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6 UNITED STATES DISTRICT COURT
7 WESTERN DISTRICT OF WASHINGTON
8 AT TACOMA

9 TODD and KAREN BRANDT,

10 Plaintiffs,

11 v.

12 AMERICAN BANKERS INSURANCE
13 COMPANY OF FLORIDA,

14 Defendant.

CASE NO. C08-5760BHS

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

15 This matter having come before the Court on a two-and-one-half-day trial, and
16 after considering the evidence submitted by the parties, the Court makes the following
17 findings of fact and conclusions of law:

18 **I. FINDINGS OF FACT**

19 1. Plaintiffs Todd and Karen Brandt purchased a four-bedroom rambler-style
20 home on June 30, 2007 for \$260,000. The home is located along the Skookumchuck
21 River in Centralia, Washington.

22 2. Defendant American Bankers Insurance Company of Florida (hereinafter,
23 “American Bankers”) issued a Standard Flood Insurance Policy, Policy Number AB0 000
24 7154, to Plaintiffs for building coverage only, which was in effect at all material times.
25 This policy provided coverage pursuant to the terms and conditions of the policy, some of
26 which are set out as follows:
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1 I. Agreement

2 The Company provides flood insurance under the terms of the
3 National Flood Insurance Act of 1968 and its Amendments, and Title
4 44 of the Code of Federal Regulations.

5 We will pay you for direct physical loss by or from flood to your
6 insured property if you:

- 7 1. Have paid the correct premium;
- 8 2. Comply with all terms and conditions of this policy; and
- 9 3. Have furnished accurate information and statements.

10 Exhibit 1, p. 1.

11 II. Definitions

12 * * *

13 B. The following are other key definitions we use in this policy:

14 * * *

15 (12) *Direct Physical Loss By or From Flood*. Loss or damage
16 to insured property, directly caused by a flood. There must be
17 evidence of physical changes to the property.

18 (28) *Valued Policy*. A policy in which the insured and the
19 insurer agree on the value of the property insured, that value
20 being payable in the event of a total loss. The Standard Flood
21 Insurance Policy is not a valued policy.

22 Exhibit 1, p. 2.

23 V. Exclusions

24 A. We only pay for direct physical loss by or from flood, which
25 means that we do not pay you for:

26 * * *

27 6. The cost of complying with any ordinance or law
28 requiring or regulating the construction, demolition,
remodeling, renovation or repair of property, including
removal of any resulting debris. This exclusion does
not apply to any eligible activities we describe in
Coverage D–Increased Cost of Compliance; or

* * *

C. We do not insure for loss to property caused directly by earth
movement even if the earth movement is caused by flood.
Some examples of earth movement that we do not cover are:

1. Earthquake;
2. Landslide;
3. Land subsidence;
4. Sinkholes;
5. Destablization or movement of land that results from
accumulation of water in subsurface land area; or

1 6. Gradual erosion.

 * * *

2 D. We do not insure for direct physical loss caused directly or
3 indirectly by any of the following:

 * * *

4 4. Water, moisture, mildew, or mold damage that results
5 primarily from any condition:

6 a. Substantially confined to the dwelling; or

7 b. That is within your control, including but not
8 limited to:

9 (1) Design, structural, or mechanical defects;

10 (2) Failure, stoppage, or breakage of water or
11 sewer lines, drains, pumps, fixtures, or
12 equipment; or

13 (3) Failure to inspect and maintain the
14 property after a flood recedes;

15 5. Water or water-born material that:

 * * *

16 c. Seeps or leaks on or through the covered
17 property;

18 Unless there is a flood in the area and the flood is the
19 proximate cause of the sewer or drain backup, sump
20 pump discharge or overflow, or the seepage of water.

21 Exhibit 1, pp. 5-6.

22 VII. General Conditions

 * * *

23 D. Amendments, Waivers, Assignment

24 This policy cannot be changed nor can any of its provisions be
25 waived without the express written consent of the Federal
26 Insurance Administrator. No action that we take under the
27 terms of this policy constitutes a waiver of any of our rights.

 * * *

28 J. Requirements in Case of Loss

 In case of a flood loss to insured property, you must:

 * * *

3 3. Prepare an inventory of damaged property showing the
4 quantity, description, actual cash value, and amount of
5 loss. Attach all bills, receipts and related documents.

6 4. Within 60 days after the loss, send us a proof of loss,
7 which is your statement of the amount your are
8 claiming under the policy signed and sworn by you, and
9 which furnishes us with the following information:

- a. The date and time of loss;
- b. A brief explanation of how the loss happened;
- c. Your interest and the interest, if any, of others in the damaged property;
- d. Details of any other insurance that may cover the loss;
- e. Changes in title or occupancy of the covered property during the term of the policy;
- f. Specifications of damaged buildings and detailed repair estimates;
- g. Names of mortgagees or anyone else having a lien, charge, or claim against the insured property;
- h. details about who occupied any insured building at the time of loss and for what purpose; and
- i. The inventory of damaged personal property described in J.3. above.

* * *

6. You must cooperate with the adjuster or representative in the investigation of the claim.
7. The insurance adjuster whom we hire to investigate your claim may furnish you with a proof of loss form, and she or he may help you complete it. However, this is a matter of courtesy only, and you must still send us a proof of loss within 60 days after the loss even if the adjuster does not furnish the form or help you complete it.
8. We have not authorized the adjuster to approve or disapprove claims or to tell you whether we will approve your claim.
9. At our option, we may accept the adjuster's report of the loss instead of your proof of loss. The adjuster's report will include information about your loss and the damages you sustained. You must sign the adjuster's report. At your opinion, we may require you to swear to the report.

Exhibit 1, pp. 6-7.

3. In December 2007 the Skookumchuck River overran its banks and entered the attached garage, which was situated at an elevation about eighteen inches below the floor level of the main house. Water also entered the crawl space, which is walled in by the house foundation.

1 4. Following the flood event, the Brandts submitted a claim to American
2 Bankers under the policy. Upon receipt of the claim, American Bankers inspected the
3 subject damage. Based upon this inspection, an estimate for repairs was generated.

4 5. American Bankers sent a structural engineer to examine the Brandts' house,
5 and he determined that the house had shifted on its foundation as a result of the flood.

6 6. The Brandts submitted a signed proof of loss in the amount of \$20,629.83,
7 and pursuant to the proof of loss, American Bankers issued a check to the Brandts in that
8 amount.

9 7. The Brandts refused to negotiate American Bankers' check because they
10 believed the amount of reimbursement was too low.

11 8. American Bankers proceeded to issue payment for the amount of the
12 estimated repairs in the amount of \$37,715.92.

13 9. Thereafter the Brandts claimed additional amounts owed under the policy
14 based upon a theory that the house had shifted off its foundation. American Bankers
15 proceeded to investigate that additional claim.

16 10. The flood level did not rise enough to produce water on the floor of the
17 non-garage portion of the house, but that it is also likely that water sloshed around in the
18 crawl space sufficiently to cause some parts of the car decking to become wet and
19 conceivably saturated in places. This, in turn, could have caused the floor coverings to be
20 wet in places, but there was insufficient evidence to conclude that there was water
21 throughout the house on or in the floor coverings.

22 11. The moisture found in the carpet and high moisture content measured in the
23 car decking, or underlayment of the flooring, measured months after the flood had
24 subsided did not result from the December 2007 flood.

25 12. Any moisture in the carpet and car decking was the result of a combination
26 of factors including the removal of the moisture (or vapor) barrier after the flood, the lack
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1 of any subfloor insulation, roof leaks, inadequate gutter-to-eave installation, as well as a
2 possible contributing factor arising from an interior plumbing leak in the master bedroom
3 bathroom.

4 13. The flood did not cause any of the anomalies discovered in the house by the
5 Brandts or observed by other experts following the flood. The most likely theory is that
6 some of the observed anomalies are the result of the original construction of the house.

7 14. The house did not move on its foundation as a result of the flood. The
8 house did not move off its foundation based on (1) the evidence of paint that was applied
9 before the flood that was continuous and uninterrupted over the surface where the siding
10 and foundation interface; (2) the lack of any evidence of movement of rim adjacent to the
11 sliding door of the bedroom; and (3) the lack of any evidence of movement of the post
12 supporting the house floor and steel plates affixed to the post. Additionally, the leaning
13 columns that had been painted before the flood showed no sign of movement either at the
14 top or bottom.
15

16 15. The house experienced at least one other significant flood event, as well as
17 the Nisqually earthquake, which could have caused the observed anomalies in the
18 columns and siding. No explanation was offered for the removal and replacement of the
19 bottom nine inches of siding other than because of a prior flood event.

20 16. There is no damage to the interior of the house resulting from the flood that
21 needs repair. The cracking of the interior walls observed by the Brandts preceded the
22 flood.

23 17. The Brandts have not made any repairs to the property as of this date.

24 18. The compensable damage to the Brandts' house is limited to the amount of
25 \$37,715.92 already paid to the Brandts by American Bankers.
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II. CONCLUSIONS OF LAW

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2 1. American is a Write-Your-Own Carrier (“WYO”) Program carrier
3 participating in the U.S. Government’s National Flood Insurance Program (the “NFIP”)
4 pursuant to the National Flood Insurance Act of 1968, as amended (the “NFIA”) (see 42
5 U.S.C. § 4001, *et seq.*), and appearing herein in its “fiduciary” capacity as the “fiscal
6 agent of the United States,” and at the expense of the U.S. Treasury. 44 C.F.R. Pt.
7 62.23(f), 42 U.S.C. § 4071(a)(1); *Gowland v. Aetna*, 143 F.3d 951, 953 (5th Cir. 1998).

8 2. As the SFIP is itself a codified federal law, found at 44 C.F.R. 61,
9 Appendix A(1) (2007 edition), Plaintiffs are charged with knowledge of the necessary
10 conditions for participating in this U.S. Treasury-funded program.

11 3. American itself may not waive any provision of the SFIP, including the
12 Proof of Loss requirement. Only the Federal Insurance Administrator may do so, and it
13 must be in writing. 44 C.F.R. 61.13(d) and Article VII(D) of the SFIP, codified and
14 found at 44 C.F.R. 61, App. A(1), Article VII(D) (2002 edition).

15 4. Absent a waiver in compliance with 44 C.F.R. 61.13(d) and Article VII(D)
16 of the Standard Flood Insurance Policy, no additional amounts can be paid to the
17 Plaintiffs for the alleged damages from the December 04, 2007 flood event.

18 5. The SFIP is a “single risk policy” which provides coverage only for “Loss
19 or damage to insured property, directly caused by a flood.” (See, e.g., SFIP Article I,
20 Article II(B)(12) and Article V(A).)

21 6. The flood policy does not allow for consequential damages – it must be
22 directly by or from flood. See Article V(A)(1) through (7) of the SFIP.

23 7. The Appropriations and Supremacy Clauses of the U.S. Constitution, as
24 well as the Separation of Powers Doctrine, prohibits payment of any further amounts to
25 the Plaintiffs absent a waiver by FEMA. However, the Court ordered American Bankers
26 to exercise good faith in seeking a waiver from FEMA of any proof of loss requirement
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1 and other conditions to coverage, and American Bankers represented to the Court that
2 waivers in other claims it handled had been granted and that it would seek such a waiver
3 in connection with the Brandts' claim.

4 8. The house does not need to be raised pursuant to the requirements of the
5 building code of the City of Centralia because the house has not suffered damage
6 amounting to more than 50% of its value.


7 9. The Brandts may not recover replacement costs or code required upgrade
8 costs because the time in which the repairs needed to be made under the terms of the
9 policy's replacement cost coverage has expired.

10 10. The Brandts may not recover for the increased costs of code required
11 upgrades or repair costs because such costs have not been incurred.

12 11. The Brandts have the burden of proof in establishing their damages.

13 12. The Brandts have failed to establish that they are entitled to any additional
14 recovery for the actual cash value of any repairs in addition to the amounts previously
15 paid by American Bankers. As a result, American Bankers did not breach its contract of
16 insurance with the Brandts, and no money is due the Brandts.
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18 DATED this 13th day of August, 2010.

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21 BENJAMIN H. SETTLE
22 United States District Judge
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