RECENT DEVELOPMENTS IN PROPERTY INSURANCE LAW

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I. BUSINESS INTERRUPTION/CIVIL AUTHORITY

In *National Union Fire Insurance Co. of Pittsburgh, Pennsylvania v. Trans-Canada Energy USA, Inc.*,[1] the insurers sought a declaratory judgment that they were not liable for lost sales in excess of $48 million resulting

1. 28 N.Y.S.3d 800 (N.Y. Sup. Ct. 2016).

from a shutdown of a steam turbine generator as a result of a "mechanical breakdown." The mechanical breakdown was found to be caused by a crack that expanded and caused property damage during the policy period.

The insurers denied coverage because the loss during the policy period was caused by a crack that formed before the policy commenced.[2] In rejecting the carriers' argument, the court found that the policy at issue insured against "all risks of physical loss or damage" occurring during the policy period without regard to when the incident giving rise to the loss occurred.[3]

In addition, the insurers argued that because most of the claimed lost sales were sustained after the period of interruption, there was no coverage for the insured's lost capacity. The court disagreed, explaining:

> Here, it is undisputed that between September 12, 2008 and May 18, 2009, as a result of the damaged unit, TransCanada was unable to generate any or the usual amount of electricity, and that when it sold those months of electricity capacity at auctions held after May 18, 2009, it did so at a decreased amount due to its decreased capacity. Thus, its loss, the decreased capacity, was not manifest or realized until the auctions were held. In other words, the loss at issue here is the decreased capacity sustained during the period of liability, even though the amount of the loss was not ascertained until after the period of liability when the auctions were held.[4]

The court found that the losses were the direct result of covered physical loss or damage and were not speculative or incapable of being linked to the loss. "As the purpose of a business interruption policy is to reimburse the insured for the amount of profit that it would have earned during the period of interruption had an injury not occurred and to place it in the position it would have occupied had the interruption not occurred,"[5] the court found that the insured was entitled to coverage.

II. COLLAPSE

In *Fabozzi v. Lexington Insurance Co.*,[6] the U.S. Court of Appeals for the Second Circuit construed collapse coverage providing for "direct physical loss to covered property involving collapse of a building or any part of a building *caused only by one or more of the following*[.]"[7] The court held that the provision was ambiguous because the italicized language might mean: (1) the policy provided coverage for collapse caused by the named perils (even if other perils contributed), or (2) there was coverage for collapse

2. *Id.*
3. *Id.*
4. *Id.*at 811.
5. *Id.*
6. 639 F. App'x 758 (2d Cir. 2016).
7. *Id.* at 760 (emphasis added).

only if caused exclusively by the named perils.[8] The court held that the word "caused" included principles of proximate causation.[9] Thus, insureds would reasonably expect coverage as long as one of the named perils was the predominant cause of the collapse.[10]

III. COVERED PROPERTY

A. *Structures*

In *Bell v. Certain Underwriters at Lloyd's London*,[11] the Mississippi Court of Appeals affirmed a ruling that Lloyd's properly denied coverage for a loss to a building not listed on the policy.[12] The Bells purchased a property with two buildings: a wood-framed barn and a smaller metal building.[13] The application and the policy listed only the metal building.[14] The barn collapsed during high winds, and the Bells made a claim, which Lloyd's rejected.[15] In the subsequent litigation, the court held that the plain language of the policy covered "only the smaller steel building, not the barn."[16]

In *Erie Insurance Exchange v. Bullock*,[17] the Ohio Court of Appeals held that a policy's "Other Structures" exclusion, for structures "[u]sed in whole or in part for business purposes," precluded coverage for losses to a barn used for the insured's poultry business.[18] The insured argued that his farming operations were a "hobby" and "just [for] fun."[19] The court held that "the evidence establishes that appellants' poultry operation was a 'full-time, part-time or occasional activity engaged in as a trade, profession, or occupation.'"[20]

B. *Insurable Interest*

In *Mikaelian v. Liberty Mutual Insurance*,[21] a son purchased and renovated a residential property.[22] His father purchased a homeowners' policy covering the property, but the policy did not name the son as an insured, nor did the father live at the property.[23] Liberty argued that the father had no insurable

8. *Id.* at 761.
9. *Id.* at 762.
10. *Id.* at 763.
11. 200 So. 3d 447 (Miss. Ct. App. 2016).
12. *Id.* at 448.
13. *Id.*
14. *Id.* at 449.
15. *Id.*
16. *Id.* at 452.
17. 55 N.E.3d 460 (Ohio Ct. App. 2015).
18. *Id.* at 461, 467.
19. *Id.* at 467.
20. *Id.*
21. 2016 WL 4702106 (E.D.N.Y. Sept. 8, 2016).
22. *Id.* at *1.
23. *Id.* at *2.

interest.[24] The U.S. District Court for the Eastern District of New York noted that, as pled, the father had no connection to the property other than purchasing the insurance policy.[25] The court held that, because the complaint did not allege that the father had any connection to the property, it did not adequately allege that the father had an insurable interest.[26]

In *Green Earth Wellness Center, LLC v. Atain Specialty Insurance Co.*,[27] the issuer argued, inter alia, that public policy precluded it from paying for damages to Green Earth's marijuana plants.[28] Green Earth ran a retail medical marijuana business with an adjacent growing facility.[29] Atain sold Green Earth commercial property insurance.[30] Smoke and ash from a wildfire overwhelmed Green Earth's ventilation system, damaging its marijuana plants.[31] In denying coverage, Atain argued that an exclusion for "Contraband, or property in the course of illegal transportation or trade" and public policy precluded coverage.[32] The court rejected this argument, noting "it is undisputed that, before entering into the contract of insurance, Atain knew that Green Earth was operating a medical marijuana business."[33] The U.S. District Court for the District of Colorado noted that, despite Atain's knowledge that federal law "nominally prohibited" marijuana growing, "Atain nevertheless elected to issue a policy to Green Earth and that policy unambiguously extended coverage for Green Earth's inventory of saleable marijuana."[34]

C. *Newly Acquired*

In *IPA Asset Management, LLC v. Certain Underwriters at Lloyd's London*,[35] the court held that Lloyd's failed to establish that IPA made a material misrepresentation as to whether certain property was newly acquired and thus covered under the policy's newly acquired or constructed property provision.[36] On May 7, 2010, real property partially owned by IPA was damaged in a fire.[37] Lloyd's denied coverage, contending that "the property was not insured at the time of the loss and was not owned by [IPA]."[38] According to

24. *Id.* at *5.
25. *Id.*
26. *Id.*
27. 163 F. Supp. 3d 821(D. Colo. 2016).
28. *Id.* at 834–35.
29. *Id.* at 823.
30. *Id.*
31. *Id.*
32. *Id.* at 824.
33. *Id.* at 833.
34. *Id.*
35. 39 N.Y.S.3d 198 (N.Y. App. Div. 2016).
36. *Id.* at 200.
37. *Id.* at 199.
38. *Id.*

Lloyd's, the property was not listed on the policy schedule at the time of the fire. Lloyd's claimed that the property was improperly added to the policy schedule after the fire, at which time IPA allegedly misrepresented the property as newly acquired as of April 26, 2010.[39] The court held that, contrary to Lloyd's contentions, the evidence established that the property was added to the policy by endorsement retroactive to April 26, 2010.[40]

IV. EXCLUSIONS

A. *Causation*

1. Generally

In *Seahawk Liquidating Trust v. Certain Underwriters at Lloyds London*,[41] the Fifth Circuit addressed application of the concurrent cause doctrine in evaluating coverage for loss of a third-party contract under an all-risk policy. As a result of severe weather in February 2010, the legs of the policyholder's drilling rig became misaligned.[42] In April, the rig traveled to perform a drilling contract, but failed to jack up to a sufficient height.[43] Seahawk sought coverage for the loss of the contract under the policy's loss-of-contract provision, claiming that the misalignment caused the rig to not operate, thereby occasioning the loss of the contract.[44]

The Fifth Circuit reasoned that the misaligned legs were only a contributing, as opposed to an independent, cause of the loss because the rig completed later drilling contracts without any repairs to the legs.[45] Applying the concurrent cause doctrine, the Fifth Circuit held that the misaligned legs (a covered peril) at most combined with the defective hydraulic-jacking system (an excluded peril) to cause the loss of the drilling contract and that no coverage was warranted because the policyholder failed to present evidence to support an apportionment of damages between the perils.[46] The insured had the burden of proving the part of damage caused by the covered risk.[47] The court held that the insured failed to meet its burden of proving damages because it "presented no ev-

39. *Id.*
40. *Id.*
41. 810 F.3d 986 (5th Cir. 2016).
42. *Id.* at 988.
43. *Id.*
44. *Id.* at 990.
45. *Id.* at 995.
46. *Id.* at 996 ("Under Texas law, the concurrent cause doctrine applies any time 'covered and non-covered perils combine to create a loss' and limits an insured's recovery to the 'portion of the damage caused solely by the covered peril(s)' ") (quoting Wallis v. United Servs. Auto. Ass'n, 2 S.W.3d 300, 302–03 (Tex. App. 1999).
47. *Id.* at 994–95.

idence to segregate the damage attributable solely" to the covered peril as compared to the excluded peril.[48]

2. Anti-Concurrent/Anti-Sequential Causation

In *Bozek v. Erie Insurance Group*,[49] the court held, as a matter of first impression, that an anti-concurrent causation clause barred coverage for damage to an in-ground swimming pool.[50] Following a rainstorm, the policyholders suffered damage to their pool due to a failed pressure-relief valve (a covered cause) and hydrostatic pressure (an excluded cause).[51]

The court held that the anti-concurrent causation clause applied.[52] The court reasoned that "as far as any sort of order, sequence or timing is concerned, we look to the point in time that the cause contributed to the loss, not the point in time that the cause came into existence."[53] The court concluded that the failed valve and the hydrostatic pressure contributed concurrently to the loss.[54] The court found that the covered event (the failed valve) did not lead to a loss separate or different from the excluded event (the hydrostatic pressure).[55] Rather, there was no loss to which coverage applied until the covered event converged with the excluded event to cause the loss.[56]

B. *Vacancy*

In *1 West Main Street, LLC v. Tower National Insurance Co.*,[57] the plaintiff's building suffered damage when two sprinkler pipes froze and broke, allowing water to leak into the fifth story and basement of the building.[58] The fire department's investigation confirmed that the building's heat was off when the pipes froze and burst.[59] At the time of the loss, only a portion of the second floor of the building was occupied by tenants, and the plaintiff was considering converting the fourth and fifth floors into condominiums.[60] The policy contained a vacancy provision that established that the building would be considered vacant "unless at least 31% of its total square footage" was rented and in use by the lessee (or sub-lessee) or used by the building owner to conduct "customary opera-

48. *Id.* at 996.
49. 46 N.E.3d 362 (Ill. App. Ct. 2015).
50. *Id.* at 364.
51. *Id.*
52. *Id.* at 372.
53. *Id.* at 369.
54. *Id.*
55. *Id.* at 371.
56. *Id.*
57. 2016 WL 1043545 (E.D. Pa. Mar. 15, 2016).
58. *Id.* at *1.
59. *Id.*
60. *Id.* at *4.

tions."[61] The vacancy provision also provided that "[b]uildings under construction or renovation are not considered vacant."[62] If a building was "vacant," the policy excluded loss for "[s]prinkler leakage, unless you have protected the system against freezing[.]"[63] The carrier denied coverage relying on this exclusion.[64]

The court held that "less than 20% of the building was in use for customary operations[.]"[65] The plaintiff argued that the 31 percent requirement was inapplicable because the building was undergoing renovations.[66] The court disagreed.[67] Although blueprints for the conversion of the fourth and fifth floors had been drawn up, no additional steps to renovate were made before the loss.[68] Accordingly, the court found that the building was not undergoing renovations and the sprinkler system was not adequately protected against freezing. Thus, the loss was not covered.[69]

Similarly, in *Verzura v. Allstate Indemnity Co.*,[70] the plaintiff filed a claim for damage caused by vandalism and theft.[71] The policy excluded "loss caused by vandalism if the property was vacant or unoccupied more than 90 days immediately prior to the loss."[72] The court, citing the plaintiff's admission that the property had been unoccupied for a year before the loss, held that the vandalism endorsement unambiguously applied to preclude coverage.[73]

In *Shank v. Safeco Insurance Co. of America*,[74] one of the plaintiffs' homes burned in a 2014 fire.[75] From 2012 until the loss, the plaintiffs used the home on a weekly basis, but stayed in a second home, also insured under the policy, as their primary residence.[76] Both homes were fully furnished.[77] On the day of the fire, the plaintiffs had begun tearing down the first home, removing the siding and turning off utility service.[78] The fur-

61. *Id.*
62. 1 W. Main St., LLC v. Tower Nat'l Ins. Co., 2016 WL 1043545, at *4 (E.D. Pa. Mar. 15, 2016).
63. *Id.*
64. *Id.* at *1.
65. *Id.* at *6.
66. *Id.*
67. *Id.* at *6–7.
68. *Id.* at *7.
69. *Id.* at *7–10.
70. 2016 WL 4586068 (Ill. App. Ct. Aug. 31, 2016).
71. *Id.* at *1.
72. *Id.*
73. *Id.* at *5–6.
74. 2016 WL 4534028 (S.D. W. Va. Aug. 30, 2016).
75. *Id.* at *1.
76. *Id.*
77. *Id.*
78. *Id.*

nishings and personal property were in the home at the time of the fire.[79] The policy contained a "residence premises" provision that the insurer maintained was a permissible variant of West Virginia's standard fire policy.[80] Because the standard fire policy language conditioned application of its vacancy exclusion on the expiration of sixty days, the court determined that the policy's more restrictive "residence premises" language was unlawful.[81] Applying the standard fire policy language, the U.S. District Court for the Southern District of West Virginia determined that, because the damaged house was fully furnished, visited and used on a weekly basis, and intact at the time of the fire, it was "occupied" at the time of loss.[82]

C. *Dishonest Acts*

In *Telamon Corp. v. Charter Oak Fire Insurance Co.*,[83] Telamon's Vice-President of Major Accounts, Juanita Berry, stole certain inventory and property.[84] Telamon filed a claim under its Charter Oak property policy,[85] which contained an exclusion for "[d]ishonest or criminal act[s] by you, any of your partners, employees (including leased employees), directors, trustees, authorized representatives or anyone (other than a carrier for hire or bailee) to whom you entrust the property for any purpose[.]"[86] Telamon employed Ms. Berry pursuant to a contract that classified her as an independent contractor.[87] She worked out of Telamon's New Jersey facility and was supervised remotely from Indiana.[88] She had "operational oversight" over the New York/New Jersey facilities and was eventually put in charge of the disposal and salvage of old telecommunications equipment.[89] During this process, Ms. Berry made certain false adjustments in the project accounting and false allocations of re-

79. Shank v. Safeco Ins. Co. of Am., 2016 WL 4534028, at *1 (S.D. W. Va. Aug. 30, 2016).

80. *Id.* at *4. The "residence premises" provision established that a location was insured under the policy only when the named insured resided there full time. By contrast, the standard fire policy wording in West Virginia stated that coverage would not attach for loss "occurring . . . while a described building whether intended for occupancy by owner or by tenant, is vacant or unoccupied beyond a period of sixty consecutive days." *Id.* at *4–5.

81. *Id.* at *6.

82. *Id.* at *7.

83. 2015 WL 10738615 (S.D. Ind. Dec. 10, 2015).

84. *Id.* at *1.

85. *Id.*

86. *Id.* at *5.

87. *Id.* at *2. Ms. Berry also had a Telamon business card, noting her name and title, a Telamon-issued email address, and was the prime contact for certain Telamon customers, including AT&T. *Id.* at *3.

88. Telamon Corp. v. Charter Oak Fire Ins. Co., 2015 WL 10738615, at *2 (S.D. Ind. Dec. 10, 2015).

89. *Id.* at *3.

placement costs.[90] Charter Oak denied the claim based on the policy's dishonest acts exclusion, stating that Ms. Berry was "either an 'authorized representative' of Telamon or 'anyone' to whom the property was entrusted for any purpose."[91] Telamon argued that the term "authorized representative" was ambiguous.[92] The court disagreed, stating that the undisputed evidence showed that Berry was authorized and empowered to act on Telamon's behalf.[93] The court also rejected Telamon's argument that Ms. Berry was not "entrusted" with the property because she was never physically entrusted with tangible property.[94] The court stated that "Telamon made Berry accountable for inventory issues, and gave her access to its project accounting system," and she was therefore entrusted with the property as a matter of law.[95]

Similarly, in *Grover Commercial Enterprises, Inc. v Aspen Insurance UK, Ltd.*,[96] the insured owned and leased a building and certain business personal property to a restaurant.[97] When the restaurant vacated the premises at the end of the lease, it took most of the business personal property.[98] Although the parties did not dispute that the restaurant stole business personal property, the insured asserted that the dishonest acts exclusion was ambiguous as to "whether 'leasing' property to a tenant is distinct from 'entrusting' property in general."[99] The court concluded that "under the plain meaning of the term 'entrust,'" the insured had entrusted its property to its tenant, and the dishonest acts exclusion applied to the insured's claim.[100]

Other opinions from the survey period analyzing a dishonest acts exclusion declined to grant summary judgment due to factual disputes. For example, in *Great American Insurance Co. v. Castleton Commodities International LLC*,[101] Castleton contracted with a number of purchasers to store and sell bitumen in China.[102] The bitumen was covered by a Marine Cargo/Storage & War Risks Policy issued by Great American and AXA.[103] The policy contained an exclusion precluding coverage for "[l]oss or damage to goods and merchandise caused by or resulting from misappropriation,

90. *Id.* at *3–4. She was ultimately indicted for wire fraud. *Id.*
91. *Id.* at *5.
92. *Id.*
93. *Id.* at *6 (internal citation omitted).
94. *Id.* at *7–8.
95. *Id.* at *8.
96. 202 So. 3d 877 (Fla. Dist. Ct. App. 2016).
97. *Id.* at 879.
98. *Id.*
99. *Id.*
100. *Id.* at 881.
101. 2016 WL 828127 (S.D.N.Y. Feb. 25, 2016).
102. *Id.* at *1.
103. *Id.*

secretion, conversion, infidelity, or any dishonest act on the part of the Assured or other party of interest, his or their employees or agents."[104] The exclusion applied to goods in temporary storage.[105] Castleton learned that nearly 90,000 metric tons of bitumen stored at a Chinese facility, for which Castleton was awaiting payment, had been released by the storage company, Fukang, without Castleton's knowledge or consent.[106]

The insurers argued that the dishonest acts exclusion applied because Fukang was an agent of Castleton and released the bitumen without Castleton's consent.[107] The insurers alternatively argued that Fukang was an "other party of interest" subject to the exclusion.[108] The U.S. District Court for the Southern District of New York declined to grant summary judgment on the question of whether Fukang was either an agent of Castleton or an "other party of interest."[109] The court held that certain evidence presented by Castleton, including policy language distinguishing "agents" from storage owners or operators, was sufficient to create a triable issue of material fact.[110]

In *Tapper's Fine Jewelry, Inc. v. Chubb National Insurance Co.*,[111] the insured bought consumers' jewelry and delivered it to a refiner to melt down into bars.[112] The refiner would then buy the bars from the insured.[113] In September 2013, the insured dropped off jewelry to be refined.[114] The refiner valued the bars and paid a portion of the value, but left an unpaid balance.[115] The insured reported the loss to the police the next month and filed a claim under two Chubb policies.[116] Chubb rejected the claim, citing the dishonest acts exclusion.[117] The insured agreed that "a dishonest act was a possibility," but stated that there were no concrete, established facts that proved that a dishonest act caused

104. *Id.* at *2.
105. *Id.* at *5.
106. Great Am. Ins. Co. v. Castleton Commodities Int'l LLC, 2016 WL 828127, at *3 (S.D.N.Y. Feb. 25, 2016). Fukang stored the bitumen in accordance with a three-party agreement among Castleton, its purchaser, and a storage facility (here, Fukang). Castleton retained title to the bitumen even though its purchaser paid storage costs. *Id.* at *2.
107. *Id.* at *5.
108. *Id.* at *7.
109. *Id.* at *5–7.
110. *Id.* at *6.
111. 2015 WL 9268750 (E.D. Mich. Dec. 21, 2015).
112. *Id.* at *1.
113. *Id.*
114. *Id.* at *2.
115. *Id.* The insured's CFO attempted to collect the balance through numerous phone calls. In October 2013, the owner of the refiner apologized and said he would pay the balance, but the insured never heard from the owner again.
116. Tapper's Fine Jewelry, Inc. v. Chubb Nat'l Ins. Co., 2015 WL 9268750 (E.D. Mich. Dec. 21, 2015).
117. *Id.*

the loss.[118] The U.S. District Court for the Eastern District of Michigan concurred, stating that "the evidence [was] insufficient to establish as a matter of law that Tapper's losses arose from the dishonest or criminal act of someone to whom the property was entrusted."[119] Although it was certainly possible that the refiner committed a dishonest or criminal act, the court found that other evidence, including the possibility that the failure to pay the balance was simply a contractual dispute and the statement by a Chubb adjuster that "we can not [sic] prove a dishonest act," was sufficient to create an issue of fact.[120]

D. *Mold and Water Damage*

1. Sudden and Accidental vs. Gradual Seepage

In *Raschkovsky v. Allstate Insurance Co.*,[121] the insureds made a claim for water damage in their guest bathroom and adjacent bedroom.[122] Allstate denied coverage and the insureds sued.[123] Allstate argued that the loss was the result of "gradual seepage."[124] The insureds claimed the water loss was "sudden and accidental."[125] Both parties submitted expert reports in support of their respective positions.[126] The U.S. District Court for the Central District of California granted summary judgment to Allstate, holding that the insureds were unable to provide sufficient evidence from which "a reasonable jury could find that the water damage resulted from a sudden and accidental discharge."[127]

2. Anti-Concurrent Causation

In *McCartha v. State Farm Fire & Casualty Co.*,[128] a tree limb fell on the roof of the insured's property during a rainstorm.[129] The insured's daughter, who was alone at home when the tree branch fell, saw damage to the fence and gutter, but did not see any damage "from the roof inward."[130] The insured made a claim for roof damage. State Farm investigated, and the claims representative observed that the roof's condition was severely deteriorated with signs of wear, tear, deterioration, and prior damage.[131]

118. *Id.* at *7.
119. *Id.*
120. *Id.* at *7–8.
121. 2015 WL 9463882 (C.D. Cal. Dec. 21, 2015).
122. *Id.* at *1.
123. *Id.* at *3.
124. *Id.* at *1.
125. *Id.*
126. *Id.* at *3.
127. *Id.* at *8.
128. 2016 WL 4375659 (Mich. Ct. App. Aug. 16, 2016).
129. *Id.* at *1.
130. *Id.*
131. *Id.*

There was also a large hole in the middle of the roof and the remains of a blue tarp that appeared to have been exposed to weather for a long period of time.[132] State Farm covered the removal of the tree debris and repairs for the visible damage to the gutter and fencing, but denied the claim for the roof since the policy excluded wear, tear, deterioration, or neglect.[133] Several months after State Farm denied the roof claim, the insured made a claim for interior water damage, which he said occurred after the tree limb fell on his house and was a result of that incident.[134] State Farm denied the insured's claim on the bases of late notice; failure to mitigate the loss; and lack of coverage for mold, rot, and neglect.[135]

The insured sued.[136] State Farm contended that the loss was the result of wear and tear, deterioration, or neglect.[137] State Farm also argued that the insured's claims were precluded by the anti-concurrent causation language in the applicable exclusions.[138] The trial court granted summary disposition to State Farm.[139] The insured appealed, arguing that he had not experienced any water leaks, damage, or problems with the roof before the tree limb fell and that the trial court erred since State Farm failed to prove that the roof damage was the result of deterioration.[140] The Michigan Court of Appeals affirmed.[141] The court noted that it was undisputed that the roof was in poor condition and deteriorated before the date of loss, but even if the fallen tree limb aggravated the water damage to the interior of the home, this damage would be precluded by the "neglect" exclusion in the policy, which contained anti-concurrent causation language.[142]

3. Insured's Knowledge of Prior Water Damage

In *Smith v. State Farm Fire and Casualty Co.*,[143] the insureds retained a home inspector to perform an inspection for potential water damage to their home after their neighbors had some water damage problems.[144] The inspection took place before May 15, 2012.[145] The inspector issued

132. *Id.*
133. McCartha v. State Farm Fire & Cas. Co., 2016 WL 4375659, at *1 (Mich. Ct. App. Aug. 16, 2016).
134. *Id.*
135. *Id.*
136. *Id.*
137. *Id.*
138. McCartha v. State Farm Fire & Cas. Co., 2016 WL 4375659, at *1 (Mich. Ct. App. Aug. 16, 2016).
139. *Id.*
140. *Id.* at *2–3.
141. *Id.* at *5.
142. *Id.*
143. 2015 WL 7568326 (E.D. Pa. Nov. 25, 2015).
144. *Id.* at *1.
145. *Id.*

a report that found numerous design flaws and defects in the home that resulted in cracking, staining, extensive rot, water entry into the basement and living room, saturated sheathing, and elevated moisture levels around both the interior and exterior of the home.[146] State Farm issued a homeowners policy to the insureds effective April 23, 2013. On November 25, 2013, the insureds reported a loss from water behind the home's stucco, which had rotted out the sheathing.[147] During the investigation, the insureds told State Farm they had "been dealing with the issue for a few months now."[148] State Farm denied coverage for the stucco and rotted sheathing, but agreed to evaluate coverage for the interior water damage.[149] State Farm's inspection revealed evidence of rot and deterioration to the sheathing and a small amount of water damage to the interior drywall, as well as water staining around the windows and gutters.[150] The insureds testified at deposition that it was the inspector's report that prompted them to make the claim.[151] State Farm denied the claim for the stucco, rotted sheathing, and moldy insulation. The insureds sued, and State Farm moved for summary judgment, contending that the suit was barred by the policy's one-year suit limitation provision.[152] The U.S. District Court for the Eastern District of Pennsylvania granted State Farm's motion, finding that the inspector's report, prepared in May 2012, showed that claimed damage had occurred long before the suit limitations period expired.[153]

E. *Ensuing Loss*

In *National Railroad Passenger Corp. v. Aspen Specialty Insurance Co.*,[154] the U.S. Court of Appeals for the Second Circuit held that damage to Amtrak's tunnels after Superstorm Sandy due to a "chloride attack" arising from the combination of seawater residue with oxygen in the air was not an "ensuing loss."[155] The policy provided that "[e]ven if the peril of flood . . . is the predominant cause of loss or damage, any ensuing loss or damage not otherwise excluded herein shall not be subject to any sublimits."[156] The court explained that, an ensuing loss clause "does not res-

146. *Id.*
147. *Id.*
148. Smith v. State Farm Fire & Cas. Co., 2015 WL 7568326, at *1 (E.D. Pa. Nov. 25, 2015).
149. *Id.* at *2.
150. *Id.*
151. *Id.* at *1. The court noted the "conspicuous eighteen-month lag" between the inspection and the date the loss was reported. *Id.* at *1 n.1.
152. *Id.* at *2
153. *Id.*
154. 2016 WL 4570327 (2d Cir. Aug. 31, 2016).
155. *Id.* at *2.
156. *Id.*

urrect coverage for an excluded peril" and that, in general, "courts should not allow coverage 'for [an] ensuing loss directly related to the original excluded risk.'"[157] The court found that the damage from "chloride attack" could not be separated meaningfully from water damage subject to the flood sublimit or characterized as a distinct, covered peril.[158]

In *Taja Investments LLC v. Peerless Insurance Co.*,[159] while the insured was renovating a residential property, the insured over-excavated the basement, causing a wall to collapse.[160] The policyholder filed a claim, which was denied based on defects in workmanship and earth movement exclusions.[161] The U.S. District Court for the Eastern District of Virginia held that the ensuing loss exception to the exclusions failed to restore coverage because no other covered, independent peril contributed to the collapse.[162]

In *Eagle West Insurance Co. v. SAT, 2400, LLC*,[163] the policyholder's roof suffered water damage when water pooled around a blocked drain during a storm.[164] The carrier denied coverage based on, inter alia, the faulty, inadequate, or defective work exclusion.[165] That exclusion included an ensuing loss clause.[166] The U.S. District Court for the Western District of Washington held that the ensuing loss clause applied because the covered rooftop pooling of water was separate from any inadequate maintenance of the roof or drain.[167] With respect to damages, the court explained that "[the policyholder] cannot recover for the elements of the roof that themselves were inadequately maintained," but could recover for damage to portions of the roof that were adequately maintained and damaged by rainwater and losses ensuing from the covered rainfall and pooling water.[168]

V. DAMAGES

A. *ACV/RCV/Holdback*

When calculating property damage, policies usually do not provide for replacement cost value (RCV) coverage until the damaged property is actually repaired or replaced. Until that time, the insured is entitled to actual

157. *Id.* (quoting Platek v. Hamburg, 26 N.E.3d 1167, 1172 (N.Y. 2015) and Narob Dev. Corp. v. Ins. Co. of N. Am., 631 N.Y.S.2d 155, 155–56 (App. Div. 1995)).
158. *Id.*
159. 2016 WL 3951406 (E.D. Va. July 21, 2016).
160. *Id.* at *1.
161. *Id.* at *1–2.
162. *Id.* at *5–6.
163. 2016 WL 2939096 (W.D. Wash. May 20, 2016).
164. *Id.* at *1.
165. *Id.* at *3–4.
166. *Id.* at *4.
167. *Id.* at *5.
168. *Id.*

cash value (ACV), which is typically calculated as replacement cost less depreciation. During the survey year, the issue of whether labor may be depreciated when calculating ACV has come up several times—with courts coming down on both sides of the issue. There have been several purported class actions challenging insurers' practice of depreciating labor, and the opinions in those cases come down on both sides.

In *Papurello v. State Farm Fire & Casualty Co.*,[169] the insureds filed a putative class action alleging that the insurer violated Pennsylvania law in the way in which it calculated ACV.[170] The U.S. District Court for the Western District of Pennsylvania considered whether labor may be depreciated in calculating ACV.[171] The court acknowledged a split in authority on whether labor may be depreciated, but concluded that it may be.[172] The court held that covered property, like a roof, refers to a finished product, which is "the *result* or physical manifestation of combining know-how, labor, physical materials . . . and anything else required to produce the final, finished roof itself."[173]

The U.S. District Court for the Western District of Missouri reached a different conclusion in *Labrier v. State Farm Fire & Casualty Co.*[174] In an earlier opinion in that case, the court found the term "actual cash value" to be inherently ambiguous because it was not defined in the policy, requiring that it be construed in favor of the insureds.[175] The court reviewed cases holding both that labor may be depreciated and that it may not. As there are a number of ways in which ACV can be determined, the court ruled in favor of class certification on the issue of whether the insurer "may withhold labor depreciation from ACV payments under Missouri law."[176]

In *Shelter Mutual Insurance Co. v. Goodner*,[177] the Supreme Court of Arkansas held that labor may not be depreciated, notwithstanding policy language specifically allowing depreciation of labor.[178] The court held that, under Arkansas law, labor may not be depreciated in calculating ACV and a policy provision allowing for depreciation of labor was unenforceable.[179]

169. 144 F. Supp. 3d 746 (W.D. Pa. 2015).
170. *Id.* at 749.
171. *Id.* at 769.
172. *Id.* at 769–770, 771 n.13.
173. *Id.* at 770.
174. 315 F.R.D. 503 (W.D. Mo. 2016).
175. *Id.* at 513 (discussing Labrier v. State Farm Fire & Cas. Co., 147 F. Supp. 3d 839, 846 (W.D. Mo. 2015)).
176. *Labrier*, 315 F.R.D. at 522.
177. 477 S.W.3d 512 (Ark. 2015).
178. *Id.* at 513.
179. *Id.* at 516.

In contrast, in *Wilcox v. State Farm Fire & Casualty Co.*,[180] the Supreme Court of Minnesota held that, under the broad evidence rule, the jury can consider depreciation, including "embedded-labor-depreciation."[181]

B. *Matching*

In *Great American Insurance Co. v. Towers of Quayside No. 4 Condominium Ass'n*,[182] a broken valve on an air-conditioning unit released water, damaging drywall, carpeting, baseboards, insulation, and wallpaper in the east hallways of the eleventh floor and below in a twenty-five story condominium building.[183] Floors three through twenty-five had uniform carpet, wallpaper, and woodwork.[184] The east and west carpeted hallways of each floor were separated by a tiled elevator landing.[185] Following the water loss, Quayside submitted a claim for repair and replacement of undamaged carpeting, wallpaper, baseboards, and woodwork in both the damaged floors and undamaged floors claiming the floors had an aesthetic uniformity and that the building would be devalued if it lost its uniform appearance.[186]

Great American sought summary judgment that it had no obligation to cover repair or replacement of building components that did not sustain direct physical loss or damage.[187] The court found that coverage for matching, for purposes of achieving "aesthetic uniformity," is appropriate where repairs concern "any continuous run of an item or adjoining area."[188] However, the court concluded that there was no coverage for undamaged floors above floor eleven because the policy covered only "direct physical loss," and since there was a break in the carpeting caused by the elevator landing, there was no coverage for the undamaged carpeting.[189]

VI. OTHER INSURANCE

In *Southern Insurance Co. v. Affiliated FM Insurance Co.*,[190] the Fifth Circuit predicted that the Mississippi Supreme Court would not require policies to cover the same insured in order to mandate an other-insurance analysis.[191] Southern Insurance Co. and Affiliated FM Insurance Co. both is-

180. 874 N.W.2d 780 (Minn. 2016).
181. *Id.* at 785.
182. 2015 WL 6773870 (S.D. Fla. Nov. 5, 2015).
183. *Id.* at *1.
184. *Id.*
185. *Id.*
186. *Id.*
187. *Id.* at *2.
188. *Id.* at *3.
189. *Id.*
190. 830 F.3d 337 (5th Cir. 2016).
191. *Id.* at 350.

sued policies covering a building on the University of Southern Mississippi campus, but to different insureds.[192] The building was owned by the University and insured as part of a policy Affiliated issued to the University for all of its buildings.[193] Southern insured the building for the University's alumni association.[194] The court determined that both other insurance clauses were "excess" clauses and were mutually repugnant.[195] Southern argued that since Affiliated paid for the damage to the property, it owed nothing.[196] The court held that to allow that construction would encourage insurers that insure the same risk to enter into "a stare-down," waiting for the other to blink.[197] Finally, the court concluded that Affiliated's blanket $500 million limit was the relevant limit for a pro rata analysis, not the individual building's scheduled value.[198]

VII. OBLIGATIONS AND RIGHTS OF THE PARTIES

A. *Misrepresentation*

Liberty Corporate Capital v. Bhanu Management, Inc.[199] addressed both types of misrepresentation that provide insurers the right to void a policy: misrepresentation in the application[200] and misrepresentation during the claim process.[201] Bhanu Management sought insurance for its hotel and restaurant.[202] After the property was inspected, the policy was issued on the condition that Bhanu complete five mandatory safety requirements

192. *Id.* at 340.
193. *Id.* at 341.
194. *Id.*
195. S. Ins. Co. v. Affiliated FM Ins. Co., 830 F.3d 337, 348–49 (5th Cir. 2016).
196. *Id.* at 342–43.
197. *Id.* at 346–57.
198. *Id* at 352.
199. 161 F. Supp. 3d 1307 (S.D. Ga. 2015).
200. *Id.* at 1315. *See* Moustafa v. Omega Ins. Co., 2016 WL 4649849, at *1 (Fla. Dist. Ct. App. Sept. 7, 2016) (failure to disclose prior claims and unrepaired prior damage); Certain Underwriters at Lloyd's London v. Jimenez, 197 So. 3d 597 (Fla. Dist. Ct. App. 2016) (misrepresented existence of central station alarm for smoke, temperature, and burglar protective device that was monitored); Nationwide Mut. Fire Ins. Co. v. Almco, Ltd., 2016 WL 1452327, at *1 (D.D.C. Apr. 13, 2016) (misrepresented nature of insured business as deli when business was actually night club).
201. *Id.* at 1320–21. *See* Metro. Prop. & Cas. Ins. Co. v. Calvin, 802 F.3d 933, 939 (8th Cir. 2015) (misrepresentations related to ownership of property, contents of home, financial situation, criminal history, and previous fire); Cincinnati Ins. Co. v. Drenocky, 2016 WL 3633521, at *5–6 (M.D. Pa. July 7, 2016) (failure to disclose previous expert report related to water damage); and Hartford Steam Boiler & Inspection Co. v. Int'l Glass Prods., LLC, 2016 WL 5468111, at *1 (W.D. Pa. Sept. 29, 2016) (multiple misrepresentations regarding repair and replacement of damaged equipment and business interruption period necessary for repair).
202. *Liberty Corp. Capital*, 161 F. Supp. 3d at 1309.

at the hotel within a specified time.[203] The policy contained a concealment, misrepresentation, or fraud clause providing that the policy would be void if any insured intentionally concealed or misrepresented a material fact concerning the property or concerning a claim.[204] Bhanu's insurance agent explained that coverage would not be continued without written confirmation of compliance with the five requirements.[205] Bhanu emailed its agent stating that it had completed all five requirements, and the agent forwarded the email to insurers.[206] In fact, Bhanu had not completed any of the mandatory requirements when a fire occurred in the hotel some eight months later.[207] Bhanu admitted that it had misrepresented its compliance with the requirements.[208]

Bhanu hired a public adjuster to assist with submission of the fire claim.[209] The public adjuster prepared a claim that included repair or replacement of property that was not damaged by the fire, higher-grade materials than were in the fire-damaged rooms, and an exaggerated amount of time to complete the repairs.[210] Bhanu reviewed the claim and gave approval to submit it to the insurers on its behalf.[211]

The insurers sued to rescind the policy based on both misrepresentation about compliance with the safety requirements and misrepresentation about the amount of loss.[212] Applying Georgia's statutory requirements for voiding an insurance policy, the court found that Bhanu had provided false information in the application regarding the mandatory requirements for coverage and that these misrepresentations were material.[213] The court concluded that the insurers had sustained their burden for rescission under the statute.[214]

Turning to the insurers' claim that the policy was void due to the insured's misrepresentations during the adjustment of its claim, the court found that the insured had "vastly misrepresented the amount of its insurance claim."[215] Finding that the insured's "misrepresentations of the extent of its losses were material to the adjustment of the claim," the

203. *Id.* at 1309–10.
204. Liberty Corp. Capital v. Bhanu Mgmt., Inc., 161 F. Supp. 3d 1307, 1311 (S.D. Ga. 2015).
205. *Id.* at 1310.
206. *Id.*
207. *Id.* at 1310–11.
208. *Id.* at 1310.
209. Liberty Corp. Capital v. Bhanu Mgmt., Inc., 161 F. Supp. 3d 1307, 1312–13 (S.D. Ga. 2015).
210. *Id.* at 1313.
211. *Id.* at 1314.
212. *Id.*
213. *Id.* at 1315–16 (applying GA. CODE ANN. § 33–24–7 (2015)).
214. *Liberty Corporate Capital*, 161 F. Supp. 3d at 1322.
215. *Id.* at 1319.

court held that those misrepresentations provided an additional basis to void the policy.[216]

In *Nationwide Mutual Fire Insurance Co. v. Almco, Ltd.*,[217] Almco submitted a signed application for insurance that described "Almco's business as a 'deli,' and stated that Almco did not have a website, did not 'serve or sell alcohol,' and did not 'have bouncers. DJs, live entertainment, pool tables . . . paid admissions, cover charges or other similar exposures."[218] After a shooting at the premises, Nationwide learned that Almco "never operated as a deli, and instead, conducted business as a billiards hall and entertainment venue that served alcohol and provided live music and entertainment."[219] Nationwide sought to void the policy because Almco made material misrepresentations in the application.[220] Nationwide moved for summary judgment based on D.C. Code § 31-4314 and provided evidence that Nationwide would not issue insurance covering the exposures present at Almco's night club.[221] The court held that the misrepresentations were material because a "disco is not a deli, and the risks posed by the combination of billiards, booze, and entertainment are materially different from the hazards that could arise out of a corned beef on rye."[222]

B. *Duties*

1. Examinations Under Oath

In *Martin v. Homeland Insurance Co.*,[223] after a fire loss, the insurer made multiple requests for an examination under oath (EUO).[224] The insured refused to appear, and the insurer denied coverage. When the insured sued, the insurer moved for summary judgment based on the insured's failure cooperate and submit to an EUO.[225] The insured claimed she had Lyme disease and the disease excused her failure to appear for the EUO.[226] The trial court granted the insurer's motion, finding that the insured's failure to submit to an EUO for over three years when the insurer had repeatedly requested her appearance breached the policy's cooperation clause.[227] The court further noted that, because the insured was

216. *Id.* at 1320–21.
217. 179 F. Supp. 3d 97 (D.D.C. 2016).
218. *Id.* at 101.
219. *Id.* at 103.
220. *Id.* at 101.
221. *Id.* at 103–04.
222. *Id.* at 100.
223. No. CV 15-1064 FMO, 2016 U.S. Dist. LEXIS 34818 (C.D. Cal. Mar. 17, 2016).
224. *Id.* at *7–13.
225. *Id.* at *16.
226. *Id.* at *17.
227. *Id.* at *18–19.

healthy enough to work intermittently and write a book during that time period, she was healthy enough to appear for an EUO.[228]

In *Martinez v. Liberty Insurance Corp.*,[229] the insureds sued for coverage for property damage after a natural gas explosion. During the suit, the insureds claimed work product protection for communications with their public adjuster and counsel related to their EUO, claiming the fact both parties hired counsel to handle the EUOs suggested litigation was imminent.[230] The insurer claimed that the EUOs were taken before any litigation could have been anticipated and that any privilege was waived because the insureds included the public adjuster in the communications.[231] The U.S. District Court for the District of Colorado found that the EUO communications were not protected work product, noting that the examinations took place two years before litigation was filed.[232] The fact that the EUOs were taken by a lawyer did not convert the communications from ordinary business communications to litigation preparation.[233]

In *Aminpour v. Arbella Mutual Insurance Co.*,[234] the insured made claims for property damage and personal property loss, including lost jewelry, after a fire at her home.[235] The insured submitted to two recorded interviews and two EUOs to determine the value of the jewelry and whether the loss was caused by theft during the fire cleanup process.[236] The insurer demanded a third EUO to investigate some suspect claim documentation. The insured refused because the insurer had failed to pay for the remaining personal property.[237] The insurer then denied coverage.[238] After suit was filed, the trial court granted summary judgment to the insurer, finding the insured had failed to cooperate by not consenting to a third EUO.[239] The appellate court reversed, holding that, under the policy's requirement to submit to an EUO "as often as reasonably required," there was an issue of fact as to whether the third EUO was reasonably required. The court also noted that the insured had later offered to submit to a third EUO if the insurer provided transcripts of the first two EUOs, a request that the insurer refused.[240]

228. *Id.* at *19.
229. 2015 WL 5915415 (D. Colo. Oct. 9, 2015).
230. *Id.* at *2.
231. *Id.*
232. *Id.* at *6.
233. *Id.*
234. 2016 WL 4162417 (Mass. App. Ct. Aug. 5, 2016).
235. *Id.* at *1.
236. *Id.* at *2.
237. *Id.*
238. *Id.*
239. *Id.* at *3.
240. *Id.*

In *Roller v. American Modern Home Insurance Co.*,[241] the insureds' husband intentionally started a fire in his garage as part of a suicide attempt.[242] The insurer repeatedly requested EUOs of the insureds to investigate the intentional nature of the fire.[243] The insureds' counsel did not allow the EUOs because there were outstanding document disputes.[244] The insureds filed suit before submitting to the EUOs, and the insurer filed for summary judgment based on their refusal to cooperate and submit to the EUOs.[245] The trial court granted summary judgment to the insurer, finding that the insureds' failure to submit to the EUOs was a breach of the cooperation clause independent of document issues.[246] The court further noted that, by filing the lawsuit instead of appearing for the EUOs, the insureds had prejudiced the insurer by denying it the opportunity to complete its investigation and issue a coverage decision on the claim.[247]

2. Proof of Loss

In *Cummings v. Fidelity National Indemnity Insurance Co.*,[248] a homeowner made a claim for flood damage under a standard flood insurance policy after Hurricane Isaac.[249] The insured submitted a signed, sworn proof of loss for building damage, which was paid by the insurer. Later, however, the insured submitted a claim for contents loss without a signed, sworn proof of loss.[250] The insurer requested additional information, but did not tell the insured to submit an additional proof of loss. The insurer merely directed the insured to review his policy.[251] The Fifth Circuit held that a second sworn proof of loss for contents was required before the insured was entitled to damages.[252]

In *Sea Bright First Aid Squad, Inc. v. Arch Insurance Co.*,[253] the insured made a claim for Superstorm Sandy damage to two ambulances.[254] The insurer made multiple requests to the insured to fill out a proof of loss, which the policy required, but the insured never submitted a proof.[255] The U.S. District Court for the District of New Jersey held that the in-

241. 484 S.W.3d 110 (Mo. Ct. App. 2015).
242. *Id.* at 112.
243. *Id.* at 113.
244. *Id.* at 117.
245. *Id.*
246. *Id.* at 118.
247. *Id.*
248. 636 F. App'x 221 (5th Cir. 2016).
249. *Id.* at 222.
250. *Id.*
251. *Id.*
252. *Id.* at 223–24.
253. 2016 WL 4491835 (D.N.J. Aug. 25, 2016).
254. *Id.* at *1.
255. *Id.* at *2–3.

sured could not bring any coverage claim against its insurer because the insured failed to comply with the policy's proof of loss requirement.[256]

In *Cotton v. Scottsdale Insurance Co.*,[257] the insureds testified that they faxed a proof of loss form to the insurer, while the insurer contended that it never received the fax.[258] The insureds also testified that they relayed information to the insurer over the phone.[259] The U.S. District Court for the Eastern District of Louisiana denied the insurer's motion for judgment as a matter of law and request for new trial because, under Louisiana law, simply putting the insurer on notice is a satisfactory proof of loss.[260] The court found there was sufficient evidence to allow a reasonable jury to find that the insurer had received proper notice.[261]

In *Indianapolis Airport Authority v. Travelers Property Casualty Co. of America*,[262] the insured sued its insurer, seeking a declaration that its commercial inland marine policy provided coverage for collapse of temporary shoring towers used in constructing a new terminal.[263] The insured submitted a signed, sworn statement in proof of loss, but failed to include the soft costs claim in the proof.[264] The U.S. District Court for the Southern District of Indiana held that the insured did not comply with the condition precedent to coverage for soft costs under the policy and, therefore, waived its claim for soft costs.[265]

In *Gilbert v. Infinity Insurance Co.*,[266] the insured sued its auto insurer, alleging breach of contract and breach of the covenant of good faith and fair dealing.[267] The insurer moved for summary judgment, contending that the insured breached the policy's "cooperation clause" by failing to disclose unredacted records.[268] The insurer tried at least seven times to obtain the records from the insured without success.[269] The U.S. District Court for the Central District of California held in favor of the insurer, stating submission of a proof of loss is subject to the substantial performance standard, which was not met when the insured failed to provide the requested records.[270]

256. *Id.* at *4.
257. 2015 WL 6605437 (E.D. La. Oct. 28, 2015).
258. *Id.* at *2–3.
259. *Id.*
260. *Id.* at *3–4.
261. *Id.*
262. 178 F. Supp. 3d 745 (S.D. Ind. 2016).
263. *Id.* at 750–51.
264. *Id.* at 760.
265. *Id.* at 758–61.
266. 186 F. Supp. 3d 1075 (C.D. Cal. 2016).
267. *Id.* at 1078.
268. *Id.* at 1085.
269. *Id.* at 1086–87.
270. *Id.* at 1085–86.

C. *Appraisal*

1. Scope of Appraisal

In *D Boys, LLC v. Mid-Century Insurance Co.*,[271] the plaintiff owned three apartment buildings, which allegedly sustained roof damage caused by wind, a covered peril.[272] The defendant conceded that one of the buildings was damaged by wind, but contended that the damage to the two other buildings was due to excluded "wear, tear and deterioration."[273] The plaintiff moved to compel appraisal, and the district court granted the motion.[274] In reversing, the Sixth Circuit held that the district court should have held a hearing before compelling appraisal, because the dispute required questions of coverage to be resolved by the court before appraisal.[275]

In *Hunstad v. State Farm Fire & Casualty Co.*,[276] an appraisal panel issued an award for damage to the plaintiffs' personal property immediately before the insurer denied coverage based, in part, on fraud. The plaintiff argued that the award was binding and prevented the insurer from denying coverage.[277] The U.S. District Court for the District of Minnesota held that the award was not binding until, and unless, there was a determination that the claim was covered.[278] The court also held that the appraisers may not "construe the policy or decide whether the insurer should pay" the claim.[279] Rather, coverage issues must be decided by the court.[280]

In *McCoy v. American Family Mutual Insurance Co.*,[281] the plaintiff sought to compel appraisal. The defendant opposed the motion, arguing that (1) appraisal would be impracticable or exceedingly difficult because the plaintiff changed the condition of the property by making repairs and improvements, and (2) there were coverage issues that were beyond the scope of appraisal.[282] The U.S. District Court for the District of Minnesota ordered appraisal, holding that difficulty was not a legally sufficient basis to refuse appraisal.[283] The court further held that, under Minnesota law, the phase "amount of loss" in the appraisal provision "necessarily in-

271. 644 F. App'x 574 (6th Cir. 2016).
272. *Id.* at 575.
273. *Id.*
274. *Id.* at 575–76.
275. *Id.* at 577.
276. 2016 WL 3014653 (D. Minn. May 24, 2016).
277. *Id.* at *1.
278. *Id.* at *2.
279. *Id.*
280. *Id.*
281. 2016 WL 3022072 (D. Minn. May 25, 2016).
282. *Id.* at *4.
283. *Id.*

cludes a determination of the cause of the loss."[284] However, if the appraisal award addresses issues of liability, it may be challenged.[285]

In *Condominiums of Shenandoah Place v. SECURA Insurance*,[286] the plaintiff sought coverage for roof damage allegedly caused by wind and hail.[287] The plaintiff alleged that the loss occurred during the policy period, but could not demonstrate the precise date.[288] The defendant argued that the question of the date and cause of loss presented a coverage issue and, therefore, appraisal was not appropriate.[289] The U.S. District Court for the District of Minnesota held that a determination of the amount of loss in appraisal includes a determination of causation.[290] Accordingly, the court held that the determination of when the damages were sustained was an issue of causation that could be decided in appraisal.[291]

In *Quick Response Commercial Division v. Cincinnati Insurance Co.*,[292] the plaintiff sustained damage to its property and retained a contractor to perform repairs. The defendant contended that the repairs were outside the agreed scope of loss and refused to pay the contractor.[293] The defendant sought to submit the dispute to appraisal.[294] The U.S. District Court for the Northern District of New York concluded that "New York public policy favors an appraisal proceeding over a trial on damages," as evidenced by the November 2014 Amendment to New York Insurance Law Section 3208(c).[295] Section 3208(c) appears to allow appraisers to determine the "extent of loss or damage" and not just the "amount of loss."[296] Therefore, the court determined that, when the dispute involves questions of the extent and amount of damage, the issues are within the scope of appraisal.[297] In addition, the court held that "apportioning damage causation is an issue properly subject to appraisal[.]"[298] Because the

284. *Id.* at *5.
285. *Id.*
286. 2016 WL 614381 (D. Minn. Feb. 16, 2016).
287. *Id.* at *1.
288. *Id.*
289. *Id.* at *2–3.
290. *Id.* at *4.
291. *Id.*
292. 2015 WL 5306093 (N.D.N.Y. Sept. 10, 2015).
293. *Id.* at *1.
294. *Id.*
295. *Id.* at *2. *See also* N.Y. INS. LAW § 3408(c) (McKinney 2014).
296. *Quick Response Commercial Div.*, 2015 WL 5306093, at *2. *See also* N.Y. INS. LAW § 3408(c) (McKinney 2014).
297. Quick Response Commercial Div. v. Cincinnati Ins. Co., 2015 WL 5306093, at *3 (N.D.N.Y. Sept. 10, 2015).
298. *Id.* (citing Zarour v. Pac. Indem. Co., 2015 WL 4385758, at *3 (S.D.N.Y. July 6, 2015) (holding that the question of apportioning damage causation is a factual question subject to appraisal)).

parties' dispute involved the extent and value of the loss, not the scope of coverage, appraisal was appropriate.[299]

2. Timeliness of Demand or Refusal to Appraise

In *Zarour v. Pacific Indemnity Co.*,[300] the U.S. District Court for the Southern District of New York held that the right to appraisal must be exercised within a reasonable time.[301] Courts consider three factors in determining whether a demand for appraisal is timely: "(1) whether the appraisal would result in prejudice to the insured party; (2) whether the parties engaged in good-faith negotiations over valuation of the loss prior to the appraisal demand; and (3) whether an appraisal is desirable or necessary under the circumstances."[302] The defendants' appraisal demand was timely because the plaintiffs waited months between accepting the initial payment and filing suit; the plaintiffs were not prejudiced by the two year gap between the date of loss and the demand date; and the defendants continued to try to resolve the dispute even after suit was filed.[303]

In *Nassar v. Liberty Mutual Fire Insurance Co.*,[304] the plaintiffs alleged that the defendant waived its right to appraisal by failing to invoke it until four years after suit was filed.[305] The court determined that a party does not waive the right to appraisal absent "(1) intentional relinquishment or intentional conduct inconsistent with claiming the right; and (2) prejudice [to the other party]."[306] The court held that waiver based on delay is evaluated from the date on which it becomes evident that the parties reach an impasse in negotiations and not from the date that the parties disagree as to coverage.[307] The court concluded that the defendant did not waive its right to appraisal because it waited until it became clear that the parties would not resolve the matter before requesting appraisal.[308]

3. Enforcing and Modifying Appraisal Awards

In *Silverstein v. XI Specialty Insurance Co.*,[309] the court held that, although there is no statue governing vacating and modifying appraisal awards, the awards receive deferential judicial review similar to the standard of review

299. *Quick Response Commercial Div.*, 2015 WL 5306093, at *4.
300. 2015 WL 4385758 (S.D.N.Y. July 6, 2015).
301. *Id.* at *4.
302. *Id.*
303. *Id.*
304. 478 S.W.3d 65 (Tex. App. 2015).
305. *Id.* at 76.
306. *Id.*
307. *Id.* at 77.
308. *Id.*
309. 2016 WL 3963129 (S.D.N.Y. July 21, 2016).

for arbitrations.[310] Thus, New York courts apply Civil Practice Law and Rule § 7511 to review appraisal awards.[311] The U.S. District Court for the Southern District of New York determined that an appraisal award should be affirmed unless there is "clear and convincing evidence that the appraiser rendered the award in bad faith without sufficient thoroughness or based on bias or fraud."[312]

4. Appraiser Qualifications

In *Neumann v. Allstate Insurance Co.*,[313] the Ninth Circuit held that a retired judge was not a qualified appraiser within the meaning of the policy because the plaintiff failed to show that the judge was knowledgeable or experienced in appraising damaged cars.[314] The court held that serving as a judge "does not qualify a person as an expert as to each and every subject matter[.]"[315]

VIII. WHO CAN SUE ON THE POLICY AND COLLECT PROCEEDS

In *Bioscience West, Inc. v. Gulfstream Property & Casualty Insurance Co.*,[316] the insured hired Bioscience to perform emergency water removal and construction services in her home and executed an "assignment of insurance benefits," authorizing Bioscience to directly bill and collect from the policyholder's carrier.[317] The insured's claim was denied.[318] Bioscience, as assignee, sued for breach of contract.[319] On summary judgment, the insurer argued that the anti-assignment provision required its consent for assignment, and the insured never obtained consent.[320] The court agreed with Bioscience that the provision prohibited the policyholder's assignment of the entire policy because the provision referred to "[a]ssignment of this policy."[321] As the assignment was a post-loss assignment of a policy benefit, i.e., the right to seek payment for mitigation services, and not an assignment of the entire policy, however, the assignment was valid.[322]

310. *Id.* at *5.
311. *Id.*
312. *Id.*
313. 638 F. App'x 619 (9th Cir. 2016).
314. *Id.* at 620.
315. *Id.*
316. 185 So. 3d 638 (Fla. Dist. Ct. App. 2016).
317. *Id.* at 639–40.
318. *Id.* at 640.
319. *Id.*
320. *Id.*
321. *Id.*
322. *Id.* at 641.

IX. SUIT LIMITATIONS

In *Greenlake Condominium Ass'n v. Allstate Insurance Co.*,[323] the insured discovered hidden damage to and decay of the exterior walls of the condominium and the condominium's elevated walkway.[324] The U.S. District Court for the Western District of Washington rejected the insurer's argument that the insured's lawsuit was barred by the suit limitation provision of the policy, relying on Washington Supreme Court precedent, which held that a suit limitation clause requiring a lawsuit be commenced "after a loss occurs" did not, in cases of hidden decay, begin to run until either the decay was "revealed" or "no longer obscured from view."[325]

X. BAD FAITH

In *Tran v. Seneca Insurance Co.*,[326] a property owner suffered damages after a local fire department had to remove water from the property's flat roof, which was in danger of collapsing.[327] After being denied coverage, the property owner sued Seneca, alleging bad faith because Seneca did not estimate the loss and unreasonably delayed its investigation.[328] The U.S. District Court for the Eastern District of Pennsylvania disagreed, finding that Seneca conducted a reasonable investigation because it employed an adjuster, reviewed the property owner's estimate, reviewed the fire department's investigation, and requested documents during its investigation.[329] While the court held that there was a delay because the investigation took over a year, the delay not was due solely to Seneca.[330]

In a unique case from the U.S. District Court for the Eastern District of North Carolina, *Woodson v. Allstate Insurance Co.*,[331] the court awarded bad faith damages to an insured who sued under a National Flood Insurance Program (NFIP) policy, notwithstanding the general rule that bad faith is not actionable under the NFIP.[332] After Allstate denied coverage under the theory that Hurricane Irene had not caused flood damage to the property, the court found through a bench trial that Allstate had acted in bad faith.[333] The court conceded that it was "aware of other cases finding

323. 2015 WL 11988945 (W.D. Wash. Dec. 23, 2015).
324. *Id.* at *1.
325. *Id.* at *3 (citing Panorama Vill. Condo. Owners Ass'n Bd. of Dirs. v. Allstate Ins. Co., 26 P.3d 910, 912 (Wash. 2001)).
326. 2015 WL 5964996 (E.D. Pa. Oct. 14, 2015).
327. *Id.* at *1.
328. *Id.* at *6.
329. *Id.* at *7.
330. *Id.*
331. 186 F. Supp. 3d 510 (E.D.N.C. 2016).
332. *Id.* at 512.
333. *Id.* at 515.

that such state extra-contractual statutes are preempted by the federal program[.]"[334] However, the court found treble damages were warranted because of the "higher purpose of the NFIP: providing relief for worthy claims."[335] The court awarded bad faith damages because the insurer flagrantly had violated that purpose.[336]

334. *Id.* at 517–18.
335. *Id.* at 518.
336. *Id.*