

No. 19-20363

*In the United States Court of Appeals
for the Fifth Circuit*

PAN AM EQUITIES, INCORPORATED,

Plaintiff-Appellant,

v.

LEXINGTON INSURANCE COMPANY,

Defendant-Appellee.

On Appeal from the United States District Court for
the Southern District of Texas, Houston Division

**OPENING BRIEF OF PLAINTIFF-APPELLANT
PAN AM EQUITIES, INC.**

Stephen A. Weisbrod (*Counsel of Record*)
Derek Y. Sugimura
WEISBROD MATTEIS & COPLEY PLLC
1200 New Hampshire Avenue, Suite 600
Washington, DC 20036
Telephone: (202) 499-7900
Facsimile: (202) 478-1795
sweisbrod@wmclaw.com
dsugimura@wmclaw.com

Frank P. Winston, Esq. (*of counsel –
application for admission to be filed*)
LERNER, ARNOLD & WINSTON,
LLP
475 Park Avenue South, 28th Fl.
New York, NY 10016
Telephone: (212) 686-4655
Facsimile: (212) 532-3301
fwinston@lawpartnersllp.com

CERTIFICATE OF INTERESTED PERSONS

PAN AM EQUITIES, INC.

Plaintiff-Appellant,

v.

LEXINGTON INSURANCE CO.

Defendant-Appellee.

Case No. 19-20363

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Fed. R. App. P. 28.2.1 have an interest in the outcome of this case:

- A. Pan Am Equities, Inc. (“Pan Am”)
- B. Lexington Insurance Company (“Lexington”)
- C. American International Group, Inc.
- D. Weisbrod Matteis & Copley PLLC
 - 1. Stephen A. Weisbrod
 - 2. Derek Y. Sugimura
- E. Lerner, Arnold, & Winston LLP

1. Frank P. Winston
- F. Eggleston & Briscoe LLP
1. Raymond L. Gregory II
- G. Mound Cotton Wollan & Greengrass LLP
1. James M. Dennis
 2. Diana E. McMonagle
 3. Wayne R. Glaubinger
- H. Any other person or entity identified in a Certificate of Interested Persons filed by any other party in this matter.

These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

/s/ Stephen Weisbrod
1200 New Hampshire Ave. NW, Suite 600
Washington, DC 20036
Tel: (202) 499-7900
Fax: (202) 478-1795
sweisbrod@wmclaw.com

Lead Counsel for Plaintiff-Appellant

STATEMENT REGARDING ORAL ARGUMENT

Pan Am respectfully requests oral argument, which will facilitate the Court's understanding of the complicated contract provisions at issue and the broad ramifications of the district court's decision.

TABLE OF CONTENTS

CERTIFICATE OF INTERESTED PERSONS	i
STATEMENT REGARDING ORAL ARGUMENT	iii
TABLE OF AUTHORITIES	vii
JURISDICTIONAL STATEMENT	1
STATEMENT OF ISSUES PRESENTED FOR REVIEW	2
STATEMENT OF THE CASE.....	4
A. Pan Am Sought Coverage for Flood Loss at Two Houston Properties after Hurricane Harvey.....	4
B. Lexington Denied Coverage after Applying the Windstorm Deductible Instead of the Flood Deductible.....	5
C. Lexington Asserted that “Windstorm” Loss Can Encompass “Flood” Loss.....	8
D. The District Court Ruled in Favor of Lexington.....	11
SUMMARY OF ARGUMENT	17
STANDARD OF REVIEW	22
ARGUMENT	24
I. The District Court Erred by Failing to Consider the Policy’s Structure and Definitions.....	24
A. The Policy’s Deductibles Section Treats Flood Loss and Windstorm Loss Separately	24

1.	“Flood” Is Defined in the Policy and Has Its Own Deductible	26
2.	The Meaning of “Windstorm” Is Well-Established, Such that the Provision Increasing the Windstorm Deductible when Windstorm Loss Results from a “Named Storm” Does Not Apply to Flood Loss	26
B.	By Its Own Terms, the “Named Storm” Provision Applies Only to Loss Due to “Windstorm” or “Hail.”	32
1.	No Single Deductible in the Policy Applies to Every Possible Type of Damage that Can Result from Named Storms	32
2.	The Named Storm Provision Does Not Expand the Meaning of “Adjusted Loss Due to Windstorm and Hail.”	33
3.	The District Court’s Discussion of the “Except” and “Regardless of” Language in the Windstorm and Hail Deductible Contained Major Errors of Logic and Grammar	34
II.	The District Court’s Countermanding of Applicable Precedent, if Upheld, Would Upset the Reasonable Expectations of Millions of Policyholders Who Depend on Flood Coverage after Hurricanes	37
III.	The District Court Erred by Refusing to Consider Admissible Evidence Regarding Industry Custom and Usage	41
IV.	In the Alternative, the District Court Erred by Ignoring Ambiguity in the Policy Terms Arising from the Two Interpretations of the Term “Windstorm” and/or the Presence of Two Inconsistent “Regardless of” Clauses	48
A.	The Policy’s Use of the Undefined Term “Windstorm” Creates Ambiguity	48

B.	The Policy’s Inclusion of Two Inconsistent “Regardless of” Clauses Creates Ambiguity	49
C.	Ambiguity in the Policy Should Be Resolved in Favor of Pan Am	49
CONCLUSION		51
CERTIFICATE OF SERVICE		53
CERTIFICATE OF COMPLIANCE.....		54
ECF CERTIFICATIONS		55
ADDENDUM		

TABLE OF AUTHORITIES

Cases

Affiliated FM Ins. Co. v. Constitution Reinsurance Corp., 626 N.E.2d 878, 882 (Mass. 1994).....	49
Alabama Farm Bureau Mut. Cas. Co. v. Am. Fid. Life Ins. Co., 606 F.2d 602, 609 (5th Cir. 1979).....	24
Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).....	24
APS Capital Corp. v. Mesa Air Grp., Inc., 580 F.3d 265, 271 (5th Cir. 2009).....	48
ARM Properties Mgmt. Grp. v. RSUI Indem. Co., 400 F. App'x 938, 940 (5th Cir. 2010).....	26
Atwood v. Rodman, 355 S.W.2d 206, 216 (Tex. Civ. App. 1962, writ refused NRE June 20, 1962).....	49
Aubris Res. LP v. St. Paul Fire & Marine Ins. Co., 566 F.3d 483, 486 (5th Cir. 2009).....	55
Balog, Inc. v. United States Fid. and Guar. Co., 2007 WL 1599748 ...	16, 17, 30, 31
Bilbe v. Belsom, 530 F.3d 314 (5th Cir. 2008)	43
Brabender v. N. Assur. Co. of Am., 65 F.3d 269, 273 (2d Cir. 1995)	54
Bradley v. Allstate Ins. Co., 620 F.3d 509, 523 (5th Cir. 2010)	43
Cicciarella v. Amica Mut. Ins. Co., 66 F.3d 764, 768 (5th Cir. 1995).....	54

Columbia Gas Trans. Corp. v. New Ulm Gas, Ltd., 940 S.W.2d 587, 589 (Tex. 1996).....	23
Consarc Corp. v. Marine Midland Bank, N.A., 996 F.2d 568, 573 (2d Cir. 1993).....	23
Culwell v. City of Fort Worth, 468 F.3d 868, 871 (5th Cir. 2006)	24
Dwyer v. Fid. Nat. Prop. & Cas. Ins. Co., 565 F.3d 284, 285 (5th Cir. 2009).....	43
First Bank v. Brumitt, 519 S.W.3d 95, 109 (Tex. 2017)	50
Jefferson Block 24 Oil & Gas, L.L.C. v. Aspen Ins. UK Ltd., 652 F.3d 584, 594 (5th Cir. 2011).....	26
Kemp v. Am. Universal Ins. Co., 391 F.2d 533, 534-35 (5th Cir. 1968).....	29, 41
Law Debenture Tr. Co. of New York v. Maverick Tube Corp., 595 F.3d 458, 466 (2d Cir. 2010).....	50
Lloyds London v. Perraud, 623 F. App'x 628, 632 (5th Cir. 2015).....	54
Lloyd's London, 93 F.3d 529, 537 (9th Cir. 1996)	49
Louisiana Generating, L.L.C. v. Illinois Union Ins. Co., 831 F.3d 618, 624 (5th Cir. 2016).....	48
Lowery v. Fid. Nat. Prop. and Cas. Ins. Co., 805 F.3d 204 (5th Cir. 2015).....	43
Luling Oil & Gas Co. v. Humble Oil & Ref. Co., 191 S.W.2d 716, 724 (1946)	50
Monistere v. State Farm Fire & Cas. Co., 559 F.3d 390, 391 (5th Cir. 2009)	43

Morgan Stanley Grp. Inc. v. New England Ins. Co., 225 F.3d 270, 275 (2d Cir. 2000)	54
Mutual Life Insurance Co. v. Simpson, 31 S.W. 501, 502	54
Napanoch Realty Corp. v. Pub. Serv. Mut. Ins. Co., 336 N.Y.S.2d 489, 490-91 (N.Y. App. 3d Dept 1972)	30, 41
Nat'l Union Fire Ins. Co. of Pittsburgh, PA v. CBI Indus., Inc., 907 S.W.2d 517, 521-22 (Tex. 1995)	48
Nat'l Union Fire Ins. Co. of Pittsburgh, PA v. Cont'l Carbon Co., No. CIV.A. H- 10-2379, 2012 WL 43604 (S.D. Tex. Jan. 9, 2012)	30
New Sea Crest Health Care Ctr., LLC v. Lexington Ins. Co., No. 12 CV 6414 RJD RLM, 2014 WL 2879839, at *2 (E.D.N.Y. June 24, 2014)	13, 14, 51
Ogden Corp. v. Travelers Indem. Co., 681 F. Supp. 169, 173 (S.D.N.Y. 1988)	54
Pan American World Airways, Inc. v. Aetna Cas. & Sur. Co., 368 F. Supp. 1098 (S.D.N.Y. 1973)	49
Seacor Holdings, Inc. v. Commonwealth Insurance Co., 635 F.3d 675 (5th Cir. 2011)	passim
Stainless, Inc. v. Employers Fire Ins. Co., 418 N.Y.S.2d 76, 79 (N.Y. App. 1 st Dept 1979)	41

Tesoro Ref. & Mktg. Co., L.L.C. v. Nat'l Union Fire Ins. Co., 833 F.3d 470, 474 (5th Cir. 2016).....	26
Union City Barge Line v. Union Carbide Corp., 823 F.2d 129, 136 (5th Cir. 1987).....	24
Weiser-Brown Operating Co. v. St. Paul Surplus Lines Ins. Co., 801 F.3d 512, 517 (5th Cir. 2015).....	23
XCO Prod. Co. v. Jamison, 194 S.W.3d 622, 627-28 (Tex. App. 2006)	48

Statutes

28 U.S.C. § 1291	1
28 U.S.C. § 1332(a)(1).....	1
28 U.S.C. § 1391	1
Texas Insurance Code § 541	11
Texas Insurance Code § 542	11

Rules

Fed. R. Civ. P. 56(a).....	22
Fed. R. Civ. P. 56(d)	1, 15, 23, 50

Regulations

44 C.F.R. Pt. 61	38
------------------------	----

Other Authorities

The Definition and Effect of Usage, 12 Williston on Contracts § 34:1 (4th ed.)	42
Proof of Usage for the Purpose of Defining Words in a Contract, 12 Williston on Contracts § 34:5 (4th ed.).....	43
21A Am. Jur. 2d <i>Customs and Usages</i> § 17 (2019)	42
Restatement (Second) of Contracts § 222.....	42

JURISDICTIONAL STATEMENT

The U.S. District Court for the Southern District of Texas had subject matter jurisdiction pursuant to 28 U.S.C. § 1332(a)(1) because Plaintiff and Defendant are citizens of different States and the amount in controversy exceeds \$75,000.00, excluding interest and costs. Venue was proper pursuant to 28 U.S.C. § 1391 because substantial events giving rise to the claim occurred in that district.

The district court (Atlas, J.) granted Lexington's motion for summary judgment and denied Pan Am's cross motion for partial summary judgment and its motion for discovery pursuant to Fed. R. Civ. P. 56(d). ROA.978, ROA.988. Pan Am filed a notice of appeal on May 23, 2019. ROA.989. This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

Pan Am seeks coverage from Lexington under a first-party property insurance policy (the “Policy”) for damage caused by flooding after Hurricane Harvey. Lexington contends that Pan Am’s loss is subject to the Policy’s “Windstorm and Hail” deductible, which states that the deductible for Windstorm or Hail damage is significantly increased if the Windstorm or Hail loss results from a “Named Storm.” Pan Am contends that its loss due to flooding is subject only to the Policy’s “Flood” deductible, which does not contain a “Named Storm” provision.

If only the Flood deductible applies, then Lexington owes millions of dollars, but if the Windstorm and Hail deductible applies, then Lexington owes nothing. The district court ruled for Lexington, finding that Pan Am’s Flood loss was a type of Windstorm loss and subject to the Windstorm and Hail deductible’s Named Storm provision.

The issues presented are:

First, did the district court err by ignoring the Policy’s structure and defined terms, which confirm that the Policy treats the perils of “Windstorm” and “Flood” as separate and distinct perils, and that the Flood deductible applies to Flood loss “regardless of any other cause or event contributing concurrently or in any other sequence of loss”?

Second, did the district court err by countermanding established law holding that, absent clear contract language to the contrary, the term “windstorm”—when used in property insurance policies—refers solely to the insurable peril of damage due to the force of high-speed wind and does not encompass the separate peril of damage due to flood?

Third, did the district court err by disregarding, and precluding discovery to obtain, admissible evidence of insurance industry custom and usage, which would explicate the structure of the Policy and confirm that the peril of “windstorm” refers to damage due to the force of high-speed wind and does not encompass damage due to flood?

Fourth, and in the alternative, even if Lexington’s Policy interpretation were reasonable, did the district court err by ignoring ambiguity created by (a) the existence of two different reasonable meanings of the term “Windstorm,” and/or (b) the presence in the Policy of one clause requiring application of the Flood deductible to any loss due to Flood “regardless of” the existence of another weather event (such as a hurricane) as a contributing cause of the loss, and a second inconsistent clause requiring application of the Windstorm and Hail deductible to any loss due to a Named Storm “regardless of” the existence of damage due to Flood?

STATEMENT OF THE CASE

A. Pan Am Sought Coverage for Flood Loss at Two Houston Properties after Hurricane Harvey.

In the aftermath of Hurricane Harvey, Pan Am suffered not less than \$6.7 million in damage due to flooding at buildings located at 777 Preston Street and 930 Main Street in Houston (the “Subject Properties”). ROA.7. The Subject Properties were not damaged by wind. *Id.*

Pan Am’s Policy states: “This Policy covers physical loss or damage caused by or resulting from Flood.” ROA.39. “Flood” is defined to encompass various kinds of loss caused by water “*regardless of any other cause or event contributing concurrently or in any other sequence of loss.*” ROA.39 (emphasis added). The Flood definition—and the anti-concurrent causation clause within it—applies to the term “Flood” “wherever used in this Policy.” *Id.*

The full definition is:

Flood:

Flood; surface water; rising waters; waves; tide or tidal water; the release of water, the rising, overflowing or breaking of boundaries of natural or man-made bodies of water; or the spray therefrom, surface waters or sewer back-up resulting from any of the foregoing; *regardless of any other cause or event contributing concurrently or in any other sequence of loss.*

Id. (emphasis added).

The balance of this brief has been omitted for this sample.
For a complete version of this brief, please contact our office.

Thank you.