RECENT DEVELOPMENTS IN PROPERTY INSURANCE COVERAGE LITIGATION

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I. INTRODUCTION

For the first time in several years, this year's survey of developments in property insurance law is not dominated by cases arising out of any one particular substantive area. We discuss notable cases in many areas, but there is no discernible overall trend or dominance by any singular substantive event, like Hurricane Katrina or Chinese-manufactured drywall, giving rise to one large set of claims. For example, we discuss the Seventh Circuit's rather unique application of a continuous trigger theory, more often applied to a liability policy, to a property policy. We also look at interesting cases involving the insurers' reliance on, and some policyholders' reluctance to participate in, examinations under oath.

II. BUSINESS INTERRUPTION / CIVIL AUTHORITY

The recent decision of *Millennium Inorganic Chemicals Ltd. v. National Union Fire Insurance Co. of Pittsburgh, PA*[1] adds to the relatively small number of cases that have interpreted contingent business interruption (CBI) coverage. In *Millennium*, the insured, a global producer of titanium dioxide, claimed for business interruption losses it sustained due to the loss of the natural gas supply at its plant in Western Australia. At issue was whether the natural gas production facility was a "direct contributing property" under the insured's contingent business interruption coverage

1. 2012 WL 4480708 (D. Md. Sept. 28, 2012).

even though the insured purchased the gas from an intermediary, which in turn bought the gas from natural gas producers for resale.

Millennium's policies provided coverage for loss resulting from the interruption of business

> caused by damage to or destruction of any of the real or personal property described below and referred to as CONTRIBUTING PROPERTY(IES) and which is not operated by the Insured, by the peril(s) insured against during the term of this Policy, which wholly or partially prevents delivery of materials to the Insured or to others for the account of the Insured and results directly in a necessary interruption of the Insured's business.[2]

The policies did not identify specific contributing property or define "direct supplier" and "contributing property."

Neither the insurer nor the insured argued that the language was ambiguous, but each offered a contrary application of the CBI coverage. The court noted that the gas company was a "supplier" of gas to Millennium, notwithstanding the intermediary from which Millennium contracted to receive the gas. It held that although the parties intended for CBI coverage to apply only to direct contributing properties, there was no extrinsic evidence reflecting the specific meaning of "direct" or how the coverage would apply in the context of the insured's natural gas supply. Therefore, the court relied on contra proferentem and resolved any ambiguity in favor of the insured. The court concluded that the "natural gas production facility was a 'direct contributing property' to Millennium's [o]perations, so as to come within the CBI coverage" of the policies, because the gas facility physically provided a direct supply of natural gas to Millennium's premises despite the fact that the gas facility and Millennium did not have a direct contractual relationship.[3]

III. COLLAPSE

The question of whether coverage for "collapse" requires a building to actually collapse or merely be structurally damaged and in danger of collapse, albeit standing, continues to generate interesting case law. In *Kappa Ethanol, LLC v. Affiliated FM Insurance Co.*,[4] the Eighth Circuit affirmed a trial court's ruling that a property policy covered a collapse of ethanol tanks where the tanks had shifted but remained standing, although it remanded the case for a new trial on the issue of how imminent the collapse of the tanks needed to be to trigger coverage.

2. *Id.* at *3.
3. *Id.* at *19.
4. 660 F.3d 299 (8th Cir. 2011).

The ethanol tanks in *Kappa Ethanol* were stainless steel tanks that began to shift off of their concrete foundation rings soon after construction. The ethanol plant owner reset the tanks on their foundations and replaced the fill underlying them, but its property insurer declined to cover its claim, citing the policy's exclusions for faulty workmanship and settling. The policy provided coverage for a collapse, but only as an exception to the exclusion for loss caused by settling. In the ensuing coverage case, the insurer did not object to a jury instruction that allowed the jury to find a "collapse" without finding that the tanks were "in imminent danger of falling down."[5] The jury found that $4 million of Kappa's damages were caused by a collapse.[6]

On appeal, the Eighth Circuit held that the insurer had waived its argument that the loss was caused by a collapse because it had not objected to the jury instruction.[7] It held, however, that Nebraska law may require the collapse to be "imminent," and it remanded the case for a jury finding on whether the collapse of the tanks was imminent.[8]

The Florida District Court of Appeal also confronted this issue in *Kings Ridge Community Ass'n, Inc. v. Sagamore Insurance Co.*,[9] where the roof trusses of the insured's clubhouse "deflected twelve inches" downward and a drop ceiling similarly lurched downward. The policy defined "collapse" as "an abrupt falling down or caving in of a building or part of a building"; it also provided that a building "in danger of falling down or caving in" or that is "standing . . . even if it shows evidence of cracking, bulging [or] bending, leaning . . ." would not be considered to have collapsed.[10] The insured sued after the insurer denied the claim, and the trial court granted the insurer's motion for summary judgment, holding that the clubhouse was not in a state of collapse that would trigger coverage.[11]

The appellate court disagreed. It held that the downward movement of the roof trusses and the drop ceiling constituted a "falling down" of those elements of the building sufficient to trigger coverage; moreover, those parts were not "standing" when a dictionary definition of that word, meaning "upright on the feet or base," was applied to the policy.[12]

5. *Id.* at 303.
6. *Id.*
7. *Id.* at 304.
8. *Id.* at 306.
9. 98 So. 3d 74 (Fla. Dist. Ct. App. 2012).
10. *Id.* at 75–76.
11. *Id.* at 75.
12. *Id.* at 78 (quoting MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 1216 (11th ed. 2008)).

IV. COVERED PROPERTY

In *Tracy v. USAA Casualty Insurance Co.*,[13] the District of Hawaii had to decide whether plaintiff could bring a breach of contract claim against her insurer for failing to pay a claim for stolen property under her homeowners policy. Her policy provided "coverage for loss to trees, shrubs, and other plants."[14] She filed a claim for the theft of twelve marijuana plants that she "lawfully possessed, grew, nurtured and cultivated . . . consistent with the laws of the State of Hawaii," which allows individuals "to possess and grow marijuana for medical purposes."[15] USAA agreed to pay the claim and issued a check, but when the insured complained that it was not enough, USAA refused to make any further payments because it believed plaintiff did not have an insurable interest in the plants.[16] Relying on the Hawaii Legislature's intent that users of medical marijuana not face criminal penalties,[17] the court predicted "the Hawai'i Supreme Court would hold that a qualifying patient who is in strict compliance with the Hawai'i medical marijuana laws has a lawful interest [and thus insurable interest] in her marijuana supply."[18] Despite this prediction, the court granted the insurer's motion for summary judgment, holding that "[p]laintiff's possession and cultivation of marijuana, even for State-authorized medical use, clearly violates federal law. To require the insurer to pay insurance proceeds for the replacement of medical marijuana plants would be contrary to federal law and public policy."[19]

In *Gilbert v. Allstate Insurance Co.*,[20] plaintiff owned a building as a tenant in common that he insured solely in his name.[21] After a fire destroyed the building, plaintiff filed a claim and defendant paid him for one-half of the value of the property.[22] The court held that "[w]hen two co-tenants own real property which is damaged by a fire and insurance is procured in the name of only one co-tenant, recovery under the policy is limited to the insured co-tenant's one-half interest in the real property."[23]

13. 2012 WL 928186 (D. Haw. Mar. 6, 2012).
14. *Id.* at *1 (internal quotation marks omitted).
15. *Id.*
16. *Id.* USAA made the argument that "in order to have an insurable interest, the insured's interest in the property must be 'lawful' property." *Id.* at *2 (citing HAW. REV. STAT. § 431:10E-101).
17. *See* 2000 Haw. Sess. Laws Act 228, § 1, at 595–96 ("Therefore, the purpose of this Act is to ensure that seriously ill people are not penalized by the State for the use of marijuana for strictly medical purposes when the patient's treating physician provides a professional opinion that the benefits of medical use of marijuana would likely outweigh the health risks for the qualifying patient.").
18. *Tracy*, 2012 WL 928186, at *10.
19. *Id.* at *13.
20. 95 A.D.3d 1072 (N.Y. App. Div. 2012).
21. *Id.* at 1073.
22. *Id.*
23. *Id.* (citations omitted).

V. EXCLUSIONS

A. *Earth Movement*

The Supreme Court of New Hampshire held that an earth movement exclusion did not bar coverage for damage caused when a cellar chamber holding the insured's septic pump gave way under the pressure of heavy groundwater, allowing water to ruin the pump. In *Barking Dog, Ltd. v. Citizens Insurance Co. of America*,[24] the insured's septic system failed during a period of heavy rain and melting snow. Although its expert opined that the underground septic box failed due to water pressure and the pressure of water-swollen earth, the insurer declined coverage based on the earth movement exclusion.[25] In its declaratory judgment action, the insured argued the earth movement exclusion gave way to the "Broad Form Water Damage" endorsement it had purchased, which covered damage caused by "water under the ground surface pressing on . . . foundations, wall, floors [or] basements."[26] After the trial court held that the endorsement trumped the earth movement exclusion, the insurer appealed. The New Hampshire Supreme Court, affirming, rejected the insurer's argument that a subterranean septic chamber did not have a "wall," "ceiling," or "floor" as those terms are commonly used.[27] It also held that to the extent the two conflicting provisions of the policy, the earth movement exclusion and the water damage endorsement, were in conflict, the resulting ambiguity was to be read in favor of coverage: "a reasonable layperson would not understand that the additional coverage he paid for does not provide such coverage."[28]

Also during the survey period, a Massachusetts appellate court affirmed a trial court's holding that the earth movement exclusion barred coverage for damage to a condominium unit where the insured's expert opined that the damage resulted from "hydro-compaction related to a leak in a water pipe."[29] The insured in *Audubon Hill South Condominium Association v. Community Association Underwriters of America, Inc.*[30] argued that another portion of the expert's opinion, i.e., that the damage to the unit occurred suddenly, made the loss a covered collapse despite the earth movement exclusion, but the court held that anti-concurrent causation language in the earth movement exclusion barred coverage.[31]

24. 53 A.3d 554 (N.H. 2012).
25. *Id.* at 557.
26. *Id.*
27. *Id.* at 558.
28. *Id.* at 559.
29. Audubon Hill S. Condo. Ass'n v. Cmty. Ass'n Underwriters of Am., Inc., 975 N.E.2d 458, 462 (Mass. App. Ct. 2012).
30. *Id.*
31. *Id.* at 469.

B. *Dishonest Acts*

In *2315 St. Paul Street v. Hartford Fire Insurance Co.*,[32] an insured sought coverage under a builder's risk policy for a demolition contractor's theft of fixtures, construction equipment, and other items. The demolition contractor was given unsupervised access to the property and had removed the items without the owner's permission while the property's supervisor was away on vacation.[33] Upon learning of the items' removal, the property supervisor contacted the demolition contractor and entered into a second contract under which the demolition contractor agreed to "fulfill the terms of his original contract" and "correct and repair any damage and replace any stolen or destroyed items at his expense."[34] When the demolition contractor failed to honor the second contact, the insured contacted law enforcement and filed an insurance claim for the theft.[35] The insurer denied the claim, contending the policy's entrustment exclusion precluded coverage because "the loss in question was caused exclusively by dishonest and criminal acts of a contractor to whom you entrust[ed] the property."[36] The trial court granted the insurer's motion for summary judgment, finding that the demolition contractor was responsible for the theft and that the entrustment exclusion applied because the insured had entrusted the property to the demolition contractor by providing the contractor with "unfettered access to the property . . . and with the confidence that he would complete the demolition work and secure the building."[37]

C. *Faulty Workmanship*

In *1765 First Associates, LLC v. Continental Casualty Co.*,[38] a tower crane collapsed on a construction site. The insurer agreed to pay for certain costs arising from damage to and cleanup of the construction site and building stemming from the crane collapse.[39] Relying on the faulty workmanship exclusion in the builder's risk policy, the insurer refused to reimburse the insured for costs associated with construction delays resulting from the collapse.[40] In entering declaratory judgment for the insured, the court held that

> the Faulty Workmanship Exclusion, as it is most naturally read, does not apply to losses related to accidents or equipment malfunctions during con-

32. 2012 WL 2450167 (D. Md. June 25, 2012).
33. *Id.* at *1–2.
34. *Id.* at *2.
35. *Id.* at *5–6.
36. *Id.*
37. *Id.* at *6–8.
38. 817 F. Supp. 2d 374 (S.D.N.Y. 2011).
39. *Id.* at 375.
40. *Id.*

> struction. . . . [T]he Faulty Workmanship Exclusion applies only to losses attributable to the quality of the constructed property and arising from defects in the materials or process used by the insured or its agents to construct the property, that provision does not exclude losses incurred during construction associated with the crane collapse.[41]

D. *Mold and Water Damage*

1. No Direct Physical Loss

In *Miller v. Safeco Insurance Co. of America*,[42] the Seventh Circuit affirmed the somewhat unique application of a continuous trigger to a first-party insurance loss. The case presented the question of whether the insureds experienced an "accidental direct physical loss to property" during the policy period.[43] After purchasing a home, the insureds discovered extensive water and mold damage. Their insurer denied the claim on the basis that the claimed damage did not occur during the policy period.[44] With respect to the question of when the loss occurred, the court observed that Wisconsin law applies the "continuous trigger theory to determine the date of injury in cases where the exact date of harm is uncertain and potentially occurring over several policy periods."[45] The court was not persuaded that this trigger theory is only applicable to liability insurance cases but also found that the loss manifested during the policy period.[46] Safeco argued that "because the district court found that the property was a total loss when the [insureds] discovered the problem, the water leakage and mold growth [could not] have caused any direct physical loss to the property during the policy period."[47] The court disagreed, stating, "That the degree of damage put the home beyond repair doesn't mean water leakage wasn't still causing further direct physical loss to the property during the policy period."[48] The court also held that Safeco could not rely on any policy exclusions because the insureds did not receive the policy until after they discovered the loss. "Wisconsin law provides that an insurer cannot rely on a policy's exclusions when it fails to inform the insured of those terms."[49]

In *Universal Image Productions, Inc. v. Federal Insurance Co.*,[50] the court affirmed summary judgment in favor of the insurer after finding that mold

41. *Id.* at 376 (internal citations omitted).
42. 683 F.3d 805 (7th Cir. 2012).
43. *Id.* at 809.
44. *Id.*
45. *Id.* at 810 (citing Soc'y Ins. v. Town of Franklin, 607 N.W.2d 342, 346 (Wis. Ct. App. 2000)).
46. *Id.* at 810–11.
47. *Id.* at 811.
48. *Id.*
49. *Id.* (citing Kozlik v. Gulf Ins. Co., 673 N.W.2d 343, 348 (Wis. Ct. App. 2003)).
50. 475 F. App'x 569 (6th Cir. 2012).

and bacteria contamination did not constitute "direct physical loss or damage."[51] The insured was a tenant in a building where a "significant microbial contamination" was identified in the heating, ventilation, and air conditioning system, which required the system to be shut down (during 100 degree heat) and the insured to relocate from the first floor to the third floor during remediation.[52] The insured made a claim for lost leasehold improvements, cleaning and moving expenses, and lost business income.[53] The insurer denied the claim, arguing that the insured had not suffered a "direct physical loss."[54] The policy did not define "direct physical loss or damage," but the insurer argued that mold and bacterial contamination did not qualify because no property of the insured was "structurally damaged."[55]

The court held that although the insured had suffered an inconvenience, it had not demonstrated that it had experienced any "tangible damage" to its property.[56] The court held the claimed cleaning and moving expenses were economic, not tangible, losses.[57]

2. Anti-Concurrent Causation

During the survey period, three cases dealt with the application of anti-concurrent causation issues in water damage claims. This issue often comes up when determining whether wind, which is often covered, or water, which is frequently excluded or limited, caused the loss in question. In *Robichaux v. Nationwide Mutual Fire Insurance Co.*,[58] the insurer denied coverage for an insured's claim for property damage following Hurricane Katrina. The trial court granted summary judgment for Nationwide, finding that the insureds failed to create an issue of fact as to whether their home was damaged by wind or destroyed by flood.[59] Although the fact that the home was ultimately destroyed by flood was not disputed, the Supreme Court of Mississippi held that it was error for the trial court to have concluded that there was no issue of fact as to whether the home was damaged by wind prior to the storm surge.[60] Not all the damage, the court found, was caused by a simultaneous convergence of wind and water. Therefore, the anti-concurrent causation clause would not apply to damage caused by wind prior to the storm surge.

51. *Id.* at 569–70.
52. *Id.* at 570.
53. *Id.* at 571.
54. *Id.* at 572–73.
55. *Id.*
56. *Id.* at 575.
57. *Id.*
58. 81 So. 3d 1030 (Miss. 2011).
59. *Id.* at 1037.
60. *Id.*

Two Massachusetts cases addressed anti-concurrent causation clauses in the context of surface water exclusions. In *Boazova v. Safety Insurance Co.*,[61] the insured brought a claim for water damage to her home, which was built against the side of a hill with a full basement and garage below the house. A concrete patio was added at the rear of the house at a grade higher than the foundation. There was no waterproofing barrier or membrane between the patio and the rear wall of the house to prevent water from entering the home's wooden frame. Extensive interior wall damage was found during kitchen renovations.[62] The insured informed the insurer that ground water, surface water, or both entered the home through the sill and rear wall where the patio was added.[63] The insurance company denied the insured's claim because the damage was "caused by a combination of surface water, deterioration, settling, and improper construction of the concrete patio. . . ."[64] The court agreed with the insurer, unconvinced by the insured's argument in favor of coverage built on a distinction between "hidden seepage" and "surface water."[65] Because the surface water exclusion included anti-concurrent causation language, the court held that it barred coverage where the loss was caused by a combination of covered and excluded perils.[66]

The same court reached the same conclusion in *Surabian Realty Co. v. NGM Insurance Co.*[67] The insured made a claim for damage caused when a parking lot drain, which backed up during a heavy rainstorm, caused flooding in the building. The insured argued that the loss was covered as a result of "water that backs up or overflows from a sewer, drain or sump."[68] The court found that although the loss did result in part due to a backup, it was also caused by the accumulation of surface water.[69] As a result, the policy's anti-concurrent causation provision excluded coverage for damage caused by surface water "regardless of any other cause or event that contributes concurrently or in any sequence to the loss."[70]

E. *Ensuing Loss*

In *Vision One, LLC v. Philadelphia Indemnity Insurance Co.*,[71] the insured was developing a condominium project.[72] Temporary shoring, which

61. 968 N.E.2d 385 (Mass. 2012).
62. *Id.* at 388.
63. *Id.* at 388–89.
64. *Id.*
65. *Id.* at 393.
66. *Id.* at 394.
67. 971 N.E.2d 268 (Mass. 2012).
68. *Id.* at 273.
69. *Id.* at 274.
70. *Id.* at 271.
71. 276 P.3d 300 (Wash. 2012).
72. *Id.* at 302.

was installed during construction to support the pouring of a concrete slab, failed; as a result, the framing, rebar, and newly poured concrete crashed onto a lower level.[73] The carrier denied coverage, contending that the builder's risk policy excluded faulty workmanship and defective design.[74] The insured contended that the resulting loss due to the faulty workmanship was the collapse of the concrete and thus coverage should be extended.[75] The court found that ensuing loss clauses limit the scope of what is otherwise excluded under the policy because they ensure that any ensuing loss that is otherwise covered remains covered even if the original event is never covered.[76] Applying this reasoning, the court held that the collapse resulting from the faulty workmanship was covered due to the ensuing loss clause.[77]

In *Sprague v. Safeco Insurance Co.*,[78] the insured discovered that the supports of a deck were improperly constructed and made a claim to its insurer.[79] The insurer denied coverage based on the defective construction exclusion.[80] The insured contended that the deck was in a state of imminent collapse due to the rot and resulting damage from the defective construction.[81] The court found that the damage to the deck was excluded by the policy because the rot and imminent collapse was only to the deck itself.[82] There was no damage to any other property that would have triggered coverage under the ensuing loss provision.[83]

In *Friedberg v. Chubb & Son, Inc.*,[84] the insureds discovered extensive water damage to their home and requested coverage from their insurer.[85] After an investigation, the insurer denied coverage, contending that the water damage was a loss caused by faulty construction and therefore was excluded from the policy.[86] The insureds argued that the water damage was an ensuing loss and thus an exception to the exclusion.[87] Examining Minnesota law, the court determined that an ensuing loss provision applies only to "distinct, separable, ensuing losses."[88] The damage due to

73. *Id.* at 303.
74. *Id.* at 303–04.
75. *Id.* at 304.
76. *Id.* at 307.
77. *Id.* at 310.
78. 276 P.3d 1270 (Wash. 2012).
79. *Id.* at 1271.
80. *Id.*
81. *Id.*
82. *Id.* at 1272.
83. *Id.*
84. 691 F.3d 948 (8th Cir. 2012).
85. *Id.* at 950.
86. *Id.*
87. *Id.*
88. *Id.* at 953.

faulty construction and resulting water intrusion were not "separable and distinct perils."[89] The interpretation advocated by the insureds, it held, would "nearly destroy the exclusion."[90] In the court's view, "[t]o define a loss that is contributed to, made worse by, or in any way results from faulty construction as only the cost of remedying the construction defect itself would be an unnatural reading of the language."[91]

VI. DAMAGES

A. *Hold Back*

In *Florida Insurance Guaranty Association v. Somerset Homeowners Association, Inc.*,[92] the Florida District Court of Appeal reversed a trial court ruling and held that plaintiff properly withheld depreciation.[93] After suffering hurricane damage to its condominiums, defendant filed claims with its insurer; when a dispute arose about the amount of loss, it was submitted to appraisal.[94] The umpire issued an award for both the replacement cost value (RCV) and the actual cost value (ACV) of the loss.[95] The insurer neither timely paid the award nor contested it, and the insured obtained a final judgment of $6,262,339 from the trial court as the ACV.[96] The insurer appealed on the grounds that the appraisal award included $951,262 attributed to depreciation.[97] The policyholder countered that it should receive "the depreciation under the doctrine of prevention of performance because [the insurer] failed to timely pay the appraisal award."[98] Under the language of the policy, "an insured must actually repair or replace the damage as a condition precedent to payment of replacement costs."[99] The court found this policy language to be unambiguous and remanded the case to the trial court to deduct the depreciation.[100]

B. *Other Insurance*

In *Tyler v. Pacific Indemnity Co.*,[101] two parties entered into a land contract for the purchase and sale of real property. Although the seller had existing

89. *Id.*
90. *Id.* at 954.
91. *Id.*
92. 83 So. 3d 850 (Fla. Dist. Ct. App. 2011).
93. *Id.* at 853.
94. *Id.* at 851.
95. *Id.*
96. *Id.*
97. *Id.*
98. *Id.*
99. *Id.* at 852.
100. *Id.* at 853.
101. 2012 WL 300883 (E.D. Mich. Feb. 1, 2012).

property insurance on the property, the land contract required the purchaser to obtain property insurance on the property.[102] Thus, two property insurance policies were in effect at the same time on the property.[103] After a fire occurred, the purchaser made a claim under his property policy. The insurer denied the claim and, as a result, the purchaser filed suit against the insurer.[104] One issue on summary judgment was the insurer's reliance on the policy's "other insurance" clause, which required a pro rata allocation in the event that other property insurance applied to a covered loss. The Eastern District of Michigan, applying Michigan law in connection with "other insurance" clauses, held that those clauses "only apply [when] the applicable insurance policies cover the same interests in the same property."[105] In entering summary judgment in favor of the purchaser, the court stated that "the policies were on the same property and against the same risks[,] but on different interests and payable to different parties. . . . As such, the other insurance clause does not apply."[106]

VII. OBLIGATIONS AND RIGHTS OF THE PARTIES

A. *Representations and the Application for Insurance*

In *Sexton-Walker v. Allstate Insurance Co.*,[107] the insurer, investigating a claim for water damage, learned the insured had made several misrepresentations on her insurance application. The insured answered "yes" in the application when asked whether "the dwelling . . . [was] on a solid and continuous foundation," but the insurer discovered "the property was a mobile home and therefore not on a solid and continuous foundation."[108] The insured also stated in the application that the property was regularly occupied in the days and evenings, but she conceded in her examination under oath that she "mostly live[d] in [another state]."[109] Finally, the insured had made nine property claims in the last five years, despite answering "none" when asked to describe her five-year loss history at the residence.[110] On appeal, the Fifth Circuit affirmed the district court's grant of summary judgment, finding the misrepresentations were material and that there were no genuine issues of fact for trial.[111]

102. *Id.*
103. *Id.* at *1–2.
104. *Id.* at *2.
105. *Id.* at *4 (citing Lubetsky v. Standard Fire Ins. Co., 187 N.W. 260, 260 (Mich. 1922)).
106. *Id.* at *5.
107. 2012 WL 3139567 (5th Cir. Aug. 2, 2012).
108. *Id.* at *2.
109. *Id.* at *5.
110. *Id.*
111. *Id.*

In *Landmark American Insurance Co. v. Moulton Properties, Inc.*,[112] the insured made a claim for damage related to Hurricane Dennis. During the claim adjustment, the insurers discovered that the "damage at issue was not from Hurricane Dennis, but instead was unrepaired or partially repaired damage from Hurricane Ivan."[113] The insured's insurance broker had previously submitted a property summary to the insurers during the policy application process representing that the repairs of prior storm damage from Hurricane Ivan were complete.[114] The insurers rescinded coverage and filed suit for declaratory judgment based upon the misrepresentations made by the broker about the status of repairs for damage related to Ivan.[115] The district court rejected all of the insurers' arguments for rescission, and the insurers appealed.[116] On appeal, the Eleventh Circuit considered whether the insurance broker was acting as an agent of the insured when it submitted the alleged misrepresentations regarding the status of repairs.[117] The court found that the broker was in fact the agent of the insured and held that, based on Florida law and the language of the brokerage contracts, all representations made by the broker were attributable to the insured.[118] The case was remanded to the district court for a finding of whether the representations were material.[119]

B. *Examinations Under Oath*

An increasing number of cases are holding that policyholders must submit to an examination under oath (EUO) and answer questions as a condition precedent to coverage; failure to comply can bar recovery under the insurance policy. Occasionally, these cases have held that an insurer has the right to examine an insured that no longer has an interest in the property. For example, in *Citizens Property Insurance Corp. v. Ifergane*,[120] the insureds submitted a claim under a wind-only dwelling policy for damage from Hurricane Wilma. The insurer made an initial payment and then requested the EUOs of both insureds when it became concerned the property had suffered damage not covered under the policy.[121] The insureds filed for divorce shortly after the claim was submitted, and as part of the divorce Alexandra Ifergane "executed a quit claim deed to Haim Ifergane granting him 'all right, title, interest, claim and demand' in the subject

112. 440 F. App'x 788 (11th Cir. 2011).
113. *Id.* at 791.
114. *Id.*
115. *Id.*
116. *Id.*
117. *Id.* at 792–93.
118. *Id.*
119. *Id.* at 795.
120. 2012 WL 4010964 (Fla. Dist. Ct. App. Sept. 12, 2012).
121. *Id.*

property."[122] Haim Ifergane submitted a proof of loss and sat twice for his EUO.[123] However, Alexandra refused to appear, "asserting that she was not obligated to do so because she had assigned [to her ex-husband] all of her rights and interest in the property."[124] The insurer filed suit, seeking a declaratory judgment that, among other things, the "assignment did not relieve [Alexandra] of her obligations under the policy."[125]

The trial court found that Haim was entitled to coverage as a resident spouse co-insured who complied with the policy's post-loss requirements, and that Alexandra's "alleged failure to comply could not be imputed to him as an innocent co-insured."[126] It also granted Alexandra's motion to dismiss based on the fact she transferred her rights and never made a claim for the insurance proceeds.[127] The appellate court reversed, finding that the insurer was entitled to an EUO from Alexandra as a named insured and resident spouse with potentially material information, regardless of the assignment.[128] The appellate court further held that Alexandra's refusal to submit to an EUO precluded any recovery under the policy, even for her ex-husband, because submitting to an EUO was a condition precedent to coverage.[129]

In *Portside Investors, LP v. Northern Insurance Co. of New York*,[130] the owner of a pier on the Delaware River filed an insurance claim after the pier collapsed. Shortly thereafter, the insured's principal was indicted for "involuntary manslaughter and other offenses related to ignoring warnings by engineers and others that the pier was unsafe and in danger of imminent collapse."[131] The insurer requested the EUO of the indicted principal to investigate his knowledge of the pier's decay before its collapse and refused to further adjust the claim without his EUO.[132] On appeal, the insured claimed this position was a "bad faith delay tactic, as there was no reason to believe [the principal] could do anything at that point except exercise his Fifth Amendment rights throughout the course of his criminal case."[133] The appellate court affirmed the trial court's denial of the insured's statutory bad faith claim related to the EUO request, noting that, under the insurance policy, "coverage was unavailable for the . . . loss

122. *Id.*
123. *Id.*
124. *Id.*
125. *Id.* at *2.
126. *Id.*
127. *Id.*
128. *Id.* at *5.
129. *Id.* at *17.
130. 41 A.3d 1 (Pa. Super. Ct. 2011).
131. *Id.* at 5.
132. *Id.* at 7.
133. *Id.*

caused by 'decay' unless the decay was 'hidden decay,'" and that the "indictment gave reason to believe [the pier's] collapse resulted from something other than hidden decay."[134] Thus, the EUO request sought information material to the coverage analysis and was a reasonable part of the investigation into whether the pier decay was actually hidden decay unknown to the insured before the collapse.[135]

C. *Proof of Loss*

In *Telerico v. Nationwide Mutual Fire Insurance Co.*,[136] the insureds submitted a notice of claim after their home was damaged when its roof sagged and leaked. The insurer began an investigation of the loss but closed its file after the insured failed to submit a completed proof of loss as requested.[137] The insureds filed suit several years later, and the insurer moved for summary judgment claiming the insureds could not recover under the policy for six reasons, including their failure to timely return their proof of loss as required under the terms of the policy.[138] The policy stated that the insured was required to submit a sworn proof of loss within sixty days after requested by the insurer.[139] In their depositions, the insureds both testified that they had "no memory" of sending the proof of loss to the insurer.[140] However, one of the insureds submitted an affidavit after his deposition asserting that he had properly mailed the requested information to the insurer.[141] The district court granted summary judgment to the insurer because the insured had not established that the proof of loss was properly mailed and timely received, which was a condition precedent to recovery under the policy.[142] Regarding the affidavit, the court followed the Sixth Circuit's instruction that a factual issue is not created when a party files an affidavit that contradicts his earlier deposition testimony after a motion for summary judgment has been made.[143]

VIII. APPRAISAL

A. *Scope of Appraisal*

In *Auto-Owners Insurance Co. v. Second Chance Investments, LLC*,[144] the issue was whether the district court erred by denying the insurer's motion

134. *Id.* at 8.
135. *Id.* at 14.
136. No. 11-10702, 2012 WL 3609882 (E.D. Mich. Aug. 22, 2012).
137. *Id.* at *4.
138. *Id.* at *6.
139. *Id.* at *1.
140. *Id.* at *9.
141. *Id.*
142. *Id.*
143. *Id.* at *10.
144. 812 N.W.2d 194 (Minn. Ct. App. 2012).

to compel appraisal to determine whether the fire resulted in a total loss to the insured's property. In this case, the property caught fire and certain areas of the residence were charred and burned, while other areas were completely destroyed.[145] The insured filed a proof of loss with the insurer claiming that it was a "total loss" and asserted it was entitled to payment of the policy limits.[146] The insurer demanded appraisal to resolve both the scope of the damage and the amount of the loss.[147] The insured, which contended an appraisal was inappropriate, insisted that it would proceed only if the appraisal panel's determination would be binding as to whether a total loss occurred.[148] The insurer then filed suit, seeking a declaration that all issues be submitted to appraisal, including the determination as to whether the property suffered a total loss.[149] The district court denied the motion, holding that there were genuine issues of material fact and ordering that the issue of whether the property suffered a total loss be submitted to a jury.[150]

The appellate court affirmed, holding that the determination as to whether fire damage caused a total loss is beyond the scope of an appraisal panel's authority.[151] Noting that questions of law are outside the scope of an appraiser's powers, the court held that appraisers do not have the authority to determine liability under an insurance policy.[152] Therefore, the district court did not err in concluding that a jury must make the determination.

In *Quade v. Secura Insurance*,[153] the insured submitted a claim for storm damage to several buildings. The insurer paid for some of the damages but determined that the roofs of the buildings were not covered and informed the insured that it should initiate an appraisal if it disagreed.[154] Instead, the insured filed suit, arguing that the appraisal clause did not apply to its claim for damage to the roofs because the policy covered roof damage.[155]

The district court concluded that determining the amount of loss under the appraisal clause included a causation element and ordered the parties to appraisal.[156] The appellate court reversed the decision, conclud-

145. *Id.* at 196.
146. *Id.*
147. *Id.*
148. *Id.*
149. *Id.*
150. *Id.*
151. *Id.* at 201.
152. *Id.* at 199.
153. 814 N.W.2d 703 (Minn. 2012).
154. *Id.*
155. *Id.* at 705.
156. *Id.*

ing that resolution of the claim required determination of legal questions.[157] It held that appraisers have the authority to decide the "amount of loss" but may not construe the policy or decide whether the insurer should pay.[158] Thus, the appraisers must necessarily determine the cause of the loss as well as the amount necessary to repair the loss, but cannot go beyond that scope and interpret policy exclusions.[159]

B. *Timeliness of Demand or Refusal to Appraise*

In *Amerex Group, Inc. v. Lexington Insurance Co.*,[160] the Second Circuit held that an insurer's appraisal demand made six years after the loss was still timely in a case where the insured contributed to the delay. In *Amerex*, a 2001 flooding loss resulted from an equipment collapse that set off sprinklers. Two years later, the insured submitted its proof of loss to its primary and excess property carriers. The primary insurer paid its policy limits, and the insured sought to collect the remaining $6.3 million from its excess insurers. Those insurers ultimately denied the claim in 2006 based on the insured's failure to document the claimed loss of its business income. The parties then proceeded to mediation, in which the insurers made a settlement offer.[161] The insured rejected the offer and filed suit in 2007.[162]

In response, the excess insurers moved to compel appraisal.[163] The insured objected, arguing the demand was untimely and was made only to preclude the insured from prosecuting its claims and obtaining discovery.[164] The district court granted the excess insurers' motion.[165] On appeal, the insured claimed that the excess insurers' appraisal rights were waived because they had failed to invoke them within a reasonable time.[166]

The Second Circuit affirmed the appraisal demand. The court found that the insurers did not waive their appraisal rights by asserting them after the insured initiated litigation because much of the delay was due to the insured's inaction, i.e., specifically, its failure to promptly produce necessary documents.[167] Furthermore, the parties engaged in good faith negotiations prior to the appraisal demand.[168]

157. *Id.*
158. *Id.*
159. *Id.* at 708.
160. 678 F. 3d 193 (2d Cir. 2012).
161. *Id.* at 198.
162. *Id.*
163. *Id.*
164. *Id.*
165. *Id.*
166. *Id.* at 199.
167. *Id.*
168. *Id.*

C. *Enforcing and Modifying Appraisal Awards*

In *First Protective Insurance Co. v. Hess*,[169] First Protective challenged an appraisal award because the trial court affirmed the award without reducing it based on certain limits in the insured homeowner's policy. The policy contained a $1,000 deductible for all perils except for those caused by hurricanes.[170] Furthermore, the policy also provided "Special Limits of Liability" for certain items of personal property like money, gold, and jewelry.[171] The insured made a claim for losses after her home was burglarized. The appraisal panel issued an award to the insured for $130,011.[172] The appraisal award was not itemized.

First Protective issued a check for $28,994 based on its own calculation of the applicable deductibles and limits.[173] The insured sued, seeking confirmation of the original appraisal award amount. The trial court affirmed the original award, finding that it could not make the insurer's adjustments to the award because, in order to do so, it would need to take testimony from the appraisal panel, which was neither contemplated by the policy nor permitted by Florida law.[174] The Florida District Court of Appeal affirmed.[175]

D. *Miscellaneous Appraisal Issues*

To encourage insurers and insureds to resolve disputes without resort to litigation or appraisal, Florida Statutes § 627.7015 requires insurers to notify insureds of their right to participate in mediation when a first-party claim is made. If the insurer fails to do so, the insured is not required to submit to appraisal as a precondition for a suit for breach of contract for the insurer's failure to pay the claim. In *Gassman v. State Farm Florida Insurance Co.*,[176] the Florida District Court of Appeal enforced the statute in favor of the insured, finding that Gassman was not required to submit to appraisal because of the insurer's failure to comply with the statute.

However, the insured unsuccessfully attempted to invoke the statute in another Florida case.[177] In *American Integrity Insurance Co. of Florida. v. Gainey*, the insured claimed damage, which the insurer paid in part, to her home from a water leak.[178] The insured responded that the payment

169. 81 So. 3d 482 (Fla. Dist. Ct. App. 2011).
170. *Id.* at 483.
171. *Id.*
172. *Id.*
173. *Id.* at 484.
174. *Id.* at 485–86.
175. *Id.* at 485.
176. 77 So. 3d 210 (Fla. Dist. Ct. App. 2011).
177. Am. Integrity Ins. Co. of Fla. v. Gainey, 100 So. 3d 720 (Fla. Dist. Ct. App. 2012).
178. *Id.* at 721.

was "significantly inadequate" to cover the losses and subsequently filed a breach of contract suit against the insurer.[179] The parties engaged in mediation at the insured's request, but once mediation proved unsuccessful, the insurer requested appraisal.[180] The insured moved to enjoin appraisal, arguing that the insurer had waived its right by failing to provide notice of mediation pursuant to the statute.[181] On appeal, the court noted the statute was meant to encourage insurers and insureds to "use the mediation process to encourage an inexpensive and speedy resolution of insurance claims prior to commencing the appraisal process, or commencing litigation."[182] The court found that the insured could not rely on the statute because she had rendered it inapplicable by filing suit.[183]

IX. MISCELLANEOUS ISSUES

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

In *Stone Flood & Fire Restoration, Inc. v. Safeco Insurance Co. of America*,[184] the Supreme Court of Utah held that simply by signing a nonwaiver agreement as the "named insured" and the "spouse," the shareholders of a closely held corporation did not gain standing to sue for breach of a property insurance policy issued to the corporation.[185] In rejecting the shareholders' argument that identifying themselves as "named insured" and "spouse" on the nonwaiver converted them into "de facto insureds," the court reasoned that "[a] contrary conclusion would lead to the absurd result that Safeco insured the Stones' personal property when they paid no premiums to gain that coverage."[186] The court also held that the shareholders lacked standing to pursue their claim for intentional infliction of emotional distress against the insurance company on the grounds that their alleged injuries were derivative of injuries to the insured corporation.[187]

In *Peters v. Lexington Insurance Co.*,[188] the Hawaii District Court held that condominium owners did not have standing to sue under a property insurance policy issued to the condominium's homeowners association.[189]

179. *Id.*
180. *Id.*
181. *Id.*
182. *Id.* at 722 (citation emphasis and internal quotation marks omitted).
183. *Id.*
184. 268 P. 3d 170 (Utah 2011).
185. *Id.* at 177.
186. *Id.*
187. *Id.* at 179.
188. 836 F. Supp. 2d 1117 (D. Haw. 2011).
189. *Id.* at 1123.

The court also rejected the owners' assertion that a state statute requiring insurance policies covering buildings with attached units to cover individual units and common spaces conferred on unit owners standing to sue under such policies.[190] Interestingly, the court noted that although the owners did not have standing to sue under the association policy, they nonetheless had the legal remedy of suing their own association for failing to vigorously seek coverage from its insurer.[191]

B. *Suit Limitations*

Two cases decided under Georgia law during the survey period grappled with the consequences of a state statute that required contractual limitations periods in all multiline property policies to be as favorable as the two-year limitations period in the state's standard fire policy. In *White v. State Farm Fire & Casualty Co.*,[192] the Supreme Court of Georgia answered a question certified to it by the Eleventh Circuit, asking whether the Georgia Commissioner of Insurance acted within its legal authority in enacting the statute. The court held that the commissioner had authority only to require that the two-year limitations period be incorporated into the fire coverage portion of a multiple-lines policy.[193] As such, the court held that a policyholder's claim for personal property loss resulting from a burglary was subject to the one-year limitations clause in his multiline policy.[194]

In *Jenkins v. Allstate Property & Casualty Insurance Co.*,[195] the Eleventh Circuit rejected the policyholder's argument that because the one-year limitations period in her property insurance policy did not conform to the two-year limitations period in the standard fire policy, Georgia's six-year statute of limitations for contract causes of action should apply to her suit against the carrier.[196] Instead, the court applied the two-year limitations period prescribed in the standard fire policy on the grounds that the "at least as favorable" language in the policy's conformity provision made it clear that "the parties intended . . . to substitute the closest limitations period permitted by the relevant state law."[197]

Other cases have addressed waiver of a policy's suit limitations clause. For instance, in *Jackson v. State Farm Fire & Casualty Co.*,[198] the Sixth Circuit held that the insurance company did not waive its right to enforce a policy's one-year limitations period where the policyholder presented no

190. *Id.* at 1124–26.
191. *Id.* at 1126.
192. 728 S.E.2d 685 (Ga. 2012).
193. *Id.* at 687.
194. *Id.* at 688.
195. 448 F. App'x 977 (11th Cir. 2011).
196. *Id.* at 979.
197. *Id.*
198. 461 F. App'x 422 (6th Cir. 2012).

evidence that (1) the carrier indicated that it was liable under the policy, or (2) that the carrier's actions caused the policyholder to delay filing suit.[199] Conversely, in *Portside Investors, L.P. v. Northern Insurance Co. of New York*,[200] Pennsylvania's Superior Court held that the insurance company was estopped from enforcing the two-year limitations period in its policy where the insurer indicated it would defer the issue of appraisal until after one of the policyholders, who was then a criminal defendant in a case relating to the collapse of the insured property, could be examined under oath.[201] In reaching its holding, the court reasoned that the insurance company's "statement is reasonably read as a willingness to resume action of the claim after [the policyholder]'s criminal trial, regardless of the policy time-bar."[202]

C. *Bad Faith*

Several cases during the survey period examined the general principle that coverage must exist before an insured can bring a bad faith action against an insurer. In *Trafalgar at Greenacres, Ltd. v. Zurich American Insurance Co.*,[203] the Florida District Court of Appeal held that an appraisal award constituted a "favorable resolution" of coverage necessary to sustain the policyholder's bad faith claim.[204] Citing the Florida requirement that coverage be resolved favorably for the policyholder before a bad faith claim can accrue, the trial court dismissed the policyholder's bad faith claim on the grounds that its breach of contract claim had been dismissed on summary judgment.[205] On appeal, the court noted that the contract claim was dismissed only because the carrier had invoked the appraisal provision in its policy, which had resulted in a multimillion dollar award for the policyholder.[206] Noting that "[a] judgment on a breach of contract action is not the only way of obtaining a favorable resolution," the court ruled that the appraisal award satisfied the bad faith prerequisite.[207] In *Miller v. Safeco Insurance Co. of America*,[208] the Seventh Circuit rejected the homeowner insurer's contention that the district court erred in granting summary judgment to the policyholder on its bad faith claim because coverage was excluded under the policy.[209] In reaching its deci-

199. *Id.* at 426.
200. 41 A.3d 1, 14 (Pa. Super. Ct. 2011).
201. *Id.*
202. *Id.*
203. 2012 WL 3822215 (Fla. Dist. Ct. App. Sept. 5, 2012).
204. *Id.* at *2–3.
205. *Id.* at *2.
206. *Id.*
207. *Id.* at *2–3.
208. 683 F.3d 805 (7th Cir. 2012).
209. *Id.* at 812.

sion, the court noted that although the policy form excluded coverage, the insurer's failure to timely provide the policy to the homeowners rendered the exclusions ineffective.[210] Specifically, the court reasoned that the insurer "cannot now avoid a bad faith finding based on exclusions that were not part of the policy when the [homeowners] discovered the damage."[211]

210. *Id.*
211. *Id.*