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COURT OF APPEALS

STATE OF NEW YORK

PLATEK,

Respondent,

-against-

No. 21

TOWN OF HAMBURG, ET AL.,

Appellants.

20 Eagle Street
Albany, New York 12207
January 15, 2015

Before:

CHIEF JUDGE JONATHAN LIPPMAN
ASSOCIATE JUDGE SUSAN PHILLIPS READ
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM

Appearances:

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Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: We're going to start
2 with number 21, Platek v. Allstate.

3 Counselor, you want any rebuttal time,
4 counsel?

5 MR. KING: May I have two minutes, Your
6 Honor.

7 CHIEF JUDGE LIPPMAN: Two minutes. Sure,
8 go ahead.

9 MR. KING: May it please the court my name
10 is Robert King, and I'm here this afternoon
11 representing the appellant, Allstate Indemnity
12 Company.

13 CHIEF JUDGE LIPPMAN: Explain in a - - - in
14 a simple layman's term what this provision is. What
15 does it - - - what does it mean in a nutshell?

16 MR. KING: In a nutshell, Your Honor, what
17 it means - - -

18 CHIEF JUDGE LIPPMAN: An ensuing loss
19 provision. Go ahead.

20 MR. KING: Correct. What it means is if
21 there is an initial water loss to the property - - -

22 CHIEF JUDGE LIPPMAN: Yes.

23 MR. KING: - - - but a fire, explosion, or
24 theft occurs thereafter, the damage caused by that
25 fire, explosion, or theft is covered but not the

1 water damage.

2 JUDGE PIGOTT: Suppose it's the opposite -
3 - -

4 MR. KING: Only the ensuing damage.

5 JUDGE PIGOTT: Suppose it's the opposite.
6 Suppose there's an explosion that causes the water
7 damage.

8 MR. KING: It - - - well, it - - - for - -
9 - for example in this case, I would argue that the
10 cause of the loss, as the plaintiffs admit repeatedly
11 in their papers and below, was they suffered a water
12 intrusion loss.

13 JUDGE PIGOTT: Well, it seemed - - -

14 MR. KING: So that's excluded.

15 JUDGE PIGOTT: It seemed like the case got
16 twisted at some point, because the - - - the
17 homeowners were saying we had an explosion out on the
18 street. And they called the water - - -

19 MR. KING: Right.

20 JUDGE PIGOTT: - - - you know, and they
21 called the carrier. And it was the carrier that said
22 this - - - this explosion was not an ensuing
23 explosion. Therefore, it's not covered.

24 MR. KING: Well - - -

25 JUDGE PIGOTT: But it seems to me that the

1 policy covers explosions as the original cause. For
2 example, if the furnace had blown up you'd - - -

3 MR. KING: Sure.

4 JUDGE PIGOTT: So the - - - the - - - the
5 only person to testify said this is an explosion. So
6 it seemed to me that the policy would cover any loss
7 caused by explosion. And then it got - - - be - - -
8 because the - - - the disclaimer went into the
9 ensuing section, they got into an argument over the
10 ensuing section. But if they had been arguing
11 explosion caused loss it's covered, you'd be arguing
12 whether or not the - - - the - - - the water loss
13 caused by the explosion was - - - was covered.

14 MR. KING: Well, and my answer to that
15 would be that in this particular case the explosion
16 was not the cause of the loss. There's no - - -
17 there's no assertion - - -

18 CHIEF JUDGE LIPPMAN: Well, indirect cause,
19 isn't there?

20 MR. KING: It - - - it may be an indirect
21 cause, but under New York causation law we don't go
22 back to the first necessary - - -

23 CHIEF JUDGE LIPPMAN: Yeah, yeah, but what
24 under your policy in the wording of the policy?

25 MR. KING: Well, we cover - - -

1 CHIEF JUDGE LIPPMAN: Is it - - - you know
2 exclusions are interpreted narrowly.

3 MR. KING: Yes, they are, Your Honor.

4 CHIEF JUDGE LIPPMAN: Was the language
5 ironclad that that's what it means? That's it's in
6 this order - - -

7 MR. KING: Yes.

8 CHIEF JUDGE LIPPMAN: - - - if the
9 explosion causes water damage, no good? I mean is
10 that crystal clear?

11 MR. KING: Yes. I believe it is.

12 JUDGE PIGOTT: Let me ask you in that
13 regard. Suppose there's a fire, your standard, old
14 fire. And the fire's not a big deal, but what - - -
15 by the time the fire departments' done, the place is
16 waterlogged. Do you cover the water damage caused as
17 a result of the fire?

18 MR. KING: The answer is fire is a - - - is
19 a covered - - - it's not an excluded peril. So - - -

20 JUDGE PIGOTT: Nor is - - - nor is
21 explosion.

22 MR. KING: Nor is explosion that causes
23 direct - - -

24 JUDGE PIGOTT: So - - - so if - - -

25 MR. KING: - - - that causes direct

1 physical loss.

2 JUDGE PIGOTT: Right. So if the fire
3 causes direct physical loss, i.e. the fire department
4 deluge - - - deluging the place, you'd cover that.

5 MR. KING: That's - - - that's correct.

6 JUDGE PIGOTT: If an explosion happened, a
7 furnace blew up and the same thing happened, you'd
8 cover that.

9 MR. KING: That - - - that - - - if it's a
10 direct physical loss. That's correct.

11 JUDGE PIGOTT: They said here's the
12 explosion. All this water is three feet in our - - -
13 in our basement dir - - - directly caused by the
14 explosion you'd cover that?

15 MR. KING: Well, no. Because there the - -
16 - the - - - the cause of the water loss here is it
17 was water, not the explosion. There was no damage -
18 - -

19 JUDGE PIGOTT: Well, how do you think the
20 water - - -

21 MR. KING: There was no damage done to the
22 property by the explosion.

23 JUDGE PIGOTT: The explosion was the water.
24 I mean it was - - - it was a - - -

25 MR. KING: It - - - it may have - - -

1 JUDGE PIGOTT: - - - big water pipe.

2 MR. KING: Well, according to them, their
3 theory is that water caused the pipe to burst which
4 caused the release of water.

5 JUDGE PIGOTT: Right.

6 MR. KING: So if you - - - if you used
7 their logic, you'd go back to the - - - the first
8 cause, and the first cause isn't the explosion. It's
9 the water, which would be excluded.

10 JUDGE ABDUS-SALAAM: But if it hadn't been
11 the water that caused the explosion, say there was a
12 bomb on the street or something, and then the pipe
13 burst, would you cover that?

14 MR. KING: No. That - - - that would - - -
15 that would create the same scenario that we have here
16 that - - -

17 JUDGE PIGOTT: If somebody put a firebomb
18 in a - - - in - - - in the upstairs toilet, do you
19 cover that?

20 MR. KING: I - - - I - - - I'd have to
21 think about that, but I don't think that's excluded.

22 JUDGE PIGOTT: I don't think so either. I
23 - - - I - - - it seems to me that if the - - - if - -
24 - if the explosion causes the loss, there's nothing
25 in the policy doesn't say you'll - - - you pay - - -

1 your opponent about.

2 MR. KING: Okay.

3 JUDGE PIGOTT: Because - - - because all of
4 a sudden your - - - your - - - your representative -
5 - - I mean, what the day after the loss by the way,
6 after a thorough investigation, said this - - - this
7 is water damage - - - this - - - this ensued from
8 water and, therefore, the explosion isn't covered.

9 MR. KING: Well, I think what they said
10 was, as I recall the - - - the - - - the letter, was
11 that this is not covered by reason of exclusion 4,
12 which was the water exclusion.

13 JUDGE PIGOTT: Right. The - - - the
14 ensuing loss stuff.

15 MR. KING: No.

16 JUDGE PIGOTT: And that really wasn't - - -

17 MR. KING: Actually - - - actually the
18 letter didn't even quote, as my opponent points out,
19 that - - - that the declination letter did not even
20 quote the ensuing loss language at all. It relied
21 exclusively on the water loss exclusion set forth in
22 4.

23 JUDGE PIGOTT: Right.

24 JUDGE ABDUS-SALAAM: Counsel - - -

25 CHIEF JUDGE LIPPMAN: Counsel, what do you

1 - - - what do you think the average insured believes
2 when they get a policy along these lines? Isn't this
3 a little bit of an arcane distinction in terms of we
4 know that we want to interpret this in what the - - -
5 the ordinary person would think it means?

6 MR. KING: Well, I think the ordinary
7 person would not think that their policy covered a
8 water intrusion loss when there's an exclusion that
9 says we don't cover water - - -

10 JUDGE PIGOTT: Yeah, yeah. But you don't
11 think the average person would think that when
12 there's an explosion that results in the water loss
13 that they're covered?

14 MR. KING: I don't think so.

15 CHIEF JUDGE LIPPMAN: Don't you think
16 that's what a - - - a normal person would think in
17 really reviewing this policy in the sense of its - -
18 - its normal meaning, right?

19 MR. KING: Correct.

20 CHIEF JUDGE LIPPMAN: That's what we have
21 to do under the law.

22 MR. KING: That's correct. I - - - I - - -
23 I think not. I think because the water exclusion is
24 so broad that if your loss is caused by water, a
25 reasonable person's going to say that's not covered.

1 JUDGE PIGOTT: But - - - but you just said
2 the fire department deluged the house, we cover that
3 fire - - - that water loss.

4 MR. KING: Because the - - - if the - - -
5 if - - -

6 JUDGE PIGOTT: Explosion, we cover that
7 water loss. But we don't cover a water loss that's
8 in a - - - a water explosion.

9 MR. KING: The - - - the efficient
10 proximate cause of this loss, I would say, is water.

11 JUDGE ABDUS-SALAAM: Counsel - - -

12 CHIEF JUDGE LIPPMAN: Does it matter where
13 the - - - the explosion takes place? In other words,
14 if the explosion takes place in the middle of your
15 property is one thing. And what if the explosion
16 takes place one centimeter from the front door; is it
17 covered and then you get all this water damage?

18 MR. KING: Well, if you're looking at the
19 ensuing loss provision - - -

20 CHIEF JUDGE LIPPMAN: Yeah.

21 MR. KING: - - - there has to be an initial
22 water loss on the property or to the property for it
23 to be triggered. Otherwise, the exception wouldn't
24 come into play.

25 CHIEF JUDGE LIPPMAN: It's not triggered by

1 an explosion that's literally right on your property?
2 What if the explosion takes place in the middle of
3 the - - -

4 MR. KING: Well - - - well - - -

5 CHIEF JUDGE LIPPMAN: - - - the - - - the
6 home?

7 MR. KING: Well, the - - - in the middle of
8 the home?

9 CHIEF JUDGE LIPPMAN: Yeah.

10 MR. KING: Well, that would be on the
11 property.

12 CHIEF JUDGE LIPPMAN: If it takes place and
13 then water damage, you're covered, right?

14 MR. KING: That should result in a covered
15 loss.

16 CHIEF JUDGE LIPPMAN: And if it takes place
17 one centimeter - - -

18 MR. KING: But - - - but again the dam - -
19 - the damage - - -

20 CHIEF JUDGE LIPPMAN: - - - from the front
21 door it doesn't?

22 MR. KING: Well, the - - - there - - -
23 there could be an ambiguity here depending upon the
24 facts, but you would certainly have coverage for the
25 damage caused by the explosion. You - - - there

1 might be an issue about whether the damage by the
2 water is covered.

3 JUDGE ABDUS-SALAAM: Well, even if we agree
4 with your interpretation that this is an ensuing loss
5 provision and - - - but - - - but if we think that
6 the interpretation by the plaintiffs or the - - - the
7 homeowners here is also reasonable, do we have to
8 decide in their favor because of the possible
9 ambiguity?

10 MR. KING: Well, I think - - -

11 JUDGE ABDUS-SALAAM: The two reasonable
12 interpretations?

13 MR. KING: - - - under the facts of this
14 case the court could say there was no direct physical
15 loss caused by explosion. There's no assertion that
16 the explosion caused a pipe to, you know - - -

17 JUDGE READ: That's your sort of proximate
18 cause argument or direct - - -

19 MR. KING: Correct.

20 JUDGE READ: Let me ask you something else.
21 If you - - - assuming that you're - - - you're
22 correct, okay, and I'm the homeowner. What - - - is
23 there something I can buy that would insure me
24 against the kind of loss that happened here? Is
25 there some sort of standard policy or is there some

1 kind of a - - - a rider?

2 MR. KING: Not that I'm aware of.

3 CHIEF JUDGE LIPPMAN: Flood damage?

4 MR. KING: Well, I don't even know if this
5 would be covered under flood insurance. I'm not
6 sure.

7 JUDGE RIVERA: Be - - - because why? I'm
8 sorry. Why - - -

9 MR. KING: I - - - well, I'm not - - -

10 JUDGE RIVERA: Why do you hesitate?

11 MR. KING: Well, I hesitate because I'm
12 trying to recall the definition of flood under the -
13 - - the FEMA policy. I just don't know if it's - - -
14 it - - - it would include an incident like this.

15 CHIEF JUDGE LIPPMAN: Okay, counsel. Let -
16 - - you'll have your rebuttal.

17 MR. KING: All right. Thank you very much.

18 CHIEF JUDGE LIPPMAN: Let's - - - let's
19 hear from your adversary.

20 MR. MACKEY: May it please the court my
21 name is Patrick Mackey, and I represent the
22 respondents Frederick Platek and Mary Platek. Good
23 afternoon, Your Honors.

24 CHIEF JUDGE LIPPMAN: Counsel, why aren't -
25 - - why isn't your adversary right that if you look

1 at that language, you know, it - - - it appears
2 pretty specific as to what constitutes resulting
3 loss. Why - - - do you think it's clear in your
4 direction?

5 MR. MACKEY: I don't - - - I don't think
6 the Allstate - - -

7 CHIEF JUDGE LIPPMAN: Or do you think it's
8 ambiguous?

9 MR. MACKEY: I think Allstate's
10 interpretation is ambiguous to the effect that
11 they're looking or they're arguing that the prefatory
12 language should be included in the exception to the
13 exclusion.

14 JUDGE READ: Why wouldn't it be? I mean
15 why wouldn't you read the whole thing. If you don't
16 - - -

17 MR. MACKEY: Well, if you look at the
18 exception language, first off, it doesn't direct the
19 reader. It doesn't direct the consumer to go back to
20 the prefatory language. It just - - - it says rev -
21 - - revert back to items 1 through 4, 4 being the
22 exclusions at issue today. So it doesn't direct - -
23 - it doesn't instruct - - - instruct the reader to go
24 to the prefatory language.

25 But even if it did and the reader or the

1 consumer went back to the prefatory language, what
2 the - - - what Allstate is arguing is that you should
3 go - - - you shouldn't even read the entire prefatory
4 language. You should start five words in, because if
5 you take the exception language and you match it up
6 with the prefatory language, it just doesn't
7 grammatically make any sense.

8 CHIEF JUDGE LIPPMAN: Counsel, this is a
9 fairly standard terminology. Isn't it?

10 MR. MACKEY: In this particular policy?

11 CHIEF JUDGE LIPPMAN: In - - - in this kind
12 of policy, yes.

13 MR. MACKEY: It - - - it - - - looking at
14 other cases in researching there were similar - - -
15 similar wordings in this particular exception.

16 JUDGE PIGOTT: Well, it's identical. They
17 have to be approved by the Commissioner of Insurance
18 and there - - - and, you know, there's even a
19 boilerplate that talks about, you know, the - - - the
20 basic policy and - - -

21 MR. MACKEY: I guess what's ambiguous is
22 the term "result from".

23 JUDGE PIGOTT: Well, what - - -

24 MR. MACKEY: Because it could be - - - it
25 could be meaning caused or it could be meaning

1 followed.

2 JUDGE PIGOTT: If you started at the top of
3 your policy they cover fire, explosion, and a bunch
4 of stuff. And that's the way you started out your
5 argument. Not you personally. The plaintiff started
6 out their argument in - - - in special term. They
7 said, "The water main literally exploded causing a
8 tremendous amount of water to rush into the house."
9 And that appeared to be your claim.

10 They then argued this is - - - this is
11 under the - - - the exclusion to the exceptions. We
12 don't pay for water and - - - and - - - but we will
13 pay for an explosion if it's caused by the water.
14 This was the - - - this was - - - the water was
15 caused by the explosion.

16 But it seemed like you left that argument
17 and - - - and started arguing no, they're reading
18 their policy wrong. And I'm not sure they were. It
19 does read like the explos - - - the ensuing explosion
20 not - - - not the explosion that caused it.

21 MR. MACKEY: I - - - I guess what is most
22 important is to look at what's the triggering event.
23 What triggers, in their argument, the ensuing loss.
24 In - - -

25 CHIEF JUDGE LIPPMAN: What - - - what does

1 trigger in this case?

2 MR. MACKEY: In this case it's water on or
3 below the surface of the ground exerting pressure on
4 the Platek's property.

5 CHIEF JUDGE LIPPMAN: So if it was - - -

6 MR. MACKEY: So - - -

7 CHIEF JUDGE LIPPMAN: So - - - and I think
8 someone asked this question before, if it - - - if it
9 wasn't caused by water coming, you know, that - - -
10 that causes the pipe to explode, is that a different
11 situation then when water causes it to explode? Does
12 that change whether one collects or doesn't collect?

13 MR. MACKEY: Well, it would change that
14 this particular exclusion wouldn't even come into
15 effect. What happened is - - -

16 CHIEF JUDGE LIPPMAN: If - - - if - - - if
17 it wasn't caused by water - - -

18 MR. MACKEY: Right.

19 CHIEF JUDGE LIPPMAN: - - - making the
20 explosion.

21 MR. MACKEY: I - - - I can't imagine
22 Allstate would say, you know, there's no water
23 involved but we're going to deny you under this water
24 exclusion.

25 JUDGE RIVERA: Counsel, the - - - I'm - - -

1 I'm a little confused how you can read this
2 particular provision that way since, excuse me, the
3 exception that refers to fire and explosion also
4 result - - - also refers to theft.

5 MR. MACKEY: Um-hum.

6 JUDGE RIVERA: So how does theft result
7 from water?

8 MR. MACKEY: Well, if water comes onto the
9 - - -

10 JUDGE RIVERA: How do you harmonize that?

11 MR. MACKEY: I'm sorry?

12 JUDGE RIVERA: How do you harmonize that?

13 MR. MACKEY: Well, if water comes onto the
14 property - - - and it's part of the exclusion. The
15 exclusion says water seeping, leaking - - -

16 JUDGE RIVERA: Yes.

17 MR. MACKEY: - - - or flowing onto the
18 property.

19 JUDGE RIVERA: Yes, um-hum.

20 MR. MACKEY: And then also it's part of the
21 exception. If that water comes onto the property,
22 causes enough damage to the property to make it
23 inhabitable, the family would have to leave the
24 property leaving it unsecure. You could - - - it
25 could result in - - - in - - - in a theft at that

1 point. It - - - it - - - it's a proximate cause.

2 The water - - -

3 JUDGE RIVERA: That's a lot of ifs.

4 MR. MACKEY: Well, I - - - I don't know if

5 it's a lot of ifs - - -

6 JUDGE RIVERA: That's very attenuated.

7 MR. MACKEY: - - - but it's a very - - -

8 JUDGE RIVERA: And it doesn't seem like a

9 natural reading - - -

10 MR. MACKEY: It's - - - I - - - I think

11 it's - - -

12 JUDGE RIVERA: - - - from the word

13 "effect".

14 MR. MACKEY: I think it's a reasonable

15 belief that that could happen. If a - - - if a house

16 is left uninhabitable because of water flowing onto

17 the property and causing enough damage, then you're

18 leaving a property unsecure.

19 JUDGE ABDUS-SALAAM: That - - - that then

20 results from the water damage, which means that's an

21 ensuing loss, right? You're - - - you're reading it,

22 as I - - - as I hear you say - - - stating your

23 position, you're reading it as an ensuing loss.

24 MR. MACKEY: Well, I think the exception to

25 the exclusion is actually quite broad. It - - - it

1 allows for coverage for ensuing losses but also
2 allows for coverage for, essentially, not ensuing
3 losses because all the triggering that - - - the
4 triggering event that has to occur is it's water on -
5 - - on or below the - - - the surface of the ground
6 exerting pressure on the property. If that causes an
7 explosion and the explosion causes damage, there is -
8 - - there is the - - - the chain of events that's
9 covered under this policy.

10 JUDGE PIGOTT: And that's your argument?

11 MR. MACKEY: It doesn't - - - it doesn't
12 require the water to actually come on the property to
13 cause damage. All it does is - - - is require that
14 it exerts pressure on the property, and it's that
15 pressure that causes the explosion.

16 JUDGE PIGOTT: So when I - - - when I was
17 positing hypotheticals to Mr. King, I'm really off
18 base. You're not - - - you're not making an argument
19 there was an explosion; that's covered under the
20 policy. The damage was as it is in the pictures and
21 everything else; we should collect. You're saying
22 water came on the property. There's an ensuing
23 explosion and we should collect.

24 MR. MACKEY: Well, I think it's covered
25 under both ways. One, it's covered because it was

1 strictly an explosion. It could be an explosion
2 caused by ignition of a fire or a combustible
3 explosion. But it's Allstate who kind of created
4 this issue by saying it's - - - it's not covered
5 because there's a water exclusion. But then still,
6 it's - - - it's still a covered - - -

7 CHIEF JUDGE LIPPMAN: You're saying as long
8 - - - you're saying as long as there's an explosion
9 and as long as there's seepage you are covered?

10 MR. MACKEY: I think as long as the
11 explosion was caused by water exerting pressure on
12 their property, it's covered. The exception covers
13 the Plateks for the property that was damaged from
14 that explosion. It - - - there is nothing in the
15 exclusion that requires water to first come on the
16 property and then cause the explosion. All it has to
17 do is exert pressure on their property, which it was
18 doing with the water main abutting the Roberts Road
19 property. And as soon as that - - - that pressure
20 created an explosion, it doesn't matter that water
21 went on their property to cause the damage.

22 CHIEF JUDGE LIPPMAN: So - - -

23 MR. MACKEY: It could have been the
24 explosion of the pipe, could have been shrapnel that
25 went into the - - - in - - - into the house causing

1 the damage.

2 CHIEF JUDGE LIPPMAN: So if there was no
3 pressure on the pipes, you don't recover - - - any
4 water pressure on the pipes?

5 MR. MACKEY: If it was an unusable water -
6 - - a water main, for whatever reason explodes.

7 CHIEF JUDGE LIPPMAN: Whatever reason, yes.

8 MR. MACKEY: - - - it - - - it's - - - I
9 guess that's possible. In this case, what happened
10 was there was enough water that it was almost like a
11 geyser coming out of the water main as soon as it
12 exploded. So it was - - - it was a - - - a - - - a
13 utility - - - a utility line that was being used and
14 active and from what I understand, actually had been
15 - - -

16 JUDGE RIVERA: Yeah.

17 MR. MACKEY: - - - repaired a couple of
18 times beforehand, so - - -

19 JUDGE RIVERA: Counsel, not to have us
20 repeat things too often, but I guess I'm really not
21 understanding this reading that you're saying. It
22 means "water that exerts pressure on the residence."
23 I'm reading the language. But this is water that
24 exerted pressure on a pipe that's not part of the
25 residence, right?

1 MR. MACKEY: But it's exerting pressure on
2 the property because the - - - the water line - - -
3 the water main abutted the property. So you have the
4 pressure, the water pressure, which is highly
5 pressurized according to our expert - - -

6 JUDGE RIVERA: Right.

7 MR. MACKEY: - - - going through this water
8 main which abuts the property meaning it's causing
9 pressure on the property. So as long as that
10 pressure causes the explosion, which results in
11 damage to the house, it should be - - -

12 JUDGE RIVERA: But - - - but the water - -
13 -

14 MR. MACKEY: - - - covered under the
15 exception.

16 JUDGE RIVERA: - - - exerts pressure on the
17 pipe that explodes that then causes water to enter
18 the residence. Is that not the sequence?

19 MR. MACKEY: The pressure is within the
20 pipe. Yes. The pressure is within the water main,
21 but it's also a water main that's abutting the
22 property.

23 JUDGE PIGOTT: Don't you have a problem
24 with that, though? I mean if - - - if somebody's
25 pond overflows, I mean you could say that it was, you

1 know, pressure, you know, water flows downhill and it
2 put pressure on the foundation and it seeped in and
3 there was damage. And that's exactly what they're
4 trying to exclude.

5 MR. MACKEY: That would be excluded,
6 because there's no fire, theft, or explosion that was
7 triggered by - - -

8 JUDGE PIGOTT: Well, no that - - -

9 MR. MACKEY: - - - that, right. I don't
10 doubt that that would be a reasonably excluded event.

11 JUDGE ABDUS-SALAAM: So, counsel, you're -
12 - - you're - - - I - - - I just want to be clear that
13 you're relying - - - you're relying on the exception
14 and not on the explosion portion of the - - -

15 MR. MACKEY: Well, I'm relying on both. I
16 think there's coverage under both. If it - - -

17 JUDGE ABDUS-SALAAM: Okay. But under the -
18 - -

19 MR. MACKEY: You - - - and I believe - - -
20 I believe you strictly should look at this as an
21 explosion event. It's not a water event.

22 JUDGE ABDUS-SALAAM: But if you - - -

23 MR. MACKEY: It's not a water event that
24 created the damage. It's the explosion that creates
25 the - - -

1 CHIEF JUDGE LIPPMAN: But you're saying the
2 water created the explosion that created the water
3 damage.

4 MR. MACKEY: It's - - - it's more a
5 coverage for the explosion. It just so happens the
6 explosion was caused by water.

7 JUDGE RIVERA: No, no, no. But - - -

8 MR. MACKEY: That's where they jumped in
9 with the water exclusion.

10 JUDGE RIVERA: But, counsel, the - - - the
11 water flows onto the property because of the
12 explosion, right.

13 MR. MACKEY: Right.

14 JUDGE RIVERA: I mean if the - - - if the
15 explosion had caused the water to flow the other way,
16 it's not the explosion. It's the water that gets
17 onto your property, which is what this entire
18 provision says they don't cover. The water gets on
19 your property and does damage. You don't get - - -
20 or your client, excuse me - - -

21 MR. MACKEY: Well, what - - -

22 JUDGE RIVERA: - - - doesn't get paid for
23 that.

24 MR. MACKEY: But whatever damage is caused
25 by that explosion is covered. It doesn't matter that

1 it's water damage other damage. And I guess another
2 thing I - - - I'd like to - - -

3 JUDGE ABDUS-SALAAM: Is that under the
4 exception portion that you're talking about?

5 MR. MACKEY: That'd probably be beyond the
6 exception because we're - - - we're talking more of
7 liability strictly because of the explosion, not
8 because it entailed water.

9 JUDGE PIGOTT: Not the way your brief
10 reads.

11 MR. MACKEY: And - - - and I - - - and I
12 think another issue that probably should be recalled
13 is that the issue - - -

14 CHIEF JUDGE LIPPMAN: Finish off, counsel.
15 You're light is on. Go ahead.

16 MR. MACKEY: Okay. Is - - -

17 CHIEF JUDGE LIPPMAN: Finish your thought.

18 MR. MACKEY: Is that there is case law that
19 finds that a lot of these policies with - - - with
20 similar exclusions don't even include when it's a
21 manmade event. It only excludes when it's a natural
22 event.

23 CHIEF JUDGE LIPPMAN: Okay, counsel. Thank
24 you, counsel.

25 MR. MACKEY: Thank you.

1 CHIEF JUDGE LIPPMAN: Counsel, rebuttal.

2 MR. KING: Yes, Your Honor. The plaintiff - -
3 - the appellee has conceded in their brief that,
4 standing alone, the Allstate policy water loss
5 exclusion would arguably provide Allstate with a
6 reasonable basis to decline this coverage on this
7 claim. They are relying on the exception. That's
8 why - - - why we're all here.

9 JUDGE PIGOTT: Didn't - - - didn't - - -
10 and I - - - I forget where I read it but Allstate
11 make the argument if this was simply an explosion,
12 it'd be covered, but it's not because we - - - it - -
13 - it's water and unless it's - - - it's ensuing, the
14 explosion's ensuing, we - - - we don't have to pay.

15 MR. KING: Well, that's - - - that's
16 essentially correct. What - - - that's what the - -
17 -

18 JUDGE PIGOTT: And that skirts the issue
19 that I brought up, that apparently your opponent is
20 not making, which is if there's an explosion you pay
21 for the natural direct causes of the explosion.

22 MR. KING: Right, right. And here - - -
23 somebody on the court asked what the triggering event
24 was for this exception. The triggering event is a
25 water loss. If there's - - -

1 JUDGE PIGOTT: No, it's an explosion. And

2 - - -

3 MR. KING: No. The triggering event is a
4 water loss because if there's no water loss, the
5 exception never comes into play.

6 JUDGE PIGOTT: Well, of course. But if
7 there - - - you - - - you can't say the triggering
8 event - - - event is - - - is the arsonist. Because
9 if - - - if - - - if there's no fire there's no - - -

10 MR. KING: No, no, but, Your Honor - - -

11 JUDGE PIGOTT: The - - - the triggering
12 event may be arson. And sometimes you pay, sometimes
13 you don't. You don't say, you know, well, you know,
14 it's a fire, so I pay.

15 MR. KING: No, that's true. But here the -
16 - - the way the exception reads, if there's an
17 initial water loss - - -

18 JUDGE PIGOTT: I know the exception is - -

19 -

20 MR. KING: Right.

21 JUDGE PIGOTT: - - - is in your brief.

22 JUDGE ABDUS-SALAAM: Well, whose burden is
23 it, counsel, to prove an exception in a policy like
24 that?

25 MR. KING: It's the appellee's. And we

1 cite case law - - -

2 JUDGE ABDUS-SALAAM: You think - - -

3 MR. KING: - - - to that effect.

4 JUDGE ABDUS-SALAAM: And your position is
5 they have not met that burden?

6 MR. KING: Correct. That is correct. And
7 one last point I'd make with regard to the theft
8 hypothetical. And water could never cause a theft,
9 and the reason why is, of course, the thief is an
10 independent actor and intentionally steals. So
11 regardless of whether a house is rendered
12 uninhabitable by water, that would not be the cause -
13 - -

14 JUDGE PIGOTT: Does the policy - - -

15 MR. KING: - - - of theft.

16 JUDGE PIGOTT: - - - cover theft?

17 MR. KING: I'm sorry?

18 JUDGE PIGOTT: Does the policy cover theft?

19 MR. KING: It - - - it does in the personal
20 property section.

21 JUDGE PIGOTT: So if the - - - so if the
22 thief steals the water meter and the water goes in
23 the basement, you'd cover that, right?

24 MR. KING: I'd have to think about that
25 one. But - - -

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JUDGE PIGOTT: Okay.

CHIEF JUDGE LIPPMAN: Okay. Thanks,
counsel.

MR. KING: Thank you very much.

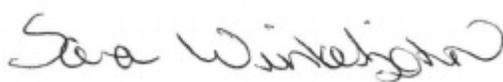
CHIEF JUDGE LIPPMAN: Thank you both.

(Court is adjourned)

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C E R T I F I C A T I O N

I, Sara Winkeljohn, certify that the foregoing transcript of proceedings in the Court of Appeals of Platek v. Town of Hamburg et el., No. 21 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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