RECENT DEVELOPMENTS IN PROPERTY INSURANCE COVERAGE LITIGATION

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I. INTRODUCTION

The standard fire policy, which is the pre-curser of modern property insurance, has been around for more than one hundred years, and yet we are still litigating many of the same issues. The same holds true in this survey period. Although we are more than seven-years past Superstorm Sandy, related cases are still being decided in the appellate courts. These cases will have an impact on the upcoming Hurricane Harvey, Irma, and Maria cases now in litigation. Other issues experiencing renewed popularity include matching and whether labor can be depreciated when calculating actual cash value.

II. HURRICANES AND FLOODS

In *Migliaro v. Fidelity. National Indemnity Insurance Co.*, the court held that an insurer's rejection of a proof of loss under a Standard Flood Insurance

Program ("SFIP") policy is not a *per se* denial of the claim, but it is a denial if the policyholder treats it as such and files suit against the insurer.[1] Migliaro's property was damaged in Sandy.[2] After receiving payment for his initial claim, Migliaro submitted a proof of loss for additional damages. Fidelity sent a letter titled "Rejection of Proof of Loss."[3] The SFIP has a one-year statute of limitations, and insureds may not file suit under the SFIP until a claim has been denied in writing.[4] The court held that, "[b]ecause a policyholder cannot bring suit until his claim has been denied in writing, Migliaro must have accepted that this had occurred when he brought suit" and "by bringing suit, Migliaro acknowledged that the letter constituted a written denial of his claim."[5]

In *D & S Remodelers, Inc. v Wright National Flood Insurance Services, LLC*,[6] D & S entered into an open services contract after Sandy with the Foundry at Hunters Point Condominiums to provide floodwater-pumping services following Sandy.[7] D & S met with Foundry and an adjuster from Colonial Claims Corp., which D & S alleged was the National Flood Insurance Program ("NFIP") insurer's agent, and entered into oral agreements to expand the work to include decontamination. D & S claimed that Colonial represented that any insurance claim submitted to Foundry's insurer would be accepted and paid in full.[8] D & S provided more than $500,000 in drying and decontamination services, but was not paid.[9]

D & S sued Foundry, the flood insurer (Wright), and the adjuster (Colonial).[10] Defendants moved to dismiss the suit on grounds that the National Flood Insurance Act ("NFIA") pre-empted D & S's claims. The district court granted the motion because all claims arising out of a NFIP policy are governed by the Federal Emergency Management Agency's ("FEMA's") flood insurance regulations. D & S argued that, because it was not an insured under Foundry's policy and its claims were not based on Foundry's policy, the NFIA did not preempt its claims.[11] D & S argued that its claims arose from procurement, not claims handling, and the NFIA did not preempt its claims. The Sixth Circuit held that the NFIA preempts D & S's state law claims arising from Wright's handling of Foundry's claim.[12]

1. 880 F.3d 660 (3dCir. 2018).
2. *Id.* at 663.
3. *Id.*
4. *Id.* at 667.
5. *Id.*
6. 725 F. App'x 350 (6th Cir. 2018).
7. *Id.* at 352.
8. *Id.*
9. *Id.*
10. *Id.* at 353.
11. *Id.*
12. *Id.*at 356.

Therefore, claims by a plaintiff who is not a policyholder under an NFIP policy may still be preempted by the NFIA.

In *LCP West Monroe, LLC v. United States*, [13] LCP's buildings sustained flood damage during regional flooding in March 2016.[14] FEMA authorized an extension of the 60-day period in which an insured must normally submit a proof of loss.[15] LCP submitted timely proofs of loss to its insurer, Selective, which paid the claim. LCP submitted another proof of loss six months later, and that claim was denied.[16] The court held that, when an insured submits a timely proof of loss and notifies its insurer that a supplement will follow, but the supplemental claim is not accompanied by a timely proof of loss, the supplemental claim may be denied.[17]

III. BUSINESS INTERRUPTION/CIVIL AUTHORITY

In *Somnus Mattress Corp. v. Hilson*,[18] a fire at a mattress warehouse resulted in a total loss.[19] The mattress company had not purchased business interruption coverage.[20] The company sued its broker. [21] The company owner testified that he had asked his broker about buying coverage in the past, but the broker told him that it was "pretty expensive" and "hard to get."[22] Based on those representations, the owner had decided not to purchase the insurance. In contrast, the broker testified that he told the owner that he needed business interruption insurance.[23] The circuit court entered summary judgment in favor of the insurance agent and insurer. The Supreme Court of Alabama affirmed, finding that the broker and insurer had no duty to advise the company about the adequacy of its coverage.[24] The broker and insurer had not voluntarily undertaken that duty, no special relationship existed between broker and client, and the insurer had not misrepresented anything.[25]

In *Maritime Park, LLC v. Nova Casualty Co.*,[26] the New Jersey Department of Environmental Protection ordered a restaurant to close before

13. Civil Action No. 17-0372, 2018 U.S. Dist. LEXIS 84149 (W.D. La. May 18, 2018).
14. *Id.* at *2.
15. *Id.* at *3.
16. *Id.* at *4.
17. *Id.* at *12–13 (citing Ferraro v. Liberty Mut. Fire. Ins. Co., 796 F.3d 529 (5th Cir. 2015)).
18. 280 So. 3d 373 (Ala. 2018)
19. *Id.* 376.
20. *Id.*
21. *Id.* at 377.
22. *Id.*
23. *Id.*
24. *Id.* at 385.
25. *Id.*
26. No. A-3554-17T2, 2019 N.J. Super. Unpub. LEXIS 712 (N.J. Super. Ct. Mar. 29, 2019).

Hurricane Sandy made landfall in New Jersey.[27] The restaurant sought civil authority coverage from its insurer, Nova Casualty, which denied coverage. The court held that the policy required the prohibition on access to be the result of damage caused by a "covered cause of loss."[28] Because the policy expressly excluded coverage for damage caused by water in combination with wind or storm surge, the court held there was no civil authority coverage because the loss was not caused by a covered peril.[29]

IV. COLLAPSE

In *Feenix Parkside LLC v. Berkley North Pacific*,[30] the roof of the insured's building partially collapsed after temperature differentials in the attic space caused the truss system to weaken and fail. There was no evidence of dry rot or similar organic "decay," so the insurer denied coverage. The Court of Appeals adopted the dictionary definition of decay, which broadly included "a gradual decline in strength, soundness"[31] and found for the insured.

In *Easthampton Congregational Church v. Church Mutual Insurance Co.*,[32] a church ceiling collapsed because of failed truss fasteners, but there was no evidence of organic rot or decay. The court held there was coverage because the insured had shown that the failure of the ceiling was caused, at least in part, by a gradual deterioration or decline in strength or soundness and that condition met one of the dictionary definitions of "decay."[33]

Connecticut state and federal courts resolved several cases involving crumbling basement walls and foundations in a residential development due to the use of defective concrete. In *Vera v. Liberty Mutual Fire Insurance Co.*,[34] the insureds sought coverage for crumbling basement walls and foundations. Liberty Mutual denied coverage under the exclusion for "cracking to the foundation due to faulty, inadequate or defective materials." The Supreme Court of Connecticut answered the certified question of what constitutes "substantial impairment of structural integrity" for purposes of applying the "collapse" provision and concluded that "collapse" was "sufficiently ambiguous to include coverage for any substantial impairment of the structural integrity" of the insureds' home" where the insured shows that the building is in imminent danger of falling down or caving in.

27. *Id.* at *2.
28. *Id.* at *6–7.
29. *Id.* at *13–14.
30. 438 P.3d 597, 604 (Wash. Ct. App. 2019), *review denied*, 447 P.3d 162 (Wash. 2019).
31. *Id.* at 603.
32. 322 F. Supp. 3d 230 (D. Mass. 2018), *aff'd*, 916 F.3d 86 (1st Cir. 2019).
33. *Id.* at 237.
34. 2019 WL 5955936 (Conn. Nov. 12, 2019).

In *Karas v. Liberty Insurance Corp.*,[35] the companion case to *Vera*, the basement walls of the home were failing. Concluding that there was coverage under the "collapse" provision if the home was in imminent danger of falling down or caving in, the court rejected the notion that collapse only applied to "a sudden and catastrophic event" because the insurer had not limited the coverage to only that type of event. *Karas* also addressed whether the policy exclusion for collapse of the home's "foundation" included the basement walls of the home.[36] Applying the "layperson" definition of "foundation" and over 100 years of court cases using the term "foundation wall" when referring to the basement wall of a building, the court concluded that the concrete basement walls of a home are part of its foundation.[37] Finally, *Karas* construed an exclusion for loss to a "foundation" and, by endorsement, loss to a "footing," caused by water or ice. The court held that "even when the collapse of a foundation is excluded from coverage because it resulted from hidden decay within the foundation itself, any damage to the rest of the building caused by that collapse would be covered."[38]

In *Jemiola, Trustee of Edith R. Jemiola Living Trrust v. Hartford Casualty Insurance. Co.*,[39] the insured had noticed cracks in various areas of her home since March 2005 and sought coverage in 2014 when she noticed cracks in the foundation. Having been insured with the Hartford since 2005, the insured sought retroactive coverage. The court held that, in order for the policies issued before March 2005 to apply, the insured had to establish through expert opinion that there was a substantial impairment of structural integrity before 2006. The court also held that the "collapse" provision excluded coverage for cracks, differentiating between "signs of deterioration" (not a "collapse") and "substantial impairment" (potentially a collapse).

In *Mazzarella v. Amica Mutual Insurance Co.*,[40] the complaint alleged damage to the basement walls and floors "caused by water and oxygen infiltration" and "rainwater entering the Residence."[41] The court affirmed dismissal of the action because the policy excluded coverage for loss caused by "[w]ater," which included "surface water," "overflow of any body of water," "storm surge," water that "[b]acks up through sewers or drains," and water "below the surface of the ground, including water which exerts pressure

35. 2019 WL 5955947 (Conn. Nov. 12, 2019).
36. *Id.* at *11.
37. *Id.* at *12–13.
38. *Id.*
39. 2019 WL 5955904 (Conn. Nov. 12, 2019).
40. 774 F. App'x 14, 16 (2d Cir. 2019).
41. *Id.* at 15.

on, or seeps, leaks, or flows through a building, sidewalk, driveway, patio, foundation, swimming pool, or other structure."[42]

In *Messina v. Shelter Insurance Co.*,[43] the brick veneer on an exterior wall collapsed due to a combination of "wind suction" or "wind velocity" and pre-existing weakness and deterioration in the mortar, as well as corroded and rusted metal connectors tying the brick veneer to the wood sheathing behind it. Absent the deterioration, the wind would not have caused the collapse. The policy covered loss caused by wind, but not long-term deterioration. Construing the policy's concurrent causation exclusion, the court upheld the insurer's coverage denial.[44] The policy unambiguously excluded coverage if the loss would not have occurred in the absence of "wear and tear," "deterioration," and "rust." Because one of those perils was a "but for" cause of the loss, there was no coverage, even though other, non-excluded, perils contributed to the loss.

V. EXCLUSIONS

A. *Causation*

1. Generally

In *City of West Liberty, Iowa v. Employers Mutual Casualty Co.*,[45] it was undisputed that arcing caused substantial damage to the insured's power plant, and that the arcing was triggered by a squirrel climbing onto an electrical transformer.[46] The insured argued that the exclusion did not preclude coverage because the exclusion was not subject to an anti-concurrent causation ("ACC") clause, the efficient proximate cause doctrine applied, and the squirrel, not the arcing, was the efficient proximate cause of loss. [47] The court found that the efficient proximate cause doctrine was inapplicable because that doctrine only applies when there are two independent causes, one covered and one excluded,[48] and the squirrel itself caused no damage; rather, the squirrel was "the immediate reason" for the arcing.[49] Arcing is "always going to have *some* cause"[50] and "[p]olicy language excluding an event would be meaningless if an insured could avoid the exclusion simply by pointing out that the event itself had a cause."[51]

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42. *Id.* at 17.
43. 585 S.W.3d 839 (Mo. Ct. App. Oct. 8, 2019)
44. *Id.* at 844.
45. 922 N.W.2d 876 (Iowa 2019).
46. *Id.* at 877.
47. *Id.* at 879–80.
48. *Id.* at 880.
49. *Id.*
50. *Id.*
51. *Id.* at 880–81.

2. Anti-Concurrent/Anti-Sequential Causation

In *Jackson v. Standard Fire Insurance Co.*,[52] the parties disputed how to apply the ACC clause to the loss.[53] Mold was one of the excluded perils.[54] The parties agreed that the loss was initially caused by water damage resulting from a toilet malfunction, and that the water damage, coupled with humidity, led to mold growth throughout the house.[55] The parties also agreed that water damage was a covered peril.[56] The insurer argued that the ACC clause and mold exclusion precluded coverage for the loss.[57] The insurer argued that mold caused additional damage throughout the house, and all of that damage was excluded by the ACC clause.[58] The court interpreted the ACC clause to: (1) preclude coverage for damage to any items for which the excluded peril contributed to the loss; and (2) *not* exclude coverage for items where the evidence established the item was only damaged by the covered peril and was a total loss regardless of whether the excluded peril subsequently manifested.[59]

B. *Earth Movement*

In *Oklahoma Schools Risk Management Trust v. McAlester Public Schools*,[60] the policy excluded coverage for earth movement.[61] The insured sought coverage after an underground water pipe broke and damaged the building's foundation and walls.[62] The carrier relied in part on the earth movement exclusion to deny the claim.[63] Even though other subsections of the exclusion referred to man-made events, like mine subsidence, the court found it was ambiguous.[64] The court said the exclusion did not expressly state that it applied to earth movement due to man-made events regardless of cause, while other policy exclusions stated they applied "however caused."[65] Moreover, earth movement exclusions have historically been understood to apply to natural and catastrophic events like earthquakes and landslides.[66]

52. 406 F. Supp. 3d 480 (D. Md. 2019).
53. *Id.* at 490.
54. *Id.*
55. *Id.*
56. *Id.* at 481.
57. *Id.* at 490.
58. *Id.*
59. *Id.* at 491.
60. 457 P.3d 997 (Okla. Jan. 29, 2019).
61. *Id.* ¶ 21. The remaining subsections of the exclusion dealt with "[e]arthquake," "[l]andslide," and "[m]ine subsidence," respectively. *Id.*
62. *See id.* ¶ 1 (Wyrick, V.C.J., dissenting).
63. *Id.* ¶ 8.
64. *Id.* ¶ 24.
65. *Id* ¶ ¶ 24, 27.
66. *Id.* at ¶ 27.

The court in *Thurston Foods Inc. v. Wausau Business Insurance Co.*[67] reached the opposite result based on an identical earth movement exclusion. In *Thurston*, blocked ventilation pipes caused ice to form at the bottom of the floor at the insured's facility.[68] The ice formations caused frost heave that damaged the facility's floor.[69] The court found the earth movement exclusion applied because frost heave caused by ice formations in the ground was "soil conditions" of "freezing" or "action of water under the ground surface."[70] The court rejected the proposition that the exclusion applied only to natural events.

C. *Vacancy*

In *Durasevic v. Grange Insurance Co. of Michigan*,[71] after a fire at their home, the insureds were living in temporary housing when a second fire occurred. At the time of the second fire, there had been no human occupants for six months and the insureds had not started construction work after the first fire. The court concluded that the home was vacant at the time of the second fire, even though it contained inanimate objects. The court interpreted "vacant" as "not routinely characterized by the presence of individuals." The court rejected the insureds' argument that the carrier should be estopped from asserting this defense because the carrier paid for the homeowners to live in temporary housing after the first fire.

In *Johnson & Associates, LLC v. Hanover Insurance Group, Inc.*,[72] several months before the policy was renewed, the tenant moved out, leaving the building vacant. The insurer gave notice that coverage was being dropped on renewal. The insured met with brokers and negotiated a new policy with higher premiums and deductibles. A theft occurred at the property and the carrier denied coverage. The court found that the carrier knew of the vacancy when the new policy was issued and the vacancy clause was waived. The court also concluded that the carrier was estopped from denying coverage because the broker represented more than once to the insured that theft coverage was being provided for the vacant property.

In *Carter v. State Farm Fire & Casualty Co.*,[73] there was a six-month gap between the last time anyone slept at a lakeside vacation home and the date of damage to the plumbing. The home was used when family and guests gathered at the lake property. The policy did not define "vacant" or "unoc-

67. No. 3:15cv14 (WWE), 2019 WL 2075875 (D. Conn., Jan. 9, 2019), *clarified on reconsideration*, 2019 WL 2075880 (D. Conn. Mar. 6, 2019).
68. *Id.* at *2.
69. *Id.*
70. *Id.* at *5.
71. 328 F. Supp. 3d 770, 774 (E.D. Mich., July 9, 2018), *aff'd*, 780 F. App'x 271 (2019).
72. 572 S.W.3d 636, 638–46 (Tenn. Ct. App. 2018).
73. 407 F. Supp. 3d 780, 781–85 (S.D. Ind. July 17, 2019).

cupied." The court reasoned that the words "vacant" or "unoccupied" may have a different meaning in the context of a vacation home and concluded that a vacation home used on a seasonal basis with intermittent and even infrequent usage was not "vacant" at the time of loss when the term is construed in relation to the character of the property.

D. *Dishonest Acts*

In *KA Together, Inc. v. Aspen Specialty Insurance Co.*,[74] the insured owned a mixed commercial and residential building. The lease for the third-floor residential apartment prohibited the tenant from transferring the lease or subletting the apartment without first obtaining the insured's written consent.[75] The tenant and his roommate, who was not listed on the lease, were arrested and removed from the property.[76] The insured then discovered two individuals in the apartment who claimed they signed a lease with the roommate.[77] The insured claimed the lease was invalid, but allowed the individuals to remain in the apartment for two weeks, and gave them three extensions of their stay.[78] The day after the individuals vacated the premises, the insured discovered water running and the drains blocked in the apartment, which caused water to flood the second-floor tenant's business.[79] The insurer argued coverage was precluded under the exclusion for dishonest or criminal acts by anyone to whom the insured entrusted the apartment for any purpose.[80] The court agreed, finding that a written contract is not needed to show entrustment. Because the insured did not attempt to retrieve the keys or change the locks to the apartment, he knowingly entrusted the apartment to the individuals.[81] That relationship continued each time the insured gave them permission to stay on.[82]

In *Fabrique Innovations, Inc. v. Federal Insurance Co.*,[83] the insured entered into a contract with a vendor to store goods the insured manufactured for the vendor.[84] The vendor filed for bankruptcy and, without the insured's consent, sold the goods.[85] Claiming it had superior title to the sold goods, the insured sued the vendor and filed a theft claim under its all-risk policy.[86] The insurer argued that the claim was precluded by the dishonest

74. 362 F. Supp. 3d 281 (E.D. Pa. 2019).
75. *Id.* at 284.
76. *Id.*
77. *Id.* at 285.
78. *Id.*
79. *Id.*
80. *Id.*
81. *Id.* at 290–91.
82. *Id.* at 292.
83. 354 F. Supp. 3d 340 (S.D.N.Y. 2019).
84. *Id.* at 344.
85. *Id.* at 345.
86. *Id.* 345–46.

acts exclusion, but the court held that "the fact that [the vendor] sold the goods without [the insured]'s permission does not mean that [the vendor] acted dishonestly."[87] The vendor's acknowledgement that it did not have an ownership interest in the goods did not establish that it believed it had no interest in the goods, so the sale was not "dishonest."[88] The court also rejected the insurer's assertion that the vendor's refusal to return the goods was a fraudulent act that would preclude coverage under the willful misconduct exclusion.[89] Because there was no evidence that the sale of the goods extended "well beyond" the parties' storage agreement or was motivated by anything other than the vendor's own economic self-interest, the sale did not constitute "willful misconduct."[90]

E. *Mold and Water Damage*

1. Anti-Concurrent Causation

In *O.L. Matthews, M.D., P.C. v. Harleysville Insurance Co.*,[91] the court held that *lack* of ACC language did not preclude enforcement of an exclusion because Michigan does not follow the efficient proximate cause doctrine.[92] The case arose from a dispute over water damage from roof leaks at a doctor's office covered by an all-risk policy.[93] The insurer denied coverage based on exclusions for "wear and tear" and "deterioration."[94] The policyholder argued that, because the exclusions did not include ACC language, the insurer had to prove that the excluded causes were the only causes of the loss, which was not possible because experts on both sides agreed that another cause—weight of rainwater accumulating on the roof—stretched parts of the roof membrane, contributing to the leaks.[95] The court rejected that argument, holding that "the default rule under Michigan law is that a loss is *not* covered when it is concurrently caused by the combination of a covered cause and an excluded cause."[96]

2. Insured's Knowledge of Prior Mold

In *Keathy v. Grange Insurance Co. of Michigan*,[97] plaintiff bought a home in December with plans to renovate it before moving in.[98] In January, the

87. *Id.* at 351.
88. *Id.*
89. *Id.* at 352.
90. *Id.*
91. 412 F. Supp. 3d 717 (E.D. Mich. 2019).
92. *Id.* at 723.
93. *Id.* at 720–21.
94. *Id.* at 721.
95. *Id.* at *721–22.
96. *Id.* at 722 (quoting Iroquois on the Beach v. General Star Indem. Co., 550 F.3d 585, at 588 (6th Cir. 2008)).
97. No. 15-CV-11888, 2019 WL 423838 (E.D. Mich. Feb. 4, 2019).
98. *Id.* at *2.

furnace stopped working and water pipes froze and burst, causing water damage.[99] Plaintiff sought coverage for water damage and basement mold remediation.[100] The insurer denied the water damage and mold claims due to late notice because the claim was not made until after the water-damaged areas had been gutted and repairs nearly completed.[101] The insurer also denied the mold remediation claim because the policyholder had received a price adjustment on the purchase of the home after a home inspection revealed mold "throughout the basement," so the policyholder had notice of the mold issue before coverage incepted.[102] The court granted summary judgment on both reasons for denying coverage. As to the mold claim, the court held that coverage was barred by a known loss provision in the policy, and by the common law known loss doctrine, which is "properly invoked" when the insured is aware of the claimed loss before coverage is bound.[103]

F. *Ensuing Loss*

In the Connecticut "crumbling foundation" cases discussed above, the policies generally contained exclusions precluding coverage for loss caused by faulty materials, but restoring coverage for ensuing loss when the policies excluded losses caused by cracking. [104] The Connecticut courts unanimously held that the claims were not covered under the ensuing loss provisions because, even if the cracking ensued from faulty materials, cracking was expressly excluded.[105]

In *12W RPO, LLC v. Affiliated FM Insurance Co.*,[106] the building's plumbing system failed when rubber components decomposed and disintegrated due to a chemical reaction with Portland's water supply; the windows were

99. *Id.*
100. *Id.* at *3.
101. *Id.* at *1.
102. *Id.* at *1, *2, *13–14.
103. *Id.* at *13.
104. *See* Kim v. State Farm Fire & Cas. Ins. Co., 751 F. App'x 127, 128 (D. Conn. 2018) (excluding "loss consisting of . . . defect . . . in . . . materials used in construction," but covering "any resulting loss from [the listed exclusions] unless the resulting loss itself is a Loss Not Insured by this Section" (emphasis omitted)); Dumas v. USAA Gen. Indem. Co., No. 3:17-cv-01083, 2019 WL 3574920, at *3–4 (D. Conn. Aug. 6, 2019) (excluding "loss caused by . . . faulty, negligent inadequate or defective . . . materials used in . . . construction," but covering "any ensuing loss to [covered property] not precluded by any other provision in this policy"); Dinardo v. Pac. Indem. Co., No. CV-16-6010979-S, 2019 WL 2487851, at *3 (Conn. Super. Ct. May 30, 2019) (excluding "faulty, inadequate, or defective planning, construction or maintenance," but insuring "ensuing covered loss unless another exclusion applies"); Willenborg v. Unitrin Preferred Ins. Co., No. TTDCV166010936S, 2018 WL 7046877, at *1 (Conn. Super. Ct. Dec. 14, 2018) (excluding "loss which results from . . . a defect, a weakness, the inadequacy, a fault or unsoundness in materials used in construction or repair," but covering "ensuing loss unless the ensuing loss itself is excluded").
105. *See Kim*, 751 F. App'x at 128–29; *Dumas*, 2019 WL 3574920 at *4; *Dinardo*, 2019 WL 2487851 at *9; *Willenborg*, 2018 WL 7046877 at *5–6.
106. 353 F. Supp. 3d 1039 (D. Or. 2018).

damaged when opacifying film separated and peeled away from the glass.[107] Both types of loss were the result of faulty workmanship and/or defective design. The court held that the ensuing loss provision did not restore coverage for the plumbing loss because the ensuing loss was itself subject to the deterioration and/or contamination exclusions.[108] The window loss was not covered because the film was part of the windows, so the windows as a unit were defective—there was no separate, ensuing loss.[109]

A Washington federal court addressed ensuing loss when an insured made a claim for coverage for water damage caused by defects in the original construction and improper maintenance.[110] Because the efficient proximate cause of the loss was excluded, the ensuing loss provision did not allow coverage.

In *Balfour Beatty Construction, LLC v. Liberty Mutual Insurance Co.*,[111] faulty workmanship during welding resulted in welding slag damaging windows on the lower floors of a building. The court granted summary judgment to the insurer, holding that "there needs to be at least two loss events," but "there is only one instance of loss or damage in this case: the damage to the windows."[112] Because there was only one loss, there was no coverage for the insured's claim.[113]

In *D&R Full Service, LLC v. Hardin County Diesel & Auto Repair*,[114] a company had a piece of equipment repaired by a mechanic. The equipment ignited and caught fire.[115] The policy excluded loss caused by latent defect, deterioration, and artificially generated electric current, and contained an ensuing loss provision which restored coverage for loss "caused by fire or explosion, except as otherwise excluded."[116] Experts for the insured and insurer disagreed as to the cause of the fire, but both agreed it was possible the fire was caused by issues with the wiring.[117] The court declined to grant summary judgment to the insurer, holding that a reasonable jury could

107. *Id.* at 1043.
108. *Id.* at 1056.
109. *Id.* at 1059. In a factually similar case, a building's windows were damaged by crushed glass cleaner used to clean the building's façade. Viking Constr. Inc. v. 777 Residential, LLC, 210 A.3d 654, 658 (Conn. App. Ct. 2019). The court held that the damage to the windows was "a direct result of the cleaning," so there was no second covered peril necessary to trigger the ensuing loss provision. *Id.* at 664–65. Because the loss was the result of a single, excluded peril, the ensuing loss clause did not reinstate coverage for the loss. *Id.* at 667.
110. *See* Belmain Place Condo. Owners Assoc. v. Am. Ins. Co., No C19-156 MJP, 2019 WL 4190170, at *1 (W.D. Wash. Sept. 4, 2019).
111. 366 F. Supp. 3d 836 (S.D. Tex. 2018).
112. *Id.* at 845.
113. *Id.* at 845–46.
114. No. 1:18-CV-115, 2019 WL 5390104, at *1 (E.D. Tex. Jan. 22, 2019).
115. *Id.*
116. *Id.* at *2.
117. *Id.*

conclude that the excluded loss was the failure of electrically-charged wiring, and the ensuing loss was the fire that followed.[118]

In another fire loss, the insured's home was damaged when "'improper conditions' related to the junction box 'were the direct cause of the fire.'"[119] The faulty workmanship exclusion had an ensuing loss exception.[120] The court held that the insured established that the ensuing loss was covered because the fire was "two years after the alleged faulty workmanship . . . and caused ensuing loss to property 'wholly separate from the defective property itself.'"[121]

In *Griggs Road, L.P. v. Selective Way Insurance Co. of America*,[122] a subcontractor's faulty work in applying stucco and installing trim on a home necessitated replacement of stucco siding, reinstallation of concrete trim pieces, and repairs to the walls and soffits. The policy excluded faulty workmanship, but provided coverage for ensuing loss.[123] The court held that the ensuing loss provision was ambiguous, and the ensuing loss clause restored coverage for the losses except for correcting the stucco coating or reapplying the pre-cast trim.[124]

In *Ingenco Holdings, LLC v. ACE American Insurance. Co.*,[125] a gas purification plant was damaged when metal brackets securing a crucial component broke, resulting in damage to other components and an eventual shutdown of the entire plant.[126] The cause of loss was disputed and the insured argued that, even if it was "defectively designed, . . . the 'ensuing loss' exception . . . preserves coverage for the post-failure damage throughout [the system]."[127] The court agreed, holding that, even if it were conclusively established that the brackets suffered from some inherent defect, the subsequent destruction would be covered.[128]

VI. DAMAGES

A. *ACV/RCV/Holdback*

The last several years have seen increasing litigation over whether an insurer may depreciate labor when calculating actual cash value ("ACV").

118. *Id.* at *10.
119. *See* Fruchthandler v. Tri-State Consumer Ins. Co., 96. N.Y.S.2d 649, 650 (App. Div. 2019).
120. *Id.*
121. *Id.* at 651.
122. 368 F. Supp. 3d 799 (M.D. Pa. 2019).
123. *Id.* at 805.
124. *Id.* at 810.
125. 921 F.3d 803 (9th Cir. 2019).
126. *Id.* at 806.
127. *Id.* at 818.
128. *Id.*

During the survey period, courts came down on both sides of this issue. In *Accardi v. Hartford Underwriters Insurance Co.*,[129] the court held that the term ACV is unambiguous, and permitted the insurer to depreciate labor when calculating ACV. The court noted that the policy unambiguously allowed a deduction for depreciation when calculating ACV and there was no indication that labor and material costs should be treated differently in making that calculation.[130]

In *Cranfield v. State Farm Fire & Casualty Co.*,[131] the court dismissed a putative class action, holding that the policy unambiguously included labor in the depreciation calculation. The court relied on *Black's Law Dictionary*, noting that "the methods of depreciation listed in *Black's Law Dictionary* focus on the whole product, rather than the component parts," and that labor's finished products are subject to wear and tear.[132] The court was also persuaded by "the current majority view among state and federal courts that labor should be included in depreciation."[133]

Conversely, the court in *Stuart v. State Farm Fire and Casualty Co.*,[134] affirmed class certification for a class of homeowners alleging breach of contract for depreciating labor when making ACV payments based on Arkansas law. In 2013, the Arkansas Supreme Court had held that labor may not be depreciated. While that ruling was superseded by statute, the court allowed certification of a class of State Farm insureds who received ACV payments where labor was depreciated before December 6, 2013.[135]

Tennessee joined those courts holding that labor cannot be depreciated in *Lammert v. Auto-Owners (Mutual) Insurance Co*.[136] The court held that "depreciation can only be applied to the cost of materials, not to labor costs."[137]

The courts in *Bosse v. Access Home Insurance Co.*[138] and *Cushing v. Allstate Fire and Casualty Insurance Co.*,[139] held that the insureds were not entitled to

129. No. 18 CVS 2162, 2018 WL 5273971 (N.C. Sup. Ct. Oct. 22, 2018).
130. *Id.* at *5.
131. 340 F. Supp. 3d 670 (N.D. Ohio Nov. 26, 2018).
132. *Id.* at 676.
133. *Id.* at 677 (citing *In re* State Farm Fire Cas. Co., 872 F.3d 567, 575–76 (8th Cir. 2017); Graves v. Am. Family Mut. Ins. Co., 686 F. App'x 536, 540 (10th Cir. 2017); Riggins v. Am. Family Mut. Ins. Co., 281 F. Supp. 3d 785, 789 (W.D. Mo. 2017); Basham v. United Servs. Auto. Ass'n, No. 16-CV-03057-RBJ, 2017 WL 3217768, at *4 (D. Colo. July 28, 2017); Ware v. Metro. Prop. & Cas. Ins. Co., 220 F. Supp. 3d 1288, 1291 (M.D. Ala. 2016); Henn v. Am. Family Mut. Ins. Co., 295 Neb. 859, 894 N.W.2d 179, 190 (2017); Wilcox v. State Farm Fire & Cas. Co., 874 N.W.2d 780, 785 (Minn. 2016); Redcorn v. State Farm Fire & Cas. Co., 55 P.3d 1017, 1018 (Okla. 2002)).
134. 910 F.3d 371 (8th Cir. 2019).
135. *Id.* at 374.
136. 572 S.W.3d 170 (Tenn. 2019).
137. *Id.* at 179.
138. 267 So.3d 1142 (La. Ct. App. Dec. 17, 2018).
139. 104 N.Y.S.3d 456 (App. Div. 2019).

replacement cost value ("RCV") where they did not comply with the policy provisions for recovering it. In *Bosse*, the policies required the insureds to notify the insurer of intent to repair or replace damage within 180 days after the damage occurs. The court held that since the insureds did not notify the insurer within 180 days of their intent to repair or replace, the insurer did not breach the policies by failing to pay the full RCV. Similarly, in *Cushing*, the court enforced a provision limiting the insured's recovery to ACV where the building was not repaired or replaced within two years, as required by the policy.

B. *Matching*

In *Villas at Winding Ridge v. State Farm Fire & Casualty Co.*,[140] the Seventh Circuit held that the insured's claim for matching was untimely because the insured raised it after the appraisal award was issued, despite knowing that matching would be an issue. The appraisers agreed that 20 of the insured's 33 buildings had no hail damage. Of the 13 that were hail damaged, the appraisers disagreed as to the extent of repairs needed (full vs. partial replacement). The panel awarded minor hail damage to the roofing shingles on 13 buildings and awarded a 20% allowance to repair those shingles. The panel awarded ACV for roofing metals and RCV for elevation repairs and replacement shingles around new turtle roof vents on all 33 buildings.

The insured challenged the award, seeking full replacement of all roofs on all 33 buildings so that they would have a uniform appearance. The court rejected that argument, upheld the appraisal award, and declared the request for matching untimely. The insured knew six months before the appraisal that a match was not available, yet only raised the issue after the award was issued. The court rejected the argument that the information should be accepted to construe the policy language, concluding that extrinsic evidence was inappropriate because the policy language as to the amount owed for the damages was not ambiguous. Factually distinguishing the case from *Erie Insurance Exchange, v. Sams*,[141] and *Cedar Bluff Townhome Condominum Association, Inc. v. American Family Mutual Insurance Co.*,[142] the court also rejected the argument that "comparable materials" required a reasonable color match because: (a) not all the roofs suffered physical damage; (b) there was no evidence of a uniform appearance before the loss or that the property would be devalued because of color inconsistencies; and (c) the panel did not award total replacement.

140. 942 F.3d 824 (7th Cir. 2019).
141. 20 N.E.3d 182, 186, 190 (Ind. Ct. App. 2014).
142. 857 N.W.2d 290, 292 (Minn. 2014).

In *Windridge of Naperville Condominium Association v. Philadelphia Indemnity Insurance Co.*,[143] a storm damaged aluminum siding on a building's south and west sides, and replacement siding that matched the undamaged north and east sides was not available. The court required the insurer to pay for all four sides, reasoning that "a replacement cost policy, by definition, provides a 'make-whole' remedy" that must approximate the situation in which the insured would have been had no loss occurred.

VII. OBLIGATIONS AND RIGHTS OF THE PARTIES

A. *Misrepresentation*

In *Borchardt v. State Farm Fire and Casualty Co.*,[144] the insureds sued after their insurer denied coverage for personal property lost in a fire. The insurer denied the claim because the fire was caused or procured by an insured and concealment and misrepresentation of material facts concerning the claim. The jury determined the fire was not intentionally set by the insureds. However, the jury found that the insureds willfully, and with intent to defraud, concealed or misrepresented material facts relating to the fire or the insurance claim. The district court found there was sufficient evidence to conclude that the insureds overstated the items lost in the fire by thousands of dollars and no expert was required to prove the statements would be material to an insurer.

On appeal, the Eighth Circuit held that a concealment or misrepresentation is "material" if it is sufficiently substantial to matter to a reasonable insurer. A concealment or misrepresentation that affects the investigation of an insurer into the cause of a fire is material. A concealment or misrepresentation about items of personal property that were allegedly destroyed by a fire is material unless the amount of money involved in the concealment or misrepresentation is so small that a reasonable insurer is not likely to care about it. The insureds admitted at trial to misrepresenting a number of items they claimed were lost in the fire (they submitted a claim for ten (10) times the actual number of DVDs, two flat screen televisions that did not exist, and two lawnmowers when they owned only one non-functioning mower). The insurer also cast doubt on the plausibility of the insured's claim for food, liquor, coffee, and tea. In addition, the insured was unable to explain why she valued her wedding ring at an amount 50 times more than she valued all her jewelry in a bankruptcy petition filed 13 years earlier. The court found sufficient evidence to support the jury's determination that the insureds made material misrepresentations.

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143. 932 F.3d 1035 (7th Cir. 2019).
144. 931 F.3d 781 (8th Cir. 2019).

B. *Duties*

1. Cooperation and Production of Records

In *Imrie v. Ratto*,[145] plaintiff sold his car repair business and accompanying garage to Ratto. As part of the transaction, Ratto executed and delivered two promissory notes to Imrie and executed and delivered two mortgages encumbering the property. On July 17, 2013, plaintiff commenced a foreclosure action against Ratto ("Action 1"). On July 31, 2013, the premises were destroyed by fire. At the time of the fire, the premises were insured by Erie. The policy had been issued to Ratto Restorations, Inc. d/b/a Ridge Road Car Care. Imrie was not named as an additional insured or loss payee. Plaintiff submitted a claim to Erie and Erie denied the claim. Ratto and Ratto Restorations assigned the claim to plaintiff, and plaintiff sued for breach of contract as assignee of Ratto and Ratto Restorations.

Erie moved for summary judgment, claiming that plaintiff could not recover as the assignee of Ratto and Ratto Restorations. Erie had denied the insured's claim based upon lack of cooperation. Erie contended that the same defenses against the insured applied to plaintiff, since the assignee can have no greater rights than the assignor. Erie also argued that, since the claim had been denied before the assignment, Ratto and Ratto Restorations had no rights to assign and the assignment was null on its face. The court found Ratto's willful failure to provide material and relevant documents, or to submit to examination under oath, was a material breach of contract which barred recovery, so Ratto had no claim to assign. The court noted that, even if Ratto Restorations had rights at the time of the assignment, Ratto's failure to corporate barred plaintiff's claim.

2. Examinations Under Oath

In *Durasevic v. Grange Insurance Co. of Michigan*,[146] two fires hit the insureds' home in just seven months. The first occurred in the fall of 2015. At the time, the insureds lived with their two sons, their daughter-in-law, and their grandchild. The insureds filed a claim, which Grange paid. Grange also paid for the family to live in an apartment temporarily due to damage to their home. The second fire occurred in late April 2016. The insureds filed a second claim—the one at issue—seeking approximately $330,000 for the additional damage. Grange hired a private investigator, who determined that someone intentionally set the April fire. Grange also discovered that one of the insureds' sons had been at the house the night of the fire. Grange asked the adult family members to submit to examinations under oath ("EUOs"), and asked the insureds to hand over tax, bank, phone,

145. 63 Misc.3d 1232(A) (N.Y. Sup. Ct. 2019).
146. 780 F. App'x 271 (6th Cir. 2019).

and Facebook records. The insured's son and daughter-in-law refused to appear for an EUO and the insureds never gave Grange the requested documents. The insureds sued and the court granted Grange's motion for summary judgment.

On appeal, the insureds argued that their claim should not be barred by the failure of their son and daughter-in-law to submit to an EUO, invoking the innocent insured doctrine. The testimony from the insured's son was essential, and he refused to say anything, whether under oath or not. The insureds failed to turn over certain bank, phone, and Facebook records. The court held the insureds did not substantially comply with their duties after loss and thus could not recover.

3. Proof of Loss

In *Uddoh v. Selective Insurance Co. of America*,[147] the court held that a proof of loss submitted by the insured under a SFIP that did not include the amount he was seeking to recover did not comply with regulatory requirements. The insured argued that the proof of loss requirement was waived by a FEMA bulletin issued after Hurricane Sandy. The court found that the bulletin did not eliminate the proof of loss requirement; it simply allowed an insurer's initial payment to be based on the adjuster's report, rather than a proof of loss. Consequently, the insured's failure to submit a proper proof of loss precluded coverage.

C. *Appraisal*

1. Scope of Appraisal

In *Church Mutual Insurance Co. v. Circle of Light*,[148] the scope of the appraisal was limited to "appraisal parameters" to which the parties had agreed. Notwithstanding the fact that the appraisal award had been signed off on by all three members of the appraisal panel, the court held that the scope of the appraisal had been exceeded and the award would be set aside because it failed to comply with the agreed appraisal parameters.

In *Hatter v. Guardian Insurance Co.*,[149] plaintiff moved for a "wish-list" of procedures, including timeframes for the scheduling of inspection, the sharing of information, the questioning of witnesses and the timeframe for signing the award. Noting that there was no requirement for the appraisers to meet and make a determination upon proof adduced at a hearing, the court denied plaintiff's motion.

147. 772 F. App'x (3d Cir. 2019).
148. Cause No. 4:18CV00249 JCH, 2019 WL 4277334 (E.D. Mo. Sept. 10, 2019).
149. No. 1L18-cv-00041, 2019 WL 3892415 (D. V.I. Aug. 19, 2019).

2. Timeliness of Demand or Refusal to Appraise

Florida Statute Section 627.7015 encourages insurers and policyholders to resolve their property insurance claims through alternative means, without the necessity of litigation or appraisal. The statute puts the burden on the insurer to advise the policyholder of the right to participate in the statutory mediation process. In *Kennedy v. First Protective Insurance Co.*,[150] the court held that the carrier waived its right to appraisal where the carrier demanded appraisal before providing written statutory notice of the policyholders' right to mediate.

In *Neumann v. GeoVera Specialty Insurance Co.*,[151] the court found that the insurer had not waived its right to appraisal where it first demanded appraisal one month after litigation had started where the policy did not require that appraisal be demanded before filing suit. The court also noted that the insurer did not act inconsistently with its intent to invoke appraisal and timely moved to compel appraisal.

In *Right at Home Glass, LLC v. Liberty Mutual Group Inc.*,[152] the court held that defendant's eight-month delay in invoking appraisal was not unreasonable and defendant did not waive its right to appraisal. In order to show unreasonable delay, plaintiff must show by clear evidence: (1) prejudice suffered; and (2) a demand for appraisal so egregiously untimely and inconsistent with an intent to assert the right to appraisal that an intentional relinquishment can be inferred. Both parties had allegedly caused delay in proceeding with appraisal and plaintiff had not offered clear evidence that it would be prejudiced by appraisal.

3. Enforcing and Modifying Appraisal Awards

In *Guzman v. American Security Insurance Co.*,[153] the umpire circulated a signed appraisal award and requested that, if agreed, one or both appraisers sign the award. The insurer's appraiser objected to the award and asked for a breakdown of the award and a copy of the estimate prepared by the insured's appraiser. Moments later, the insured's appraiser signed the award and emailed it back to all parties. Ultimately the umpire issued a "revised award" for approximately $30,000 less than the original award. The appraiser for the insurer signed the award and the insurance company paid the revised award. The court looked to the express terms of the policy which stated that a "decision agreed to by any two will be binding."

150. 271 So.3d 106 (Fla. Dist. Ct. App. Mar. 6, 2019).

151. Case No. 3:19-cv-463-J-32JBT, 2019 WL 5085312 (M.D. Fla. July 31, 2019), *adopted by* Neumann v. Geovera Specialty Ins. Co., 2019 WL 5085302 (M.D. Fla. Aug. 19, 2019).

152. No. CV-18-04190-PHX-JJT, 2019 WL 4600381 (D. Ariz. Sept. 23, 2019).

153. 377 F. Supp. 3d 1362 (S.D. Fla. Mar. 27, 2019).

Once the first award was signed by the umpire and an appraiser, it became binding.

4. Appraiser Qualifications

In *State Farm Florida Insurance Co. v. Sanders*,[154] the court addressed the qualifications of the insured's appraiser. The policy's appraisal condition stated: "Each party will select a qualified, disinterested appraiser . . . ." Under Florida law, that provision expressed the parties' clear intention to restrict appraisers to people who are, in fact, disinterested. The court found that the insureds' public adjuster was not disinterested. The public adjuster was the insureds' agent and was entitled to 10% of the amount recovered. The court held a fiduciary, such as a public adjuster who is in a contractual agent-principal relationship with the insureds, cannot be a disinterested appraiser as a matter of law.

5. Miscellaneous Issues

The Texas Supreme Court, in two opinions issued on the same day, addressed whether an insured could pursue certain causes of action after an insurance company fully and timely paid an appraisal award. In *Barbara Technologies Corp. v. State Farm Lloyds*,[155] the court held that an insured could still pursue a violation for delay in payment under the Texas Prompt Payment of Claims Act ("TPPCA"). The court noted that one purpose of the TPPCA is to ensure that specific requirements and deadlines for responding to, investigating, and evaluating claims are met. Because the TPPCA did not have specific language related to appraisal, the court concluded that the absence of such language meant that neither State Farm's invocation of appraisal nor State Farm's payment based on the appraisal award, exempted it from TPPCA damages if it delayed payment for more than the applicable sixty days statutory period.

Barbara Technologies Corp. caused the Southern District of Texas to grant reconsideration in *Shin v. Allstate Texas Lloyds*,[156] where the court had granted summary judgment on plaintiff's TPPCA claim on grounds that full and timely payment of an appraisal award under the policy precluded an award of penalties under the Code's prompt payment provisions. The court, relying on *Barbara Technologies*, found that the insured's claim for TPPCA damages was not precluded, although it did find that the insurer's pre-appraisal payment within the statutorily-provided period was reasonable.

154. 2019 WL 3309217 (Fla. Dist. Ct. App. 2019).
155. 589 S.W.3d 806 (Tex. 2019).
156. Civil Act. No. 4:18-CV-01784, 2019 WL 4170259 (S.D. Tex. Sept. 3, 2019).

The Texas Supreme Court, in *Ortiz v. State Farm Lloyds*,[157] concluded that the insurer's payment of the appraisal award barred the insured's breach of contract and bad faith claims to the extent the only damages sought were lost policy benefits. When appraisal is invoked and the award is paid, the insurer complied with its obligations under the policy. If an insured could sue after an award was entered for failing to pay the loss, insureds would be incentivized to sue for breach every time an appraisal yielded a higher amount than the insurer's estimate.

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

In *Sidiq v. Tower Hill Select Insurance Co.*,[158] the insureds sued after the insurer denied their water damage claim. The insurer argued that the insureds had no standing to sue because the insureds had signed a contract assigning all their rights under the policy to a water damage mitigation company.[159] The court ruled in favor of the insureds, reasoning that the insureds did not intend to transfer all of their rights under the policy, and the assignment to the water damage mitigation company was limited to the insureds' rights as to water mitigation services.[160]

In *Charter School Solutions v. GuideOne Mutual Insurance Co.*,[161] the court held that a policy covering hail damage to property formerly owned by a bankruptcy debtor remained an executory contract after the insurer terminated the policy and was validly assigned to a subsequent owner during the debtor's bankruptcy proceeding, notwithstanding the policy's non-assignment clause.

In *Capitol Property Management Corp. v. Nationwide Property and Casualty Insurance Co.*,[162] the property manager of the insured condominium association, as its assignee, sued the insurers to recover insurance claim processing and construction management fees owed by the insured after a fire. The court held that, under Virginia law, the insurers had no legally enforceable obligation to pay the construction management fee because the assignment did not refer to that fee.[163] The court also held that fee was a non-physical loss and did not fall within the policy's coverage for "direct physical loss."[164] This fee was not a covered extra expense as the fee was not necessary to maintain the insured's operations or business activities, but

157. 589 S.W.3d 127 (Tex. 2019).
158. 276 So.3d 822 (Fla. Dist. Ct. App. 2019).
159. *Id* at 822.
160. *Id*. at 825.
161. 407 F. Supp. 3d 641 (W.D. Tex. 2019).
162. 757 F. App'x 229 (4th Cir. 2018).
163. *Id*. at 232.
164. *Id*. at 234.

rather represented outsourcing of the insured's duties after a loss.[165] Finally, the court held that any expenses the insured's property manager incurred for an employee to perform specific tasks relating to the claim were not covered extra expense resulting from the fire.[166]

In *Restoration 1 of Port St. Lucie v. Ark Royal Insurance Company*,[167] a contractor, who was the assignee of the insured's claim under a homeowner's policy, sued after the insurer refused to recognize the assignment and pay the contractor's claim. The court held that the policy provision requiring consent of all insureds and the mortgagee before the insureds' rights could be assigned was enforceable where the policy did not prohibit assignment or condition it on the insurer's consent.[168] The court also held that a contractual blanket ban on all assignments of rights under a policy is impermissible.[169]

E. *Suit Limitations*

In *Smith v. Travelers Casualty Insurance Co. of America*,[170] the Fifth Circuit held that an insurer's post-denial re-investigation of an insured's claim did not extend a prior accrual date of claims for breach of contract and violations of the Texas Insurance Code and Texas Deceptive Trade Practices Consumer Protection Act ("DTPA").[171] Those claims accrued on the date coverage was denied.[172] The Fifth Circuit concluded that the insurer's re-investigation would not have led a reasonable person to conclude that the prior unambiguous claim denial had been rescinded, revoked, or withdrawn pending additional investigation because the insurer never signaled any retreat from its denial, and warned the insured that her retained engineer had not presented "any additional or different information which would cause [it] to change its position."[173]

F. *Bad Faith*

In *Mazzarella v. Amica Mutual Insurance Co.*,[174] the Second Circuit addressed the pleading requirements to state a claim for bad faith under Connecticut law. The Second Circuit held that, to state a claim for bad faith under Connecticut law, "the acts by which [the insurer] allegedly impedes the [insured's] right to receive benefits that he or she reasonably expected to

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165. *Id.*
166. *Id.*
167. 255 So.3d 344 (Fla. Dist. Ct. App. 2018).
168. *Id.* at 348.
169. *Id.* at 346.
170. 932 F.3d 302 (5th Cir. 2019).
171. *Id.* at 316.
172. *Id.* at 313.
173. *Id.* at 315–16.
174. 774 F. App'x 14, 17 (2d Cir. 2019).

receive under the [insurance policy] must have been taken in bad faith.'"[175] "Allegations of a mere coverage dispute or negligence by an insurer in conducting an investigation will not state a claim for bad faith . . . ."[176] The Second Circuit held that the insureds failed to state a claim for bad faith "as they plainly set forth a 'mere coverage dispute' or a negligent investigation claim."[177] The court noted: "Significantly, none of the factual allegations suggest that [the insurer] acted with a dishonest purpose."[178]

In *D.K. Property, Inc. v. National Union Fire Insurance Co. of Pittsburgh, PA*,[179] the insured sued for breach of contract and bad faith and sought consequential damages, including legal fees, "engineering costs, painting, repairs, monitoring equipment, and moisture abatement to address water intrusion, loss of rents, and other expenses attributable to mitigating further damage to the property."[180] The trial court granted the insurer's motion to dismiss the claims for consequential damages, except for legal fees.[181] On appeal, the First Department reversed,[182] explaining "[a] plaintiff may sue for consequential damages resulting from an insurer's failure to provide coverage if such damages ('risks') were foreseen or should have been foreseen."

G. *Assignment of Benefits*

On July 1, 2019, Florida Statute §627.7152, Florida's new Assignment of Benefits ("AOB") Reform Bill, went into effect.[183] The bill amended Florida Statutes Section 627.422 and created Sections 627.7152 and 627.7153, which contain definitions and required provisions for assignment agreements executed under property insurance policies. The statute provides requirements with which an AOB must comply for the assignment to be valid.

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175. *Id.* (quoting De La Concha of Hartford, Inc. v. Aetna Life Ins. Co., 849 A.2d 382, 388 (Conn. 2004)).

176. *Id.* (quoting Martin v. Am. Equity Ins. Co., 185 F. Supp. 2d 162, 165 (D. Conn. 2002), and citing Courteau v. Teachers Ins. Co., 243 F. Supp. 3d 215, 219 (D. Conn. 2017); Capstone Bldg. Corp. v. Am. Motorists Ins. Co., 67 A.3d 961, 988 (Conn. 2013)).

177. *Id.* (citing *Martin*, 185 F. Supp. 2d at 165).

178. *Id.* (citing *De La Concha*, 849 A.2d at 388).

179. 92 N.Y.S.3d 231 (App. Div. 2019).

180. *Id.* at 232–33.

181. *Id.*

182. *Id.* at 232.

183. House Bill 7065 was signed by Governor DeSantis on May 23, 2019.