

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF OHIO  
WESTERN DIVISION**

UNITED STATES OF AMERICA, et al.,  
Plaintiffs,

Case No. 1:02-cv-107  
Spiegel, J.  
Litkovitz, M.J.

vs.

BOARD OF HAMILTON COUNTY  
COMMISSIONERS, et al.,  
Defendants.

**ORDER RE: REQUEST  
FOR REVIEW BY  
ADA BARNES**

This matter is before the Court on the Request for Review of the denial of a Sewer Backup (“SBU”) claim by Ada Barnes. (Doc. 562). Ms. Barnes seeks compensatory damages from the Metropolitan Sewer District of Greater Cincinnati (“MSD”) for sewer water backup into her basement.

Ms. Barnes’ request for review is filed under the Sewer Backup<sup>1</sup> program (formerly known as the Water-in-Basement [WIB] Claims Process Plan) (Doc. 131, Consent Decree, Exhibit 8). The Plan states in relevant part:

Subject to the requirements of this Plan, occupants who incur damages as a result of the backup of wastewater into buildings due to inadequate capacity in MSD’s Sewer System (both the combined and the sanitary portions) can recover those damages. This plan also provides a means for occupants to recover damages arising from backups that are the result of MSD’s negligent maintenance, destruction, operation or upkeep of the Sewer System. The Claims Process is not intended to address water in buildings caused by overland flooding not emanating from MSD’s Sewer Systems or caused by blockages in occupants’ own lateral sewer lines.

(Doc. 131, Consent Decree, Exhibit 8 at 1). In determining the cause of SBU, MSD must

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<sup>1</sup>The “Water-In-Basement” program has been renamed the “Sewer Backup” program to more accurately reflect MSD’s responsibility for sewage backups caused by inadequate capacity in MSD’s sewer system. See Doc. 452 at 4; Doc. 454 at 16.

exercise its good faith reasonable engineering judgment and consider the following non-exclusive factors: amount of precipitation, property SBU history, condition of the sewer system in the neighborhood, results of a visual inspection of the neighborhood to look for signs of overland flooding, neighborhood SBU history, capacity of nearby public sewer lines, and topography. (Doc. 131, Consent Decree, Exhibit 8 at 2). Damages arising from basement backups for which MSD is responsible are limited to documented real and personal property. *Id.*

Ms. Barnes is the tenant of the property located at 1726 Gellenbeck Street, Cincinnati, Ohio. Ms. Barnes appeals MSD's denial of a property loss claim resulting from a January 17, 2012 sewer backup into the property. (Doc. 562).

Ms. Barnes experienced a sewer backup at 1726 Gellenbeck Street on December 19, 2011, and contacted MSD to report the backup. That same day, a crew from MSD investigated and determined there was no mainline sewer trouble causing the backup. The crew advised Ms. Barnes that a plumber should be called to investigate the source of the backup. The crew also created a work order for MSD to investigate the condition of the portion of the building sewer that lies within the public right-of-way using closed circuit TV equipment (TV Inspection). Ms. Barnes testified that a plumber was contacted by the owner of the property to investigate the cause of the backup and found no problems with the building lateral. MSD states that it was not contacted by the property owner or a plumber following the December 19, 2011 backup. Ms. Barnes did not make a claim for the December 19, 2011 backup.

One month later, on January 17, 2012, a second backup occurred at the Gellenbeck Street property. Ms. Barnes reported the backup to MSD, which responded and determined there was no mainline trouble that day. MSD sent another crew to the property to rod the building sewer

on January 18, 2012. Rodding of the building sewer revealed that a repair to a portion of the building sewer within the public right-of-way was needed, and MSD repaired the right-of-way lateral that same day.

On March 27, 2012, Ms. Barnes submitted her claim for damages to her personal property resulting from the sewer backup event that occurred on January 17, 2012. (Doc. 580, Exs. A, B). MSD denied the claim as follows:

An investigation of your claim has determined that the sewer back-up incident of January 18, 2012,<sup>2</sup> was the result of a collapse of the private sewer lateral serving the property at 1726 Gellenbeck and not a problem that originated in the public sewer. MSD repaired that part of the private lateral within the public right-of-way; under MSD's Rules and Regulations, MSD is responsible for the repair of that part of a private lateral that lies within public rights-of-way. However, because the entire building lateral from the building to its connection in the right-of-way to the public main is owned by the owner of the building served by the lateral and not MSD, MSD must reject your claim for damages.

(Doc. 562 at 2).

Ms. Barnes contests MSD's denial of her claim, asserting that if MSD had promptly fixed the collapsed lateral building line in the right-of-way following the December 2011 backup, the second backup would have been prevented. MSD asserts it denied Ms. Barnes' claim "[b]ecause the property owner did not notify MSD and it did not otherwise have knowledge that the portion of the building sewer within the public right-of-way required repair." (Doc. 580 at 2).

Under the Consent Decree, property owners may recover damages to personal or real property arising from not only "backup of wastewater into buildings due to inadequate capacity in MSD's Sewer System" but also "damages arising from backups that are the result of MSD's negligent maintenance, destruction, operation or upkeep of the Sewer System." (Doc. 131,

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<sup>2</sup>In its brief, MSD represents that the backup occurred on January 17, not January 18, 2012. (Doc. 580).

Consent Decree, Exhibit 8 at 1). Property owners are responsible for blockages in the occupant's own building lateral sewer lines, which are owned by the property owner and not MSD. (*Id.*)

MSD's Rules and Regulations provide in relevant part:

The owner of the premises served by a sewer shall be responsible for the maintenance and cleaning of the building sewer from the building to the point of connection with the public local sewer. Repair and reconstruction of the *building sewer in a public street right-of-way* or within the specified width of a recorded public easement *shall be the responsibility of the District except as follows. . . .* It shall be the responsibility of the owner or his agent to establish, by means of a valid sewer cleaner contractor's receipt, that such a repair or reconstruction is the responsibility of the District. The District shall have the right to verify the sewer cleaner's finding prior to beginning repair or reconstruction. . . .

(Doc. 580, Ex. C, Section 2008, MSD Rules and Regulations) (emphasis added).

MSD contends that it "is not responsible for sewer repair or backups resulting from a broken lateral in the right-of-way until such time as it receives notice from the property owner."

(Doc. 580 at 3). MSD states that "because the January 17, 2012 sewer backup event at Ms. Barnes' home was caused by a damaged building sewer within the public right-of-way, and MSD did not have notice of its responsibility for repair, Ms. Barnes' claim should be dismissed." (*Id.*)

Under MSD's rationale, as the Court understands it, MSD will pay for backups where MSD does have notice of its responsibility for repair. MSD implies the onus is on the property owner to investigate and advise MSD of a problem with the right-of-way lateral before MSD will undertake its responsibility to repair. MSD's theory raises two questions: Why did MSD issue a work order on December 19, 2011, if it was the homeowner's responsibility to notify MSD of a problem with the lateral in the right-of-way? In addition, who bears the responsibility when MSD's own crew suspects a problem, issues a specific work order to investigate the portion of the lateral which MSD is responsible for repairing, but then fails to act on that work order in a

timely manner?

The evidence in this case establishes that on December 19, 2011, Ms. Barnes advised MSD of a sewer backup into her property. That same day, the MSD crew created a work order for MSD to investigate the condition of the portion of the building sewer that lies within the public right-of-way using closed circuit TV equipment, strongly implying that the crew suspected a problem with the lateral in the right-of-way. However, MSD took no action until one month later, *after* a second backup had already occurred at the Gellenbeck Street property. MSD reads Section 2008 of the Rules and Regulations as absolving it from any responsibility for the backup, which was indisputably caused by a collapsed lateral in the public right-of-way, because MSD allegedly had no “notice” of its responsibility for repair. Yet, MSD did have notice of an issue with the right-of-way lateral by virtue of the work order its own crew issued on December 19, 2011 – a work order that MSD did not act on until after the second backup into Ms. Barnes’ home. MSD is responsible for repairing broken lateral lines in the public right-of-way when it has notice of its responsibility. Had MSD acted in a timely manner on the work order issued in December 2011 once it had notice of the issues with the right-of-way lateral, the damage to Ms. Barnes’ property would have been avoided. Under these circumstances, MSD’s actions fall squarely under the provision of the Consent Decree making MSD responsible for “backups that are the result of MSD’s negligent maintenance, destruction, operation or upkeep of the Sewer System.”

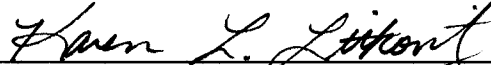
The Court understands that MSD cannot actually repair a problem in the public right-of-way of which it is not aware. Yet, where MSD’s own work crew suspected a problem in the right-of-way lateral after the first backup in December 2011, issued a work order for MSD to

investigate the problem, and failed to perform the investigation in a timely manner, MSD should bear the responsibility for damages to Ms. Barnes' property as a result of the subsequent backup. It is undisputed that the cause of the backup was the collapsed lateral in the right-of-way, which MSD is responsible for repairing, and the fact that the repair was delayed because of MSD's inaction should not bar Ms. Barnes' claim.

Ms. Barnes' appeal is sustained and any damages to Ms. Barnes' property on January 17, 2012, as a result of the collapsed lateral in the right-of-way are compensable under the Consent Decree. Ms. Barnes is entitled to compensation for the January 17, 2012 backup, and this matter is therefore remanded to MSD for an evaluation of the amount of damages to be awarded to Ms. Barnes in this appeal.

**IT IS SO ORDERED.**

Date: 3/4/13

  
Karen L. Litkovitz, Magistrate Judge  
United States District Court