RECENT DEVELOPMENTS IN PROPERTY INSURANCE COVERAGE LITIGATION

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I. INTRODUCTION

As we predicted in last year's survey, the pace of cases involving hurricanes and floods is starting to pick up. The three cases in this year's survey all involve federal flood insurance and highlight the importance for insureds and their counsel to understand federal flood insurance as the rules governing the coverage and claims handling are very different than those for standard policies. Another area of increasing litigation is whether labor can be depreciated when calculating ACV. Finally, matching is always at issue.

II. HURRICANES AND FLOODS

In *Migliaro v. Fidelity National Indemnity Insurance Co.*,[1] the U.S. Court of Appeals for the Third Circuit held that an insurer's rejection of proof of loss is not a *per se* denial of the claim, but it can be a denial of the claim if the policyholder treats it as such and files suit against the insurer.[2]

In *D&S Remodelers, Inc. v Wright National Flood Insurance Services, LLC*,[3] D&S entered into a contract with the insured to provide floodwater-pumping services after Hurricane Sandy.[4] D&S met with the insured and an independent adjuster and entered into oral agreements to expand the scope of work to include decontamination.[5] D&S claimed that the adjuster represented that any insurance claim would be accepted, and full payment would be made to D&S.[6] Wright, Foundry's flood insurer, refused to pay D&S, and D&S sued.[7] Wright moved to dismiss, claiming that the NFIA preempted D&S's claims.[8] D&S argued that, because it was not an insured the policy, and its claims did not arise under the policy, the NFIA did not preempt its claims.[9] The U.S. Court of Appeals for the Sixth Circuit affirmed dismissal, holding that D&S's state law claims related to Foundry's claims under its flood policy because the cause of action arose from Wright's claims handling and were pre-empted.[10]

In *LCP West Monroe, LLC v. United States*,[11] LCP's buildings sustained flood damage.[12] LCP submitted timely proofs of loss to Selective, which paid the net amounts claimed.[13] LCP presented Selective with an additional proof of loss six months later, and that claim was denied.[14] LCP argued that FEMA's claims handbook allowed for supplemental claims if damage is discovered after the deadline for proofs of loss.[15] The U.S. District Court for the Western District of Louisiana held that, when an insured submits a timely proof of loss and notifies its insurer a supplement will follow, but the supplemental claim is not accompanied by a timely, sworn proof of loss, the supplemental claim may be denied.[16]

1. 880 F.3d 660 (3d Cir. 2018).
2. *Id.* at 662.
3. 725 Fed. Appx. 350 (6th Cir. 2018).
4. *Id.* at 352.
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.* at 353.
9. *Id.* at 356.
10. *Id.* at 356–57.
11. 328 F. Supp. 3d 577 (W.D. La.2018).
12. *Id.* at 579.
13. *Id.* at 580.
14. *Id.*
15. *Id.* at 583.
16. *Id.* at 585.

III. BUSINESS INTERRUPTION/CIVIL AUTHORITY

In *Bernstein Liebhard, LLP v. Sentinel Insurance Co., Ltd.*,[17] the insured, a law firm with a large, contingent fee, mass tort practice, suffered a fire at its office.[18] The insured claimed that, as a result of the fire, it was unable to advertise for new mass tort plaintiffs, causing a $27 million loss of contingency fees it otherwise would have earned.[19] The policy defined "business income," in relevant part, as the "net income that would have been earned" during the 12 months after the fire.[20] On appeal, the New York Appellate Division held that "[t]he entire fee amounts that eventually result from settlements and judgments in cases foregone by the plaintiff would not have been 'earned' by plaintiff . . . within the 12-month cutoff after the fire[.]"[21]

In *Milk Industry Management Corp. v. Travelers Indemnity Co. of America*,[22] the insured—a distributor of dairy products—contracted with an organization of dairy farmers to distribute the farmers' product.[23] The insured subcontracted the receipt, storage, and load out of this product to Black Bear Distribution, whose storage facility—a covered premises under the policy—was destroyed by fire.[24] Black Bear did not re-build.[25] The insured could not procure alternate warehouse space and capabilities sufficient to continue distribution services to the dairy farmers, and therefore terminated its contract with the farmers.[26] The insurer paid approximately $3 million in business income coverage, but the insured sued for an additional $7 million.[27] The insured argued that it had no legal ability to repair, rebuild or replace the Black Bear warehouse, and that its period of restoration should not be "based on a hypothetical rebuild or repair of the Black Bear warehouse when it did not, and could not, rebuild, and it never resumed operations."[28] The U.S. District Court for the District of New Jersey rejected this argument, holding that the policy's coverage for lost business income during a suspension of operations "contemplates that business will resume."[29] If the business ceases altogether, "the calculation

17. 78 N.Y.S.3d 339 (App. Div. 2018).
18. *Id.* at 339.
19. Bernstein Liebhard, LLP v. Sentinel Ins. Co., Ltd., 2018 WL 623535, at *1 (N.Y. Sup. Ct. Jan. 30, 2018).
20. *Id.*
21. *Bernstein Liebhard, LLP*, 78 N.Y.S.3d at 340.
22. 337 F. Supp.3d 423 (D.N.J. 2018).
23. *Id.* at 425.
24. *Id.*
25. *Id.* at 426.
26. *Id.*
27. *Id.*
28. *Id.* at 428–29.
29. *Id.* at 431.

of business income loss must be based on . . . the date when the repairs or rebuilding should have reasonably been completed."[30] In addition, because the insured never resumed operations, it was not entitled to extended business income coverage, which was only triggered after the property "is actually repaired, rebuilt or replaced, and when operations are resumed."[31]

In *Welspun Pipes, Inc. v. Liberty Mutual Fire Insurance Co.*,[32] the insured entered into a lucrative contract to supply approximately 220,000 metric tons of steel pipeline.[33] A fire suspended operations at the insured's Little Rock, Arkansas facility, which was slated to produce a large portion of the order.[34] The insured sought business interruption coverage for what it characterized as "mitigation costs" incurred when it shifted production from Little Rock to India to avoid loss of the contract.[35] The policy covered "[t]he actual loss of business income you incur during [the] period of restoration," as well as "[t]he necessary expenses you incur in excess of your normal operating expenses that reduces your loss of business income."[36] The insured argued that the costs of transferring production to India were "necessary expenses" because they reduced its business income loss by avoiding loss of the entire contract.[37] The insurer characterized the mitigation costs as "extra expense," for which it had already paid the policy limit.[38] The U.S. Court of Appeals for the Eighth Circuit found "no evidence that spending $14 million to shift some . . . production to India was 'necessary' to satisfy [the insured's] duty to mitigate . . . covered business income losses."[39]

IV. COLLAPSE

In *Hoban v. Nova Casualty Insurance Company*,[40] the U.S. District Court for the Eastern District of California held, as a matter of first impression, the collapse coverage in the policy was ambiguous.[41] Two roof trusses in a bowling alley failed, causing the building ceiling, overhead monitors and

30. *Id.*
31. *Id.* at 434.
32. 891 F.3d 351 (8th Cir. 2018).
33. *Id.* at 353.
34. *Id.* at 354.
35. *Id.*
36. *Id.*
37. *Id.* at 355.
38. *Id.* at 355–56 (noting that the policy defined "extra expense" as "reasonable and necessary extra costs: 1. Incurred to temporarily continue as nearly normal as practicable the conduct of your business; or 2. Of temporarily using property or facilities of yours or others.").
39. *Id.* at 358–59.
40. 335 F. Supp. 3d 1192 (E.D. Cal. 2018).
41. *Id.* at 1202.

disco ball to drop six to ten inches, as well as ceiling tiles and insulation to fall onto tables tops and counters below.[42] The insurer's expert opined that the damage was caused by the combination of defective construction methods and degradation of the wood trusses due to seasonal cycling of temperature and humidity.[43] The insurer denied the claim.[44] The court held there was more than one reasonable interpretation of the collapse provision.[45] The court noted that the policy differentiated between a building that suffered an "abrupt collapse" and one that is still standing, suggesting that the policy does not require "that the building or part of the building must collapse completely to the ground."[46] The court also held that the requirement that the building "cannot be occupied for its intended purpose" would be redundant if the policy required a complete collapse.[47]

In *Hurlburt v. Massachusetts Homeland Insurance Co.*,[48] the insureds alleged that a chemical reaction in the concrete caused deterioration and decay of their concrete basement floor, leading to substantial impairment of the structural integrity of the building.[49] The insurer argued that the insureds' loss was not "sudden and accidental direct physical loss" as required by the policy.[50] The insurer also argued that, because the insureds alleged that the deterioration of the concrete due the chemical reaction would progressively deteriorate the basement walls, the insureds had not and could not allege that there has been an "abrupt" collapse.[51] The U.S. District Court for the District of Connecticut explained that, since the insureds alleged that the concrete in their basement was deteriorating, which may or may not lead to collapse, the insureds had not alleged an "abrupt collapse".[52]

V. COVERED PROPERTY

A. *Structures*

In *Jones v. State Farm Fire & Casualty Co.*,[53] an insurer argued that a backyard retaining wall was "land" and excluded under an exclusion for damage to land.[54] The court disagreed, holding that the retaining wall was an

42. *Id.* at 1196.
43. *Id.* at 1197.
44. *Id.* at 1198.
45. *Id.* at 1202.
46. *Id.*
47. *Id.* at 1203.
48. 310 F.Supp.3d 333 (D. Conn. 2018).
49. *Id.* at 339–40.
50. *Id.* at 343.
51. *Id.* at 339–40.
52. *Id.* at 341.
53. 2018 WL 4281532 (W.D. Wash. Sept. 7, 2018).
54. *Id.* at *6 n.2.

"other structure" under the policy's extension for structures.[55] However, the court held the loss was excluded because it was caused by an excluded peril, "water below the surface of the ground."[56]

B. *Insurable Interest*

In *Estate of Frye v. MMG Insurance Co.*,[57] the Supreme Judicial Court of Maine examined whether the insured's estate maintained an insurable interest where the decedent had held a life estate in the property.[58] Before the purchase of the policy, the insured conveyed his house to his children, but reserved a life estate.[59] The policy defined "insured" in part as: "You and residents of your household who are . . . [y]our relatives[.]"[60] The children did not live in the property.[61] Six weeks after the insured died, the home was destroyed by fire, and coverage litigation ensued.[62] The court held that, while the insured was alive, the remaindermen on the life estate had an insurable interest in the property,[63] but were never added to the policy and did not meet the policy's definition of "insureds."[64] As to the estate, the court held that it did not have an insurable interest in the property since the property was immediately acquired by the remaindermen when the insured died.[65]

C. *Newly Acquired*

In *Berrylane Trading, Inc. v. Transportation Insurance Co.*,[66] the insured leased a warehouse before the policy incepted, but the insured did not take physical possession until after the policy began.[67] The insured argued that the "newly acquired property" provision should apply since the damaged goods were acquired after the inception of the policy, and the warehouse was not physically acquired until after inception of the policy.[68] The U.S. Court of Appeals for the Sixth Circuit rejected both arguments, holding that "the Policy was about covering property at [a specific location] it was not a policy intended to cover all [the insured's] personal property 'wherever it may

55. *Id.* at *4.
56. *Id.*
57. 182 A.3d 158 (Me. 2018).
58. *Id.* at 161–62.
59. *Id.* at 162.
60. *Id.* at 160.
61. *Id.*
62. *Id.* at 161.
63. *Id.* at 162–63.
64. *Id.* at 160.
65. *Id.* at 164–65.
66. 2018 WL 5778298 (6th Cir. Nov. 2, 2018).
67. *Id.* at *3.
68. *Id.*

be found.'"[69] The court also held that "physical possession" is not required to legally acquire a building.[70]

VI. EXCLUSIONS

A. *Causation*

1. Generally

In *Sunwood Condominium Ass'n v. Travelers Casualty Insurance Co. of America*,[71] the policy covered "all risks of direct physical loss or damage, except as excluded or limited" therein.[72] Policy exclusions included loss or damage "caused by" various perils.[73] For the relevant exclusions, the policy added: "but, if loss or damage from a **covered cause of loss** results, [the insurance company] will pay for that resulting loss or damage."[74] The U.S. District Court for the Western District of Washington found that the subject policy covered an otherwise excluded loss if it was proximately caused by concurrent excluded and covered perils.[75] The court noted that, under Washington's efficient proximate cause rule, unless specifically precluded by the policy, where covered and excluded perils combine as the concurrent efficient proximate cause of the loss, the loss is covered.[76] The policy contained anti-concurrent cause language for other exclusions.[77] The court concluded that application of that clause to other perils, but not to the ones at issue, "indicates an intent to cover the damage or loss here if it results from concurrent covered and excluded causes."[78]

2. Anti-concurrent/Anti-sequential Causation

In *Oltz v. Safeco Insurance Co. of America*,[79] the parties disputed whether an "anti-concurrent causes clause" in a homeowners' policy was enforceable in Montana.[80] The U.S. District Court for the District of Montana held that the clause did not make coverage illusory, was not ambiguous,[81] did not prevent application of the efficient proximate cause doctrine,[82] and would

69. *Id.* at *4 (quoting Spike Indus., Inc. v. Midwestern Indem. Co., 2007 WL 4145842 (Ohio Ct. App. Nov. 14, 2007)).
70. *Id.* at *7.
71. 2017 WL 5499809 (W.D. Wash. Nov. 16, 2017).
72. *Id.* at *2.
73. *Id.*
74. *Id.* (emphasis in original).
75. *Id.* at *3.
76. *Id.* at *4.
77. *Id.*
78. *Id.*
79. 306 F. Supp. 3d 1243 (D. Mo. 2018).
80. *Id.* at 1255–56.
81. *Id.* at 1256–57.
82. *Id.*

be clear to an average consumer.[83] The court also noted that there was no Montana law barring application of anti-concurrent cause provisions.[84]

B. *Earth Movement*

In *Taja Investments LLC v. Peerless Insurance Co.*,[85] Peerless issued a builder's risk insurance policy to Taja that covered renovations which involved excavating an existing crawl space in order to create a new living area.[86] The project required Taja to periodically underpin the structure to prevent a collapse.[87] Taja excavated without any underpinning, and one wall of the building partially collapsed.[88] Peerless denied the claim based on the earth movement exclusion.[89] Taja sued for breach of contract and argued that the earth movement exclusion did not apply because the "movement" occurred "below the earth's surface at the basement level" of the building, and thus was not "movement of the earth's surface" within the exclusion.[90] In rejecting Taja's argument, the district court reasoned that, "while the movement that caused the . . . collapse occurred below grade . . . it still involved movement of the earth surface (the uppermost layer of the soil and clay)."[91] Therefore, the district court held, and the U.S. Court of Appeals for the Fourth Circuit affirmed, that the earth movement exclusion supported summary judgment for Peerless.[92]

In *Temperature Service Co. v. Acuity*,[93] the U.S. District Court for the Northern District of Illinois held that an "earth movement" exclusion barred coverage for loss resulting from the presence of "urban backfill" (man-made fill material and construction debris) which caused differential settlement and damage to the building's foundation.[94] The exclusion precluded coverage for loss caused by "soil conditions which cause settling, cracking, or other disarrangement of foundations or other parts of realty."[95] The policy defined "soil conditions" to include "improperly compacted soil."[96] Plaintiff argued that the exclusion did not apply because the soil conditions "result[ed] from human action."[97] The court reasoned that

83. *Id.*
84. *Id.*
85. 717 F. App'x 190 (4th Cir. 2017).
86. *Id.* at 191.
87. *Id.*
88. *Id.* at 192.
89. *Id.* at 191.
90. *Id.* at 193.
91. *Id.*
92. *Id.*
93. 2018 WL 1378345, at *1 (N.D. Ill. Mar. 15, 2018).
94. *Id.* at *1–2.
95. *Id.* at *3.
96. *Id.*
97. *Id.* at *4.

the term "*improperly* compacted soil" in the policy required human action.[98] Thus, the exclusion included "both naturally occurring soil conditions and soil conditions resulting from human action."[99]

Finally, in *Burgunder v. United Specialty Insurance Co.*,[100] the policy precluded coverage for loss directly or indirectly caused by: "(4) Earth sinking (other than sinkhole collapse), rising or shifting including soil conditions which cause settling, cracking or other disarrangement of foundations or other parts of realty."[101] The exclusion "applies regardless of whether [earth movement] is caused by an act of nature or is otherwise caused."[102] United Specialty argued that the failure of the retaining wall on a neighboring property constituted earth movement "otherwise caused" and was excluded from coverage.[103] The court disagreed, and held that to read subsection (4) so broadly would render the rest of the exclusion superfluous.[104]

C. *Vacancy*

In *Jarvis v. Geovera Specialty Insurance Co., Inc.*,[105] the U.S. Court of Appeals for the Eleventh Circuit found that an exception to the vacancy provision of a vandalism and malicious mischief exclusion for "dwellings being constructed" was not ambiguous and did not apply where the property had been vacant for over three months and there were no "substantial continuing" construction activities.[106]

In *Newport News Holdings, LLC v. Great American Insurance Co.*,[107] where the vacancy provision provided that "[b]uildings under construction or renovation are not considered vacant," the U.S. District Court for the Eastern District of Virginia found a genuine issue of fact as to whether the insured had performed caulking and cleaning and whether that amounted to "renovations."[108] Similarly, in *Durasevic v. Grange Insurance Co. of Michigan*,[109] where the vandalism exclusion precluded coverage for "intentionally set" fires, the U.S. District Court for the Eastern District of Michigan held there was an issue of fact as to whether a fire at issue was intentionally set.[110]

98. *Id.* at *5 (emphasis added).
99. *Id.*
100. 2018 WL 2184479 (W.D. Pa. May 11, 2018).
101. *Id.* at *4.
102. *Id.*
103. *Id.*
104. *Id.* at *5.
105. 733 F. App'x 468 (11th Cir. 2018).
106. *Id.* at 469–71.
107. 2018 WL 3117635 (E.D. Va. June 25, 2018).
108. *Id.* at *4, *6.
109. 328 F. Supp. 3d 770 (E.D. Mich. 2018).
110. *Id.* at 776.

The U.S. District Court for the Northern District of Illinois in *Ervin v. Travelers Personal Insurance Co.*,[111] held that a vandalism and malicious mischief exclusion did not apply even though there was no dispute that the insured premises was vacant for two years before the loss.[112] Because the Illinois Standard Fire Policy sets forth the minimum required coverage, the court held that the insurer could not rely on the exclusion to preclude coverage for a loss that occurred within the first 60 days of the policy period.[113]

D. *Dishonest Acts*

In *K.V.G. Properties, Inc. v. Westfield Insurance Co.*,[114] the insured leased property to tenants who, unbeknownst to the insured, built a large-scale marijuana growing operation.[115] When the insured learned of the operation, it evicted the tenants, and then sought coverage for some $500,000 in damage they caused.[116] The insurer denied coverage based on a dishonest or criminal acts exclusion which included "anyone to whom you entrust the property for any purpose."[117] The court held the exclusion applied because the insured did not present any evidence that the tenants complied with the Michigan Medical Marihuana Act.[118] To the contrary, in its eviction action against the tenants, the insured "repeatedly claimed that the '[t]enant illegally grew marijuana' in the unit and stated that the '[i]llegal growing of marijuana' was a 'continuing health hazard.'"[119]

E. *Faulty Workmanship*

In *Westridge Townhomes Owners Association v. Great American Assurance Co.*,[120] an all-risk "Difference in Conditions" policy excluded coverage for loss caused by "faulty workmanship", but did "not explicitly exclude 'faulty construction,' 'faulty maintenance,' or 'wet or dry rot,' although those terms are excluded in other policies issued by [the insurer]."[121] The court rejected the insurer's argument that faulty construction and faulty maintenance are excluded under "faulty workmanship," and that wet or dry rot is excluded under "deterioration."[122] The court held that "'workmanship'

111. 317 F. Supp. 3d 1014 (N.D. Ill. 2018).
112. *Id.* at 1016.
113. *Id.* at 1018.
114. 900 F.3d 818 (6th Cir. 2018).
115. *Id.* at 820.
116. *Id.*
117. *Id.*
118. *Id.* at 823.
119. *Id.* at 822.
120. 2017 WL 4957634 (W.D. Wash. Oct. 31, 2017).
121. *Id.* at *1.
122. *Id.* at *3.

must mean something distinct from 'construction' . . . or else it would be superfluous."[123]

F. *Ensuing Loss*

In *Taja Investments, LLC v. Peerless Insurance Co.*,[124] a wall in the insured's property collapsed during renovations due to the failure to "support the building's foundation properly while excavating the basement."[125] The insurer denied coverage because the loss was caused by the insured's faulty construction.[126] The insured argued that the collapse was an ensuing loss. Applying Virginia law, the district court held—and the U.S. Court of Appeals for the Fourth Circuit affirmed—that an "ensuing loss provision 'excludes from coverage the normal results of defective construction, and applies only to distinct, separable, and ensuing losses.'"[127] Because the collapse was "the direct result of [the insured's] failure of workmanship rather than a separate 'resulting loss,'" the ensuing loss provision did not allow coverage.[128]

Citing *Taja*, the Supreme Court of New Hampshire held in *Russell v. NGM Insurance Co.*[129] that an ensuing loss exception did not allow coverage for an insured's loss.[130] In *Russell*, the insureds discovered mold in their attic which resulted from faulty workmanship.[131] The homeowners sued, claiming that they were entitled to loss of use damages under their policy.[132] After the trial court granted summary judgment to the insurer, the homeowners appealed.[133] Their first argument on appeal was that "their loss of use damages . . . constitute 'ensuing losses' of faulty workmanship," contending that the "hidden and unknown accumulation of moisture is an ensuing loss of faulty workmanship" which led to the mold, which in turn led to the loss of use.[134] The court rejected this argument, stating that "[t]o be covered under an ensuing loss provision, 'the damage that falls under the exclusion and the ensuing damage must be separable events in that the damage and the ensuing loss must be different in kind, not just degree.'"[135] The court concluded that mold is "a natural and expected . . .

123. *Id.*
124. 717 F. App'x 190 (4th Cir. 2017).
125. *Id.* at 191.
126. *Id.*
127. *Id.* at 192 (quoting Friedberg v. Chubb & Son, Inc., 691 F.3d 948, 953 (8th Cir. 2012)).
128. *Id.*
129. 176 A.3d 196 (N.H. 2017).
130. *Id.* at 204.
131. *Id.* at 199.
132. *Id.*
133. *Id.*
134. *Id.* at 204.
135. *Id.* (quoting *In re* Chinese Manufactured Drywall Prods. Liab., 759 F. Supp. 2d 822, 850 (E.D. La. 2010)).

result of water damage, and thus cannot be an ensuing loss of accumulated unknown and hidden moisture."[136]

In *EMS USA, Inc. v. Travelers Lloyds Insurance Co.*,[137] the insured was contracted to build a pipeline, which required a horizontal directional drilling operation.[138] A subcontractor improperly performed the initial reaming of the pilot hole through which the pipeline would eventually run.[139] The pilot hole was not salvageable, so the project required drilling a new, deeper pilot hole.[140] The insured claimed it was only "trying to recover physical damage to the hole caused by negligence during the construction process," not the cost of repairing the original pilot hole or "making good" the faulty workmanship.[141] The court held that coverage was precluded because the only costs sought were those associated with the faulty workmanship.[142]

In *Nay Co. v. Navigators Specialty Insurance Co.*,[143] the insured was installing a new grain elevator when it toppled over and collapsed after the guy wires stabilizing it during installation were released and slackened.[144] Both the elevator and surrounding property were damaged.[145] The insurer argued that the ensuing loss provision was inapplicable because the removal of the guy wires did not cause the wind that collapsed the elevator.[146] The insured argued that the ensuing loss exception restored coverage for the loss because "even though [the insured's] removal of the guy wires was an excluded act . . . it resulted in a covered peril—the elevator's collapse due to wind."[147] The court found that the phrase "results in" in the ensuing loss exception was susceptible to more than one interpretation and was therefore ambiguous.[148] The court agreed "that the removal of the guy wires resulted in a covered peril—the elevator's collapse due to wind."[149]

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136. *Russell*, 176 A.3d at 206 (internal citation and quotations omitted).
137. 2018 WL 1545700 (S.D. Tex. Feb. 28, 2018).
138. *Id.* at *2.
139. *Id.*
140. *Id.*
141. *Id.* at *6.
142. *Id.* at *7. In *Enderle v. Amica Mutual Ins. Co.*, 2018 WL 2048364 (D. Conn. May 2, 2018), the insureds asserted that cracking and deterioration of their walls were covered ensuing losses resulting from a chemical reaction. *Enderle*, 2018 WL 2048364, at *1. Like the *EMS USA, Inc.* court, the *Enderle* court determined that the insured was only seeking coverage for damage caused by excluded causes of loss under the policy—cracking and deterioration, as opposed to EMS's faulty workmanship—so the ensuing loss provision was not triggered. *Id.* at *4. *See also* Cohen v. Pacific Specialty Ins. Co., 2017 WL 5405645 (Cal. Ct. App. Nov. 14, 2017) (water intrusion and resulting damage not a loss ensuing from defective construction as it was not a separate peril).
143. 2018 WL 4026346 (N.D. Tex. June 12, 2018).
144. *Id.* at *1.
145. *Id.*
146. *Id.* at *4.
147. *Id.* at *5.
148. *Id.*
149. *Id.*

In *Cockerham v. American Family Mutual Insurance Co.*,[150] the insureds were constructing a celestial observatory in their home. [151] During construction, the subcontractor incorrectly poured concrete, damaging the piers, the telescope support system's pole, and the house's foundation.[152] The insurer denied the claim based on the faulty construction exclusion, which had a resulting loss exception. [153] The court held that the damage to the piers, pole, and foundation "resulted from the excluded loss caused by the bad concrete pour—the cost of removing and replacing the incorrectly–poured concrete" —and were covered.[154]

VII. DAMAGES

A. *ACV/RCV/Holdback*

A frequently litigated issue this year was whether an insurer may depreciate labor costs when calculating actual cash value ("ACV"). In *Mitchell v. State Farm Fire and Casualty Co.*,[155] following a loss, the insured was advised State Farm would pay ACV.[156] The insured sued, alleging that State Farm improperly depreciated labor. The U.S. District Court for the Northern District of Mississippi concluded that the policy was ambiguous, as it did not define ACV, which could be interpreted to either include or exclude labor depreciation.[157] Similar conclusions were reached in *Brasher v. Allstate Indemnity Co.*,[158] and *Titan Exteriors, Inc. v. Certain Underwriters at Lloyd's, London*.[159]

In *Hicks v. State Farm Fire & Casualty Co.*,[160] the policies did not define ACV, but incorporated Kentucky's ACV regulation, which defines ACV as replacement cost less depreciation.[161] The Sixth Circuit held that the policies were ambiguous because they did not define ACV, but merely incorporated Kentucky's regulation, which did not define depreciation.[162]

150. 2018 WL 4569878 (Mo. Ct. App. Sept. 25, 2018).
151. *Id.* at *1.
152. *Id.*
153. *Id.* at *3.
154. *Id.*
155. 335 F.Supp.3d 847 (N.D. Miss. Sept. 24, 2018)
156. *Id.* at 850.
157. *Id.* In *Lammert v. Auto-Owners Mutual Ins. Co.*, 286 F. Supp. 3d 919 (M.D. Tenn. Dec. 22, 2017), the U.S. District Court for the Middle District of Tennessee also certified to the Tennessee Supreme Court the issue of whether an insurer could depreciate labor costs when making an ACV payment. *Lammert*, 286 F. Supp. 3d at 927. The Tennessee Supreme Court has yet to rule.
158. 2018 WL 5629918 (N.D. Ala. Sept. 7, 2018).
159. 297 F. Supp. 3d 628 (N.D. Miss. 2018).
160. 2018 WL 4961391 (6th Cir. Oct. 15, 2018).
161. *Id.* at *4.
162. *Id.* at *5 (citing 806 Ky. Admin. Regs. 12:095(9)(2) (amended 1997)).

In *Thorne v. Member Select Insurance Co.*,[163] the insurer argued that the district court erred in allowing the broad evidence rule to determine the ACV following a fire loss.[164] The insurer argued that the policy language "settlement will be on an Actual Cash Value basis; this includes deduction for depreciation," to mean "settlement will be on an Actual Cash Value basis; meaning/defined as replacement cost with deduction for depreciation."[165] The U.S. Court of Appeals for the Seventh Circuit rejected the insurer's argument because the policy did not define ACV to mean replacement cost less depreciation.[166]

In *Dunkerly v. Encompass Insurance Co.*,[167] the policy required the insured to make a claim for "any additional liability on a replacement cost basis" within one year of the loss.[168] The U.S. District Court for the District of New Jersey upheld the provision as written and concluded that, where the insured's estate did not make a supplemental replacement cost claim within one year, it could not recover replacement cost.[169]

B. *Overhead and Profit*

In *McKinnie v. State Farm Fire and Casualty Co.*,[170] following a hail storm, State Farm inspected the damage and determined the loss was covered.[171] State Farm provided estimates which included line items for "commercial supervision/project management", defined as the time required "to manage commercial jobs where Supervision/Project Management is needed to coordinate the work of subcontractors, or perform other project management duties."[172] The cover pages of each State Farm estimate stated that "depending on the complexity of your repair, our estimate may or may not include an allowance for general contractor's overhead and profit."[173] The insureds hired a licensed prime contractor whose estimate included overhead and profit.[174] Ultimately, the insureds filed a class action to recover overhead and profit.[175] The insureds claimed that State Farm had a pattern and practice of failing to pay overhead and profit, that it manipulated the Xactimate system, and only paid "job-related" overhead.[176]

163. 882 F.3d 642 (7th Cir. Feb. 12, 2018)
164. *Id.* at 646.
165. *Id.* at 646–47.
166. *Id.* at 647.
167. 296 F. Supp. 3d 681 (D. N.J. Oct. 27, 2017)
168. *Id.* at 685.
169. *Id.* at 686.
170. 298 F. Supp. 3d 1138 (M.D. Tenn. Feb. 2, 2018).
171. *Id.* at 1140.
172. *Id.* at 1141.
173. *Id.*
174. *Id.*
175. *Id.* at 1140.
176. *Id.* at 1142.

While the U.S. District Court for the Middle District of Tennessee dismissed the class claims, it allowed the individual claims based on State Farm's refusal to pay overhead and profit.[177] Noting that "overhead and profit is recoverable by the insured where it is reasonable that a general contractor would be needed," the court concluded the insureds had presented sufficient evidence of that need, especially where State Farm's own estimate contemplated the possible need for a general contractor.[178]

In *Kurach v. Truck Insurance Exchange*,[179] following a water loss, Truck determined the services of a general contractor would likely be necessary to repair the damaged property.[180] Truck calculated ACV by excluding general contractor overhead and profit ("GCOP").[181] The policy provided that ACV does not include GCOP unless and until the insured actually paid GCOP, unless the law of the state requires GCOP to be paid with the ACV.[182] The Superior Court of Pennsylvania concluded that the policy explicitly made payment due only when the insureds actually incurred GCOP, and the insureds had not cited any case law that ACV must include overhead and profit.[183]

C. *Matching*

In *Windridge of Naperville Condo. Ass'n v. Philadelphia Indemnity Insurance Co.*,[184] the insured argued that replacement siding that matched the undamaged elevations was no longer available so the insurer had to pay to replace the siding on all four elevations.[185] The insurer argued that, even if no matching siding was available, the policy required it to pay to replace only the siding on the elevations that sustained covered hail damage because those were the only elevations that suffered "direct physical loss."[186]

In holding that, absent a match, the insurer must replace both the damaged and undamaged siding, the court stated that the policy covered the buildings as a whole, and comparable material and quality required matching materials.[187] The court then found that the dispute did not raise a coverage question and should be resolved through appraisal.[188] The court

177. *Id.* at 1148.
178. *Id.*
179. 2018 WL 4041707 (Pa. Super. Ct. Aug. 24, 2018).
180. *Id.* at *2.
181. *Id.* at *3.
182. *Id.*
183. *Id.* at *1.
184. 2018 WL 1784140 (N.D. Ill. Apr. 13, 2018).
185. *Id.*
186. *Id.* at *3.
187. *Id.* at *4. The court also noted that "[e]ven if this were not the only sensible reading of the policy, the most that could be said in [the insurer's] favor is that the policy is ambiguous" and Illinois law required ambiguous provisions to be construed in favor of coverage. *Id.*
188. *Id.* at *2, *5.

ordered a separate appraisal to determine whether there was matching siding available.[189] As the court explained, "[i]n calculating repair or replacement cost, it is necessary to assess what must be replaced or repaired . . . and how much that work costs. . . . That determination is a question proper for appraisal."[190]

In *160 Lee St. Condo. Homeowners' Ass'n v. Mid-Century Insurance Co.*,[191] a fire damaged the siding on the west tower of the insured condominium, but not the siding on the east tower.[192] The insured argued that the insurer had to cover the cost to replace the siding on both the west and east towers when the adjuster was unable to find replacement siding that matched the east tower's existing siding.[193] According to the insured, the insurer was required to cover the cost of replacing the siding of both towers so that it would be "compatible" or "equivalent."[194]

The court agreed with the insured. The court focused on the policy terms "replace" and "property."[195] "Replace" was not defined in the policy and was therefore given its plain and ordinary meaning of "to restore to a former place or position."[196] The policy defined "property" to include the "[b]uilding and structure described in the Declarations."[197] Therefore, "any 'replacement' must necessarily restore the *entire* condominium to its condition before the fire – a condition in which there was no visual mismatch between the east and west towers."[198]

In *Avery v. Erie Insurance Co.*,[199] the insureds sustained storm damage to their roof.[200] The insurer identified five damaged roof tiles and offered to pay the amount it would cost to replace those damaged tiles.[201] The insurer determined that three areas of the roof had been patched with tiles "different from those covering the rest of the roof."[202] The insured argued that matching tiles were not available and the insurer must pay for the entire roof to be replaced under Ohio Administrative Code ("O.A.C.") 4101:8-1-01, § 113 and 3901-1-54(I)(1)(b).[203] The applicable code sections provided

189. *Id.* at *5.
190. *Id.*
191. 2018 WL 1994059 (W.D. Wash. Apr. 27, 2018).
192. *Id.* at *2–3
193. *Id.* at *3.
194. *Id.*
195. *Id.* at *4.
196. *Id.*
197. *Id.*
198. *Id.* (emphasis in the original). The court observed that, to the extent the policy's replacement coverage was ambiguous, any ambiguity would be constructed against the insurer. *Id.*
199. 2018 WL 2100371 (S.D. Ohio May 7, 2018).
200. *Id.* at *1.
201. *Id.*
202. *Id.*
203. *Id.* at *2.

that "the roof repairs need not meet the standards for new construction as long as the work is done 'in the same manner and arrangement as was in the existing system' and is not less safe.[204] Similarly, insurers must 'match the quality, color or size of the item suffering the loss' or replace as much of it 'as to result in a reasonably comparable appearance.'"[205]

The court framed the issue as whether the insurer could replace the insured's tiles "in the same manner and arrangement" as the existing roof and "match the quality, color or size" of the roof tiles to result in a reasonably comparable appearance."[206] The new tiles would never age to an exact or nearly exact match to the existing tiles.[207] The court held that O.A.C. 3901-1-54(I)(1)(b) does not require the new materials to be identical; rather, it requires only restoring a "reasonably comparable appearance" to "the item suffering loss."[208] Similarly, O.A.C. 4101:8-1-01, § 113 requires only that repairs be made "in the same manner and arrangement as was in the existing system [and] is not less safe than when originally installed."[209] Because the insureds' roof had – at the time of the storm damage – already been repaired with non-matching tiles, the court held that using similar, non-matching tiles satisfied the code provisions.[210]

D. *Other Insurance*

In *Preferred Display, Inc. v. Great American Insurance Co. of New York*,[211] the insured had purchased $4 million in coverage for damage to business personal property from Great American and $2 million of similar coverage from The Hartford.[212] Following a covered fire loss, the insured and Great American measured the ACV of the loss at $6,392,119.[213] The insured argued it was entitled to the $4 million policy limit.[214] Great American disagreed, arguing that the "Other Insurance" and "Coinsurance" clauses reduced its liability to $2,680,250.23.[215]

The court noted that "Other Insurance" provisions "are valid for the purpose of establishing the order of coverage between insurers, as long as their enforcement does not compromise coverage for the insured."[216] Great American's "Other Insurance" provision contained both a pro rata

204. *Id.*
205. *Id.* at *3 (internal citation omitted).
206. *Id.*
207. *Id.* at *4.
208. *Id.*
209. *Id.*
210. *Id.*
211. 288 F. Supp. 3d 515 (D. Conn. 2018)
212. *Id.* at 519.
213. *Id.*
214. *Id.*
215. *Id.* at 520.
216. *Id.* (quoting Aetna Cas. & Sur. Co. v. CNA Ins. Co., 606 A.2d 990 (Conn. 1992)).

and a contingent excess clause.[217] Neither of these clauses were triggered because the total covered loss ($6.39 million) exceeded the insurance total available ($6 million).[218] Accordingly, the court held that the "Other Insurance" provision did not reduce Great American's liability.[219]

VIII. OBLIGATIONS AND RIGHTS OF THE PARTIES

A. *Misrepresentation*

In *QBE Seguros v. Morales-Vasquez*, [220] Vasquez applied for insurance for his yacht from QBE in March 2014.[221] The QBE Application asked whether Morales ever had any accidents or losses (even if no insurance claim was filed) in connection with a vessel that he operated or controlled.[222] Morales checked the box for "yes" and indicated that he had an accident eleven years before.[223] However, he did not disclose that he had grounded a different yacht in January 2010.[224] The application also required Morales to provide a chronological list of boats he owned or operated.[225] Morales only listed two of seven vessels.[226] The policy was issued based on the application.[227] The yacht suffered a fire loss, and QBE learned about Morales' 2010 grounding.[228] QBE examined Morales under oath and he testified to both omissions on the QBE application.[229]

The court concluded that Morales breached his duty of utmost good faith when he failed to fully disclose all material facts known to him when he sought coverage. [230] The court also held that Morales breached his warranty of truthfulness when he failed to tell QBE about the 2010 grounding and the vessels he previously owned.[231]

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217. *Id.* at 522. "An 'excess insurance' clause . . . provides that, if there is other valid insurance covering the loss, the excess policy applies only if the claimant's loss exceeds the policy limits of the primary insurer. A 'pro rata' other insurance clause provides that if there is other valid coverage, the insurer is liable only for its pro rata share of the loss, that is, the proportion that its policy limits bears to the total applicable policy limits." *Id.* at 521 (quoting *Aetna Cas. & Sur. Co.*, 606 A.2d at 994, n.3).
218. *Id.* at 521–22.
219. *Id.* at 522.
220. 2018 WL 3763305 (D.P.R. Aug. 7, 2018).
221. *Id.* at *2.
222. *Id.*
223. *Id.*
224. *Id.*
225. *Id.*
226. *Id.*
227. *Id.* at *3.
228. *Id.*
229. *Id.* at *4.
230. *Id.* at *5–6 (citing Catlin at Lloyd's v. San Juan Towing & Marine, 778 F.3d 69, 75 n.6 (1st Cir. 2015) and Markel Am. Ins. Co. v. Leonor Veras, 995 F. Supp. 2d 65, 77 (D.P.R. 2014)).
231. *Id.* at *14. (applying *Veras*, 995 F. Supp. 2d. 65).

In *Lee v Mercury Insurance Co. of Georgia*,[232] Ronald Lee bought a home in Georgia from Jim Constable in 2007.[233] Lee was married and living with his wife in South Carolina, but part of his work as a project manager included frequent travel between Georgia and Florida. Lee would frequently stay at Constable's home rather than rent motel rooms.[234] When Lee bought the home in 2007, he stayed there so many nights a week that his mortgage company considered it his primary residence, but as time passed, he stayed there only one to two nights every two weeks.[235] In 2010, Lee sought insurance from Mercury.[236] The application stated that the home was a primary residence occupied by the named insured; it also listed all residents, including unrelated individuals - Lee was listed as the insured, followed by Constable and his two children, with an indication of "other" as their relation to the insured.[237]

The property was destroyed by an accidental fire.[238] Mercury claimed that Lee made a material misrepresentation by stating that the home was his primary residence.[239] The trial court granted Mercury summary judgment on rescission, based in part on Mercury's submission of an affidavit from its director of underwriting that, if not for Lee's representation of residence, it would not have issued the policy or would have issued the policy at a higher premium.[240] The appellate court overruled, finding that Georgia statutory and case law indicated "that summary judgment can never issue based on opinion evidence alone" unless made by a qualified expert.[241] Based on Lee's expert submissions, the court held there were fact issues regarding the materiality of Lee's representations.[242]

In *Purry v. State Farm Fire & Casualty Co.*,[243] Eric Purry purchased a home from a person purporting to be Iesha Kurtz via a quitclaim deed.[244] The deed was recorded on February 23, 2017 with the register of deeds.[245] Purry applied for a policy from State Farm.[246] The application asked for "ownership type," to which Purry responded "individual"; the application did not ask questions to determine whether Purry was the legal owner

232. 808 S.E.2d 116 (Ga. Ct. App. 2017).
233. *Id.* at 121.
234. *Id.*
235. *Id.*
236. *Id.* at 121–22.
237. *Id.*
238. *Id.* at 122.
239. *Id.*
240. *Id.*
241. *Id.* at 127–28.
242. *Id.* at 129–30.
243. 2018 WL 5619738 (E.D. Mich. Oct. 30, 2018).
244. *Id.* at *1.
245. *Id.*
246. *Id.* at *2.

of the property.[247] State Farm issued a policy, but when fire damaged the property, State Farm interviewed "the real Iesha Kurtz," who said that she did not convey the property to Purry.[248] Purry claimed that he performed a title search, "but an official title search for the parcel by street address would have revealed that Iesha Kurtz had previously conveyed the same property to Bee Properties Management[.]"[249] Applying Michigan law and relying on an affidavit from State Farm stating that the property was ineligible for coverage if the applicant did not own the home, the court concluded that Purry's misrepresentation about ownership was material.[250] Even though Purry's representation may have been innocent and the policy required intentional misrepresentations for rescission, the court held that the insurer was entitled to rescind.[251]

B. *Duties*

1. Cooperation and Production of Records

In *Bolton v. State Farm Fire & Casualty Co.*,[252] the insureds sued their insurer after their residence was destroyed in a fire and their claim was denied for lack of cooperation in the claim investigation.[253] The insureds refused to provide financial documents, including tax and bank records.[254] The court held that the failure to produce records relevant to the insureds' motive and opportunity to start the fire was a violation of the cooperation clause, and substantially and materially prejudiced the insurer's ability to investigate whether the fire was caused by arson.[255]

In *Earnest Issacs Lumber Co. v. Cincinnati Specialty Underwriters Insurance Co.*,[256] the insured's property was destroyed in a fire.[257] The insurer contended that the insured had failed to cooperate in its arson investigation.[258] The insured sued, claiming that it had fully cooperated with the unnecessarily lengthy investigation and that it was owed policy limits.[259] In denying the insurer's motion for judgment on the pleadings, the court noted that, under Kentucky law, an insured is only required to comply with the

247. *Id.*
248. *Id.*
249. *Id.* at *1.
250. *Id.* at *3–4 (citing Oade v. Jackson Nat'l Life Ins. Co. of Mich., 632 N.W.2d 126, 131 (Mich. 2001).
251. *Id.* at *6 (citing Burton v. Wolverine Mut. Ins. Co., 540 N.W.2d 480, 482 (Mich. Ct. App. 1995)).
252. 2017 WL 5132732 (N.D. Ohio Nov. 6, 2017).
253. *Id.* at *1, *8.
254. *Id.* at *4.
255. *Id.* at *15.
256. 2018 WL 5315199 (E.D. Ky. Oct. 26, 2018).
257. *Id.* at *1.
258. *Id.*
259. *Id.*

"essential requirements" of a policy, rather than strictly complying with those duties.[260] It also held that "substantial compliance does not require an insured to supply proof or documentation that has been made unavailable by reasons beyond the power of the insured."[261]

2. Examinations Under Oath

In *North Carolina Farm Bureau Mutual Insurance Co. v. Lilley*,[262] the insurer asked for an audio recorded examination under oath (EUO).[263] The insured said he would only appear for a stenographically transcribed EUO.[264] The insurer sued and filed for summary judgment arguing, in part, that the insured violated a condition precedent to coverage by not appearing for a recorded EUO.[265] The insured claimed that his willingness to appear for a stenographically transcribed EUO was sufficient.[266] The court held that the insured violated the EUO condition, and the insurer was prejudiced by the insured's refusal to appear for a recorded EUO.[267]

In *Ifergane v. Citizens Property Insurance Corp.*,[268] a husband and wife were both asked to appear for EUOs.[269] The husband appeared for his EUO, but the wife failed to appear.[270] The insurer argued that it could not complete its investigation because the couple had separated, and the wife was the "resident spouse" at the property at the time of the loss.[271] The insurer contended it did not owe coverage due to the wife's failure to appear for EUO.[272] On appeal, the insured argued that the wife's failure to appear did not preclude coverage because the insurer had previously sent a claim denial letter, which waived the insurer's right to an EUO.[273] The court held there was an issue of fact as to whether the insurer had waived its right to an EUO.[274]

In *Preka v. Vermont Mutual Insurance Co.*,[275] the insureds made claims for loss of personal property, including cash, due to a burglary.[276] The

260. *Id.* at *3.
261. *Id.* at *4.
262. 2018 WL 414135 (N.C. Ct. App. Jan. 16, 2018).
263. *Id.* at *2.
264. *Id.*
265. *Id.*
266. *Id.*
267. *Id.*
268. 232 So. 3d 1063 (Fla. Dist. Ct. App. 2017).
269. *Id.* at 1064.
270. *Id.*
271. *Id.*
272. *Id.*
273. *Id.* at 1064–65.
274. *Id.* at 1065.
275. 2017 WL 6947747 (Conn. Sup. Ct. Dec. 11, 2017).
276. *Id.* at *1.

insureds refused to appear for their scheduled EUOs, and the insurer denied their claims based on the failure to appear.[277] The insureds sued and the insurer filed a summary judgment motion based on the failure to appear for EUOs.[278] The insureds argued that they had otherwise substantially complied with the policy, noting that they gave recorded statements, immediately called the police, provided notice to the insurer, allowed a site inspection, completed a theft questionnaire, and produced claim documentation.[279] The trial court found these actions were insufficient, noting that recorded statements were not comparable to EUOs and failure to appear for EUOs was a material breach of the contract.[280]

3. Proof of Loss

In *Vilaythong v. Allstate Insurance Co.*,[281] the insured sued, claiming he was entitled to more money from the insurer for hail and wind damage.[282] The insurer moved to dismiss the suit, claiming that the insured failed to submit a sworn proof of loss more than ninety-one days before filing suit.[283] The court held the insured substantially complied because the insurer was timely notified of the claim months before suit was filed, provided with the public adjuster's estimate, had ample opportunity to investigate the claim before suit was filed, and failed to show any prejudice resulting from the failure to provide a proof of loss. [284]

In *Gehani v. American Zurich Insurance Co.*,[285] the insured's property was damaged by fire.[286] The insurer requested a proof of loss within 60 days pursuant to the policy, and also gave the insured a list of the supporting documentation it wanted to substantiate his claim.[287] The insured did not provide a proof of loss or documents within 60 days, and the insurer denied the claim for failure to comply with policy conditions.[288] Only after the claim was denied did the insured provide some documents, but did not submit a proof of loss.[289] The insured sued, and claimed he substantially complied by producing partial records and making himself available for

277. *Id.* at *2.
278. *Id.* at *1–2.
279. *Id.* at *4.
280. *Id.* at *5.
281. 2017 WL 4805522 (N.D. Tex. Oct. 25, 2017).
282. *Id.* at *1.
283. *Id.* at *2.
284. *Id.* at *3–4.
285. 287 F. Supp. 3d 574 (N.C. Ct. App. 2018).
286. *Id.* at 575.
287. *Id.* at 576.
288. *Id.* at 577.
289. *Id.*

an EUO, and that the insurer had not alleged prejudice.[290] The trial court granted summary judgment, holding that the insurer was not required to show prejudice, and the insured did not substantially comply with the policy requirement for submitting a proof of loss.[291]

In *Samuels v. Allstate Property & Casualty Insurance Co.*,[292] the insured claimed $60,000 in personal property damage allegedly caused by burst frozen pipes.[293] The insurer denied coverage based on false statements in the proof of loss, claiming the insured overstated the value of the property and both parties field for summary judgment after suit was filed.[294] However, the adjuster admitted in his deposition that the insurer had not done its own estimate of the value of the contents, that he did not actually know the valuation to be materially false, and that the estimate only appeared "exaggerated" based on the "sparse" furnishings in the property.[295] The court held that the insurer had not proved an "extreme disparity" in the valuation to support a finding of false or fraudulent statements in the proof of loss sufficient to vitiate the contract.[296]

C. *Appraisal*

1. Scope of Appraisal

In *State Automobile Mutual Insurance Co., v. Rod & Reel, Inc.*,[297] the insurer provided blanket coverage for loss of business income and extra expense coverage for several businesses.[298] Following a fire, the insureds submitted a claim, but the parties could not agree on the amount due.[299] The dispute went to appraisal and an award was issued reflecting the sum of the appraisers' calculation of the monthly loss for 15 months from the date of the loss.[300] The insurer refused to pay full award, arguing that the award determined the period of restoration, which was outside the scope of the appraisal, and sued to vacate the award or modify it to include only the month-to-month calculations of loss.[301] The insureds moved to confirm the award or modify it by removing the period of restoration, but not the calculation of the total amount due.[302] Citing the Fourth Circuit's decision

290. *Id.*
291. *Id.* at 579–80.
292. 310 F. Supp. 3d 847 (E.D. Mich. Apr. 20, 2018).
293. *Id.* at 871.
294. *Id.* at 867.
295. *Id.* at 872.
296. *Id.* at 872–73.
297. 2018 WL 5830734 (D. Md. 2018).
298. *Id.* at *1.
299. *Id.*
300. *Id.*
301. *Id.*
302. *Id.*

in *High Country Arts & Craft Guild v. Hartford Fire Insurance Co.*,[303] the court held that "an appraiser can calculate of the amount of loss without determining the period of restoration."[304] The court modified the award to include only the appraisers' month-to-month calculations, reserving the period of restoration for further proceedings.[305]

In *Speros v. Sentinel Insurance Co.*,[306] the insured filed a motion to confirm an appraisal award.[307] The carrier filed a counter-motion to vacate, contending that payment of an appraisal award required a proof of loss.[308] The court noted that the carrier had never agreed that the proof of loss requirement had been satisfied, particularly because multiple events damaged the property.[309] The carrier had agreed to cover only one event: a water line leak near the fountain in the courtyard of the property. [310] Quoting its prior order, the court held that appraisers are to arrive at a figure representing damages for a covered event.[311] However, it is for the court, or the ultimate fact finder, to determine whether the appraisers are right about scope.[312] If the court or fact finder concludes the appraisers are correct, the appraisers' larger damages number is adopted.[313] If not, another number may apply, depending on the fact finder's conclusion.[314]

2. Timeliness of Demand or Refusal to Appraise

In *In re Allstate Vehicle & Property Insurance Co.*,[315] the court noted that, under Texas law, appraisal is a condition precedent to suit and is intended to take place before suit is filed.[316] However, a party may waive this condition precedent expressly, through a clear repudiation of the right, or impliedly, through conduct.[317] Implied waiver must be clearly demonstrated by the surrounding facts and circumstances.[318] The court found the insurer's intentional conduct was inconsistent with its right to invoke appraisal.[319] Before demanding appraisal, the carrier had conducted multiple inspections of the roof at the insured property and had obtained an

303. 126 F.3d 629 (4th Cir. 1997)
304. *State Auto. Mut. Ins. Co.*, 2018 WL 5830734, at *6.
305. *Id.* at *8.
306. 2018 WL 1536389 (D. Ariz. Mar. 29, 2018).
307. *Id.* at *1.
308. *Id.*
309. *Id.* at *1–2.
310. *Id.* at *2.
311. *Id.*
312. *Id.*
313. *Id.*
314. *Id.*
315. 549 S.W.3d 881 (Tex. Ct. App. 2018).
316. *Id.* at 887–88.
317. *Id.*
318. *Id.*
319. *Id.* at 890.

order compelling a seventh inspection of roof by a new expert.[320] The carrier had represented to the trial court that the seventh inspection was needed for the carrier to prepare for the upcoming jury trial.[321] The carrier had also obtained an extension of the expert designation deadline in order to permit it to designate the new expert.[322] The insured's counsel had stated that she had no objection to an extension of the designation deadline for the new expert provided it did not postpone the trial setting to which the insurer had agreed.[323]

3. Enforcing and Modifying Appraisal Awards

In *State Automobile Mutual Insurance Co., v. Rod & Reel, Inc.*,[324] the court held that 9 U.S.C. § 10 allows a court to vacate an arbitration award only if the arbitrators "exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made."[325] The court found that the period of restoration was outside the scope of the appraisal and modified the award to include only the appraisers' month-to-month calculations, reserving the period of restoration for further proceedings.[326]

4. Appraiser Qualifications

In *Brickell Harbour Condominium Ass'n v. Hamilton Specialty Insurance Co.*,[327] the insurer moved to compel appraisal.[328] The insured contended that the carrier's appointment of an employee of J.S. Held, a building consultant hired by the carrier as its party-designated appraiser, was a breach of the policy requirement that each appraiser be "impartial."[329] In rejecting the insured's assertion, the court noted that the umpire acts as the neutral tie-breaking third appraiser and provides the "real impartiality."[330] The court found no indication in the record that the insurer's appraiser was directly paid by the insurer, or that any part of his or his employer's compensation for work on the appraisal or the insured's claim would include a contingent fee.[331] In *dicta*, the court noted that it had surveyed decisions in

320. *Id.* at 883–84.
321. *Id.* at 884.
322. *Id.*
323. *Id.* at 890.
324. 2018 WL 5830734 (D. Md. 2018).
325. *Id.* at *5 (citing 9 U.S.C.A. § 10 (2002)).
326. *Id.* at *6–8.
327. 256 So. 3d 245 (Fla. Dist. Ct. App. 2018).
328. *Id.* at 246.
329. *Id.* at 248–49.
330. *Id.*
331. *Id.* at 248.

other jurisdictions and reviewed of the Code of Ethics for Arbitrators in Commercial Disputes.[332] The court concluded that an appraiser's "direct or indirect financial interest in the outcome of the arbitration, including an arrangement for a contingent fee, requires disclosure rather than disqualification."[333]

In *Verneus v. Axis Surplus Insurance Co*.,[334] the U.S. District Court for the Southern District of Florida directed each party to select a competent and impartial appraiser.[335] When the insured appointed her public adjuster as her appraiser, the carrier claimed he was not "impartial" because of his contingent fee.[336] The court held that the public adjuster was not impartial because he was involved in the initial analysis of the damages, so he had an interest in giving a second appraisal that did not much differ from his first.[337] The court also found significant questions existed concerning the public adjuster's ownership of the public adjusting company, which was contractually entitled to a contingent fee from any recovery and had a long-term involvement with the insured's counsel.[338] The court rejected the insured's argument that the policy required only that each party select a "competent" appraiser because the order compelling appraisal provided for "impartial" appraisers.[339] As neither party had objected to the order, it controlled. In a later opinion in the same case,[340] after the insured appointed her expert witness as her appraiser, the court adopted the Black's Law Dictionary definition of "impartial" and held that the insured's new appraiser had already given an expert report, was neither unbiased nor disinterested, and would likely be swayed by personal interest.[341]

5. Miscellaneous Issues

In *Progressive American Insurance Co. v. SHL Enterprises, LLC*,[342] the insureds filed nine individual first-party claims seeking payment for windshield repairs.[343] The insureds assigned their rights under their policies to various windshield replacement companies and those companies submitted

332. *Id.* at 249.
333. *Id.* (internal citations and quotations omitted).
334. 2018 WL 3417905 (S.D. Fla. July 13, 2018).
335. *Id.* at *1.
336. *Id.*
337. *Id.*
338. *Id.*
339. *Id.* at *4.
340. Verneus v. Axis Surplus Ins. Co, 2018 WL 4150933 (S.D. Fla. Aug. 29, 2018).
341. *Id.* at *3.
342. 2018 WL 5624384 (Fla. Dist. Ct. App. 2018).
343. *Id.* at *1.

invoices to the carrier.[344] The carrier paid less than the amounts sought, and the windshield replacement companies sued.[345] The carrier moved to compel appraisal and to stay discovery in each case.[346] The windshield replacement companies argued that the appraisal provisions in the policies were contrary to Fla. Stat. § 627.7288, which provides that deductibles do not apply to windshield repairs and enforcement of the appraisal provision for a windshield claim would require the insured or the insured's assignee to share the cost of appraisal.[347] This would be the equivalent of applying a deductible in contravention of the statute.[348] The appellate court held that Fla. Stat. § 627.7288 contained "no express prohibition against requiring an insured to pay his or her own appraisal costs where there is a dispute over windshield repair/replacement costs."[349] The court held that the classic definition of a "deductible" is a part of the loss that the insured must pay.[350] The insured's share of appraisal costs is not part of the loss.[351]

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

Titan Exteriors, Inc. v. Certain Underwriters at Lloyd's, London,[352] involved a hail loss that resulted in roof damage to a shopping center.[353] The insured assigned its claim to the ACV payment to the roofing contractor.[354] Relying on the anti-assignment clause in the policy, the insurer refused to pay the contractor.[355] Given the rational for enforcing the anti-assignment clauses – (1) prevention of an increased risk for the insurer; and (2) avoiding a restraint on the alienation of a personal property right such as the right to collect monies owed, the Northern District of Mississippi determined that the anti-assignment clause did not prevent the post-loss assignment.[356]

In *Farmers Insurance Exchange v. Udall*,[357] a water remediation company sought payment of proceeds for services rendered pursuant to an assignment of benefits.[358] The policies contained anti-assignment clauses.[359] Farmers paid less than the invoices submitted and sued seeking a declara-

344. *Id.*
345. *Id.*
346. *Id.* at *2.
347. *Id.*
348. *Id.*
349. *Id.* at *3.
350. *Id.* at *3–4.
351. *Id.*
352. 297 F. Supp. 3d 628 (N.D. Miss. 2018).
353. *Id.* at 630.
354. *Id.*
355. *Id.*
356. *Id.* at 632–33.
357. 424 P.3d 420 (Ariz. Ct. App. 2018).
358. *Id.* at 421–22.
359. *Id.* at 422.

tion that the assignments were invalid.[360] The court held that, under Arizona law, an assignment may be made after a loss without the insurer's consent. [361]

E. *Suit Limitations*

In *Brookshire Downs at Heatherridge Condominium Ass'n v. Owners Insurance Co.*,[362] the plaintiff argued that, since the policy insured condominium units and condominium units were homes, the policy was a homeowner's policy.[363] The U.S. District Court for the District of Colorado held that a condominium association was not a "homeowner" under a Colorado statute preventing insurers from shortening the suit limitations period beyond the statutory three years for contract actions.[364]

In *Classic Laundry & Linen Corp. v. Travelers Casualty Insurance Co. of Am*erica,[365] the U.S. Court of Appeals for the Second Circuit held that the two-year time limit on a business interruption claim began to run from the date the direct physical damage occurred.[366] While New York law prohibits enforcement of limitation periods that expire before the insured's cause of action accrues, the court concluded that the insured's cause of action had accrued nine months before the two-year period expired.[367]

In *Willowbrook Investments, LLC v. Maryland Casualty Co.*,[368] the U.S. District Court for the Western District of Kentucky held that a two-year suit limitations period that began to run on the date the physical damage occurred did not violate Kentucky public policy, but was unenforceable when it expired before the insured's cause of action accrued.[369] Kentucky had a statute that prohibited insurers from limiting the time to sue to less than one year from the time the insured's cause of action accrued, but Sixth Circuit precedent had held that suit limitations that began to run before the insured's right to accrue did not run afoul of the statute.[370] However, the court held the limitation could be unenforceable if it did not give the insured reasonable time to sue.[371] As the record before it did not show that the insured had a reasonable time to sue, the court denied the insurer's motion for judgment on the pleadings.[372]

360. *Id.*
361. *Id.* at 423.
362. 324 F. Supp. 3d 1201 (D. Colo. 2018).
363. *Id.* at 1204.
364. *Id.* at 1206 (citing Colo. Rev. Stat. § 10-4-110.8(12)).
365. 739 F. App'x 41 (2d Cir. 2018).
366. *Id.* at 43.
367. *Id.*
368. 325 F. Supp. 3d 813 (W.D. Ky. 2018).
369. *Id.* at 817–18.
370. *Id.* (citing Smith v. Allstate Ins. Co., 403 F.3d 401 (6th Cir. 2005)).
371. *Willowbrook Investments, LLC*, 325 F. Supp. 3d at 819–20.
372. *Id.* at 820.

F. *Bad Faith*

In *Homeowners Choice Property and Casualty Insurance Co. v. Kuwas*,[373] Kuwas sued his insurer for breach of contract after it denied two claims for interior water damage.[374] The case went to trial with Kuwas' attorney repeatedly suggesting to the jury that the carrier was "playing the odds," meaning that the carrier had based its claims determination not on the facts and policy language, but on the "hope that the party who is seeking to be paid under a policy will not sue" after the claim is denied.[375] The trial court permitted several such references to "playing the odds" despite objections by the carrier's counsel.[376] The appellate court determined that those references were "highly prejudicial and inflammatory," and warranted a new trial.[377] It found that those references shifted "the focus inappropriately to the carrier's claims handling and bad faith, which were not issues before the jury."[378] The appellate court also found that Kuwas' counsel compounded the unfair prejudice by making other improper references and implications.[379]

A recent case considered the propriety of a request for "all reports Defendant's experts have prepared for Defendant on claims other than the subject claim."[380] In *VTT Management, Inc. v. Federal Insurance Co.*,[381] claimant argued that the requested reports "could show" bias on the part of the expert.[382] The insurer argued that the requests were a mere "fishing expedition" as there was no evidence to substantiate an actual bias on the part of the expert.[383] The court ordered production of five years of prior expert reports on the cause of loss at issue, finding that they "could be reasonably calculated to lead to discoverable information on the possible bias of defendant's expert witnesses."[384]

373. 251 So. 3d 181 (Fla. Dist. Ct. App. 2018).
374. *Id.* at 183.
375. *Id.* at 184.
376. *Id.* at 185.
377. *Id.* at 185–86.
378. *Id.* at 186.
379. *Id.*
380. VTT Mgmt., Inc. v. Fed. Ins. Co., 2018 WL 5078111 (W.D. Okla. Oct. 17, 2018).
381. *Id.*
382. *Id.* at *1.
383. *Id.*
384. *Id.* at *2.