

RECENT DEVELOPMENTS IN PROPERTY  
INSURANCE LAW

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## I. APPRAISAL

### A. Scope

In *Kendall Lakes Townhomes Developers, Inc. v. Agricultural & Surplus Lines Excess Insurance Co.*,<sup>1</sup> wind from Hurricane Irene damaged clay roof tiles and forced water to penetrate the interior of townhouses. The insurer acknowledged that its policy covered wind damage to a few tiles but did not agree that it covered the interior water damage. A court appointed an umpire for an appraisal and ordered that the appraisers establish a total amount of loss and include a breakdown “by virtue of excluded clauses.”<sup>2</sup> Further, the court ordered that it alone should be “the ultimate finder of fact on the issue of whether the loss, in whole or part, was caused by a covered cause.”<sup>3</sup> At appraisal, the umpire found that the insured failed to prove that a covered cause proximately caused the loss and awarded no coverage. The trial court confirmed that award.<sup>4</sup> The appellate court held that, under Florida law, appraisal can “decide causation issues when causation is not a coverage question, but rather an amount-of-loss question.”<sup>5</sup> However, in this particular case, the court held that the panel exceeded the authority given by the trial court by failing to break down the amount of loss and by ruling on causation.<sup>6</sup>

In *Ori v. American Family Mutual Insurance Co.*,<sup>7</sup> the insurer and the policyholder disagreed on the amount of loss because each proposed a different method to remove smoke. The insurer opposed appraisal, arguing that the issue of repair methods went to the scope of the loss and duties under the insurance contract, not the amount of the loss, and therefore was not subject to the insurance contract’s appraisal clause. The court disagreed, finding the “amount of loss . . . necessarily includes . . . the amount it would cost to repair that which was lost,” and the repair methods used are subsumed within that issue.<sup>8</sup>

1. 916 So. 2d 12 (Fla. Dist. Ct. App. 2005).

2. *Id.* at 14.

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.* at 16.

7. No. 05-697 PHX-ROS, 2005 WL 3079044 (D. Ariz. Nov. 15, 2005).

8. *Id.* at \*14.

In *Hartford Lloyd's Insurance Co. v. Yarbrough*,<sup>9</sup> the policyholders' bathtub leaked and damaged the house. An appraisal panel awarded an amount for repairs to the structure and mold remediation. The insurer moved to set aside the award, arguing that its contract excluded mold and that by including mold remediation in its award, the panel made findings on causation and coverage issues. The court agreed and set the award aside, holding that under Texas law any award "that assesses causation, coverage, or liability is made without authority, since appraisers may only determine the amount of a loss."<sup>10</sup>

#### B. *Timeliness*

In *Smith v. Civil Service Employees Insurance Co.*,<sup>11</sup> the policyholder did not waive its right to appraisal by waiting eleven months after filing suit to seek appraisal. The court held that filing suit was not inconsistent with seeking appraisal, nor was the insurer prejudiced by the delay.<sup>12</sup> But, in *Schachter v. Royal Insurance Co. of America*,<sup>13</sup> the court could not order appraisal where the policy's suit limitation period expired before the policyholder filed suit.

#### C. *Binding Nature of Appraisal*

In *Angott v. Chubb Group Insurance Cos.*,<sup>14</sup> the insurer conceded, without limitation, that coverage existed and demanded appraisal in its answer to a declaratory judgment action. By its answer, the insurer waived the right to later seek to modify an appraisal award to eliminate damages for landscaping and land stabilization that were not covered.<sup>15</sup>

#### D. *Nonrevocable*

In *Frans v. Harleysville Lake States Insurance Co.*,<sup>16</sup> the court held that a policyholder did not have a right to revoke the appraisal clause when the insurer exercised its contractual right to appraisal. Although a common law agreement to arbitrate could be unilaterally revoked by either party "at any time before the announcement of the award, regardless of which party initiated the arbitration," the appraisal right in the policy was not a common law right; on the contrary, the appraisal clause was statutorily required as part of the standard fire policy.<sup>17</sup>

9. No. 05-056, 2006 WL 1469705 (S.D. Tex. May 24, 2006).

10. *Id.* at \*3.

11. No. 04-0201 PHX MEA, 2005 WL 2620537 (D. Ariz. Oct. 13, 2005).

12. *Id.* at \*5.

13. 801 N.Y.S.2d 372 (App. Div. 2005).

14. 717 N.W.2d 341 (Mich. Ct. App. 2006).

15. *Id.* at 346-47.

16. 714 N.W.2d 671 (Mich. Ct. App. 2006).

17. *Id.* at 673-74.

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## II. BUSINESS INTERRUPTION — CIVIL AUTHORITY

### A. *Necessary Suspension of Operations*

In *Forestview the Beautiful, Inc. v. All Nation Insurance Co.*,<sup>18</sup> a severe storm damaged four of twenty cabins at a Minnesota resort. The policyholder continued to rent the sixteen undamaged cabins and sought coverage for the loss of income for the four damaged cabins. The policy covered “the actual loss of Business Income you sustain due to necessary suspension of your ‘operations’ during the ‘period of restoration.’”<sup>19</sup> The policy defined *operations* as “business activities occurring at the described premises.”<sup>20</sup> The court held that a suspension required a complete cessation rather than a partial cessation of operations.<sup>21</sup> Because the policyholder continued to rent sixteen of the twenty cabins, there was no such suspension and therefore no coverage.<sup>22</sup>

In *Apartment Movers of America, Inc. v. One Beacon Lloyd’s of Texas*,<sup>23</sup> a clerk for a moving company embezzled funds intended for Yellow Page advertising. Consequently, Yellow Page ads for the movers were printed in a less desirable location and size within the book. This led to a slowdown of the insured’s moving business. The trial court found no coverage for their business income loss and explained that a necessary suspension of operations was required to come “not from a lack of customer demand, but of an inability to meet customer demand.”<sup>24</sup>

### B. *Assignment*

In *Globecon Group, LLC v. Hartford Fire Insurance Co.*,<sup>25</sup> Old Globecon operated a financial educational services company about 250 feet from the World Trade Center. A month after the September 11, 2001, attack, Old Globecon filed for Chapter 11 bankruptcy. Its assets, including all rights to pursue claims for insurance coverage, were eventually sold to another company, New Globecon. New Globecon then sought to recover a multimillion dollar business interruption claim. On appeal, the Second Circuit found that the general rule was that “once an insured-against loss has occurred, the policyholder is essentially transferring a cause of action rather than a particular risk profile.”<sup>26</sup> If such a claim had been presented,

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18. 704 N.W.2d 773 (Minn. Ct. App. 2005).

19. *Id.* at 775.

20. *Id.*

21. *Id.* at 775–76.

22. *Id.* at 776.

23. No. 3:04-0278-B, 2005 WL 106477 (N.D. Tex. Jan. 19, 2005).

24. *Id.* at \*3.

25. 434 F.3d 165 (2d Cir. 2006).

26. *Id.* at 171.

the assignment would be one of a cause of action and hence not precluded by the policy's nonassignment clause. The Second Circuit found there was a factual question as to whether Old Globecon submitted the claim before the asset transfer.<sup>27</sup>

In *SR International Business Insurance Co., Ltd. v. World Trade Center Properties, LLC*,<sup>28</sup> insurers argued that because the leasehold interest in the World Trade Center retail space transferred to the Port Authority in December 2003, there could be no recovery for loss of rental value following the transfer. The insurers argued that the claim accrued after December 2003. As such, they argued that the policy's nonassignment clause precluded recovery. The court disagreed and found that "[i]n contrast to . . . business interruption cases, the amount of the loss under a rental insurance claim is largely 'fixed or easily ascertained' in advance of the assignment."<sup>29</sup> The risks borne by the insurers were not altered by either the conduct or the characteristics of the assignee. Reasoning that nonassignment clauses are designed to protect the insurers from "unforeseen increases in risk," the court rejected the insurers' argument that the claim for post-2003 rental value losses could not be assigned.<sup>30</sup>

### C. Civil Authority

In *By Development, Inc. v. United Fire & Casualty Co.*,<sup>31</sup> the governor of South Dakota ordered the town of Deadwood evacuated and prohibited access for about fifty-four hours because a wildland fire approached the city. The court found that civil authority coverage was not available because the policy provided that coverage would begin seventy-two hours after the time of the action by civil authorities.<sup>32</sup> The court also rejected claims for coverage based on road restrictions that extended beyond the seventy-two hour period. The court reasoned that such road restrictions did not prohibit access to the premises even if they may have restricted the way in which the premises were accessed.<sup>33</sup>

In *United Air Lines, Inc. v. Insurance Co. of the State of Pennsylvania*,<sup>34</sup> the Second Circuit addressed a civil authority claim brought by United Air Lines, seeking to recover lost income resulting from the government's temporary shutdown of Ronald Reagan Washington National Airport after the September 11 terrorist attack. United's policy covered losses from business interruption "caused by damage to or destruction of the Insured Locations"

27. *Id.* at 174-75.

28. 375 F. Supp. 2d 238 (S.D.N.Y. 2005).

29. *Id.* at 249.

30. *Id.*

31. No. 04-5116, 2006 WL 694991 (S.D. Mar. 14, 2006).

32. *Id.* at \*5.

33. *Id.*

34. 439 F.3d 128 (2d Cir. 2006).

or “when access to the Insured Locations is prohibited by order of civil authority as a direct result of damage to adjacent premises.”<sup>35</sup> The court found that the business interruption was not caused by any damage to United’s Insured Locations. Additionally, it held the airport shutdown was not “a direct result of damage to adjacent premises.”<sup>36</sup> Although United argued that the Pentagon should be considered adjacent to Reagan National Airport, the Second Circuit found that immaterial because the shutdown was in fact ordered at 9:26 a.m., fourteen minutes before the crash into the Pentagon, and because the shutdown was motivated by fears of future attacks, not the damage that resulted from the attack earlier that morning.<sup>37</sup>

*PMA Capital Insurance Co. v. US Airways, Inc.*<sup>38</sup> concerned a similar claim by US Airways. The Virginia Supreme Court found that payments received by US Airways from the federal government pursuant to the Air Transportation Safety and System Stabilization Act of 2001<sup>39</sup> offset any business interruption losses US Airways may have sustained as a result of the shutdown of Reagan National Airport and the nation’s airspace after September 11. The trial court in *US Airways* had found that the orders to shut down Reagan National Airport triggered civil authority coverage because they were a “direct result of fear that United Flight 93 was heading for the airport.”<sup>40</sup> The Virginia Supreme Court did not reach this issue, but its decision, reversing the trial court, eliminated the lower court’s decision.

#### D. *Period of Restoration*

*Malacca Corp. v. Travelers Indemnity Co.*<sup>41</sup> concerned the shutdown of a restaurant because of a grease fire. The carrier contended that the policyholder was only entitled to two weeks of business interruption coverage because the policyholder failed to open the restaurant as quickly as possible. The policyholder contended that a dispute with the landlord over the scope of repairs was the cause of the delay. The district court found that whether this dispute caused a reasonable delay in opening the restaurant was an issue of fact, precluding summary judgment in favor of the carrier.<sup>42</sup>

In *Zurich American Insurance Co. v. ABM Industries*,<sup>43</sup> ABM provided janitorial, lighting, and engineering services in the common areas of the World Trade Center and to virtually all tenants of the center. It contended that the “period of restoration” for its claims of business income coverage

35. *Id.* at 135.

36. *Id.*

37. *Id.*

38. 626 S.E.2d 369 (Va. 2006).

39. Pub. L. No. 107-42, 115 Stat. 230 (2001) (codified at 49 U.S.C. §§ 40101, 44302-06).

40. Law No. 03-507, 2004 Va. Cir. LEXIS 121 (Cir. Ct. Arlington Co., Va., July 23, 2004).

41. 421 F. Supp. 2d 137 (D.D.C. 2006).

42. *Id.* at 139.

43. No. 01-11200(JSR), 2006 WL 1293360 (S.D.N.Y. May 11, 2006).

extended through the “hypothetical length of time required to rebuild the WTC,” and the district court agreed.<sup>44</sup> The court distinguished the Second Circuit’s decision in *Duane Reade, Inc. v. St. Paul Fire & Marine Insurance Co.*,<sup>45</sup> contending that “[u]nlike Duane Reade . . . ABM cannot simply relocate to another building and carry on its business. To the contrary, ABM’s business was . . . fundamentally connected to its use of the common spaces at the World Trade Center.”<sup>46</sup>

E. *Scope/Proof*

In *Wyndham International, Inc. v. Ace American Insurance Co.*,<sup>47</sup> the operator of 163 hotels and resort properties claimed that government orders halting airline business and increasing airline security measures caused travel reservations to be canceled and inhibited the public from using its properties. In support of its claimed losses of \$66 million, the policyholder relied only upon the testimony of an accountant. The Texas Court of Appeals upheld the lower court’s finding that the accountant’s testimony was inadmissible because the accountant relied upon the policyholder’s own unreliable projections of income and extrapolated from those projections without compensating for rebookings and causes other than September 11 that affected the policyholder’s profitability. Because the accountant’s testimony was the sole evidence of the policyholder’s losses, the claim for business income coverage was dismissed.<sup>48</sup>

In *Blis Day Spa LLC v. Hartford Insurance Co.*,<sup>49</sup> the policyholder sought coverage for business interruption losses after fire destroyed its day spa. The carrier argued that such losses were not proven because the policyholder’s estimate involved increasing the number of revenue-producing hairdressers rather than using the number that had operated before the loss, and using an industry average for each hairdresser’s revenue rather than the actual revenue generated at the spa. The court found that although lost income must be proven with “reasonable certainty,” “absolute certainty is not required,” and it denied the carrier’s motion for summary judgment.<sup>50</sup> With respect to the policyholder’s claim that certain advertising expenses were “necessary” and therefore covered as extra expense, the district court found that the word *necessary* was ambiguous and, accordingly, denied the carrier’s motion for summary judgment on extra expense as well.<sup>51</sup>

44. *Id.* at \*3.

45. 411 F.3d 384 (2d Cir. 2005).

46. 2006 WL 1293360, at \*2.

47. 186 S.W.3d 682 (Tex. App. 2006).

48. *Id.* at 689.

49. 427 F. Supp. 2d 621 (W.D.N.C. 2006).

50. *Id.* at 626.

51. *Id.* at 631.

*Lyle Enterprizes, Inc. v. Hartford Steam Boiler Inspection & Insurance Co.*<sup>52</sup> concerned a business interruption and extra expense claim under an equipment breakdown insurance policy. The policy provided coverage when equipment owned by a company with which the policyholder had a contract to provide electrical power suffered direct physical damage caused by an accidental event. The policyholder sought coverage for business interruption caused by a massive blackout that affected Southeast Michigan, Ohio, Pennsylvania, New York, and Canada. The district court denied the policyholder's motion for summary judgment because there was no evidence that damage to property of Detroit Edison's (the policyholder's electricity supplier) caused the policyholder's loss of power.<sup>53</sup>

*Wal-Mart Stores, Inc. v. United States Fidelity & Guaranty Co.*<sup>54</sup> concerned a claim for business interruption coverage arising out of the closure of a store. The court found that the policyholder was not entitled to summary judgment because there was

an issue of fact as to whether plaintiff's closing of its store was necessitated by the physical damage to the store caused by the . . . rockslide, in which event lost business income would be covered, or was made out of concern for the safety of the store and its occupants raised by the risk of future rockslides, in which event there would not be coverage.<sup>55</sup>

The court dismissed the carrier's known loss and loss in progress defenses, however, reasoning that the "rockslide, while a known risk at the time the policies took effect, was not 'substantially certain to occur.'"<sup>56</sup>

#### F. Limits

*Snelling and Snelling, Inc. v. Federal Insurance Co.*<sup>57</sup> involved a claim for business interruption loss by a business in the vicinity of the World Trade Center. The policyholder provided personnel services and sought to recover under the policy's contingent business interruption coverage. The limits were specified as \$250,000 for contingent business interruption "at each of your premises."<sup>58</sup> The policyholder contended that the limits applied separately to each of the dependent properties. The district court disagreed, finding that only a single limit applied no matter how many dependent properties were involved.<sup>59</sup> The policyholder also sought to recover, as an extra expense, legal fees associated with the policyholder's eviction of

52. 399 F. Supp. 2d 821 (W.D. Mich. 2005).

53. *Id.* at 826.

54. 816 N.Y.S.2d 17 (App. Div. 2006).

55. *Id.* at 17-18.

56. *Id.* at 18.

57. No. 3:03-2948-K, 2005 WL 2767610 (N.D. Tex. Oct. 25, 2005).

58. *Id.* at \*2.

59. *Id.* at \*3.

a tenant from the policyholder's location, contending that it had leased part of its space to decrease its losses after September 11 and arguing that the eviction costs should therefore be treated as an extra expense. The court disagreed, finding that the policyholder's attorney fees were incurred in an attempt to terminate an activity that began subsequent to the loss, not to continue a business activity that had occurred before the loss.<sup>60</sup>

### III. COLLAPSE

#### A. *Noncovered Property Falls on Covered Building*

In *Royal Insurance Co. of America v. Liberty Corp.*,<sup>61</sup> two transmission towers collapsed because of high winds and the negligence of a building contractor. The collapsing towers, which were not covered property, damaged a covered transmitter building. The court held that because the towers were not covered property, the exclusions for "collapse" and "faulty workmanship" could not apply to exclude coverage to the transmitter building.<sup>62</sup>

#### B. *Collapse Defined*

In *Dally Properties, LLC v. Truck Insurance Exchange*,<sup>63</sup> the court held that *collapse* meant "substantial impairment of structural integrity."<sup>64</sup> *Collapse* within the meaning of the policy did not require actual or imminent collapse.<sup>65</sup>

Similarly, in *Northeastern Center Inc. v. St. Paul Fire & Marine Insurance Co.*,<sup>66</sup> the court held that *collapse* meant "substantial impairment of the building" pursuant to the "modern interpretation" and found coverage for a brick wall of a building that separated from an underlying wall but did not collapse.<sup>67</sup> Likewise, the court in *Schray v. Fireman's Fund Insurance Co.*<sup>68</sup> adopted "the modern trend" where courts find "collapse coverage if any part of the building sustained substantial impairment to its structural integrity."<sup>69</sup>

In *Jernigan v. Nationwide Mutual Insurance Co.*,<sup>70</sup> the policy defined *collapse* to mean "an abrupt falling down or caving in of a building."<sup>71</sup> A contractor intentionally demolished the insured's building. The insured authorized the demolition on the condition that the city approved the plan. However, the contractor failed to obtain the appropriate city permits. The court found

60. *Id.* at \*4.

61. No. 6:04-1985-HFF, 2005 WL 2877735 (D.S.C. Nov. 1, 2005).

62. *Id.* at \*3-4.

63. No. C05-0254L, 2006 WL 1041985 (W.D. Wash. Apr. 5, 2006).

64. *Id.* at \*3.

65. *Id.* at \*2.

66. No. 1:03-CV-246TS, 2006 WL 842396 (N.D. Ind. Mar. 28, 2006).

67. *Id.* at \*5-6.

68. 402 F. Supp. 2d 1212 (D. Or. 2005).

69. *Id.* at 1218.

70. No. C04-5327, 2006 WL 463521 (N.D. Cal. Feb. 27, 2006).

71. *Id.* at \*9.

that “abrupt falling down” was not the same as “intentional demolition” and held that there was no collapse nor covered cause of collapse.<sup>72</sup>

### C. Sinkhole Collapse

A covered sinkhole collapse led to the failure of an embankment on a canal, regardless of the role that erosion and earth movement played in the failure, and therefore the failure of the embankment was covered, according to a federal district court in *Federated Rural Electric Insurance Exchange v. Public Utility District No. 1*.<sup>73</sup> On summary judgment, the court held that regardless of whether the sinkhole collapse was viewed under an “immediate cause” or “efficient proximate cause” analysis, the sinkhole “set in motion, in a direct sequence, unbroken by any new independent cause, forces which resulted in the loss.”<sup>74</sup> Therefore, the policyholder was entitled to a grant of summary judgment.

## IV. COVERED PROPERTY

### A. Structures

In *Seattle Monorail Services v. Affiliated FM Insurance Co.*,<sup>75</sup> the court was required to determine whether monorail trains were structures within the meaning of a Demolition and Increased Cost of Construction (“DICCC”) clause in a property insurance policy. A train caught fire because of an electrical malfunction, resulting in fire and smoke damage to that train and smoke damage to another train. The DICCC clause covered only buildings and structures. The court determined that the term *structure* was not ambiguous and looked to dictionary definitions defining structures as “something built or constructed, as a building, bridge or dam,” and “something made up of a number of parts assembled in a particular pattern.”<sup>76</sup> The court held that there was no requirement in either definition that a “structure” be affixed to the land, as the insurer had contended. However, because the trains were permanently attached to the tracks that were permanently affixed to track supports embedded in the ground, the trains were, in fact, affixed to the land.<sup>77</sup> The court found the policyholder’s analogy to an elevator very compelling, noting that although an elevator is not a building, no one would ever think to dispute that the elevator is both a structure and a part of a building.<sup>78</sup>

72. *Id.*

73. No. C04-5052 RBL, 2006 WL 521705 (W.D. Wash. Mar. 3, 2006).

74. *Id.* at \*4.

75. No. C05-1052-MJP, 2005 WL 2333482 (W.D. Wash. Sept. 23, 2005).

76. *Id.* at \*1.

77. *Id.* at \*2.

78. *Id.* at \*3.

In *Dixon v. First Premium Insurance Group*,<sup>79</sup> the policyholders moved out of their insured home and rented it to a tenant. Two months later, fire damaged the property. The insurer denied coverage, claiming that the house was no longer covered because coverage extended to the “residence premises,” meaning that the insureds must reside at the premises rather than renting to others. The court rejected that argument, holding that the Louisiana standard fire policy did not allow a restriction on coverage based on tenancy and that the insurer had failed to prove that the insureds increased the risk by renting the property.<sup>80</sup>

#### B. *Personal Property*

In *Zulick v. Patrons Mutual Insurance Co.*,<sup>81</sup> the insureds regularly kept personal property in the barn and carriage house of a home they rented to others. Their policy on the house in which they lived limited coverage for personal property not kept at the “residence premises” to ten percent of the personal property limit. The court held that the barn and carriage house were not part of the residence premises and enforced the policy limitation.

The Court of Appeals of Wisconsin reached a different result in *Acuity v. Reinsurance*.<sup>82</sup> In *Acuity*, the insureds kept tools in a locked garage on property other than where the insureds lived. The second property consisted of seven acres, a mobile home, and a garage. The mobile home was not rented at the time of the loss. The court held that the fact that the garage was on a different piece of land did not make it any less a part of the “residence premises” and refused to enforce an exclusion for theft of personal property that occurred off the residence premises while the property was at any other residence owned by, rented to, or occupied by an insured.<sup>83</sup>

#### C. *Newly Acquired Property*

In *Warnock Capital Corp. v. Hermitage Insurance Co.*,<sup>84</sup> Warnock purchased property on March 28, 2002, and submitted an application to its broker. On April 5, 2002, Hermitage gave notice to the broker that it rejected the application for coverage on the new property. A fire occurred on April 7, 2002. Warnock sought coverage under a coverage extension that provided up to \$250,000 for a newly acquired property until either (1) thirty days after its acquisition, (2) the property’s value was reported to the carrier, or (3) the policy expired. The court affirmed summary judgment in favor

79. No. 2005 CA 0988, 2006 WL 786781 (La. Ct. App. Mar. 29, 2006).

80. *Id.* at \*5.

81. No. CV040072605, 2005 WL 3665092 (Conn. Super. Ct. Dec. 21, 2005).

82. 715 N.W.2d 241 tbl., 2006 WL 1072068 (Wis. Ct. App. 2006).

83. *Id.* at \*1–2.

84. 803 N.Y.S.2d 606 (App. Div. 2005).

of Warnock, holding that none of the three terminating events occurred. However, because the original binder issued by the retail broker was only in the amount of \$200,000, coverage was limited to that amount.<sup>85</sup>

In *McDermott v. Great American Alliance Insurance Co.*,<sup>86</sup> a fraternity leased a building owned by McDermott. The building was added to the Fraternity Risk Management Trust's blanket policy, which listed as scheduled locations: "As per Statement of Values on file."<sup>87</sup> The court held that once the broker issued the Evidence of Insurance and notified the insurer, the property was part of the statement of values on file and could not be considered newly acquired property. Therefore, the lower limits mandated by the values supplied to the insurer applied, not the higher limits available for a newly acquired property.<sup>88</sup>

#### D. Additional Coverages

In *Brightpoint, Inc. v. Zurich American Insurance Co.*,<sup>89</sup> the court was asked to determine whether phone cards obtained through fraud were "covered property" under the Computer Fraud/Wire Transfer coverage form of a commercial crime policy. That policy defined *covered property* as "Money," "Securities," and "Property Other Than Money and Securities."<sup>90</sup> Some 300,000 phone cards were stolen through submission of fraudulent checks and bank guarantees. Zurich argued that the loss of the phone cards was a purely economic loss and that the phone cards were not "tangible property."<sup>91</sup> The court rejected this argument, holding that the phone cards were tangible, could be physically transferred to another, and carried an ascribed intrinsic value. Therefore, the court held they were covered property.<sup>92</sup> However, the court affirmed the denial of coverage because the loss did not occur at premises or "banking premises" occupied by the insured or through computer fraud, both requirements of the coverage.<sup>93</sup>

### V. DEBRIS REMOVAL

In *LJC Investments, Inc., LLC v. Merchants Mutual Insurance Co.*,<sup>94</sup> the policy limited the additional coverage for debris removal to twenty-five percent of the building loss, or \$10,000 if the building loss and twenty-five percent exceeded the limit for building damage. The insurer argued that, once

85. *Id.* at 1094.

86. No. 02 CV 607 NAM, 2005 WL 2437020 (N.D.N.Y. Sept. 30, 2005).

87. *Id.* at \*1.

88. *Id.*

89. No 1:04-CV-2085-SEB-JPG, 2006 WL 693377 (S.D. Ind. Mar. 10, 2006).

90. *Id.* at \*1.

91. *Id.* at \*5.

92. *Id.* at \*5-6.

93. *Id.* at \*6-7.

94. No. ESX-L-6144-04, 2006 WL 1508708 (N.J. Super. Ct. App. Div. June 2, 2006).

the building loss policy limit was reached, only an additional \$10,000 was available for debris removal. The insured argued that the additional coverage provided limits in excess of the building limit of up to twenty-five percent of the building loss plus \$10,000. The court held that the standard ISO form was ambiguous as it could be read either way. In addition, the court noted in a footnote that ISO had changed the policy form to clarify the provision, and this was further evidence of ambiguity.<sup>95</sup> Therefore, the court awarded twenty-five percent plus \$10,000.

#### VI. COINSURANCE

After the Michigan Supreme Court refused to decide the issue on certification, the Sixth Circuit, in *Melson v. Prime Insurance Syndicate, Inc.*,<sup>96</sup> held that an unambiguous coinsurance provision did not violate the public policy of Michigan.<sup>97</sup> Coinsurance was specifically permitted by a Michigan statute that was repealed in 1990. The court held that the statute “merely provided structure for a right long recognized by a Michigan common law.”<sup>98</sup> It did not create the right to include coinsurance provisions in property policies.

#### VII. DUTIES

##### A. *Proof of Loss*

In *Chong v. American Family Insurance Co.*,<sup>99</sup> the court granted summary judgment in favor of an insurer for the insured’s failure to submit a timely proof of loss statement. The court stated that the policyholder failed to offer any evidence to establish a genuine issue of material fact on the questions of compliance and waiver that could have otherwise negated summary judgment.<sup>100</sup>

In *Sager v. Farm Bureau Mutual Insurance Co.*,<sup>101</sup> an Iowa appellate court held that a “concealment or fraud” provision did not bar recovery for fire damage under a homeowners policy where inaccuracies in the insured’s proof of loss were not made with “intent to defraud.” The court agreed with the court below that “overstatements” in the insured’s proof of loss were “honest mistakes,” noting that the insured surveyed the damage only once before completing the proof of loss and acknowledged her errors in an examination under oath.<sup>102</sup>

95. *Id.* at \*4 n.2.

96. 429 F.3d 633 (6th Cir. 2005).

97. *Id.* at 639.

98. 429 F.3d at 638.

99. No. L-05-1075, 2005 WL 2334506 (Ohio Ct. App. Oct. 4, 2005).

100. *Id.* at \*3-4.

101. 710 N.W.2d 259 tbl., 2005 WL 3299085 (Iowa Ct. App. Dec. 7, 2005).

102. *Id.* at \*2.

### B. Prompt Notice

Summary judgment was granted in favor of the insurer in *US Pack Network Corp. v. Travelers Property Casualty*,<sup>103</sup> where the insureds did not give the insurer written notice for two losses until six and fifteen months after they occurred. The court rejected the insureds' argument that the word *prompt* was ambiguous and ruled that absent any excuse or mitigating circumstances for the delays, the notices were not prompt as a matter of law.<sup>104</sup> The court further found that the assertion by the insureds' president that he verbally notified the broker "shortly after each loss" was too vague to raise a genuine issue of material fact.<sup>105</sup>

In *Hartford Financial Services Group, Inc. v. Cleveland Public Library*,<sup>106</sup> the Sixth Circuit found that the lower court did not err in (1) sending to the jury the issue of whether Hartford's notice defense was waived, (2) refusing to grant a new trial on that issue, (3) finding sufficient evidence to support a verdict that Hartford did not waive its notice defenses with respect to a structural damage claim, or (4) instructing the jury on the definition of *loss* and including a reference date in the instruction.

The court denied the excess insurers' motion for summary judgment based on late notice in *Gannon International, Ltd. v. National Union Fire Insurance Co. of Pittsburgh*<sup>107</sup> because a determination of whether the excess insurer was prejudiced by the delay was a question of fact for the jury.

### C. Examination Under Oath

In *Morris v. Economy Fire & Casualty Co.*,<sup>108</sup> the court held that the insureds breached the policy as a matter of law by failing to provide requested documents and failing to submit to examinations under oath until the insurer provided their prior recorded statements. In rejecting the insureds' arguments that they were merely waiting for the court's ruling on what documentation was reasonable, the court stated that the insureds' obligation to disclose documents and submit to an examination under oath "was a contractual obligation, not a discovery request under the Trial Rules" and that "[c]ompliance was not optional or subject to a trial court determination."<sup>109</sup>

### D. Reasonable Measures

In *Chang v. Brethren Mutual Insurance Co.*,<sup>110</sup> heavy snowfall caused snow to accumulate on a building's roof, causing the local fire department to

103. 808 N.Y.S.2d 153 (App. Div. 2005).

104. *Id.* at 154.

105. *Id.*

106. No. 04-4415, 2006 WL 238215 (6th Cir. Jan 31, 2006).

107. No. 4:04-CV-893, 2006 WL 288096 (E.D. Mo. Feb. 7, 2006).

108. 848 N.E.2d 663 (Ind. 2006).

109. *Id.* at 667.

110. 897 A.2d 854 (Md. Ct. App. 2006).

prohibit occupancy of the building until the snow was removed and the roof inspected by an engineer. The insured claimed that the snow removal cost was within the definition of a “mitigation expense” or an “extra expense” under the policy and moved for summary judgment. The insurer disagreed and denied coverage, arguing that the mitigation provision of the policy in question required that the insured mitigate its losses “for consideration in the settlement of the claim.”<sup>111</sup> The court denied summary judgment because several issues of material fact existed, namely, whether the actual snow removal was necessary and effective in preventing further loss and if the costs incurred were reasonable.<sup>112</sup> The court further noted that the word *consideration* in the policy was ambiguous and explained that the parties could present extrinsic evidence to resolve the ambiguity; if no such evidence exists, the provision would be construed against the insurer.<sup>113</sup>

#### VIII. EMPLOYEE DISHONESTY/CRIME

In *Acid Piping Technology, Inc. v. Great Northern Insurance Co.*,<sup>114</sup> the court found the following language in a commercial policy regarding employee dishonesty to be ambiguous when reading the policy as a whole: “any loss caused by an employee . . . either resulting from a single act or any number of acts.”<sup>115</sup> Accordingly, the \$5,000 limit applied to each fraudulent invoice that the employee submitted rather than the \$5,000 limit applying only once.<sup>116</sup>

In *Travelers Indemnity Co. v. Vas-Nas, P.C.*,<sup>117</sup> the court held that if an entity is incorrectly or inaccurately listed on the declarations of an employee dishonesty form, no coverage is available for the wrongful acts of the entity’s employees.

#### IX. EXCLUSIONS

##### A. Causation

In *Travelers Personal Security Insurance Co. v. McClelland*,<sup>118</sup> the court reiterated Texas law that if an insurer claims that a loss is excluded under a policy, the insured is then required to either prove that the damage was caused solely by a covered cause of loss or segregate the damage caused by the insured peril from that caused by an excluded peril. The appellate

111. *Id.* at 859.

112. *Id.* at 863.

113. *Id.*

114. No. 4:04 CV 1667, 2005 WL 3008512 (E.D. Mo. Nov. 5, 2005).

115. *Id.* at \*2.

116. *Id.* at \*6.

117. No. 03-5120-SW-ODS, 2005 WL 3107697 (W.D. Mo. Nov. 18, 2005).

118. 189 S.W.3d 846, 849 (Tex. App. 2006).

court then affirmed the jury verdict that eighty percent of the damage to the insured's house was caused by the plumbing leak (a covered peril) and twenty percent resulted from natural causes (a noncovered peril), stating that the insured placed before the jury "more than a scintilla of evidence" segregating the damage.<sup>119</sup>

*Fire Insurance Exchange v. Sullivan*<sup>120</sup> involved an insurance claim for mold contamination as the result of leaks in the insured's pipes and air conditioner. The jury found that forty-five percent of the insured's claimed loss was the result of accidental water leakage or discharge (a covered peril), ten percent was the result of "deterioration of the roof" (a noncovered peril), and forty-five percent was the result of "dampness of atmosphere" (a noncovered peril).<sup>121</sup> The jury then awarded, and the trial court accepted, the insured's full costs for the mold remediation and repair.<sup>122</sup> The Texas Appeals Court found that the trial court erred in including the full amount of the dwelling's remediation and repair costs in the judgment's total cost amount when the jury found that only forty-five percent of these costs were attributable to a covered peril and, as a result, reduced the award by fifty-five percent.<sup>123</sup>

In *Omaha Cold Storage Terminals, Inc. v. Hartford Insurance Co.*,<sup>124</sup> summary judgment was denied for an insurer on the issue of an exclusion for negligence committed by other parties when the negligent repair of damaged flooring resulted in the collapse of a warehouse. The court held that the word *direct* in an exclusion for faulty workmanship that read that it would not "reduce the insurance for loss or damage caused directly by a covered peril" meant intermediate or proximate as opposed to remote or incidental, and, therefore, it was an issue of fact as to whether the negligent repair was the proximate and direct cause of harm.<sup>125</sup>

In *Solimine v. Massachusetts Property Insurance Underwriting Ass'n*,<sup>126</sup> the court reversed an order granting summary judgment for an insurer on the basis of a policy exclusion for lack of maintenance or normal wear and tear. The court held that the bulging brick façade of the insured building could have been caused by water of indeterminate origin and would thus be covered by the policy, if the fact finder found so on remand.<sup>127</sup>

*Dally Properties, LLC v. Truck Insurance Exchange*<sup>128</sup> dealt with water damage done to an apartment building by wind-driven rain and construction

119. *Id.* at 851–52.

120. 192 S.W.3d 99 (Tex. App. 2006).

121. *Id.* at 104–05.

122. *Id.* at 102.

123. *Id.* at 106.

124. No. 8:03CV445, 2006 WL 695456 (D. Neb. Mar. 17, 2006).

125. *Id.* at \*6.

126. 844 N.E.2d 256 (Mass. App. Ct. 2006).

127. *Id.* at 259.

128. No. C05-0245L, 2006 WL 1041990 (W.D. Wash. Apr. 5, 2006).

defects. The building's policy excluded loss for faulty construction. The court held that Washington's efficient proximate cause rule did not allow summary judgment, and the question of whether the rain or the construction was the efficient proximate cause must go to the jury.<sup>129</sup>

#### B. *Earth Movement*

In *Simon v. Encompass Insurance Co.*,<sup>130</sup> the insurer denied coverage under the earth movement exclusion for the collapse of a cellar wall due to pressure from soil inundated by heavy rain that was then exacerbated by lack of drain gutters and improper land grading. The court granted summary judgment for the insured because the exclusory language did not include earth movement due to hydrostatic pressure, and the defendant had not provided any evidence that the earth moved before the wall broke.<sup>131</sup>

In *Holy Trinity Greek Orthodox Church v. Church Mutual Insurance Co.*,<sup>132</sup> the insured claimed that water from a burst pipe caused soil inundation that resulted in significant damage to the building's slab. The policy contained an exclusion for damage caused by earth movement and an anticoncurrent causation provision. The insured argued the exclusion was ambiguous and should apply only to natural phenomena.<sup>133</sup> The court granted summary judgment for the insurer, finding that the clause was unambiguous and that Arizona courts do not apply efficient proximate cause, and thus the anticoncurrent causation clause was valid.<sup>134</sup>

A Florida appellate court, in *Widdows v. State Farm Florida Insurance Co.*,<sup>135</sup> overturned the trial court's summary judgment in favor of the insured and found that the language "accidental direct physical loss" in the policy included abnormalities in sewage pipes caused by settlement, erosion, or a sinkhole.<sup>136</sup> It also found that the insurer failed to meet its burden that the earth movement exclusion applied.<sup>137</sup>

The court upheld a summary judgment ruling in favor of the insurer in *Nototny v. Farmers Insurance Co. Inc.*,<sup>138</sup> where water damage to the insured property was caused by a cracked and leaking pipe. According to the Iowa Appeals Court, the trial court had found that the pipes leaked because of settling, and the policy clearly stated that losses caused directly

129. *Id.* at \*4.

130. No. 86143, 2005 WL 2811890 (Ohio Ct. App. Oct. 27, 2005).

131. *Id.* at \*3-4.

132. No. CIV 04-1700PHXSMM, 2006 WL 18488 (D. Ariz. Jan. 4, 2006).

133. *Id.* at \*3.

134. *Id.* at \*6-7.

135. 920 So. 2d 149 (Fla. Dist. Ct. App. 2006).

136. *Id.*

137. *Id.* at 150-51.

138. No. 05-0110, 2006 WL 468704 (Iowa Ct. App. Mar. 1, 2006).

or indirectly by earth movement such as water leaks caused by settling were not covered.<sup>139</sup>

The Oklahoma Court of Appeals ruled that the lower court correctly denied, based on an earth movement exclusion, an insurer's motion for directed verdict in *Duensing v. State Farm Insurance & Casualty Co.*<sup>140</sup> because reasonable people could differ whether the "earth" included movement of sand fill that was added to the property in question to make the slab "float" so as to avoid cracking. The court also held that the anticoncurrent causation clause pertaining to the settling exclusion was not sufficiently unambiguous to override the efficient proximate cause doctrine.<sup>141</sup>

In *Auto Owners Insurance Co. v. Parks*,<sup>142</sup> the Georgia appellate court upheld the denial of summary judgment to an insurer disclaiming coverage for earthmoving equipment that fell into a pond it was digging. Although the policy specifically covered landslides, the insurer argued that it only covered natural landslides. Applying the plain meaning of *landslide*, the court held that the term encompassed both natural landslides and those caused by excavation and that there was still an issue of fact as to whether the damage was caused from a landslide or from the equipment's sinking into the mud.<sup>143</sup>

### C. Vandalism

In *Cipriano v. Patrons Mutual Insurance Co. of Connecticut*,<sup>144</sup> the insurer and insured disagreed as to whether arson was included in an exclusion for vandalism when the dwelling was left unoccupied for more than thirty days. The court denied summary judgment for the insurer because the term *vandalism* was undefined in the policy and ambiguous as to whether it included arson.<sup>145</sup>

The court held in *Battisbill v. Farmers Alliance Insurance Co.*<sup>146</sup> that the exclusion of coverage for "vandalism and malicious mischief" if the dwelling was unoccupied for thirty days was unambiguous and did include acts of arson by its plain meaning. The court also held that because of the clarity

139. *Id.* at \*1.

140. 131 P.3d 127 (Okla. Ct. App. 2005).

141. *Id.* at 136–37.

142. 629 S.E.2d 118 (Ga. Ct. App. 2006).

143. *Id.* at 123.

144. No. 4100708, 2005 WL 3665306 (Conn. Super. Ct. Dec. 23, 2005).

145. *Id.* at \*6. Reargument in *Cipriano* was denied even though one of the cases the court relied upon, *Battisbill v. Farmers Alliance Insurance Co.*, 97 P.3d 620 (N.M. Ct. App. 2004), was overruled by that state's supreme court, 127 P.3d 111 (N.M. 2006). The *Cipriano* court maintained that numerous other cases relied upon in the original decision still held that "vandalism and malicious mischief" was ambiguous as to whether it included arson and thus were sufficient to support the ruling. *Cipriano*, 2005 WL 1230337, at \*2.

146. 127 P.3d 1111 (N.M. 2006).

of the term, it was unnecessary to examine whether the contents portion of the policy that listed “fire” and “vandalism” as named perils created an ambiguity.<sup>147</sup>

#### D. *Intentional Loss*

There was no coverage under the intentional loss exclusion of the policy in *State Auto Property & Casualty Insurance Co. v. St. Louis Supermarket #3, Inc.*<sup>148</sup> for fires caused by a director and shareholder in the company that owned the burned stores, even though he later resigned as director and sold his stock.

The court in *Auto-Owners Insurance Co. v. Hamin*<sup>149</sup> upheld a declaratory judgment that a policy’s intentional loss exclusion applied where the policyholder’s sister (who was considered an insured under the policy) intentionally set the insured’s house on fire. The court reasoned that the phrase “intent to cause a loss” was unambiguous and encompassed the facts at hand.<sup>150</sup>

In *Scott v. Allstate Indemnity Co.*,<sup>151</sup> the court held that a policy’s intentional act exclusion prevented recovery for a house fire started when the insured lit an unknown substance in his garage to test the nature of that substance. The court reasoned that his actions were not accidental in that they were not unforeseen, and that language in the policy excluding harm that “may be reasonably expected to result” from actions rendered the insured’s intent unimportant.<sup>152</sup>

#### E. *Water Damage*

##### 1. Sewer Backup

In *B & W Heat Treating Co., Inc. v. Hartford Fire Insurance Co.*,<sup>153</sup> flooding and possibly a clogged drain caused water damage to the insured’s property. The insured sought coverage under their endorsement that covered loss from “water that backs up from a sewer or drain.”<sup>154</sup> The court held that the endorsement’s “flood” exclusion applied even if “other factors such as a clogged drain contributed to the loss.”<sup>155</sup>

In *1335 Piccard LLC v. National Fire Insurance Co. of Hartford*,<sup>156</sup> water from a municipal sewer line backed up into the insured’s building, causing damage and loss of rents. The insured’s policy included “additional

147. *Id.* at 1116.

148. No. 4:04CV1358, 2006 WL 27292, at \*1–4 (E.D. Mo. Jan. 5, 2006).

149. 629 S.E.2d 683, 685–86 (S.C. Ct. App. 2006).

150. *Id.* at 686.

151. 417 F. Supp. 2d 929, 935–36 (N.D. Ohio 2006).

152. *Id.* at 936.

153. 803 N.Y.S.2d 870 (App. Div. 2005).

154. *Id.*

155. *Id.*

156. 171 F. Appx. 993 (4th Cir. 2006).

coverage” for business income losses resulting from covered causes of loss. Although the policy excluded losses caused by sewer backup, the policy included a “coverage extension” for “damage to covered property caused by water that backs up through sewers or drains.”<sup>157</sup> The court held that the coverage extension expressly applied to property only and did not modify the covered causes of loss for the additional coverage of business income.<sup>158</sup>

## 2. Interior Water Damage

In *Aginsky v. Farmers Insurance Exchange*,<sup>159</sup> a temporary roof covering put in place during construction leaked storm water into the Aginsky’s building. The Farmers policy covered rain damage to the building’s interior, but only if there was first covered roof damage. The court held that a “temporary structure consisting of wooden framing and a plastic tarp would not be considered a ‘roof’ by any reasonable person.”<sup>160</sup>

In *Century Theaters, Inc. v. Travelers Property Casualty Co. of America*,<sup>161</sup> contractors installed drywall, ceiling tiles, and insulation before completing the roof on a new building. Rain leaked through the incomplete roof and damaged the interior. The court held that neither the faulty workmanship exclusion nor the exclusion for loss by rain to the interior of the building applied.<sup>162</sup> Faulty workmanship meant flawed finished products and not a flawed process as occurred here.<sup>163</sup> The exclusion for loss by rain to the interior of buildings did not apply because this was not the proximate cause of the loss.<sup>164</sup>

## 3. Flood and Surface Water

In *Walker v. McKinnis*,<sup>165</sup> the Walkers routinely suffered basement “flooding” during rainstorms due to a defectively designed roof and gutter system.<sup>166</sup> Water entered their basement window like “Niagara Falls” after overflowing from gutters, dropping to the ground, and then flowing into the window well.<sup>167</sup> The court first held that the defective roof and gutter system was an excluded “latent defect” because it “existed in hidden form” and was “not manifest” at the time the Walkers purchased the home.<sup>168</sup>

157. *Id.* at 995.

158. *Id.*

159. 409 F. Supp. 2d 1230 (D. Or. 2005).

160. *Id.* at 1236.

161. No. C-05-3146 JCS, 2006 WL 708667 (N.D. Cal. Mar. 20, 2006).

162. *Id.* at \*7–9.

163. *Id.* at \*8–9.

164. *Id.* at \*7.

165. No. CA2004-10-082, 2005 WL 1864144 (Ohio Ct. App. Aug. 8, 2005).

166. *Id.* at \*2.

167. *Id.*

168. *Id.*

The court next held that the water damage was excluded as “flood” and “surface water.”<sup>169</sup>

The fact that the policy included both “flood” and “overflow of a body of water” as meanings for “water damage” is an indication that the policy intended “flood” not to mean strictly an overflow of a body of water, but also to have a broader meaning such as a “great stream of something flowing in a steady course,” or “a large quantity widely diffused.” [The court] find[s] it noteworthy that appellant . . . described the water intrusion as “flooding.”<sup>170</sup>

In *Angott v. Great Northern Insurance Co.*,<sup>171</sup> Angott prepared to build an addition to his home by excavating immediately adjacent to his foundation and basement wall. Surface water from a storm flowed into the excavation and then leaked through a basement door that opened to the excavation. The insured argued that the loss was not caused by excluded “surface water” because the water’s “legal status changed” when it collected in the excavation.<sup>172</sup> The court rejected this assertion, reasoning that surface water only loses its character when it “percolates, evaporates or reaches a natural body of water.”<sup>173</sup>

#### 4. Water Below the Surface

In *Hudson v. Allstate Insurance Co.*,<sup>174</sup> a water supply line burst and damaged the foundation walls and floor. The line was embedded in gravel fill below the concrete floor of the home. The court held that the exclusion for loss caused by water “below the surface of the ground” did not apply.<sup>175</sup> Because “the pipe ran through gravel fill, it was not ‘below the surface of the ground.’”<sup>176</sup> Furthermore, the exclusion conflicted with coverage for water damage from plumbing systems that ensued from wear and tear. The court also found that because the damage was caused by the displacement of fill, the earth movement exclusion did not apply.<sup>177</sup>

#### 5. Hurricane—Wind Versus Flood

In *Leonard v. Nationwide Mutual Insurance Co.*,<sup>178</sup> the Leonards owned a house in Pascagoula, Mississippi, some 515 feet from the beachfront. High winds and storm surge from Hurricane Katrina damaged their home. Nationwide provided homeowners insurance that covered windstorm damage but

169. *Id.*

170. *Id.*

171. No. 05-72115, 2006 WL 1328874 (E.D. Mich. May 15, 2006).

172. *Id.* at \*3.

173. *Id.* at \*4.

174. 809 N.Y.S.2d 124 (App. Div. 2006).

175. *Id.* at 125.

176. *Id.*

177. *Id.* at 125–26.

178. 438 F. Supp. 2d 684 (S.D. Miss. 2006).

excluded, with anticoncurrent causation language, water damage, which included flood, surface water, waves, tidal waves, overflow of a body of water, and spray from these, whether or not driven by wind. The policy also excluded loss caused by weather conditions if they contributed in any way to, inter alia, water damage. The court held that the anticoncurrent causation language of the water damage and weather condition exclusions was ambiguous when read in conjunction with the policy's explicit coverage for windstorm.<sup>179</sup> Therefore, the court held that the Leonards could recover for that portion of the damage that was caused by wind. The portion that Nationwide could prove was caused by water damage was excluded. The court, sitting without a jury, found that the vast majority of damage was caused by water, not wind. The Leonards, who sought \$158,000 in coverage, were awarded a little less than \$3,000 on their claim, an amount slightly more than that originally paid on the claim by Nationwide.<sup>180</sup>

Also in *Leonard*, the court rejected the insureds' claims that their Nationwide agent misled them to believe that their policy covered flood when he advised them not to purchase flood insurance. The Leonards did not live in one of the areas most prone to flood, which are designated as Flood Zone A under federal regulations. Although the agent may have advised them not to buy a separate flood policy, he never represented that their homeowners policy covered flood. Furthermore, the insured presented no evidence of the standard of care for an insurance agent.<sup>181</sup>

Similarly, in *Buente v. Allstate Property & Casualty Insurance Co.*,<sup>182</sup> Hurricane Katrina damaged the plaintiffs' Mississippi home by wind, rain, and storm surge. The court held that "storm surge" fell within the policy's exclusion for "flood," and damage by such tidal water would be excluded.<sup>183</sup> The court also held that anticoncurrent causation language would not be enforced.<sup>184</sup> Consequently, if loss was caused in part by covered wind and rain and in part by excluded storm surge, loss caused proximately by the wind and rain would be covered.<sup>185</sup> Also, "if wind damage preceded damage from storm surge, the wind damage would be a covered loss even if subsequent damages from the 'storm surge' that exacerbated the loss were properly

179. *Id.* at 694; *see also* Guice v. State Farm Fire & Cas. Co., No. 1:06-cv-00001-LTS-RHW, 2006 WL 2359474 (S.D. Miss. Aug. 14, 2006) (weather conditions exclusion was ambiguous and unenforceable with or without a Hurricane Deductible endorsement).

180. *See Leonard*, 438 F. Supp. 2d at 695-96.

181. *Id.* at 692-93, 695.

182. No. 1:05 CV 712 LTS JMR, 2006 WL 980784 (S.D. Miss. Apr. 12, 2006); *see also* Tuepker v. State Farm Fire & Cas. Co., No. 1:05CV559LTS-JMR, 2006 WL 1442489 (S.D. Miss. May 24, 2006).

183. *Buente*, 2006 WL 980784, at \*1.

184. *Buente v. Allstate Ins. Co.*, 422 F. Supp. 2d 690 (S.D. Miss. 2006); *see also* Tuepker v. State Farm Fire & Cas. Co., No. 1:05CV559LTS-JMR, 2006 WL 1442489 (S.D. Miss. May 24, 2006).

185. *Buente*, 422 F. Supp. 2d at 696.

excluded.”<sup>186</sup> The weather conditions exclusion was ambiguous and unenforceable.<sup>187</sup>

In *Mayton v. Auto-Owners Insurance Co.*,<sup>188</sup> Hurricane Isabel damaged the Maytons’ Virginia home by wind, a covered cause of loss under their policy, and overflow of the James River, an excluded cause of loss. If “damage is caused by two causes, one of which is excluded, the law upholds the exclusion of the entire damage.”<sup>189</sup> Furthermore, if flood alone was sufficient to totally destroy the home, then preceding wind damage is not covered.<sup>190</sup>

#### 6. Hurricane—Class Action

In *Guice v. State Farm Fire & Casualty Co.*,<sup>191</sup> Hurricane Katrina destroyed the insured’s home. State Farm compensated the insured for wind damage to an off-premises barn but denied coverage for the residence because excluded flood, surface water, waves, and tidal water caused the loss. Guice filed suit and brought a motion to certify the matter as a class. The court denied the motion, noting that “[t]he nature and extent of property damage [from] Hurricane Katrina will vary greatly in its particulars, depending on the location and condition of the property before the storm struck and depending also on what combination of forces caused the damage.”<sup>192</sup> The court described its own docket as a “variety package” with respect to the number of lawyers, the theories of recovery, geographical location of loss, conduct of agents, and issues of jurisdiction.<sup>193</sup>

#### F. Pollution/Contamination

In *Ho v. State Farm Fire & Casualty Co.*,<sup>194</sup> State Farm recommended a fire restoration company to the Hos after they made a claim for a small fire and smoke loss.<sup>195</sup> The restorer contaminated the Hos’ home with a cleaning solution that eliminated the smoke odor but made the home uninhabitable.<sup>196</sup> State Farm paid for the fire and smoke damage and the related additional living expenses. However, it denied coverage for the contamination pursuant to the contamination exclusion. The court affirmed summary judgment for State Farm on the Hos’ claim for bad faith because the “negligence in attempting to rid the home of the smoke odor was an intervening cause”

186. *Id.*

187. *Id.* at 697.

188. No. Civ.A.3:05CV667, 2006 WL 1214831 (E.D. Va. May 2, 2006).

189. *Id.* at \*5.

190. *Id.* at \*6–7.

191. No. 1:06-cv-00001-LTS-RHW, 2006 WL 2359474 (S.D. Miss. Aug. 14, 2006).

192. *Id.* at \*5 (quoting *Comer v. Nationwide Mut. Ins. Co.*, No. 1:05CV436, 2006 WL 1066645, at \*2 (S.D. Miss. Feb. 23, 2006)).

193. *Id.* at \*5.

194. No. 86217, 2005 WL 2600651 (Ohio Ct. App. Oct. 13, 2005).

195. *Id.* at \*2.

196. *Id.* at \*2–4.

and not part of the covered fire and smoke loss: “There is no basis for a bad faith claim, when the claim is specifically excluded by the policy.”<sup>197</sup>

In *Pillsbury Co. v. Zurich American Insurance Co.*,<sup>198</sup> pieces of a plastic screen used to sift ingredients for biscuits fell into the mixture during production. To prevent distribution and sale of products containing plastic, Pillsbury destroyed over \$12 million in goods and then filed a claim with Zurich for the loss. The pollution exclusion did not apply: the pieces of screen did not “soil, stain, corrupt or infect the ingredients” because they did not “blend with or permeate” the ingredients in such a way that removal was “technically or chemically difficult.”<sup>199</sup> Rather, “the pieces of screen could be isolated and picked or sifted out.”<sup>200</sup> Further, the screen pieces did “not constitute a particulate, chemical or similar impurity by mixture, but rather presented a choking hazard due to physical obstruction.”<sup>201</sup> The ordinary meaning of *contamination* “does not include the presence of foreign objects.”<sup>202</sup>

In *Parks Real Estate Purchasing Group v. St. Paul Fire & Marine Insurance Co.*,<sup>203</sup> commercial property owners sought coverage for damage caused by “abrasive and corrosive particulate” that infiltrated their property after terrorists flew planes into the World Trade Center, causing the center to collapse and release particulate into the environment. The court held that the particulate was excluded contamination and that contamination, not collapse, was the dominant efficient proximate cause of the loss.<sup>204</sup>

#### G. *Theft, Wrongful Conversion, Embezzlement*

In *O’Daniel v. NAU Country Insurance Co.*,<sup>205</sup> O’Daniel learned that operators of a feedlot, to whom he entrusted his livestock, wrongfully converted a large number of his cattle. O’Daniel’s property policy “covered theft, but specifically excluded coverage when the loss has occurred by wrongful conversion or embezzlement.”<sup>206</sup> The appellate court rejected the trial court’s conclusion that “the conversion and embezzlement exclusion[s] [were] ambiguous simply because ‘[a] reasonable person [might be] left confused by the use of the terms ‘theft’ and ‘wrongful conversion.’”<sup>207</sup> The court held that the loss was not covered under the policy.

197. *Id.* at \*4.

198. No. Civ. 03-06560 (DCD/JJG), 2005 WL 2778752 (D. Minn. Oct. 25, 2005).

199. *Id.* at \*3.

200. *Id.*

201. *Id.*

202. *Id.*

203. No. 04 Civ. 5201(LAP), 2005 WL 2414771 (S.D.N.Y. Sept. 28, 2005).

204. *Id.* at \*4.

205. 427 F.3d 1058 (8th Cir. 2005).

206. *Id.* at 1060.

207. *Id.*

#### H. Freezing

In *Continental Western Insurance Co. v. Reid*,<sup>208</sup> pipes froze and burst, causing damage to Reid's unoccupied home. Reid's homeowners policy covered "freezing," but only if he did his "best to maintain heat."<sup>209</sup> Reid allegedly believed that his propane contractor would automatically fill the tank when it was low. However, the gas company only filled tanks if called. The jury found that Reid had not done his best to maintain heat. The appellate court affirmed, rejecting Reid's argument that the requirement was illusory and thus void.<sup>210</sup>

#### I. Rot

In *Topor v. Erie Insurance Co.*,<sup>211</sup> a parapet on Topor's building collapsed due to rotten wood supports or deteriorated mortar. Erie argued that the "rotting" exclusion applied to both the rotting of wood and "the deterioration of the mortar joints in the brick wall as a result of water infiltration and the freezing and thawing of that water."<sup>212</sup> The court, however, rejected Erie's contention and held that "rotting" only applied "to the deterioration of organic materials such as wood."<sup>213</sup>

#### J. Extremes of Temperature

In *Old Town Canoe Co. v. Continental Casualty Co.*,<sup>214</sup> high temperatures in storage buildings warped 1,776 canoes and kayaks. Old Town Canoe Company argued that their policy's "extremes of temperature, changes of temperature" exclusion may apply to damage caused directly by outside ambient air temperature, but not to damage arising from temperature inside storage trailers. The court agreed, reasoning that the exclusion was ambiguous and could be interpreted to apply only to outside ambient air.<sup>215</sup>

Conversely, in *Providence Washington Insurance Co. v. Volpe & Koenig, P.C.*,<sup>216</sup> the extremes of temperature and change in temperature exclusions were not limited to outdoor temperatures. The exclusions applied to a law firm's loss of computer equipment and data resulting from a failed air conditioning system in the computer room. The court distinguished other cases where courts found similar exclusions ambiguous. The "Computer Endorsement" at issue contained additional clarifying language that referred to losses related to air conditioning. Because air conditioning affects

208. 715 N.W. 2d 689 (Wis. Ct. App. 2006).

209. *Id.* at 690.

210. *Id.*

211. 816 N.Y.S.2d 631 (App. Div. 2006).

212. *Id.* at 633.

213. *Id.*

214. No. Civ. 05-25-B-W, 2005 WL 2674902 (D. Me. Oct. 20, 2005).

215. *Id.* at \*1.

216. 396 F. Supp. 2d 542 (E.D. Pa. 2005).

only indoor temperatures, the language referencing air conditioning damage causing a change in temperature would be meaningless if the exclusion for damage due to changes in or extremes of temperature meant only outdoor or atmospheric temperature.<sup>217</sup>

K. *Vacancy/Unoccupancy*

In *Gallo v. Travelers Property Casualty*,<sup>218</sup> a New York appellate court concluded that a policy's vacancy and unoccupancy exclusions did not preclude coverage for a fire loss. The insured established that the damaged building was not "vacant" for sixty consecutive days before the loss as the insured had sufficient "business personal property" to "conduct customary operations" in the building.<sup>219</sup> The insured also established that the building was not "unoccupied" as the building contained "personal property usual to the occupancy of the building while customary activity and operations are suspended."<sup>220</sup> Notably, the property had been used as a campaign headquarters and a storage facility prior to the loss.

In *Little v. Livingston Mutual Insurance Co.*,<sup>221</sup> the same New York appellate court held that a triable issue of fact existed as to whether a vandalized residence was vacant for more than thirty consecutive days before the loss, thus triggering the policy's vacancy exclusion. Although the insurer demonstrated that utility service at the residence was disconnected at least three months before the loss, the insured created a factual issue by testifying that his inspection did not "reveal any sign of abandonment of the premises by the tenants."<sup>222</sup>

## X. FLOOD INSURANCE

After their home sustained hurricane damage, the insureds in *Thomas v. Standard Fire Insurance Co.*<sup>223</sup> filed claims under both their Standard Flood Insurance ("SFIP") and Excess Flood ("EFP") policies. Although the SFIP contained a specific "Increased Cost of Compliance" provision covering the amount paid to comply with flood plain management laws or ordinances, the EFP insured only against "direct physical loss by or from flood."<sup>224</sup> The insureds sued their EFP insurer after it denied their claim for code compliance costs that they incurred in excess of the SFIP's code compliance limit. The court held that these compliance costs were not covered under the EFP,

217. *Id.* at 545.

218. 801 N.Y.S.2d 849 (App. Div. 2005).

219. *Id.* at 850-51.

220. *Id.* at 851.

221. 801 N.Y.S.2d 460 (App. Div. 2005).

222. *Id.* at 462.

223. 414 F. Supp. 2d 567 (E.D. Va. 2006).

224. *Id.* at 569.

holding that they did not constitute physical losses to the insured structure as required by the policy.<sup>225</sup> The court also reasoned that code compliance costs were not available under the EFP as the insureds did not pay a premium for that specific coverage as they had with respect to the SFIP.

In *Gallup v. Omaha Property & Casualty Insurance Co.*,<sup>226</sup> the Fifth Circuit held that the National Flood Insurance Act, the statute that established the National Flood Insurance Program (“NFIP”), authorizes the Federal Emergency Management Agency (“FEMA”) to promulgate regulations that preempt state law claims made against Write Your Own Insurance (“WYO”) providers operating under the NFIP. Referring to a recent decision in which state law tort claims against a WYO insurance carrier were held to be preempted by the Act itself, the court reasoned that “it necessarily follows that the Act gives FEMA authority to promulgate regulations to that effect.”<sup>227</sup> As a result, the insureds’ state law-based bad faith breach of contract claims against its WYO insurer were preempted.

#### XI. INSURABLE INTEREST

In *Battle v. Liberty Mutual Fire Insurance Co.*,<sup>228</sup> a Georgia appellate court held that an insured could not recover against his insurers for fire damage to his house where the insured had failed to list the house as an asset in a successful Chapter 7 bankruptcy petition nearly seven years before the loss. The court held that the insured was judicially estopped from asserting an ownership interest in the house in the coverage litigation and rejected the insured’s argument that the insurers were required to prove that they were prejudiced by the insured’s posture in the former bankruptcy proceeding.<sup>229</sup>

#### XII. LOSS SETTLEMENT

In *Drew v. Mobile USA Insurance Co.*,<sup>230</sup> the court recognized that where a policy contains a provision permitting the insurer itself to perform repair work, an insurer could potentially be held responsible for an amount in excess of the policy limits if the insurer enters into and breaches a second, “new” contract to complete repairs. The court found that questions of material fact existed with respect to whether the insurer in *Drew* created a new contract to repair and whether the insurer “selected the repair company to conduct the mold remediation” at the insureds’ home.

225. *Id.* at 570–71.

226. 434 F.3d 341 (5th Cir. 2005).

227. *Id.* at 345.

228. 623 S.E.2d 541 (Ga. Ct. App. 2005).

229. *Id.* at 543–44.

230. 920 So. 2d 832 (Fla. Dist. Ct. App. 2006).

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### XIII. MISREPRESENTATION

In *Scottsdale Insurance Co. v. Tolliver*,<sup>231</sup> Oklahoma's highest court declined to answer a question certified to it by a federal court inquiring whether an applicable Oklahoma statute<sup>232</sup> "requires a finding that the insured intended to deceive the insurer" before a misrepresentation on an insurance application can serve as a bar to recovery. The court acknowledged, however, that there was existing precedent addressing the issue and noted that well-established Oklahoma law requires such a finding.<sup>233</sup>

### XIV. MOLD

#### A. Covered Water Damage Required

Two courts applying Texas law held that covered water damage is a prerequisite to coverage for mold damage. In *Garza v. Allstate Texas Lloyds*,<sup>234</sup> the court acknowledged that the policy at issue covered mold damage that "ensues from an otherwise covered water damage event"<sup>235</sup> and thus held that water leaks caused by a deteriorating roof and a faulty HVAC system, uncovered events, did not give rise to covered mold damage.<sup>236</sup> Similarly, in *Gordon v. Allstate Texas Lloyds*,<sup>237</sup> a federal court granted an insurer's motion for summary judgment with respect to airborne mold contamination caused by condensation from the insureds' HVAC system because the condensation was caused by improper maintenance, an uncovered cause of loss. The insureds avoided summary judgment on other claims because questions remained as to whether the mold was also caused by covered perils. The court declined to determine whether an ensuing loss provision, like the one contained in the insureds' policy, "provides coverage for mold contamination caused by water damage that is otherwise covered under the policy" because the same question was pending before the Texas Supreme Court in another case.<sup>238</sup>

In *Lundstrom v. United Services Automobile Ass'n-CIC*,<sup>239</sup> also applying Texas law, a Texas appellate court held that an "ensuing loss" exception to a mold exclusion contained in a homeowners policy precluded coverage for mold damage even where the water damage causing the mold was a covered

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231. 127 P.3d 611, 612 (Okla. 2005).

232. OKLA. STAT. ANN. tit. 36, § 3609 (West 1999).

233. *Tolliver*, 127 P.3d at 614.

234. No. Civ. A.M.-04-270, 2005 WL 2388254 (S.D. Tex. Sept. 28, 2005).

235. *Id.* at \*2.

236. *Id.* at \*4.

237. No. Civ. A. H-04-1061, 2006 WL 509838 (S.D. Tex. Mar. 2, 2006).

238. *Fiess v. State Farm Lloyd's*, 392 F.3d 802 (5th Cir. 2004), discussed in *Gordon*, 2006 WL 509838, at \*4.

239. No. 14-04-00357-CV, 2006 WL 176559 (Tex. App. Jan. 26, 2006).

risk.<sup>240</sup> The court noted that “for the ensuing loss exception to override the exclusion for mold[,] . . . the mold must have caused or preceded the water damage, not vice versa.”<sup>241</sup>

Confirming that Georgia has adopted the efficient proximate cause doctrine, the court in *Burgess v. Allstate Insurance Co.*<sup>242</sup> applied the doctrine in a case involving a homeowner who sued her insurer after it denied her claims for water and mold damage. Where the insured was able to make a prima facie showing that she had a covered claim for “sudden and accidental” water damage under the policy and that she suffered mold-related losses, the court denied the insurer’s motion for summary judgment based on the policy’s mold exclusion, noting that “whether Plaintiff’s loss is caused by the mold infestation or the water damage is a question of fact to be submitted to a jury.”<sup>243</sup>

In *Buscher v. Economy Premier Assurance Co.*,<sup>244</sup> a federal court applying Minnesota law held that a policy provision excluding coverage for “physical damage caused by . . . mold”<sup>245</sup> did not operate to bar coverage for mold that resulted from covered water damage. The court found that the exclusion at issue only precluded coverage for damage occurring over time caused by mold, not for “the occurrence of mold due to a separate, covered water loss.”<sup>246</sup>

#### B. *Mold Exclusions Applied*

In *Ortiz v. Allstate Insurance Co.*,<sup>247</sup> an exclusion barring coverage for losses caused by “mold, wet or dry rot” was found to preclude coverage for mold resulting from water used to suppress a fire. Coverage was not “saved” by a second exclusion that barred coverage where there are two losses and the predominant cause is not a covered loss, even though the predominant cause of loss was fire, a covered cause of loss.<sup>248</sup>

In *Church of the Palms-Presbyterian, Inc. v. Cincinnati Insurance Co.*,<sup>249</sup> the court found that an all-risk policy’s exclusion barring coverage for, inter alia, “fungus, decay, deterioration,” etc., was unambiguous and precluded coverage for the insured’s mold damage, which resulted from faulty construction and design.<sup>250</sup> The court rejected the “strained, unnatural” interpretation advocated by the insured, who argued that the words surrounding *fungus*

240. *Id.* at \*11.

241. *Id.*

242. 334 F. Supp. 2d 1351 (N.D. Ga. 2003).

243. *Id.* at 1364.

244. No. Civ. 05-544, 2006 WL 268781 (D. Minn. Feb. 1, 2006).

245. *Id.* at \*1.

246. *Id.* at \*7.

247. No. 254777, 2006 WL 889378 (Mich. Ct. App. Apr. 6, 2006).

248. *Id.* at \*3.

249. 404 F. Supp. 2d 1339 (M.D. Fla. 2005).

250. *Id.* at 1342.

limited the exclusion's application to fungus caused by the natural decay of the building.<sup>251</sup>

C. *Personal Property Not Touching Water*

In *Fisher v. Certain Interested Underwriters at Lloyds*,<sup>252</sup> a Florida appellate court held that mold damage to the insureds' personal property caused by a burst pipe was covered because it constituted a "direct physical loss" caused by a "named peril" within the meaning of the policy.<sup>253</sup> The court reasoned that the "discharge of water set into motion a sequence of events proximately resulting in mold damage to the homeowner's personal property."<sup>254</sup> The policy at issue did not contain a specific exclusion for mold.

D. *Reliance on Insurer Investigations*

In *Benavides v. State Farm General Insurance Co.*,<sup>255</sup> a California appellate court held that because no coverage existed under the policy for the plaintiff's mold damage, the insurer could not be held liable in tort for negligent investigation of the plaintiff's claim. The court stated that in order to establish a tortious breach, "an insured must show first, that benefits were due under the policy, and second, that the benefits were withheld without proper cause."<sup>256</sup> However, "[i]f the insurer's investigation—adequate or not—results in a *correct* conclusion of no coverage, no tort liability arises for breach of the implied covenant [sic]."<sup>257</sup>

In *Palm v. Farmers Insurance Co. of Washington*,<sup>258</sup> insureds who sued their insurer after the expiration of a one-year suit limitation provision argued that the insurer was equitably estopped from invoking the provision because the insurer's mold remediation inspector represented that remediation in the insureds' attic had been successful.<sup>259</sup> The court rejected this argument, noting that the insureds were not reasonable in relying on the insurer's report in deciding not to timely demand coverage where the report made representations only with regard to the insureds' attic and not other affected areas for which coverage was sought.<sup>260</sup>

E. *Trigger of Coverage*

In *Nelson v. Hartford Underwriters Insurance Co.*,<sup>261</sup> a North Carolina appellate court affirmed that the "injury-in-fact" trigger theory was applicable in

251. *Id.* at 1343.

252. No. 4D04-4425, 2006 WL 1234962 (Fla. Dist. Ct. App. May 10, 2006).

253. *Id.* at \*2.

254. *Id.*

255. 39 Cal. Rptr. 3d 650 (Ct. App. 2006).

256. *Id.* at 655.

257. *Id.* at 656.

258. No. 32519-5-II, 2006 WL 226716 (Wash. Ct. App. Jan. 31, 2006).

259. *Id.* at \*2.

260. *Id.*

261. No. COA05-1052, 2006 WL 1526882 (N.C. Ct. App. June 6, 2006).

determining whether a policy was triggered in connection with mold damage sustained by the insured homeowners. Rejecting the “manifestation” theory advocated by the insureds, the court found that there was no coverage for the mold damage at issue as the “injuries” causing the mold (i.e., leaks in a water supply line, etc.) predated the policy’s effective date of coverage.<sup>262</sup>

In *Eckstein v. Cincinnati Insurance Co.*,<sup>263</sup> a federal court applying Kentucky law declined to adopt a specific trigger theory in a first-party property coverage case involving claims for mold damage, leaving the issue for determination by the Kentucky Supreme Court.

#### XV. SUIT LIMITATIONS

In *Palm v. Farmers Insurance Co. of Washington*,<sup>264</sup> the homeowners reported a leak to their carrier; the carrier’s inspection disclosed mold, which the insurer paid to remediate. The insurer’s inspection several months after the repairs indicated the mold remediation was effective. Subsequently, and more than a year after first reporting the leak, the homeowners sued the insurer for failing to pay for additional repairs their expert claimed were needed. The court held that summary judgment was correctly granted to the insurer based on the one-year suit limitations clause because the homeowners “were on notice of the . . . mold before the one-year deadline and nothing limited their ability to timely file a coverage claim.”<sup>265</sup>

In *Arwood v. St. Paul Fire & Marine Insurance Co.*,<sup>266</sup> the policyholder argued that she was entitled to the benefit of policy language in the suit limitations clause that read, “If a state law provides you more time, we’ll conform to that law.”<sup>267</sup> She argued this language entitled her to the ten-year statute of limitations for contract lawsuits allowed by Illinois state law. The trial court and the appellate court agreed that “state law” in the insurance policy referred to insurance statutes, not general contract law; otherwise, the one-year period would be a nullity in every state that allowed a longer period for general contract actions.<sup>268</sup>

In *Klawiter v. CGU/OneBeacon Insurance Group*,<sup>269</sup> the court clarified that a two-year suit limitations clause in a homeowners policy began to run from the date of loss, not, as the policyholders contended, “the accrual date of their cause of action” against the insurer.<sup>270</sup>

262. *Id.* at \*8.

263. No. Civ. A. 505CV043M, 2005 WL 3050469, at \*3 (W.D. Ky. Nov. 14, 2005).

264. 131 Wash. App. 1026 tbl., 2006 WL 226716 (Wash. Ct. App. 2006).

265. *Id.* at \*3.

266. 845 N.E.2d 68 (Ill. App. Ct. 2006).

267. *Id.* at 69.

268. *Id.* at 71.

269. 810 N.Y.S.2d 756 (App. Div. 2006).

270. *Id.* at 757.

In *North Coast Enterprises v. St. Paul Fire & Marine Insurance Co.*,<sup>271</sup> the insurer's investigation of the claim took nearly a year, the same length as the suit limitations clause in the policy. During the investigation, the parties frequently corresponded and exchanged information about the claim. After the claim was denied, the policyholder filed suit against the insurer, but the suit limitations period was five months' expired. The policyholder moved for summary judgment on the insurer's suit limitations clause defense, arguing the suit limitations period was either automatically tolled while the claim was under investigation or equitably tolled while it waited for the insurer's denial.<sup>272</sup> The court disagreed, reasoning that equitable tolling was not automatic in Washington and that the insurer's correspondence with the policyholder was not intended to mislead the policyholder into letting the suit limitations period expire.<sup>273</sup>

#### XVI. REPLACEMENT COST

After a school roof collapse, the insured in *Wallace School District No. 393 v. Coregis Insurance Organizations*<sup>274</sup> sought "additional" recovery, beyond actual cash value, under an endorsement covering the increased cost of repairing or rebuilding "according to the minimum requirements of any ordinance, law or code. . . ."<sup>275</sup> The insurer argued that because the insured had demolished the school, it was not entitled to an additional recovery because it could not comply with the requirement that repairs be made within three years of the loss. The court held that a fact issue existed as to whether the insurer anticipatorily repudiated the insurance contract, potentially excusing the insured's failure to comply with the requirements of the endorsement.<sup>276</sup>

In *Saleh v. Farmers Insurance Exchange*,<sup>277</sup> Utah's highest court determined that an insured was not entitled to coverage in excess of actual cash value until repairs to his damaged residence were fully completed because the policy unambiguously stated that the insurer would "pay no more than the actual cash value until repair or replacement is completed."<sup>278</sup> The court rejected as "implausible" the insured's argument that the policy language required the insurer to make periodic payments as the repair and replacement work was completed.<sup>279</sup>

271. No. C05-653L, 2006 WL 399276 (W.D. Wash. Feb. 16, 2006).

272. *Id.* at \*3.

273. *Id.* at \*4.

274. No. CV04-128-N-EJL, 2005 WL 2847223 (D. Idaho Oct. 28, 2005).

275. *Id.* at \*1.

276. *Id.* at \*4.

277. 133 P.3d 428 (Utah 2006).

278. *Id.* at 432.

279. *Id.*

In the ongoing World Trade Center coverage litigation, the court declined to reconsider its ruling that insureds under the WilProp form are not entitled to immediate payment of actual cash value (“ACV”) if they elect to rebuild.<sup>280</sup> The court rejected the insureds’ argument that such a reading of the form violates New York’s statutory fire policy and renders “illusory” the potential for replacement cost recovery under the form because “most insureds could not afford to satisfy the requirement to begin rebuilding the property before receiving any payment.”<sup>281</sup> The court reasoned, in part, that because ACV bears no relationship to the actual amount an insured would need to begin rebuilding, the immediate payment of ACV would not remedy the problem perceived by the insureds.

After recovering the ACV of his home and personal property, the insured in *Palmieri v. Allstate Insurance Co.*<sup>282</sup> sued his flood insurer for the difference between the ACV and the cost of repairing or replacing his storm-damaged property. The court affirmed that the policy’s plain language barred replacement cost recovery for personal property<sup>283</sup> but found that the insured was entitled to the replacement cost of his home. The court rejected the insurer’s contention that the insured was required to make a claim for the replacement cost value within 180 days of the loss, noting that the provision upon which the insurer relied was “so meaningless as to have no reasonable interpretation.”<sup>284</sup>

In *Celebrate Windsor, Inc. v. Harleysville Worcester Insurance Co.*,<sup>285</sup> a federal court applying Connecticut law held that in connection with the rebuilding of a “unique tent-like” performing arts center, an insurer could not be held responsible for increased costs attributable to compliance with building codes that existed before the loss or for additional amounts paid by the insured to redesign the damaged structure in order to remedy preloss design defects.<sup>286</sup>

#### XVII. VALUED POLICY

In a case arising out of the World Trade Center loss, *International Office Centers Corp. v. Providence Washington Insurance Co.*,<sup>287</sup> a Connecticut court held that a business that had leased property in one of the destroyed

280. SR Int’l Bus. Ins. Co. v. World Trade Ctr. Props., LLC, 407 F. Supp. 2d 587 (S.D.N.Y. 2006).

281. *Id.* at 588, 590.

282. 445 F.3d 179 (2d Cir. 2006).

283. *Id.* at 187–88.

284. *Id.* at 190.

285. No. 3:05CV282 (MRK), 2006 WL 1169816 (D. Conn. May 2, 2006).

286. *Id.* at \*18.

287. No. 04-990(JCH), 2005 WL 2258531 (D. Conn. Sept. 16, 2005).

buildings had valued policy coverage, meaning that, in the event of a total loss, the insurer's liability is set at a fixed sum stated in the contract rather than the "open" valuation the insurer claimed. Even though the policy in that case had an agreed value for personal property on the declarations page, the insurer argued that the inclusion of other provisions in the contract that could be used for determining value, such as the appraisal provision, overrode the agreed value and potentially reduced the insurer's liability, depending on a valuation process. The trial court disagreed and granted the policyholder's motion for declaratory judgment valuing its loss at the policy's agreed value amount.<sup>288</sup>

In *Citizens Property Insurance Corp. v. Ceballo*,<sup>289</sup> the court held that although a homeowners policy is subject to Florida's Valued Policy Law ("VPL"), the policyholders are not entitled to an additional twenty-five percent of their policy limit for ordinance and law-related rebuilding expenses without proof that they actually incurred such expenses.<sup>290</sup> The court certified its opinion to the Florida Supreme Court, realizing that its opinion may be in conflict with another appellate court's valued policy decision in *Mierzwa v. Florida Windstorm Underwriting Ass'n*.<sup>291</sup>

In Missouri, a federal court in *Schaffer v. Safeco Insurance Co. of America*<sup>292</sup> held that the phrase *total loss* in that state's VPL was not ambiguous.<sup>293</sup> The court held that the phrase was well understood as a matter of Missouri law even though "more than one factual situation" could fit the definition of the phrase.<sup>294</sup> In the absence of an ambiguity as a matter of law, the court refused to order the insurer to produce the claim handling materials the policyholder sought.

*Chawin v. State Fire & Casualty Co.*<sup>295</sup> involved consolidated VPL claims arising from Hurricanes Katrina and Rita. In these claims, the plaintiffs sought to recover the total value of their policies where a portion of their total loss was caused in part by covered wind or rain and in part by excluded flood. The court noted that if

the VPL has the meaning plaintiffs ascribe to it, an insured holding a valued homeowner's policy that covered wind damage but specifically excluded flood losses could recover the full value of his policy if he lost 20 shingles in a windstorm and was simultaneously flooded under 10 feet of water.<sup>296</sup>

288. *Id.* at \*6-7.

289. No. 3D05-2259, 2006 WL 1331504 (Fla. Dist. Ct. App. May 10, 2006).

290. *Id.* at \*1.

291. 877 So. 2d 774 (Fla. Dist. Ct. App. 2004).

292. No. 4:05-CV-2408 CEJ, 2006 WL 1313992 (E.D. Mo. May 11, 2006).

293. *Id.* at \*2 (construing Mo. Rev. Stat. § 379.140 (2002)).

294. *Id.*

295. No. 05-6454, 2006 WL 2228946 (Aug. 2, 2006).

296. *Id.* at \*5.

The court found that such a result would be well outside the boundaries of any party's reasonable expectations and seriously doubted that the Louisiana legislature intended such a commercially unreasonable result.<sup>297</sup> Therefore, the court held that Louisiana's VPL did not apply when a total loss was not caused by a covered peril.<sup>298</sup> Consequently, the plaintiffs' claims under the VPL that were predicated on this theory were dismissed.<sup>299</sup>

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<sup>297.</sup> *Id.*

<sup>298.</sup> *Id.* at \*8.

<sup>299.</sup> *Id.*