

RECENT DEVELOPMENTS IN PROPERTY INSURANCE COVERAGE LITIGATION

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I. INTRODUCTION

During this past year, the pace of cases involving large-scale disasters ground almost to a halt. However, in light of this year's major hurricanes, there will undoubtedly be a significant uptick this coming year and thereafter. The principles of property insurance law, however, remain the same. Issues addressed below will be relevant to hurricane claims and lit-

igation, including causation, anti-concurrent causation language in exclusions, mold coverage, time element coverages, and the scope of appraisal. Of course, while the principles remain the same, their application to the unique facts of every claim is usually the source of the disputes.

II. BUSINESS INTERRUPTION/CIVIL AUTHORITY

In *Philadelphia Indemnity Insurance Co. v. 24 West 57 APF, LLC*,¹ a tenant's insurer filed a subrogation action against a property manager seeking property damage and business interruption resulting from a water leak.² The insurer argued that the building manager failed to properly maintain equipment, resulting in a leak.³ The lease had a waiver of subrogation provision, but the insurer argued that waiver of subrogation did not apply to business interruption losses because "under New York law, 'a waiver of subrogation clause does not preclude a suit to recover losses for which [a tenant] has not purchased and was not required by the lease to purchase, insurance coverage.'"⁴ The Appellate Division of the New York Supreme Court rejected this argument and concluded that "plaintiff waived its ability to assert a claim for business interruption losses when it executed the Lease[.]"⁵

In *Abmadpoor v. Truck Insurance Exchange*,⁶ the owner of an automobile repair business made a burglary claim that included business interruption.⁷ The insurer denied coverage, asserting that the policyholder violated the "Concealment, Misrepresentation or Fraud" clause of the policy by submitting a claim for lost profits that, in part, relied on tax forms that the policyholder's son admitted "did not accurately reflect the business's income."⁸ The plaintiff argued that the misrepresentations to the Internal Revenue Service (IRS) could not have materially influenced the insurer because they were made to a third party and the policyholder admitted to the insurer the tax forms were inaccurate.⁹ The California Court of Appeal concluded that "[p]laintiff's misrepresentations about the level of the business's income during relevant time periods were, as a matter of law, material, because they were reasonably related to the claims being made for business interruption amounts."¹⁰

1. 2017 WL 4180169 (N.Y. App. Div. Sept. 7, 2017).

2. *Id.* at *1.

3. *Id.*

4. *Id.* at *5 (quoting *Reade v. Reva Holding Corp.*, 30 A.D.3d 229, 232 (N.Y. App. Div. 2006)).

5. *Id.*

6. 2017 WL 1230462 (Cal. Ct. App. Apr. 4, 2017).

7. *Id.* at *1.

8. *Id.* at *2, *7.

9. *Id.* at *7.

10. *Id.* at *8.

III. COLLAPSE

In *Conlon v. Allstate Vehicle & Property Insurance Co.*,¹¹ the policy covered collapse of “building structures,” defined as having walls and a roof, because of the weight of ice and snow. In *Conlon*, the insured suffered a collapse of a structure attached to his house that consisted of a roof and posts; there were no walls. The court held that the loss was not covered because the awning was not a “building structure,” as defined in the policy, because the awning did not have walls.¹²

There have been a number of recent cases out of Connecticut construing collapse provisions.¹³ The policies in these cases generally defined “collapse” as “an abrupt falling down or caving in of a building or any part of a building[.]”¹⁴ Courts have ruled in favor of insurers in cases “where insurance policies require ‘sudden and accidental’ losses, or otherwise contain language requiring that the loss be temporally abrupt.”¹⁵

In *Suter v. State Farm Fire & Casualty Co.*,¹⁶ the Superior Court of Delaware held that a homeowner’s claim for damage to his basement was not covered.¹⁷ The policyholder noticed a crack in his basement wall that got progressively larger over a two-week period.¹⁸ Fearing that the wall would collapse, the policyholder paid to have the wall fixed and filed an insurance claim, which State Farm denied.¹⁹ The policy stated that collapse “means actually fallen down or fallen into pieces. It does not include set-

11. 152 A.D.3d 488 (N.Y. App. Div. 2017).

12. *Id.* at 491.

13. *See, e.g.*, *Jemiola v. Hartford Cas. Ins. Co.*, No. CV-15-6008837-S, 2017 WL 1258778, at *1 (Conn. Super. Ct. Mar. 2, 2017).

14. *Id.* at *8.

15. *Manseau v. Allstate Ins. Co.*, No. 3:16-CV-1231 (MPS), 2017 WL 3821791, at *4 (D. Conn. Aug. 31, 2017); *see also* *England v. Amica Mut. Ins. Co.*, No. 3:16-CV-1951 (MPS), 2017 WL 3996394, at *6 (D. Conn. Sept. 11, 2017) (denying coverage where “collapse coverage does not apply where a building is standing but shows evidence of cracking”); *Metsack v. Liberty Mut. Fire Ins. Co.*, No. 3:14-CV-01150 (VLB), 2017 WL 706599, at *7 (D. Conn. Feb. 21, 2017) (granting motion for summary judgment where policy required “a sudden and accidental direct physical loss”); *Toomey v. Cent. Mut. Ins. Co.*, No. CV156009841S, 2017 WL 4159820, at *7 (Conn. Super. Ct. Aug. 3, 2017) (granting summary judgment where policy defined collapse as “an abrupt falling down or caving in”); *Jemiola*, 2017 WL 1258778, at *1 (granting summary judgment where policy defined collapse as “an abrupt falling down or caving in”). In cases where the policy did not define “collapse,” courts have followed *Beach v. Middlesex Mutual Assurance Co.*, 532 A.2d 1297 (Conn. 1987), where “the Connecticut Supreme Court held that the term ‘collapse’ in a homeowners’ insurance policy, when otherwise undefined, was ‘sufficiently ambiguous to include coverage for any substantial impairment of the structural integrity of a building.’” *Roberts v. Liberty Mut. Fire Ins. Co.*, No. 3:13-CV-00435 (SRU), 2017 WL 3710062, at *6 (D. Conn. Aug. 28, 2017) (quoting *Beach*, 532 A.2d at 1300).

16. No. CV S15C-06-025ESB, 2016 WL 5867435, at *3 (Del. Super. Ct. Oct. 6, 2016).

17. *Id.* at *3.

18. *Id.* at *1.

19. *Id.*

ting, cracking, shrinking, bulging, expansion, sagging or bowing.”²⁰ The court found that the evidence showed that the policyholder’s “basement wall did not collapse. It only cracked and bowed.”²¹

IV. COVERED PROPERTY

A. Structures

In *Nassar v. Liberty Mutual Fire Insurance Co.*,²² the insured’s 4,000 foot fencing system included cross fences, garden fences, pens, gates, and numerous different fencing materials.²³ The insured contended that the entire system constituted “a structure attached to the dwelling” under the higher limit because the system was interconnected and attached to the house at four points.²⁴ The insurer countered that the fencing system was an “other structure,” which included structures connected “by only a fence.”²⁵ The Supreme Court of Texas held that the insured’s interpretation was reasonable and reversed summary judgment in favor of the insurer,²⁶ but noted that, on remand, a fact finder may determine that only damage to the fencing originally bolted to the dwelling falls under the dwelling limit, since the policy language may require treating fencing as both “dwelling” and “other structures,” depending on the circumstances.²⁷

B. Insurable Interest

In *Hensley v. State Farm Fire & Casualty Co.*,²⁸ a buyer of real estate by contract for deed was not named in a homeowners’ policy bought by seller, but the contract for deed required buyer to make monthly payments to seller for the cost of policy’s premiums.²⁹ The buyer sued the insurer, which claimed that buyer was a stranger to the insurance contract and did not have standing.³⁰ The buyer argued that the parties intended for buyer to be insured and pointed to the fact that the insurer was notified of the contract for deed before the loss, and that policy limits were for the full value of the property, not just the seller’s insurable interest of remaining principal.³¹ The court held that, while the buyer’s equitable title

20. *Id.* at *2.

21. *Id.*

22. 508 S.W.3d 254 (Tex. 2017).

23. *Id.* at 256.

24. *Id.* at 256–57.

25. *Id.* at 257.

26. *Id.* at 260.

27. *Id.* at 261.

28. 398 P.3d 11 (Okla. 2017).

29. *Id.* at 14.

30. *Id.* at 15.

31. *Id.* at 16–17, 25.

to property was insufficient by itself to confer insured status, whether the buyer was an intended third party beneficiary was a fact issue.³²

C. *Newly Acquired*

In *Revived Alive, Inc. v. Valley Forge Insurance Co.*,³³ a wedding dress retailer argued that it had coverage under its policy's "newly acquired" property endorsement for 549 dresses that it purchased before the inception of the policy, but within 180 days of its loss.³⁴ The policy stated that the newly acquired property limit ends when: (1) the policy as a whole expires; (2) the newly acquired property is more specifically insured; (3) the insured reports the property's value to insurer; or (4) 180 days expire after the property was acquired.³⁵ The insured argued that, since none of those events had occurred, the newly acquired property limit applied.³⁶ The insurer countered that only property purchased after the inception of an insurance policy can be "newly acquired," since the value of dresses had already been assessed and taken into consideration when the policy was issued.³⁷ The U.S. District Court for the Western District of Washington agreed with the insurer, holding one must look at not only when coverage under the endorsement terminates, but also when it begins, and that the ordinary consumer understands that insurance coverage begins when a policy begins and is not retroactive.³⁸

V. EXCLUSIONS

A. *Causation*

1. Generally

In *Sebo v. American Home Assurance Co., Inc.*,³⁹ the insured sought coverage under his homeowners' policy after suffering losses caused by defective construction, rain, and wind.⁴⁰ The policy expressly excluded loss caused by defective construction.⁴¹ The parties disputed whether the concurrent cause or efficient proximate cause doctrine applied.⁴²

32. *Id.* at 25.

33. *Revived Alive, Inc. v. Valley Forge Ins. Co.*, No. C16-5882-RBL, 2017 WL 3781907 (W.D. Wash. Aug. 31, 2017).

34. *Id.* at *1.

35. *Id.* at *2.

36. *Id.*

37. *Id.* at *3.

38. *Id.*

39. 208 So. 3d 694 (Fla. 2016).

40. *Id.* at 695-96.

41. *Id.* at 699-700.

42. *Id.* at 699.

The Supreme Court of Florida held that, “when independent perils converge and no single cause can be considered the sole or proximate cause,” the concurrent cause doctrine applied.⁴³ It was not feasible to use the efficient proximate cause doctrine because there was no reasonable way to determine the proximate cause of the loss.⁴⁴ The court held that “[w]here weather perils combine with human negligence to cause a loss, it seems logical and reasonable to find the loss covered by an all-risk policy even if one of the causes is excluded from coverage.”⁴⁵ The court also disagreed with the lower court that the concurrent cause doctrine would nullify all exclusions, because the insurer had explicitly written other sections of the policy to avoid that doctrine.⁴⁶

2. Anti-Concurrent/Anti-Sequential Causation

In *Southern Insurance Co. v. C7G Enterprises, Inc.*,⁴⁷ the parties disputed whether the policies contained an applicable anti-concurrent cause provision.⁴⁸ The policyholders sustained roof damage to their barns after a windstorm.⁴⁹ The insurer paid the losses because windstorm was not an excluded peril.⁵⁰ The carrier then filed a subrogation action against the companies that manufactured and assembled the barns, alleging that defective design and construction were contributing causes of the losses.⁵¹ The barn manufacturer argued that the carrier could not subrogate because the policies did not cover the damage to the barns since: (1) the policies excluded coverage for defective design and construction (the “Defects Exclusion”), which were allegedly contributing causes of the losses; and (2) an anti-concurrent-cause provision precluded coverage for losses caused by a combination of covered and excluded perils.⁵²

The U.S. District Court for the Southern District of Iowa noted that the policies divided exclusions into two sections, and the Defects Exclusion was in the second.⁵³ The first section was preceded by unmistakable anti-concurrent-cause language, but it applied only to the exclusions in that section.⁵⁴ The second section contained the following prefatory language: “We cover risks of direct physical loss to covered property *unless*

43. *Id.* at 697.

44. *Id.* at 700.

45. *Id.* (quoting *Wallach v. Rosenberg*, 527 So. 2d 1386, 1388 (Fla. Dist. Ct. App. 1988) (internal quotation marks omitted)).

46. *Id.*

47. No. 3:15-cv-00131-RGE-SBJ, 2017 WL 3453369 (S.D. Iowa Feb. 10, 2017).

48. *Id.* at *1, *7.

49. *Id.* at *2.

50. *Id.*

51. *Id.* at *2, *6.

52. *Id.* at *6.

53. *Id.* at *8.

54. *Id.*

the loss is limited or caused by a peril that is excluded."⁵⁵ The manufacturer argued that this clause (the "Perils Covered Clause") was an anti-concurrent cause provision.⁵⁶

The court reasoned that this language did not reference concurrent causes in any way and stated that it would not supply a new meaning to unambiguous language.⁵⁷ The court also found it instructive that there was a clear anti-concurrent cause provision in the first exclusions section, but not in the second.⁵⁸ The difference demonstrated that the drafters knew how to contract out of coverage for multiple causes through an anti-concurrent cause provision and chose to do so only for certain perils.⁵⁹

B. *Earth Movement*

Three courts considered issues of first impression in their states relating to earth movement exclusions. In *Erie Insurance Property & Casualty Co. v. Chaber*,⁶⁰ the insureds' property was damaged when soil and rock slid down a hill behind the property.⁶¹ The policy excluded coverage for earth movement regardless of whether it was "caused by an act of nature or is otherwise caused."⁶² The Supreme Court of Appeals of West Virginia held that the exclusion was "not ambiguous and excludes coverage for the loss whether it is caused by a man-made or a naturally-occurring event."⁶³

In *Elwell v. Selective Insurance Co. of America*,⁶⁴ the insured, under a Standard Flood Insurance Policy, sought coverage for a Hurricane Sandy loss.⁶⁵ The policy excluded coverage for losses caused by earth movement, *unless* the earth movement results from a mudslide or flood-related erosion.⁶⁶ The court held that a plaintiff must establish four elements to demonstrate flood-related erosion not subject to the earth movement exclusion:

- (1) [C]ollapse or subsidence of land;
- (2) the land is along the shore of a lake or similar body of water;
- (3) the collapse or subsidence resulted from erosion or undermining caused by waves or currents of water exceeding anticipated cyclical levels; and
- (4) the waves or currents resulted in a flood as defined in Article II(A)(1)(a) [of the National Flood Insurance Act of 1968].⁶⁷

55. *Id.* at *7, *8 (emphasis added).

56. *Id.* at *7.

57. *Id.*

58. *Id.* at *9.

59. *Id.*

60. 801 S.E.2d 207 (W.Va. 2017).

61. *Id.* at 209.

62. *Id.*

63. *Id.* at 212–13.

64. No. 14-2590 (RBK/KMW), 2016 WL 5928682 (D.N.J. Oct. 11, 2016).

65. *Id.* at *1.

66. *Id.* at *2.

67. *Id.* at *3.

The court held there was a question of fact as to whether the loss was caused by earth movement or erosion because “flood-related erosion as contemplated by [the policy] may very well involve some movement of the earth; Congress simply made the decision to nonetheless include coverage of earth movement from flood-related erosion within the [policy].”⁶⁸

Finally, in *Home-Owners Insurance Co. v. Andriacchi*,⁶⁹ the insured sought coverage for damage to his building that occurred after a major street repair.⁷⁰ The Court of Appeals of Michigan held that an “any earth movement” exclusion precluded coverage.⁷¹ The court rejected the insured’s argument that this exclusion applied only to losses from natural causes, holding instead that the phrase “any earth movement” means “every” and “all” movement of the earth without regard to whether the earth movement resulted from natural or man-made causes.⁷²

C. *Vacancy*

In *Farm Bureau Mutual Insurance Co. of Arkansas v. Future Davenport*,⁷³ the plaintiff owned a home in Arkansas.⁷⁴ The policy insured against loss caused by fire, vandalism, or malicious mischief.⁷⁵ The policy contained a “Vacancy or Unoccupancy” condition, establishing that if the plaintiff vacated or failed to occupy the home for thirty days, the insurer would not “cover loss to property caused by” vandalism or malicious mischief; if the plaintiff vacated or failed to occupy the home for sixty days, the insurer would “not be liable for any property loss.”⁷⁶

In September 2010, while the plaintiff and her husband were in their Michigan home, burglars broke into the Arkansas home, “stole some items, and set the house on fire. At the time of the fire, the [Arkansas] house was fully furnished, was equipped with fully functioning utilities, and food was stocked in the refrigerator and the freezer.”⁷⁷ While the plaintiff and her husband had not been in the Arkansas home since April 2010, their adult son was at the Arkansas home a few days before the fire.⁷⁸ The insurer denied the claim because the plaintiff had not occupied the Arkansas home for more than sixty days at the time of the fire.⁷⁹

68. *Id.* at *4.

69. 903 N.W.2d 197 (Mich. Ct. App. 2017).

70. *Id.* at 200.

71. *Id.* at 202.

72. *Id.* at 203.

73. 519 S.W.3d 702 (Ark. Ct. App. 2017).

74. *Id.* at 704.

75. *Id.* at 705.

76. *Id.*

77. *Id.* at 708.

78. *Id.*

79. *Id.* at 705.

The jury found that the Arkansas house had been occupied. The trial court entered judgment for the plaintiff.⁸⁰ The insurer appealed, claiming there was inadequate evidence of occupancy by the insured because “two overnight stays were insufficient to render the home ‘occupied.’”⁸¹ Because whether a building is vacant or unoccupied at the time a loss occurs is a question of fact for the jury,” the Court of Appeals of Arkansas affirmed the judgment.⁸²

In *Jarvis v. Geovera Specialty Insurance Co.*,⁸³ the policy excluded damage caused by vandalism or malicious mischief if the home was vacant or unoccupied for thirty days before the loss, with the exception of a “dwelling being constructed.”⁸⁴ In October 2016, vandals intentionally started a fire at the property.⁸⁵ It was undisputed that the house was unoccupied for more than thirty days before the fire while the plaintiff was renovating and repairing the house and that the arson constituted malicious mischief or vandalism.⁸⁶ The issue was “whether the ‘dwelling being constructed’ language included a dwelling being renovated, repaired and/or refurbished.”⁸⁷ The policy did not define the terms “construct” or “being constructed.”⁸⁸ The court used *Webster’s Third New International Dictionary* definitions and concluded that the policy language “dwelling being constructed” was not ambiguous and held that the language meant bringing a dwelling into existence from the ground up, i.e., creating a complete dwelling that did not previously exist.⁸⁹ The phrase did not include renovations, repairs, or refurbishments to an already-existing dwelling.⁹⁰ Therefore, the U.S. District Court for the Middle District of Florida held that the vacancy exclusion applied, the exception to the exclusion did not, and entered judgment for the insurer.⁹¹

D. *Disbonest Acts*

In *Maldonado Investments, LLC v. State Farm Fire & Casualty Co.*,⁹² the insured operated a restaurant that was destroyed by a fire set by an employee.⁹³ The employee pleaded guilty to criminal arson.⁹⁴ The insurer

80. *Id.* 705–06.

81. *Id.* at 708.

82. *Id.* at 708, 710.

83. No. 8:17-cv-296-T-24-JSS, 2017 WL 2869706 (M.D. Fla. July 5, 2017).

84. *Id.* at *1.

85. *Id.*

86. *Id.* at *1–2.

87. *Id.* at *3.

88. *Id.* at *1.

89. *Id.* at *4.

90. *Id.*

91. *Id.* at *4–5.

92. 2016 WL 8135411 (W.D. La. Nov. 4, 2016).

93. *Id.* at *1.

94. *Id.* at *2.

denied the claim, and the insured sued.⁹⁵ The insurer moved for summary judgment based on the dishonesty exclusion.⁹⁶ The trial court found that the dishonesty exclusion applied, but analyzed whether there was coverage under an employee dishonesty endorsement.⁹⁷ That endorsement provided coverage for direct physical loss to business personal property resulting from the dishonest acts of one or more of the insured's employee(s), but required that the employee have the intent to cause the insured to sustain loss and to obtain a financial benefit for any employee or other individual or organization.⁹⁸ The U.S. District Court for the Western District of Louisiana found that the endorsement did not apply because the insured did not show that the employee started the fire with the intent to obtain a financial benefit.⁹⁹

In *J&A Freight Systems, Inc. v. Travelers Property Casualty Co. of America*,¹⁰⁰ the U.S. District Court for the Northern District of Illinois explained that certain endorsements that deal generally with theft do not necessarily override pre-existing endorsements that address specific types of theft and that the modification of coverage does not necessarily affect deductibles.¹⁰¹ The court analyzed whether an endorsement that increased the general limit for Coleman Cable shipments from \$100,000 to \$150,000 changed the policy's Freight Charges, Loading and Unloading "Carrier" Dishonesty Endorsement (Carrier Dishonesty Endorsement).¹⁰² The Carrier Dishonesty Endorsement modified the policy's contract's categorical carrier dishonesty exclusion by providing coverage for up to \$50,000 for loss to covered property caused by or resulting from any fraudulent, dishonest, or criminal act committed by a carrier, and excluded losses in excess of \$50,000 by restating word for word the categorical carrier dishonesty exclusion.¹⁰³

The insured transportation broker arranged for transport of its client's load of copper wire with an individual who held himself out as a representative of a legitimate carrier.¹⁰⁴ Unbeknown to the insured, the individual was an imposter who picked up the copper wire, but never delivered it.¹⁰⁵ Following discovery of the subterfuge, the insured submitted a claim for

95. *Id.* at *1–2.

96. *Id.* at *1, *3.

97. *Id.* at *3–5.

98. *Id.* at *4.

99. *Id.* at *4–5.

100. 2017 WL 4274170 (N.D. Ill. Sept. 26, 2017).

101. *Id.* at *1–2, *4–8.

102. *Id.* at *6–8.

103. *Id.* at *5.

104. *Id.* at *1.

105. *Id.*

\$116,163.60.¹⁰⁶ Because of the Carrier Dishonesty Endorsement, the insured determined that coverage was limited to \$50,000 and paid that amount to the insured.¹⁰⁷ The insured sued.¹⁰⁸

The insurer moved for summary judgment, arguing that the policy provided only \$50,000 coverage for the claim.¹⁰⁹ The insured argued that the policy was ambiguous as to whether the \$50,000 or \$150,000 limit applied to the loss, which created a question of fact precluding summary judgment.¹¹⁰ The court found that the carrier dishonesty exclusion precluded coverage for losses caused by acts of carrier dishonesty and the Carrier Dishonesty Endorsement gave back coverage of only \$50,000.¹¹¹ The court further found that the endorsement that changed the limit for Coleman Cable shipments from \$100,000 to \$150,000 and provided for a \$2,500 deductible for theft did not change the effect of the Carrier Dishonesty Endorsement or make it ambiguous.¹¹² The court explained that the Coleman Cable Endorsement's reference to the \$2,500 deductible for theft did not show the \$150,000 limit applied to theft covered by the Carrier Dishonesty Endorsement because the deductible and exclusions are described in different portions of the policy, can be modified separately, and address different concepts.¹¹³

E. *Faulty Workmanship*

In *James McHugh Construction Co. v. Travelers Property Casualty Co. of America*,¹¹⁴ the insured made a claim for windows scratched by a contractor while attempting to clean construction debris off the windows.¹¹⁵ The insurer denied the claim under the faulty workmanship exclusion.¹¹⁶ The insured argued that "faulty workmanship" was ambiguous because it did not specify whether it applied to processes or final products.¹¹⁷ The U.S. District Court for the District of Maryland found the term was unambiguous and enforceable and that the term "faulty workmanship" applies to both processes and final products.¹¹⁸ The court held that faulty workmanship damaged the windows.¹¹⁹

106. *Id.* at *2.

107. *Id.*

108. *Id.*

109. *Id.* at *4.

110. *Id.*

111. *Id.* at *5–6.

112. *Id.* at *6–8.

113. *Id.* at *6–7.

114. 223 F. Supp. 3d 462 (D. Md. 2016).

115. *Id.* at 465.

116. *Id.* at 465–66.

117. *Id.* at 467.

118. *Id.* at 469–71.

119. *Id.* at 473.

In *Leep v. Trinity Universal Insurance Co.*,¹²⁰ the insured hired a contractor to replace roofing to remedy hail damage.¹²¹ After the roof replacement, the insured discovered water damage in his attic due to water vapor from disconnected furnace vent piping.¹²² The insurer denied the claim under the faulty workmanship exclusion, claiming that the damage occurred because the contractor disconnected the furnace vent during the roof replacement.¹²³ The insured argued that the disconnected furnace vent piping was not faulty workmanship because work on vent piping was not within the scope of the roofing contract.¹²⁴ The U.S. District Court for the District of Montana denied both parties' motions for summary judgment, rejecting the insured's claim that the faulty workmanship exclusion does not apply based on the scope of the contract, but also finding an issue of fact as to whether the contractor's workmanship was faulty.¹²⁵

In *National Manufacturing Co., Inc. v. Citizens Insurance Co. of America*,¹²⁶ the insured made a claim for damage for metal casing stock that was damaged due to pitting caused by a faulty chemical component.¹²⁷ The insurer denied the claim, claiming that coverage was barred under a faulty workmanship exclusion.¹²⁸ The insurer argued that the faulty workmanship exclusion applied because the finished product was defective, the exclusion applied to both flawed product and process, the policy did not require the insured's own workmanship be faulty, and applying the exclusion would preclude the insured from obtaining coverage for its own faulty products.¹²⁹ The insured contended that the cases cited by the insurer applied only to real property, that the loss was not caused by its manufacturing process, and the exclusion was ambiguous because it contained an exception for damage from covered causes of loss.¹³⁰ The U.S. District Court for the District of New Jersey held that the faulty workmanship exclusion applied to both flawed product and process, but also held that an exception in the exclusion providing coverage for damages resulting from a covered cause of loss was contradictory, making the exclusion ambiguous and unenforceable.¹³¹

120. No. CV 16-57-BLG-TJC, 2017 WL 2457882 (D. Mont. June 6, 2017).

121. *Id.* at *1.

122. *Id.* at *2.

123. *Id.* at *3.

124. *Id.*

125. *Id.* at *9.

126. 2016 WL 7491805 (D.N.J. Dec. 30, 2016).

127. *Id.* at *1.

128. *Id.* at *9.

129. *Id.*

130. *Id.*

131. *Id.* at *10-11.

F. *Mold and Water Damage*

In *Morrow v. Allstate Indemnity Co.*,¹³² the plaintiffs reported “two claims for direct physical loss to their home—one involving water damage and the other involving foundation and/or structural support damage.”¹³³ The insurer adjusted the claim, authorized repairs to the house, and paid certain repair costs.¹³⁴ In the subsequent lawsuit, the insureds argued that “Defendants breached their insurance contract with Plaintiffs by (1) failing to assess [Plaintiffs’] property for diminution in value resulting [from] the damage giving rise to the covered claims and (2) failing to pay Plaintiffs for such diminution in value.”¹³⁵

The insurer asserted that the policy covered only “sudden and accidental direct physical loss to property.”¹³⁶ Thus, the policy did not cover diminished value because diminished value is neither a “sudden” or “accidental” loss, nor a “physical” loss.¹³⁷ The insurer also asserted that the Building Structure Reimbursement provision precluded diminished value liability.¹³⁸ The insurer noted that, under that provision, liability is strictly tied to repair and replacement cost.¹³⁹

The U.S. District Court for the Middle District of Georgia rejected the insurer’s position on the basis of two earlier Georgia Supreme Court decisions, *State Farm Mutual Automobile Insurance Co. v. Mabry*¹⁴⁰ and *Royal Capital Development, LLC v. Maryland Casualty Co.*¹⁴¹ The court also rejected the insurer’s claim that the language that required the insurer to pay for actual repair costs negated the insurer’s obligation to pay for diminished value resulting from stigma.¹⁴² The court found the provision served only to abate, not eliminate, the insurer’s liability for the difference between pre-loss value and post-loss value as, under Georgia law, “repair” means “restoration of the property to substantially the same condition and *value* as existed before the damage occurred.”¹⁴³

G. *Ensuing Loss*

In *Leep v. Trinity Universal Insurance Co.*,¹⁴⁴ in response to the insurer’s reliance on the faulty workmanship exclusion, the insured argued that

132. 2017 WL 1196441 (M.D. Ga. Mar. 29, 2017).

133. *Id.* at *1.

134. *Id.*

135. *Id.*

136. *Id.* at *4.

137. *Id.*

138. *Id.*

139. *Id.*

140. 556 S.E.2d 114 (Ga. 2001).

141. 728 S.E.2d 234 (Ga. 2012).

142. *Morrow*, 2017 WL 1196441, at *4.

143. *Id.* (emphasis in original) (quoting *Mabry*, 556 S.E.2d at 121).

144. No. CV 16-57-BLG-TJC, 2017 WL 2457882 (D. Mont. June 6, 2017).

the ensuing loss exception to the exclusion restored coverage for its loss.¹⁴⁵ The U.S. District Court for the District of Montana noted that there are two lines of cases addressing ensuing loss provisions.¹⁴⁶ One interprets the language broadly “to provide coverage for losses to property that occur as a consequence of an excluded event, as long as the ensuing loss is otherwise covered by the policy.”¹⁴⁷ The second interprets the language narrowly, holding that ensuing loss exceptions do not restore coverage “for losses that result directly and proximately from the excluded peril,” instead requiring “a separate and independent cause of the loss” in order to allow coverage.¹⁴⁸ The court chose the broad approach and held that “the faulty workmanship exclusion would exclude from coverage damage to property caused by faulty workmanship. But . . . the ensuing loss provision [would] provide coverage for any otherwise covered loss that took place after or as a consequence or result of the faulty workmanship.”¹⁴⁹ Thus, the cost to repair or replace the furnace vent was excluded, but damage caused by the water vapor was a covered ensuing loss.¹⁵⁰

In *Erie Insurance Property & Casualty Co. v. Chaber*,¹⁵¹ a rockslide damaged the insureds’ properties.¹⁵² The policy excluded loss or damage caused by earth movement, but contained an ensuing loss exception that restored coverage for loss or damage when earth movement “results in fire, explosion, sprinkler leakage, volcanic action, or building glass breakage.”¹⁵³ The insurer decided that only the cost of replacing broken windows in the buildings was a covered ensuing loss.¹⁵⁴ The insureds argued that the ensuing loss exception should be construed as restoring “coverage for the entire loss rather than the limited portion of the loss caused by glass breakage.”¹⁵⁵ The circuit court agreed.¹⁵⁶

The Supreme Court of Appeals of West Virginia reversed, holding that “[t]he circuit court’s interpretation of the ensuing loss provision is unjustifiable, based upon the purpose and express language of the ensuing loss provision.”¹⁵⁷ The court, recognizing that an ensuing loss provision “provides a narrow exception to the exclusion but does not revive or reinstate coverage for losses otherwise unambiguously excluded by the policy,”

145. *Id.* at *9.

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.* at *10.

150. *Id.* at *12.

151. 801 S.E. 2d 207 (W.Va. 2017).

152. *Id.* at 209.

153. *Id.*

154. *Id.* at 209–10.

155. *Id.* at 214.

156. *Id.*

157. *Id.*

held that the glass breakage caused by the earth movement was covered, but that all other damage caused by the rockslide was excluded.¹⁵⁸

In *James McHugh Construction Co. v. Travelers Property Casualty Co. of America*,¹⁵⁹ the U.S. District Court for the District of Maryland, recognizing that “an ensuing loss clause like the one [in this policy] ‘operates to ensure coverage for damage from a covered cause of loss that results from an excluded cause of loss,’”¹⁶⁰ held that “the damage—scratched glass—was directly the result of faulty workmanship” and determined that the ensuing loss exception did not apply.¹⁶¹

In *Travelers Property Casualty Co. of America v. Brookwood, LLC*,¹⁶² rain entered through openings in the EPDM (synthetic rubber) membrane of the insured’s roof, damaging the building and a tenant’s property.¹⁶³ Expert testimony differed on whether the openings in the membrane were caused by wind or from thermal shock.¹⁶⁴ Regardless of the cause of the openings, the U.S. District Court for the Northern District of Alabama held that “the ‘ensuing loss’ exception to the faulty workmanship and maintenance exclusions . . . does not apply.”¹⁶⁵ The court reasoned that “neither faulty workmanship nor inadequate maintenance could have *caused* either thermal shock or wind.”¹⁶⁶ The court further stated “that covered causes of loss *occurred after* any alleged improper workmanship, repair, construction, or maintenance . . . is insufficient to trigger the application of the [ensuing loss] exception.”¹⁶⁷

In *Homeowners Choice Property & Casualty v. Maspons*,¹⁶⁸ the insureds’ sanitary drain line—located in a poured concrete slab foundation—was broken.¹⁶⁹ The policy excluded damage caused by wear and tear or deterioration, but included an ensuing loss provision which provided that, if

158. *Id.* at 215.

159. 223 F. Supp. 3d 462 (D. Md. 2016).

160. *Id.* at 473 (quoting *Selective Ways Ins. Co. v. Nat’l Fire Ins. Co. of Hartford*, 988 F. Supp. 2d 530, 538 (D. Md. 2013)).

161. *James McHugh Constr. Co.*, 223 F. Supp. 3d at 473. In a non-precedential decision from Pennsylvania, *Ridgewood Group, LLC v. Millers Capital Insurance Co.*, No. 1138 EDA 2016, 2017 WL 781620 (Pa. Super. Ct. Feb. 28, 2017), the Pennsylvania Superior Court adopted a similar approach, holding that “[f]oreseeability is the lynchpin of the analysis. Thus, in this case, [the insured’s] loss is excluded from coverage if it was a natural, foreseeable loss arising from deficient maintenance. On the other hand, it is covered, pursuant to the ensuing loss exception, if it was non-foreseeable.” *Ridgewood Group, LLC*, 2017 WL 781620, at *5.

162. No. 2:15-CV-01016-KOB, 2017 WL 3896692 (N.D. Ala. Sept. 6, 2017).

163. *Id.* at *1.

164. *Id.* at *2–3.

165. *Id.* at *7.

166. *Id.* (emphasis in original).

167. *Id.* (emphasis in original) (internal quotations omitted).

168. 211 So. 3d 1067 (Fla. Dist. Ct. App. 2017).

169. *Id.* at 1068.

wear and tear or deterioration “cause water damage, not otherwise excluded, from a plumbing . . . system . . . , we cover loss caused by the water including the cost of tearing out and replacing any part of the building necessary to repair the system[.]”¹⁷⁰ There was no claim that the broken pipe caused any water damage to the interior of the home because the slab had not been opened.¹⁷¹ However, the District Court of Appeal of Florida noted as follows:

While the exclusion for “wear and tear” or “deterioration” might mean . . . that Homeowners Choice is not obligated to compensate the Maspons for their corroded drain pipe, if the Maspons suffered consequential loss as a result of the corroded pipe and that . . . ensuing loss is not [otherwise] excluded . . . , [that] loss is covered.¹⁷²

VI. DAMAGES

A. ACV/RCV/Holdback

When calculating property damage, policies often do not provide for replacement cost coverage until the damaged property is actually repaired or replaced. Until that time, the insured is entitled to actual cash value (ACV), which is typically calculated as replacement cost less depreciation. Disputes often arise regarding what can be depreciated when calculating ACV.

In *In re State Farm Fire and Casualty Co.*,¹⁷³ the U.S. Court of Appeals for the Eighth Circuit held that “actual cash value” has an unambiguous meaning under Missouri law—the difference between the fair market value of damaged property immediately before and after a loss.¹⁷⁴ This amount must be estimated, and the court held that State Farm’s method of depreciating replacement cost was a practical and reasonable method for estimating the fair market value of the property, or ACV, at the time of loss.¹⁷⁵ The court also held that whether the insurer’s use of Xactimate estimating software produced an unreasonable ACV estimate would have to be determined on a case-by-case basis, precluding common facts that would warrant class certification.¹⁷⁶

In *Henn v. American Family Mutual Insurance Co.*,¹⁷⁷ an insured filed a putative class action alleging that the insurer wrongfully depreciated labor

170. *Id.* at 1069.

171. *Id.* at 1070.

172. *Id.* at 1069.

173. 872 F.3d 567 (8th Cir. 2017).

174. *Id.* at 574.

175. *Id.* at 576.

176. *Id.* at 577.

177. 894 N.W.2d 179 (Neb. 2017).

when calculating ACV.¹⁷⁸ The Supreme Court of Nebraska rejected the insured's argument that labor cannot be depreciated, noting that ACV "is 'not a substantive measure of damages,' but, rather, a representation of the depreciated value of the property immediately prior to the damages."¹⁷⁹ Because ACV requires "depreciation of the whole," the court held that "the insured is not underindemnified by receiving the depreciated amount of both materials and labor."¹⁸⁰

The U.S. District Court for the Northern District of California reached a different result in *Johnson v. Hartford Casualty Insurance Co.*¹⁸¹ The insured sought class certification on whether the insurer could depreciate certain building components when calculating ACV of a partial loss.¹⁸² California Insurance Code Section 2051 states: "In case of a partial loss to the structure, a deduction for physical depreciation shall apply only to components of a structure that are normally subject to repair and replacement during the useful life of the structure."¹⁸³ The insured asserted that, when calculating ACV, the insurer wrongfully depreciated items like trim, cement, doors, drywall, and wiring, which are not normally subject to repair and replacement during the useful life of a structure.¹⁸⁴ The court granted the motion for class certification.¹⁸⁵ The court found the insured's injury to be the insurer's "failure to calculate his ACV claim in accordance with Section 2051," and that a question common to the class is "whether Hartford depreciates certain building components in violation of Section 2051 when making ACV payments for partial losses[.]"¹⁸⁶ This order has been appealed.

B. *Overhead and Profit*

In *Prepared Insurance Co. v. Gal*,¹⁸⁷ the insured filed suit against his homeowners' insurer to recover full replacement cost of cabinets damaged by a sink leak, as well as amounts for general contractor's overhead and profit.¹⁸⁸ The Florida District Court of Appeal observed that a replacement cost policy "is designed to cover the difference between what property is actually worth and what it would cost to rebuild or *repair* that prop-

178. *Id.* at 189.

179. *Id.* (quoting *Olson v. Le Mars Mut. Ins. Co. of Iowa*, 696 N.W.2d 453, 458 (Neb. 2005)).

180. *Id.* at 190.

181. No. 15-cv-04138-WHO, 2017 WL 2224828 (N.D. Cal. May 22, 2017).

182. *Id.* at *1.

183. CAL. INS. CODE § 2051(b)(2).

184. *Johnson*, 2017 WL 2224828, at *6.

185. *Id.* at *12.

186. *Id.* at *1.

187. 209 So. 3d 14 (Fla. Dist. Ct. App. 2016).

188. *Id.* at 15.

erty.”¹⁸⁹ The court held that “an insurer is required to pay overhead and profit only if the insured is ‘reasonably likely to need a general contractor.’”¹⁹⁰ Because whether a general contractor was necessary to repair the cabinets was a disputed issue of fact, the insured was not entitled to summary judgment for the insured.¹⁹¹ This case has been appealed.¹⁹²

C. Other Insurance

A common question in the context of a loss with more than one insurer is how much each insurer should pay. In *Philadelphia Indemnity Insurance Co. v. Lexington Insurance Co.*,¹⁹³ a dispute arose between the insurers of a lessee and owner of a building.¹⁹⁴ A charter school, TSAS, leased a building from the school district, which owned more than 100 facilities.¹⁹⁵ The lease agreement required TSAS to procure property insurance, and TSAS obtained coverage with Philadelphia, naming the district as a loss payee.¹⁹⁶ The building was also insured under the district’s policy with Lexington.¹⁹⁷ After the building suffered fire damage, there was a dispute between the insurers.¹⁹⁸ The district court ordered Philadelphia to pay 54 percent and Lexington to pay 46 percent of the \$6,014,359.06 loss.¹⁹⁹ The U.S. Court of Appeals for the Tenth Circuit affirmed.²⁰⁰

The policies had identical excess “Other Insurance” clauses.²⁰¹ The court determined that these clauses canceled each other and the policies applied on a pro rata basis.²⁰² The court rejected Lexington’s argument that the loss should not be shared since the policies insure different entities because the district was protected under both policies—under its own as an insured, and under TSAS’s as a loss payee.²⁰³

The Philadelphia policy had a \$7 million limit, and the Lexington policy had a \$100 million limit.²⁰⁴ The Lexington policy, however, also had an endorsement stating that its liability would be limited to the least of the

189. *Id.* at 17 (emphasis in original) (quoting *Trinidad v. Fla. Peninsula Ins. Co.*, 121 So. 3d 433, 438 (Fla. 2013)).

190. *Id.* (quoting *Trinidad*, 121 So. 3d at 440).

191. *Id.* at 17–18.

192. *See Gal v. Prepared Ins. Co.*, No. SC16–2190, 2017 WL 3484284 (Fla. Apr. 26, 2017).

193. 845 F.3d 1330 (10th Cir. 2017).

194. *Id.* at 1332–33.

195. *Id.* at 1332.

196. *Id.*

197. *Id.*

198. *Id.* at 1333.

199. *Id.* at 1332.

200. *Id.*

201. *Id.*

202. *Id.* at 1333–34.

203. *Id.* at 1333.

204. *Id.* at 1334.

adjusted amount of loss or any limit or sublimit of the policy.²⁰⁵ The district court applied the endorsement and calculated each insurer's pro rata share based on a total of \$13,014,359.06 in coverage.²⁰⁶ Philadelphia argued that the pro rata shares should be based on Lexington's full limit, but the Tenth Circuit held that using \$100 million would disregard the plain language of the endorsement.²⁰⁷

VII. OBLIGATIONS AND RIGHTS OF THE PARTIES

A. *Misrepresentation*

In *H.J. Heinz Co. v. Starr Surplus Lines Insurance Co.*,²⁰⁸ Heinz sought a product contamination insurance policy.²⁰⁹ Heinz engaged a large insurance broker to assist in procuring the coverage, and its new "global insurance director" was responsible for preparing and confirming the insurance application.²¹⁰ In June 2014, the broker emailed the Heinz application to the insurer and included Heinz's loss history and a certification signed by its insurance director.²¹¹ One question asked if Heinz had experienced any recall or withdrawal of any products or been responsible for a third party's recall or withdrawal of a product, whether insurable or not, during the previous ten years.²¹² Heinz did not answer, but attached the company's loss history from 1998 to 2013.²¹³ The loss history contained only one loss during that period in an amount over the requested \$5 million self-insured retention.²¹⁴ The insurer issued the policy with a \$5 million SIR, effective July 1, 2014.²¹⁵

Two weeks later, Chinese authorities notified Heinz that baby food Heinz manufactured in China was contaminated with lead.²¹⁶ In August 2014, Heinz made a claim for the lead contamination loss.²¹⁷ While investigating the claim, the insurer learned that, in 2014, before the policy was issued, Heinz had a loss in excess of \$10 million involving excessive

205. *Id.* at 1345.

206. *Id.* at 1345–46.

207. *Id.* at 1334.

208. 675 F. App'x 122 (3d Cir. Jan. 11, 2017).

209. *Id.* at 124.

210. *Id.* at 124–25.

211. *Id.* at 125.

212. *Id.*

213. *Id.*

214. *Id.* "Similar to a deductible, a [self-insured retention] is the amount of a loss the insured must bear before the insurance coverage begins to respond." *Id.* at 124.

215. *Id.* at 125.

216. *Id.*

217. *Id.*

nitrite levels in baby food manufactured in China.²¹⁸ That loss was not disclosed in Heinz's application.²¹⁹

Applying New York law, the trial court found that Heinz had intentionally made misrepresentations in its application.²²⁰ The trial court concluded that the insurer would not have issued the policy with a \$5 million retention if it had known about the undisclosed losses.²²¹ The Third Circuit affirmed, finding that the record contained "overwhelming evidence" that the insurer relied on the misrepresentations in offering a policy with a \$5 million SIR.²²²

In *Freeze v. Tennessee Farmers Mutual Insurance Co.*,²²³ a husband and wife applied for a property insurance policy.²²⁴ The application asked the applicant to list any "pending legal action," whether the applicant had "[e]ver been charged with, convicted of, or pled guilty to a felony crime of any type," and whether the applicant had "[e]ver been charged with, convicted of, or pled guilty to arson, fraud, theft, or drug related crime of any type."²²⁵ The plaintiffs' answered "No" to each of these questions, and both plaintiffs signed and submitted the application.²²⁶

A few days later, the plaintiffs' house was destroyed by fire.²²⁷ The insurer refused to pay the loss, asserting that the plaintiffs made material misrepresentations about the husband's prior arrests and charges for felony DUI and other drug-related charges.²²⁸ At the time of the application, the husband was under indictment on twelve criminal charges, including felony DUI.²²⁹ The plaintiffs sued, and the insurer moved for summary judgment.²³⁰ The plaintiffs claimed that the insurance agent asked them: "Neither one of you are felons are you?"²³¹ As the husband had not been convicted of the pending charges, the plaintiffs claimed that they responded truthfully to the agent.²³²

Applying Tennessee's statutory requirements for voiding an insurance policy, the trial court found that the plaintiffs had provided false informa-

218. *Id.*

219. *Id.*

220. *Id.* at 128.

221. *Id.*

222. *Id.* at 129.

223. 527 S.W.3d 227 (Tenn. Ct. App. 2017).

224. *Id.* at 228.

225. *Id.*

226. *Id.* at 229.

227. *Id.* at 228.

228. *Id.* at 230.

229. *Id.* at 230–31.

230. *Id.* at 228.

231. *Id.* at 230.

232. *Id.* at 234.

tion in the application about the husband's criminal history.²³³ The Court of Appeals of Tennessee held that the "questions on the Application clearly asked if the applicants had any pending legal action and also clearly asked if the applicants ever had been *charged with* a felony or a drug related crime. The questions did not ask solely about convictions."²³⁴ The court held that the husband's pending drug related and felony charges increased the risk to insurers under the statute and affirmed judgment for the insurer.²³⁵

In *State Farm Fire & Casualty Co. v. Flowers*,²³⁶ after buying a property in 2008, the plaintiffs were unable to obtain financing to build a house and entered into an agreement to deed the property to their building contractors, who obtained a construction loan.²³⁷ The agreement was that the property would be deeded back to the plaintiffs after construction. However, a dispute arose between the plaintiffs and the building contractors about the scope and costs of construction. The plaintiffs lived in the unfinished house.²³⁸ The plaintiffs never received title to the property from the contractors, who had defaulted on the construction loan.²³⁹ When the husband applied for homeowner's insurance in April 2012, he represented that that he owned the property.²⁴⁰ Three months later, the house and its contents were damaged by fire.²⁴¹ The insurer sued for a declaration that the policy was void *ab initio* because of material misrepresentations in the application.²⁴² It was undisputed that the plaintiffs did not own the property and that whether the plaintiffs owned the property was material to the risk.²⁴³ The plaintiffs argued that they did not knowingly or willfully misrepresent ownership of the property because the husband "reasonably, and in good faith, believed he was the owner of the property."²⁴⁴ Applying Mississippi law, the trial court found that "whether the misrepresentation 'was intentional, negligent, or the result of mistake or oversight is of no consequence.'"²⁴⁵ The U.S. Court of Appeals for the Fifth Circuit noted that, under Mississippi law, the applicant's belief that the statement

233. *Id.* at 230–31 (applying TENN. CODE ANN. § 56-7-103 (2016)).

234. *Id.* at 233–34 (emphasis in original).

235. *Id.* at 234 (applying TENN. CODE ANN. § 56-7-103 (2016)).

236. 854 F.3d 842 (5th Cir. 2017).

237. *Id.* at 843. The building contractors were also the plaintiffs' relatives.

238. *Id.*

239. *Id.*

240. *Id.*

241. *Id.*

242. *Id.*

243. *Id.* at 845.

244. *Id.*

245. *Id.* (quoting Republic Fire & Casualty Ins. Co. v. Azlin, No. 4:10-CV-037-SA-JMV, 2012 WL 4482355, at *6–7 (N.D. Miss. Sept. 26, 2012)).

is true is not sufficient, and if the statement is false and material, the insurer is entitled to void or rescind the policy.²⁴⁶

B. Duties

1. Examinations Under Oath

Generally, in the absence of a reasonable excuse, an insured's failure to submit to an examination under oath (EUO) and to submit documents usually results in the insurer being relieved of its duty to pay. In *Ruggerio v. Harleysville Preferred Insurance Co.*,²⁴⁷ the EUO was adjourned with the express understanding that Harleysville could continue the examination and that the insured needed to produce the requested records.²⁴⁸ The insured was reluctant to continue the EUO when she learned that there was an outstanding warrant for her arrest on charges of attempted larceny, insurance fraud, and making a false statement.²⁴⁹ The U.S. District Court for the District of Connecticut noted that the insured could assert her Fifth Amendment privilege regarding specific questions, but she could not refuse to continue her EUO.²⁵⁰ The court also concluded that she had not satisfied the EUO requirement by appearing for one session.²⁵¹

In *Nationwide Property & Casualty Insurance Co. v. Brown*,²⁵² the U.S. District Court for the Eastern District of Michigan confirmed that an insured's repeated false statements about, and concealment of, a co-insured's whereabouts entitled the insurer to judgment.²⁵³ In this case, Tamara Brown reported a water damage claim.²⁵⁴ Nationwide asked both Tamara and James Brown to appear for an EUO.²⁵⁵ Tamara appeared and provided testimony regarding James's location and mental health conditions.²⁵⁶ Nationwide determined that Tamara misled Nationwide about James's availability and mental health.²⁵⁷ James's EUO was delayed by seven months.²⁵⁸ The Browns argued that they ultimately complied with Nationwide's request.²⁵⁹ The court concluded that the seven-month delay would cause the interview to be less useful and that Tamara's concealment of James's location effec-

246. *Flowers*, 854 F.3d at 844 (citing *Prudential Ins. Co. of Am. v. Estate of Russell*, 274 So. 2d 113, 116 (Miss. 1973)).

247. 2017 WL 4401453 (D. Conn. Sept. 30, 2017).

248. *Id.* at *4.

249. *Id.* at *5.

250. *Id.* at *12.

251. *Id.* at *13.

252. 2017 WL 1436488 (E.D. Mich. Apr. 24, 2017).

253. *Id.* at *12.

254. *Id.* at *3.

255. *Id.*

256. *Id.* at *4.

257. *Id.*

258. *Id.* at *10.

259. *Id.*

tively deprived Nationwide of the EUO.²⁶⁰ Moreover, the Browns were unable to show that Tamara's conduct was not deliberate or willful.²⁶¹ The court granted judgment to Nationwide.²⁶²

Florida's absolute litigation privilege provides that "a defendant can slander [a] plaintiff and lie to her and the court, and still be absolutely immune from [suit] for defamation . . . as long as the slander and lies were made in the courtroom or during a formal discovery process and had some relation to the [trial]."²⁶³ The Florida District Court of Appeal in *Arko Plumbing Corp. v. Rudd*²⁶⁴ recently held that Florida's absolute litigation privilege does not apply to an EUO.²⁶⁵

2. Proof of Loss

Traditionally, proof of loss provisions have been considered a condition precedent to recovery under an insurance policy. Thus, if insureds did not comply with the proof of loss provision, they could not recover under the policy. Under Texas law, however, the insurer must demonstrate that it was prejudiced by the insured's failure to comply. To demonstrate prejudice, the insurer must prove that one of the recognized purposes of the provision has been frustrated.²⁶⁶ In a variety of cases addressing Allstate's "Action Against Us" provision and the effect of an insured's failure to provide a proof of loss, Texas courts held that Allstate did not show prejudice and its motions to dismiss were denied.²⁶⁷

Submitting a sworn statement in proof of loss under a Standard Flood Insurance Policy (SFIP) remains a condition precedent. In *Scharr v. Selective Insurance Co. of New York*,²⁶⁸ the court granted the insurer's motion for summary judgment when the insured failed to submit a signed and sworn proof of loss within sixty days of the flood-related loss.²⁶⁹ The insured argued substantial compliance by submitting of a proof of loss for the undisputed damage, as well as submitting various reports that in-

260. *Id.* at *11.

261. *Id.*

262. *Id.* at *12.

263. *Arko Plumbing Corp. v. Rudd*, No. 3D16-1689, 2017 WL 4654904, at *1 (Fla. Dist. Ct. App. Oct. 18, 2017).

264. No. 3D16-1689, 2017 WL 4654904 (Fla. Dist. Ct. App. Oct. 18, 2017).

265. *Id.* at *1.

266. *Vilaythong v. Allstate Ins. Co.*, 2017 WL 4805522, at *8 (N.D. Tex. Oct. 25, 2017) (citing *Blanton v. Vesta Lloyds Ins. Co.*, 185 S.W.3d 607, 612 (Tex. App. 2008)).

267. See *id.* at *3; *Rogers v. Allstate Veh. & Prop. Ins. Co.*, 2017 WL 3215292, at *2 (N.D. Tex. July 28, 2017); *Wilson v. Allstate Ins., Co.* 2017 WL 1313854, at *1 (E.D. Tex. Apr. 10, 2017); *Lopez v. Allstate Veh. & Prop. Ins. Co.*, 2017 WL 1294453, at *3 (E.D. Tex. Apr. 4, 2017); *Polen v. Allstate Veh. & Prop. Ins. Co.*, 2017 WL 661836, at *2 (E.D. Tex. Feb. 17, 2017).

268. 2017 WL 4778779 (W.D.N.Y. Oct. 23, 2017)

269. *Id.* at *6.

cluded the estimated amount of damages.²⁷⁰ The U.S. District Court for the Western District of New York concluded the insureds' submission of a proof of loss for the undisputed amount did not relieve the insured of the obligation to submit a proof of loss setting forth *all* claimed damages.²⁷¹

C. Appraisal

1. Scope of Appraisal

Courts continue to wrestle with whether appraisers may consider issues of causation in addition to issues of valuation, and if so, to what extent. Many states have interpreted the phrase "amount of loss" found in a typical appraisal provision as limiting appraisal to determining solely disputes regarding valuation. However, in recent years, some courts have permitted appraisers to determine issues of causation.

In *Allied Mechanical Services v. National Fire & Marine Insurance Co.*,²⁷² the U.S. District Court for the Western District of Michigan determined that a dispute concerning the amount of loss was appropriate for appraisal, but that all other disputes must be resolved by the court.²⁷³ There, the insured sued for breach of contract because the insurer refused to participate in appraisal after a fire loss.²⁷⁴ The insurer contended that appraisal was premature because there were coverage issues regarding which definition of ACV applied to the claim.²⁷⁵ The court held that a question regarding the interpretation of the policy is generally not resolved in appraisal.²⁷⁶ However, the court also held that, since the dispute involved which policy provision should be used to calculate ACV was a factual and not legal question, it should be resolved through appraisal, because ACV applies to the calculation of damages.²⁷⁷

In *Matter of Pottenburgh v. Dryden Mutual Insurance Co.*,²⁷⁸ after a covered vandalism loss, the plaintiff demanded appraisal to determine the amount of loss.²⁷⁹ The insurer rejected the appraisal demand, contending that there was a dispute about the scope of coverage and appraisal was not appropriate.²⁸⁰ The plaintiff petitioned to compel appraisal and the insurer moved to dismiss her petition. The plaintiff conceded that the disputed items were not damaged by vandalism, but contended that they still

270. *Id.* at *6–7.

271. *Id.* at *7.

272. 2017 WL 1313897 (W.D. Mich. 2017).

273. *Id.* at *3.

274. *Id.* at *1.

275. *Id.* at *3.

276. *Id.*

277. *Id.* at *5.

278. 48 N.Y.S.3d 885 (N.Y. Sup. Ct. 2017).

279. *Id.* at 888.

280. *Id.*

needed to be repaired or replaced due to issues with matching and work necessary to repair the property that was damaged by vandalism. The New York Supreme Court held that “issues of causation relate to the scope of coverage, which is not a proper subject for an appraisal, and issues regarding the extent of necessary repairs involve valuation of damages, which are properly submitted for an appraisal.”²⁸¹ Accordingly, the court held that, the insurer’s objections to the appraisal were limited to the extent of necessary repairs to the property, which was within the scope of appraisal because it did not implicate a question of causation.²⁸²

In *Walnut Creek Townhouse Association v. Depositors Insurance Co.*,²⁸³ the insurer denied the insured’s claim for damage to its buildings as a result of hail, contending that the damage was not covered under the policy.²⁸⁴ The insured sued, demanded appraisal, and asked the court to approve the language to be used on the appraisal form.²⁸⁵ Although the Iowa Court of Appeals declined to approve any specific language, it did identify which issues would be determined by the appraisers and which issues should be left for litigation.²⁸⁶ The court held that appraisers may make the initial causation determination because “causation is an integral part of the definition of loss, without consideration of which the appraisers cannot perform their assigned function.”²⁸⁷ The court also held that a natural part of the appraisal process requires appraisers to determine the *cause of loss* and the *amount necessary to repair the loss* as “[c]ausation relates to both liability and damages because it is the connection between them.”²⁸⁸ Accordingly, the court held that an appraisal panel must make causation determinations.²⁸⁹

In *Royal Publications, Inc. v. Travelers Indemnity Co.*,²⁹⁰ the insured sought coverage for water damage that it alleged resulted from a storm.²⁹¹ The

281. *Id.*

282. *Id.* at 889.

283. No. 16-0121, 2017 WL 3077916 (Iowa Ct. App. July 19, 2017).

284. *Id.* at *1.

285. *Id.*

286. *Id.* at *2.

287. *Id.* (quoting *N. Glenn Homeowners Ass’n v. State Farm Fire & Cas. Co.*, 854 N.W.2d 67, 71 (Iowa Ct. App. 2014)).

288. *Id.* at 5 (quoting *State Farm Lloyds v. Johnson*, 290 S.W.3d 886, 891–92 (Tex. 2009)). The dissent argued that appraisers should determine only the amount of the loss, which is a question of damages, and not whether there is a loss, because that determination is an issue of liability. The dissent further argued that giving appraisers authority to determine issues of causation raises due process concerns.

289. *Walnut Creek Townhouse Ass’n*, 2017 WL 3077916, at *5; see also *Runaway Bay Condominium Ass’n v. Phila. Indem. Ins. Cos.*, 2017 WL 1478114, at *1 (N.D. Ill. Apr. 25, 2017) (court held causation may be decided in appraisal); *Snyder v. Am. Family Ins. Co.*, 2016 WL 5796838, at *3–4 (D. Minn. Oct. 3, 2016) (the court compelled appraisal, holding that an appraisal panel is allowed to determine causation).

290. No. 15-cv-02719-RM, 2016 WL 7732999 (D. Colo. Oct. 13, 2016).

291. *Id.* at *1.

insured demanded appraisal.²⁹² The insurer contended that appraisers could not determine causation.²⁹³ The U.S. District Court for the District of Colorado focused on the purpose of appraisal, i.e., to avoid litigation and encourage settlement.²⁹⁴ Accordingly, the court held that, because the appraisal provision permitted the insurer to deny the claim and permitted parties to dispute coverage issues even after an appraisal award, appraisers may determine causation.²⁹⁵

2. Timeliness of Demand or Refusal to Appraise

In *Matter of Pottenburgh*,²⁹⁶ the insurer also claimed the appraisal demand was untimely.²⁹⁷ The New York Supreme Court held that, to determine the timeliness of an appraisal demand, it must consider the following factors: “1) whether the appraisal would result in prejudice to the insured party; 2) whether the parties engaged in good-faith negotiations over valuation of the loss prior to the appraisal demand; and 3) whether an appraisal is desirable or necessary under the circumstances.”²⁹⁸ Relying on these factors, the court held that, because the insurer had timely notice of the claim and an opportunity to inspect the property, there would be no prejudice to the insurer if the motion to compel appraisal was granted.²⁹⁹

3. Enforcing and Modifying Appraisal Awards

In *Garcia v. Lloyds*,³⁰⁰ the insured submitted a claim for storm damage to her property.³⁰¹ After the insured sued, the insurer demanded appraisal.³⁰² The parties agreed to appraisal for the sole purpose of calculating the amount of the loss, and the suit was stayed.³⁰³ An appraisal award was issued and the insurer paid the award.³⁰⁴ The insurer moved for summary judgment, arguing that the insured was estopped from continuing her breach of contract action because the appraisal award resolved the dispute.³⁰⁵ The insured rejected the insurer’s payment and opposed sum-

292. *Id.*

293. *Id.* at *2.

294. *Id.* at *3.

295. *Id.* at *4.

296. 48 N.Y.S.3d 885 (N.Y. Sup. Ct. 2017).

297. *Id.* at 887.

298. *Id.* (quoting *Zarour v. Pac. Indem. Co.*, 113 F. Supp. 3d 711, 716 (S.D.N.Y. 2015)). Although the *Matter of Pottenburgh* court noted that it considers whether the insured would be prejudiced by the appraisal as a factor in determining the timeliness of an appraisal demand, the court’s analysis here focused on the potential prejudice to the insurer.

299. *Id.* at 888.

300. 514 S.W.3d 257 (Tex. App. 2016).

301. *Id.* at 262.

302. *Id.*

303. *Id.*

304. *Id.* at 263.

305. *Id.*

mary judgment, arguing that the award should be vacated because the appraisers exceeded the scope of their authority by failing to use prior estimates prepared by the parties in the determining the award.³⁰⁶ The insured argued that the appraisers made an improper causation determination when they did not consider certain items during the appraisal, which she contended the parties had already agreed were covered.³⁰⁷

The Court of Appeals of Texas noted that appraisal awards made pursuant to an insurance policy are binding and enforceable unless: (1) “the award was made without authority;” (2) “the award was made as a result of fraud, accident, or mistake;” or (3) “the award was not in compliance with the requirements of the policy.”³⁰⁸ The party seeking to set aside the appraisal award bears the burden of demonstrating that it was not valid.³⁰⁹ In determining whether the appraisers had exceeded their scope of authority, the court analyzed case law regarding whether appraisers may decide causation.³¹⁰ On the one hand, the court held that appraisers have no authority to determine issues of causation, liability, or coverage and that appraisers should determine solely the amount of loss.³¹¹ However, the court also acknowledged the practical reality that distinguishing between causation as a question of damages versus coverage is difficult, because appraisers must consider causation, at least as an initial matter, when separating different types of damage to the same item of property.³¹² Thus, the court held that “[a]ny appraisal necessarily includes some causation element, because setting the amount of loss requires appraisers to decide between damages for which coverage is claimed from damages caused by everything else.”³¹³ The court also reasoned that, if appraisers determine causation, there would be no liability determination left for the courts.³¹⁴ The court ultimately held that deciding whether appraisers exceeded their authority by determining causation depends heavily on the circumstances of each case.³¹⁵ The court held the plaintiff had not raised a triable issue of fact regarding the validity of the appraisal award because the appraisal provision of the policy did not dictate the manner in which the award had to be made and, therefore, the appraisers had not exceeded their authority by disregarding the parties’ prior estimates.³¹⁶

306. *Id.* at 267.

307. *Id.* at 266.

308. *Id.* at 265.

309. *Id.* at 264.

310. *Id.* at 266–67.

311. *Id.* at 266.

312. *Id.* at 266–67.

313. *Id.* at 267 (quoting *State Farm Lloyds v. Johnson*, 290 S.W.3d 886, 893 (Tex. 2009)).

314. *Garcia*, 514 S.W.3d at 267.

315. *Id.*

316. *Id.* at 270.

In *Zarour v. Pacific Indemnity Co.*,³¹⁷ the insureds moved to modify an appraisal award to include losses sustained to their property due to mold.³¹⁸ Initially, the appraisal solely determined and awarded losses caused by wind.³¹⁹ In their affidavits in support and in opposition to the motion, the appraisers offered competing explanations for why they did not consider mold damage.³²⁰ The U.S. District Court for the Southern District of New York noted that, because appraisal in New York is limited to “factual disputes over the amount of loss for which an insurer is liable,” and appraisal resolves solely questions of valuation, a party seeking to challenge an appraisal award may challenge it only by showing “fraud, bias, or bad faith.”³²¹ An appraisal panel’s valuation determination is presumed valid absent a showing of the forgoing factors.³²² However, the court also noted that the insureds were not challenging the valuation determinations made by the appraisers.³²³ They were arguing that the panel did not complete its “contractual and court-ordered task” by solely calculating the damage caused by wind and failing to calculate the amount of loss sustained due to mold.³²⁴ In other words, the appraisers made an improper coverage determination by omitting mold damage from their calculations when it was a part of the insured’s claim.³²⁵ The court determined that the scope of the plaintiffs’ claim was not an issue for appraisal, and the panel exceeded its authority by failing to determine the amount of damage caused by mold.³²⁶

4. Appraiser Qualifications

In *Owners Insurance Co. v. Dakota Station II Condominium Association, Inc.*,³²⁷ the insurer filed a petition seeking to set aside an appraisal award based on the lack of impartiality of the insured’s appraiser.³²⁸ The appraisal provision in the insurance policy stated that “each party will select a competent and impartial appraiser,” but the phrase “impartial” was not defined in the policy.³²⁹ The Colorado Court of Appeals determined that, to be considered impartial, an appraiser must render his or

317. No. 15-cv-2663 (JSR), 2017 WL 946332 (S.D.N.Y. Feb. 22, 2017).

318. *Id.* at *1.

319. *Id.*

320. *Id.*

321. *Id.* at *2 (quoting *Duane Reade, Inc. v. St. Paul Fire & Marine Ins. Co.*, 411 F.3d 384, 389 (2d Cir. 2005) and *Forbes v. Candant Corp.*, No. 99-9180, 2000 WL 232069, at *2 (2d Cir. Jan. 28, 2000)).

322. *Id.*

323. *Id.*

324. *Id.*

325. *Id.*

326. *Id.* at *3.

327. No. 16CA0733, 2017 WL 3184568 (Colo. Ct. App. July 27, 2017).

328. *Id.* at *1.

329. *Id.* at *2.

her valuation opinion in “fairness, good faith, and lack of bias,” but there is no requirement that the appraiser be impartial in the same way as a judge, arbitrator, or umpire.³³⁰ Although an appraiser should be unbiased and disinterested, an impartial appraiser may favor one side over another, as the policy does not state to the contrary.³³¹ Accordingly, the court held that the insured’s appraiser was impartial despite the fact that he had pre-appraisal meetings with the insured and public adjuster and communicated with the public adjuster during the appraisal.³³²

D. *Who Can Sue on the Policy and Collect Proceeds?*

In *Givaudan Fragrances Corp. v. Aetna Casualty & Surety Co.*,³³³ the New Jersey Supreme Court held that “once an insured loss has occurred, an anti-assignment clause in an occurrence policy may not provide a basis for an insurer’s declination of coverage based on the insured’s assignment of the right to invoke policy coverage for that loss.”³³⁴ In reaching this holding, the Supreme Court aligned New Jersey law with the majority rule.³³⁵ Before this decision, two New Jersey Superior Court, Appellate Division decisions—*Flint Frozen Foods, Inc. v. Fireman’s Insurance Co. of Newark*³³⁶ and *Elat, Inc. v. Aetna Casualty & Surety Co.*³³⁷—reached the same conclusion, but no previous New Jersey Supreme Court case decided the issue.³³⁸

E. *Suit Limitations*

In *Woodson v. Allstate Insurance Co.*,³³⁹ the U.S. Court of Appeals for the Fourth Circuit held that the one-year suit limitations period in the SFIP was not tolled by timely filing suit in state court because the SFIP requires that suit be filed in federal court.³⁴⁰ The insured argued that timely filing the state court action equitably tolled the limitations period because the case was removed to federal court.³⁴¹ The court rejected that argument because removal occurred after the limitations period expired.³⁴²

330. *Id.* at *3–4.

331. *Id.* at *4.

332. *Id.* at *4–5.

333. 151 A.3d 576 (N.J. 2017).

334. *Id.* at 579.

335. *Id.* at 586.

336. 79 A.2d 739 (N.J. Super. Ct. Law Div. 1951) (reversed by the New Jersey Supreme Court using an analysis that did not contradict the post-loss assignment analysis). See *Flint Frozen Foods v. Firemen’s Ins. Co. of Newark*, 86 A.2d 673 (N.J. 1952).

337. 654 A.2d 503 (N.J. Super. Ct. App. Div. 1995).

338. *Givaudan Fragrances Corp.*, 151 A.3d at 584–85.

339. 855 F.3d 628 (4th Cir. 2017).

340. *Id.* at 634.

341. *Id.*

342. *Id.* at 634–35.

In *Ryan v. Liberty Mutual Fire Insurance Co.*,³⁴³ the court, applying New Jersey law, held that an insurer's letter explaining that flood damages was not covered, but did not state that coverage was "denied," did not restart the running of the limitations period, which had been tolled by the insured's filing the claim.³⁴⁴ The court held that the insurer's letter amounted to a denial, the letter's description of the appeal process did not make the denial equivocal, and New Jersey law does not require an insurer to point out a policy's suit limitation provision.³⁴⁵

In *Albert Frassetto Enterprises v. Hartford Fire Insurance Co.*,³⁴⁶ the plaintiff argued that the policy's suit limitation provision did not apply to business interruption (BI) claims because it appeared in the property coverage part and was not repeated in the BI coverage form, and because the BI coverage was separate and distinct from the property coverage.³⁴⁷ The court disagreed, and held that "the only fair construction of the policy language is that the [BI] coverage form provides coverage for losses incident to the direct physical property damage or loss [and is not] separate and distinct coverage falling outside of the coverage part to which the two-year limitation period condition applies."³⁴⁸

In *Holmes v. Safeco Insurance Co. of America*,³⁴⁹ the court enforced a one-year suit limitations period in an all-risk homeowner's policy, rather than the 18-month period applicable to fire insurance policies, even though the policy covered fire losses. The plaintiffs' home was damaged by heavy snow and ice dams in February 2011.³⁵⁰ The court held that the 18-month period did not apply because the loss at issue was not a fire loss.³⁵¹

In *De Jongh v. State Farm Lloyds*,³⁵² State Farm Lloyds closed the plaintiff's file on July 12, 2012, but did not issue a denial letter.³⁵³ A month later, State Farm Lloyds reopened the file, reinspected the home, issued a denial letter, and closed the file again.³⁵⁴ The plaintiff filed suit in November 2012 against an entity related to State Farm Lloyds, but did not name State Farm Lloyds as a defendant until she amended her petition on July 14, 2014.³⁵⁵ The court held that the plaintiff's legal claims ac-

343. 234 F. Supp. 3d 612 (D.N.J. 2017).

344. *Id.* at 617–19.

345. *Id.*

346. 144 A.D.3d 1556 (N.Y. App. Div. 2016).

347. *Id.* at 1557.

348. *Id.* at 1558.

349. 157 A.3d 1147 (Conn. Ct. App. 2017).

350. *Id.* at 1148.

351. *Id.*

352. 664 F. App'x 405 (5th Cir. 2016).

353. *Id.*

354. *Id.* at 406–07.

355. *Id.* at 407.

crued on July 12, 2012, when State Farm Lloyds first closed the file.³⁵⁶ The court concluded that the plaintiff's claims against State Farm Lloyds were barred by the suit limitations provision because the plaintiff did not name State Farm Lloyds as a defendant until two years and two days after the accrual date.³⁵⁷

F. *Bad Faith*

The Pennsylvania Supreme Court recently confirmed in *Rancosky v. Washington National Insurance Co.*³⁵⁸ that to prevail on a claim pursuant to Pennsylvania's bad faith statute, a policyholder is not required to prove that an insurance company acted with a "motive of self-interest or ill-will."³⁵⁹ After the 1990 passage of Pennsylvania's bad faith status, Section 8371, Pennsylvania courts struggled to define "bad faith."³⁶⁰ Then, in *Terletsky v. Prudential Property & Casualty Insurance Co.*,³⁶¹ the Pennsylvania Superior Court established a two-part test for bad faith, holding that to recover under Section 8371, an insured must show by clear and convincing evidence: (1) the insurer did not have a reasonable basis for denying benefits under the policy, and (2) the insurer knew or recklessly disregarded its lack of a reasonable basis in denying the claim.³⁶² Relying on *Terletsky*, insurers over the years had argued that the insured was also obligated to prove a third element—that the insurer was motivated by "self-interest or ill will."³⁶³

The Pennsylvania Supreme Court unanimously rejected the insurer's attempt to add the element of "motive of self-interest or ill will" to the elements of statutory bad faith. Reasoning that requiring ill will would make it "highly unlikely that any plaintiff could prevail thereunder," the court reasoned that the Pennsylvania legislature could not have intended such a stringent standard.³⁶⁴

In *Perez-Crisantos v. State Farm*,³⁶⁵ the Supreme Court of Washington refused to allow a policyholder to sue an insurer for bad faith under the Washington's Insurance Fair Conduct Act (IFCA) based solely on procedural violations of insurance regulations.³⁶⁶ The IFCA made it unlawful for insurers to unreasonably deny certain claims and allowed for attorney

356. *Id.*

357. *Id.* at 407–08.

358. 170 A.3d 364 (Pa. 2017).

359. *Id.* at 365.

360. *Id.* at 371.

361. 649 A.2d 680 (Pa. Super. Ct. 1994).

362. *Id.* at 689–90.

363. *Rancosky*, 170 A.3d at 369.

364. *Id.* at 376.

365. 389 P.3d 476 (Wash. 2017).

366. *Id.* at 482–83.

fees and treble damages.³⁶⁷ The Washington Supreme Court held that State Farm could not be held liable under the IFCA based solely on the company's alleged unfair conduct in handling a policyholder's claim for coverage of medical bills following a car accident.³⁶⁸ After analyzing the history of the IFCA, the court held that the state legislature had not intended to create an independent cause of action under IFCA for regulatory violations and that the IFCA only allows claims where an insurer unreasonably denies coverage or benefits.³⁶⁹

367. *Id.* at 480.

368. *Id.* at 482–83.

369. *Id.*

