

UNITED STATES COURT OF APPEALS
for the Fifth Circuit

No. 94-40624
Summary Calendar

LESTER M. CUMMINGS and LINDA L. CUMMINGS,
d/b/a Hide-A-Way Boarding, Grooming, and Pet Supplies,
Plaintiffs-Appellants,

VERSUS

OMAHA PROPERTY and CASUALTY INSURANCE CO.,
Defendant-Appellee.

Appeal from the United States District Court
for the Western District of Louisiana
(3:92 CV 749)

March 22, 1995

Before DUHÉ, WIENER, and STEWART, Circuit Judges.

PER CURIAM:¹

Plaintiffs Mike and Linda Cummings sued Omaha Property and Casualty Insurance Co. for losses resulting from flood damage to a structure they owned in Monroe, Louisiana. They purchased a flood insurance policy (issued pursuant to the National Flood Insurance Act) on April 30, 1991, when flooding was occurring in the area. The district court denied the Plaintiffs' claim, finding no coverage for the flood damage they suffered. We affirm.

The policy does not cover a loss which was already in progress as of 12:01 a.m. of the first day of the policy term. See Standard

¹ Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

Flood Insurance Policy (SFIP), Pls.' Exs., p. 11, Art. III., "Losses Not Covered," B.1. The policy became effective on May 5, 1991. Omaha denied the claim on the basis that the loss was in progress before May 5.

The court found the loss-in-progress exclusion applicable for two alternative reasons. The property at issue consisted of a wood frame residence abutting a commercial dog kennel. The parties have stipulated that the kennel portion was flooded on May 3. By the afternoon of May 5, the flood waters breached a sandbag wall built around the dwelling portion of the structure, flooding that part of the structure. First, the court found that the kennel and dwelling were a single building, and held that the inundation of the kennel before the effective date excluded the loss to the entire structure. Second, the court found that water had seeped through the sandbags and come into contact with the slab of the dwelling before May 5 as well, disqualifying the loss to the dwelling. We find either holding is adequate to affirm.

I. Contact with the Dwelling.

Plaintiffs argue that mere contact with the slab of the dwelling is not the objective test for determining loss in progress because the policy covers only direct physical loss. The policy defines "Direct Physical Loss" to mean "any loss in the nature of actual loss of or physical damage, evidenced by physical changes." See SFIP, Pls.' Exs., p. 10, Art. II, "Definitions." The Federal Emergency Management Agency's summary of coverage under the SFIP explains that a loss is in progress, and therefore not covered, "when an insured building or insured contents first sustain damage by flood. This is when surface flood waters first make contact

with the insured building or contents, not when flood waters first enter the described premises." Pls.' Exs. p. 96 (emphasis added). Similarly, FEMA's Adjuster Manual reflects that a loss is considered to be in progress "when the flood waters first make contact with the insured building or contents." Def.'s Ex. 17 p. 69.

The court found Mr. Cummings' testimony that the water had not come into contact with the dwelling less credible than Mrs. Cummings' admission in deposition that water was between the sand bags and the slab. Finding neither clear error in the factual finding nor error in the legal conclusions, we will not disturb the court's ruling.

II. Single Structure

Alternatively, because the rising waters invaded and damaged the kennel portion of the structure before the effective date of the policy, Plaintiffs may not recover. The policy does not cover more than one building. See SFIP, definitions of "building" and "policy."

The court found that the kennel and dwelling are a single building structure. A building "must be separated from other buildings by intervening clear space or solid vertical load-bearing division walls." General Rules (published by FEMA), Def.'s Ex. 19, GR 8. The kennel and the dwelling are not separated by intervening clear space or a solid wall because they are connected by a doorway.

Accordingly, the inundation of the kennel before the effective date of the policy brings the entire structure into the "loss-in-progress" exclusion.

AFFIRMED.