A Flooded Basement
May Not Lead to Liability

Warmer weather brings rain, which potentially causes sewer backup and wet basements. A client calls seeking redress related to his water-soaked basement. What actions should an attorney take in response to such a phone call before filing suit? The usual potential defendants abound: an errant neighbor improperly dug a new well, improper installation of sewer lines by a construction company, or even your client’s homeowner’s insurer. Each could be liable. But, does your client have redress if a municipal sewer caused the seepage? This article will contemplate parties which are potentially liable for a sewer backup that causes flooding or water seepage into a homeowner’s basement. It will also set forth guidelines for litigation where a municipality causes the homeowner’s soggy basement.

First, Rule Out An Act of God

In order to determine coverage under your client’s homeowner’s policy, investigate the facts and obtain the weather report for the days surrounding the flooding. Generally, homeowner’s policies exclude from coverage incidents which arise from an Act of God. Weather-related issues are often deemed to be an Act of God. Thus, if the insurer can demonstrate that the backup from the sewer or drains was caused by extraordinary rainfall, the act of God exclusion may come into play. Even if the court determines that a rainstorm was an “act of God” under the insurance policy, the homeowner may have an defense that the rain was not the sole cause the damage. A secondary cause of liability may exist that the proximate cause of the damages was at least in part a result of the failure of those responsible to keep the water course clean and free from debris. After determining whether the weather was the sole proximate cause of the water that entered your new client’s basement, one must next determine who controlled and maintained the sewer out of which the water rose. Generally, a municipality has control of the local sewer lines.

Second, What if A Municipality Controlled the Sewer Line?

If the municipality controls the line, the municipality often wins. Illinois case law is consistent that in the absence of evidence that a storm sewer was inadequately maintained or that a municipality assumed control of another party’s faulty sewer drain, a municipality is afforded many protections against liability to homeowners. In Burford v. Village of LaGrange, 90 Ill. App.2d 210, 234 N.E.2d 120 (1968), the plaintiffs sought recovery for water damage to their home resulting from an allegedly inadequate or defective village storm sewer. The defendant argued that no liability could attach. The jury rendered a verdict of $21,000 in favor of the plaintiffs. The trial court ordered a remittitur and reduced the judgment to $12,000. The village appealed the entry of any judgment, even at the reduced amount, and the plaintiffs appealed the propriety of the remittitur.
The plaintiffs purchased a home in October 1954. Prior to purchasing the home, water was noted at the intersection of the relevant streets. However, no additional inspection was done to the home or the water lines. The plaintiffs moved into the home. Afterwards, approximately once per year, following a heavy rain, water would enter the basement and reach depths of two to six inches. Finally in July 1957 following a “gulley washing, frog strangling rain” during which a new 24-hour rainfall record was set, the basement suffered the largest flooding level ever and the plaintiffs were forced to evacuate. *Burford v. Village of LaGrange*, 90 Ill. App. 2d 210, 214, 234 N.E.2d 120 (1968). The appellate court considered the act of God defense, stating that “…[e]ven if there is negligence concurrent with an extraordinary flood or rainfall, the municipality is relieved from liability if the flow is so voluminous in character that it would of itself have produced the injury independently of such negligence.” *Id.* at 215.

The *Burford* court found that “[it is] abundantly clear as a matter of law that the defendant village cannot be liable to the plaintiffs on any part of the damage occasioned by the flood of July 12, 1957. It seems clear from this record that the flood was so overwhelming and so devastating that the damages to the plaintiffs would have occurred notwithstanding any independent negligence of the defendant village.” *Id.* at 215 citing 59 A.L.R. 2d 329 § 19(b).

The *Burford* appellate court determined that the plaintiffs were required to establish a duty owed by the village to the plaintiffs in connection with either the main drain or the spurred drain located wholly upon the plaintiffs’ property. The plaintiffs were also obligated to demonstrate a breach of that duty.

The court further ruled that if a plaintiff attempts to prove that a municipality is negligent, such negligence must be predicated upon a failure to properly inspect or a defective blocked village sewer. In the case at bar, no such evidence existed. The court ultimately ruled

[w]here a municipality provides ample sewers and drains to carry off all water likely to fall or accumulate under ordinary conditions, the fact that the sewers and drains proved inadequate to carry off all the water from an extraordinary rain storm does not subject the municipality to liability for damages caused by the surplus water…. It is liable only for such injuries or damages which are the proximate cause of such negligence.


The court found that the plaintiffs had failed to demonstrate a duty owed by the Village in light of the torrential nature of the rain.

**Finally, Can You Plead a Duty Not Subject to Immunity?**


The Tort Immunity Act was not designed to impose new duties on a public entity; rather it confers immunity and defenses to that public entity. Illinois courts have established that the existence of a duty and the existence of immunity are distinct issues which must be analyzed separately. *Village of Bloomingdale*, 196 Ill. 2d 484, 490, 752 N.E.2d 1090 (2001).
Prior to enactment of the Act, Illinois abided by the common law Public Duty Rule. Specifically, the courts held “[t]here is no common law duty to the general public for a municipality’s failure to enforce an ordinance or building code.” See Millerick v. Village of Tinley Park, 272 Ill. App. 3d 738, 740, 652 N.E.2d 17 (1995). The Illinois Supreme Court has held that a municipality’s duty is to protect the well being of the community at large and not specific members of the public. Zimmerman v. Village of Skokie, 183 Ill. 2d 30, 44, 697 N.E.2d 699 (1998). The Illinois Supreme Court in Zimmerman also concluded that the public duty rule survived the abolition of sovereign immunity and the enactement of the Tort Immunity Act. Further, it has been expressly incorporated into the immunities afforded under the Tort Immunity Act.

For example, 745 ILCS § 10/2-105 states that “[a] local public entity is not liable for injury caused by its failure to make an inspection or by reason of making an inadequate or negligent inspection, of any property, other than its own, to determine whether the property complies with or violates any enactment or it contains or constitutes a hazard to health or safety.” The Illinois Appellate Court in Ware v. City of Chicago, 375 Ill. App. 3d 574, 873 N.E.2d 944 (2007) addressed this application of the public duty rule (the duty owed element of liability) and the Tort Immunity Act (the immunity from liability element) with respect to the inspection of a porch. The court found that there is an absolute immunity for negligent inspection and further found no legal duty was owed pursuant to the public duty rule. Thus, a municipality could avail itself of both remedies, one statutory and the other common law as a defense to liability.

The Ware Court also addressed the issue raised by the plaintiff’s that if, as case law dictated, the public duty rule was embodied in the Tort Immunity Act, then the plaintiffs could argue that a duty and liability may arise in the event that the inspectors acted willfully, an exception to tort immunity. However, the Ware court found that there is no common law duty to refrain from willful and wanton conduct, “[r]ather willful and wanton conduct is only considered after we have first found that the plaintiff is owed a duty…” Ware, 375 Ill. App. 3d at 581.

It may be difficult for an individual homeowner to establish all of the criteria necessary to prove that a municipality is liable for a flooded basement. Consider the “Act of God” defense and/or the Public Duty Rule as your new client may have a difficult time simply passing the pleading stage of a claim against a municipality for water damage caused by a city sewer. These defenses should also be contemplated if a lawsuit is filed against your defendant client with peripheral connections to a municipality.

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