

RECENT DEVELOPMENTS IN PROPERTY
INSURANCE COVERAGE LITIGATION

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The aftermath of recent hurricanes in the Gulf South—primarily Hurricane Katrina—continues to provide the context for many of the recent significant developments in property insurance law. Extensive coverage litigation arising out of hurricane-related losses is now maturing into significant appellate court rulings on several important issues. These precedents will affect the boundaries of property insurance coverage and claim handling for future losses—resulting from hurricanes as well as other perils—in a number of substantive areas, from business interruption coverage to the mechanics of the appraisal process.

Even outside of hurricane-related claims and litigation, interesting property insurance questions continued to be addressed by courts around the country during the survey period. While this survey reviews a broad spectrum of issues relating to property coverage, two developments in particular

are worthy of note. First, several courts continued to grapple with the scope of coverage for a “collapse.” Additionally, many courts continued to define and interpret the policyholder’s duties after a loss, with particular focus on the examination under oath.

I. APPRAISAL

A. *Scope of Appraisal*

Most jurisdictions hold that appraisal is limited to the amount of loss and that appraisal may not include coverage issues. Thus, in *Salinas v. State Farm Lloyds*,¹ where State Farm maintained that the open portion of a claim was not covered and the policyholder made no attempt to confine the appraisal so as to avoid implicating coverage issues, there was no right to appraisal. A similar result was reached in *Caribbean I Owners’ Association, Inc. v. Great American Insurance Co. of New York*,² where the court held that “Alabama law is pellucidly clear that ‘appraisers are not vested with the authority to decide questions of coverage and liability’ in insurance disputes.”³ In *Laird v. CMI Lloyds*,⁴ a Texas appellate court ruled that an appraisal award amount was not binding on the insured. Rather, the extent of coverage under the policy and issues of causation were still to be determined by the court. Further, the court ruled that it may alter the award after resolution of the coverage issues.

B. *Timeliness of Demand or Refusal to Appraise*

While most policies provide for mandatory appraisal if the parties dispute the amount of loss, the right to appraisal may be waived if it is not invoked in a timely fashion. Thus, in *Ragas v. State Farm Fire & Casualty Co.*,⁵ the U.S. District Court for the Eastern District of Louisiana held that an insured’s demand for appraisal was untimely when it was made eight months after litigation commenced. That court also found that the insured could not recover additional amounts for wind damage when she had previously received insurance payments for alleged flood damages that exceeded the total amount of damage she alleged was suffered by her property.⁶

However, in *Detroit City Dairy, Inc. v. United National Insurance Co.*,⁷ the court held that the policyholder did not waive its right to appraisal

1. 267 F. App’x 381 (5th Cir. 2008).

2. No. 07-0829-WS-B, 2008 WL 687381 (S.D. Ala. Mar. 10, 2008).

3. *Id.* at *7 (citing *Rogers v. State Farm Fire & Cas. Co.*, 984 So. 2d 382 (Ala. 2007)).

4. 261 S.W.3d 322, 326 (Tex. App. 2008).

5. No. 07-1143, 2008 WL 425536 (E.D. La. Feb. 11, 2008).

6. *Id.* at *6.

7. No. 07-CV-11228-DT, 2007 WL 3333020 (E.D. Mich. Nov. 8, 2007).

even though the demand came after the policyholder had filed suit, been granted partial summary judgment on coverage, and only then demanded appraisal. Moreover, in *Rogers v. State Farm Fire & Casualty Co.*,⁸ because the policyholder was not prejudiced in any way, the court held that State Farm did not waive its right to appraisal where it initially demanded appraisal before suit was filed, the policyholder refused to enter into appraisal, and State Farm did not renew the demand until over fourteen months after suit was filed and State Farm had “substantially invoked the litigation process.”

Other courts have elaborated on these themes. The Northern District of California reached a typical conclusion concerning an appraisal provision. In *Garner v. State Farm Mutual Automobile Insurance Co.*, the court held that once the insurer invokes the appraisal provision of an auto policy, and the dispute involved only the amount of loss, the policyholder was obligated to proceed with appraisal.⁹ The appraisal provision in an automobile policy is not unconscionable.¹⁰

In *Tavilla v. Employers Mutual Casualty Insurance Co.*,¹¹ the carrier asked for a proof of loss. In response, the policyholders invoked appraisal and submitted proofs of loss for a portion of the claim. The policyholders then submitted additional receipts, without an additional proof of loss and without explanation of why the receipts represented covered losses. The insureds then filed suit for breach of contract and bad faith. The court held that whether the insureds had submitted sufficient proofs of loss to require the carrier to engage in appraisal was an issue of fact. Therefore, the issue was properly submitted to the jury, which found for the carrier.

C. Enforcing and Modifying Appraisal Awards

At issue in *Maiden Creek T.V. & Appliance, Inc. v. General Casualty Insurance Co.* was the impact of a voluntary agreement between the parties on the valuation of a stock loss on a subsequent appraisal.¹² In that case, the insurer paid the agreed amount. Because it did so, the court held that the necessary predicate to invoke the appraisal process was not met, and the appraisers had no authority to reevaluate the stock loss.¹³ Therefore, the court modified the appraisal award to reflect the agreed amount, as opposed to the lower amount set by the appraisers. It also modified the award to correct an apparent mathematical error.¹⁴ The appraisal award in another

8. 984 So. 2d 382 (Ala. 2007).

9. No. C 08-1365 CW, 2008 WL 2620900 (N.D. Cal. June 30, 2008).

10. *Id.* at *10.

11. No. 1 CA-CV 06-0764, 2008 WL 2154800 (Ariz. Ct. App. May 20, 2008).

12. No. 05-667, 2008 WL 351906 (E.D. Pa. Feb. 8, 2008).

13. *Id.*

14. *Id.*

case, *Moncada v. Allstate Insurance Co.*, specifically stated that it did not take into account the amounts already paid by the insurer, but addressed only the total amount of loss; in that case, the court subsequently held, the insurer was entitled to have the award modified to reflect the amounts it had already paid.¹⁵ In *Devonwood Condominium Owners Ass'n v. Farmers Insurance Exchange*, a California appellate court held that an appraisal award that specifically stated that it did not address the deductible or coverage issues was improperly enforced by a trial court, and there was no basis to enter a judgment in the amount of the award when the insurer timely raised coverage issues.¹⁶

At issue in *Magaldi v. Safeco Insurance Co. of America* was the impact of a town's condemnation of insured property rendering it a "constructive total loss."¹⁷ A Florida federal court held that the appraisal award did not govern the quantum of the loss—even where the award had been entered and the insurer had paid it—because the condemnation entitled the policyholder to recovery of full policy limits under a valued policy law, thus overriding the need for an appraisal because the valuation of the loss was no longer in question.¹⁸ In *Children's Imagination Station v. Prime Insurance Syndicate*, the court rejected the insurer's argument that an appraisal award was ambiguous and, therefore, could not be enforced because the award appeared clear on its face and the policyholder submitted affidavits from its appraiser and the umpire supporting the plain language of the appraisal award and the insurer submitted no contrary evidence.¹⁹ However, in *Farmers Automobile Insurance Ass'n v. Union Pacific Railway Co.*, the court held that discovery of appraisers in subsequent litigation was not allowed because appraisers are not permitted to impeach their own award.²⁰

Saathoff v. Country Mutual Insurance Co. involved the enforcement of an appraisal award that established both actual cash value (ACV) and replacement cost value (RCV).²¹ The court in that case held that the insurer was only required to pay the ACV until the insured actually repairs or replaces.²² The policyholder in *Wilson v. Federated National Insurance Co.* was entitled to judgment on an appraisal award even though the insurer paid the amount at issue into court and sought to litigate the propriety of the appraisal.²³ And, in *National Refrigeration v. Travelers Indemnity Co.*

15. No. C 05-4762 CW, 2008 WL 3992717 (N.D. Cal. Aug. 26, 2008).

16. 77 Cal. Rptr. 3d 88 (Cal. Ct. App. 2008).

17. No. 07-80618-CIV, 2008 WL 4097697 (S.D. Fla. Sept. 2, 2008).

18. *Id.*

19. No. 1:07CV1000-LG-JMR, 2008 WL 724049 (S.D. Miss. Mar. 14, 2008).

20. 756 N.W.2d 461 (Wis. Ct. App. 2008).

21. 886 N.E.2d 370 (Ill. App. Ct. 2008).

22. *Id.* at 404.

23. 969 So. 2d 1133 (Fla. Dist. Ct. App. 2007).

of America, the Rhode Island Supreme Court held that legal action to enforce an appraisal provision was subject to the policy's suit limitations provision.²⁴

D. Appraiser Qualifications

In most jurisdictions, an appraiser who will be paid a contingent fee is not disinterested; either the appraiser will be disqualified or any award to which that appraiser agrees will be found unenforceable. See *Chardonmay Village Condominium Ass'n, Inc. v. James River Insurance Co.*,²⁵ *Spring Creek Village Apartments Phase V, Inc. v. General Star Indemnity Co.*,²⁶ and *Harris v. American Modern Home Insurance Co.*²⁷ There are, however, contrary views. Thus, in *Prien Properties, LLC v. Allstate Insurance Co.*,²⁸ the court held that an appraiser may be disinterested even if he was also the adjuster for the party that appointed him, so long as there is no evidence in the record to indicate improper motives.²⁹ Moreover, given that the insurer was aware of the contingent fee arrangement (which had been fully disclosed), but did not object to the appointment until after the award was entered, the insurer had waived the objection.³⁰

E. Miscellaneous Issues

Invoking an appraisal provision and then failing to follow through can lead to an assessment of damages against an insurer. In *Poteet v. Kaiser*,³¹ Farmers Group invoked the appraisal provision of the applicable policy and later sued the policyholder seeking appointment of an umpire. That suit was dismissed some twenty months later for want of prosecution. The policyholder then sued Farmers for breach of contract and bad faith, including a claim for damages arising out of Farmers' breaching the contract by abandoning the appraisal process once invoked, contending that Farmers intended only to cause further delay in resolving the claim. The appellate court held that Farmers' abandonment of the appraisal process and the litigation it filed to have an umpire appointed could lead to breach of contract damages, and that the trial court erred in granting summary judgment as to the breach of the insurance contract's appraisal provision.³²

24. 947 A.2d 906 (R.I. 2008).

25. No. 06-4878, 2008 WL 3285908 (E.D. La. Aug. 9, 2008).

26. 261 S.W.3d 206 (Tex. App. 2008).

27. 571 F. Supp. 2d 1066 (E.D. Mo. 2008).

28. No. 07 CV 845, 2008 WL 1733591 (W.D. La. Apr. 14, 2008).

29. *Id.* at *4.

30. *Id.*

31. No. 2-06-397-CV, 2007 WL 4371359 (Tex. App. Dec. 13, 2007).

32. *Id.* at *8.

In *Mornay v. Travelers Insurance Co.*,³³ the district court stayed an antitrust class action based on the use of the Xactimate software to determine the amount of a property damage loss. The court held that, because Standard Fire invoked the appraisal provision as to the class representative, if the appraisal award substantially satisfied the class representative's claims, the class representative would no longer be an appropriate representative and the remaining claims against Standard Fire could not proceed as a class action.³⁴

Finally, under proper circumstances an insurer's invocation of the appraisal provision is not necessarily bad faith. Thus, in *316, Inc. v. Maryland Casualty Co.*,³⁵ Maryland Casualty acknowledged coverage and paid \$3.8 million towards the loss. The parties could not agree on the total amount of loss, and Maryland Casualty invoked its right to appraisal. One week later, the insureds filed a civil remedy notice under Florida law. The appraisal award came in at \$6.8 million, and Maryland Casualty paid the balance due. The court held that Maryland Casualty was entitled to summary judgment on the bad faith claim because the loss was complex, Maryland Casualty paid over \$3.8 million within seven months of the loss, and ultimately it paid over sixty percent of the final appraisal award in advance of the appraisal. Given the complicated nature of the claim and the large dollar amounts involved, the court held that Maryland Casualty acted reasonably when it demanded appraisal.

II. BUSINESS INTERRUPTION/CIVIL AUTHORITY

A. *Necessary Suspension*

In a case from the Eastern District of Louisiana, an insured law firm's business interruption claim arising from the closure of one of its offices withstood the insurer's summary judgment motion, even though work at the law firm's other offices continued without any interruption. In *Evans v. Lafayette Insurance Co.*,³⁶ the law firm's New Orleans office suffered roof damage and was closed for a protracted amount of time after Hurricane Katrina. The insurer denied the firm's business interruption claim, contending that several of its partners and employees—including the leading partner—were able to work out of the firm's other offices that had escaped damage. The insurer moved to dismiss the subsequent lawsuit, arguing that the policyholder did not suffer a "necessary suspension" of operations due to the roof damage because its work continued in other locations, and

33. No. 07-5274, 2008 WL 2439941 (E.D. La. June 13, 2008).

34. *Id.* at *4.

35. No. 3:07CV528/RS/MD, 2008 WL 3926863 (N.D. Fla. Aug. 21, 2008).

36. No. 06-6783, 2007 WL 4545883 (E.D. La. Dec. 18, 2007).

therefore the firm could not show it suffered any actual loss. The trial court denied the motion, holding that there was no question the policyholder's New Orleans office had suffered a necessary suspension of operations, and that the insured's efforts to move work to other locations was in compliance with its duties to mitigate its loss.³⁷ The court also held that fact questions remained on the quantum of the policyholder's actual loss.³⁸

A Louisiana state appellate court clarified in *Magee v. National Fire Insurance Co. of Hartford*³⁹ that coverage for loss caused by an "action of civil authority" that prohibited access automatically stopped when an evacuation order issued in the aftermath of Hurricane Katrina was lifted. In another case arising out of that hurricane, *Clover v. Allstate Insurance Co.*,⁴⁰ the U.S. District Court for the Eastern District of Louisiana denied the insurer's motion for summary judgment, finding the insured's claim for lost business income was not precluded as a matter of law because the insured closed her store, evacuated, and remained in Florida following Hurricane Katrina.

B. Valuation

In *Consolidated Companies, Inc. v. Lexington Insurance Co.*,⁴¹ policy language compelled the court's conclusion that a business interruption loss resulting from Hurricane Katrina would be calculated using the net profit the policyholder earned before it resumed operations, not its gross margin during the same period. In granting partial summary judgment to the insurer, the court held that the policyholder's net profit earned by partially restoring its operations was to be deducted from its business interruption claim.⁴²

When an insured shopping mall was able to rent its parking lot to the Federal Emergency Management Agency (FEMA) after Hurricane Katrina, the revenue from the rental would not be considered an offset against the shopping mall's business interruption claim because the policy at issue excluded "paved surfaces" from the definition of "covered property," a Louisiana appellate court held in *Chalmette Retail Center, LLC v. Lafayette Insurance Co.*⁴³ Since the insurer's claim for an offset was based on its view that the parking lot was within the scope of the policy, but the policy unambiguously excluded the lot from coverage, the trial court's grant of partial summary judgment on the offset issue to the policyholder was affirmed.⁴⁴

37. *Id.* at *2.

38. *Id.* at *3.

39. No. 2007 CA 0474, 2008 WL 426285 (La. Ct. App. Feb. 8, 2008).

40. No. 06-4339, 2008 WL 821961, at *3 (E.D. La. Mar. 26, 2008).

41. No. 06-4700, 2007 WL 2694592 (E.D. La. Sept. 11, 2007).

42. *Id.* at *3.

43. 974 So. 2d 822 (La. Ct. App. 2008).

44. *Id.* at 823-24.

III. COLLAPSE

A. Collapse Defined as Substantial Impairment of Structural Integrity

In *GCG Associates LP v. American Casualty Co. of Reading, Pennsylvania*,⁴⁵ the court granted the policyholder's motion for partial summary judgment, defining "collapse" in the policy as the "substantial impairment of structural integrity." While the parties agreed to this definition, they argued that the respective experts employed the wrong standard, with the insurance company's expert referring to an "imminent collapse" as part of the definition. The court held that the extent to which the experts' definition of collapse conflicted with the approved definition went to their credibility and would not be resolved at the summary judgment stage.⁴⁶

In *Miller v. First Liberty Insurance Co.*,⁴⁷ a termite infestation caused severe structural damage to a house, causing the policyholder to tear down the infested walls for safety reasons. The policyholder sought coverage under the policy's collapse provision, but the insurance company denied coverage. The policyholder then filed a motion for summary judgment. The policy explicitly defined a collapse as follows:

Collapse means the sudden and entire falling down or caving in of a building or any part of a building with the result that the building or any part of the building cannot be occupied or used for its current intended purpose A building or any part of a building that is in danger of falling down or caving in is not considered to be in a state of collapse A part of a building that is standing is not considered to be in a state of collapse even if it has separated from another part of the building A building or any part of a building that is standing is not considered to be in a state of collapse even if it shows evidence of cracking, bulging, sagging, bending, leaning, settling, shrinkage or expansion.⁴⁸

The court applied this express definition and refused to define collapse as the substantial impairment of structural integrity, stating that it would convert the policy into a maintenance agreement. As there was no evidence of a sudden and entire falling down or caving in of the building, the court denied the policyholder's motion.⁴⁹

In *130 Slade Condominium Ass'n, Inc. v. Millers Capital Insurance Co.*,⁵⁰ however, the court defined collapse as the impairment of structural integrity despite apparently contrary policy language. In that case, support columns in a condominium complex buckled and cracked due to rust. An engineer opined

45. No. C07-792BHS, 2008 WL 3542620 (W.D. Wash. Aug. 8, 2008).

46. *Id.* at *5-6.

47. No. 07-1338, 2008 WL 2468605 (E.D. Pa. June 17, 2008).

48. *Id.* at *2.

49. *Id.* at *4.

50. No. CCB-07-1779, 2008 WL 2331048 (D. Md. June 2, 2008).

that the support columns were in danger of further collapsing and the building needed to be evacuated.⁵¹ The policy contained a definition of collapse similar to that in *Miller*.⁵² The court emphasized the policy provision stating that “[c]ollapse means an abrupt falling down *or* caving in of a building. . . .” The policy, however, did not define what “caving in” meant and the court held that “to the extent the ‘caving in’ language is ambiguous . . . the court adopts the ‘any serious impairment of structural integrity’ definition of ‘caving in’ as used to define ‘collapse.’”⁵³ The court noted that when the damage occurred, it sounded “like a truck had hit the building,” which was evidence that the building did abruptly cave in. Thus, under either the plain language of the policy or the liberal definition applied under Maryland law to ambiguous collapse provisions, the policyholder was entitled to coverage.⁵⁴

B. *Collapse as Efficient Proximate Cause of Damage*

In *Tastee Treats, Inc. v. United States Fidelity & Guaranty Co.*,⁵⁵ a restaurant was damaged by earth movement after collapse of culverts located adjacent to the property. The insurance company denied coverage based on an earth movement exclusion. The court found that the earth movement exclusion did not apply because the efficient proximate cause was the collapse of the culverts. The court rejected the insurance company’s argument that a concurrent causation clause precluded coverage.⁵⁶

In *Hartford Casualty Insurance Co. v. Evansville Vanderburgh Public Library*,⁵⁷ a building was damaged by collapse when a vibratory hammer used in an adjacent construction project sent vibrations through the ground that caused the sand in the soil beneath the building to compact. The compaction created a hole into which the building collapsed.⁵⁸ The court held that coverage was excluded because, even though the policy provided coverage for collapse, the efficient proximate cause of the damage was faulty workmanship, which was specifically excluded.⁵⁹

C. “Sudden” Collapse of Land

In *Amitie One Condominium Ass’n v. Nationwide Property & Casualty Insurance Co.*,⁶⁰ the condominium foundation and floor slabs were damaged by sinkholes beneath the property. The insurer denied coverage, asserting

51. *Id.* at *1.

52. *Id.* at *2.

53. *Id.* at *5.

54. *Id.* at *5–6.

55. No. 5:07-CV-00338, 2008 WL 2836701 (S.D. W. Va. July 21, 2008).

56. *Id.* at *2–4.

57. 860 N.E.2d 636 (Ind. Ct. App. 2007).

58. *Id.* at 641.

59. *Id.* at 647.

60. No. 1:07-CV-1756, 2008 WL 2973097 (M.D. Pa. Aug. 4, 2008).

that the policy covered damage caused by sinkholes only if they resulted from a sudden collapse of land.⁶¹ The policy covered damage “caused by or resulting from risks of direct physical loss involving collapse of a building or any part of a building” if the damage resulted from a specified cause of loss. Sinkholes were a specified cause of loss and defined as “the sudden sinking or collapse of land into underground empty spaces. . . .”⁶² The court denied the insurer’s motion to dismiss, stating that there was insufficient evidence to determine whether the sinkhole collapse constituted a sudden collapse of land, noting that ten-year development of the problem might be deemed “sudden” in the geologic context.⁶³

D. Collapse Constituted an Accident

In *Harbor Communities, LLC v. Landmark American Insurance Co.*,⁶⁴ building number nine of several buildings under construction was damaged by collapse. The insured sued its carrier for damages resulting from the collapse. The coverage dispute focused upon whether the collapse was an “accident” within the meaning of the policy, where “accident” was undefined. The court held that the operative definition was whether damage was expected or intended from the standpoint of the insured.⁶⁵ The parties disagreed as to the cause of the collapse, with the insurer arguing that the collapse was caused by a design flaw as well as improper shoring during construction.⁶⁶ The court held that the collapse was an accident because “the fact that a subsequent forensic investigation was able to determine the cause of the collapse does not make the event expected or intentional” from the standpoint of the insured.⁶⁷ The insured also sought coverage for the cost of demolishing and rebuilding other buildings incorporating the design defect that caused the collapse of building nine. The court held that the policy’s design defect exclusion precluded such coverage, “except to the extent the collapse of Building #9 caused direct physical loss or damage to other structures.”⁶⁸

IV. COVERED PROPERTY

A. Structures

In *Shelter Mutual Insurance Co. v. Simmons*,⁶⁹ the insured sought payment for damage to their brick driveway as a “building structure.” The court de-

61. *Id.* at *2.

62. *Id.*

63. *Id.* at *4.

64. No. 07-174336-CIV, 2008 WL 2986424 (S.D. Fla. Aug. 4, 2008).

65. *Id.* at *3.

66. *Id.* at *4.

67. *Id.* at *3.

68. *Id.* at *8.

69. 543 F. Supp. 2d 582 (S.D. Miss. 2008), *aff’d*, No. 08-60241, 2008 WL 4189585 (5th Cir. Sept. 11, 2008).

defined “building structure” as something that provides shelter or habitation to people, animals, or property. Based on that definition, the court held that a driveway was not a “building structure,” and there was no additional payment due since the policy limit for “other structures” was exhausted.⁷⁰

In *Ormond Country Club v. James River Insurance Co.*,⁷¹ a golf course that sustained damage during Hurricane Katrina was not covered since it was not listed in the Declarations and because it was excluded from coverage as “land.”⁷² Also, building coverage for “outdoor fixtures” and “completed additions” did not encompass swimming pools, tennis courts, or the surrounding fences since they were not listed in the Declarations, nor were they part of any building or structure that was listed.⁷³

In *Mentesana v. State Farm Fire & Casualty Co.*,⁷⁴ the insured’s swimming pool and waterfall were covered under the “Dwelling Extension Coverage,” which applied to “other structures on the residence premises, separated from the dwelling by a clear space.” The court found that it was unreasonable to allow the structures to be brought within the “Dwelling Coverage” merely by placing them on a concrete slab and connecting the slab to the foundation of the house.⁷⁵

B. *Personal Property*

In *Villanueva v. Preferred Mutual Insurance Co.*,⁷⁶ the policy limit for “personal property on the insured premises used for business purposes” did not apply since the property was not used for “business purposes.” “Business” was defined to include “the rental of property to others. It does not include the occasional rental for residential purposes of the part of the insured premises normally occupied solely by your household.”⁷⁷ The court held that the rental of the property for five months during ski season was “occasional” since it was a one-time, temporary vacation rental, and the insureds intended to return to the property and use it themselves.⁷⁸

C. *Insurable Interest*

In *Cordell v. Pacific Indemnity Co.*,⁷⁹ a fire destroyed the insured’s property, and the insured subsequently sold the property. No repairs had been made

70. *Id.* at 585–86.

71. No. 06-11376, 2008 WL 859482 (E.D. La. Mar. 27, 2008).

72. *Id.* at *2.

73. *Id.* at *3.

74. No. 07-0456-CV-W-ODS, 2008 WL 2225737 (W.D. Mo. May 28, 2008).

75. *Id.* at *3.

76. 851 N.Y.S.2d 742 (App. Div. Feb. 28, 2008).

77. *Id.* at 743–44.

78. *Id.* at 744.

79. No. 4:05-CV-167-RLV, 2007 WL 4531834 (N.D. Ga. Dec. 13, 2007).

between the time the property was damaged by fire and the time it was sold.⁸⁰ The court held that the insured could recover for the dwelling and the fixtures because insurable interest is determined at the time of loss.⁸¹

D. *Newly Acquired*

In *Spike Industries, Inc. v. Midwestern Indemnity Co.*,⁸² following a fire at the insured's manufacturing facility, the insurer interpreted the policy as only covering newly acquired personal property at newly acquired locations. The court rejected the insurer's argument and held that the coverage extension covered newly acquired property at any location, regardless of whether the location was newly acquired.⁸³

V. DUTIES

A. *Examinations Under Oath*

The sole owner and member of an insured limited liability company was required to produce his personal tax returns at the insurer's request after a loss, a Connecticut trial court held in *Double G.G. Leasing, LLC v. Certain Underwriters at Lloyd's London*.⁸⁴ In that case, the policyholder company owned a vacant building that was destroyed by fire about a month after the policyholder purchased commercial property insurance. The insurer asked for copies of the personal tax returns filed by the company's sole owner as part of its request for an examination under oath (EUO). The owner appeared for examination but declined to produce his own tax returns, arguing that the limited liability company was the only named insured in the policy and the only entity or person that owed any duties to the insurer. The policy's cooperation clause allowed the insurer to examine "an insured's books and records." The insured denied the claim because of the owner's failure to produce his personal tax returns, and litigation followed.⁸⁵ Both sides moved for summary judgment, and the court granted the insurer's motion. The court initially agreed with the policyholder: strictly construed, the policy's cooperation clause only required the insured LLC, not the owner, to cooperate with the insurer by producing documents, and so the policy language itself did not require the owner to produce his tax returns.⁸⁶ In this case, however, given that the owner was the only owner of the LLC, the court "pierced the

80. *Id.* at *1.

81. *Id.* at *3.

82. No. 06 MA 148, 2007 WL 4145842 (Ohio Ct. App. Nov. 14, 2007).

83. *Id.* at *3.

84. No. AANCV075003003, 2008 WL 2345205 (Conn. Super. Ct. May 16, 2008).

85. *Id.* at *2.

86. *Id.* at *6.

corporate veil” between the two and held that the owner needed to produce the returns because they were material to the insurer’s investigation.⁸⁷

A policyholder’s failure to appear and subsequent refusal to answer questions or to produce documents justified the insurer’s denial of his claim without prejudice, a Massachusetts appellate court held in *Hanover Insurance Co. v. Cape Cod Custom Home Theater, Inc.*⁸⁸ In that case, the insurer asked the policyholder to appear for an EUO in connection with the policyholder’s theft claim under its commercial property policy. The policyholder failed to appear for the first date and, at two further examinations, gave “no response to any legitimate questions that were raised by counsel.” Moreover, his attorney’s conduct was “unprofessional,” according to the trial court in the insurer’s subsequent action seeking a declaration that the claim was barred by virtue of the policyholder’s failure to cooperate.⁸⁹ The trial court held that such conduct, combined with the policyholder’s failure to produce requested financial documents, constituted a material breach of the policy but declined to find that the insurer had been prejudiced by such conduct. The appellate court, reversing the trial court in part, held that the insured’s “willful, unexcused refusal to comply with a reasonable request for an examination under oath” was a material breach but that the insurer did not need to demonstrate prejudice.⁹⁰

An Ohio appellate court affirmed a trial court’s holding that a policyholder’s failure to complete an examination under oath required dismissal of the policyholder’s subsequent lawsuit seeking coverage for her theft claim.⁹¹ Also during the survey period, the Seventh Circuit Court of Appeals adopted a district court opinion holding that a policyholder could not require the insurer to agree in advance to the scope of questions that could be asked at an EUO.⁹²

B. *Proof of Loss*

The U.S. Sixth Circuit Court of Appeals held that a policyholder’s signed, but unsworn, letter giving notice of rain damage to his National Flood Insurance Program insurer was not a valid proof of loss.⁹³ In affirming the trial court’s grant of summary judgment, the court held that the proof of loss requirement in the policy and in the regulations governing the flood

87. *Id.* at *10–11.

88. 891 N.E.2d 703 (Mass. App. Ct. 2008).

89. *Id.* at 705.

90. *Id.* at 707.

91. *Vogias v. Ohio Farmers’ Ins. Co.*, 894 N.E.2d 1265 (Ohio Ct. App. 2008).

92. *Nat’l Athletic Sportswear, Inc. v. Westfield Ins. Co.*, 528 F.3d 508 (7th Cir. 2008).

93. *Evanoff v. Standard Fire Ins. Co.*, 534 F.3d 516 (6th Cir. 2008).

insurance program was to be strictly construed.⁹⁴ It also rejected the policyholder's argument that the flood insurer waived the proof of loss requirement because it repudiated the entire policy when it denied his claim.⁹⁵

VI. EXCLUSIONS

A. Causation

In *Ash Grove Cement Co. v. Employers Insurance of Wausau*,⁹⁶ a federal court applying Kansas law vacated a portion of its previous decision in which it had applied the concurrent cause doctrine. The court formerly held that coverage was not necessarily precluded under a construction defect exclusion where concurrent covered and excluded causes combine to produce damage, "as long as the covered cause is independent and does not fall within the relevant exclusion."⁹⁷ The court vacated this section of its opinion in light of the court's application of the efficient proximate cause standard in the jury instructions.

In *Dickinson v. Nationwide Mutual Fire Insurance Co.*,⁹⁸ a federal court sitting in Mississippi declined to adopt an insurer's broad interpretation of an anti-concurrent causation clause that barred coverage for wind damage (a covered peril) when the property also sustained flood damage (an excluded peril). Citing Fifth Circuit precedent, the court held that where a home first sustained wind damage that preceded flood damage, the anti-concurrent causation clause did not apply "because each force causes its own separate damage independent of the damage caused by the other even when the same item of property is damaged by both forces acting separately and sequentially."⁹⁹ The court summarily rejected the insurer's motion for reconsideration, noting that the anti-concurrent causation clause has no application to damage that is not caused by an excluded peril.¹⁰⁰ Conversely, in *Corban v. United Services Automobile Ass'n*,¹⁰¹ a Mississippi state court, relying upon the same precedent as *Dickinson*, came to the opposite conclusion, holding that anti-concurrent causation language precluded coverage for property that sustains wind damage first, and then sustains damage

94. *Id.* at 521.

95. *Id.*

96. 530 F. Supp. 2d 1199, 1200 (D. Kan. 2008).

97. *Ash Grove Cement Co. v. Employers Ins. of Wausau*, 513 F. Supp. 2d 1200, 1205 (D. Kan. 2007), *vacated in part*, 530 F. Supp. 2d 1199, 1200 (D. Kan. 2008).

98. No. 1:06CV198 LTS-RHW, 2008 WL 941783, at *5-6 (S.D. Miss. Apr. 4, 2008), *clarified*, 2008 WL 1913957 (S.D. Miss. Apr. 25, 2008).

99. *Id.* at *6.

100. *Dickinson*, 2008 WL 1913957, at *6.

101. No. A2401-2006-00404U (Miss. Mar. 28, 2008).

from a storm surge. Notably, however, this case has been selected for expedited appeal to the Mississippi Supreme Court.¹⁰²

A New York appellate court held in *Kennel Delites, Inc. v. T.L.S. NYC Real Estate, LLC*¹⁰³ that a rain exclusion applied to preclude coverage for water damage from a rainstorm. The court rejected the insured's contention that the cause of the damage was debris and mortar that fell from a neighboring building that clogged the roof drain, causing an accumulation of rainwater that entered the building. Reversing the lower court, the appellate court held that the efficient physical cause of the damage was the rainwater.¹⁰⁴

In *Studdard v. State Auto Property & Casualty Insurance Co.*,¹⁰⁵ a federal court sitting in Mississippi interpreted anti-concurrent causation language contained in an exclusion that excluded "earth movement" and "water damage" to bar coverage for damage sustained in connection with Hurricane Katrina, even though at least some of the damage was caused by a tree falling on the insured home as a result of the windstorm (a covered cause of loss). The court held that any damage caused by "water damage" and "earth movement" was excluded regardless of whether a covered cause of loss "sets in motion a sequence of events resulting in 'water damage' and 'earth movement.'" ¹⁰⁶

In a similar case arising out of Hurricane Katrina, *Maxus Realty Trust, Inc. v. RSUI Indemnity Co.*,¹⁰⁷ the U.S. District Court for the Western District of Missouri found that an anti-concurrent causation provision preceding a flood exclusion did not bar coverage as a matter of law for hurricane damage that occurred below an uncontested flood waterline. The insured filed suit against RSUI to recover amounts allegedly owed under the excess policy. The court found that the anti-concurrent preface did not preclude coverage for damage below the waterline even if the flood would have caused the damage anyway.¹⁰⁸

B. *Earth Movement*

A New York appellate court held in *Labate v. Liberty Mutual Insurance Co.*¹⁰⁹ that exclusions in a homeowners' policy for "earth movement" and "settling" unambiguously excluded coverage for a claimed loss, reversing a trial court's

102. Corban v. United Servs. Auto. Ass'n, No. 2008-M-00645-SCT (Miss. May 19, 2008).

103. 852 N.Y.S.2d 130 (N.Y. App. Div. 2008).

104. *Id.*

105. No. 1:06cv190-P-D, 2007 WL 3047150, at *6-7 (N.D. Miss. Oct. 17, 2007).

106. *Id.* at *7.

107. No. 06-0750-CV-W-ODS, 2007 WL 4468697, at *2 (W.D. Mo. Dec. 17, 2007).

108. *Id.* at *2-3.

109. 45 A.D.3d 811 (N.Y. App. Div. 2007).

denial of summary judgment to the insurer. After the homeowners' claim for damage to their basement and walls due to settling and cracking was denied by the insurer based on those two exclusions, the homeowners contended in their subsequent lawsuit that the loss was actually caused by covered "hidden decay." The trial court denied the insurer's summary judgment motion, holding there was a triable issue of fact on the actual cause of the loss. The appellate court disagreed and granted the motion, finding that both sides' experts had opined that the damage was caused either directly or indirectly by excluded earth movement, and that the policy's exclusions for such losses were unambiguous.¹¹⁰

A Massachusetts trial court held that the earth movement exclusion in a homeowners' policy did not bar coverage for foundation cracks caused, according to the insurer's engineer, by the lateral pressure of soil against the house's foundation in *Lundquist v. Cambridge Mutual Fire Insurance Co.*¹¹¹ The court denied the insurer's motion for summary judgment because the policy's definition of "earth movement" focused on earthquakes, landslides, and other occurrences that involved the literal movement or shaking of the earth, not the mere pressure of soil on the foundation.¹¹²

In *Um v. Cumberland Insurance Group*,¹¹³ a New Jersey appellate court held the earth movement exclusion in a homeowners' policy barred coverage for damage caused by a contractor's use of heavy equipment nearby. In that case, the exclusion specifically excluded loss from "any natural or human made" earth movement, and included anti-concurrent causation language clarifying that the exclusion applied even if "loss otherwise covered" contributed to the earth movement loss.¹¹⁴ The homeowners' expert opined that the damage to the house resulted from a contractor's use of bulldozers and dewatering at a construction site, and after the insurer denied coverage based on the earth movement exclusion, the policyholders argued that the loss was covered because loss resulting from "vehicles or aircraft"—in this case, the bulldozers—was a covered cause of loss.¹¹⁵ The trial court granted summary judgment for the insurer, and the appellate court agreed, holding that the policy clearly excluded other concurrent causes (such as losses from vehicles) from the earth movement exclusion.¹¹⁶

110. *Id.* at 812.

111. No. 05917, 2007 WL 4711404 (Mass. Super. Ct. Dec. 14, 2007).

112. *Id.* at *3-4.

113. No. A-0625-06T2, 2008 WL 656805 (N.J. Super. App. Div. Mar. 13, 2008).

114. *Id.* at *3.

115. *Id.* at *2.

116. *Id.* at *5-6.

C. Vacancy

In *Ellis v. Farm Bureau Insurance Co.*,¹¹⁷ a Michigan appellate court held that coverage for a fire caused by vandalism was not barred by a vacancy exclusion where the property was temporarily unoccupied while it underwent major renovations in anticipation of new tenants. The court noted that under Michigan law, temporary lags between renters or periods of renovation do not qualify as vacancies for insurance purposes.¹¹⁸

Another Michigan appellate court affirmed the application of an exclusion barring coverage for buildings “vacant or unoccupied beyond a period of 60 consecutive days.” In *Mallett v. Farm Bureau Insurance Co.*,¹¹⁹ the insured’s rental property was vandalized twice before it was damaged in a fire, and the vacancy of the subject property was due in part to the vandalism damage.¹²⁰ The insured argued unsuccessfully that he was entitled to coverage because the insurer’s alleged failure to pay claims relating to the vandalism resulted in the property being unoccupied. The court rejected this argument, determining that the exclusion was unambiguous.¹²¹

In *Farm Bureau Mutual Insurance Co. of Arkansas v. Nowlin*,¹²² an Arkansas appellate court held that there was insufficient evidence to support a jury’s verdict that a home was not unoccupied within the meaning of a vacancy/unoccupancy exclusion where there was testimony that no one lived in the insured house from August 2002 to May 2003, a period of more than sixty days. The court reversed the verdict in favor of the insured and remanded for a new trial.

In *Smutz v. Central Iowa Mutual Insurance Ass’n*,¹²³ an Iowa appellate court held that an exclusion for freezing, discharge, leakage, or overflow in an “unoccupied residence” did not apply to preclude coverage for water damage where a tenant was in the process of vacating, but still had keys to the insured property, had belongings in the house, intended to return, and had informed the landlords that she would be vacating at a future date (which post-dated the loss). The court affirmed a lower court’s determination that a temporary vacancy or nonuse by a tenant who indicates an intent to return and not to completely vacate does not constitute vacancy or unoccupancy for insurance purposes.¹²⁴

117. No. 275240, 2008 WL 376409, at *1 (Mich. Ct. App. Feb. 12, 2008).

118. *Id.*

119. No. 277493, 2008 WL 902214, at *1 (Mich. Ct. App. Apr. 3, 2008).

120. *Id.*

121. *Id.*

122. 101 Ark. App. 354 (Ark. Ct. App. 2008).

123. No. 07-0187, 2007 WL 3085794, at *6-7 (Iowa Ct. App. Oct. 24, 2007).

124. *Id.*

D. Dishonest Acts

In *DKE, Inc. v. Secura Insurance Co.*,¹²⁵ a Michigan appellate court held that a lower court erred in its determination that a “dishonest and criminal acts” exclusion was void under state law because it failed to provide the insured with the minimum fire coverage required by law. The insurer argued that coverage was barred under this exclusion because the son of the sole owner of the insured corporation was involved in the arson that damaged the property. The subject exclusion precluded coverage for criminal acts by employees, authorized representatives, or “anyone to whom you entrust the property for any purpose.”¹²⁶ The appellate court remanded the case to determine whether the insured’s son had complete dominion and control over the affairs of the insured corporation.¹²⁷

E. Water Damage

The Louisiana Supreme Court held in *Sher v. Lafayette Insurance Co.*¹²⁸ that the exclusion for “flood, surface water, waves, [and] tides . . .” was unambiguous when applied to a property loss following the breach of the New Orleans levees after Hurricane Katrina. In that case, the policyholder refused to accept the insurer’s conclusion that flooding of the insured building’s basement resulted from a “flood” and the trial court agreed, holding that because “flood” was not defined in the policy and could be interpreted to include “man-made events,” the insurer could not squarely exclude a water loss resulting from the breach of the levees. An intermediate appellate court affirmed, holding—in a decision agreed to by only a plurality of the court—that the undefined word “flood” was contextually ambiguous in part because it was contained in a list of “specific natural disasters that cause inundations of water” in the exclusion.¹²⁹ On further appeal, the Louisiana Supreme Court reversed, holding that the lack of a definition of “flood” in the policy did not automatically mean the term was ambiguous; on the contrary, because the “plain, ordinary, and generally prevailing meaning” of the word was reasonable and did not conflict with any public policy, the insurer correctly applied the flood exclusion to the flooding of the insured’s building.¹³⁰

In *Broussard v. State Farm Fire & Casualty Co.*,¹³¹ the U.S. Court of Appeals for the Fifth Circuit overturned a Hurricane Katrina-related verdict

125. No. 2005-068745-CH, 2008 WL 4276481, at *1 (Mich. Ct. App. Sept. 16, 2008).

126. *Id.*

127. *Id.* at *3.

128. 988 So. 2d 186 (La. 2008).

129. *Sher v. Lafayette Ins. Co.*, 973 So. 2d 39 (La. Ct. App. 2007).

130. *Sher*, 988 So. 2d at 196.

131. 523 F.3d 618, 626 (5th Cir. 2008).

for the insured, including a \$1 million punitive damages award. The court found that the trial court erred in determining coverage and causation as a matter of law based upon the parties' stipulation regarding personal property damage and the insurer's expert's uncertainty regarding structural damage.¹³² The court held that causation and the allocation of damages between wind and water were jury questions and also rejected the insurer's claim that the burden of proof had shifted back to the insured to prove the respective amounts of covered wind and excluded flood damage.¹³³

Similarly, the U.S. Ninth Circuit Court of Appeals also held that a flood exclusion unambiguously excluded storm surge in *Northrup Grumman Corp. v. Factory Mutual Insurance Co.*¹³⁴ The court held that the plain and ordinary meaning of the term "flood" unambiguously included the twenty-two-foot inundation of water that covered the policyholder's shipyards during Hurricane Katrina.¹³⁵ In affirming the trial court's holding, the court rejected the policyholder's argument that the flood exclusion in an excess policy was ambiguous because the underlying primary policy defined "flood" in a different way.¹³⁶ It also rejected the argument that the flood exclusion's lack of the phrase "whether driven by wind or not"—often found in flood exclusions—compelled a different result.¹³⁷

In another Hurricane Katrina case, *Legacy Condominiums, Inc. v. Landmark American Insurance Co.*,¹³⁸ the U.S. District Court for the Southern District of Mississippi held that an exception to the interior water damage limitation of the policy placed the burden of proof on the insured to prove that damage caused by wind-driven rain was the result of rain entering the building through an opening in the roof or walls created by a covered cause of loss. The court found that if wind or another covered peril caused a breach that allowed the covered cause of loss, wind-driven rain, and the excluded cause of loss, storm spray, to enter and damage the same area, the loss would not be compensable under the terms of the anti-concurrent causation provision.¹³⁹

In *Gainer v. Specialty Risk Associates, Inc.*,¹⁴⁰ a Louisiana state appellate court held that an endorsement excluding coverage for loss caused by wind or wind-driven water was enforceable despite a coverage provision

132. *Id.* at 625–26.

133. *Id.* at 626–27.

134. 538 F.3d 1090 (9th Cir. 2008).

135. *Id.* at 1095.

136. *Id.*

137. *Id.* at 1096–97.

138. No. 106CV1108KS-MTP, 2008 WL 80373, at *3–4 (S.D. Miss. Jan. 4, 2008).

139. *Id.* at *4.

140. 977 So. 2d 1089, 1092 (La. Ct. App. 2008).

in the main policy stating that coverage for water damage was included. The court found it was clear that the water damage coverage was subject to policy exclusions and the quote for the policy provided to the insureds flagged the existence of the exclusion.¹⁴¹

In *Bolan v. Auto-Owners Insurance Co.*,¹⁴² a Michigan appellate court affirmed a lower court's ruling that the exclusion in a homeowners' policy for "constant or repeated seepage or leakage of water or steam from [a] domestic appliance which occurs over a period of weeks, months or years" barred coverage for damage to a kitchen floor caused by a dishwasher. In doing so, it rejected the policyholders' argument that an exception to the exclusion for "inherent vice, latent defect or mechanical breakdown" for "water escape from a . . . domestic appliance" created a conflict in the policy that mandated a finding of coverage for the loss, and held that the two provisions could be read together in the context of a loss caused by repeated and recurrent leaks from the dishwasher.¹⁴³

Damage caused when a culvert on a nearby road burst as a result of an overwhelming rain storm was excluded damage from water, and not covered as an ensuing "explosion" as the policyholder contended in *Bates v. Phenix Mutual Fire Insurance Co.*¹⁴⁴ In that case, the homeowners' policy covered damage from "explosion" as a covered cause of loss but excluded loss caused by "rupture or bursting . . . of any building or structure, caused by or resulting from water." The policy also excluded damage from water, but with an exception to the exclusion for ensuing damage resulting from "fire, explosion, or sprinkler leakage" caused by water.¹⁴⁵ The policyholder argued that the damage to its property was not caused directly by the water flooding into the culvert itself, but rather by the ensuing damage from the "explosion" of the culvert and adjacent road as a result of the pressure of that water. The trial court disagreed, holding that the proximate cause of the loss was the flooding water itself.¹⁴⁶ The New Hampshire Supreme Court affirmed the grant of summary judgment to the insurer, holding that the damage to the policyholder's property was directly caused by the floodwater itself, not as an ensuing loss from any "explosion" of the culvert; it added that to hold otherwise would essentially turn the insurer into a flood insurer, a risk the policy clearly rejected.¹⁴⁷

141. *Id.*

142. No. 274927, 2007 WL 4322263 (Mich. Ct. App. Dec. 11, 2007).

143. *Id.* at *2.

144. 943 A.2d 750 (N.H. 2008).

145. *Id.* at 752.

146. *Id.* at 753.

147. *Id.* at 754.

Causation of a water-related loss was also at issue in *Junius Development, Inc. v. New York Marine & General Insurance Co.*,¹⁴⁸ where an appellate court held that fact issues precluded a trial court's grant of summary judgment in the insurer's favor. In that case, a drainpipe connected to the insured apartment building's rooftop tank was clogged with construction debris, and the pipe burst when a contractor tried to drain the tank. The insurer denied the claim based on an exclusion in the policy for loss or damage caused by water overflowing from a drain, and the trial court agreed.¹⁴⁹ The appellate court reversed, though, holding that the proximate cause of the loss was the failure of the drainpipe and not the water itself and that the insurer had not sustained its burden of proving that the water exclusion barred coverage.¹⁵⁰

In *Bao v. Liberty Mutual Fire Insurance Co.*,¹⁵¹ a trial court granted summary judgment for the insurer based on the surface water exclusion in a homeowners' policy. The loss in that case involved twelve inches of rainwater that pooled at the bottom of a stairwell leading into the policyholder's basement and that ultimately entered the basement when the pressure of the water broke a glass door. The court held that the pool of rainwater in the stairwell pressing on the door constituted "surface water," and the policy unambiguously excluded losses caused by surface water.¹⁵²

A similar result was reached by the U.S. Third Circuit Court of Appeals in *T.H.E. Insurance Co. v. Charles Boyer Children's Trust*.¹⁵³ In that case, a sewer pipe, located in an embankment above the insured's bowling alley, burst during a heavy rainstorm. Falling rainwater and rainwater from the sewer pipe coursed down the embankment and pooled behind the alley, and the weight of this water eventually forced open a door to the building and caused some \$2 million in damage. The insurer denied the claim, relying on the exclusion in its policy for loss caused by "surface water." The trial court agreed, rejecting the insured's arguments that the surface water exclusion was ambiguous and that a material question of fact existed regarding the contribution to the loss from a separate pool of standing water in the parking lot of the bowling alley.¹⁵⁴ The Third Circuit affirmed, rejecting the insured's argument that the surface water exclusion could not apply to both water released from the burst sewer pipe and falling rainwater. The court held that both types of water essentially became surface

148. 852 N.Y.S.2d 185 (App. Div. 2008).

149. *Id.*

150. *Id.*

151. 535 F. Supp. 2d 532 (D. Md. 2008).

152. *Id.* at 536.

153. 269 F. App'x 220 (3d Cir. 2008).

154. *Id.* at 222.

water for purposes of the exclusion when they combined into a pool behind the bowling alley.¹⁵⁵

VII. WHO IS AN “INSURED”?

In *Hannah v. Nationwide Mutual Fire Insurance Co.*,¹⁵⁶ the daughter and son-in-law of the named insureds were occupying the residence under a land contract and were paying the insurance premiums. The court held that personal property coverage did not extend to their property since the insurance company was not notified of the change, and the named insureds did not reside on the premises.¹⁵⁷

In *Gonzalez v. Atlantic Casualty Insurance Co.*,¹⁵⁸ the building leased by the insured tenant was damaged when someone drove a vehicle into it. The insured submitted a claim, which was denied. The court agreed with the insurer, holding that the insured was precluded from recovering under the property portion of the policy because he had no financial interest in the building, and coverage under the liability section was precluded by the policy’s exclusion for property “you own, rent or occupy.”¹⁵⁹

VIII. MISREPRESENTATION

A similar result was reached in *Barth v. State Farm Fire & Casualty Co.*¹⁶⁰ In that case, the court held that intentional concealment and misrepresentation of material facts voided coverage regardless of whether the insurer relied on the false information or was prejudiced as a result.¹⁶¹

In *Precision Auto Accessories, Inc. v. Utica First Insurance Co.*,¹⁶² the insured’s business was destroyed by fire, and following an investigation, the insurer notified the insured it was rescinding the policy due to the insured’s misrepresentation of its loss history in its insurance application. The insured did not dispute that the application misrepresented the loss history but denied that the misrepresentation was willful. The court held that under New York law, the insurer did not have to prove that the misrepresentation was willful and intentional.¹⁶³ The court further held that the insured was bound by the misrepresentations even if they were due to the negligence of his agent.¹⁶⁴

155. *Id.* at 223.

156. 660 S.E.2d 600 (N.C. Ct. App. 2008).

157. *Id.* at 603–04.

158. 542 F. Supp. 2d 601 (W.D. Tex. 2008).

159. *Id.* at 603–04.

160. 886 N.E.2d 976 (Ill. 2008).

161. *Id.* at 981–82.

162. 859 N.Y.S.2d 799 (App. Div. 2008).

163. *Id.* at 802–03.

164. *Id.* at 803.

In *Vernor's Dollars Discount, Inc. v. Fremont Mutual Insurance Co.*,¹⁶⁵ the sole shareholder of a corporation failed to disclose a prior fire loss of a previous business when completing an application for insurance. The court held that since the application asked for the loss history of the applicant and not that of its shareholders or other entities owned by its shareholders, there was no misrepresentation.¹⁶⁶ However, the court decided to pierce the corporate veil and treat both businesses as one business, which resulted in a finding that there was a misrepresentation as to the new business entity.¹⁶⁷

IX. MOLD

A. Covered Water Damage Required

In *Cincinnati Insurance Co. v. Bluewood, Inc.*,¹⁶⁸ a burst water pipe caused water and mold damage to the insured's buildings. The insured argued that if covered water damage causes mold, then it is a covered peril. The court disagreed and, applying a proximate cause analysis, held that the proximate cause of the mold was the insured's delay and failure to remediate and not the burst water pipe.¹⁶⁹

B. Mold Exclusions Applied

Mold exclusions have been regularly applied. In *Orthopedic Practice, LLC v. Hartford Casualty Insurance Co.*,¹⁷⁰ the court held that there was no coverage for a policyholder's claim for damage to business personal property and lost income following Hurricane Katrina. Although the first floor of the insured's medical center was submerged by flood waters, the medical and office equipment on the second floor remained dry, and since the policyholder did not submit any evidence that the equipment was damaged electronically, the policy's mold and rust exclusions precluded coverage.¹⁷¹

A California appellate panel considered, in *De Bruyn v. Superior Court*,¹⁷² whether the insured's toilet overflow caused significant water and mold damage to the insured home. The policy covered losses from a sudden and accidental discharge of water from a plumbing system, and it excluded any loss resulting from mold "however caused." Following California law, which follows the "efficient proximate cause" doctrine and rejects anti-concurrent

165. No. 276541, 2008 WL 541146 (Mich. Ct. App. Feb. 28, 2008).

166. *Id.* at *4.

167. *Id.*

168. No. 06-04127-CV-C-NKL, 2007 WL 4365738 (W.D. Mo. Dec. 12, 2007).

169. *Id.* at *6.

170. No. 06-8710, 2008 WL 687184 (E.D. La. Mar. 10, 2008).

171. *Id.* at *3.

172. 70 Cal. Rptr. 3d 652 (Ct. App. 2008).

causation policy language, the court held that the mold damage caused by a sudden and accidental release of water was an excluded peril. The court noted that its holding did not violate the efficient proximate cause doctrine because the water damage exclusion specifically stated that mold resulting from water damage caused by sudden and accidental release of water was not covered.¹⁷³ The court further noted that the “however caused” language alone would not have rendered the exclusion effective.¹⁷⁴

In *Carrizales v. State Farm Lloyds*,¹⁷⁵ the court held that a mold exclusion in the Texas Standardized Homeowners Policy-Form B (HO-B) (pre-2002 version) precluded coverage for mold damage to a dwelling caused by a covered plumbing leak.¹⁷⁶

C. *As Ensuing Loss*

In *Feinbloom v. American International Insurance Co.*,¹⁷⁷ a policy exclusion for “any loss caused by mold” applied to exclude coverage for mold damage caused by water discharged as a result of a pump failure. The court held that because mold is damage itself, the language is clear that “loss caused by” mold references damage consisting of mold and mold-related losses that are coextensive with the mold condition.¹⁷⁸ The court further held that the ensuing loss provision did not apply, interpreting an “ensuing loss” as a covered loss that follows as a consequence of an excluded peril.¹⁷⁹

D. *Trigger of Coverage*

In *Allstate Insurance Co. v. Hunter*,¹⁸⁰ the court held that the manifestation trigger of coverage applied to determine whether a water and mold loss commenced during the policy period. The court held that the loss could not be manifest until it was “capable of being easily perceived, recognized, and understood.” Applied to the case at issue, the court held that the manifestation did not occur until the water and mold damage were actually discovered.¹⁸¹

In a case before the Delaware Supreme Court, *Sullivan v. Standard Fire Insurance Co.*,¹⁸² the insureds claimed damage to personal property inside their condominium following a wind storm that blew shingles off the roof

173. *Id.* at 660.

174. *Id.* at 658–59.

175. 518 F.3d 343 (5th Cir. 2008).

176. *Id.* at 347–48.

177. No. 276928, 2008 WL 1836563 (Mich. Ct. App. Apr. 24, 2008).

178. *Id.* at *2–3.

179. *Id.* at *3.

180. 242 S.W.3d 137 (Tex. App. 2007).

181. *Id.* at 143–44.

182. No. 515, 2007, 2008 WL 361141 (Del. Feb. 11, 2008).

of the condominium. Under the policy, the court held that to be entitled to coverage, the insureds had to prove that rain proximately caused the alleged loss from mold contamination, and that the loss was a “physical loss.”¹⁸³ The court found that a mold loss was a “physical loss,” and the issue on remand was whether the rain was the efficient proximate cause of the mold.¹⁸⁴

X. MORTGAGE CLAUSE

In *Countrywide Home Loans v. Allstate Insurance Co.*,¹⁸⁵ the U.S. District Court for the Western District of Missouri found that the mortgagee’s interest as a mortgagee was extinguished when it purchased the property for the full amount of the indebtedness at the foreclosure sale such that the mortgagee was not entitled to insurance proceeds from a fire that occurred prior to the sale despite the presence of a union mortgage clause in the insurance contract. The court noted that the mortgagee’s rights were fixed at the time of the pre-foreclosure loss and it could have pursued the debt, the insurance proceeds, or the deficiency against the mortgagor, and chose to proceed with the foreclosure.¹⁸⁶

XI. OTHER INSURANCE

The U.S. District Court for the Middle District of Florida found in *Lexington Insurance Co. v. Kash N’ Karry Food Stores, Inc.*,¹⁸⁷ that the lease agreement between the parties governed which policy was to provide primary coverage for a fire loss rather than the “other insurance” provisions of the respective policies. The court found that the very purpose of including a provision in the lease requiring the tenant to obtain fire insurance coverage for the premises was to shift the risk of such loss to the tenant and the tenant’s insurer.¹⁸⁸

XII. SUIT LIMITATIONS

In *Matos v. Farmers Mutual Fire Insurance Co. of Salem County*,¹⁸⁹ the court held that a one-year contractual limitations period for filing suit against

183. *Id.* at *1–2.

184. *Id.* at *3.

185. 246 S.W.3d 515 (Mo. Ct. App. 2007).

186. *Id.* at 518.

187. No. 607CV-842-ORL-22DAB, 2008 WL 450035 (M.D. Fla. Feb. 15, 2008).

188. *Id.* at *3.

189. 943 A.2d 917 (N.J. Super. Ct. App. Div. 2008).

the homeowners' insurance company was binding on the homeowners, even if it was omitted from their copy of the policy, because the insurer informed the policyholder in letters that they must file suit within twelve months. This letter, the court held, was sufficient because the homeowners "could easily have made further inquiry about the applicability of the twelve-month limitation period."¹⁹⁰

The Northern District of Georgia, in *Morrell v. Allstate Insurance Co.*, held that the suit limitations defense is an affirmative defense, so the burden is on the insurance company to come forward with evidence sufficient to demonstrate a *prima facie* case that the plaintiff's claim falls outside of the limitations period.¹⁹¹ Once the insurance company establishes a *prima facie* case, the burden shifts to the policyholder to show a material issue of fact.¹⁹²

Another federal court, the District of Oregon, held that in order to estop an insurance company from asserting a suit limitations defense, the insured must show a false representation, made with knowledge of the facts and with the intention that it should be acted upon by the insured, who was ignorant of the truth, and that the insured was induced to act upon it.¹⁹³ Appellate courts in Ohio and Georgia have held that an insured must file suit within the contractual limitations period even if the insurer is continuing to investigate the claim.¹⁹⁴ As another example, in *National Refrigeration, Inc. v. The Travelers Indemnity Co.*,¹⁹⁵ the Rhode Island Supreme Court held that, although Travelers agreed to investigate plaintiff's claims in 2002 and 2003, this did not estop the carrier from invoking the suit limitations provision. At no time did Travelers promise the insured that a settlement of the dispute would be reached. Travelers also made it "abundantly clear" that it would not be compensating plaintiff any further for damages under the contract. In 1997, Travelers informed plaintiff that no further payments would be forthcoming. Nonetheless, plaintiff did not file suit until February 2005, almost eight years after the loss. The court held that Travelers' actions did not toll the suit limitations period. The Southern District of New York perhaps went even further to circumscribe the limits of estoppel when it ruled in *Plon Realty Corp. v. Travelers Insurance Co.* that even if an insurance company ignores correspondence from the insured's lawyer,

190. *Id.* at 921–23.

191. No. 106-CV-2631-RWS, 2008 WL 1766954 (N.D. Ga. Apr. 14, 2008).

192. *Id.* at *3.

193. *Trust Solutions v. Hartford Ins. Co.*, No. 08-6011-HO, 2008 WL 4133530 (D. Or. Aug. 28, 2008).

194. See, e.g., *Vogias v. Ohio Farmers Ins. Co.*, 894 N.E.2d 1265 (Ohio Ct. App. 2008); *Morrill v. Cotton States Mut. Ins. Co.*, 666 S.E.2d 582 (Ga. Ct. App. 2008).

195. 947 A.2d 906, 911 (R.I. 2008).

this may not be sufficient to estop the insurance company from relying on the suit limitations clause.¹⁹⁶

In *LaeRoc Waikiki Parkside, LLC v. Westchester Fire Insurance Co.*,¹⁹⁷ the policy contained a two-year limitations clause. The court found that the hotel manager knew about the damage arising from the chilled water pipes in early January 2002; therefore, the claims were untimely because the insured did not file the original complaint until July 30, 2004, more than two years later.¹⁹⁸ The suit limitations clause was not tolled by the submission of the original claim because that claim only identified fungus and mildew on the exterior of the house, not water or mold damage arising out of the chilled water pipes.¹⁹⁹ The court was not persuaded by the hotel's argument that the case involved "progressive" damage such that the "limitations period did not begin to run until the hotel was closed to remediate the water and mold problem."²⁰⁰ The court held that the two-year suit limitations period began to run when the appreciable damage occurred that was or should have been known to the insured.²⁰¹

However, some courts confronting this issue during the survey period held that suit limitations clauses were equitably tolled by insurance company delay. For example, in *City of Hollister v. Monterey Insurance Co.*,²⁰² a California court held that an insurer may be estopped from asserting a contractual limitations period if its conduct induced the policyholder to file its action late. An insurer failing to speak when in law or equity it is bound to do so, delaying formal denial of a claim to complete its own investigation, or failing to comply with a regulatory requirement that it notify the insured of the limitations period are also grounds for estoppel. This equitable rule was applied in *North American Foreign Trading Corp. v. Mitsui Sumitomo Insurance USA, Inc.*,²⁰³ where the U.S. Second Circuit Court of Appeals affirmed the trial court's finding that Mitsui had lulled the policyholder into thinking that its claim would be treated differently so the policyholder did not file suit until after the limitations period expired.²⁰⁴

196. See 533 F. Supp. 2d 391, 396 (S.D.N.Y. 2008) ("Even if Travelers may have delayed or ignored Plon's lawyers' correspondence, this does not deprive the company of the right to rely on a clear and unambiguous policy provision.")

197. No. 06-00006 SOM/LEK, 2008 WL 3911013 (D. Haw. Aug. 22, 2008).

198. *Id.* at *6.

199. *Id.* at *6-7.

200. *Id.* at *7.

201. *Id.*

202. 165 Cal. App. 4th 455, 488 (Ct. App. 2008).

203. No. 07-2442-CV(L), 2008 WL 2873265 (2d Cir. Jul. 24, 2008).

204. *Id.* at *3.

Similarly, in *Phoenix Insurance Co. v. Patterson*,²⁰⁵ the appellate court affirmed a trial court's order granting the policyholder's motion to add the correct entity as a third-party defendant after the policy's limitations period expired. On the last day on which to comply with the policy's one-year suit limitations clause, the policyholder sued the wrong entity, filing suit against "The Travelers Insurance Company," rather than St. Paul Travelers, a completely separate entity, of which Phoenix Insurance Company was a subsidiary. The trial court ruled that Phoenix had waived the suit limitations period by leading the policyholder to believe that his insurer was "The Travelers Insurance Company."²⁰⁶ The appellate court affirmed, in part, because the transcript of the evidentiary hearing was not in the record before it. The appellant has the burden to show error in the record and, without the transcript, the court could not determine what evidentiary submissions, stipulations, or statements were adduced at the hearing in support of appellant's decision. Therefore, it had no choice but to affirm.²⁰⁷

Different criteria for determining the date that the loss accrued may also determine the outcome. For example, in *Liberty Mutual Insurance Co. v. Costco Wholesale Corp.*,²⁰⁸ the court held that "loss" means a loss compensable under the policy. Therefore, in a case involving the suit limitations clause of an excess policy, the limitations period only began to run when the insured became aware that the damages arising out of the sinking warehouse implicated the excess policy. The insured alleged that the loss occurred during the policy period and, therefore, the court denied the insurer's motion for judgment on the pleadings.²⁰⁹

State statutes prescribing the date on which the suit limitations period begins to run may also determine the outcome. In *Abrens Contracting, Inc. v. Pacific Insurance Co.*,²¹⁰ the Southern District of Illinois applied an Illinois statute and held that "an insurance company's policy contractual limitations period is tolled from the date the insured files a proof of loss claim until the date the insurer finally denies the claim." In that case, the court found that the outcome depended on whether the insured filed a proper proof of loss. If the insured's proof of loss complied with the policy requirements, then the insured's time to file its complaint was arguably tolled. Since this

205. 664 S.E.2d 264 (Ga. Ct. App. 2008).

206. *Id.* at 265.

207. *Id.*

208. No. C07-1499RAJ (W.D. Wash. Mar. 4, 2008).

209. See also *Koppelman v. Standard Fire Ins. Co.*, No. CV 05-2496 (AKT), 2008 WL 789882, at *6 (E.D.N.Y. Mar. 21, 2008) (one-year suit limitations clause begins to run from date that loss is payable and liability accrues, not one year after loss or damage occurs).

210. No. 07-CV-387-WDS, 2008 WL 686984, at *2 (S.D. Ill. Mar. 13, 2008).

was a question of fact, the court denied the insurer's motion to dismiss and remanded for further proceedings. A similar result was reached in *Diebold, Inc. v. Continental Casualty Co.*, where the court held that the suit limitations clause was tolled because the allegations of the amended complaint were sufficient to support the conclusion that the policy's limitations period was tolled until the insurer formally denied coverage.²¹¹

National flood insurance is subject to its own rules. For example, in *Qader v. Federal Emergency Management Agency*,²¹² the court held that the one-year filing period for suits under the National Flood Insurance Act begins to run when FEMA denies a claim that is accompanied by a proof of loss, unless proof of loss is waived. FEMA never responded to the proofs of loss, so the court found that the lawsuit was timely.

XIII. STANDING

In *Texas Windstorm Insurance Ass'n v. Poole*,²¹³ a Texas court of appeals found that the Texas Windstorm Insurance Association was permitted to initiate its own lawsuits to protect its interests. The insureds had contended that only policyholders could initiate litigation. The court left open the question of exhaustion of administrative remedies.

XIV. DAMAGES

A. *Hold Back*

In *Hackman v. EMC Insurance Co.*,²¹⁴ the insured's building suffered a partial loss by fire, and the insurer paid \$64,775 with a notation that payment was for "fire loss less \$7,294 depreciation." The insured sold the building "as is" and filed suit claiming that the insurer failed to pay the market value of the repairs or the actual amount of the damage to the building.²¹⁵ The court held that the depreciation holdback was allowed under Louisiana law since the requirement in the insurer's policy that an insured repair or replace the property before recovering the holdback was not in conflict with the Standard Fire Policy statute, which required payment of the actual cash value (reproduction cost less depreciation) not to exceed the amount to repair or replace, for all direct losses by fire.²¹⁶

211. No. CIV.A. 07-1991 (JED), 2008 WL 2645471 (D.N.J. July 2, 2008).

212. 543 F. Supp. 2d 558 (E.D. La. 2008).

213. 255 S.W.3d 775, 777-78 (Tex. App. 2008).

214. 984 So. 2d 139 (La. Ct. App. 2008).

215. *Id.* at 140.

216. *Id.* at 142-43.

B. Overhead and Profit

In *Mills v. Foremost Insurance Co.*,²¹⁷ a federal appellate court applying Florida law concluded that a general contractor's overhead and profit were encompassed within the definition of "actual cash value" (ACV) contained in a mobile home insurance policy, which covered "the cost to repair or replace property with new materials of like kind and quality." The court observed that the policy did not specifically exclude such costs from the ACV definition and that overhead and profit charges are "well-recognized types of costs routinely charged."²¹⁸ The court further noted that this holding was consistent with precedent holding that ACV includes such costs where the policyholder would be reasonably likely to need a general contractor in repairing or replacing damaged property.²¹⁹

Citing *Mills*, a federal court applying Arizona law held that actual cash value payments made to an insured in connection with water damage from a burst pipe were required to include the overhead and profit of a general contractor.²²⁰ The court observed that "actual cash value" was defined in the policy as the "amount which it *would* cost to repair or replace" the covered property, and that the insurer was aware that a contractor's services "would be" required to repair the damaged property.²²¹

Similarly, in *Nguyen v. St. Paul Travelers Insurance Co.*,²²² a federal court applying Louisiana law denied an insurer's motion to dismiss a breach of contract claim for failure to include contractor's overhead and profits in ACV, finding that these amounts must be included in ACV where an insured is reasonably likely to require the services of a general contractor. The court further noted that this is true whether the insured hires a general contractor, acts as his own general contractor, or does not ever repair the property.²²³ However, the court rejected the insureds' argument that the insurer was required as a matter of contract to include such amounts in ACV where an estimate reflects that three or more trades are necessary to perform the insured's repairs.²²⁴

C. Matching

In *Greene v. United Services Automobile Ass'n*,²²⁵ a Pennsylvania appellate court found that the damaged slope of a roof, rather than the entire roof,

217. 511 F.3d 1300, 1305 (11th Cir. 2008).

218. *Id.*

219. *Id.* at 1306.

220. *Bond v. Am. Family Mut. Ins. Co.*, No. CV-06-249-PHX-DGC, 2008 WL 477873, at *4 (D. Ariz. Feb. 19, 2008), *reconsideration denied*, 2008 WL 629275 (D. Ariz. Mar. 5, 2008).

221. *Id.* at *3-4 (emphasis added).

222. No. 06-4130, 2008 WL 4534395, at *4 (E.D. La. Oct. 6, 2008).

223. *Id.*

224. *Id.* at *4-5.

225. 936 A.2d 1178, 1186 (Pa. Super. Ct. 2007).

was the “part of the building damaged” within the meaning of the policy provision requiring the insurer to pay the cost of replacement of the “part of the building damaged.” Further, the court found that using shingles similar to the damaged shingles in function, color, and shape satisfied the insurer’s obligation to pay for repair or replacement with like construction.

XV. VALUED POLICY

In *Liberty Mutual Insurance Co. v. Lamb*,²²⁶ the U.S. District Court for the Southern District of Mississippi found that Mississippi’s valued policy law (VPL) did not require payment of full policy limits when a fire damaged the insureds’ home two weeks after it was flooded during Hurricane Katrina.

In another case, *Burkhalter v. State Farm Fire & Casualty Co.*,²²⁷ the insured sought to recover the full policy limits under his homeowners’ policy pursuant to Louisiana’s VPL and asserted that hurricane wind and rain rendered his property a total loss before flooding occurred. The insurer moved for summary judgment, arguing that the VPL did not apply as it was undisputed that flooding had reached the property and thus the loss could not have been caused exclusively by wind and rain. The U.S. District Court for the Eastern District of Louisiana denied the motion and ruled that the insurer had failed to carry its burden of showing an absence of a genuine issue of material fact that the loss could not have been exclusively caused by wind and rain.

In *Landry v. Louisiana Citizens Property Insurance Co.*,²²⁸ the Louisiana Supreme Court found that assuming Louisiana’s VPL applied to the homeowner’s policy, the insurer validly set forth a different method for loss computation in the policy, as allowed by the VPL. The court found that once an insurer validly provides a different method of loss computation as permitted under the VPL, the substantive valuation provisions of the VPL become inapplicable.

In another case applying Louisiana law, the U.S. Court of Appeals for the Fifth Circuit in *Turk v. Louisiana Citizens Property Insurance Co.*²²⁹ found that the insureds had no basis for their class action suit seeking to recover full policy limits for hurricane losses caused partly by a combination of wind and flood damage. The court found that Louisiana’s VPL did not

226. No. 106CV976-HSO-JMR, 2008 WL 625021 (S.D. Miss. Feb. 29, 2008).

227. No. 06-9253, 2008 WL 1730513 (E.D. La. Apr. 10, 2008).

228. 983 So. 2d 66, 81–82 (La. 2008).

229. No. 07-30279, 2008 WL 2228854 (5th Cir. May 29, 2008).

apply to total losses caused in part by a covered peril and in part by an excluded peril.

XVI. OCCURRENCE

The Arizona Supreme Court held that a series of thefts by one employee over a five-year period constituted one “occurrence” under an employee fidelity policy in *Employers Mutual Casualty Co. v. DGG & CAR, Inc.*²³⁰ The court, reversing a trial court’s ruling to the contrary, held that the policy’s definition of “occurrence” as “all loss caused by, or involving, one or more employees, whether the result of a single act or series of acts” was not ambiguous and that public policy did not compel a result that would have resulted in each individual theft being considered an individual occurrence.²³¹ A similar result on similar facts—theft by one employee over ten years—was reached under Mississippi law in *Madison Materials Co. v. St. Paul Fire & Marine Insurance Co.*,²³² where the Fifth Circuit affirmed a trial court’s grant of summary judgment in the insurer’s favor.

In *Six Flags, Inc. v. Westchester Surplus Lines Insurance Co.*,²³³ the U.S. District Court for the Eastern District of Louisiana held that flood sublimits in the excess policies would apply to the insured’s Hurricane Katrina claim despite coverage under the primary policy for a “Named Storm” occurrence as well as separate deductibles for earthquake, flood, and loss or damage from such a Named Storm.

XVII. BAD FAITH

In *Marketfare Annunciation, LLC v. United Fire & Casualty Co.*,²³⁴ the U.S. District Court for the Eastern District of Louisiana held that the amended version of Louisiana’s bad faith statute could not be applied retroactively. The insured moved for partial summary judgment requesting that the court find that if the insured was able to prove bad faith conduct in violation of the statute, the insured would be entitled to collect statutory penalties assessed at the higher rate available under the amended statute. The court found that the insured’s cause of action arose prior to the effective date of the statute.²³⁵ The critical date for the application of the amended statute, according to the court, was the date on which the insured could bring suit

230. 183 P.3d 513 (Ariz. 2008).

231. *Id.* at 518–19.

232. 523 F.3d 541 (5th Cir. 2008).

233. 535 F. Supp. 2d 744, 753–54 (E.D. La. 2008).

234. No. 06-7232, 2007 WL 4144944, at *5–6 (E.D. La. Nov. 20, 2007).

235. *Id.* at *6.

against the insurer for the alleged bad faith. The court found that the allegation of continuing bad faith conduct beyond the effective date of the amendment of no consequence as the insured's action had fully accrued prior to the effective date.²³⁶

However, in *Kodrin v. State Farm Insurance Co.*,²³⁷ decided by the Eastern District of Louisiana one day following *Marketfare*, the court found that the insured was entitled to attorney fees under the amended statute even though the alleged bad faith conduct began before the effective date of the statute. The court applied the statute prospectively and concluded that the insured was entitled to recover attorney fees that were incurred more than thirty days beyond the effective date of the statute. The court noted that while it was aware that other cases had held that only the version of the statute in effect at the time of the original breach can apply, this interpretation did not seem justified in the context of the legislative amendments increasing the penalties and in the context of the insurer's "continuing duty" of good faith under Louisiana law.²³⁸

236. *Id.*

237. No. 06-8180, 2007 WL 4163437, at *1 (E.D. La. Nov. 21, 2007).

238. *Id.*