

**STATE OF NEW HAMPSHIRE  
SUPREME COURT**

Docket No. 2021-0376

CC 145 Main, LLC. v. Union Mutual Fire Insurance Company

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**RULE 7 APPEAL FROM MOTION FOR SUMMARY JUDGMENT  
ORDER OF THE ROCKINGHAM COUNTY SUPERIOR COURT  
(Judge Martin P. Honigberg)**

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**BRIEF OF APPELLEE  
CC 145 MAIN LLC**

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## QUESTION PRESENTED

The crux of this case is the interpretation of two words, ‘sewer’ and ‘drain’, neither of which are defined in the subject insurance policy. Appellant challenges Rockingham County Superior Court’s finding that these words, as used in the insurance policy in question, were ambiguous. New Hampshire law is clear, “where disputed terms are not defined in the policy, we construe them in context, and in the light of what a more than casual reading of the policy would reveal to an ordinarily intelligent insured.” *Mellin v. N. Sec. Ins. Co., Inc.*, 167 N.H. 544, 547 (2015) (quoting *Great Am. Dining v. Philadelphia Indem. Ins. Co.*, 164 N.H. 612, 625, (2013)). When construing insurance policy terms, New Hampshire courts consider the reasonable policyholder’s expectation of coverage. See *Barking Dog, LTD. v Citizens Insurance Company of America* 164 N.H. 80 at 86. “If more than one reasonable interpretation is possible, and an interpretation provides coverage, the policy contains an ambiguity and will be construed against the insurer.” *Great Am. Dining, Inc.*, 164 N.H. 612, 616 (2013). In light of the forgoing, the Supreme Court should affirm the Rockingham County Superior Court’s Order.

## STATEMENT OF THE CASE AND STATEMENT OF FACTS

Appellant, Union Mutual Fire Insurance Company (“Union Mutual”) has, throughout the course of this matter, focused almost exclusively on small excerpts from the subject insurance policy’s lengthy list of exclusions from coverage - - excerpts containing the words sewer and drain, words not defined in the subject policy. Small excerpts from a rather lengthy document - - a policy of BusinessOwners insurance purchased from Union Mutual by the Appellee CC 145 Main LLC a New Hampshire limited liability company (“145 Main”) which is 105 pages long (the “Policy”). Small excerpts separated from the context in which they are used.

For example, in its Motion for Summary Judgement below Union Mutual, reduced its recitation of the exclusion to coverage it relied on in denying 145 Main’s claim to ten lines of text. Just ten lines, when the exclusion section of the Policy fills six full double columned single spaced 8 point font pages of exclusions.

Yet it is clear that “where disputed terms are not defined in the policy, we construe them in context, and in the light of what a more than casual reading of the policy would reveal to an ordinarily intelligent insured.” *Mellin v. N. Sec. Ins. Co., Inc.*, 167 N.H. 544, 547.

While Union Mutual’s Brief is accurate when, on page 8, under Section III, it states “**There were no disputes of material fact...**”, that same brief fails to mention important material facts in this case - - material facts that the Trial Court had before it in the pleadings including (a) “Plaintiff’s Amended Complaint For Declaratory Judgement”, the (b) “Statement of Material Facts and Response Thereto” filed with the Trial Court on May 25, 2021 and (c) the “Plaintiff’s Surreply In Opposition To Defendant’s Motion For Summary Judgement and In Further Support of Its Cross Motion For Summary Judgement.” filed with the Trial Court on June 9, 2021 (all of which are set forth in the Addendum hereto) in which the facts relating to 145 Main’s Insurance Claim were made clear.

## 1. Chronology of 145 Main's Insurance Claim.

On November 11, 2020 145 Main's property, a seven unit apartment building located at 145 Main Street, Newmarket, New Hampshire (the "Premises"), was damaged by water. 145 Main timely filed a claim under its insurance policy with Union Mutual, a policy written on Insurance Services Office, Inc. ("ISO") form BP 00 03 01 10, a standard form insurance policy used by many insurers (the "Claim"). The policy provides '**all risk**' coverage including damage to property, debris removal, and business interruption.<sup>1</sup>

Union Mutual assigned Anderson Adjustment Company as the adjuster for the Claim (the "Adjuster"). On November 19, 2020 the Adjuster filed its "First Report To Union Mutual Fire Insurance Company" (the "First Report") which stated, "The loss is the result of water damage which occurred on November 11, 2020. On that date, **water leaked from the main sewer drainpipe...**" *In that report the Adjuster advised Union Mutual that coverage did exist under the Insurance Policy and recommended that Union Mutual reserve a total of \$25,000 to cover the Claim. (See "Plaintiff's Surreply In Opposition To Defendant's Motion For Summary Judgement and In Further Support of Its Cross Motion For Summary Judgement" at Exhibit 2.)*

Upon receipt of the First Report from the Adjuster, Mr. Jim Able, Northern NE and NY Property Claims Supervisor of Union Mutual, contacted the Adjuster and instructed Adjuster that coverage could not be provided for this loss as water that backs up, overflows, or is otherwise discharged from a sewer, drain, sump, sump pump or related equipment is specifically excluded under the Policy (the "Union Mutual Response").

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<sup>1</sup> *Drutz v. Scottsdale Ins. Co. (U.S. Dist. Ct., D.Md. 2012) 2012 WL 665984* held "An all risk policy, like the policy at issue here, "creates coverage of a type not ordinarily present under other types of insurance, and recovery is allowed for fortuitous losses unless the loss is excluded by a specific policy provision; the effect of such policy is to broaden coverage and a fortuitous event is one which, to the knowledge of the parties is dependent on chance." Couch on Insurance 3<sup>rd</sup> Section 148:50 (1998).

Following Union Mutual's Response Mr. Wade Anderson, President and Lead Adjuster of Adjuster<sup>2</sup>, sent Mr. Able an e-mail (the "Admission E-mail") which reads, in pertinent part, as follows: **"I don't believe this is a covered loss, but I have been told by both Andover Companies and Vermont Mutual that if the loss originates on premises they cover the resultant overflow."** Mr. Anderson went on to say. **"I was going based on past experience that I disagree with. I assume the other two companies ... maybe see it as vague?"** (See *"Plaintiff's Surreply In Opposition To Defendant's Motion For Summary Judgement and In Further Support of Its Cross Motion For Summary Judgement at Exhibit 4 and Mr. Anderson's deposition contained in "Statement of Material Facts and Response Thereto" at pgs. 31-23.*)

Thereafter the Adjuster made no further physical investigation of the incident or the Premises. Yet, on November 25, 2020, as instructed by Union Mutual, the Adjuster sent a letter to 145 Main denying coverage, (the "Denial Letter"), stating:

"Our investigation into the interior water damage to your seven (7) unit apartment building on November 13, 2020 revealed that the water damage was **caused by the overflow of a main sewer pipe** that was clogged with debris. We understand that your plumber, Mr. Harry Goldberg of HS Goldberg Plumbing & Mechanical, cleared a blockage in the sewer line between the second and third floors that caused the overflow. Based on the fact that water damage that is the result of water that backs up or overflows or is otherwise discharged from a sewer, drain, sump, sump pump or related equipment is specifically excluded under this policy of insurance, the Union Mutual Fire Insurance Company has determined that no coverage can be provided for this loss." (*emphasis added*).

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<sup>2</sup> Mr. Anderson, who founded Adjuster, has 30 years of experience as a claims adjuster, a position that requires that he hold an 'adjuster of property and casualty' license in New Hampshire. To obtain such license he was required to pass a State examination and to retain such license is required to achieve continuing education credits relating to the insurance business acceptable to the State and report them to the State every other year for renewal thereof. His company, the Adjuster, provides claim adjuster services for a number of insurance companies, including Union Mutual, the Andover Companies, Vermont Mutual, Norfolk and Dedham Group, MMG, and CAU. Mr. Anderson's company's revenue for adjustment services is earned only from the service he provides for insurance companies, as he is not licensed to provide adjustment services for people or companies other than insurance companies, most of which use standard ISO forms of insurance.

145 Main was completely surprised by the Denial Letter and the Adjuster's reliance on an exception based on the blockage of a "main sewer line". 145 Main knew that neither the blockage or the overflow had anything to do with a sewer line, but involved an internal plumbing pipe within the Premises. No reasonable definition of 'sewer line' would ever include a plumbing pipe running from the third floor down through the insured building to the basement, a plumbing pipe that was fully internal to the insured building and no part of which was located underground.

145 Main, through its insurance agent, immediately objected to the position taken in the Denial Letter, to no avail. In a December 14, 2020 letter to Union Mutual (the "Demand Letter") 145 Main's attorney demanded payment in the amount of \$25,000 to cover the insured loss and provided a legal analysis of why the cause of the loss set forth in the denial letter (*"the water damage was caused by the overflow of a main sewer pipe."*) was inapplicable to the Claim, as a plumbing line between the second and third floors could not, under any definition, be a "sewer line". (See December 14, 2020 Demand Letter set forth in the Addendum hereto)

On December 15, 2021, 145 Main's counsel sent a complaint to the State of New Hampshire's Insurance Department ("Complaint Letter"), a copy of which, per the Insurance Department's usual practice, was delivered to Union Mutual. (See December 15, 2020 Complaint Letter set forth in the Addendum hereto)

Notwithstanding RSA 417:4, "**Unfair Methods, Acts, and Practices Defined**" Section XV (a) (2)<sup>3</sup> and applicable regulations issued by the New Hampshire Insurance Department, Union Mutual failed to respond to its insured regarding the Demand Letter or the Complaint Letter. A full 30 days after the Demand Letter, on January 14, 2021, 145 Main, having had no

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<sup>3</sup> Which defines as an Unfair Practice "(2) Failing to acknowledge and act promptly upon communications with respect to claims arising under insurance policies."

response thereto, filed Plaintiff's Complaint for Declaratory Relief ("145 Main's Original Complaint").

The first indication that Union Mutual's position on the cause of the loss had significantly changed from that stated in the Denial Letter was found in Union Mutual's Answer to 145 Main's Original Complaint dated January 29, 2021. In its Answer Union Mutual for the first time asserted that *its denial of the Claim was based on the fact that the loss was caused by the overflow of a drain.*

Union Mutual's unannounced change in the basis of its denial of the claim required that 145 Main amend its complaint. (See "Plaintiff's Amended Complaint For Declaratory Judgement", set forth in the Addendum hereto)

## **2. Definition of "Sewer" and "Drain".**

When seeking the applicable legal definition of the terms 'sewer' and 'drain' in a building, the obvious place to look is the building code applicable to the insured property. The insured property in question lies in the Town of Newmarket, NH which has adopted as its Building Code the State Building Code: the 2015 editions of the International Codes published by the International Code Council, specifically International Building Code 2015 (IBC) (the "Building Code"). Thus, the building code applicable to the property which is the subject of this case is both the municipal code and State code.<sup>4</sup>

Specifically, the Building Code defines the "Building Sewer" as follows: **"That part of the drainage system that extends from the end of the building drain and conveys its**

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<sup>4</sup> See International Building Code 2015 (IBC) at Section 1.4, A Definitions, Subsections 6 and 7 which define 'Building Sewer' and 'Building Drain'.

**discharge to a public sewer disposal system or other point of disposal.”**

The Building Code also defines the “Building Drain”. The definition reads as follows: **“The lowest piping that collects the discharge from all other drainage piping inside the house and extends 30 inches in developed length beyond the exterior walls and conveys the drainage to the building sewer.”**

Another obvious place to look for the applicable definition of ‘sewer’ or ‘drain’ would be other laws, ordinances and regulations applicable to the property in question. The Town of Newmarket Ordinance Governing Water and Wastewater into the Public Sewer System, was adopted by the Town in 2017, well before the policy in question was purchased. We refer the Court to a copy of the applicable portion of that Ordinance which is attached to the Statement of Material Facts and Response Thereto, but, due to clerical mistake, was included not as Exhibit 3, but follows Exhibit 2.

Similarly, the United States Environmental Protection Agency and States, in regulations promulgated under the Clean Water Act, and similar statutes and town ordinances, have established definitions of sewers and drains. N.H. is one such state.

**“NH RSA 147:8 Toilets; Drains.** – No person shall occupy, lease to any other person, or permit any other person to occupy, a building or any part of a building as a dwelling house, office, store, shop, theater, public hall, sleeping apartment or tourist cabin, unless such building shall have readily accessible adequate toilet and lavatory facilities, properly ventilated and constructed, and kept in proper sanitary condition; and *unless said building shall be provided with suitable drains or sewers, if there be one within 100 feet thereof*, and if not, for conveying it away underground or in some other manner that will not be offensive. The phrase “public sewer”, as used in this chapter, shall be understood to mean any sewer constructed and maintained by taxation, or any sewer which is open for general use upon the payment of a rental, license or other fee.”

The United States Environmental Agency has, in widely read press releases announcing the settlement of claims brought against New Hampshire municipalities, described how “drains”, although different from sewers, are public property which are used to separate stormwater runoff from sewage. The following is a quote from one such press release, a copy of which is attached to the Statement of Material Facts and Response Thereto as Exhibit 4:

*“BOSTON – July 13, 2020: In a settlement with the U.S. Environmental Protection Agency (EPA) and the State of New Hampshire, the City of Manchester, N.H., has agreed to implement a comprehensive set of corrective measures and improvements to the city’s sewer system that will result in significant reductions of sewage ... Manchester will design and construct a new 2.5 mile drain for Cemetery Brook from Mammoth Road to the Merrimack River to convey both the brook’s and storm drainage flows, ranging in size conceptually from 6-foot-wide by 5-foot-tall box culvert to 12-foot-wide by 10-foot-tall at the downstream terminus.”*

### **3. Burden of Proof.**

The New Hampshire Supreme Court has ruled that “Where disputed terms are not defined in the policy, **we construe them in context**, and in light of what a more than casual reading of the policy would reveal to an ordinary intelligent person.” *Mellin v. N. Sec. Ins. Co., Inc.*, 167 N.H. 544, 547 (2015). When construing insurance policy terms, New Hampshire courts consider the reasonable policyholder’s expectation of coverage. *Barking Dog v. Citizens Ins. Co. of Am.*, 164 N.H. 80, 83 (2012).

NH RSA 491:22-a reads as follows:

*“491:22-a Liability Coverage; Burden of Proof. – In any petition under RSA 491:22 to determine the coverage of a liability insurance policy, the burden of proof concerning the coverage shall be upon the insurer whether he institutes the petition or whether the claimant asserting the coverage institutes the petition.”*

Thus, the burden of proof as to the meaning of the terms contained in the policy lies with Union Mutual. **“If more than one reasonable interpretation is possible, and an interpretation provides coverage, the policy contains an ambiguity and will be construed**

**against the insurer.”** *Great Am. Dining, Inc. v. Philadelphia Indem. Ins. Co.*, 164 N.H. 612.

(See also *Brickly v. Progressive N. Ins. Co.*, 160 N.H. 625, 627 (2010)).

## SUMMARY OF THE ARGUMENT

145 Main respectfully requests that this Court uphold and affirm the lower court's order. As stated above, the crux of this case is the interpretation of two words, 'sewer' and 'drain'. Union Mutual appears to have surrendered its original position, that the applicable exclusion of coverage is based on the water damage at the Premises arising from the backup of a 'sewer', and is now requesting that this Court reverse the lower court's Order that Union Mutual's use of the word 'drain' in the exclusion creates an ambiguity that must be resolved in favor of the insured. New Hampshire law is clear, **if more than one reasonable interpretation is possible, and an interpretation provides coverage, the policy contains an ambiguity and will be construed against the insurer.**

The word "drain" is what a linguist would call a 'semantic ambiguity' or a word that has two or more meanings. 'Drain' can be used as a verb (*drain the swamp*), a noun (*Manchester will design and construct a new 2.5 mile **drain***) or an adjective (*drain pipe*). As discussed above, the noun drain also has more than two meanings. The word as used by the EPA describes a drain as a pipe or culvert used to convey stormwater. **NH RSA 147:8** refers to it as a device used "*for conveying waste water and sewage away from the premises into some public sewer.*" The Building Code for the Town and State in which the Premises are located defines it as, "*The lowest piping that collects the discharge from all other drainage piping inside the house and extends 30 inches in developed length beyond the exterior walls and conveys the drainage to the building sewer.*"

Union Mutual obviously recognizes the semantic ambiguity inherent in the word drain. At the very beginning of its Brief (See "Questions Presented", Section 1) it adds adds the modifiers *toilet and shower* when addressing what it is referring to as a drain - -

placing the word in context to make its meaning understandable. Such modifiers were not used in the insurance policy in question.

As will be described below, courts in other jurisdictions have dealt with the use of semantic ambiguity in insurance exclusions identical or similar to the use of the word 'drain' in the exclusion which is the subject of the present litigation. Here in New Hampshire the black letter law is crystal clear and the Rockingham Superior Court correctly applied it.

Where disputed terms are not defined in the policy, **we construe them in context**, and in light of what a more than casual reading of the policy would reveal to an ordinary intelligent person. **If more than one reasonable interpretation is possible, and an interpretation provides coverage, the policy contains an ambiguity and will be construed against the insurer."**

## ARGUMENT

### I. **The use of the word ‘drain’ in the exclusion relied on by Union Mutual is ambiguous and must be read in context to be properly understood.**

In the present case the testimony of Union Mutual’s agent and representative, the Adjuster, in the Admission E-mail admits the existence of the ambiguity. The pertinent part of the Admission E-mail reads:

**“I have been told by both Andover Companies and Vermont Mutual that if the loss originates on premises they cover the resultant overflow.” I was going based on past experience that I disagree with. I assume the other two companies ... maybe see it as vague?”**

Vague is a common synonym for ambiguous.

Courts and insurance companies across the nation have recognized the ambiguity of the terms ‘sewer’ and ‘drain’ as used in the applicable exclusion. As stated above, the word ‘drain’ is in and of itself a semantic ambiguity or a word with two or more meanings.<sup>5</sup>

Courts and insurance companies have also established the meaning of the word ‘drain’ as used in the exclusion. As the Admission E-mail states, two large regional insurance companies, both of which are licensed in New Hampshire<sup>6</sup>, have interpreted the word, in context, to require that **“if the loss originates on premises they cover the resultant overflow.”**

This position comports with New Hampshire law which clearly holds that where disputed terms are not defined in the policy, **we construe them in context**, and in light of what a more than casual reading of the policy would reveal to an ordinary intelligent person. **If more than one reasonable interpretation is possible, and an interpretation provides**

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<sup>5</sup> See “MERLIN Property Insurance Coverage Law Blog” dated February 13, 2019 (set forth in the Addendum hereto) which was part of Union Mutual’s Claim File obtained by Plaintiff during discovery.)

<sup>6</sup> Vermont Mutual Insurance Company is licensed in N.H. Andover Companies, a holding company, conducts its insurance business through subsidiaries. Its licensed subsidiaries in N.H. are Merrimack Mutual Insurance Company and Bay State Insurance Company.

**coverage, the policy contains an ambiguity and will be construed against the insurer.**

When seeking to give meaning to this ambiguous word, what should a “reasonable policyholder’s expectation of coverage” be? Particularly when the term “drain” is contained in an insurance policy exception which deals exclusively with potential major external events? The answer can be found by reading the exclusion in the context of the full Water Exclusion, which reads as follows:

**B. “Exclusions**

*We 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. These exclusions apply whether or not the loss event results in widespread damage or affects a substantial area.*

**g. Water**

- (1) Flood, surface water, waves (including tidal and tsunami), tides, tidal water, overflow of any body of water, or spray from any of these, all whether or not driving by wind (including storm surge);
- (2) Mudslide or mudflow;
- (3) Water that backs up or overflows or is otherwise discharged from a sewer, drain, sump, sump pump or related equipment;
- (4) Water under the ground surface pressing on, or flowing or seeping through:
  - (a) Foundations, walls, floors or paved surfaces;
  - (b) Basements, whether paved or not; or
  - (c) Doors windows or other openings; or
- (5) Waterborne material carried or otherwise moved by any of the water referred to in Paragraph (1), (3), or (4), or material carried or otherwise moved by mudslide or mudflow.

*This exclusion applies regardless of whether any of the above, in Paragraphs (1) through (5), is caused by and act of nature or otherwise caused. An example of a situation to which this exclusion applies is the situation where a dam, levee, seawall or other boundary or containment system fails in whole or in part, for any reason, to contain the water.*

*But if any of the above, in Paragraph (1) through (5) results in fire, explosion or sprinkler leakage, we will pay for the loss or damage caused by that fire, explosion or sprinkler leakage.”*

The exclusions contained in this section of the policy all have one thing in common, they reflect that there is no coverage for water damage to an insured property which is caused by certain outside forces unrelated to the property’s plumbing system. Further, this specific

exclusion follows a listing of six other exclusions; exclusions which are clearly described by the captions they bear:

1. **Ordinance or Law,**
2. **Earth Movement,**
3. **Government Action,**
4. **Nuclear Hazard,**
5. **Power Failure.**
6. **War and Military Action.**

Each and every one of these exclusions relate to actions or causes occurring unrelated to the insured property itself. (See *Mr. Anderson's deposition contained in "Statement of Material Facts and Response Thereto"* at pg.s 22-30) Reading the subject exclusion in the context of so many similar exclusions, all excluding off-premised causes or actions, creates a strong context for the interpretation of the term 'drain' – a context that leads to only one logical conclusion. The drains referenced in the exclusion must be off-premises.

Many U.S jurisdictions have acknowledged that the exclusionary language in question here is ambiguous and not applicable to interior plumbing. They have recognized the distinction between damage caused by a blockage within a 'plumbing system' and damage resulting from a backup in a sewer or drain i.e. emanating from off the premises.

In *Hix Brix v. AmGuard Ins. Co., No. 600249/18 (N.Y. Sup. Ct., Nassau County Sept. 27, 2018)* the New York Supreme Court interpreted a business owners policy (like that before this Court the in the present case) which contained identical exclusion language:

***B. Exclusions***

***g. Water***

***(3) Water that backs up or overflows or is otherwise discharged from a sewer, drain, sump, sump pump, or related equipment.***

The insured in that case argued that the pipe that was clogged was not a sewer pipe, nor are toilet and shower drains the type of drain referred to in the exclusion (as is shown by the

context of the exclusion) but part of the interior plumbing of the Insured Property.

The insured's contention was that if the damage is caused by a blockage on the premises within the 'plumbing system' it is a covered loss and that the sewer and drain exclusion at issue only applies to backups or overflows that emanate from off the insured's premises that force water and water-borne materials up into the insured's plumbing system.

The *Hix Brix* court ruled that the language excluding damage from "sewer, drain, sump pump or related equipment" is not specific and clear with respect to internal plumbing and that AmGuard did not establish that the pertinent language is subject to no other reasonable interpretation. For example, the *Hix Brix* court ruled, "the leak may have been caused from an internal building pipe in which case it is not backup from a sewer, drain, sump pump or related equipment."

In *Pichel v. Dryden Mutual Insurance Company* 117 AD 3<sup>rd</sup> 1267 (N.Y. App. 3<sup>rd</sup> Dept. 2014) the court ruled that an insurance policy containing a similar exclusion to that in question in this case was not a valid reason to deny coverage and stated: "[T]hat water damage caused by a backup/overflow that originates from a pipe or clogged drain located within the insured's property line come from the insured's plumbing system and is covered by the policy; conversely, if the cause of the backup/overflow is from outside the insured's property boundaries – such as a clogged municipal sewer that forces water from outside the insured's plumbing system to overflow – the sewer or drain exclusion is applicable."

In *Old Dominion Ins. Co. v. Elysee, Inc.*, 601 So. 2<sup>nd</sup> 1243 (Fla. 1<sup>st</sup> DCA), the Supreme Court of Florida clearly articulated the common understanding of the terms in question in the present case:

*"The common understanding of the words "sewer" and "drain" is that they describe devices which carry water and sewage away from property. It is also understood that a plumbing blockage which contains waste from another premises must be a backup from a "sewer" or "drain." Webster's New World Dictionary, Third College Edition (1988) defines the words as follows:*

*Sewer — a pipe or drain usually underground, used to carry off water and waste matter.*

*Drain — channel or pipe for carrying off water, sewage, etc.*

*The cases cited by appellant indicate that the general understanding in the case law is that a sewer or drain begins at the appellant's property line. Hallsted v. Blue Mountain Convalescent Center, Inc., 23 Wn. App. 349, 595 P.2d 574 (1979); Jackson v. American Mut. Fire Ins. Co., 299 F. Supp. 151 (M.D.N.C. 1968), affirmed 410 F.2d 395 (4th Cir. 1969); Haines v. United Security Ins. Co., 43 Colo. App. 276, 602 P.2d 901 (1979)."*

In *Cameron v. Scottsdale Ins. Co.* 294 So. 2d 362 (Fla. Dist. Ct. App. 1974) the court held that an exclusion for Water that backs up or overflows, or is otherwise discharged from a sewer, drain, sump, sump pump or related equipment only applies if the water originated outside of the insured premises 'plumbing system'. The Cameron court went on to state:

"Exceptions to coverage in an insurance policy are strictly construed against the insurer and any doubt or ambiguity is resolved in favor of the insured. See *Sabella v. Wisler*, 59 Cal.2d 21, 27 Cal.Rptr. 689, 377 P.2d 889 and *World Fire and Marine Insurance Company v. Carolina Mills Distributing Co.*, 8 Cir., 169 F.2d 826. See also *Harris v. Carolina Insurance Company, Fla.*, 233 So.2d 833; *Continental Casualty Insurance Co. v. Gold, Fla.*, 194 So.2d 272 and *Sapp v. LaViolette, Fla.App.*, 258 So.2d 507 (1st DCA) for the proposition that ambiguities in policy provisions are construed in favor of the insured."

*See also CHEETHAM v. SOUTHERN OAK INSURANCE COMPANY* 114 So. 3<sup>rd</sup> 257 (Fla. Dist. App. 2013).

**II. The trial court did not force an ambiguity regarding the meaning of the undefined word 'drain' by reading the subject exclusion in context.**

It was not only appropriate that the trial court sought to interpret the undefined term 'drain' in the context of the full exclusion, the trial court was obliged to do so under applicable New Hampshire law.

As stated in the trial court's order:

"In this case, the Court must interpret the language used in an exclusion. Although insurers are free to contractually limit the extent of their liability provided that they violate no

statutory provision by doing so ... limitations must be stated in such clear and unambiguous terms ... that the insured can have no reasonable expectation that coverage exists. “For exclusionary language to be considered clear and unambiguous, two parties cannot reasonably disagree about its meaning.” *Mellin v. N. Sec. Ins. Co. Inc.*, 167 N.H. 544, 547 (2015). Thus, when an insurance policy’s language is ambiguous and one interpretation favors coverage, we construe the policy in the insureds’ favor and against the insurer.”

As shown above, the use of the undefined word ‘drain’, an inherent semantic ambiguity, in the subject exclusion, in light of the many differing meanings of that word, required that the trial court look to the context in which the word is used. This Court has ruled that “Where disputed terms are not defined in the policy, **we construe them in context**, and in light of what a more than casual reading of the policy would reveal to an ordinary intelligent person.” *Mellin v. N. Sec. Ins. Co., Inc.*, 167 N.H. 544, 547 (2015)”.

**III. Union Mutual was aware of the ambiguity contained in the exclusion in question when denying 145 Main’s Claim and knew the difference between internal plumbing and the ‘drains’ included in the exclusion.**

Plaintiff during discovery uncovered in Union Mutual’s Claim file two documents that clearly indicate that sister Courts had ruled that the term ‘drain’ as used in the subject exclusion was ambiguous. First was the “MERLIN Property Insurance Coverage Law Blog” dated February 13, 2019 (well before the subject policy was sold to the insured) captioned “**Court Rules Sewer Backup Clause Does Not Include Internal Plumbing**” and citing *Pichel v. Dryden Mutual Insurance Company (supra)* and *Hix Brix v. AmGuard Ins. Co. (supra)*, a copy of which is set forth in the Addendum hereto)

On June 2, 2020, well before the claim in question was filed, Tom Able, the Northern NE and NY Property Claims Supervisor of Union Mutual, circulated an e-mail to his

colleagues at Union Mutual (the “Able E-mail”)<sup>7</sup> containing an opinion from the Property & Liability Resource Bureau which contained the following quotes:

*“Courts have tended toward coverage in similar cases.”*

*In old Dominion Ins. Co. v. Elysee, Inc. [citation omitted] the court ruled that the terms ‘sewer’ and ‘drain’ describe, in common understanding, devices which carry water and sewage away from the property, and the general understanding in caselaw is that a sewer or drain begins at the insured’s property line.*

*Carmerson v. Scottsdale Ins. Co. [citation omitted] held that an exclusion for Water that backs up or overflows, or is otherwise discharged from a sewer, drain, sump, sump pump of related equipment only applies if the water originated outside of the insured premises ‘plumbing system’.*”

In the Admission E-Mail, Mr. Wade Anderson, President and Lead Adjuster of Adjuster clearly advised Union Mutual that other insurance companies doing business in New Hampshire covered claims such as that presently before this Court: **“.... I have been told by both Andover Companies and Vermont Mutual that if the loss originates on premises they cover the resultant overflow.”** Mr. Anderson went on to say. **“I assume the other two companies ... maybe see it as vague?”**

In the Complaint Letter 145 Main’s counsel made clear that:

“Nowhere in the exclusion on which Union Mutual’s denial of coverage is based does the word “plumbing” occur. However, the word “plumbing” does appear in an exclusion for “frozen plumbing”. Notwithstanding the fact that Union Mutual is clearly aware of the distinction between the terms “plumbing” and “sewer”, the plumbing being inside the Insured Property and sewer being off premises, Union Mutual does not include the word “plumbing” in the exclusion on which Union Mutual based its denial of coverage.”

---

<sup>7</sup> See Able E-mail which is attached as an Addendum hereto and was taken from Union Mutual’s Claim file and produced during discovery.

Had Union Mutual intended to include interior plumbing in the subject exclusion, it could have easily edited the standard ISO form language used in the policy it sold to 145 Main to include modifiers to the term 'drain' to make clear that in covered overflows from plumbing in the premises. **But it did not.**

Nowhere in the subject *exclusion* does the word "plumbing" occur. However, the word "plumbing" does appear in the subject policy, in an exclusion for "frozen plumbing".

Notwithstanding the fact that Union Mutual is clearly aware of the distinction between the terms "plumbing" and "drain", the plumbing being inside the Insured Property and drain being off premises, Union Mutual did not include the word "plumbing" in the exclusion on which Union Mutual based its denial of coverage. Union Mutual's failure to include the term "plumbing" or a similar modifier in the exclusion makes clear that 145 Main's claim is a covered loss.



## ADDENDUM

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STATE OF NEW HAMPSHIRE  
ROCKINGHAM COUNTY, SS.

SUPERIOR COURT

CC 145 MAIN LLC  
PO Box 571  
Greenland, NH 03840

v.

Union Mutual Fire Insurance Company  
139 State Street  
P.O. Box 158  
Montpelier, VT 05601

Docket No. 218-2021-CV-00042

**PLAINTIFF'S AMENDED COMPLAINT FOR DECLARATORY RELIEF**

NOW COMES Plaintiff, CC 145 Main LLC (the "Plaintiff"), by and through its attorneys, Stebbins, Lazos, and Van Der Beken PLLC, and submits the following Complaint against Union Mutual Fire Insurance Company ("Union Mutual" or "Defendant"), seeking a declaration that the Insurance Policy issued to Plaintiff by Defendant covers Plaintiff's losses arising out of clogged interior plumbing in the Plaintiff's apartment building located at 145 Main Street, Newmarket, NH (the "Insured Property"). In support thereof, Plaintiff states as follows:

**I.**

**Parties, Jurisdiction and Venue**

1. Plaintiff is a New Hampshire limited liability company with a principal and sole place of business at 47 Park Ave., Greenland, Rockingham County, New Hampshire.
2. Defendant Union Mutual is a Vermont corporation with a principal place of business at 139 STATE STREET, MONTPELIER, VT, 05602, and holds itself out as a regional insurance company offering insurance for individuals and businesses in New England and New York.

3. This Court's exercise of personal jurisdiction over Union Mutual is proper because Union Mutual, which is licensed to do business in New Hampshire by the New Hampshire Insurance Department and regularly conducts business in New Hampshire, solicited and sold the subject Insurance Policy to Plaintiff in New Hampshire insuring a property located in Rockingham County, New Hampshire.

4. The Court has subject matter jurisdiction over the matter pursuant to RSA 491:7, RSA 491:22, and the Court's general equity jurisdiction.

5. Venue is proper in this Court pursuant to RSA 507:9.

## II.

### FACTUAL BACKGROUND

6. Plaintiff owns and operates the Insured Property, a seven-unit apartment building located at 145 Main Street, Newmarket, NH, for which it has purchased from Union Mutual a "Business Owner's" insurance policy: Policy Number BOP0172629-02 (the "Insurance Policy").

7. Plaintiff paid \$5,200 annually in premiums to Defendant for the Insurance Policy which provides in excess of \$530,000 in coverage for the Insured Property

8. The Union Mutual Fire Insurance web site advertises that its "Business Owners Policy" provides the following basic coverage:

- Replacement cost coverage for Buildings & Owned Business Contents
- Loss of Business Income
- Debris Removal
- Equipment Breakdown

9. On November 11, 2020 the Insured Property suffered significant damage caused by a clogged interior plumbing line. Mr. Harry Goldberg of HS Goldberg Plumbing & Mechanical, cleared the blockage in the interior plumbing line. The damage to the Insured

Building required significant cleaning, remediation, repair and replacement. It also caused the tenants to have to move out of their apartments during which time their rents payments were abated. These losses are covered under the Insurance Policy that Plaintiffs purchased from Defendant, and the Plaintiff, through its insurance agent, filed a claim under the Insurance Policy.

10. On November 12, 2020, an agent of the Defendant issued an acknowledgement of receipt the Plaintiff's claim.

11. On November 13, the Defendant's designated adjuster made an inspection of the Insured Premises.

12. On November 25, 2020, the adjuster, in a letter to Plaintiff denying coverage, (the "denial letter"), stated:

"Our investigation into the interior water damage to your seven (7) unit apartment building on November 13, 2020 revealed that the water damage was caused by the overflow of a main sewer pipe that was clogged with debris. We understand that your plumber, Mr. Harry Goldberg of HS Goldberg Plumbing & Mechanical, cleared a blockage in the sewer line between the second and third floors that caused the overflow. Based on the fact that water damage that is the result of water that backs up or overflows or is otherwise discharged from a sewer, drain, sump, sump pump or related equipment is specifically excluded under this policy of insurance, the Union Mutual Fire Insurance Company has determined that no coverage can be provided for this loss." (*emphasis added*).

13. The exclusion to coverage set forth the denial letter was set forth in Section 1 B, subsection 3 (g) (3) of the Insurance Policy and reads as follows:

***B. Exclusions***

*We 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. These exclusions apply whether or not the loss event results in widespread damage or affects a substantial area.*

***g. Water***

- (1) Flood, surface water, waves (including tidal and tsunami), tides, tidal water, overflow of any body of water, or spray from any of these, all whether or not driving by wind (including storm surge);*

- (2) *Mudslide or mudflow;*
- (3) *Water that backs up or overflows or is otherwise discharged from a sewer, drain, sump, sump pump or related equipment;*
- (4) *Water under the ground surface pressing on, or flowing or seeping through:*
  - (a) *Foundations, walls, floors or paved surfaces;*
  - (b) *Basements, whether paved or not; or*
  - (c) *Doors windows or other openings; or*
- (5) *Waterborne material carried or otherwise moved by any of the water referred to in Paragraph (1), (3), or (4), or material carried or otherwise moved by mudslide or mudflow.*

*This exclusion applies regardless of whether any of the above, in Paragraphs (1) through (5), is caused by and act of nature or otherwise caused. An example of a situation to which this exclusion applies is the situation where a dam, levee, seawall or other boundary or containment system fails in whole or in part, for any reason, to contain the water.*

*But if any of the above, in Paragraph (1) through (5) results in fire, explosion or sprinkler leakage, we will pay for the loss or damage caused by that fire, explosion or sprinkler leakage.”*

14. Defendant’s coverage defense is contrary the terms of the Insured Policy as courts across the country have ruled that, “The language excluding damage from "sewer, drain, sump, sump pump or related equipment" is not specific and clear with respect to internal plumbing.” (Hix Brix v. AmGuard Ins. Co., No. 600249/18 (N.Y. Sup. Ct., Nassau County Sept. 27, 2018)  
The pipe that was clogged was not a sewer pipe, nor are toilet and shower drains the type of drain referred to in the exclusion (as is shown by the context of the exclusion) but part of the interior plumbing of the Insured Property.

15. Although there are no cases on point in New Hampshire regarding this specific exclusion, Courts across the country have acknowledged that the exclusionary language in question here is ambiguous and not applicable to interior plumbing. (see Hallsted v Blue Mtn. Convalescent Ctr., Inc., 23 Wash App 349, 351-352, 595 P2d 574, 575 [1979], review denied 92 Wn2d 1023 [1979]; Jackson v American Mut. Fire Ins. Co., 299 F Supp 151, 156 [MD NC 1968], affd 410 F2d 395 [4th Cir 1969]; Cheetham v Southern Oak Ins. Co., 114 So 3d 257, 262-263 [Fla 2013], review

denied 129 So 3d 1069 [2013]; Kozlowski v Penn Mut. Ins. Co., 295 Pa Super 141, 146, 441 A2d 388 [1982]; and Haines v United Sec. Ins. Co., 43 Colo App 276, 277-278, 602 P2d 901 [1979]).

16. In New Hampshire, the “interpretation of insurance policy language is ultimately an issue of law for this court to decide.” *Mellin v. N. Sec. Ins. Co., Inc.*, 167 N.H. 544, 547 (2015) (quoting *Amica Mut. Ins. Co. v. Mutrie*, 167 N.H. 108, 111 (2014)). “Policy terms are construed objectively; and where the terms are clear and unambiguous, we accord the language its natural and ordinary meaning.” *Mellin*, 167 N.H. at 547 (quoting *Barking Dog v. Citizens Ins. Co. of Am.*, 164 N.H. 80, 83 (2012)). “Where disputed terms are not defined in the policy, we construe them in context, and in the light of what a more than casual reading of the policy would reveal to an ordinarily intelligent insured.” *Mellin*, 167 N.H. at 547 (quoting *Great Am. Dining v. Philadelphia Indem. Ins. Co.*, 164 N.H. 612, 625, (2013)). When construing insurance policy terms, New Hampshire courts consider the reasonable policyholder’s expectation of coverage. *See Barking Dog*, 164 N.H. at 86 (“Simply put, a reasonable layperson would not understand that the additional coverage he paid for does not actually provide such coverage.”). “If more than one reasonable interpretation is possible, and an interpretation provides coverage, the policy contains an ambiguity and will be construed against the insurer.” *Great Am. Dining, Inc. v. Philadelphia Indem. Ins. Co.*, 164 N.H. 612, 616 (2013) (internal quotation omitted).

17. In a declaratory judgment action to determine first-party insurance coverage, the burden is on the insurance company to establish that a claim is not covered, regardless of who brings the lawsuit. *See RSA 491:22-a; Andrews v. Nationwide Mut. Ins. Co.*, 124 N.H. 1148, 152 (1983).

18. Merriam-Webster Dictionary defines the word “sewer” as follows; “*An artificial usually subterranean conduit to carry off sewage and sometimes surface water.*”

19. Macmillan Dictionary defines “sewer” as “*An underground pipe or passageway*

*that carries sewage.”*

20. The Cambridge Dictionary defines “sewer” as “*A large pipe, usually underground, that is used for carrying waste water and human waste away from buildings to a place where they can be safely gotten rid of.*”

21. Union Mutual’s adjuster, in the denial letter, stated that “a blockage in the *sewer* line between the second and third floors that caused the overflow.” In fact, the plumbing line in question ran through the interior of the building from the third floor to ground level, and at no point was outside of the building or underground.

22. The use of the word drain, in the context of an exclusion dealing with waves (including tidal and tsunami), mudslides, mud flows, water under the ground surface pressing on or flowing or seeping through foundations and basements ..., all sources of water coming from a building’s exterior, does not include interior plumbing sources such as toilets and showers.

23. Nowhere in the exclusion on which Union Mutual’s denial of coverage does the word “plumbing” occur. However, the word “plumbing” does appear in an exclusion for “frozen plumbing”. Notwithstanding the fact that Union Mutual is clearly aware of the distinction between the terms “plumbing” and “sewers and drains” (the plumbing being inside the Insured Property and sewers and drains being off premises) Union Mutual it does not include the word “plumbing” in the exclusion on which Union Mutual based its denial of coverage. Union Mutual’s failure to include the term “plumbing” in the exclusion in question, clearly implies that the backup of water through Plaintiff’s internal plumbing system is a covered loss.

24. Plaintiff seeks a judicial declaration by the Court, pursuant to RSA § 491:22, that Defendant has a duty to cover Plaintiffs claims under the Insurance Policy for Plaintiffs’ property damage, debris removal and business interruption losses.

25. Plaintiff is entitled to court costs and reasonable attorneys' fees incurred in bringing this action to determine coverage under the Policies, pursuant to RSA § 491:22-b.

WHEREFORE, Plaintiff, CC 145 Main LLC, requests that this Honorable Court:

- A. Order that the Section B 3 (g) (3) exclusion contained in the Insurance Policy does not apply to Plaintiff's claim;
- B. Award Plaintiff its attorney's fees and cost of prosecuting this litigation, pursuant to RSA § 491:22-b and the New Hampshire common law concerning the litigation of matters to which there is no reasonable defense, Harkeem v. Adams, 117 N.H. 687, 690-91 (1977); and
- C. For such further relief as the Court deems appropriate.

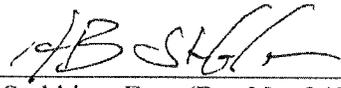
Respectfully submitted,

CC 45 Main LLC

By Its Attorneys,

Stebbins, Lazos & Van Der Beken PLLC

Dated: February 25, 2021

By:   
Henry Stebbins, Esq. (Bar No. 2429)  
889 Elm St. 6<sup>th</sup> Floor  
Manchester, NH 03101  
(603) 626-3300  
hstebbins@slvlaw.com

#### Certificate of Service

It is hereby certified that a copy of the foregoing AMENDED COMPLAINT FOR DECLARATORY RELIEF was served through the electronic filing system upon Gary Burt, Esquire.

/s/ Henry Stebbins  
Henry Stebbins

STATE OF NEW HAMPSHIRE

ROCKINGHAM, SS.

SUPERIOR COURT

Docket No. 218-2021-CV-00042

CC 145 Main LLC

v.

Union Mutual Fire Insurance Company

**STATEMENT OF MATERIAL FACTS  
AND REPOSE THERETO**

NOW COMES Union Mutual Fire Insurance Company (“Union Mutual”) by and through its attorneys, Primmer Piper Eggleston & Cramer PC, and pursuant to New Hampshire Superior Court Civil Rule 12(g), submits the following statement of material facts in support of its motion for summary judgment:

1. Plaintiff owns a seven-unit apartment building located at 145 Main Street, Newmarket, New Hampshire (the “Property”). See Plaintiff’s Amended Complaint for Declaratory Relief (“Amended Complaint,”), ¶ 6.

**1R. Plaintiff does not dispute.**

2. At all times relevant hereto, the Property was insured through a BusinessOwners policy of insurance with Policy Number BOP0172629-02 (the “Policy”) issued by Union Mutual. See Amended Complaint, ¶ 6; see generally Policy, attached hereto as Exhibit A.

**2R. Plaintiff does not dispute.**

3. The Policy provides coverage for “direct physical loss of or damage to Covered Property... resulting from any Covered Cause of Loss.” Policy, BP 00 03 01 10, p. 1.

**3R. Plaintiff does not dispute, but refers the Court to Plaintiff’s Statement of Additional Material Facts, Item 9, set forth below.**

4. The Policy defines Covered Causes of Loss as “[r]isks of direct physical loss unless the loss is a. Excluded in Paragraph B. Exclusions in Section I; or b. Limited in Paragraph 4. Limitations in Section I.” Policy, BP 00 03 01 10, p. 2.

**4R. Plaintiff does not dispute that the foregoing is a direct abstract from the Policy, but refers the Court to Plaintiff’s Statement of Additional Material Facts, Item 8 and set forth below relating to coverage provided by the Policy.**

5. The Policy contains an exclusion (the “Exclusion”) that provides:

**B. Exclusions**

1. We 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. These exclusions apply whether or not the loss event results in widespread damage or affects a substantial area.

...

**g. Water**

...

(3) Water that backs up or overflows or is otherwise discharged from a sewer, drain, sump, sump pump or related equipment;

Policy, BP 00 03 01 10, p. 15, 16.

**5R. Plaintiff does not dispute that this is a small portion of the exclusionary provisions of the Policy, but states that it must be read in context and refers the Court to Plaintiff’s Additional Material Facts, Items 8 and 15 set forth below.**

6. On November 11, 2020, the Property was damaged by water that backed up and overflowed from a toilet and shower drains in Units 6 and 7 of the Property (the “Incident”). See Amended Complaint, ¶¶ 9, 14; *see also* Answer to Amended Complaint, ¶ 27.

**6R. Plaintiff does not dispute that on November 11 the Property was**

damaged by water but does dispute the remainder of this paragraph, and refers the Court to Plaintiff's Additional Uncontested Facts, Items 19, 20, and 21 set forth below.

7. Units 6 and 7 are on the Property's third floor. *See* Answer to Amended Complaint, ¶ 27.

7R. Plaintiff does not dispute.

### PLAINTIFF'S STATEMENT OF ADDITIONAL MATERIAL FACTS

NOW COMES CC 145 MAIN LLC ("Plaintiff") by and through its attorneys, Stebbins Lazos & Van Der Beken PLLC, and, pursuant to New Hampshire Superior Court Civil Rule 12(g), submits the following statement of additional material facts in support of its objection to Union Mutual's Motion for Summary Judgment and Plaintiff's Cross Motion for Summary Judgment:

8. The Policy, a copy of which is attached to the Statement of Material Facts filed by Union Mutual as Exhibit A, is written on Insurance Services Office, Inc. ("ISO") form BP 00 03 01 10, a standard form of insurance policy used by a number of insurers.

9. The Policy provides all risk coverage including damage to property, debris removal, and business interruption. *See* Deposition of Wade Anderson at pages 15 through 32 attached as Exhibit 1.

10. Nowhere in the Policy are the terms "sewer" or "water" defined. *See* Exhibit A

11. Anderson Adjustment Company, Inc., which served as insurance adjuster for Union Mutual (the "Adjuster") regarding Plaintiff's Claim under the Policy (the "Claim"), filled a "First Report To: Union Mutual Fire Insurance Company Attn: Mr. Jim Able" on or about November 19, 2020 ("the "First Report"), a copy of which is attached hereto as Exhibit 2.

12. The First Report contained a recommendation that Union Mutual reserve a total of \$25,000 to cover the claimed loss and stated as follows: “The loss is the result of water damage which occurred on November 11, 2020. On that date, water leaked from a main sewer drainpipe ...” See Exhibit 2, First Report under captions “Recommended Reserves” and “Origin”, and Exhibit 1 Deposition of Wade Anderson at pages 15 through 33.

13. The First Report also contained the following recommendation: “We feel that no coverage can be provided to repair the main sewer drain pipe: however, **the ensuing water damage can be covered under this policy of insurance.**” See Exhibit 2, First Report under caption “Origin” at the last two lines, and Exhibit 1 Deposition of Wade Anderson at pages 15 through 33

14. The exclusion to coverage relied on by Union Mutual is Section 1 B 1 of the Policy Captioned EXCLUSIONS. The first seven exclusions listed in this Section are captioned: 1. **Ordinance or Law**, 2. **Earth Movement**, 3. **Government Action**, 4. **Nuclear Hazard**, 5. **Power Failure**. 6. **War and Military Action**, and 7. **Water**. See Exhibit A pgs. 15 – 16, and Exhibit 1 Deposition of Wade Anderson at pages 15 through 33.

15. The specific exclusion relied upon by Union Mutual in its denial of the Claim is Subsection (g) which reads (in full) as follows:

***g. Water***

- (1) Flood, surface water, waves (including tidal and tsunami), tides, tidal water, overflow of any body of water, or spray from any of these, all whether or not driving by wind (including storm surge);*
- (2) Mudslide or mudflow;*
- (3) Water that backs up or overflows or is otherwise discharged from a sewer, drain, sump, sump pump or related equipment;*
- (4) Water under the ground surface pressing on, or flowing or seeping through:*
  - (a) Foundations, walls, floors or paved surfaces;*
  - (b) Basements, whether paved or not; or*
  - (c) Doors windows or other openings; or*

(5) Waterborne material carried or otherwise moved by any of the water referred to in Paragraph (1), (3), or (4), or material carried or otherwise moved by mudslide or mudflow.

*This exclusion applies regardless of whether any of the above, in Paragraphs (1) through (5), is caused by an act of nature or otherwise caused. An example of a situation to which this exclusion applies is the situation where a dam, levee, seawall or other boundary or containment system fails in whole or in part, for any reason, to contain the water.*

*But if any of the above, in Paragraph (1) through (5) results in fire, explosion or sprinkler leakage, we will pay for the loss or damage caused by that fire, explosion or sprinkler leakage."*

See Exhibit A pg. 16

16. Wade Anderson, the President and Lead Adjuster of the Adjuster, when describing Subsection (g) testified as follows;

*"Q. We have reviewed this exclusion, this specific exclusion earlier in the deposition. And what we had looked at was exclusion G, Water. And that exclusion, exclusion G, had much more verbiage than is shown here, doesn't it?"*

*A. Yes.*

*Q. In fact, included at number 1 that we reviewed, which was the first part of the water exclusion, which was flood, surface water, waves, including tidal waves and tsunamis, tides, tidal water, overflow of any body of water or spray of any of these all of whether or not driven by wind, including storm surge; is that correct? Do you recall reading that?"*

*A. Yes.*

*Q. It included mudslide or mudflow; is that correct?"*

*A. Yes.*

*Q. It included water under the ground surface pressing upon or flowing or seeping through foundations, walls or paved surfaces, basements, whether paved or not, or doors, windows or other openings; is that correct?"*

*A. Yes.*

*Q. It excluded waterborne material carried or otherwise moved by any of the water referred to in*

*paragraph 1, 3 or 4, or materials carried otherwise, carried or otherwise moved by a mudslide or mudflow; is that correct?*

*A. Yes.*

*Q. And, generally, we discussed the fact that all of those exclusions, numbers 1, 2, 4 and 5 involved occurrences that occurred outside of the premises?*

*A. I don't recall discussing that at all.*

*.....*

*Q. Okay. You, just to review them for a minute, the first exclusion is flood, surface water, waves, including tidal waves and tsunamis, tides, tidal water, overflow of any body of water or spray from any of these all whether or not by wind, including storm surge. Now, would you say that those were events that were external to the premises?*

*A. Yes.*

*Q. Okay. Mudslide or mudflow. Would you say that that was an event that was external to the premises?*

*A. Yes.*

*Q. Water under the ground or surface pressing on or flowing or seeping through, and then it listed foundations, floor and doors. Is that cause external to the premises?*

*A. Yes.*

*Q. So my question is aren't the other exclusions contained in this section G external, based on actions external to the premises?*

*A. That was not your question; but, yes, I do agree with that."*

See Exhibit 1.

17. Upon receipt of the First Report from the Adjuster, Mr. Jim Able of Union Mutual contacted the Adjuster instructing Adjuster that coverage cannot be provided for this loss as water that backs up, overflows, or is otherwise discharged from a sewer, drain, sump, sump pump or related equipment is specifically excluded under the Policy. See Exhibit 1 Deposition of Wade Anderson at pages 32 through 33.

18. Upon receipt of the contact from Union Mutual's Jim Able, Mr. Wade Anderson, President and Lead Adjuster of Adjuster sent Mr. Able an e-mail which reads, in pertinent part, as follows: **"I don't believe this is a covered loss, but I have been told by both Andover Companies and Vermont Mutual that if the loss originates on premises they cover the resultant overflow."** Mr. Anderson went on to say. **"I was going based on past experience that I disagree with. I assume the other two companies ... maybe see it as vague?"** See Exhibit 4, E-mail from Wade Anderson to Jim Able dated November 24, 2020 at 8:04 AM.

19. The Town of Newmarket NH has adopted as its Building Code the State Building Code: the 2015 editions of the International Codes published by the International Code Council, specifically International Building Code 2015 (IPC) (the "Building Code"). Thus, the building code applicable to the property which is the subject of this case is both the municipal code and the State code. The Building Code contains definitions for the terms 'sewer' and 'drain'. Specifically, the Building Code defines the "Building Sewer" as follows:

**"That part of the drainage system that extends from the end of the building drain and conveys its discharge to a public sewer disposal system or other point of disposal."**

The Building Code also defines the “Building Drain”. The definition reads as follows:

**“The lowest piping that collects the discharge from all other drainage piping inside the house and extends 30 inches in developed length beyond the exterior walls and conveys the drainage to the building sewer.”**

20. The Town of Newmarket, New Hampshire’s “Ordinance Governing the Discharge of Waters and Wastewater Into the Public Sewer System” defines Building Drain as *“That part of the lowest horizontal piping of a drainage system which receives the discharge from soil, waste and other drainage piping of a drainage system inside the building and conveys it to the building sewer, beginning five (5) feet outside the inner face of the building wall.”* See Exhibit 3 at pg. 4 of 60.

21. The Town of Newmarket, New Hampshire “Ordinance Governing the Discharge of Waters and Wastewater Into the Public Sewer System” defines Building Sewer as *“The extension from the building drain to the public sewer or other place of disposal, also called house connection.”* See Exhibit 3 at pg. 4 of 60.

22. The term ‘drain’ as used by the United States Department of Environmental Protection means a system that will carry storm water from one place to another to decrease the amounts of water entering into municipal sewer systems thus improving water quality. See Exhibit 5 News Release from Region 01 of the EPA.

Respectively submitted,

CC 145 MAIN LLC

By Its Attorneys:

STEBBINS, LAZOS & VANDERBEKEN PLLC

Dated: April 15, 2021

/s/ Henry B. Stebbins

Henry B. Stebbins #2429

889 Elm St. 6<sup>th</sup> Floor

Manchester, NH 03101

(603) 627-3700

hstebbins@slvlaw.com

Certificate of Service

It is certified that a copy of the foregoing document was served through the court's electronic filing system on defendant's counsel and a Word version of this document was served on defendant's counsel via e-mail.

/s/ Henry B. Stebbins

Henry B. Stebbins

**EXHIBIT 1**



Deposition of:  
**Wade Anderson**

*May 13, 2021*

In the Matter of:

**CC 145 Main LLC Vs. Union Mutual  
Fire Insurance Company**

Veritext Legal Solutions  
800-734-5292 | [calendar-dmv@veritext.com](mailto:calendar-dmv@veritext.com) |

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STATE OF NEW HAMPSHIRE  
ROCKINGHAM, SS. SUPERIOR COURT  
DOCKET NO. 218-2021-CV-00042

CC 145 MAIN, LLC )  
 )  
VS. )  
 )  
UNION MUTUAL FIRE )  
INSURANCE COMPANY )

DEPOSITION OF WADE ANDERSON

Zoom deposition taken by agreement of counsel  
on Thursday, May 13, 2021, commencing at  
10:36 a.m.

Court Reporter: (Via Zoom)

Dawn L. Griffin-Smith  
Licensed Court Reporter  
NH LCR #108 (RSA-310-A)

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APPEARANCES

Representing the Plaintiff:

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STIPULATIONS

It is agreed that the deposition shall be taken in the first instance in stenotype and when transcribed may be used for all purposes for which depositions are competent under New Hampshire practice.

Notice, filing, caption and all other formalities are waived. All objections except as to form are reserved and may be taken in court at time of trial.

It is further agreed that if the deposition is not signed within 30 days, the signature of the deponent is waived.

1           your company relies exclusively on the business of  
2           insurance companies. You just adjust for insurance  
3           companies; is that correct?

4           A. That's correct.

5           Q. And none of your revenues come from adjusting for  
6           claimants?

7           A. Correct.

8           Q. Can you generally describe to me the ISO form we  
9           just reviewed, the coverage that's applicable under  
10          that, available under that policy?

11          A. I'm sorry. Can you repeat that question?

12          Q. Yes. Can you generally describe the policy's  
13          coverage?

14          A. I don't believe so, no.

15          Q. So the ISO BP 00 03 policy is not one that you're  
16          familiar generally with the coverage?

17          A. I am familiar with the coverage; I don't know what  
18          you mean by "generally".

19          Q. Okay.

20          A. I don't know what that means. I mean, there are  
21          policy coverages; there are exclusions; there are  
22          limitations.

23          Q. Right. So would you describe it as an all-risk

1 policy?

2 A. I believe it is, yes.

3 Q. Does it cover damage to property?

4 A. Yes.

5 Q. Does it cover debris removal?

6 A. Yes.

7 Q. Does it cover business interruption?

8 A. Yes.

9 Q. And have you adjusted claims under this type form  
10 of policy for Union Mutual other than the claim we  
11 are discussing?

12 A. I don't know.

13 Q. Okay. How about for Andover Companies?

14 A. I don't know.

15 Q. Vermont Mutual?

16 A. I don't know.

17 Q. Okay. So you don't remember specifically the  
18 claims, the forms involved in all of the claims  
19 that you've dealt with?

20 A. That's correct; right.

21 Q. When you do an adjustment, do you or does your  
22 company make an initial determination if the claim  
23 is covered?

1 A. Yes. We make a recommendation.

2 Q. A recommendation. And that's based on the terms of  
3 the specific policy in question?

4 A. Yes.

5 Q. As the lead underwriter or the president, do you  
6 assist your other adjustors in making those  
7 reviews?

8 A. Yes.

9 Q. When the adjustor in question, whether it's you or  
10 one of your employees, files a report with the  
11 company, do you review it before it goes to the  
12 company?

13 A. Yes, I do.

14 Q. So you've reviewed every one of your reports that  
15 go to Union Mutual, for example?

16 A. I don't know if it's every one, but most of them.

17 Q. It's your habit --

18 A. Yes.

19 Q. Thank you. In doing the report do you also suggest  
20 a reserve for the company?

21 A. Yes.

22 Q. And does Dan Paul of your company -- let me start  
23 over again. Is Dan Paul one of your adjustors?

1 A. Yes.

2 Q. And how long has he been with you?

3 A. Maybe about four years.

4 Q. Four years. And he's a licensed adjustor?

5 A. Yes.

6 Q. And he also has passed an exam -- we won't define  
7 which one -- to become an adjustor; is that  
8 correct?

9 A. Yes.

10 Q. And he takes continuing education courses on the  
11 required schedule?

12 A. Yes.

13 Q. Does Dan Paul follow the same process that you do  
14 when reporting to a company? Does he also make an  
15 additional recommendation about whether the claim  
16 is covered or not, and does he also make a  
17 recommendation about reserves?

18 A. Yes.

19 Q. Okay. So that's a company policy that you do that?

20 A. It's a requirement from our clients.

21 Q. Okay.

22 MR. STEBBINS: Could we see Exhibit 2,  
23 please.

1 Q. So let's go -- in the first section it says it's  
2 the First Report to Union Mutual Insurance Company,  
3 Attention Jim Abel; is that correct?

4 A. Yes.

5 Q. And it states that your company was assigned the  
6 adjustment on November 12, 2020; is that correct?

7 A. Yes.

8 Q. And it says, "Date Contacted". Can you tell me  
9 what that means?

10 A. It's the date we contacted the insured  
11 representative to schedule an appointment.

12 Q. Okay. And "Date Inspected," what does that mean?

13 A. That's the date the adjustor went out and inspected  
14 the loss.

15 Q. And so this is a first report on what insured?

16 A. CC 145 Main, LLC.

17 Q. Okay. And what is the policy number?

18 A. BOP 0172696.

19 Q. And what is the policy for?

20 A. BP 00 03, edition 01 10.

21 Q. And is that the same form that we were discussing  
22 earlier?

23 A. Yes.

1 Q. Okay. And the coverages provided are listed on  
2 this first report; is that correct?

3 A. Yes.

4 Q. And the recommended reserves are stated on this  
5 first report also; is that correct?

6 A. Yes.

7 Q. And the first reserve referenced is Coverage A.  
8 Can you tell me what that coverage is?

9 A. That is the building.

10 Q. Okay. So that's coverage to damage to the building  
11 and debris removal?

12 A. Yes.

13 Q. Okay. Coverage D is also referenced. And it says  
14 Business Income after that. And is that coverage  
15 for business interruption?

16 A. Yes.

17 Q. Now, can you tell me what the coverage recommended  
18 reserves are for each of those?

19 A. Coverage A was \$20,000. And Coverage D, or  
20 business income, was \$5,000.

21 Q. Okay. Then there is a statement that says  
22 "Origin". Could you read that for me, Mr.  
23 Anderson?

1       A. "Loss is the result of water damage which occurred  
2           on November 11, 2020. On that date water leaked  
3           from a main sewer drainpipe, which is believed to  
4           be original to the building that was built in the  
5           early 1900s due to it being clogged with debris  
6           causing the main sewer drainpipe that consists of  
7           cast iron and PVC piping to overflow into the third  
8           floor bathroom and leak into the second and first  
9           floors of the apartment building.

10                        "This resulted in damage to the drywall,  
11           ceilings and walls of the third, second and first  
12           floors of the building. The building is connected  
13           to a public sewer system, and the clog, which is  
14           believed to be cat litter, occurred on-site between  
15           the second and third floors based on our  
16           conversation with the insured, who was advised by  
17           his plumber, Mr. Harry Goldberg of H.S. Goldberg  
18           Plumbing & Mechanical.

19                        "We feel that no coverage can be provided  
20           to repair the main sewer drainpipe; however, the  
21           ensuing water damage can be covered under this  
22           policy of insurance."

23       Q. Okay. So the statement that Mr. Paul made in his

1 first report was that the water damage can be  
2 covered under this policy of insurance; is that  
3 correct?

4 A. Yes.

5 Q. And that form was sent to Union Mutual?

6 A. Yes.

7 MR. STEBBINS: Can we see Exhibit 3.

8 Q. So I'm going to show you a section of the insurer's  
9 policy that was sent to me from a representative of  
10 Union Mutual which sets forth the exclusions from  
11 coverage. And this, you can see, is the policy  
12 BP 00 03 01 10, which is the form of insurance we  
13 have been discussing, I believe.

14 The exclusions start with subsection B;  
15 is that correct?

16 A. Yes.

17 Q. And are you generally familiar with this schedule  
18 of exclusions?

19 A. Yes.

20 Q. They include a number of different things, so if we  
21 can go through them. So the first exclusion that's  
22 listed is ordinance or law; is that correct?

23 A. Yes.

1 Q. Okay. The second one, B, is earth movement?

2 A. That's correct.

3 Q. And that is defined, among other things, as  
4 earthquakes, landslides, mine subsidence, meaning  
5 subsidence of a manmade mine, earth sinking,  
6 volcanic eruption, including airborne volcanic  
7 blasts, shock waves, ash, lava flow.

8 And then we go down to the next  
9 exclusion, which is C, and that's government  
10 action. And it says, Excluded are seizure or  
11 destruction of property by order of the government  
12 authority; is that correct?

13 A. Yes.

14 Q. Then exclusion D is nuclear hazard. And it refers  
15 to a nuclear reaction or radiation or radioactive  
16 contamination; is that correct?

17 A. Yes.

18 Q. Then we get to exclusion E, and that's utility  
19 services. And it's described as the failure of  
20 power, communication, water or other utility  
21 services supplied to the described premises; is  
22 that correct?

23 A. Yes.

1 Q. And it goes on to say, If the failure originates  
2 away from the described premises or originates at  
3 the described premises only if such failure  
4 involves equipment used to supply the utility  
5 service to the described premises from the source  
6 away from described premises; is that correct?

7 A. Yes.

8 Q. Okay. The next one is F, and it's war and military  
9 action; is that correct?

10 A. Yes.

11 Q. And it talks about war, including undeclared or  
12 civil war?

13 A. Yes.

14 Q. Or action by a military force?

15 A. Yes.

16 Q. Insurrection, rebellion or revolution?

17 A. Yes.

18 Q. Okay. The next exclusion shown is the water  
19 exclusion. And it's titled G, Water. And number 1  
20 under that is flood, surface water, waves including  
21 tidal waves and tsunamis, tides, tidal water,  
22 overflow of any body of water or spray from any of  
23 these all whether or not driven by wind, including

1 storm surge; is that correct?

2 A. Yes.

3 Q. Number 2, could you read that for me?

4 A. Mudslide or mudflow.

5 Q. Okay. 3, could you read that for me?

6 A. Water that backs up or overflows or is otherwise  
7 discharged from a sewer, drain, sump, sump pump or  
8 related equipment.

9 Q. Then if you could read number 4 for me.

10 A. Water under the surface pressing on or flowing or  
11 seeping through foundations, walls, floors or paved  
12 surfaces, basements, whether paved or not, or  
13 doors, windows or other openings.

14 Q. And then number 5, could you read the first part of  
15 that?

16 A. Waterborne material carried or otherwise moved by  
17 any of the water referred to in paragraph 1, 3, 4,  
18 or material carried or otherwise moved by mudslide  
19 or mudflow.

20 Q. Great. Thank you. And then H is what?

21 A. Certain computer-related losses.

22 Q. Okay. Thank you. The exclusion in question is  
23 Exclusion G, is that correct, to this claim?

1 A. Yes.

2 Q. And that was what was referenced in the denial  
3 letter that was sent to the insured; is that  
4 correct?

5 A. Yes.

6 Q. Okay.

7 MR. STEBBINS: Could we go to Exhibit 4,  
8 please.

9 Q. So there is a continuing education organization  
10 called Insurance Community University. Have you  
11 ever used that in your continuing education  
12 courses?

13 A. I don't believe so.

14 Q. Okay. It's an online one. And I just selected it  
15 out of the many of these courses. And it discusses  
16 the exclusions in B-1 of the policy that we have  
17 been talking about. And could you just read those  
18 for me?

19 A. Number 1 is ordinance or law limited inclusion  
20 endorsement. Number 2 is earth movement. Number 3  
21 is governmental action. Number 4 is nuclear  
22 hazard. Number 5 is power failure off premises.  
23 Number 6 is war and military action. Number 7,

1 water, flood. Number 8, certain computer-related  
2 losses.

3 Q. Would you agree that those are the same exclusions  
4 that we just reviewed in the policy?

5 MR. BURT: Objection to form. Objection  
6 to form. The exclusions are much more detailed  
7 than this summary ever suggests.

8 MR. STEBBINS: Thank you.

9 Q. Mr. Anderson, would you agree that generally those  
10 are the same exclusions that we just reviewed in  
11 the policy we went through?

12 MR. BURT: Same objection.

13 Q. You can answer, Mr. Anderson.

14 A. Yes.

15 Q. And the number 7, Water (flood), would be referring  
16 to that, that policy exclusion that we looked at C;  
17 is that correct?

18 MR. BURT: Objection to form.

19 A. Did you say C?

20 Q. I'm sorry. It's G.

21 MR. BURT: What are you asking? You're  
22 asking if the word "water" appears both on this  
23 document and the exclusion?

1 MR. STEBBINS: I'm wondering if it's his  
2 understanding that this would refer to exclusion G  
3 that we just went over.

4 MR. BURT: Well, he's never seen this  
5 document before, so I'm not sure how he could  
6 testify to that.

7 I object to the form.

8 Q. Go ahead and answer.

9 A. I don't know what this, what policy form this is  
10 actually referring to. All it says is exclusions  
11 B-. It doesn't address a particular form.

12 Q. Okay. I'll represent to you that this is a review  
13 of form BP 00 03 01 10.

14 A. Okay.

15 MR. BURT: I disagree with your  
16 representation, so, I mean you can't just show a  
17 witness a document you pull out of thin air and  
18 say, Hey, here it is.

19 MR. STEBBINS: Okay.

20 MR. BURT: It's not proper.

21 MR. STEBBINS: Thank you.

22 Q. Can you answer the question?

23 A. Can you state the question again, please.

1 Q. This refers to policy BP 00 03 01 10. Based on  
2 that representation to you, would you say that  
3 number 7 here represented exclusion G, Water?

4 MR. BURT: Objection to form.

5 A. Yes.

6 Q. Thank you. So I'm going to just leave this slide  
7 up and I'm going to ask you a question. The list  
8 of exclusions for potentially major external events  
9 such as earth movements, government action, nuclear  
10 hazards, power failure, war or military action are  
11 aimed at losses from external events likely to  
12 affect large number of persons; is that correct?

13 MR. BURT: Objection to form.

14 A. I've have never actually thought about that before.  
15 I don't, I don't know.

16 Q. Okay. We just went through them, and we went  
17 through captions and we went through looking at  
18 them. And the first one that we reviewed was  
19 ordinance or law. The second one that we -- which  
20 is a government act. The second one was earth  
21 movement. The third one was -- I'm sorry --  
22 government action. The fourth one was nuclear  
23 hazard. The fifth one was utility service. The

1 sixth one was war and military action. And the  
2 seventh one was water. So does that conform with  
3 what this says?

4 MR. BURT: Objection to form.

5 A. Does it conform with what the policy says that we  
6 just went through?

7 Q. Yes.

8 A. Yes.

9 Q. Okay. And it's captioned "Water (flood)"; is that  
10 correct?

11 A. Yes.

12 Q. Okay. Thank you.

13 MR. STEBBINS: Could we return to Exhibit  
14 2, please.

15 Q. And could you read the last sentence in that  
16 section entitled "Origin"?

17 A. "We feel that no coverage can be provided to repair  
18 the main sewer drainpipe; however, the ensuing  
19 water damage can be covered under this policy of  
20 insurance."

21 Q. So that was the recommendation that your company  
22 sent to Union Mutual?

23 A. That's correct.

1 Q. Okay.

2 MR. STEBBINS: Then could we go to

3 Exhibit 5.

4 Q. Exhibit 5. So once that report was filed, did you  
5 hear back from Union Mutual from Mr. Jim Abel?

6 A. Yes.

7 Q. And what did he, what was the communication you  
8 received from him? Was it an email?

9 A. I don't recall what it was.

10 Q. Okay. In this email addressed, from you addressed  
11 to him with a copy to Dan Paul, you appear to be  
12 responding to that communication from Mr. Abel.

13 Can you just take a minute and look at  
14 that and see if you agree with that statement?

15 A. Yes, I do.

16 Q. Okay. And that was sent on November 24, 2020; is  
17 that correct?

18 A. Yes.

19 Q. Okay. The, what -- the thing that I'd like to go  
20 to is the second sentence. Could you read the  
21 second sentence for me?

22 A. "I don't believe this is a covered loss, but I have  
23 been told by both Andover Companies and Vermont

1 Mutual that if the loss originates on premises they  
2 cover the resultant overflow."

3 Q. Okay. And so you were referring then to claims  
4 that you handled for two of the other insurance  
5 companies that you work with; is that correct?

6 A. Yes.

7 Q. Okay. And you were telling Mr. Abel that those  
8 companies had a different policy than what he was  
9 expressing as Union Mutual's policy; is that  
10 correct?

11 A. Yes.

12 Q. Thank you.

13 MR. STEBBINS: Can we go to Exhibit 6,  
14 please.

15 Q. This is the second report that was sent by Dan Paul  
16 to Union Mutual. And could you read the section  
17 under the caption "Adjustment"?

18 A. It says, "Since our previous report we received  
19 contact from Mr. Jim Abel of your office advising  
20 that coverage cannot be provided for this loss as  
21 water that backs up, overflows or is otherwise  
22 discharged from a sewer, drain, sump, sump pump or  
23 related equipment is specifically excluded under

**EXHIBIT 2**

Jim

Jim Abel AIC, RPA – Northern NE and NY Property Claims Supervisor

Union Mutual – POB 158, 139 State St., Montpelier, VT 05602

800-671-8550 ext. 570 (o), 802-229-2119 (f) - [www.unionmutual.com](http://www.unionmutual.com)

---

From: Wade Anderson [mailto:wade@andersonadjustment.com]

Sent: Tuesday, November 24, 2020 8:04 AM

To: Abel, Jim

Cc: Dan Paul

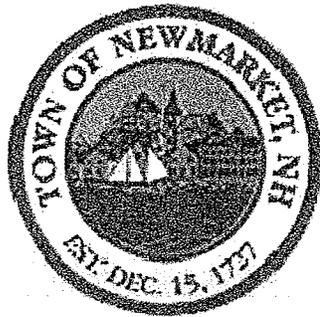
Subject: RE: CLM51306 \ CC 145 Main Street LLC

Hi Jim, I definitely understand your coverage question and I have been arguing with companies for a long time about this coverage. I don't believe this is a covered loss but I have been told by both Andover Companies and Vermont Mutual that if the loss originates on premises they cover the resultant overflow. I disagree with that evaluation and should have checked with you on this one. It clearly says that an overflow is excluded and if you offer an endorsement to cover it I think that it should definitely be denied. The fact that an endorsement is offered seems to me would clarify that this type of loss is not covered within the BP-3. I apologize for not checking with you on that one. I was going based on past experience that I also disagree with. I assume the other 2 companies may not offer an endorsement and maybe therefore see it as vague? I don't really know.

Dan can draft a denial today for that and send it over to you for approval.

Regards,

**Town of Newmarket, New Hampshire**



**ORDINANCE  
GOVERNING THE DISCHARGE OF  
WATERS AND WASTEWATER INTO THE  
PUBLIC SEWER SYSTEM**

*Adopted June 21, 2017*

**Town of Newmarket Sewer Use Ordinance**

**ORDINANCE NO. XX**

Pursuant to enabling authority in New Hampshire Revised Statutes Annotated 149-I:6, or revisions thereto, the following is an Ordinance regulating the use of public and private sewers, private wastewater disposal, the installation and connection of building sewers, and the discharge of waters and wastes into the public sewer system(s), and providing penalties for violations thereof, in the Town of Newmarket, County of Rockingham, State of New Hampshire.

Be it ordained and enacted by the Town Council of the Town of Newmarket and adopted June 21, 2017, as follows:

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**Appendices**

**Appendix A – Sewer User Fees**

**Appendix B – Residential/Commercial Sewer Connection Applications**

**Appendix C – Industrial Sewer Connection Application**

**Appendix D – POTW Screening Levels**

## SECTION 1 - GENERAL PROVISIONS

### 1.1 Purpose and Policy

This Ordinance sets forth uniform requirements for users of the Publicly Owned Treatment Works (POTW) of the Town of Newmarket and enables the Town of Newmarket to comply with all applicable State and federal laws, specifically the Clean Water Act (33 United States Code § 1251 *et seq.*) and the General Pretreatment Regulations (40 Code of Federal Regulations Part 403). Recognizing that significant opportunities exist to reduce or prevent pollution at its source through cost effective practices, and that such practices can offer savings through reduced purchases of materials and resources, a decreased need for pollution control technologies, and lower liability costs, as well as assisting to protect the environment, the Town of Newmarket establishes the following objectives of this Ordinance:

- A. To prevent the introduction of pollutants into the POTW that will interfere with the POTW's operation;
- B. To prevent the introduction of pollutants into the POTW that will pass through the POTW, without adequate treatment, into receiving waters, or otherwise be incompatible with the POTW;
- C. To protect both POTW personnel who may be affected by wastewater and sludge in the course of their employment and the general public;
- D. To promote the reuse of sludge from the POTW; and
- E. To enable the Town of Newmarket to comply with its National Pollutant Discharge Elimination System permit conditions, sludge use and disposal requirements, and any other federal or State law or regulation to which the POTW is subject.

This Ordinance shall apply to all users of the POTW. The Ordinance authorizes the issuance of wastewater discharge permits; provides for monitoring, compliance, and enforcement activities; establishes administrative review procedures; and requires user reporting.

### 1.2 Administration

Except as otherwise provided herein, the Superintendent or his designee shall administer, implement, and enforce the provisions of this Ordinance. Any powers granted to, or duties imposed upon, the Superintendent may be delegated by the Superintendent to any other Town of Newmarket personnel (designee).

- A. To defray the costs of operating and maintaining the sewer system, payment of any principal or interest on bonds, or other indebtedness, a schedule of charges shall be set established by the Town of Newmarket for all classes of service and defined in the Sewer User Charge system. Changes to the schedule of charges shall be approved by Town Council resolution after public notice and discussion at Town Council meeting.

- B. The Town shall, as necessary, make such changes or revisions in assessments, charges, and/or fees as may be required to raise necessary revenue to pay for all operation and maintenance charges, any principal and interest on bonds, or other indebtedness.
- C. To defray the cost of major repairs to the sewage collection, transmission or treatment facilities, the Town may create a sinking fund account for the purpose of such major repairs or repaying a debt incurred for the purpose of said major repairs.
- D. All sewer connection charges and all collected ad valorem tax assessments designated for the sewerage sinking fund account shall be deposited in the sinking fund account.
- E. The Town Council shall authorize withdrawals from the sinking fund account for repair or replacement work as shall be judged to be appropriate by the Superintendent.
- F. Any person found to be violating any provision of this Ordinance shall be served by the Town with written notice stating the nature of the violation and providing a 30-day period for the satisfactory correction thereof. The offender shall permanently cease all violations within the period of time as stated in said notice.
- G. Any person who shall continue any violation beyond the period of time provided in the notice shall be subject to fines and prosecution.
- H. Any person violating any of the provisions of this Ordinance shall be liable to the Town for any expense, loss, or damage occasioned the Town by reason of such violation.
- I. All ordinances or parts of ordinances in conflict herewith are hereby repealed.
- J. The invalidity of any section, clause, sentence, or provision of this ordinance shall not affect the validity of any other part of this ordinance which can be given effect without such invalid part or parts.

### 1.3 Abbreviations

The following abbreviations, when used in this Ordinance, shall have the following designated meanings:

· BOD	- Biochemical Oxygen Demand (Five Day)
· CFR	- Code of Federal Regulations
· COD	- Chemical Oxygen Demand
· EPA	- United States Environmental Protection Agency
· gpd	- Gallons per day
· IDP	- Industrial Discharge Permit
· mg/L	- Milligrams per Liter
· DES	- New Hampshire Department of Environmental Services
· NPDES	- National Pollutant Discharge Elimination System
· POTW	- Publicly Owned Treatment Works
· RCRA	- Resource Conservation and Recovery Act

- RSA - New Hampshire Revised Statute Annotated
- SIC - Standard Industrial Classification
- TDS - Total Dissolved Solids
- TSS - Total Suspended Solids
- USC - United States Code

#### 1.4 Definitions

A. Unless a provision explicitly states otherwise, the following terms and phrases, as used in this Ordinance, shall have the meanings hereinafter designated.

1. Act or the Act. The Federal Water Pollution Control Act, also known as the Clean Water Act, as amended, 33 U.S.C. § 1251 *et seq.*

2. Approval Authority. The Regional Administrator of the EPA or his duly appointed agent.

3. Authorized Representative of the User.

a. If the user is a corporation:

i. The president, secretary, treasurer, or a vice-president of the corporation in charge of a principal business function, or any other person who performs similar policy or decision-making functions for the corporation; or

ii. The manager of one or more manufacturing, production, or operating facilities, provided, the manager is authorized to make management decisions which govern the operation of the regulated facility including having the explicit or implicit duty of making major capital investment recommendations, and initiate and direct other comprehensive measures to assure long-term environmental compliance with environmental laws and regulations; can ensure that the necessary systems are established or actions taken to gather complete and accurate information for control mechanism requirements; and where authority to sign documents has been assigned or delegated to the manager in accordance with corporate procedures.

b. If the user is a partnership or sole proprietorship: a general partner or the proprietor, respectively.

c. If the user is a federal, State, or local governmental facility: a director or the highest official appointed, elected, or designated to oversee the operation and performance of the activities of the government facility.

d. The individuals described in paragraphs (a) through (c), above, may designate another authorized representative if: (a) the authorization is in writing; (b) the authorization specifies the individual or position responsible for the overall

operation of the facility from which the discharge originates or the person having overall responsibility for environmental matters for the company; (c) and the written authorization is submitted to the Town of Newmarket.

4. Biochemical Oxygen Demand or BOD. The quantity of oxygen utilized in the biochemical oxidation of organic matter under standard laboratory procedures for five (5) days at 20° centigrade, usually expressed as a concentration (e.g., mg/L).
5. Building Drain. That part of the lowest horizontal piping of a drainage system that receives the discharge from soil, waste, and other drainage pipes inside the walls of the building and conveys it to the building sewer, beginning five (5) feet outside the inner face of the building wall.
6. Building Sewer. The extension from the building drain to the public sewer or other place of disposal, also called house connection.
7. Bypass. The intentional diversion of waste streams from any portion of a wastewater treatment facility.
8. Categorical Pretreatment Standard or Categorical Standard. Any regulation containing pollutant discharge limitations promulgated by EPA in accordance with Sections 307(b) and (c) of the Act (33 U.S.C. § 1317) that applies to a specific category of users and that appears in 40 CFR Chapter I, Subchapter N, Parts 405-471.
9. Town. The Town of Newmarket, New Hampshire
10. Combined Sewer. A sewer intended to receive both wastewater and storm or surface water.
11. Commercial Use. Premises used for financial gain, such as business or industrial use, but excluding residential uses and related accessory uses.
12. Commissioner. The Commissioner of the New Hampshire Department of Environmental Services or the Commissioner's duly appointed agent.
13. Compatible Pollutant. Biochemical oxygen demand, suspended solids, pH, and fecal coliform bacteria.
14. Control Authority. The term Control Authority as used in this Ordinance, refers to the Regional Administrator of the EPA.
15. Dental Practice. A business established for the purpose of practicing dentistry, as defined by RSA 317-A:20.
16. DES or NHDES. The New Hampshire Department of Environmental Services.
17. Domestic Wastewater or Sewage. Normal water-carried household and toilet wastes or

waste from sanitary conveniences of residences, commercial buildings, and industrial plants that contains no industrial waste, excluding ground, surface, or storm water. (See also: Industrial Wastes.)

18. Easement. An acquired legal right for the specific use of land owned by others.
19. Environmental Protection Agency or EPA. The United States Environmental Protection Agency or, where appropriate, the EPA Regional Water Management Division Director, or other duly authorized official of said agency.
20. Existing Source. Any source of discharge, the construction or operation of which commenced prior to the publication by EPA of proposed categorical pretreatment standards, which will be applicable to such source if the standard is thereafter promulgated in accordance with Section 307 of the Act.
21. Floatable Oil. Oil, fat, or grease in a physical state such that it will separate by gravity from wastewater by treatment in an approved pretreatment facility. A wastewater shall be considered free of floatable oil if it is properly pretreated and the wastewater does not interfere with the collection system.
22. Force Main. A line without access from individual properties, providing a connection from a pump station to a pump station, trunk, or sanitary sewer main.
23. Garbage. The animal and vegetable waste resulting from the handling, preparation, cooking, and serving of foods.
24. Grab Sample. A sample that is taken from a waste stream without regard to the flow in the waste stream and over a period of time not to exceed fifteen (15) minutes.
25. Grease. The material removed from a grease interceptor (trap) serving a restaurant or other facility requiring such grease interceptors. Grease shall also mean volatile and non-volatile residual fats, fatty acids, soaps, waxes and other similar materials.
26. Hauler. Those persons, firms, or corporations, who pump, haul, transport, or dispose of septage and who are licensed by the New Hampshire Department of Environmental Services pursuant to RSA 485-A:4,XVI-a and rules adopted to implement said section.
27. Human Excrement and other Putrescible Material. The liquid or solid matter discharged from the intestinal canal of a human, or other liquid or solid waste materials that are likely to undergo bacterial decomposition; These terms shall not include refuse as defined in RSA 145-M.
28. Incompatible Pollutant. Any pollutant that is not a compatible pollutant.
29. Industrial Discharge Permit or IDP. The written permit between the Town of Newmarket and an industrial user that outlines the conditions under which discharge by the industrial user to the POTW will be accepted.

30. Industrial User. A person who discharges industrial wastes to the POTW of the Town of Newmarket.
31. Industrial Wastes or Non-Domestic Wastewater. The wastewater and waterborne wastes from any liquid, gaseous, or solid waste substance resulting from any process of industry, manufacturing trade, or business or from development of any natural resources as distinct from domestic wastewater, sewage or unpolluted water.
32. Indirect Discharge or Discharge. The introduction of pollutants into the POTW from any non-domestic source regulated under Section 307(b), (c), or (d) of the Act.
33. Instantaneous Discharge Limit. The maximum concentration of a pollutant allowed to be discharged at any time, determined from the analysis of any discrete or composite sample collected, independent of the industrial flow rate and the duration of the sampling event.
34. Interference. A discharge, which alone or in conjunction with a discharge or discharges from other sources, inhibits or disrupts the POTW, its treatment processes or operations, or its sludge processes, use or disposal; and therefore is a cause of a violation of the Town of Newmarket's NPDES permit or of the prevention of sewage sludge use or disposal in compliance with any of the following statutory/regulatory provisions or permits issued thereunder, or any more stringent State or local regulations: Section 405 of the Act; the Solid Waste Disposal Act, including Title II commonly referred to as RCRA; any State regulations contained in any State sludge management plan prepared pursuant to Subtitle D of the Solid Waste Disposal Act; the Clean Air Act; the Toxic Substances Control Act; the Marine Protection, Research, and Sanctuaries Act; 40 CFR Part 503 Standards for Sewage Sludge Use and Disposal and RSA 485-A:4, XVI-a.
35. Local Limits. Numerical limitations on the discharge of pollutants established by the Town of Newmarket, as distinct from State or federal limitations for non-domestic wastewater discharged to the POTW.
36. May. Means permissive (see "Shall").
37. Medical/Infectious Waste. Medical/infectious waste" as defined by RSA 125-N:2, VIII.
38. National Pollutant Discharge Elimination System Permit or NPDES Permit. A permit issued pursuant to Section 402 of the Act (33 U.S.C. 1342).
39. Natural Outlet. Any outlet, including storm sewers and combined sewer overflows, into a watercourse, pond, ditch, lake, or other body or surface water or groundwater.
40. Normal Domestic Wastewater. Wastewater generated by residential users containing not more than 253 mg/L BOD and not more than 271 mg/L suspended solids.

41. New Source.

- a. Any building, structure, facility, or installation from which there is or may be a discharge of pollutants, the construction of which commenced subsequent to the publication of proposed pretreatment standards under Section 307(c) of the Act that will be applicable to such source if such standards are thereafter promulgated in accordance with that section, provided that:
  - i. The building, structure, facility, or installation is constructed at a site at which no other source is located; or
  - ii. The building, structure, facility, or installation totally replaces the process or production equipment that causes the discharge of pollutants at an existing source; or
  - iii. The production or wastewater-generating processes of the building, structure, facility, or installation are substantially independent of an existing source at the same site. In determining whether these are substantially independent, factors such as the extent to which the new facility is integrated with the existing plant, and the extent to which the new facility is engaged in the same general type of activity as the existing source, will be considered.
- b. Construction of a new source as defined under this paragraph has commenced if the owner or operator has:
  - i. Begun, or caused to begin, as part of a continuous on-site construction program
    - A. any placement, assembly, or installation of facilities or equipment; or
    - B. significant site preparation work including clearing, excavation, or removal of existing buildings, structures, or facilities that is necessary for the placement, assembly, or installation of new source facilities or equipment; or
  - ii. Entered into a binding contractual obligation for the purchase of facilities or equipment that are intended to be used in its operation within a reasonable time. Options to purchase or contracts that can be terminated or modified without substantial loss, and contracts for feasibility, engineering, and design studies do not constitute a contractual obligation under this paragraph.
- c. Construction on a site at which an existing source is located results in a

modification rather than a new source if the construction does not create a new building, structure, facility, or installation meeting the criteria of Section (a)(ii) or (a)(iii) above, but otherwise alters, replaces, or adds to existing process or production equipment.

42. Non-Contact Cooling Water. Water used for cooling that does not directly contact any raw material, intermediate product, waste product, or finished product.
43. Pass Through. A discharge that exits the POTW into waters of the United States in quantities or concentrations that, alone or in conjunction with a discharge or discharges from other sources, is a cause of a violation of any requirement of the Town of Newmarket's NPDES permit, including an increase in the magnitude or duration of a violation.
44. Person. Any individual, partnership, copartnership, firm, company, corporation, association, joint stock company, trust, estate, governmental entity, or any other legal entity; or their legal representatives, agents, or assigns. This definition includes all federal, State, and local governmental entities.
45. pH. A logarithmic measure devised to express the hydrogen ion concentration of a solution, expressed in Standard Units. Solutions with pH values greater than 7 are basic (or alkaline); solutions with pH values less than 7 are acidic.
46. Pharmaceutical waste. A prescription drug, as defined by RSA 318:1, XVII, or a nonprescription or proprietary medicine, as defined by RSA 318:1, XVIII, that is no longer suitable for its intended purpose or is otherwise being discarded.
47. Pollutant. Dredged spoil, solid waste, incinerator residue, filter backwash, sewage, garbage, sewage sludge, munitions, medical wastes, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt, municipal, agricultural and industrial wastes, and substances with characteristics of wastewater (e.g., pH, temperature, TSS, turbidity, color, BOD, COD, toxicity, or odor).
48. Pollution Prevention. The use of materials, processes, or practices that reduce or eliminate the creation of pollutants or wastes at the source, or minimize their release to the environment prior to recycling, treatment or disposal. It includes practices that reduce the use of hazardous materials, energy, water or other resources. It also includes practices that protect natural resources and human health through conservation, more efficient use, or effective release minimization.
49. Pretreatment. The reduction of the amount of pollutants, the elimination of pollutants, or the alteration of the nature of pollutant properties in wastewater prior to, or in lieu of, introducing such pollutants into the POTW. This reduction or alteration can be obtained by physical, chemical, or biological processes; by process changes; or by other means, except by diluting the concentration of the pollutants unless allowed by an applicable pretreatment standard.

50. Pretreatment Requirements. Any substantive or procedural requirement related to pretreatment imposed on a user, other than a pretreatment standard.
51. Pretreatment Standards or Standards. Pretreatment standards shall mean prohibited discharge standards, categorical pretreatment standards 40 CFR 403, and local limits.
52. Prohibited Discharge Standards or Prohibited Discharges. Absolute prohibitions against the discharge of certain substances as identified in Section 2.3 of this Ordinance.
53. Properly Shredded Garbage. Wastes from the preparation, cooking, and dispensing of food that have been shredded to such a degree that all particles will be transported freely under the flow conditions normally prevailing in public sewers, with no particle greater than 1/2 inch in any dimension.
54. Public Sewer. A pipe or conduit that carries wastewater, storm water, groundwater, subsurface water, or unpolluted water from any source, which is controlled by a governmental agency or public utility.
55. Publicly Owned Treatment Works or POTW. A "treatment works," as defined by Section 212 of the Act (33 U.S.C. §1292) that is owned by the Town of Newmarket. This definition includes any devices or systems used in the collection, storage, treatment, recycling, and reclamation of sewage or industrial wastes of a liquid nature. It also includes sewers, pipes, and other conveyances if said structures convey wastewater to a POTW wastewater treatment facility. The term also means the municipality that has jurisdiction over discharges to and from such a treatment plant, and any sewer that conveys wastewater to the POTW from persons outside the Town of Newmarket who are, by contract or agreement with the Town of Newmarket, users of the Town of Newmarket's POTW.
56. Radiological Waste. Radioactive waste as regulated by RSA 125-F.
57. Recreational Vehicle or "RV". A mobile vehicle or trailer used for temporary living e.g. a camper or wholly self-contained transport and living unit.
58. Sanitary Sewer. A sewer that carries liquid and water-carried wastes from residences, commercial buildings, industrial facilities, and institutions, together with minor quantities of ground, storm, and surface waters that are not admitted intentionally.
59. Screening Level. That concentration of a pollutant that under baseline conditions would cause a threat to personnel exposed to the pollutant, or would adversely impact structures of the POTW. To be administered as local limits applicable to a particular discharge, the screening levels must be adjusted to account for conditions at the point of discharge that differ from baseline conditions.
60. Semi-Public Use. Premises of private, non-profit organizations such as schools, hospitals, and religious institutions.
61. Septage or Septic Tank Waste. Any liquid, solid, or sludge pumped from chemical

toilets, vaults, septic tanks, or cesspools or other holding tanks, that have received only domestic wastewater.

62. Septage Tank Truck. Any watertight vehicle that is used for the collection and hauling of septage as described above and that complies with the rules of the New Hampshire Department of Environmental Services.
63. Sewage. Human excrement and gray water, including but not limited to household showers, dishwashing operations, etc.
64. Sewer. A pipe or conduit that carries wastewater, storm water, groundwater, subsurface water, or unpolluted water from any source.
65. Shall. Means mandatory (see "May").
66. Significant Indirect Discharger. An indirect discharger that meets one or more of the following state criteria:
  - a. Is subject to national categorical pretreatment standards under 40 CFR 403.6 as amended;
  - b. Discharges an average of 10,000 gallons per day or more of process wastewater;
  - c. Discharges a process wastewater which contributes 5 percent or more of the hydraulic or organic loading to the wastewater treatment plant;
  - d. Discharges medical/infectious waste, pharmaceutical waste, or radiological waste; or
  - e. Is designated as such by the municipality as having a reasonable potential for adversely affecting the POTW's operation or performance or for violating any pretreatment standard or requirement.
67. Significant Industrial User. An indirect discharger that meets one or more of the following federal criteria:
  - a. A user subject to categorical pretreatment standards under 40 CFR 403.6; or
  - b. A user that:
    - i. Discharges an average of twenty-five thousand (25,000) gpd or more of process wastewater to the POTW, excluding sanitary, non-contact cooling, and boiler blowdown wastewater;
    - ii. Contributes a process waste stream that comprises five (5) percent or more of the average dry weather hydraulic or organic capacity of the POTW treatment plant; or

iii. Is designated as such by the Town of Newmarket on the basis that it has a reasonable potential for adversely affecting the POTW's operation or for violating any pretreatment standard or requirement.

c. Upon determining that a user meeting the criteria in Subsection b.i. or b.ii. has no reasonable potential for adversely affecting the POTW's operation or for violating any pretreatment standard or requirement, the Town of Newmarket may at any time, on its own initiative or in response to a petition received from a user, and in accordance with procedures in 40 CFR 403.8(f)(6), determine that such user should not be considered a Significant Industrial User.

68. Significant Noncompliance or SNC. An industrial user is in significant noncompliance if its violation meets one or more of the following criteria:

- a. Chronic violations. A pattern of violating the same pretreatment standard daily maximum or average limit (any magnitude of exceedance) sixty-six percent (66%) or more of the time in a 6-month period;
- b. Technical Review Criteria (TRC violations). Thirty-three percent (33%) or more of the measurements exceed the same pretreatment standard daily maximum limit or average limit by more than the TRC factor in a six month period. The TRC factor is 1.4 for biochemical oxygen demand (BOD), total suspended solids (TSS), oil & grease and 1.2 for all other pollutants;
- c. Any other discharge violation that the Superintendent believes has caused, alone or in combination with other discharges, interference or pass through, including endangering the health of POTW personnel or the general public;
- d. Any discharge of pollutants that has caused imminent endangerment to the public or to the environment, or has resulted in the Superintendent's exercise of its emergency authority to halt or prevent such a discharge;
- e. Failure to meet, within ninety (90) days of the scheduled date, a compliance schedule milestone contained in a wastewater discharge permit or enforcement order for starting construction, completing construction, or attaining final compliance;
- f. Failure to provide within thirty (30) days after the due date, any required reports, including, Industrial Discharge Permit applications, periodic self-monitoring reports, and reports on compliance with compliance schedules;
- g. Failure to accurately report noncompliance; or
- h. Any other violation(s) that the Superintendent determines will adversely affect the operation or implementation of the local pretreatment program.

**EXHIBIT 3**

**EXHIBIT 4**

An official website of the United States government.



## News Releases from Region 01

# Agreement with U.S. Government, State of New Hampshire to Yield Significant Reductions in Water Pollution from Manchester, N.H. Sewer Systems

07/13/2020

### Contact Information:

John Senn ([senn.john@epa.gov](mailto:senn.john@epa.gov))  
(617) 918-1019

**MANCHESTER, N.H.** – The U.S. Environmental Protection Agency (EPA) and the U.S. Department of Justice (DOJ) today announced an agreement with the City of Manchester that will result in significant reductions of sewage from the city's wastewater treatment systems into the Merrimack River and its tributaries. The State of New Hampshire joined the U.S. government as a co-plaintiff on this agreement, which also resolves alleged violations of the Clean Water Act by the City of Manchester.

Under a proposed consent decree filed in the U.S. District Court for the District of New Hampshire today, the City of Manchester has agreed to implement a 20-year plan to control and significantly reduce overflows of its sewer system, which will improve water quality of the Merrimack River. The plan is estimated to cost \$231 million to implement. The Merrimack River is a drinking water source for more than 500,000 people, is stocked with bass and trout for fishing, is used for kayaking and boating and other recreational opportunities.

"This agreement means a healthier Merrimack River and cleaner water for the communities along the river in both New Hampshire and Massachusetts," **said EPA New England Regional Administrator Dennis Deziel.** "EPA has long been committed to working with our state and federal partners and cities like Manchester to improve water quality along the Merrimack, which is an important source of drinking water and recreation destination."

"This agreement demonstrates a recognition by all parties of the importance of maintaining our clean waters," **said Bob Scott, Commissioner of the N.H. Department of Environmental Services.** "NHDES looks forward to continuing to work with Manchester, both in terms of financing the projects and ensuring they are successful."

The settlement addresses problems with Manchester's combined sewer system, which when overwhelmed by rain and stormwater, frequently discharges raw sewage, industrial waste, nitrogen, phosphorus and polluted stormwater into the Merrimack River and its tributaries. The volume of combined sewage that overflows from the Manchester's combined sewer system is approximately 280 million gallons annually, which is approximately half of the combined sewage discharge volume from all communities to the Merrimack River.

Under the proposed consent decree, Manchester will implement combined sewer overflow (CSO) abatement controls and upgrades at its wastewater treatment facilities that are expected to reduce the city's total annual combined sewer discharge volume by approximately 74% from approximately 280 million gallons to 73 million gallons.

The two major components of the CSO abatement controls will disconnect Cemetery Brook in Manchester, the largest of the local five significant connected brooks, from the city's combined sewer system. Manchester will design and construct a new 2.5-mile drain for Cemetery Brook from Mammoth Road to the Merrimack River to convey both the brook's and storm drainage flows. The city will also design and construct projects to separate the combined sewers for areas adjacent to the Cemetery Brook drain. These drainage and sewer separation projects will together address the largest drainage basin in the city and produce the greatest volume of CSO reduction.

The work under the proposed consent decree also includes the construction of a new drain and sewer separation in the Christian Brook drainage basin, which will remove the third largest brook from the wastewater collection system.

The proposed consent decree also requires the city to implement a CSO discharge monitoring and notification program, which will include direct measurement of all discharges from six CSO outfalls estimated to be more than 99% of all of the city's total CSO discharge volumes. The city will be required to provide initial and supplemental notification to the public, including public health departments and downstream communities, with notification made through electronic means such as posting to the city's publicly available website and reasonable efforts to provide other notification.

In addition to the 20-year control plan, the proposed settlement also requires the upgrades to improve the handling of solid waste at the wastewater treatment plant to reduce discharges of phosphorous.

Many of the communities in the Merrimack River watershed are environmental justice communities with large numbers of minority and low-income residents.

In September 2019, EPA issued Clean Water Act permits to the cities of Haverhill, Lawrence and Lowell, Massachusetts under the National Pollutant Discharge Elimination System to reduce pollutant discharges from the three wastewater treatment plants and associated CSOs into the Merrimack River at 27 locations across the three cities.

The proposed consent decree is subject to a 30-day public comment period and court approval after it is published in the Federal Register. It will be available for viewing on the DOJ's website: [www.justice.gov/enrd/Consent\\_Decrees.html](http://www.justice.gov/enrd/Consent_Decrees.html).

For more information on this settlement, visit:

<https://www.epa.gov/enforcement/city-manchester-nh-clean-water-act-settlement-information-sheet>

For more information on EPA's work on the Merrimack, including the Agency's interactive "story map," visit: <https://www.epa.gov/merrimackriver>.

For more information on EPA's work to address raw sewage and contaminated stormwater in communities across the country, visit:

<https://www.epa.gov/enforcement/former-national-compliance-initiative-keeping-raw-sewage-and-contaminated-stormwater-out>.

LAST UPDATED ON JULY 13, 2020

STATE OF NEW HAMPSHIRE

ROCKINGHAM COUNTY, SS.

SUPERIOR COURT

Docket No. 218-2021-CV-00042

CC 145 Main LLC

v.

Union Mutual Fire Insurance Company

**PLAINTIFF'S SURREPLY IN OPPOSITION TO DEFENDANT'S MOTION FOR  
SUMMARY JUDGEMENT AND IN FURTHER SUPPORT OF ITS CROSS MOTION  
FOR SUMMARY JUDGEMENT**

Plaintiff, CC 145 MAIN LLC, by and through its attorneys, Stebbins Lazos & Van Der Beken PLLC, respectfully submits this Surreply in further support of its Objection to Defendants' Motion for Summary Judgement and in further support of Plaintiff's Claims. For its Surreply CC 145 Main LLC states as follows:

1. CC 145 Main LLC filed an AMENDED COMPLAINT FOR DECLARATORY RELIEF alleging that the undefined terms 'sewer' and 'drain' contained in the subject insurance policy and upon which Defendants denied coverage were ambiguous. New Hampshire law is clear that "Where disputed terms are not defined in the policy, we construe them in context, and in the light of what a more than casual reading of the policy would reveal to an ordinarily intelligent insured." *Mellin v. N. Sec. Ins. Co., Inc.*, 167 N.H. 544, 547 (2015). "If more than one reasonable interpretation is possible, and an interpretation provides coverage, the policy contains an ambiguity and will be construed against the insurer." *Great Am. Dining, Inc. v. Philadelphia Indem. Ins. Co.*, 164 N.H. 612, 616 (2013).

2. In the present case the Town of Newington Ordinances<sup>1</sup> explicitly define the term building drain to mean the lowest piping that collects the discharge from all other drainage piping inside the house and extends beyond the exterior walls and conveys the drainage to the building sewer. Those ordinances also define the term building sewer as the extension from the building drain to the public sewer. *See Town of Newmarket NH Ordinance Governing the Discharge of Waters and Waste Waters Into the Public Sewer System and the Town of Newmarket and New Hampshire Building Codes.*

3. NH RSA 147:8 refers to “*suitable drains and sewers for conveying wastewater and sewage away from the premises into some public sewer.*” Clearly this language calls for ‘drains and sewers’ external to the premises to carry wastewater and sewage away from the premises.

4. By their terms, the Town Ordinances are the paramount definitions of the terms ‘sewer’ and ‘drain’

5. Separately, the communications between Jim Abel of Union Mutual and Wade Anderson, the adjuster working for Union Mutual on the Plaintiff’s claim, confirm the ambiguity of the subject terms. The two primary communications evidencing the fact that such terms are vague and ambiguous are (a) an e-mail dated November 24, 2020, in which Mr. Anderson states, “... **I have been told by both Andover Companies and Vermont Mutual that if the loss originates on the premises they cover the resultant overflow.**” and “**maybe therefore [they] see it as vague.**” and a First Report To Union Mutual Fire Insurance Company from Anderson Adjustment Company, Inc dated November 19, 2020, which states, “**We feel that no coverage can be provided to repair the main sewer pipe; however, the ensuing water damage can be covered under this policy of insurance.**”

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<sup>1</sup> The insured property lies in the Town of Newmarket, NH.

6. Defendant, in its Response to Plaintiff's Response to Statement of Material Facts and and Plaintiff's Statement of Additional Facts alleged that copies of the above referenced communications were not included in Plaintiff's Statement of Additional Facts. As the First Report to Union Mutual Fire Insurance Company should be read in conjunction with Mr. Anderson's e-mail, Plaintiff seeks to correct any clerical error that may have caused either of these important documents to be omitted or improperly filed with Plaintiff's Statement of Additional Facts, and respectively requests that the Court accept and review the attached Plaintiff's Exhibit 2 (the First Report) and Plaintiff's Exhibit 4 (Mr. Anderson's e-mail) as part of this proceeding.

7. As stated above, in New Hampshire "If more than one reasonable interpretation is possible, and an interpretation provides coverage, the policy contains an ambiguity and will be construed against the insurer." *Great Am. Dining, Inc. v. Philadelphia Indem. Ins. Co.*, 164 N.H. 612, 616 (2013). Certainly, the attached communications confirm that "more than one reasonable interpretation is possible."

8. Further, in a declaratory judgment action to determine first-party insurance coverage, the burden is on the insurance company to establish that a claim is not covered, regardless of who brings the lawsuit. *See RSA 491:22-a; Andrews v. Nationwide Mut. Ins. Co.*, 124 N.H. 1148, 152 (1983).

Respectfully submitted,

CC 45 Main LLC  
By Its Attorneys,

Stebbins, Lazos & Van Der Beken PLLC

Dated: June 9, 2021

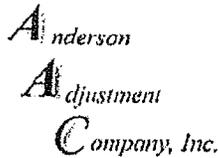
By:           /s/ Henry Stebbins            
Henry Stebbins, Esq. (Bar No. 2429)  
889 Elm St. 6<sup>th</sup> Floor  
Manchester, NH 03101  
(603) 626-3300: hstebbins@slvlaw.com

Certificate of Service

It is hereby certified that a copy of the foregoing PLAINTIFF'S SURREPLY IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGEMENT AND IN FURTHER SUPPORT OF ITS CROSS MOTION FOR SUMMARY JUDGEMENT was served through the electronic filing system upon Gary Burt, Esquire.

/s/ Henry Stebbins  
Henry Stebbins

**Plaintiff's Exhibit 2**



50 Nashua Road, Ste. 303  
 PO Box 1098  
 Londonderry, NH 03053  
 Ph. (603) 965-4379  
 Tl. (800) 675-3959  
 Fx. (603) 965-4369

*First Report*

To: *Union Mutual Fire Insurance Company*  
 Attn: Mr. Jim Abel

Date Assigned: 11/12/2020 Date Contacted: 11/12/2020 Date Inspected: 11/13/2020

Insured:	CC 145 Main LLC	Date of Loss:	11/11/2020
Address:	PO Box 571	Co. Claim #:	CLM51306
	Greenland, NH 03840	Our File #:	38646-D
Policy #:	BOP0172696	Agent:	Renaissance Alliance Insurance Services, LLC
Loss Location:	145 Main Street, Newmarket, NH	Mortgagee:	People's United Bank
Policy Term:	6/14/2020-6/14/2021	Deductible:	\$5,000.00
Forms:	BP 00 03 01-10	Type of Loss:	Water Damage

<u>ITEM</u>	<u>INSURES</u>	<u>REP. COST</u>	<u>ACV</u>	<u>ENCLOSURES</u>
Building	\$545,000.00	\$569,280.00	\$455,424.00	1. Recapitulation Sheet
Other Structures	\$0.00			2. Preliminary Building Repair Estimate
Contents	\$0.00			3. Commercial Valuation Worksheet
Rents/A.L.E.	\$0.00			4. City Assessor's Card
				5. NH Status Letter
				6. NH Contact Letter
				7. Underwriting Notice
				8. Photographs (34)

PAYMENT REQUESTED:

None at this time.

RECOMMENDED RESERVES:

Coverage A	\$20,000.00
Coverage D (Business Income)	\$5,000.00

RISK:

At risk is a seven-unit, three-story wood frame dwelling located in a mixed-use area of Newmarket, NH. Six (6) units are currently tenant-occupied and one (1) unit is currently vacant, and the units have been maintained in average condition.

ORIGIN:

This loss is the result of water damage which occurred on November 11, 2020. On that date, water leaked from a main sewer drain pipe, which is believed to be original to the building that was built in the early 1900s, due to it being clogged with debris, causing the main sewer drain pipe that consists of cast iron and PVC piping to overflow into the third floor bathroom and leak into the second and first floors of the apartment building. This resulted in damage to the drywall, ceilings and walls of the third, second and first floors of the building. The building is connected to a public sewer system and the clog, which is believed to be cat litter, occurred onsite between the second and third floors, based on our conversation with the insured, who was advised by his plumber, Mr. Harry Goldberg of H.S. Goldberg Plumbing & Mechanical. We feel that no coverage can be provided to repair the main sewer drain pipe; however, the ensuing water damage can be covered under this policy of insurance.

**ADJUSTMENT:**

Our inspection with the insured confirmed that the main sewer drain pipe was clogged with debris and overflowed through the toilet and shower drains of Units 6 and 7 on the third floor. This allowed water to seep down into the second and first floor units. Five (5) of the seven (7) units in the building were affected in this loss. The undersigned adjuster was unable to inspect Unit 1 or Unit 7, where additional damage was discovered by Insurcomm, who was hired to complete the remediation after our initial inspection. The insured advised that Insurcomm plans to be done with remediation and any necessary demolition by Friday, November 20, 2020.

At the time of our inspection, Rooter-Man was onsite attempting to locate and relieve the clog within the main sewer drain pipe, and Mr. Randy Downs of Rooter-Man confirmed that the clog was located between the second and third floors. However, since our inspection, the insured advised that he has dismissed Rooter-Man from completing any more work to the residence, as they could not relieve the clog and appeared to have caused other leaks in the main sewer drain pipe when they were using high pressure equipment to clear the clog. The insured advised that he had his plumber, Mr. Harry Goldberg of H.S. Goldberg Plumbing & Mechanical, out on November 18, 2020 and November 19, 2020, and that Mr. Goldberg had located the clog between the second and third floors and will be done making his repairs by Friday, November 20, 2020.

We have attempted to contact Mr. Harry Goldberg of H.S. Goldberg Plumbing & Mechanical to discuss his scope of work, confirm what kind of debris was clogging the pipe, and confirm the location of the clog. We have yet to speak with Mr. Goldberg and left a voicemail to contact our office.

Since our inspection, we have completed the attached preliminary building repair estimate for the repairs to Units 6, 3 and 2. Unit 6 is located on the third floor, Unit 3 is on the second floor, and Unit 2 is on the first floor. We have scheduled a re-inspection of the property for Monday, November 23, 2020 at 9:00 AM, and at that time, we will inspect Units 1 and 7 to obtain our full scope of damages.

Upon completion of our re-inspection and receipt of the remediation documentation from Insurcomm, we will revise our building repair estimate if necessary and proceed with the adjustment of this claim accordingly.

**SALVAGE/SUBROGATION:**

Based on the fact that a one-hundred (100) plus year old cast iron and PVC drain pipe became clogged with debris, causing the pipe to overflow and resulting in water damage, and the clog in the sewer pipe was located onsite, subrogation is not a factor.

**RECOMMENDATIONS:**

We recommend you diary your file ahead thirty (30) days in anticipation of our next report.

Very truly yours,

*ANDERSON ADJUSTMENT CO., INC.*

Daniel Paul, Ext. 117  
Adjuster (dan@andersonadjustment.com)  
rnr

11/19/2020

**Plaintiff's Exhibit 4**

Jim

Jim Abel AIC, RPA – Northern NE and NY Property Claims Supervisor  
Union Mutual – POB 158, 139 State St., Montpelier, VT 05602  
800-671-8550 ext. 570 (o), 802-229-2119 (f) - [www.unionmutual.com](http://www.unionmutual.com)

From: Wade Anderson [mailto:wade@andersonadjustment.com]  
Sent: Tuesday, November 24, 2020 8:04 AM  
To: Abel, Jim  
Cc: Dan Paul  
Subject: RE: CLM51306 \ CC 145 Main Street LLC

Hi Jim, I definitely understand your coverage question and I have been arguing with companies for a long time about this coverage. I don't believe this is a covered loss but I have been told by both Andover Companies and Vermont Mutual that if the loss originates on premises they cover the resultant overflow. I disagree with that evaluation and should have checked with you on this one. It clearly says that an overflow is excluded and if you offer an endorsement to cover it I think that it should definitely be denied. The fact that an endorsement is offered seems to me would clarify that this type of loss is not covered within the BP-3. I apologize for not checking with you on that one. I was going based on past experience that I also disagree with. I assume the other 2 companies may not offer an endorsement and maybe therefore see it as vague? I don't really know.

Dan can draft a denial today for that and send it over to you for approval.

Regards,



ATTORNEYS AT LAW

December 14, 2020

Claims Department  
Union Mutual Fire Insurance Company  
139 State Street, PO Box 158  
Montpelier, VT 05602

Re: Policy/Co. Claim #: CLM51306  
Type of Loss: Water Damage  
Date of Loss: 11/11/2020  
Loss Location: 145 Main Street, Newmarket, NH

Dear Sir or Madam,

This Firm represents CC 145 Main LLC, a New Hampshire limited liability company with a place of business at 47 Park Ave. Greenland, NH 03840 (the “Insured”) regarding the above captioned claim.

The Insured owns and operates a seven-unit apartment building located at 145 Main Street, Newmarket, NH, (the “Insured Property”) for which it has purchased from Union Mutual a “Business Owner’s” insurance policy: Policy Number BOP0172629-02 (the “Insurance Policy”).

On November 11, 2020 the Insured Property suffered significant damage caused by a clogged interior plumbing line. Mr. Harry Goldberg of HS Goldberg Plumbing & Mechanical, cleared the blockage in the interior plumbing line. The damage to the Insured Property required significant cleaning, remediation, repair and replacement. It also caused the tenants to have to

move out of their apartments during which time their rent payments were abated. These losses are covered under the Insurance Policy that Insured purchased from Union Mutual, and the Insured, through its insurance agent, immediately filed a claim under the Insurance Policy.

On November 12, 2020, an agent of the Defendant issued an acknowledgement of receipt the Plaintiff's claim. On November 13, the Defendant's designated adjuster inspected the Insured Property. On November 25, 2020, the adjuster, in a letter to Insured denying coverage, (the "Denial Letter"), stated:

"Our investigation into the interior water damage to your seven (7) unit apartment building on November 13, 2020 revealed that the water damage was caused by the overflow of a main sewer pipe that was clogged with debris. We understand that your plumber, Mr. Harry Goldberg of HS Goldberg Plumbing & Mechanical, cleared a blockage in the sewer line between the second and third floors that caused the overflow. Based on the fact that water damage that is the result of water that backs up or overflows or is otherwise discharged from a sewer, drain, sump, sump pump or related equipment is specifically excluded under this policy of insurance, the Union Mutual Fire Insurance Company has determined that no coverage can be provided for this loss." (*emphasis added*).

The exclusion to coverage set forth the Denial Letter is found at Section 1 B, subsection 3 (g) (3) of the Insurance Policy and reads as follows:

***B. Exclusions***

*We 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. These exclusions apply whether or not the loss event results in widespread damage or affects a substantial area.*

***g. Water***

*(3) Water that backs up or overflows or is otherwise discharged from a sewer, drain, sump, sump pump or related equipment;*

Macmillan Dictionary defines "sewer" as "*An underground pipe or passageway that carries sewage.*"

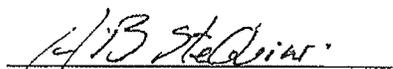
Union Mutual's adjuster, in the Denial Letter, stated that "a blockage in the *sewer* line between the second and third floors that caused the overflow." In fact, the plumbing line in question runs through the interior of the building from the third floor to ground level, and at no point is outside of the building or underground.

Nowhere in the exclusion on which Union Mutual's denial of coverage does the word "plumbing" occur. However, the word "plumbing" does appear in an exclusion for "frozen plumbing". Notwithstanding the fact that Union Mutual is clearly aware of the distinction between the terms "plumbing" and "sewer", the plumbing being inside the Insured Property and sewer being off premises, Union Mutual does not include the word "plumbing" in the exclusion on which Union Mutual based its denial of coverage. Union Mutual's failure to include the term "plumbing" in the exclusion in question, the backup of water through Plaintiff's internal plumbing system makes clear that the above referenced claim is a covered loss.

Based on the foregoing, the Insured hereby demands payment under the Insurance Policy for the loss; the total amount of which is Twenty-Five Thousand Dollars. Payment should be made to the Insured care of this Firm.

We look forward to your prompt response.

Sincerely,

A handwritten signature in cursive script, appearing to read "H B Stebbins", is written over a horizontal line.

Attorney Henry B Stebbins

**CC. New Hampshire Insurance Department, Consumer Services Division**  
**21 South Fruit Street, Suite 14, Concord, NH 03301**



RECEIVED  
NH INSURANCE DEPARTMENT  
DEC 16 2020

December 15, 2020

**New Hampshire Insurance Department  
Consumer Services Division  
21 South Fruit Street, Suite 14,  
Concord, NH 03301.**

Re: Union Mutual Fire Insurance Company

Dear Sir or Madam,

On behalf of our client, CC 145 Main LLC, A New Hampshire limited liability company (the “Insured”), we file this complaint against Union Mutual Fire Insurance Company. Union Mutual’s improperly denied the Insured’s recent claim under Union Mutual a “Business Owner’s” insurance policy: Policy Number BOP0172629-02 (the “Insurance Policy”).

The Insured owns and operates a seven-unit apartment building located at 145 Main Street, Newmarket, NH, (the “Insured Property”) for which it purchased the Insurance Policy.

On November 11, 2020 the Insured Property suffered significant damage caused by a clogged interior plumbing line. The damage to the Insured Property required significant cleaning, remediation, repair and replacement. It also caused tenants to have to move out of their apartments during which time their rent payments were abated. These losses are covered under

the Insurance Policy that Insured purchased from Union Mutual, and the Insured, through its insurance agent, immediately filed a claim under the Insurance Policy.

On November 12, 2020, an agent of the Defendant issued an acknowledgement of receipt the Plaintiff's claim. On November 13, the Defendant's designated adjuster inspected the Insured Property. On November 25, 2020, the adjuster, in a letter to Insured denying coverage, (the "Denial Letter"), stated:

"Our investigation into the interior water damage to your seven (7) unit apartment building on November 13, 2020 revealed that the water damage was caused by the overflow of a main sewer pipe that was clogged with debris. We understand that your plumber, Mr. Harry Goldberg of HS Goldberg Plumbing & Mechanical, cleared a blockage in the sewer line between the second and third floors that caused the overflow. Based on the fact that water damage that is the result of water that backs up or overflows or is otherwise discharged from a sewer, drain, sump, sump pump or related equipment is specifically excluded under this policy of insurance, the Union Mutual Fire Insurance Company has determined that no coverage can be provided for this loss." (*emphasis added*).

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***g. Water***

*(3) Water that backs up or overflows or is otherwise discharged from a sewer, drain, sump, sump pump or related equipment;*

Macmillan Dictionary defines "sewer" as "*An underground pipe or passageway that carries sewage.*"

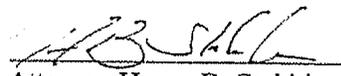
Union Mutual's adjuster, in the Denial Letter, stated that "a blockage in the *sewer*

line between the second and third floors that caused the overflow.” In fact, the plumbing line in question runs through the interior of the building from the third floor to ground level, and at no point is outside of the building or underground.

Nowhere in the exclusion on which Union Mutual’s denial of coverage is based does the word “plumbing” occur. However, the word “plumbing” does appear in an exclusion for “frozen plumbing”. Notwithstanding the fact that Union Mutual is clearly aware of the distinction between the terms “plumbing” and “sewer”, the plumbing being inside the Insured Property and sewer being off premises, Union Mutual does not include the word “plumbing” in the exclusion on which Union Mutual based its denial of coverage. Union Mutual’s failure to include the term “plumbing” in the exclusion in question, the backup of water through Plaintiff’s internal plumbing system makes clear that the above referenced claim is a covered loss.

On behalf of the Insured this Firm has demanded that Union Mutual cover the Insured’s under the Insurance Policy; however, Union Mutual’s disregard of its clear obligation under the Insurance Policy should be investigated by the Insurance Department. Such claim denials, if made regarding the legitimate claims of New Hampshire citizens, constitute not only breach of contract by Union Mutual, but are also represent blatantly false advertising for its policies - - false promises which defraud Union Mutual’s premium paying New Hampshire customers.

Sincerely,

  
Attorney Henry B. Stebbins



# Property Insurance Coverage LAW BLOG

THE POLICYHOLDER'S ADVOCATE®

## Court Rules Sewer Backup Clause Does Not Include Internal Plumbing

By Jason Cieri on February 13, 2019

Back in January 2017, I **blogged** about the landmark case of *Pichel v. Dryden Mutual Insurance Company*,<sup>1</sup> where New York's Third Department ruled that the insurance policy contained an ambiguity when differentiating between loss caused by backup to a sewer or drain and a loss caused by backup to an internal plumbing system.

The court stated:

“[T]hat water damage caused by a backup/overflow that originates from a pipe or clogged drain located within the insured's property line comes from the insured's plumbing system and is covered by the policy; conversely, if the cause of the backup/overflow is from outside the insured's property boundaries – such as a clogged municipal sewer that forces water from outside the insured's plumbing system to overflow – the

## sewer or drain exclusion is applicable.”<sup>2</sup>

While this is good case law for New York counties in the Third Department, other jurisdictions had yet to adopt the same reasoning—until now.

Recently, the Honorable Jack Libert in the Supreme Court, Nassau County, had this same issue before him.<sup>3</sup> On December 6, 2016, Plaintiff, Hix Brix LLC, sustained a water loss to their basement when a pipe broke and clogged, causing water to back up into the basement. The insurer investigated the claim and paid money solely due to a water-backup endorsement, and without that endorsement the claim would be excluded under the “water” exclusion which read:

### ***B. Exclusions***

#### ***g. Water***

***(3) Water that backs up or overflows or is otherwise discharged from a sewer, drain, sump, sump pump, or related equipment.***

Also contained within the AmGuard policy was an exclusion for “frozen plumbing.” Due to the term “plumbing” being used within this exclusion, I asked the court to recognize a distinction between the terms “plumbing” and “sewers and drains” – the plumbing being on the plaintiff’s property and the sewers and drains being off premises.

The court ruled in favor of the insured noting that an ambiguity existed in the policy regarding the exclusionary clause. The court noted, “[t]he language excluding damage from ‘sewer, drain, sump pump or related equipment’ is not specific and clear with respect to internal plumbing.”

I leave you with a quote from British philosopher, Thomas Reid, who stated: *“There is no greater impediment to advancement of knowledge than the ambiguity of words.”*

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<sup>1</sup> ***Pichel v. Dryden Mutual Ins. Co.*, 117 A.D.3d 1267 (N.Y. App. 3rd Dept. 2014).**

<sup>2</sup> *Pichel* at 1269.

<sup>3</sup> ***Hix Brix v. AmGuard Ins. Co.*, No. 600249/18 (N.Y. Sup. Ct., Nassau County Sept. 27, 2018).**

# Property Insurance Coverage LAW BLOG

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## Abel, Jim

---

**From:** Abel, Tom  
**Sent:** Tuesday, June 02, 2020 10:21 AM  
**To:** Trainor, John; Abel, Jim; Kimon, Shawn; Staples, Jeffrey; Benway, Wendy  
**Subject:** FW: Web Coverage Question - Tom Abel, Union Mutual

Hi Everyone-  
PLRB analysis of the Discharge of water from a sewer, drain etc.

PLRB says its covered. Analysis below

Tom Abel – Regional General Adjuster  
**Union Mutual** – POB 158, 139 State St., Montpelier, VT 05602  
800-671-8550 ext. 625 (o), 413-209-7099 (c) - [www.unionmutual.com](http://www.unionmutual.com)



**From:** Tim Havlir [mailto:thavlir@plrb.org]  
**Sent:** Tuesday, June 02, 2020 10:06 AM  
**To:** Abel, Tom  
**Subject:** Re: Web Coverage Question - Tom Abel, Union Mutual

Hi Tom,

### **Wear and Tear and Water Exception**

Since the initiating cause of the water damage was wear and tear, let's start with that exclusion. The BP 00 03 01 10 has an exclusion for wear and tear, but the policy also says this exclusion does not apply if wear and tear results in a "specified cause of loss." The specified causes of loss are defined on page 30 of 49, and they are a list of perils which would be covered if they resulted from wear and tear. One of the specified causes of loss is water damage, defined as follows:

c. Water damage means accidental discharge or leakage of water or steam as the direct result of the breaking apart or cracking of any part of a system or appliance (other than a sump system including its related equipment and parts) containing water or steam.

I am under this impression that this would apply in your claim. Note that it requires a "breaking apart or cracking" of a (plumbing) system, but the way you have described the loss sounds like this would qualify.

## Backup/Overflow Exclusion

We next have to see how that fits in with the exclusion you quoted in your submission:

(3) Water that backs up or overflows or is otherwise discharged from a sewer, drain, sump, sump pump or related equipment;

Your loss is probably not a "backup" or an "overflow," but this exclusion also uses the phrase "or is otherwise discharged." Such language is quite broad and, at least in a literal sense, could seemingly apply to many water leakage scenarios. See, e.g., Kelley Street Associates, LLC v. United Fire and Casualty Co., No. 14-14-00755-CV, 2015 WL 7740450 (Tex.App.- Houston (14 Dist.) 11/30/15), (Court of Appeals of Texas, Houston (14th District), applying Texas law) [reviewed at PLRB, Prop. Ins. L. Rev. 9313] (water exclusion for "water that backs up or overflows or is otherwise discharged from a sewer, drain, sump, sump pump or related equipment" unambiguously precluded coverage for damage caused by water that flowed from the policyholder's septic system into its commercial building through its floor drains).

However, this would clash with the notion of an "accidental discharge" from within a plumbing system, which is a traditionally recognized peril within first-party insurance. If we interpret this exclusion too broadly, it would override coverage for many scenarios which probably were intended to be covered. Hence, one could reasonably argue: The policy says the exclusion only applies to water discharging from a "sewer" or "drain," and perhaps this could be distinguished from water discharging from a "sewer line" or a "drain line." In other words, it could be argued this exclusion only applies when water comes out at the source or opening of the drain -- e.g., situations such as water coming up through basement drains during a heavy rain, or perhaps overflow of a clogged toilet -- which generally is either a reverse flow of water or a blockage. But leakage from a cracked pipe is different.

In Old Dominion Ins. Co. v. Elysee, Inc., 601 So.2d 1243 (Fla. App.1992) [reviewed at PLRB, Prop. Ins. L. Rev. 3804 (1992)], the court stated that the terms "sewer" and "drain" describe, in common understanding, devices which carry water and sewage away from property, and the general understanding in case law is that a sewer or drain begins at an insured's property line. But where does it end? An argument could be made that the term drain was intended to only describe the opening, and not the rest of the drain line.

## Case Law

Courts have tended toward coverage in similar cases. In Junius Development, Inc. v. New York Marine & General Ins. Co., No. 2007-07529, 2008 WL 334176, --- N.Y.S.2d --- (App. Div. 2d Dept. 2/05/08) [reviewed at PLRB, Prop. Ins. L. Rev. 7487 (2008)], the water damage exclusion for water that backs up or overflows from drains did not apply for a loss that occurred when a drainpipe filled with construction debris failed. The immediate cause of the loss was the separation of the drainpipe, which resulted in water from a rooftop water tank flowing directly into the basement of the insured's building. Under these circumstances, the water damage exclusion did not apply.

See *also* Cameron v. Scottsdale Ins. Co., No. 17-11907, 2018 WL 1791889 (11th Cir. (Fla.) 4/16/18) (U.S. Court of Appeals for the Eleventh Circuit, applying Florida law) [reviewed at PLRB, Prop. Ins. L. Rev. 10015 (2018)]. An exclusion for "Water that backs up or overflows or is otherwise discharged from a sewer, drain, sump, sump pump or related equipment" only applied if the water originated outside the insured premises' plumbing system. Thus, water damage exception to the wear and tear exclusion covered water damage that occurred when a wastewater pipe collapsed due to age-related

causes. The exception clearly applied because the damage was caused by an "accidental discharge of water" that was "a direct result of the breaking apart or cracking of a plumbing system ... that is located on the described premises and contains water."

## Conclusion

I suppose one might attempt to argue that the water damage in this claim was "Water that backs up or overflows or is otherwise discharged from a sewer, drain."

However, that is probably too literal of a reading of the exclusion. The likely intent of the policy -- and the more common approach -- would be to cover the discharge of water/sewage under the "specified cause of loss" provision quoted above. In short, the backup/overflow exclusion was probably only intended to apply when water exits at the source or opening of a drain, not when a crack occurs in the middle of the line. When water or sewage exits a plumbing system through a sudden crack or break in the pipe, that tends to be covered as an accidental discharge.

Tim Havlir, JD  
*Counsel*  
Property & Liability Resource Bureau  
3025 Highland Pkwy. Ste. 800  
Downers Grove, IL 60515  
630-724-2245 (ph)  
thavlir@plrb.org

### *Property & Liability Resource Bureau Disclaimer*

I hope this discussion assists you. It is intended to present you with information about case law and other authority applicable to the interpretation of the relevant insurance policy provisions. Every effort has been made to ensure that the information provided is accurate. However, the opinions expressed here are for internal use only. They do not constitute a substitute for legal advice as to the law of a particular jurisdiction as applied in the full factual context of a particular claim.

The opinions expressed in this discussion are those of the staff of the Property & Liability Resource Bureau and do not necessarily represent the opinions of the membership. The opinions of the staff of the Bureau do not represent an indication or prediction of any future action or position of any member insurer. You should consult with your company's management to determine your company's positions on the issues discussed.

### *Confidentiality & Copyright Notice*

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On Mon, Jun 1, 2020 at 10:31 AM Abel, Tom <[tabel@unionmutual.com](mailto:tabel@unionmutual.com)> wrote:

Hi Tim- Sorry- Yes normal wear and tear. Sorry

Tom Abel – Regional General Adjuster

**Union Mutual** – POB 158, 139 State St., Montpelier, VT 05602

800-671-8550 ext. 625 (o), 413-209-7099 (c) - [www.unionmutual.com](http://www.unionmutual.com)