033. The placement of the ACC clause within the "Exclusions" portion of the policy broadens the definition of what damage is excluded from coverage. Plaintiffs have failed to identify any ACC language contained within the language of their policy which expands coverage. The absence of any ACC language in the endorsement section of Plaintiffs' policy, leaves this Court to interpret the plain language of an all-risk policy in combination with the policy's Exception language which sets forth a clear and definite prohibition against coverage for storm water perils. Under the circumstances of this case Plaintiffs have no means to escape the prohibition on coverage as set forth in the storm water exception.

For these reasons, along with the fact that *Madelaine* dealt with a commercial policy rather than a homeowners policy, the Court finds that the case is distinguishable from the instant case. Additionally, the *Madelaine* decision cited by Plaintiffs is a summary order vacating the judgment of the District Court. The order remands the action for further proceedings and does not decide the issue on the merits.

C. Contract Interpretation

The central question in this inquiry, as stated earlier, is whether wind and flood are two separate perils under the language of the Policies, calling for the application of the efficient proximate cause rule. To determine the applicability of the rule the court is guided by the principles of contract interpretation. Courts interpret insurance contracts as an average insurance purchaser would understand them and give undefined terms in these contracts their "plain, ordinary, and popular" meaning. *Cooper Labs., Inc. v. Int'l Surplus Lines Ins. Co.*, 802 F.2d 667, (3d Cir. 1986). Courts also seek to give effect to each provision in such a contract. However, if an exclusionary clause is ambiguous, this Court will strictly construe it against the insurer. *GTE Corp. v. Allendale Mut. Ins. Co.*, 372 F. 3d 598, 608-609 (3d Cir. 2004). Generally, under New Jersey law, "the interpretation of insurance contracts requires generous readings of coverage provisions, narrow readings of exclusionary provisions, resolution of ambiguities in favor of the insured, and construction consistent with the insured's reasonable expectations." *Cobra Prod., Inc. v. Fed. Ins Co.*, 317 N.J. Super. 392 (App. Div. 1998); *see also Elizabethtown Water Co. v. Hartford Cas. Ins. Co.*, 998 F. Supp. 447, 452 (D.N.J. 1998).

The Court finds that the average purchaser of a homeowner's insurance contract would expect the term "flood" to include tidal flooding due to storms. Wind is a well-recognized component of tidal flooding. As discussed during oral argument, flooding along the New Jersey Ocean front is virtually inseparable from wind driven storm activity. Here the policy does not:

> ". . .cover any loss caused by: flood, surface water, **waves, tidal water, overflow** of water from a body of water, or water borne material from any of these. . ." (emphasis added).

Plaintiffs do not dispute that the damage to their homes was caused by ocean waves, which were driven by wind to overflow the natural high tide level on the Mantoloking beach.

Here, the body of water that overflowed was the Atlantic Ocean. Flooding along the Atlantic Coast has been well documented in New Jersey for many years. The Court and counsel for both parties have been unable to identify one occasion of coastal flooding in New Jersey that did not involve a significant wind event. The Atlantic Ocean does not "overflow" without the wind pushing tidal waters onto the beach. Here, flood, waves, tidal waters, and overflow of water from a body of water, all require the presence of wind to create flood. Wind cannot be untangled from the events of ocean flooding. Wind is the only source of energy available to push ocean water beyond the normal rise and fall of the daily tides. Without the presence of significant winds there can be no flooding.

In *Grossberg v. Chubb Insurance Co.* Docket No. A-3724-10T4 2012 (Unpublished), the court analyzed a Chubb all-risk Masterpiece Chubb policy. The policy in *Grossberg* provided that wind-driven rain was a covered peril, however, the policy specifically excluded coverage occasioned by the presence of "wear and tear, gradual deterioration, rust bacteria, corrosion, dry or wet rot, or warping, however caused..." Both experts agreed that the damage suffered by the plaintiff's home was caused by wind-driven rain resulting in "wood decay and deterioration." The court found:

> ". . . that plaintiffs' premises was compromised by wood rot occasioned by wind-driven rain that could not otherwise escape from behind the cedar siding. By its plain and unambiguous terms, the Chubb Masterpiece policy excludes coverage for losses occasioned by rot, and thus Chubb was justified in denying coverage on the claim brought by plaintiffs." *Id.*

Application of the efficient proximate cause rule would circumvent the intentions and expectations of the parties in this case. Plaintiffs lived on a nationally recognized floodplain. The fact that their particular houses are located on parcels usually not flooded does not provide relief for Plaintiffs. They knew that flood would be excluded by any insurance policy they purchased,

as exemplified by their purchase of the maximum amount of flood insurance coverage available under the National Flood Insurance Program ("NFIP").

An alternative reading of the efficient proximate cause rule, or an expansion of the interpretation regarding the ensuing loss provision of the policy would render the exclusions virtually meaningless. That is, the "exception to the exclusions cannot be construed so broadly that the rule (the exclusion) is swallowed up by the exception." *Swire Pac. Holding, Inc. v. Zurich Ins. Co.* 139 F. Supp. 2d 1374 (S.D. Fla 2001).

The insurance companies anticipated that they would not have to pay for flood damage under their all-risk policies, particularly where the risk of flood is high and the NFIP is available. To construe wind as a separate peril from flood in this case would nullify the intent of the contract language and the reasonable expectations of the parties.

One of the more prominent cases regarding flood damage and the rule of efficient proximate cause is *Kane v. Royal Ins. Co. of Am.*, 768 P.2d 678 (Colo. 1989). *Kane* analyzed the insurability of a flood occasioned by the failure of the Lawn Lake Dam in Colorado. As a result of the dam failure, water swept into the Fall River and inundated the plaintiffs' insured property, causing extensive damage. *Id.* The plaintiffs there argued that their all-risk policies provided coverage for the damage, even though the policies contained flood exclusions. The Colorado Supreme Court rejected this argument asserting efficient proximate cause and construed the term "flood" as extending to the water damage resulting from the dam failure.

In *Kane*, the homeowners argued that *Ferndale Development Co. v. Great American Insurance Co.,* 34 Colo. App. 258, 527 P.2d 939 (1974) required the court to provide insurance coverage for water escaping from a dam. In *Ferndale,* the court of appeals found the term

"flood" used in a similarly worded insurance policy exclusion to be ambiguous in a situation where a broken city water line caused the "inundation of the footings and foundations of partially completed condominiums being constructed by the [insured]." *Id.* at 259, 527. As a result, the court construed the term against the insurer, finding that "water escaping from burst water mains" was not a "flood" within the exclusion clause of that policy. *Id.*

Under the facts of *Ferndale*, the term "flood" is ambiguous not only because the water was released from a manmade object, but also because a water main is not so clearly a "body of water," and because the amount of water released was less clearly an "inundation" or "deluge". Cumulatively, the doubts were sufficient in *Ferndale* for the court to resolve them in favor of the insured." *Id.* at 262.

Additionally, in *Pan American World Airways, Inc. v. Aetna Casualty & Surety Co.*, 505 F.2d 989 (2d Cir.1974), the court, in construing a similar exclusion, stated:

> Remote causes of causes are not relevant to the characterization of an insurance loss. In the context of this commercial litigation, the causation inquiry stops at the efficient physical cause of the loss; it does not trace events back to their metaphysical beginnings. The words "due to or resulting from" limit this inquiry to the facts immediately surrounding the loss. *Id.* at 1006.

D. Surface Water Exclusion Applies

The plain language of the Surface Water Exclusion expressly provides that coverage is barred for damages caused by floodwaters. It states:

> Surface water. We do not cover any loss caused by:
>
> - flood, surface water, waves, tidal water, overflow of water from a body of water, or water borne material from any of these, including when any such water or water borne material enters and backs up or discharges from or overflows from any sewer or drain located outside of or on the exterior of a full enclosed structure. . . .

Plaintiffs seek to evade this exclusion by focusing the Court's attention on the definition of "storm surge" rather than "flood." Plaintiffs accurately provide the definition of "storm surge" as:

> "[a]n abnormal rise in sea level accompanying a hurricane or other intense storm, and whose height is the difference between the observed level of the sea surface and the level that would have occurred in the absence of the cyclone"
>
> and goes on to explain that: "[w]ind is the sine qua non of the storm surge."
> Plaintiffs' Brief at 4.

Plaintiff agreed at oral argument before the Court, that their position relies on the theory that:

> ". . .the wind caused the water to surge which then caused the damage."
> Transcript February 5, 2016; page 5, lines 15-18.

The Court does not agree that the damage can be blamed upon the wind. Instead, it is persuaded that the discussion should be focused upon the well-established meaning of the word "flood" which is the overflow of a body of water resulting in the widespread inundation of normally dry land. *See, e.g., Northrop Grumman Corp. v. Factory Mutual Ins. Co.*, 563 F.3d 777, 783-84 (9th Cir. 2009); *Sher v. Lafayette Ins. Co.*, 988 So.2d 186, 194 (La. 2008)(". . . the entire English speaking world recognizes that a flood is the overflow of a body of water causing a large amount of water to cover an area that is normally dry land").

Plaintiffs also suggest that the exclusion in dispute does not sufficiently exclude "storm surge" as a cause of loss, rendering the exclusion ambiguous and ". . .legally insufficient to deprive the policyholder of the broad coverage afforded under 'all risk' policies. . . ." In other words, because the exclusion never uses the words "storm surge," the same must be covered by the Chubb policies. Plaintiffs cite *Newark Trust Co. v. Agricultural Insurance Co.*, 237 F.

788 (3d Cir. 1916) in support of their argument. However, *Newark Trust Co.* is not helpful to the issue presently before the Court. In *Newark Trust Co.*, there was a similar question as to whether wind or water would be considered the proximate efficient cause of damage following a coastal windstorm. That court found that it was unnecessary to determine which force of nature was the proximate cause of the damage. Instead, the Third Circuit focused on the language of the policy's interior water damage exclusion. Furthermore, the policy language in *Newark Trust Co.* is not comparable to the language of the Chubb policy. Accordingly, this Court is without means to apply *Newark Trust Co.*'s analysis to its scrutiny today.

In distinguishing this case from *Newark Trust Co.*, this Court borrows the language provided by the Fifth Circuit in *Leonard v. Nationwide Mut. Ins. Co.*, 499 F.3d 419, 499 (5th Cir. 2007), where it held:

> "[t]he omission of the specific term 'storm surge' does not create an ambiguity in the policy regarding coverage available in a hurricane and does not entitle the [Plaintiffs] to recovery for their flood-induced damages." *Leonard*, supra at 499.

II. Ensuing Loss

At the center of the dispute regarding ensuing loss is whether the collapse of Plaintiffs' homes was the *cause* of the damage or the *form* of the damage. The Court finds that it was the form of the damage and, consequently, the damage should not be considered a covered loss under the terms of the policies. An ensuing loss is a loss that occurs subsequent to the initial peril which caused the damage.

Here, the house collapsed as a direct result of the force of the rising floodwaters and storm surge of Superstorm Sandy. The weight of one cubic foot of water is sixty-two pounds and seven ounces. The amount of tidal waters flowing across Plaintiffs' property at the time of

Superstorm Sandy was of historic proportions. Without the need of discussing fluid dynamics, the only credible evidence of the forces exerted upon the walls and foundations of the houses in question were limited to that of flowing water. Had the storm waters been diverted away from Plaintiffs' properties, the houses would not have collapsed. There is no evidence that the foundation, construction, or any of the building materials were defective to such an extent that any of these defects caused the collapse of either home. Here, the force of rising floodwaters, rather than defective construction techniques or materials, was the cause of the damage. Consequently, Plaintiffs can allege no exception to the policy exclusion.

In *Acme Galvanizing Co.*, the court held that there must exist an identifiable hazard or occurrence, which is the cause of a loss that is separate and independent but resulting from the original excluded peril. *Acme Galvanizing Co., Inc. v. Fireman's Funds Ins. Co.*, 221 Cal.App.3d 170, 179-80 (Cal. Ct. 1990). Further, this "new" peril must not be excluded by the exception.

Plaintiffs suggest that the collapse of the homes could be considered both the peril and the resulting damage. However, the Court is not convinced that "collapse" is meant to describe a situation where an external force impacts and immediately compromises the integrity of an insured building. Rather, it is more commonly accepted that a collapse must be independent of outside peril; that in order to qualify as an insured loss, the houses would have to abruptly implode in the absence of any impact from flowing tidal waters.

Plaintiffs cite *Fantis Foods, Inc. v. North River Ins. Co.*, 332 N.J. Super 250, 260 (App. Div. 2000) to support their position that "collapse" need not be a result of "some internal problem." The Court agrees that perhaps there could be a situation where a collapse may be considered the result of an external force. New Jersey adheres to the majority view that to recover under a policy provision for "collapse" does not require the insured to wait until the

deterioration is so severe that the building falls down. As Judge Kestin explained in *Fantis Foods*:

> "Under our law, the collapse peril insured against does not require that structures fall; rather, without any narrowing internal definition, such a policy must be taken to cover any serious impairment of structural integrity that connotes imminent collapse threatening the preservation of the building as a structure or the health and safety of occupants and passers-by." *Cf. Bromfeld v. Harleysville Ins. Cos.*, 298 N.J. Super. 62, 688 A.2d 1114 (App. Div.1997); *Ariston Airline & Catering Supply Co. v. Forbes,* 211 N.J. Super. 472, 511 A.2d 1278 (Law Div.1986).

The determination to extend insurance coverage in *Fantis Foods* centered upon the discovery that steel beams and lintels imbedded in the concrete foundation of a building had begun to rust through and deteriorate. Judge Kestin denied summary judgment in favor of defendant stating:

> "There may or may not be a genuine issue of material fact whether the structural integrity of the building was in such a state as to be considered "collapsed" under the applicable rule of law, and pursuant to the terms of the insurance policy. Also, defendant asserts that, even if the majority interpretation of "collapse" is applied in this case, the defects to the building were not caused by "hidden decay" and were engendered instead by plaintiff's failure to repair the building; and that, therefore, summary judgment is appropriate. At best, even viewed most favorably for defendant, this argument raises genuine issues of material fact, precluding summary judgment." *Fantis Foods*, 332 N.J. Super at 185.

However, given the facts presented here, the language of the policies, and the overall destruction that occurred to properties as a result of the flowing waters from Superstorm Sandy, there is no evidence to suggest a defect within the fours walls of the homes caused the collapse.

Additionally, Plaintiffs rely on the fact that the policies are "all-risk" policies with no explicit exception for "collapse." In fact, Plaintiffs further emphasize the fact that the policies contain language that states the collapse is *included* as an insured peril. The Court does not overlook this language. Rather, it simply disagrees as to the meaning of the word collapse as set forth in the policy. Though the houses did physically collapse to the ground, they collapsed as a

result of the water pressure exerted by the flowing floodwaters, and therefore the "collapse" remains excluded under the policies. The collapse was not an ensuing loss; there was no delay between the destructive forces of the floodwaters and the immediate collapse of the homes. The collapse can best be described as the form of the damage, rather than the cause of the damage suffered by Plaintiffs.

Along with this Court's reading of the plain language of the policies, *Nat'l R.R. Passenger Corp.* directly addresses Plaintiffs' position that some of their losses resulting from Superstorm Sandy should be considered "ensuing" losses and as a result, should circumvent the floodwater exception of the policies in question. *See Nat'l R.R. Passenger Corp. v. Aspen Specialty Ins. Co.*, 124 F. Supp.3d 264 (S.D.N.Y. 2015). As Chubb points out, the Second Circuit affirmed the rejection of that theory. In *National Railroad*, the court held:

> "[an ensuing loss provision] does not create a grant back for which coverage may be had for the original excluded loss and does not resurrect coverage for an excluded peril." *National Railroad*, supra 661 Fed. App'x at 13.

It is not a given that the exception will swallow the exclusion. The Second Circuit went on to confirm that

> ". . . [i]n general, therefore, courts should not allow coverage 'for [an] ensuing loss directly related to the original excluded risk." *National Railroad*, supra 661 Fed, App'x at 13.

Because the loss of Plaintiffs' homes was directly related to the original excluded risk of floodwaters this Court will enforce the plain language of the policy exception and shall prohibit any interpretation of the contract language which would seek to avoid the implementation of such an exception to insurance coverage.

This Court takes into consideration the language used by other courts in interpreting insurance policy provisions following Hurricane Katrina. The homes in New Orleans that were

lost due to the floodwaters of Hurricane Katrina have yet to be considered as having suffered a "collapse." For purposes of determining the extent of coverage, the homes that were lost in Hurricane Katrina were considered to have been destroyed due to flooding and waves. This Court applies the same rationale to the damage suffered in Superstorm Sandy. Additionally, for the Court to find the flood and the collapse to be considered two separate and independent perils would be contrary to the current body of case law which stands as the accepted authority on this subject.

III. Plaintiffs' Damage Was Covered By Federal Flood Insurance Policy

The Court also considers the fact that Plaintiffs recovered on their claims under their NFIP insurance policies. While additional coverage does not prohibit Plaintiffs from recovery under the Chubb policies, it does suggest that Plaintiffs took additional steps to ensure flood coverage *because* the Chubb policies fell short of providing coverage for damage due to floodwaters.

Plaintiff Stephanie Doerfler stated that she never read the policies. However, as required under New Jersey law, Chubb's policies include the mandatory New Jersey Flood Insurance Notice, stating:

> New Jersey law requires us to advise you of information regarding the lack of coverage in the event of flood loss.
>
> 1. Homeowner insurance policies do not cover property damage from floods.
> 2. Flood means a general and temporary condition of partial or complete inundation of normally dry land area from:
>
> i. The overflow of inland or tidal waters;

Additionally, Plaintiffs simultaneously made claims under the Chubb policy and their NFIP policies. Plaintiffs recovered payments under those NFIP policies for the same damage for which they seek to recover under the Chubb policies. Notably, Plaintiffs claims are inconsistent.

They seek to convince the Court that the damage to the homes was caused by wind, in an attempt to recover under the Chubb policies, however, Plaintiffs readily agree that their loss is due to flood damage when seeking coverage afforded by their NFIP policy. This Court is persuaded that Plaintiffs had no objective expectation of recovery under the Chubb Policy. Because their Chubb Policy did not include flood coverage, they secured additional coverage. Their NFIP policy was purchased to protect themselves against those risks which they knew the Chubb policy did not provide.

Additionally, the Court notes that flood insurance for beachfront homes in New Jersey is more expensive to purchase than a similar amount of coverage from an all-risk comprehensive homeowners insurance policy. A house located in Nevada, for example, very well may hold the same likelihood of casualty loss as does an oceanfront house in Mantoloking. Assuming the risk of loss to be the same, the homeowner in Nebraska and the Mantoloking homeowner will likely pay similar premiums for a comprehensive all-risk homeowners' insurance policy. However, a home in Nevada is far less likely to suffer flood damage than is an oceanfront house in Mantoloking. Flood insurance rates are established through a NFIP which has been established by Congress to provide affordable flood insurance for those living in flood prone areas. The NFIP utilizes an extensive network of flood mapping and data which has been collected by the Federal Emergency Management Agency (FEMA), Environmental Protection Agency and the U.S. Army Corp of Engineers. Each flood area assessment map designates a "flood zone" which identifies the probability of floodwaters encroaching on the mapped area in a given year. Flood mapping analyzes such data at ground elevation, base flood elevation (BFE), wave action, and soil permeability.

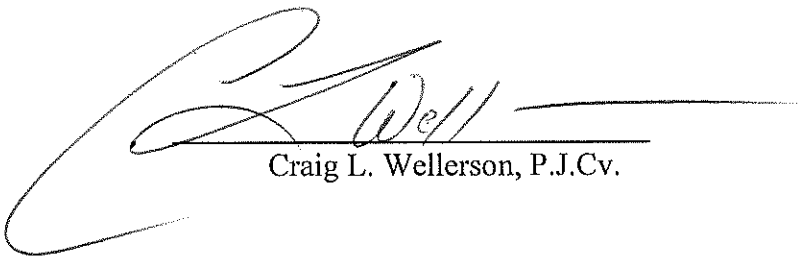
After collecting and analyzing the data, FEMA has created a series of Flood Insurance Rate Maps (FIRM). Homeowners living in flood hazard zones can calculate the cost of flood insurance by inputting their home address and the first-floor finished elevation of their home. The FIRM calculates the likelihood of a flood event on a specific parcel of land in a given year. The premium a homeowner pays for flood insurance calculates at least three factors: (1) the likelihood, amount and velocity of flood waters flowing across the insured property; (2) the ability of the home to withstand damage from flood waters; and (3) the amount of insurance coverage provided.

In 2012, the NFIP limited the amount of insurance coverage for structural damage to residential homes to two hundred fifty thousand dollars ($250,000). Excess flood insurance coverage in amounts greater than two hundred fifty thousand dollars ($250,000) is available from private carriers such as Chubb. While Plaintiffs elected to insure their home under an all-risk policy in the amount of one million two hundred sixty five thousand dollars ($265,000) Plaintiffs saw it fit to limit their flood insurance coverage to two hundred fifty thousand dollars ($250,000). Plaintiffs paid a separate premium to a different carrier to obtain protection from flood damage risks. Plaintiffs knew that they were paying one thousand thirteen hundred forty one dollars ($1,341) more in insurance premiums to receive one million fifteen thousand six hundred dollars ($1,015,600) *less* in insurance coverage. To insure the property from flood damage, the NFIP was charging a flood insurance premium more than five times the amount of that Chubb was charging to provide all-risk homeowners insurance premium.

Conclusion

Based on the plain language of the exception contained within Plaintiffs insurance policies, the Court denies Plaintiffs' motion for summary judgment and grants Chubb's cross

motion for summary judgment. The Court finds that the floodwater exception unambiguously stated that there was no coverage for flood damage.



Craig L. Wellerson, P.J.Cv.