RECENT DEVELOPMENTS IN PROPERTY INSURANCE LAW

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I. INTRODUCTION

In the wake of Superstorm Sandy, hundreds of lawsuits have been filed in state and federal courts in New York and New Jersey. These courts are trying to manage their dockets in ever more efficient ways. As the two-year anniversary of the storm approached, more and more suits were

filed. These suits address numerous issues, including application of flood sub-limits to coverages other than actual property damage, such as debris removal and time element. They also address numerous issues under the National Flood Insurance Program (NFIP) such as what constitutes a proper proof of loss, the deadline for filing suits, and what property is covered. While the litigation does not appear to be as extensive as that following Hurricane Katrina, the lessons learned from Katrina will help courts manage the cases to expedite resolution.

Non-catastrophe property insurance litigation is not going away. There are still disputes over who is covered, what is covered, and whether insureds have complied with policy conditions. Inevitably, some insureds make fraudulent claims, and some insurers act in bad faith. The survey period has cases on all these issues.

II. SUPERSTORM SANDY

A. *New York Case Management*

The U.S. District Court for the Eastern District of New York exemplifies how courts are dealing with the continuing influx of Sandy cases. The court first created a special docket to consolidate the hundreds of Sandy cases and address the unique discovery issues arising from the unprecedented storm, which caused more than $50 billion in property damage. Through a series of case management orders and practice and procedure orders, the court has streamlined discovery and mediation.

In January 2014, after noting that more than 800 actions had already been filed in the Eastern District, the court created a consolidated docket for all Sandy cases[1] and established a committee comprised of three magistrate judges to oversee the administration of the Sandy cases through discovery.[2] The court also appointed liaison counsel to address any issues designated by the committee as non-case specific on behalf of the consolidated cases.[3]

The court's first case management order set forth uniform rules for expedited discovery in Sandy cases.[4] Plaintiffs were required to provide insurers' counsel extensive information and documents, short-circuiting the need for a significant amount of paper discovery.[5] Insurers were also

1. Administrative Order 2014-03, *In Re* Hurricane Sandy Cases, Case No. 1:14-mc-00041-CLP-GRB-RER (E.D.N.Y. Jan. 10, 2014), *available at* https://img.nyed.uscourts.gov/files/general-ordes/adminorder2014-03.pdf (last visited Dec. 3, 2014).

2. Case Management Order No. 1, *In Re* Hurricane Sandy Cases, Case No. 1:14-mc-00041-CLP-GRB-RER (E.D.N.Y. Feb. 21, 2014), *available at* https://img.nyed.uscourts.gov/files/general-ordes/14mc41cmo01.pdf (last visited Dec. 3, 2014).

3. *Id.*

4. *Id.*

5. *Id.*

required to provide plaintiffs with a substantial amount of information and numerous documents, including broader expert discovery than is allowed as of right. Once expedited discovery is complete, the parties must submit either a notice of arbitration pursuant to local rule 83.7 or a stipulation consenting to mediation within fourteen days of when discovery is complete.[6] Cases that cannot be resolved through arbitration, mediation, or settlement are then assigned for trial.[7]

In March 2014, the court issued a supplemental order setting a protocol to resolve the commonly occurring issue of insureds submitting proofs of loss and supporting documentation that failed to comply with the requirements set forth under the NFIP by the Federal Emergency Management Agency (FEMA).[8] Separately, the insurers asked the court to consider potential fraud in the property damage estimates received to date, citing "improbable similarities in the damages reported" in more than 500 cases.[9] The court authorized a sample of thirty site inspections to explore this issue.[10]

An April 2014 order also addressed the implementation of the mandatory mediation/arbitration effort with the consolidated cases nearing the end of discovery.[11] The court directed that twenty cases be selected by liaison counsel to engage in mediation before the broader deadline to identify common issues for the court's consideration in the alternative dispute resolution process that was to follow.[12]

In June 2014, the court issued an order addressing cases that had pled bad faith claims against insurers, but had failed to submit a letter explaining the basis of those claims as directed by the case management order.[13] The court dismissed bad faith claims, as well as any related requests for punitive damages and attorney fees, in more than 150 cases.[14]

6. *Id.*
7. *Id.*
8. Revised Case Management Order No. 2 at 1, Proof of Loss Issues in NFIP Cases, *In Re* Hurricane Sandy Cases, Case No. 1:14-mc-00041-CLP-GRB-RER (E.D.N.Y. Mar. 28, 2014), *available at* https://img.nyed.uscourts.gov/files/general-ordes/14mc41cmor02.pdf (last visited Dec. 3, 2014).
9. Case Management Order No. 3, Clarification and Denial of Reconsideration of CMO No. 1, *In* Re Hurricane Sandy Cases, Case No. 1:14-mc-00041-CLP-GRB-RER (E.D.N.Y. Apr. 7, 2014), *available at* https://img.nyed.uscourts.gov/files/general-ordes/14mc41cmo03.pdf (last visited Dec. 3, 2014).
10. *Id.*
11. *Id.*
12. *Id.*
13. *In Re* Hurricane Sandy Cases, Report and Recommendation, 2014 WL 3489852 (E.D.N.Y. June 5, 2014).
14. *Id.*

B. *Satisfying NFIP Conditions*

In *Kroll v. Johnson*,[15] the parties disagreed over the trigger date for the NFIP statute of limitations. The court noted that the statute, 42 U.S.C. § 4072, provides that a policyholder must file suit within one year after the date of the Administrator's mailing of notice of disallowance or partial disallowance of a claim for proved and approved flood losses.[16] After receiving notices of partial disallowances of their Sandy flood claim, the Krolls filed suit against the Secretary of the Department of Homeland Security (DHS) on April 19, 2014.[17]

DHS moved to dismiss the Krolls' suit, arguing that FEMA issued an initial denial letter more than one year before suit was filed.[18] That letter advised that, because the property was a seasonal residence, the Krolls could recover only actual cash value. DHS contended that the January letter constituted a "notice of disallowance or partial disallowance" per the statute.[19] The Krolls countered that the triggering event was a later FEMA letter that acknowledged receipt of the Krolls' proof of loss and partially denied their claim.[20] Because NFIP regulations require a proof of loss in order to have the claim paid, the Krolls argued that only claims supported by a proof of loss can start the limitations period.[21] The court agreed, holding that "only a notice of disallowance for a claim supported by proof of loss triggers the statute of limitations."[22]

C. *NFIP Jurisdiction and Bad Faith*

In *Ryan v. Selective Insurance Co. of America*,[23] Selective issued two standard flood insurance policies to the plaintiffs as a participant in the NFIP's "write-your-own" policy program. The plaintiffs made claims under the policies after tidal flooding and high winds during Sandy destroyed their properties. Selective denied coverage and the plaintiffs filed suit.[24]

Selective moved to dismiss the claims for incidental damages, consequential damages, interest, attorney fees, and costs.[25] Selective argued that, pursuant to Article I of 44 C.F.R. pt. 61, app. A(I), which sets forth the standardized terms and conditions of all standard flood policies, only compensation for "direct physical loss by or from flood" is

15. No. 14-2496, 2014 WL 4626009 (D.N.J. Sept. 15, 2014).
16. *Id.* at *3.
17. *Id.* at *1.
18. *Id.* at *3.
19. *Id.*
20. *Id.*
21. *Id.*
22. *Id.* at *3–4.
23. No. 13-6823, 2014 WL 2872089 (D.N.J. June 23, 2014).
24. *Id.* at *1.
25. *Id.*

permitted.[26] Selective asserted that the extracontractual relief sought by the plaintiffs was beyond the scope of coverage.[27]

The court substantially agreed with Selective. The court held that attorney fees are not recoverable in NFIP claims.[28] Relying on the policies' limitation of coverage to "direct physical loss," the court held that consequential or incidental damages are indirect by nature and are therefore not covered.[29] The court did not decide whether interest and costs are recoverable.

D. *Wind versus Flood and Flood Sub-Limits*

In *New Sea Crest Healthcare Center, LLC v. Lexington Insurance Co.*,[30] the insureds argued that flood and storm surge are separate perils so the flood sub-limit should not apply.[31] The definition of "flood" in the policies included storm surge.[32] The insureds argued that the policies were "ambiguous as to whether storm surge is a type of flood" or a separate peril.[33] The court held that the policies were unambiguous,[34] explaining that:

> Although the named storm sublimit lists flood and storm surge separately, because flood is in bold the insurer is alerted that the term has a technical definition that applies in the named storm context. That definition expressly includes the term "storm surge" as a type of flood and further states that a flood includes water driven by wind.[35]

The court also held that the policies were clear that all loss or damage due to flood was subject to the flood sub-limit. Therefore, the insureds could not recover beyond the flood sub-limit under additional coverages such as debris removal, demolition, ingress/egress, or service interruption.[36]

In *El-Ad 250 West LLC v. Zurich American Insurance Co.*,[37] the insured sought delay-in-completion losses under a builder's risk policy after Sandy caused damage to a construction project. The policy defined flood losses as "all losses or damages arising" during a flood.[38] The insured argued that the flood sub-limit and deductible should only apply to physical

26. *Id.* at *2.
27. *Id.*
28. *Id.* at *3.
29. *Id.*
30. No. 12 CV 6414, 2014 WL 2879839 (E.D.N.Y. June 24, 2014).
31. *Id.* at *1.
32. *Id.*
33. *Id.* at *2.
34. *Id.* at *3.
35. *Id.*
36. *Id.* at *4.
37. 988 N.Y.S.2d 462 (N.Y. Sup. Ct. 2014).
38. *Id.* at 464.

damage to property, not "downstream" financial losses such as delay-in-completion losses.[39] The insurer argued that, because the flood sub-limit applied to "all losses or damages arising" from a flood, it applied to the delay-in-completion losses.[40] The Supreme Court, New York County, agreed with the insurer, holding that "the expression 'all losses or damages arising during [a flood]' clearly does not exclude non-physical losses."[41]

III. BUSINESS INTERRUPTION/CIVIL AUTHORITY

As Sandy approached New York City, Consolidated Edison of New York preemptively shut down networks in an attempt to prevent damage and reduce the time necessary to restore power following the storm. Notwithstanding its efforts, Con Ed's equipment was damaged in the storm and certain areas were without power for a period of time. In *Johnson Gallagher Magliery, LLC v. Charter Oak Fire Insurance Co.*,[42] a law firm sued its insurer for coverage during the period its business operations were suspended due to a mandatory evacuation order and lack of electricity and other utilities. Although there was no physical damage to the insured property, the policy included a utility services endorsement that provided time-element coverage if there is an interruption of power due to physical damage at the utility provider.[43] The court granted summary judgment to the insurer for the period of time the utilities were preemptively shut down.[44] The court also found that the law firm could not recover business interruption losses during the period that Con Ed failed to deliver electricity as a result of water damage, an excluded cause of loss.[45]

In *Millennium Inorganic Chemicals, Ltd. v. National Union Fire Insurance Co. of Pittsburgh, PA*,[46] the policies included contingent business interruption coverage for losses resulting in the disruption of supply of materials from contributing properties, but provided no coverage for indirect suppliers. The insured processed titanium dioxide using natural gas purchased from Alinta, a retail gas supplier.[47] Alinta purchased some of its gas from Apache.[48] After an explosion at an Apache facility, its natural gas production ceased, and Alinta's supplies ceased.[49] The insured made

39. *Id.*
40. *Id.*
41. *Id.* at 467.
42. No. 13 Civ. 866, 2014 WL 1041831 (S.D.N.Y. Mar. 18, 2014).
43. *Id.* at *1–2.
44. *Id.* at *7.
45. *Id.* at *10; s*ee also* Newman Myers Kreines Gross Harris, P.C. v. Great No. Ins. Co., 17 F. Supp. 3d 323 (S.D.N.Y. 2014).
46. 744 F.3d 279 (4th Cir. 2014).
47. *Id.* at 282.
48. *Id.*
49. *Id.* at 282–83.

a claim for contingent business interruption losses resulting from the damage to Apache.[50] The insurer denied coverage on the basis that Apache was an indirect supplier.[51] The Fourth Circuit affirmed summary judgment because Apache, the natural gas producer, was "at most an indirect supplier" to the insured.[52] The relationship between Apache and the insured was interrupted by an "intermediary," Alinta, which took control of Apache's gas before it was delivered to the insured, and the gas provided by Apache was commingled with gas from other producers.[53] Therefore, Apache could not be considered a direct contributing property.[54]

In *Boardwalk Apartments, L.C. v. State Auto Property & Casualty Insurance Co.*,[55] the court held that the "period of restoration" is based on a theoretical time period calculated as the period of time that it should take to rebuild or replace the damaged property with "reasonable speed" and "similar quality."[56] The theoretical period can be extended by coverage litigation.[57] Thus, where the insurer sued to determine the extent of available coverage, the court held that it was reasonable for the insured to delay reconstruction until its right to rebuild was determined by the court.[58]

In Artist Building Partners v. Auto-Owners Mutual Insurance Co.,[59] a business interruption provision provided:

> [W]e will pay for the actual loss of Business Income you sustain due to the necessary suspension of your "operations" during the "period of restoration" and necessary Extra Expense you incur during the "period of restoration" that occurs within 12 consecutive months after the date of direct physical loss of or damage to property at the described premises.[60]

The Tennessee Court of Appeals held that the provision was ambiguous, and the twelve-month limitation applied only to extra expense.[61]

50. *Id.* at 280.
51. *Id.* at 281.
52. *Id.* at 286.
53. *Id.* at 285–86.
54. *Id.*
55. 11 F. Supp. 3d 1062 (D. Kan. 2014).
56. *Id.* at 1088.
57. *Id.* at 1089–90.
58. *Id.*
59. 435 S.W.3d 202 (Tenn. Ct. App. 2013).
60. *Id.* at 207.
61. *Id.* at 215–16.

IV. COLLAPSE

Last year, we discussed the opinion by the court in *Queen Anne Park Homeowners Association v. State Farm Fire & Casualty Co.*,[62] which addressed the meaning of "collapse" in a condominium policy. The district court noted that the Washington Supreme Court had not decided whether it would follow the "substantial impairment of structural integrity [with] an imminent threat of collapse" approach or a strict "rubble-on-the-ground" standard.[63] The Ninth Circuit discussed the most recent Washington Supreme Court case addressing "collapse," *Sprague v. Safeco Insurance Co. of America*,[64] and certified the question of how to define "collapse" to the Washington Supreme Court,[65] which accepted the certified question.[66]

V. COVERED PROPERTY

A. *Structures*

In *Glacier Construction Corp. v. Travelers Property Casualty Co. of America*,[67] Glacier was hired to build a new wastewater pumping facility. Before construction could begin, the site had to be "dewatered," requiring installation of four submersible wells and pumps.[68] The wells and pumps failed.[69] Glacier began an expensive second dewatering plan and made a claim under its builder's risk policy for these additional costs.[70] The Tenth Circuit affirmed partial summary judgment for each party, holding that the original submersible wells and pumps were "temporary structures" and covered property under the policy,[71] but rejecting the insured's argument that redesign and construction of the upgraded dewatering system was covered.[72]

In *Barnard Pipeline, Inc. v. Travelers Property Casualty Co. of America*,[73] the insured made a claim under its builder's risk policy for damage to a right of way it built for a pipeline project. Travelers denied the claim,

62. No. C11-1579 TSZ, 2012 WL 5456685 (W.D. Wash. Nov. 8, 2012).
63. *Id.* at *4.
64. 276 P.3d 1270 (Wash. 2012) (en banc).
65. Queen Anne Park Homeowners Ass'n v. State Farm Fire & Cas. Co., 763 F.3d 1232, 1235 (9th Cir. 2014).
66. Queen Anne Park Homeowners Ass'n v. State Farm Fire & Cas. Co., Washington Supreme Court Case No. 90651-3 (scheduled hearing date Jan. 15, 2015).
67. 569 F. App'x 582 (10th Cir. 2014).
68. *Id.* at 584.
69. *Id.*
70. *Id.*
71. *Id.* at 586.
72. *Id.* at 587.
73. 3 F. Supp. 3d 865 (D. Mont. 2014).

contending that the right of way was not "covered property" as defined in the policy, but was instead excluded "land."[74] The court agreed with the insured, finding that "the right of way, after it had been cleared, excavated, and leveled constituted a 'structure,' and was therefore 'Covered Property' under the Policy."[75] The policy did not define "structure," and the court looked to legal and common dictionary definitions to decide the case.[76]

B. *Insurable Interest*

Edgewood Manor Apartment Homes, LLC v. RSUI Indemnity Co.[77] addressed whether a claim for a replacement cost value (RCV) holdback survives the insured's sale of the damaged property in its unrepaired state. The named insured, Southland, owned an apartment complex damaged by Hurricane Katrina.[78] After the actual cash value (ACV) was paid, the parties began negotiating for payment of the RCV.[79] During the negotiations, Southland contracted to sell the apartment complex in its unrepaired state to Edgewood Manor Apartment Homes, LLC.[80] Prior to closing, Southland informed RSUI, its excess insurer, that it intended to sell the property and assign the replacement cost claim to Edgewood Manor.[81] RSUI responded that neither Southland nor the buyer would be able to recover the RCV holdback if Southland sold the property before completing repairs.[82]

Southland and Edgewood Manor sued.[83] RSUI argued that Southland could not recover the holdback because it lost its insurable interest when it sold the property.[84] The Seventh Circuit held that Southland still owned the RCV claim.[85] Southland's insurable interest when the policy was issued and at the time of the loss was not extinguished by the sale of the property in its unrepaired state.[86] Mississippi law does not require that "an insured continue to maintain an insurable interest in the property while the claim is being negotiated and through litigation."[87]

74. *Id.* at 868–69.
75. *Id.* at 873.
76. *Id.* at 872.
77. 733 F.3d 761 (7th Cir. 2013).
78. *Id.* at 764.
79. *Id.*
80. *Id.*
81. *Id.*
82. *Id.*
83. *Id.*
84. *Id.* at 767.
85. *Id.* at 766.
86. *Id.* at 765.
87. *Id.* at 765, 771. Because the insurance claim had never been assigned to Edgewood Manor, the district court determined and the Seventh Circuit agreed that Edgewood Manor lacked standing to sue RSUI. *Id.*

In *Rhode Island Joint Reinsurance Association v. O'Sullivan*,[88] the insured gave Navigant Credit Union a second mortgage on certain property. The insured obtained insurance for the property listing Navigant as the mortgagee and loss payee.[89] The property sustained about $70,000 of water damage.[90] The insured subsequently defaulted on the first mortgage.[91] The first mortgagee instituted foreclosure proceedings and purchased the property at the foreclosure sale in 2011.[92] The mortgagee contended that Navigant's insurable interest in the property was extinguished by the foreclosure sale.[93] The Supreme Court of Rhode Island held that Navigant was entitled to the insurance proceeds because it had an insurable interest at the time of the loss.[94]

In *Banta Properties, Inc. v. Arch Specialty Insurance Co.*,[95] the parties disputed the extent of a property management company's insurable interest in three apartment complexes that were damaged in Hurricane Wilma. Florida Statutes § 627.405(3) "limits a nonowner's insurable interest in property to the value of a potential loss of those rights in the property."[96] At the time of the loss, the management company had a contractual right to receive only 4 percent of gross income.[97] Thus, "[t]he sole injury Banta Properties could have suffered from the impairment or destruction of the apartment complexes was the loss of revenue from that contractual right. We conclude that Florida law thus limits the extent of Banta Properties' insurable interest to the potential loss of that revenue."[98]

In *Laureate Education, Inc. v. Insurance Co. of the State of Pennsylvania*,[99] the claim arose out of earthquakes that struck Chile and Mexico, damaging several of the insured's facilities. The insurer argued that, "because the buildings at [the insured's Autopista location] were not covered, there was no covered property damage, and, thus, there [was] no coverage for

88. 91 A.3d 824 (R.I. 2014).
89. *Id.* at 826.
90. *Id.*
91. *Id.*
92. *Id.*
93. *Id.* at 827.
94. *Id.* at 828–29.
95. 553 F. App'x 908 (11th Cir. 2014).
96. *Id.* at 911 (footnote omitted).
97. *Id.* at 909.
98. *Id.* Similarly, in *Barham v. USAA Cas. Ins. Co.*, 144 So.3d 1166 (La. Ct. App. 2014), the Louisiana Court of Appeal held that a daughter's insurable interest in a newly constructed house financed by her mother was limited to her down payment and cost of improvements. As such, the daughter was not entitled to the full $242,000 limit of her homeowners policy after the home was destroyed by a fire. The mother was paid the entire policy limit under a separate policy since the residence was purchased by the mother and in the mother's name. *Id.* at 1173–74.
99. 11 Civ. 7175, 2014 WL 1345888 (S.D.N.Y. Mar. 31, 2014).

business interruption losses at [that location]."[100] The insured countered that New York law allows coverage for business interruption losses because the insured had an insurable interest in the location.[101] The court agreed, finding that the policy covered any property "used" by the insured and that "such a use is an insurable interest for which the insured is entitled to business interruption coverage."[102]

VI. EXCLUSIONS

A. *Causation*

In *Ken Johnson Properties, LLC v. Harleysville Worcester Insurance Co.*,[103] an apartment building owner filed a claim for water damage to the building's roof and interior walls. The damage was caused by rainwater pooling on the building's roof due to a clogged roof drain. The policy excluded water-related damage from the "back[] up or overflow[] from a sewer, drain or sump," but the policy also contained a water endorsement that provided limited coverage for this peril.[104] The insurer acknowledged coverage for the claim, but capped the amount paid at $25,000 based on the endorsement's limit.[105] The insured sued, arguing that the insurer breached the policy by failing to pay the full amount of the insured's damages under an "additional insurance provision in the [p]olicy that provided full coverage for building collapse due to the weight of rain that collects on a roof."[106] The court held that the policy's anticoncurrent loss provision would exclude coverage "if an excluded peril is the efficient and proximate cause of the loss."[107] However, the court held that the policy's water endorsement modified the coverage by "amend[ing] the Policy's exclusionary language regarding damage caused by water backing up or overflowing from a drain," and therefore the cause of the damage was not excluded.[108] As a result, the court found that the policy's anticoncurrent loss provision did not apply to any potential coverage in part responsive to the insured's claim and required the insurer to indemnify the insured for the full extent of the damage.[109]

100. *Id.* at *17 (footnote omitted).
101. *Id.*
102. *Id.* at *19.
103. No. 12-1582, 2013 WL 5487444 (D. Minn. Sept. 30, 2013).
104. *Id.* at *2.
105. *Id.* at *1.
106. *Id.*
107. *Id.* at *12.
108. *Id.* at *13.
109. *Id.* at *9, 13.

B. *Earth Movement*

A federal court applying Pennsylvania law in *Matson-Forester v. Allstate Insurance Co.*[110] found questions of fact regarding whether the damage at issue was caused by a natural occurrence or by the accidental failure of the local water system, a "man-made occurrence."[111] The court denied summary judgment, holding that the language "earth movement of any type" is ambiguous and should only be applied to natural occurrences.[112] If an insurer wanted the earth movement exclusion to apply to man-made events, it should have included language that expressly states that it is not limited to natural events.[113]

A federal court applying Illinois law reached the opposite result, however.[114] The insurer issued a builder's risk policy to the insured under which "earth movement" encompassed "any movement regardless of cause."[115] The insured suffered a loss that included movement of sheet piling in areas of the construction project, as well as other damage. The insured argued that the term "earth movement," as defined in the policy, is limited to movement of earth from natural, as opposed to man-made causes, and the insured's damages were not limited by the $2.5 million "earth movement limit of insurance."[116] The court held that "the word 'any' means exactly that: any movement of the earth without distinction as to the type (*i.e.*, natural or man-made)."[117]

C. *Vacancy*

In *SWE Homes, LP v. Wellington Insurance Co.*,[118] Wellington denied coverage under a vacancy exclusion when the mortgagor admitted that the house was vacant when an arsonist set it on fire. The mortgagor's policy, however, included a standard mortgagee clause that allowed the mortgagee to receive loss payments if the insurance company denied the mortgagor's claim.[119] SWE sued and the trial court granted summary judgment in favor of Wellington.[120] The Texas Court of Appeals reversed,

110. No. 1:12-cv-01838, 2014 WL 580267 (M.D. Pa. Feb. 12, 2014).
111. *Id.* at *6.
112. *Id.*
113. *Id.* at *5.
114. *See* One Place Condo., LLC v. Travelers Prop. Cas. Co. of Am., No. 11 C 2520, 2014 WL 4977331 (N.D. Ill. Oct. 6, 2014).
115. *Id.* at *6.
116. *Id.*
117. *Id.* at *7; s*ee also* JD&K Assocs., LLC. v. Selective Ins. Grp., Inc., 988 N.Y.S.2d 749 (N.Y. App. Div. 2014).
118. 436 S.W.3d 86 (Tex. Ct. App. 2014).
119. *Id.* at 87.
120. *Id.*

holding that, because SWE satisfied the requirements under the standard mortgagee clause, the vacancy exclusion did not eliminate SWE's right to payment.[121]

In *Bedford Internet Office Space, LLC v. Travelers Casualty Insurance Co.*,[122] the policy excluded coverage when the insured property was vacant for more than sixty days before the loss. The policy defined vacancy as occurring when less than 31 percent of the building's total square footage is used by a lessee or the building owner to conduct customary operations.[123] The buildings suffered several break-ins.[124] Travelers denied coverage, concluding that the "buildings had been vacant, as defined by the policy, since 2000."[125] Bedford sued and argued that, because the exact date of the loss was unknown, Travelers could not show that the buildings were vacant for sixty days before the loss.[126] The court rejected this argument, finding that there was enough evidence to prove the property was vacant during any relevant sixty-day period.[127]

D. *Dishonest Acts*

In *Jewelers Mutual Insurance Company v. Jilco, Inc.*,[128] an employee of the insured's jewelry store stole over $200,000 worth of gold bullion, ingots, and bars, and scrap gold. After paying $50,000 to the insured without admitting liability, Jewelers Mutual filed a declaratory judgment action claiming that it did not owe coverage.[129] The policy excluded coverage for "gold, silver, platinum and other precious alloys or metals whether owned by 'you' or someone else *except under the employee dishonesty coverage*."[130] The policy provided "optional property coverages," including "employee dishonesty" and "money and securities."[131] The "employee dishonesty" coverage insured loss or damage to "business personal property, including 'money' and 'securities,'" caused by an employee's "dishonest act."[132] The "money and securities" coverage insured "'money' and 'securities,' *bullion*, and lottery tickets" against "theft."[133] The "money and securities" coverage, however, was expressly subject to the

121. *Id.* at 90–91.
122. No. 3:12-cv-4322-N, 2014 WL 4230315 (N.D. Tex. Aug. 25, 2014).
123. *Id.* at *3.
124. *Id.* at *4–5.
125. *Id.* at *5.
126. *Id.* at *7.
127. *Id.* at *8.
128. No. 12 C 8730, 2014 WL 259017 (N.D. Ill. Jan. 23, 2014).
129. *Id.* at *3.
130. *Id.* at *3–4
131. *Id.* at *4.
132. *Id.*
133. *Id.*

"criminal, fraudulent, or dishonest acts" exclusion, which precluded coverage for employee theft.[134]

The parties disagreed as to how the two optional coverages interacted. The court held that "[t]he fact that the parties included 'bullion' within 'Money and Securities,' but excluded it from 'Employee Dishonesty,' indicates that the parties purposefully excluded coverage for bullion theft by an employee,"[135] and the policy therefore did not cover the bullion theft.[136]

E. *Faulty Workmanship*

In *Cedar Ridge, LLC v. Landmark American Insurance Co.*,[137] the court addressed whether the installation of tarps and use of adhesives when repairing a roof constituted repairs or workmanship within the meaning of a faulty workmanship exclusion. The insured's roof was damaged by Hurricane Isaac.[138] The insurer argued that the tarp installation and use of adhesives caused additional damage to the roof excluded by the faulty repair or workmanship exclusion.[139] The court ruled in favor of the insurer because the installation of tarps and use of adhesives constituted workmanship.[140] The court noted that "'faulty workmanship focuses on the . . . action of installing . . . the product' rather than on 'the quality or character of the material.'"[141]

F. *Mold and Water Damage*

In *Fidelity Co-Operative Bank v. Nova Casualty Co.*,[142] the insured suffered extensive water damage to the interior of a rental property after heavy rains. The building's single rooftop drain was overwhelmed and water pooled on the roof and leaked through two skylights.[143] The district court held that the policy excluded coverage for loss to the interior of a building caused by or resulting from rain.[144] The First Circuit reversed.[145] Observing that the policy contained an endorsement that covered "water damage caused by 'surface water'" and that a separate

134. *Id.* at *5.
135. *Id.*
136. *Id.* at *5.
137. 4 F. Supp. 3d 851 (E.D. La. 2014).
138. *Id.* at 852.
139. *Id.*
140. *Id.* at 856.
141. *Id.* (quoting *In re* Chinese Manufactured Drywall Prods. Liab. Litig., 759 F. Supp. 2d 822, 845 (E.D. La. 2010).
142. 726 F.3d 31 (1st Cir. 2013) (applying Mass. law).
143. *Id.* at 33.
144. *Id.* at 32–33.
145. *Id.* at 32.

endorsement deleted the portion of the water exclusion that referred to water that "backs up . . . from a sewer," the court determined that coverage could not be determined by application of the anticoncurrent causation clause of the exclusions.[146] Thus, the court found that "Massachusetts law as a default kicks in to require an efficient [proximate] cause analysis."[147] Because the failure of the rooftop drain was the proximate cause of the loss, the loss was covered.[148]

In *Romano v. Metropolitan Property & Casualty Insurance Co.*,[149] the homeowners roof failed due to the accumulation of water and mold. On appeal, the insureds argued that the policy covered direct physical loss involving collapse caused by "hidden decay" or the "weight of ice, snow, sleet, or rain which collects on a roof."[150] The policy contained an anticoncurrent causation clause, which the Appellate Division of the New Jersey Superior Court quoted, but it did not rely on in its analysis.[151] Rather, the court upheld summary judgment for the insurer because the policy stated that it provided coverage for loss "caused *only* by one or more" covered causes of loss.[152] The court stated that "the word 'only' in this context appears to mean 'exclusively.' Thus, if an excluded cause operated together with an identified cause, then there would be no coverage."[153] Because undisputed expert testimony established that the failure of the roof was caused by defective design and lack of proper maintenance—which were excluded—the court held that the damage was not covered.[154]

The *Romano* court also held that there was no coverage because the policy's coverage for collapse due to decay required the decay to be "hidden."[155] "Decay is not hidden if a reasonably objective person would conclude that structural deterioration was underway, even if they could not directly view it."[156] Although some of the damage to the roof was not visible, the ceiling bulged downward, visible mold grew around windows near the damaged portions of the roof, and vegetation had been growing in the shingles.[157] Based on these facts, the court held that the decay was

146. *Id.* at 33.
147. *Id.* at 38.
148. *Id.*
149. No. L-2456-10, 2014 WL 3537896 (N.J. Super. Ct. App. Div. July 18, 2014).
150. *Id.* at *2.
151. *Id.*
152. *Id.*
153. *Id.* at *6.
154. *Id.*
155. *Id.*
156. *Id.*
157. *Id.* at *1, 7.

not hidden because the homeowners knew or should have known that the roof was decaying.[158]

G. *Ensuing Loss*

Drury Co. v. Missouri United School Insurance Counsel[159] addressed coverage for moisture damage to a cementitious roof deck being installed in the construction of a school. During construction, rain and other precipitation, including ice storms, occurred over a period of several months.[160] The subcontractor submitted a claim under the school district's builder's risk policy for the damaged roof decking.[161] The insurer denied the claim based on a faulty workmanship exclusion claiming the subcontractor independently protected the roofing panels.[162] The insurer asserted that the policy's ensuing loss language was "subordinate to and dependent on the faulty workmanship exclusion and should not be interpreted to abrogate the exclusion."[163]

In affirming the trial court's decision that rain was an ensuing covered peril, the appellate court in *Drury* noted that the policy provided coverage against "all risks of direct physical loss . . . to the property covered from any external cause except as hereinafter excluded."[164] The builder's risk section of the policy provided coverage for "all materials, equipment and fixtures installed or to be installed, temporary structures that are used in connection with construction, and supplies or materials on site, in transit or in storage to be used in the construction or installation at a Member's building project."[165] It also provided that "[t]he perils covered are extended beyond those previously defined by including loss by rain, snow, sleet, sand or dust to covered property in the open."[166] The damaged roofing panels were a material "installed or to be installed" in the building, were "in the open" on the project's roof and the damage resulted from "rain, snow, [or] sleet."[167] Had the insurer intended the faulty workmanship exclusion to apply regardless of any ensuing rain peril, it could have added anticoncurrent causation language to the exclusion.[168]

158. *Id.* at *7.
159. No. ED 100320, 2014 WL 1225265 (Mo. Ct. App. Mar. 25, 2014).
160. *Id.* at *1.
161. *Id.*
162. *Id.*
163. *Id.* at *6.
164. *Id.* at *1.
165. *Id.* at *3.
166. *Id.* at *5.
167. *Id.*
168. *Id.* at *6.

VII. DAMAGES

A. *Holdback*

In *Pellegrino v. State Farm Fire & Casualty Co.*,[169] the Pellegrinos suffered storm damage to their home, including damage to small portions of their roof and three faces of siding. The homeowners policy provided that State Farm would only pay ACV until the damage was replaced or repaired when it would then pay the RCV holdback.[170] State Farm provided estimates for the damage: an RCV of $27,105.77, which included *inter alia*, the cost to replace the damage to the roof and sidings, and an ACV of $17,091.58.[171] Instead of taking the ACV or making the repairs, the Pelligrinos sued, "alleging that State Farm was required to pay them the cost of a full roof and siding replacement as part of the [ACV], regardless of whether these repairs were actually made."[172] They argued that State Farm had to replace the entire roof and siding because "a partial repair could not be completed with 'matching' materials."[173] The Third Circuit held that State Farm had no obligation pay the RCV.[174] The court reasoned that "allowing the Pellegrinos to recover the cost of replacing their entire roof and siding when they had no intention of undertaking these repairs would result in a 'windfall' and produce 'absurd results.'"[175]

B. *Overhead and Profit*

In *Trudel v. American Family Mutual Insurance Co.*,[176] the court held that American Family's "failure to include [overhead and profit] was a failure to perform a contractual promise, provided that the services of a general contractor were required to repair the Trudels' home."[177] The court reasoned that "if the cost to repair or replace the damaged property would likely require the services of a general contractor, the contractor's overhead and profit fees should be included in determining [the ACV]."[178]

169. 568 F. App'x 129 (3d Cir. 2014).
170. *Id.* at 130.
171. *Id.* at 130–31.
172. *Id.* at 131.
173. *Id.*
174. *Id.* at 131–32.
175. *Id.* at 132. *See also* Cent. Mut. Ins. Co. v. White Stone Props., Ltd., No. A-12-CA-275-SS, 2014 WL 1092121, at *10 (W.D. Tex. Mar. 19, 2014) (no holdback is owed if actual cost to repair is less than the ACV payment).
176. No. CV-12-1208-PHX-SMM, 2014 WL 4053405 (D. Ariz. Aug. 15, 2014).
177. *Id.* at *8.
178. *Id.* at *7.

C. *Matching*

Cedar Bluff Townhome Condominium Association, Inc. v. American Family Mutual Insurance Co.[179] addressed the issue of matching or "like kind and quality." An appraisal panel "considered whether the loss included only the directly damaged individual siding boards, or whether the loss included all of the siding because the directly damaged boards could not be replaced with matching siding."[180] In awarding all of the siding, the appraisal panel necessarily interpreted the phrases "replace . . . with other property of like kind and quality" and "replace . . . with other property . . . [o]f comparable material and quality."[181] The Minnesota Court of Appeals held that "the appraisal panel had the authority to consider the meaning of those phrases when determining the amount of loss."[182] The court also agreed with the insured's interpretation of "like kind and quality" and "comparable material and quality" as requiring the insurer to pay for uniform colored siding.[183]

In *Trout Brook South Condominium Association v. Harleysville Worcester Insurance Co.*,[184] one of the arguments advanced by the insurer was that there was no obligation to pay to match undamaged shingles because they suffered no "direct physical loss."[185] The court disagreed with that narrow view, stating that, based on the policy language, covered property is the building, not individual items attached to the building.[186] The policy obligated the insurer to pay replacement cost defined as the lesser of (1) "the cost of repair or replacement with similar materials for the same use and purpose, on the same site," or (2) "the cost to repair, replace, or rebuild the property with material of like kind and quality to the extent practicable."[187] The court determined that "the terms 'similar materials' and 'material of like kind and quality' simply cannot be defined, as a matter of law, to preclude consideration of color."[188] The court held that a jury must determine whether the insurer must pay for matching shingles and whether replacement shingles are of "like kind and quality."[189]

179. No. A13-0124, 2013 WL 6223454 (Minn. Ct. App. Dec. 2, 2013).
180. *Id.* at *3.
181. *Id.*
182. *Id.*
183. *Id.* at *4.
184. 995 F. Supp. 2d 1035 (D. Minn. 2014).
185. *Id.* at 1038.
186. *Id.* at 1042.
187. *Id.* at 1037.
188. *Id.* at 1044.
189. *Id.*

D. *Other Insurance*

In *United National Insurance Co. v. Mundell Terminal Services, Inc.*,[190] BMI was storing copper sheeting at Mundell's warehouse when it was stolen.[191] Both Mundell and BMI were insured for the loss.[192] Mundell's insurer filed a declaratory judgment action seeking a declaration that its policy's "other insurance" clause precluded coverage.[193] Noting that, under Texas law, the "other insurance" clause only applies where "the other insurance covers the same property and interest therein against the same risk in favor of the same party," the Fifth Circuit affirmed summary judgment in favor of the insurer, holding that Mundell's interest in the covered property was the same as its customer's interest.[194]

VIII. OBLIGATIONS AND RIGHTS OF THE PARTIES

A. *Misrepresentation*

In *Nationwide Mutual Insurance Co. v. Baptist*,[195] the Fifth Circuit affirmed a judgment that the insureds' misstatement of material facts voided the homeowners policy. The insureds first purchased a Nationwide policy in 2006.[196] Two years later, the insureds' house was foreclosed, but they continued to occupy the home.[197] The insureds did not inform Nationwide that the house had been foreclosed and renewed their policy for 2009–10 and 2010–11.[198] Before the insureds were evicted, the house was damaged by fire.[199] During the loss investigation, Nationwide discovered that the insureds no longer held title to the property. The Fifth Circuit held that "the renewals of their policy constituted their affirmations to Nationwide of their initial application for insurance, material portions of which were no longer true."[200] The court found that "[b]y renewing their homeowners policy when they no longer owned their home, the [insureds] made a misstatement of material fact that entitled Nationwide to rescind the policy."[201]

In *Young v. Allstate Insurance Co.*,[202] the insurer denied the claim based on the insureds' misrepresentation of material facts related to property al-

190. 740 F.3d 1022 (5th Cir. 2014).
191. *Id.* at 1025.
192. *Id.*
193. *Id.* at 1026.
194. *Id.* at 1028.
195. 762 F.3d 447 (5th Cir. 2014).
196. *Id.* at 448.
197. *Id.*
198. *Id.* at 449.
199. *Id.*
200. *Id.*
201. *Id.* (footnote omitted).
202. 759 F.3d 836 (8th Cir. 2014).

legedly lost in a fire.[203] Initially, the insureds submitted an inventory of personal property that they claimed was damaged or destroyed in the fire.[204] The day before their scheduled examinations under oath (EUOs), they provided a revised inventory.[205] The insureds testified in their EUOs that several of the items included on the inventory were not in the house on the day of the fire and that the initial inventory included items that were not destroyed or damaged by the fire.[206] Although the insureds admitted that the initial list of contents provided to the insurer "exaggerated the value of several items," they both denied intentionally overstating their claim.[207] The insurer denied the claim because the insureds "concealed and/or misrepresented material facts."[208] The issue was tried to a jury, which returned a verdict for the insurer. The Eighth Circuit affirmed.[209]

B. *Duties*

1. Examinations Under Oath

In *Solano v. State Farm Florida Insurance Co.*,[210] the court reversed summary judgment in favor of State Farm, holding that where an insured submitted to an EUO and provided certain documents, whether the insureds had failed to satisfy their obligations under the policy such that the "no action" clause of the policy prevented them from filing suit was a fact issue.[211]

In *Villarreal v. IDS Property Casualty Insurance Co.*,[212] the insureds submitted a claim for fire damage and the insurer requested their EUOs.[213] One of the insureds was charged criminally in connection with the fire; both insureds refused to appear for their EUOs until the charges were resolved.[214] Approximately ten months after the fire, the insured pled no contest to attempted insurance fraud and the insureds offered to appear for the EUOs.[215] The insurer declined and denied the claim based on the insureds' failure to cooperate by refusing to appear for EUOs.[216] The insureds sued, and the trial court granted summary judgment to

203. *Id.* at 837.
204. *Id.* at 838.
205. *Id.*
206. *Id.*
207. *Id.*
208. *Id.*
209. *Id.* at 837.
210. No. 4D12-1198, 2014 WL 1908827 (Fla. Dist. Ct. App. May 14, 2014).
211. *Id.* at *2–3.
212. No. 314891, 2014 WL 2218991 (Mich. Ct. App. May 27, 2014).
213. *Id.* at *1–2.
214. *Id.* at *1.
215. *Id.*
216. *Id.*

the insurer on the basis of the suit limitation provision, which prohibits the insureds from suing unless they have complied with all policy terms.[217]

The Michigan Court of Appeals noted that the policy required the insureds to cooperate with the insurer and appear for the EUOs.[218] The insureds' assertion of their Fifth Amendment right against self-incrimination did not relieve them of their obligation to submit to the EUOs.[219] The court further held that the insureds' refusal was willful.[220] Nevertheless, the court reversed summary judgment for the insurer because the insurer was required to prove prejudice.[221] The court held that the insurer's argument that it had been prejudiced by the insured's failure to appear for the EUOs because the condition of the property had deteriorated was insufficient to demonstrate prejudice as a matter of law.[222]

2. Proof of Loss

In *Slater v. Hartford Insurance Co. of Midwest*,[223] the insured sued for breach of contract under a "standard flood insurance policy" (SFIP). The insured submitted two proofs of loss within a two-day period.[224] The proofs were both for the same amount; however, the second proof of loss included a detailed water damage report.[225] The insurer moved for summary judgment arguing that the proofs of loss were untimely.[226] The court held that Federal Rule of Civil Procedure 6(a) applied to the computation of the sixty-day deadline for submission of a proof of loss.[227] Counting began on the day after the cause of action arose and ended on the next day that was not a Saturday, Sunday, or legal holiday.[228] Since the first proof of loss was submitted on a Monday, the court held that the proof was timely, as under any calculation it was due that Monday.[229] The court further held that genuine issues of material fact existed as to whether the two proofs of loss could be considered as one complete proof of loss.[230]

217. *Id.*
218. *Id.* at *2.
219. *Id.* at *2–3.
220. *Id.* at *2.
221. *Id.* at *4.
222. *Id.* at *3.
223. No. 3:13-cv-345-J-34JBT, 2014 WL 2700835 (M.D. Fla. June 13, 2014).
224. *Id.* at *4.
225. *Id.*
226. *Id.* at *7.
227. *Id.* at *8.
228. *Id.*
229. *Id.* at *9.
230. *See also* Kabrich v. Allstate Prop. & Cas. Ins. Co., No. CV-12-3052-LRS, 2014 WL 3925493 (E.D. Wash. Aug. 12, 2014) (failure by insured to comply with proof of loss re-

C. *Appraisal*

1. Scope of Appraisal

Courts continue to vary on the issue of whether appraisal can proceed before causation or coverage issues are resolved.[231] Some courts have found that unresolved coverage or causation issues do not preclude appraisal.[232] In *Shifrin v. Liberty Mutual Insurance*, the court addressed a homeowner's argument that because causation issues remained, the insurer was precluded from invoking appraisal. The court agreed that causation issues were still in play; however, it disagreed that those issues barred the insurer from starting appraisal.[233]

A Florida court, on the other hand, concluded that courts must resolve any and all coverage disputes before compelling appraisal. In *Citizens Property Insurance Corp. v. Demetrescu*,[234] the Florida District Court of Appeal reversed a granted motion to compel appraisal because the trial court failed to resolve underlying coverage disputes. The appellate court explained that the trial court's finding that "water leaks [were] covered under the policy" was too broad and did not address the possibility that any exclusions in the policy precluded coverage.[235] The appellate court reversed and remanded so that the issues could be resolved before appraisal.[236]

In *UrbCamCom/WSU I, LLC v. Lexington Insurance Co.*,[237] the court found the period of restoration to be a "scope of loss issue," not a coverage issue for judicial decision.[238] The owners of an apartment building suffered losses after water damage made the property uninhabitable for

quirement by having a third party submit an inventory because the insured was solely responsible for submitting the proof of loss).

231. *See* Shifrin v. Liberty Mut. Ins., 991 F. Supp. 2d 1022, 1037 (S.D. Ind. 2014); *see also* Mapleton Processing v. Soc'y Ins. Co., No. C12-4083-LTS, 2013 WL 3467190 (N.D. Iowa July 10, 2013).

232. *Shifrin*, 991 F. Supp. 2d. at 1037

233. *Id.*; *see also Mapleton Processing*, 2013 WL 3467190, at *22 (explaining the "significant difference" between arguing "appraisal is not appropriate when coverage and/or causation are in dispute" and arguing "when appraisal occurs, the appraisers are limited to valuation issues and may not address causation or coverage"). The *Mapleton Processing* court held that appraisal can take place even though disputes over coverage or causation remain; however, appraisers must limit their assessment to "dollar amounts" and not make any findings about causation or coverage. Since *Shifrin* was decided, Indiana courts have applied the same approach. *See* Phila. Indem. Ins. Co. v. WE Pebble Point, No. 1:13-cv-01453-SEB-DML, 2014 WL 4390944, at *4 (S.D. Ind. Sept. 3, 2014) (holding "that the mere presence of causation or coverage disputes—in addition to the calculation of loss amounts that are at the core of an appraiser's competency—does not negate [insured's] contractual right to appraisal").

234. 137 So. 3d 500 (Fla. Dist. Ct. App. 2014)

235. *Id.* at 502.

236. *Id.* at 503.

237. No. 12-CV-15686, 2014 WL 1652201 (E.D. Mich. Apr. 23, 2014).

238. *Id.* at *4–5 (relying on Smith v. State Farm & Cas. Co., 737 F. Supp. 2d 702 (E.D. Mich. 2010)); *see also* Artist Bldg. Partners v. Auto-Owners Mut. Ins. Co., No. M2012-

a significant period of time.[239] The insurer paid $900,000 for business interruption and extra expenses, but the insured wanted more.[240] The court sent the case to appraisal and held that the period of restoration was a fact question for the appraisal panel, explaining that the panel was better suited than a court or jury to determine the period for which time element losses were owed.[241]

2. Timeliness of Demand or Refusal to Appraise

A party waives its right to appraisal by waiting "an unreasonable amount of time" before demanding appraisal.[242] Timeliness "must be measured from the point of impasse," not from when the dispute about amount of loss damages arose.[243] A "period of delay" is only instructive and is not dispositive on whether a waiver occurred.[244] Thus, in *SCVT, Ltd. v. National Fire and Marine Insurance Co.*, the court determined the ten-month period between the insured filing suit and the insurer demanding appraisal was not unreasonable because the parties had engaged in ongoing negotiations, which only evidenced disagreement without triggering an obligation to demand appraisal.[245] The parties mediated nine months after suit was filed.[246] Only at that point did the impasse become clear, and the insurer then filed a motion to compel appraisal within two weeks.[247]

In *Heller v. ACE European Group Ltd.*,[248] the court looked at the conduct of both parties when considering the timeliness of an appraisal demand and an argument that appraisal rights were waived. The court granted the insured's motion to compel appraisal over the insurer's contention that the property owner had waived his appraisal right.[249] The insurer claimed the delay in demanding appraisal caused it prejudice.[250]

00915-COA-RM-CV, 2013 WL 6169337, at *14 (Tenn. Ct. App. Nov. 21, 2013) (finding determination of restoration period within appraisal panel's authority)).

239. *UrbCamCom/WSU*, 2014 WL 1652201, at *1.

240. *Id.*

241. *Id.* at *6.

242. SCVT, Ltd. v. Nat'l Fire & Marine Ins. Co., No. V-13-069, 2014 WL 4102127, at *3 (S.D. Tex. Aug. 18, 2014).

243. *Id.* at *2.

244. *Id.* (citing *In re* Universal Underwriters, 345 S.W.3d 404, 408 (Tex. 2011)).

245. *SCVT, Ltd.*, 2014 WL 4102127, at *2–3.

246. *Id.*

247. *Id.*

248. No. 7:12-CV-422, 2013 WL 6589253 (S.D. Tex. Dec. 16, 2013).

249. *Id.* at *8.

250. *Id.* at *7.

The court disagreed, saying that it "could have avoided any putative prejudice by demanding appraisal, but did not."[251]

3. Enforcing and Modifying Appraisal Awards

In *Devonshire Real Estate & Asset Management, LP v. American Insurance Co.*,[252] the insurance company moved to compel completion of appraisal, arguing that the appraisal award did not fully consider deductions for prior payments.[253] The court denied the motion, finding that the contract terms limited the appraisers' duties to "ascertain[ing] a total sum of financial detriment caused to the property, and nothing else."[254] The appraisers, therefore, fulfilled their contractual duties and the award was binding and enforceable.

In *Michels v. Safeco Insurance Co. of Indiana*,[255] the Fifth Circuit reiterated the rule that an award resulting from a substantially complied with appraisal provision is presumptively valid; any "minor discrepancies" in either the appraisal process or award are not sufficient to justify invalidating an award.[256] The insureds moved to vacate an appraisal award contending that the award was not in full compliance with a policy requirement that the umpire's award be "fully itemized."[257] The court determined that the insureds were estopped from making this argument because it was their own appraiser who asked the umpire not to itemize the award.[258] The court further elaborated that the difference between a contract term compelling an itemized award and an appraiser not providing an itemized award is only a "small variance" that does not warrant vacating the award.[259]

4. Appraiser Qualifications

As a matter of first impression in Florida, the court in *Florida Insurance Guaranty Association v. Branco* ruled that a party cannot name its own attorney as a "disinterested" appraiser.[260] The Florida District Court of Appeal considered that attorneys owe their clients a duty of loyalty and concluded that attorneys may not serve as arbitrators or appraisers for their

251. *Id.*
252. No. 3:12-CV-2199-B, 2013 WL 6814731 (N.D. Tex. Dec. 26, 2013) (citing Wells v. Am. States Preferred Ins. Co., 919 S.W.2d 679, 683 (Tex. Ct. App. 1996)).
253. *Devonshire*, 2013 WL 6814731, at *1.
254. *Id.* at *3.
255. 544 F. App'x 535 (5th Cir. 2013).
256. *Id.* at 541 (citing Providence Lloyds Ins. Co. v. Crystal City Indep. Sch. Dist., 877 S.W.2d 872, 875 (Tex. Ct. App. 1994)).
257. *Michels*, 544 F. App'x at 542.
258. *Id.*
259. *Id.*
260. 148 So. 3d 488 (Fla. Dist. Ct. App. 2014).

clients if the applicable provision requires any named representative to be "disinterested." [261]

In *Scalise v. Allstate Texas Lloyds*,[262] the insurer's adjuster and appraiser estimated damages within $75 of each other, approximately $550 and $475 respectively, but the insured's appraiser's estimate was over $56,000.[263] The insured claimed that the insurer's appraiser was not independent and competent, citing to the close similarities between the two estimates.[264] The court explained that the appraiser was not incompetent nor did his estimate determine the award.[265] That the estimates were very close did not breach the contract provision requiring an independent, competent appraiser.[266]

5. Miscellaneous Issues

In *Cammarata v. State Farm Florida Insurance Co.*,[267] the Florida District Court of Appeal held that an insurer's liability for coverage and the extent of damages must be determined before a bad faith action becomes ripe. The court attempted to reconcile conflicting case law in Florida and ultimately receded from its decision in *Lime Bay Condominium Inc. v. State Farm Florida Insurance Co.*,[268] which held that an insured must prove contract liability before a bad faith action is ripe.[269] *Cammarata* began with a dispute between the insured and insurer over coverage for hurricane damage and proceeded through appraisal. The insurer ultimately agreed to pay the award as determined by the court-appointed neutral umpire, and the insureds then sued the carrier for bad faith failure to settle the claim.[270] The court permitted the insureds to proceed with a bad faith claim, holding that an appraisal award is equivalent to a "favorable resolution," which is a necessary prerequisite for a bad faith claim.[271] A concurring opinion expressed concern that the decision would create a slippery slope leading to insureds suing insurers for bad faith whenever an

261. *Id.* at 496 ("If an appraiser owes his nominating party a 'fiduciary duty of loyalty' or a 'confidential relationship,' as do attorneys, then '[t]he existence of such a relationship between a litigant and an [appraiser] creates too great a likelihood that the [appraiser] will be incapable of rendering a fair judgment.'") (citation omitted).

262. No. 7:13-CV-178, 2013 WL 6835248 (S.D. Tex. Dec. 20, 2013).

263. *Id.* at *2.

264. *Id.*

265. *Id.* at *3.

266. *Id.*

267. No. 4D13-185, 2014 WL 4327948 (Fla. Dist. Ct. App. Sept. 3, 2014).

268. 94 So. 3d 698 (Fla. Dist. Ct. App. 2012).

269. *Cammarata*, 2014 WL 4327948, at *7.

270. *Id.* at *3

271. *Id.* (citing Trafalgar at Greenacres, Ltd. v. Zurich Am. Ins. Co., 100 So. 3d 1155, 1158 (Fla. Dist. Ct. App. 2012)).

insurer disputes a claim and then pays "just a penny more" than its initial offer.[272]

A Texas court reached a different result in *Scalise v. Allstate Texas Lloyds*.[273] The homeowner alleged bad faith, arguing that the insurer's initial offer, made prior to the appraisal, resulted from a "substandard investigation that failed to take into account all covered damages."[274] After the insured demanded appraisal and the insurer paid the award, the insured filed suit. The court held that, where the insurer has paid the appraisal award, it has fulfilled its obligations under the contract and generally has no unfulfilled duty.[275] The court then ruled in favor of the insurer, saying that the "payment of all covered damages ended the dispute and any bad faith claims arising from it."[276]

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

In *Priore v. State Farm Fire & Casualty Co.*,[277] an Ohio court addressed whether the guarantor of a loan secured by a mortgage on an insured apartment complex was an insured. A limited liability corporation was formed for the purpose of owning a 120–unit apartment building.[278] Priore was a 50 percent owner and the managing member of the LLC.[279] A mortgage on the property was issued and was secured by the property, and Priore personally guaranteed the loan.[280]

The roof failed due to excessive weight of accumulating snow and ice.[281] As a result, some of the apartment units flooded.[282] The LLC filed an insurance claim seeking coverage for the roof, internal property damage, and lost rental income.[283] The LLC and its property manager filed suit, and Priore moved to intervene as a plaintiff.[284] The insurer opposed the motion, arguing that Priore lacked standing.[285] Priore withdrew his motion to intervene and filed a separate state court lawsuit in his own name.[286] The trial court granted the insurer summary judgment

272. *Id.* at *7 (Gerber, J., concurring specially).
273. No. 7:13-CV-178, 2013 WL 6835248 (S.D. Tex. Dec. 20, 2013).
274. *Id.* at *6.
275. *Id.*
276. *Id.*
277. No. 99692, 2014 WL 811776 (Ohio Ct. App. Feb. 27, 2014).
278. *Id.* at *1.
279. *Id.*
280. *Id.*
281. *Id.*
282. *Id.*
283. *Id.*
284. *Id.*
285. *Id.*
286. *Id.*

on all claims.[287] The Ohio Court of Appeals affirmed, noting that the only named insured in the declarations page was the property owner and that the property coverage made no mention of a guarantor qualifying as a named insured.[288]

E. *Suit Limitations*

In *Executive Plaza, LLC v. Peerless Insurance Co.*,[289] the New York Court of Appeals unanimously held a two-year suit limitation provision in a fire insurance policy was unreasonable and unenforceable when read in conjunction with a provision that required the insured to repair or replace the damaged property within a reasonable period of time.[290]

The property sustained fire damage in February 2007.[291] By July 2007, Peerless had paid the ACV.[292] The insured notified Peerless that it would seek the balance of the RCV. The policy provided that Peerless would not pay the RCV until repairs or replacement were actually made and were made "as soon as reasonably possible after the loss or damage."[293] Peerless required documentation verifying that repairs had been completed before it would pay the holdback.[294]

To complete the repairs, the insured was required to obtain a variance from the local authorities.[295] The final building permit was not approved until seventeen months after the fire.[296] The repairs to the property were not substantially completed until more than three years after the fire.[297] Before the insured had completed rebuilding the property, but within the two-year limitations period, the insured filed suit to recover the holdback.[298] Peerless successfully moved to have the action dismissed as premature, since construction of the property had not been completed when suit was filed.[299] The insured did not appeal the decision.

After substantially completing the repairs more than two years after the loss, the insured submitted a claim for the holdback, which Peerless denied.[300] The insured again sued Peerless for breach of contract.[301] The

287. *Id.*
288. *Id.* at *4.
289. 5 N.E.3d 989 (N.Y. 2014).
290. *Id.* at 990.
291. *Id.*
292. *Id.*
293. *Id.*
294. *Id.*
295. *See* Exec. Plaza, LLC v. Peerless Ins. Co., No. 11-CV-1716 (JS)(GRB), 2012 WL 910086, at *1 (E.D.N.Y. Mar. 13, 2012).
296. *Id.*
297. *Exec. Plaza*, 5 N.E.3d at 991.
298. *Id.*
299. *Id.* at 991.
300. *Id.* at 990–91.
301. *Id.*

court granted Peerless' motion to dismiss the action as time-barred by the policy's two-year suit limitation provision.[302] The insured appealed.

The Second Circuit certified the following question:

> If a fire insurance policy contains (1) a provision allowing reimbursement of replacement costs only after the property was replaced and requiring the property to be replaced "as soon as reasonably possible after the loss"; and (2) a provision requiring an insured to bring suit within two years after the loss; is an insured covered for replacement costs if the insured property cannot reasonably be replaced within two years?[303]

The New York Court of Appeals began by noting that it had previously upheld even shorter suit limitation provisions in other insurance policies and that such limitations are generally enforceable.[304] The limitation, however, must be reasonable within the context of the particular claim. The court stated:

> The problem with the limitation period in this case is not its duration, but its accrual date. It is neither fair nor reasonable to require a suit within two years from the date of the loss, while imposing a condition precedent to the suit—in this case completion of replacement of the property—that cannot be met within that two year period.[305]

Accordingly, the court answered the certified question in the affirmative and held that, under the facts of the case, the two-year suit limitation was unreasonable and unenforceable.[306]

F. *Bad Faith*

In *State Farm Fire & Casualty Co. v. Brechbill*,[307] the Supreme Court of Alabama clarified that Alabama has a single bad faith tort, rather than separate "bad faith refusal to pay" (referred to as "normal" bad faith in prior Alabama case law)[308] and "bad faith refusal to investigate" ("abnormal" or "unusual or extraordinary" bad faith, under prior cases) torts.[309] In order to prove bad faith refusal to pay, the insured must prove, inter alia, refusal to pay the claim and the absence of an arguable reason for that refusal.[310] There is also a "conditional" element: the "insurer's intentional failure to determine whether there is a legitimate or arguable reason to refuse to pay

302. *Id.*
303. *Exec. Plaza*, LLC v. Peerless Ins. Co., 717 F.3d 114, 118 (2d Cir. 2013).
304. *Exec. Plaza*, 5 N.E.3d at 991–92.
305. *Id.* at 992.
306. *Id.* at 990.
307. 144 So. 3d 248 (Ala. 2013).
308. *See id.* at 260–61 (Moore, J., concurring specially).
309. *Id.* at 257–58.
310. *Id.* at 256–257.

the claim."[311] This requirement represents the "abnormal" case.[312] However, both types of bad faith actions require proof that there was no lawful, good faith reason for denial.[313] In *Brechbill*, the trial court dismissed a "normal" bad faith claim on summary judgment because State Farm had an arguable reason for refusing to pay a claim for windstorm damage.[314] The trial court denied State Farm's motion as to the "abnormal" claim, however, believing that issues of material fact existed as to whether the insurer's investigation was adequate. Specifically, the court considered whether the insurer allegedly failed to consider "before and after" evidence of the condition of the home.[315]

In reversing, the supreme court emphasized that, since the trial court had already determined that a legitimate reason for denying the claim existed, the insured could not prove the "conditional" element of "abnormal" bad faith.[316] The court distinguished its prior decision in *Jones v. Alfa Mutual Insurance Co.*,[317] where a bad faith failure to investigate a claim was permitted to go forward in spite of summary judgment on the failure to pay the claim. In the *Jones* case, the insurer did not have evidence for its denial until after it denied coverage.[318]

The court recently analyzed *Brechbill* and commented that there actually was an investigation and a report prepared at the time the claim was denied in *Jones*, leaving the court in *Lord v. Allstate Insurance Co.*[319] "baffled" by the basis on which the Alabama Supreme Court distinguished *Jones* from *Brechbill*.[320] These discrepancies and confusion suggest more turmoil ahead for Alabama bad faith law.

In *Porter v. Oklahoma Farm Bureau Mutual Insurance Co.*,[321] the Oklahoma Supreme Court ruled that an insurer did not commit bad faith by refusing to follow an unpublished opinion that would have required coverage for the insured's claim.[322] The opinion upon which the insured relied ruled that a similar accidental discharge coverage provision conflicted with an identical exclusion for water that backs up through sewers and

311. *Id.* at 257 (quoting Nat'l Sec. Fire & Cas. Co. v. Bowen, 417 So. 2d 179, 183 (Ala. 1982)).
312. *Brechbill*, 144 So. 3d at 258.
313. *Id.* at 257.
314. *Id.*
315. *Id.*
316. *Id.* at 259–60.
317. 1 So. 3d 23 (Ala. 2008).
318. *Id.*
319. No. 4:13-cv-593-TMP, 2014 WL 4686441 (N.D. Ala. Sept. 17, 2014).
320. *Id.* at *17.
321. 330 P.3d 511 (Okla. 2014).
322. *Id.* at 518.

drains and was, therefore, ambiguous.[323] Because the opinion was not ordered for publication, it had no precedential effect.[324] It was, therefore, not controlling and the insurer's refusal to follow the case was not bad faith.

In *Perdido Sun Condominium Association, Inc. v. Citizens Property Insurance Co.*,[325] the Florida District Court of Appeal considered whether Citizens was immune from bad faith under Florida's governmental immunity statute. The court ruled that the "willful tort" exception to the statute did, in fact, permit an action for bad faith refusal to settle a claim against Citizens.[326]

323. *Id.* at 515 (citing Andres v. Okla. Farm Bureau Mut. Ins. Co., 227 P.3d 1102 (Okla. Civ. App. 2009)). The *Andres* opinion, however, was ordered for publication by the Oklahoma Court of Civil Appeals.

324. *Id.* at 518.

325. 129 So. 3d 1210 (Fla. Dist. Ct. App. 2014).

326. *Id.* at 1213.