

RECENT DEVELOPMENTS IN PROPERTY  
INSURANCE COVERAGE LITIGATION

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## I. INTRODUCTION

Over the past few years, this survey of developments in property insurance litigation seemed to be dominated by cases arising from certain sets of common facts: initially hurricane-related claims arising out of Hurricane Katrina and other storms and, more recently, claims arising from Chinese drywall. This year we do not see a common factual theme: property insurance litigation has returned, it seems, to cases revolving around more individual fact patterns.

Practitioners will note, though, at least two themes in the cases we review. The question of what caused a given loss—and the policy language that in various ways attempts to address those losses resulting in some way from at least one covered risk and one or more noncovered risks—continues to create thorny questions for insurers, policyholders, and

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courts. Several of the decisions we review throughout the survey address this complicated issue. Another major theme is the rights and duties of the parties to a property insurance contract after a loss, including appraisal, the application of the suit limitations clause, and the requirements to prove a loss, all of which gave rise to interesting opinions during the survey period.

## II. BUSINESS INTERRUPTION/CIVIL AUTHORITY

In *Northrop Grumman Corp. v. Factory Mutual Insurance Co.*,<sup>1</sup> the U.S. District Court for the Central District of California held that covered business interruption or time element losses must be “the direct result of insured physical loss or damage.”<sup>2</sup> The policy at issue provided coverage for “TIME ELEMENT loss . . . directly resulting from physical loss or damage of the type insured by this Policy.”<sup>3</sup> The parties disputed whether the insured was required to demonstrate that its time element losses were tied directly to insured physical loss or damage. Northrop argued that its time element losses need only be the direct result of “[property] damage of the type insured” by Factory Mutual and “not necessarily damage to insured property.”<sup>4</sup> Factory Mutual asserted that there was coverage only for losses arising from insured physical damage.<sup>5</sup> The court agreed with the insurer, holding that the “directly resulting [language] requires that there be a causal link between the insured property damage and the claimed Time Element loss.”<sup>6</sup>

## III. COLLAPSE

In *Queen Anne Park Homeowners Association v. State Farm Fire and Casualty Co.*,<sup>7</sup> the U.S. District Court for the Western District of Washington determined the meaning of “collapse” as used in the extensions of coverage in the policy at issue. In 2009, the insured “discovered that the siding on the condominium buildings was leaking.”<sup>8</sup> Following the insurer’s denial of coverage, the insured filed a declaratory judgment and breach of contract action and moved for summary judgment on the meaning of “collapse.”<sup>9</sup> The motion was denied without prejudice, pending decision by

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1. No. CV 05-08444 DDP (PLAx), 2013 WL 3946103 (C.D. Cal. July 31, 2013).

2. *Id.* at \*7.

3. *Id.* at \*6.

4. *Id.* at \*7.

5. *Id.*

6. *Id.* at \*7 (citing *Syufy Enters. v. Home Ins. Co. of Ind.*, No. 94-0756 FMS, 1995 WL 129229, at \*2 (N.D. Cal. Mar. 21, 1995)).

7. No. C11-1579 TSZ, 2012 WL 5456685 (W.D. Wash. Nov. 8, 2012).

8. *Id.* at \*1.

9. *Id.*

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the Washington Supreme Court.<sup>10</sup> The district court noted that cases involving the meaning of the term “collapse” typically fall into one of two categories: the majority of courts have held that “in addition to actual collapse, imminent collapse is covered”<sup>11</sup> while a minority “have used a strict ‘rubble-on-the-ground’ standard.”<sup>12</sup> Although the Washington Supreme Court declined to answer which approach it would follow, the district court noted that it had “significant doubt about whether Washington will follow the ‘imminent collapse’ line of cases.”<sup>13</sup> The district court concluded that “even if Washington were to adopt a relaxed standard somewhere short of ‘rubble-on-the-ground,’ it would require an insured seeking collapse coverage to show, in addition to a substantial impairment of structural integrity, an imminent threat of collapse.”<sup>14</sup> Since the insured property raised no issue of an imminent threat of collapse, the district court denied the insured’s renewed motion for summary judgment.<sup>15</sup>

#### IV. COVERED PROPERTY

##### A. *Insurable Interest*

In *Azzato v. Allstate Insurance Co.*,<sup>16</sup> the insureds, husband and wife, brought suit to recover benefits under a landlord’s package insurance policy after a fire occurred at the insured property. The husband and another investor had purchased the property, and the husband and wife secured the policy covering the dwelling and contents.<sup>17</sup> The insurer moved for summary judgment dismissing the complaint as to the wife, in part, on the basis that she “did not have an insurable interest in the damaged property.”<sup>18</sup> The trial court denied the motion, concluding that “the insurable interest clause of the policy was ambiguous and . . . required consideration of extrinsic evidence.”<sup>19</sup>

On appeal, the New York Appellate Division concluded that the insurable interest provision, which provided in relevant part that “[i]n the event of a covered loss, the defendant [would] not pay for more than an insured person’s insurable interest in the property,” was not ambiguous.<sup>20</sup> The court further found that the plain language of the insurable interest pro-

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10. *Id.* (citing *Sprague v. Safeco Ins. Co. of Am.*, 276 P.3d 1270 (Wash. 2012)).

11. *Id.* at \*3.

12. *Id.*

13. *Id.* (citing *Sprague*, 276 P.3d at 1276).

14. *Id.* at \*4.

15. *Id.*

16. 99 A.D.3d 643 (N.Y. App. Div. 2012).

17. *Id.* at 643–45.

18. *Id.* at 647.

19. *Id.*

20. *Id.* at 647–48.

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vision limited the insured's recovery "to the extent of [the] person's insurable interest."<sup>21</sup> Although the term "insurable interest" is defined as "any lawful and substantial economic interest in the safety or preservation of property from loss, destruction, or pecuniary damage,"<sup>22</sup> the court concluded that "the interest must be of such a character that the destruction of the property will have a direct, and not a mere remote or consequential, effect . . .," and the wife did not have an "insurable interest" in the dwelling because she lacked a direct economic interest in it.<sup>23</sup>

### B. *Newly Acquired Property*

In *Amera-Seiki Corp. v. Cincinnati Insurance Co.*,<sup>24</sup> the insured submitted a claim for a newly purchased piece of equipment that was stored in a rented terminal.<sup>25</sup> The equipment was destroyed while it was being moved.<sup>26</sup> The newly acquired property coverage extension of the policy provided coverage for "business personal property . . . that you newly acquire, at any location you acquire other than at fairs, trade shows or exhibitions."<sup>27</sup> The insured had rented the terminal for six days to store the equipment before delivery to its final destination.<sup>28</sup> The primary issue was whether the terminal "constitute[d] a location [the insured] acquired within the meaning of the . . . coverage extension."<sup>29</sup> The U.S. District Court for the Northern District of Iowa had held that the extension of coverage to "any location you acquire" was ambiguous and that "Iowa law require[d it] to construe that ambiguity in [the insured's] favor."<sup>30</sup> The Eighth Circuit upheld the district court's grant of summary judgment to the insured.<sup>31</sup>

## V. EXCLUSIONS

### A. *Causation*

#### 1. Generally

In *American Home Assurance Co., Inc. v. Sebo*,<sup>32</sup> the insured purchased a home that began to leak during rainstorms. It became clear that the leaks were caused by major design and construction defects.<sup>33</sup> Almost

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21. *Id.* at 648.

22. *Id.* at 648–49 (quoting N.Y. INS. LAW § 3401 (McKinney 2007)).

23. *Id.* at 649 (quoting 3 STEVEN PLITT ET AL., COUCH ON INSURANCE § 41:11 (3d ed. 2013)).

24. 721 F.3d 582 (8th Cir. 2013).

25. *Id.* at 584.

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.* at 585.

30. *Id.* at 587.

31. *Id.*

32. No. 2D11-4063, 2013 WL 5225271 (Fla. Dist. Ct. App. Sept. 18, 2013).

33. *Id.* at \*1.

two years later, the insured sued the sellers, the architect, and the construction company that built the house.<sup>34</sup> The suit alleged that the home had been “negligently designed and constructed,” and the sellers failed to disclose the home’s defects.<sup>35</sup> The insured settled most of his claims and filed a declaratory judgment action against his homeowner’s insurer, seeking coverage for the water damage.<sup>36</sup> The Florida District Court of Appeal held that the “efficient-proximate-cause theory,” and not the “concurrent-causation doctrine,” applied to determine the cause of the loss.<sup>37</sup> The court explained that “a covered peril can usually be found somewhere in the chain of causation, and to apply the concurrent causation analysis would effectively nullify all exclusions in an all-risk policy.”<sup>38</sup>

## 2. Anti-Concurrent/Anti-Sequential Causation

In *Association of Apartment Owners of Imperial Plaza v. Fireman’s Fund Insurance Co.*,<sup>39</sup> an insured made a claim under its all-risks policy for arsenic damage to its property.<sup>40</sup> The arsenic damage was caused by moisture infiltrating the insulation layer below a concrete slab on the fourth floor of the building.<sup>41</sup> Under the concrete was an insulation layer of canec, a building material unique to Hawaii, which had been part of the original roof of the building and was “treated with inorganic arsenic compounds as an anti-termite agent.”<sup>42</sup> In 2003, testing was conducted on the fourth floor to determine the source of floor deflections.<sup>43</sup> The testing revealed that “moisture in the [i]nsulation [l]ayer was decomposing the canec.”<sup>44</sup> In 2010, the insured discovered that arsenic had migrated into the concrete slab on the fourth floor.<sup>45</sup> The migration of the arsenic was caused by moisture in the insulation layer that dissolved the canec.<sup>46</sup> The insurer denied the resulting claim based, in part, on the pollution exclusion, which contained anti-concurrent causation language.<sup>47</sup> In the subsequent coverage litigation, the court noted that although the pollution exclusion did contain anti-concurrent cause language, it also contained a contradictory exception to the exclusion, which provided “[b]ut, if the same is the direct

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34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.* at \*6.

38. *Id.* (citing *Garvey v. State Farm Fire & Cas. Co.*, 770 P.2d 704, 705 (Cal. 1989)).

39. 939 F. Supp. 2d 1059 (D. Haw. 2013).

40. *Id.* at 1061.

41. *Id.* at 1061–62.

42. *Id.*

43. *Id.*

44. *Id.* at 1062.

45. *Id.* at 1062, 1068.

46. *Id.* at 1062.

47. *Id.* at 1062, 1074.

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result of a covered cause of loss, we do insure direct physical loss or damage to covered property caused by the actual contact of the covered property with the pollutants.”<sup>48</sup> The court found that “the plain language of the exception to the [p]ollution [e]xclusion . . . allows coverage for pollution caused by a covered cause of loss [and] prevails over the anti-concurrent causation clause’s restriction of coverage.”<sup>49</sup>

### B. *Earth Movement*

In recent years, courts nationwide have been asked to decide if the earth movement exclusion applies to natural and manmade forces. There was a significant split of authority among the states, and even within certain states, as to the breadth of the standard earth movement exclusion. In the past survey period, however, we have seen increased litigation of non-standard earth movement exclusions. In *Bentoria Holdings, Inc. v. Travelers Indemnity Co.*,<sup>50</sup> the New York Court of Appeals reversed the trial court’s holding that the earth movement exclusion, even though it referenced “manmade” and “artificial” causes, did not apply to exclude damage as a result of excavation of an adjacent lot.<sup>51</sup> The court explained that “[b]y expressly excluding earth movement ‘due to manmade or other artificial causes,’ ”<sup>52</sup> the policy precluded argument “that ‘the intentional removal of earth by humans’ is not an excluded event.”<sup>53</sup> Accordingly, the court concluded that “the policy [could not] reasonably be read to cover” the plaintiff’s alleged damage, and the trial court was instructed to reverse its decision and enter summary judgment in favor of the insured.<sup>54</sup>

Notably, litigation surrounding the inclusion of artificial and manmade causes in the earth movement exclusion will likely become more prevalent in the future. Effective in 2013, the Insurance Services Office is adding the following wording to the earth movement exclusion causes of loss forms (CP 10 10, CP 10 20, and CP 10 30): “This exclusion applies regardless of whether any of the above, in paragraphs (1) through (5) [various types of earth movement], is caused by an act of nature or is otherwise caused.”

### C. *Vacancy*

In *West Bend Mutual Insurance Co. v. New Packing Co.*,<sup>55</sup> an insured purchased a warehouse that “had been vacant for more than [sixty] consecu-

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48. *Id.* at 1075.

49. *Id.*

50. 980 N.E.2d 504 (N.Y. 2012).

51. *Id.* at 505.

52. *Id.*

53. *Id.* (citing *Pioneer Tower Owners Ass’n v. State Farm Fire & Cas. Co.*, 908 N.E.2d 875, 877 (N.Y. 2012)).

54. *Id.*

55. No. 1-11-1507, 2012 WL 6962117 (Ill. App. Ct. Nov. 30, 2012).

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tive days prior to closing.” The warehouse was vandalized twice within seventeen days after the insurer issued an endorsement “adding the warehouse as an insured property.”<sup>56</sup> The insurer denied the claim based on a policy exclusion that precluded coverage if the insured property was “vacant for more than [sixty] consecutive days before [the] loss or damage occur[red].”<sup>57</sup> After the insurer brought suit, the court found that the vacancy exclusion did not apply “under the circumstances in this case.”<sup>58</sup> The appellate court affirmed, finding that while the vacancy exclusion technically applied to preclude coverage, the insurer “had an opportunity to inspect the premises to determine if it was vacant” and chose not to do so.<sup>59</sup> Finding that the insurer was estopped from relying on the vacancy exclusion, the appellate court stated that “[a]n insurance policy may not be issued on a vacant building and then be excluded from coverage because it is a vacant building.”<sup>60</sup>

#### D. *Dishonest Acts*

In *Telamon Corp. v. Charter Oak Fire Insurance Co.*,<sup>61</sup> a temporary employee leased by the insured from a “labor leasing firm” stole over \$5 million of the insured’s inventory and personal property.<sup>62</sup> Charter Oak denied coverage, relying on the property policy’s “dishonest acts” exclusion, which precluded coverage for dishonest acts of the insured, including its “leased employees.”<sup>63</sup> After Charter Oak moved for judgment on the pleadings, the court found that the policy included a “Crime Additional Coverages” endorsement providing coverage for, among others things, theft committed by “any natural person who is leased to you under a written agreement.”<sup>64</sup> The U.S. District Court for the Southern District of Indiana denied Charter Oak’s motion for judgment, stating that the “significance of this endorsement is that it appears to override the ‘dishonest acts’ exclusion and provides coverage for employee theft.”<sup>65</sup>

#### E. *Faulty Workmanship*

In *BSI Constructors, Inc. v. Hartford Fire Insurance Co.*,<sup>66</sup> the Eighth Circuit confirmed a Missouri district court’s grant of summary judgment to the

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56. *Id.* at \*1.

57. *Id.*

58. *Id.* at \*4.

59. *Id.*

60. *Id.* (citing *Poland v. Phillips*, 371 So. 2d 1053, 1056 (Fla. Dist. Ct. App. 1979)).

61. No. 1:13-cv-00382-RLY-DML, 2013 WL 4458886 (S.D. Ind. Aug. 20, 2013).

62. *Id.* at \*1.

63. *Id.*

64. *Id.* at \*2.

65. *Id.*

66. 705 F.3d 330 (8th Cir. 2013).

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insurer based on the faulty workmanship exclusion in a builder's risk policy.<sup>67</sup> In that case, BSI Constructors agreed to construct a commercial building and engaged subcontractors for work on various portions of the project.<sup>68</sup> The roofing subcontractor finished the roof while other subcontractors continued work in various trades.<sup>69</sup> Two other subcontractors were instructed to take precautions to protect the roof but failed to do so; the roof was damaged, allowing water to penetrate the roof and enter the roofing system.<sup>70</sup> The insurer denied BSI's claim under the builder's risk policy based on the faulty workmanship exclusion, which included an ensuing loss provision.<sup>71</sup> The district court concluded that the faulty workmanship exclusion applied to exclude coverage and that the ensuing loss provision did not apply.<sup>72</sup>

On appeal, BSI presented the issue of whether the exclusion "excludes coverage only for defects in the quality of the project as constructed or whether it also excludes coverage for accidental damage to the project during construction."<sup>73</sup> The Eighth Circuit predicted that the Missouri Supreme Court "would read the faulty workmanship exclusion to encompass both a flawed product and a flawed process and thus exclude coverage under the circumstances of this case."<sup>74</sup> The court reasoned that "because the damaged roof resulted in a flawed product (the building project), the damage fell within the faulty product definition."<sup>75</sup> The court found that "because the subcontractors negligently stored and carried equipment on the unprotected roofs, they engaged in a faulty process to complete the building project."<sup>76</sup> Further, the court found that the ensuing loss provision did not apply because that exception applies "for 'loss' to other covered property"—which must be property "'other' than the roof that suffered damage due to the defective workmanship but is not otherwise excluded."<sup>77</sup>

In *Travco Insurance Co. v. Ward*, the Supreme Court of Virginia answered certified questions from the Fourth Circuit involving coverage questions arising from installation of Chinese-made drywall.<sup>78</sup> One of the certified questions was whether damages were excluded from coverage

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67. *Id.*

68. *Id.* at 331.

69. *Id.*

70. *Id.*

71. *Id.* at 331–32.

72. *Id.* at 332.

73. *Id.* (citation omitted).

74. *Id.*

75. *Id.* at 333.

76. *Id.*

77. *Id.* at 334.

78. 736 S.E.2d 321, 324 (Va. 2012).

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by the “faulty, inadequate, or defective materials” exclusion in the policy.<sup>79</sup> The policy at issue did not cover loss caused by “[f]aulty, inadequate or defective . . . [m]aterials used in repair, construction, renovation or remodeling.”<sup>80</sup> The insured argued that the exclusion did not apply “because the drywall maintains its form and performs its function,” while the insurer argued that “drywall that releases sulfuric gas is ‘faulty, inadequate or defective.’”<sup>81</sup> The court found that the drywall “could not reasonably be said to perform its function” because the sulfuric gases “rendered the house uninhabitable.”<sup>82</sup> As a result, the drywall was defective and the “faulty, inadequate, or defective materials” exclusion applied.<sup>83</sup>

## F. *Mold and Water Damage*

### 1. No Direct Physical Loss

In *Beck v. Utica Mutual Insurance Co.*,<sup>84</sup> the owner of a skateboard shop filed suit against his property insurer for the loss of his merchandise value, claiming the loss resulted from the collapse of a portion of the roof of the warehouse where his business was located.<sup>85</sup> However, the portion of the warehouse containing his business was not damaged or otherwise affected by the roof’s collapse.<sup>86</sup> The insured did not relocate his shop or merchandise after the collapse.<sup>87</sup> In fact, it was about eight months later, when moving the merchandise from his business to his home, that the insured first noticed that some of his skateboards were warped and some of his other inventory had a “musty smell.”<sup>88</sup> The trial court held that the claimed loss was not covered under the policy as “direct physical loss” because there was no evidence that the belated claim was a direct result of the roof collapse.<sup>89</sup>

### 2. Anti-Concurrent Causation

In *Orleans Parish School Board v. Lexington Insurance Co.*,<sup>90</sup> the Louisiana Court of Appeal considered the application of mold exclusions with anti-concurrent causation (ACC) clauses in a series of excess insurance policies to claims arising from Hurricane Katrina.<sup>91</sup> The court reversed the trial court’s summary judgment ruling that held that the ACC clauses excluded all cover-

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79. *Id.*

80. *Id.* at 326.

81. *Id.* at 326–27.

82. *Id.* at 327.

83. *Id.*

84. No. CV116022761, 2013 WL 3388880 (Conn. Super. Ct. June 18, 2013).

85. *Id.* at \*1.

86. *Id.* at \*1, 3.

87. *Id.* at \*3.

88. *Id.*

89. *Id.*

90. No. 2012-CA-0095, 2013 WL 4564677 (La. Ct. App. Aug. 28, 2013).

91. *Id.* at \*1–3.

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age for mold damage “regardless of . . . source or contributing factor[s].”<sup>92</sup> Instead, the court found that the plain language of the ACC clauses indicated that they were not meant “to exclude coverage from mold damage that would otherwise be covered under the policy as attributed to a covered loss.”<sup>93</sup> The court explained that the ACC clauses were actually meant to “exclude coverage for damages incurred as a direct result of the appearance of mold, regardless of whether those particular elements of damage would have occurred as a result of some other covered loss.”<sup>94</sup> The court remanded the case for a factual determination of whether the claimed damages were due to “an initially covered loss” or due to the presence of mold.<sup>95</sup>

### 3. Insured’s Knowledge of Prior Water Damage

In *Strauss v. Chubb Indemnity Insurance Co.*,<sup>96</sup> a homeowner’s insurer brought a motion for summary judgment in relation to a water damage and mold claim, arguing in part that the claim was barred by the “known loss” or “loss in progress” doctrines.<sup>97</sup> The U.S. District Court for the Eastern District of Wisconsin noted that the Wisconsin Supreme Court had previously held that “the known loss doctrine precludes coverage under an insurance contract only if the extent of the damage was substantially known before the parties entered into the insurance contract.”<sup>98</sup> The trial court denied summary judgment, finding that, based upon the factual record, a reasonable jury could conclude that the extent of damage was not “substantially known” before the insurance policy was negotiated.<sup>99</sup>

### G. *Ensuing Loss*

In *Rapid Park Industries v. Great Northern Insurance Co.*,<sup>100</sup> Great Northern denied business interruption coverage when Rapid Park’s garage was ordered closed because of “imminent danger to the life and safety of the occupants.”<sup>101</sup> The garage floors were dilapidated and in danger of collapse.<sup>102</sup> The district court granted summary judgment for Great Northern, finding coverage excluded under multiple provisions, including the “wear and tear or deterioration” exclusion.<sup>103</sup> The appellate court affirmed, rejecting

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92. *Id.* at \*1.

93. *Id.* at \*19.

94. *Id.*

95. *Id.* at \*29.

96. Nos. 11-CV-981-JPS, 12-CV-062-JPS, 2013 WL 27344 (E.D. Wis. Jan. 2, 2013).

97. *Id.* at \*6.

98. *Id.* at \*7 (citing *Am. Family Mut. Ins. Co. v. Am. Girl, Inc.*, 673 N.W.2d 65 (Wis. 2004)).

99. *Id.*

100. 502 F. App’x 40 (2d Cir. 2012).

101. *Id.* at 41.

102. *Id.*

103. *Id.*

Rapid Park's reliance on the exclusion's "ensuing loss or damage" exception to argue that "it was 'originally water seeping into the garage' that resulted in the deterioration of the garage."<sup>104</sup> The court found that "this damage was not 'ensuing,' in the sense that it was a separate, subsequent event that occurred due to the deterioration,"<sup>105</sup> but was instead "directly related to the original excluded risk."<sup>106</sup>

*New London County Mutual Insurance Co. v. Zachem*<sup>107</sup> involved a scenario in which a thief, while stealing copper pipes from a house, broke a copper gas line, causing a basement to fill with propane gas, which "ultimately exploded and caused a fire that destroyed the house."<sup>108</sup> New London denied coverage due to a vandalism exclusion, which precluded coverage where a building had been vacant for "more than 30 consecutive days immediately before the loss."<sup>109</sup> The insured argued that the explosion and fire were caused by a spark and thus constituted an "ensuing loss" separate from the vandalism so that coverage should be provided.<sup>110</sup> In rejecting the insured's argument, the court noted that Connecticut courts utilize a proximate cause analysis when evaluating ensuing loss.<sup>111</sup> The court held that "the efficient cause of the explosion is the removal of the copper propane lines, which constitutes 'the cause to which the loss is to be attributed,' although the 'other cause,' here, the spark from the water heater, 'may follow it and operate more immediately in producing the disaster.'"<sup>112</sup>

## VI. DAMAGES

### A. Overhead and Profit

In *Trinidad v. Florida Peninsula Insurance Co.*,<sup>113</sup> the Florida Supreme Court held that if a policyholder is "reasonably likely to need a general contractor for . . . repairs," the insurance company's "required payment under a replacement cost policy includes overhead and profit."<sup>114</sup> Florida Peninsula admitted coverage for a fire loss to Trinidad's home and made payment "even though Trinidad did not make repairs . . . or hire a . . . contractor to undertake the repairs."<sup>115</sup> Even though the payment included other

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104. *Id.* at 41–42.

105. *Id.* at 42.

106. *Id.* (quoting *Narob Dev. Corp. v. Ins. Co. of N. Am.*, 219 A.D.2d 454 (N.Y. App. Div. 1995)).

107. 74 A.3d 525 (Conn. App. Ct. 2013).

108. *Id.* at 527.

109. *Id.* at 528.

110. *Id.*

111. *Id.* at 532–33.

112. *Id.* at 533–34 (quoting *Sansone v. Nationwide Mut. Fire Ins. Co.*, 770 A.2d 500, 503 (Conn. Super. Ct. 1999)).

113. 121 So. 3d 433 (Fla. 2013).

114. *Id.* at 435–36.

115. *Id.* at 436.

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costs “necessary to make the repairs,” it did not “include an amount for a general contractor’s overhead and profit.”<sup>116</sup> Florida Peninsula claimed that it could “withhold payment of overhead and profit until Trinidad actually incurred those particular expenses in repairing or contracting to repair the home.”<sup>117</sup> The court reasoned that “overhead and profit [were] no different than any other costs of a repair,” such as labor and materials, and that “[r]equiring the insurer to pay overhead and profit [under a replacement cost policy] regardless of whether the insured actually repair[ed] the property [was] consistent with [Florida statutory law].”<sup>118</sup> The court found that Florida Peninsula’s “interpretation of replacement cost insurance—that is, excluding all costs until they are actually incurred—would in actuality render the coverage meaningless.”<sup>119</sup>

### B. Other Insurance

In *Bardsley v. Government Employees Insurance Co.*,<sup>120</sup> a homeowner filed suit after her residence was severely damaged and her husband was killed when a vehicle crashed into the home.<sup>121</sup> The homeowner brought claims for property damage under their homeowner’s policy and their automobile insurance policy’s underinsured motorist (UIM) property damage coverage.<sup>122</sup> She also brought a claim on behalf of her deceased husband against the driver, and the liability insurers of the driver paid their policy limits.<sup>123</sup> The homeowner’s insurer also paid the property damage claim, which was below its policy limits, but then sought to recover that amount from the amount paid by the driver’s insurance in a subrogation action.<sup>124</sup> The homeowner returned the property damage payment from the proceeds paid by the driver’s liability insurance.<sup>125</sup> The homeowner then filed suit to recover the property damage amount under their UIM property damage coverage under the theory that the UIM carrier was obligated to pay the property damage claim because the claim was “not paid out of the available insurance because [the homeowner’s insurer] was reimbursed from the settlement.”<sup>126</sup>

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116. *Id.*

117. *Id.*

118. *Id.* at 440–41 (addressing FLA. STAT. ANN. tit. 37, § 627.7011(3), (6) (West Supp. 2008) (amended 2011)).

119. *Id.* at 441. *See also* Haynes v. Universal Prop. & Cas. Ins. Co., 120 So. 3d 651, 654 (Fla. Dist. Ct. App. 2013) (holding that the “insurer is not entitled to withhold replacement cost payments until the insured actually incurs the expenses or enters into a contract . . .”).

120. 747 S.E.2d 436 (S.C. 2013).

121. *Id.* at 438.

122. *Id.*

123. *Id.*

124. *Id.* at 439.

125. *Id.* at 438, 443.

126. *Id.* at 439.

The Supreme Court of South Carolina relied on the “other insurance” clauses of the policies to reverse the trial court’s grant of summary judgment to the insured.<sup>127</sup> While the UIM policy’s clause stated “this insurance shall be excess over other valid and collectible insurance,” the homeowner’s policy stated: “if a loss covered by this policy is also covered by other insurance, we will pay only our share of the loss.”<sup>128</sup> Based on this language, the court found that the UIM policy was an “excess” clause, and the homeowner’s policy was a “pro rata” clause that provided the primary coverage.<sup>129</sup>

### C. Valuation—Actual Cash Value and Replacement Cost

Several interesting decisions involving valuation issues were decided during the survey period. In *Buddy Bean Lumber Co. v. Axis Surplus Insurance Co.*,<sup>130</sup> the Eighth Circuit addressed whether under Arkansas law a coinsurance provision should be applied to the actual cash value or replacement cost of the covered property.<sup>131</sup> The insured had purchased optional replacement cost coverage, and Axis argued that the insured’s decision to purchase such coverage “changed the definition of ‘value’ in the coinsurance provision from ‘actual cash value’ to ‘[r]eplacement [c]ost.’”<sup>132</sup> The insured asserted that the term “value of Covered Property” in the coinsurance provision “depends on [what] type of claim it files.”<sup>133</sup> The court agreed, concluding that “the proper interpretation of the coinsurance provision varied depending upon whether the insured has filed an actual cash value claim or a replacement cost claim.”<sup>134</sup> Because the insured submitted an actual cash value claim, the court held that the claim was not subject to a coinsurance penalty.<sup>135</sup>

In *Lexington Insurance Co. v. JAW the Pointe, LLC*,<sup>136</sup> the court held that the insured must prove that amounts claimed under “Ordinance or Law Coverage” and “Demolition and Increased Cost of Construction” endorsements were caused by or result from a “Covered Cause of Loss.”<sup>137</sup> The claim arose out of hurricane damage to an apartment complex.<sup>138</sup> The policies issued to the insured did not include flood coverage, so the insurer paid the portion of the loss claimed to be the result of wind

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127. *Id.* at 443.

128. *Id.*

129. *Id.*

130. 715 F.3d 695 (8th Cir. 2013).

131. *Id.* at 697, 700.

132. *Id.* at 697.

133. *Id.* at 698.

134. *Id.* at 698, 699–700 (citation omitted).

135. *Id.* at 700.

136. No. 14-11-00881-CV, 2013 WL 3968445 (Tex. App. Aug. 1, 2013).

137. *Id.* at \*9.

138. *Id.* at \*1–2.

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damage, less the applicable deductible.<sup>139</sup> After Hurricane Ike, the city determined that the damage to the apartment complex exceeded 50 percent of its market value and required that it be demolished and rebuilt to comply with current code requirements.<sup>140</sup> The “Ordinance or Law Coverage” endorsement provided coverage for increased repair costs caused by enforcement of an ordinance “[i]f a Covered Cause of Loss occurs to covered Building property.”<sup>141</sup> Because the insured was not able to demonstrate that the city based its “substantial damage” determination on wind damage alone, which is a “Covered Cause of Loss”—rather than flood or a combination of wind and flood—it was not entitled to additional coverage.<sup>142</sup>

## VII. OBLIGATIONS AND RIGHTS OF THE PARTIES

### A. *Misrepresentation*

Several cases during the survey period dealt with the intersection between policy clauses allowing the insurer to void the policy for misrepresentation in an application and statutory provisions allowing the same result. In *Universal Property and Casualty Insurance Co. v. Johnson*,<sup>143</sup> the Florida District Court of Appeal held that the insurer was free to impose a stricter avoidance provision than that established by state statute, which allowed the policy to be voided only upon an intentional misrepresentation, rather than a nonintentional misrepresentation.<sup>144</sup> However, under the policy language at issue, the court determined that the insurer had not contracted for a stricter rescission provision.<sup>145</sup>

Conversely, in *Nationwide Mutual Fire Insurance Co. v. Guster Law Firm, LLC*,<sup>146</sup> a federal court construing Alabama law refused to apply a state statute allowing rescission for “even innocent material misrepresentations” where the policy required the misrepresentation to be intentional in order for the insurer to avoid the policy.<sup>147</sup> The court explained that “Alabama courts have read [the state statute] into the policy ‘when the contract attempted to impose more stringent conditions on the insured than in the statute, but have refused to read the statute into the contract when the contract sets less stringent standards on the insured.’”<sup>148</sup>

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139. *Id.* at \*3, 6.

140. *Id.* at \*2–3.

141. *Id.* at \*8.

142. *Id.* at \*10–11.

143. 114 So. 3d 1031 (Fla. Dist. Ct. App. 2013).

144. *Id.* at 1037 (citation omitted). See FLA. STAT. ANN. tit. 37, § 627.409(1) (2007).

145. *Johnson*, 114 So. 3d at 1037.

146. Civil Action No. 2:11-cv-1183-AKK, 2013 WL 1346593 (N.D. Ala. Mar. 28, 2013).

147. *Id.* at \*7. See ALA. CODE §§ 27-14-7, 6-5-101 (1975).

148. *Nationwide Mut. Fire Ins. Co.*, 2013 WL 1346593, at \*7 (quoting *State Farm Fire & Cas. Co. v. Oliver*, 658 F. Supp. 1546 (N.D. Ala. 1987), *aff'd*, 854 F.2d 416 (11th Cir. 1988)).

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In *Dodd v. American Family Mutual Insurance Co.*,<sup>149</sup> the Supreme Court of Indiana held that under Indiana law, an insurer may waive its right to rely on a defense of misrepresentation to void a policy if it fails to return the premiums paid to the policyholder “within a reasonable time after the discovery of the alleged breach.”<sup>150</sup> The court ruled that waiver of the defense did not apply in the *Dodd* case, however, because the policyholders failed to raise the waiver issue in the lower court.<sup>151</sup>

## B. Duties

### 1. Examinations Under Oath

In *Staples v. Allstate Insurance Co.*,<sup>152</sup> the Supreme Court of Washington announced new limitations to an insurer’s right to an examination under oath (EUO). In *Staples*, when the insured submitted a theft claim, “Allstate took two recorded statements from the insured.”<sup>153</sup> The insurer sent several letters requesting various documents as part of its investigation and informed the insured that it was exercising its right to an EUO.<sup>154</sup> The EUO, although scheduled, was conditioned on the insured producing the requested documents.<sup>155</sup> When the insured failed to produce all of the requested documents, Allstate canceled the EUO but offered to reschedule it when the documents were received;<sup>156</sup> hearing nothing, it then denied the claim.<sup>157</sup> The insured indicated he would submit to an EUO if Allstate would extend the contractual suit limitations period, which was just about to expire.<sup>158</sup> Allstate declined the offer.<sup>159</sup>

The court addressed three issues:

(1) Must an insurer’s request for an EUO be reasonable or material to the insurer’s claim investigation . . . ; (2) Did the insured in this case . . . substantially comply with Allstate’s request for an EUO . . . ; and (3) Must an insurer show prejudice before denying a claim for failure to submit to an EUO?<sup>160</sup>

On the first issue, while Allstate argued it had “an absolute right to an EUO,” the insured argued there must be “some outside limit to an insurer’s ability to demand an EUO.”<sup>161</sup> The court agreed, holding that al-

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149. 983 N.E.2d 568 (Ind. 2013).

150. *Id.* at 570.

151. *Id.*

152. 295 P.3d 201 (Wash. 2013).

153. *Id.* at 203.

154. *Id.* at 204.

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.* at 205.

161. *Id.*

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though an EUO may have been justified, “we cannot be sure because Allstate never explained what information it was seeking from the EUO that [the insured] had not already provided.”<sup>162</sup> Accordingly, the court declined to address this issue.<sup>163</sup>

The court next addressed whether the insured “substantially complied” with Allstate’s request for an EUO.<sup>164</sup> Because the record demonstrated a genuine issue of material fact, it remanded this issue to the trial court.<sup>165</sup>

The insured’s final argument was that Allstate was required to prove it was prejudiced before denying the insured’s claim.<sup>166</sup> Allstate argued that an EUO requirement was a “valid condition precedent” to bringing suit and, as such, no prejudice need be proven.<sup>167</sup> The court noted it has required a showing of prejudice “in nearly all other contexts to prevent insurers from receiving windfalls at the expense of the public.”<sup>168</sup> The court noted that the policy specifically required a showing of prejudice if the insured failed to submit to an EUO.<sup>169</sup> Accordingly, the court rejected Allstate’s argument that an insured must submit to an EUO before filing suit and found that genuine issues of fact existed regarding whether Allstate was prejudiced.<sup>170</sup>

## 2. Proof of Loss

*Ornoff v. Westfield National Insurance Co.*<sup>171</sup> involved fire damage to the insureds’ property.<sup>172</sup> Within several months, the insureds submitted an itemized accounting of their loss.<sup>173</sup> About two months later, they submitted a notarized “Sworn Statement in Proof of Loss.”<sup>174</sup> The next month, the insurer denied the claim based on exclusions for intentional acts and misrepresentation.<sup>175</sup> The denial letter referenced the policy, which tolled the contractual suit limitation (two years from the date of loss) by the “number of days between the date proof of loss is submitted and the date the claim is denied in whole or in part.”<sup>176</sup> While the insurer used the “proof of loss” submission to calculate March 26, 2012, as “the

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162. *Id.* at 207.

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.* at 208.

167. *Id.*

168. *Id.* at 209.

169. *Id.*

170. *Id.* at 210.

171. No. 1-12-2728, 2013 WL 3972162 (Ill. App. Ct. Aug. 1, 2013).

172. *Id.* at \*1.

173. *Id.*

174. *Id.* at \*2.

175. *Id.*

176. *Id.*

last day in which [the insured] could file suit against [the insurer,]” the suit was not filed until March 27.<sup>177</sup>

The insureds argued that the tolling period began when they submitted the itemized accounting of their loss, which was, in many respects, more detailed than the “Sworn Statement in Proof of Loss.”<sup>178</sup> The court rejected the insureds’ argument, also noting that “[t]he requirement that the insured swear under oath for a proof of loss is a significant one.”<sup>179</sup> The court noted that at least “[o]ne purpose of the proof of loss is to . . . ‘bind the insured and protect against the imposition of fraud.’”<sup>180</sup> Because the policy dictated that the contractual suit limitations period was tolled only by the submission of a “proof of loss,” the earlier, albeit more detailed accounting of the loss was insufficient to trigger the commencement of the tolling period.<sup>181</sup> The policy expressly established the form of the document to start the tolling period.<sup>182</sup> The court upheld the insurer’s motion to dismiss the complaint as time-barred.<sup>183</sup>

### C. *Appraisal*

#### 1. Scope of Appraisal

In *TMM Investments, Ltd. v. Ohio Casualty Insurance Co.*,<sup>184</sup> the Fifth Circuit reinstated an appraisal award a Texas district court had set aside.<sup>185</sup> The insured owned a shopping center that suffered severe roof damage during a hailstorm.<sup>186</sup> Because there was a difference of over \$600,000 between the insured’s estimate and the insurer’s, the insured invoked the appraisal clause of the insurance policy.<sup>187</sup> The appraisal panel concluded that the replacement cost was \$73,015 and the actual cash value of the loss would be \$49,633.<sup>188</sup> The district court, however, set aside the award, determining that the appraisal panel “exceeded the scope of its authority” when (1) the umpire acted prior to a disagreement between the appraisers and (2) the appraisers “improperly considered causation and coverage issues when evaluating the damage to certain parts of the property[.]”<sup>189</sup>

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177. *Id.*

178. *Id.* at \*10–11.

179. *Id.* at \*12.

180. *Id.* (quoting *Barnes v. State Farm Fire & Cas. Co.*, 623 F. Supp. 538, 540 (E.D. Mich. 1985)).

181. *Id.* at \*8.

182. *Id.*

183. *Id.* at \*13.

184. 730 F.3d 466 (5th Cir. 2013).

185. *Id.* at 476.

186. *Id.* at 468–69.

187. *Id.* at 469.

188. *Id.*

189. *Id.* at 470.

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The Fifth Circuit disagreed, holding first that although the umpire exceeded his authority when he excluded the damage to the insured's HVAC unit from the award, the umpire's minor mistake should not "taint the entire award," nor did it justify "ignoring the intent of the parties to have damages issues submitted to and decided by an appraisal panel."<sup>190</sup> Second, the court concluded that the more recent Texas Supreme Court case *State Farm Lloyds v. Johnson*<sup>191</sup> controlled the issue of causation, as opposed to the Texas appellate case *Wells v. American States Preferred Insurance Co.*,<sup>192</sup> which was relied on by the district court.<sup>193</sup> Quoting *Johnson*, the Fifth Circuit stated:

[W]hen different causes are alleged for a single injury to property, causation is a liability question for the courts. . . . By contrast, when different types of damage occur to different items of property, appraisers may have to decide the damage caused by each before the courts can decide liability.<sup>194</sup>

Because this case was similar to *Johnson*, the court concluded that it was appropriate for the appraisal panel to decide causation.<sup>195</sup>

## 2. Enforcing and Modifying Appraisal Awards

The insureds in *Citizens Property Insurance Corp. v. Casar*<sup>196</sup> "filed a claim for water damage alleged to have been caused by a refrigerator line leak."<sup>197</sup> The insurer, however, concluded that some damage was caused by water damage while other items were not caused by the leak.<sup>198</sup> The insureds "sent a written demand for appraisal of the entire claim."<sup>199</sup> The insurer forwarded an "appraisal agreement" per the terms of the policy.<sup>200</sup> Because the agreement only included those items that both parties agreed were damaged by the water, the insureds refused to sign the agreement and filed a motion to com-

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190. *Id.* at 472–73 (citation omitted).

191. 290 S.W.3d 886 (Tex. 2009).

192. 919 S.W.2d 679 (Tex. App. 1996). See *TMM Invs., Ltd.*, 730 F.3d at 473 (noting that *Wells* "held that the appraisal panel's responsibility is simply to determine the value of property damage and that questions of what caused or did not cause the loss are questions to be decided by the court").

193. *TMM Invs., Ltd.*, 730 F.3d at 473–74.

194. *Id.* at 475 (quoting *Johnson*, 290 S.W.3d at 892).

195. *Id.*; see also *In re Pub. Serv. Mut. Ins. Co.*, 2013 WL 692441, at \*5 (Tex. App. Feb. 21, 2013) (concluding that "the appraisal provision in this policy may not be disregarded simply because coverage or causation issues about which storm caused the roof damage may overlap with issues about of [sic] the amount of the loss and repair costs," reasoning that "[a]ny appraisal necessarily includes some causation element because setting the 'amount of loss' requires appraisers to decide between damages for which coverage is claimed from damages caused by everything else") (quoting *Johnson*, 290 S.W.3d at 893).

196. 104 So. 3d 384 (Fla. Dist. Ct. App. 2013).

197. *Id.* at 385.

198. *Id.*

199. *Id.*

200. *Id.*

pel appraisal.<sup>201</sup> The Florida appellate court reversed the lower court's order compelling appraisal because the insured refused to sign the appraisal agreement, which was clearly required by the policy for an appraisal to take place.<sup>202</sup> "Appraisals are creatures of contract," the court noted, and "[w]hat is appraised and whether a party can be compelled to appraisal depend on the contract provisions."<sup>203</sup>

An insurer sought to overturn the trial court's grant of summary judgment to an insured condominium association confirming an appraisal award in *Citizens Property Insurance Corp. v. River Manor Condominium Association, Inc.*<sup>204</sup> The insurer argued that the lower court's judgment should exclude amounts awarded for damage to property that was excluded under the policy.<sup>205</sup> Despite these exclusions, the insured condominium association contended the policy was in conflict with a Florida statute that required a condominium association to provide insurance for "[a]ll portions of the condominium property located outside the units," and, therefore, the policy had to be "amended" to comply with the statute.<sup>206</sup> The appellate court, however, found that the statute in question "regulates condominiums—not insurance companies" and held that the statute was "not intended to impose a mandatory insurance obligation upon carriers."<sup>207</sup> Thus, the court reversed the judgment below to the extent it awarded damages for the excluded property.<sup>208</sup>

### 3. Miscellaneous Issues

*a. Appraisal Clause Not Illusory*—A contract challenge to the enforceability of an appraisal provision was one of the issues in *In re Public Service Mutual Insurance Co.*<sup>209</sup> The insured contended that "the appraisal provision [was] unenforceable under general contract law principles" because the provision (1) was illusory, (2) lacked mutuality, (3) "requir[ed the insured] to relinquish a jury trial on valuation," and (4) was "unconscionable because the contract states that [the insurer] retains the right to deny the claim even after appraisal."<sup>210</sup> The court rejected each of these challenges, explaining that "[t]he theory behind unconscionability in contract law is that courts should not enforce a transaction so one-sided, with so gross a disparity in the values exchanged, that no rational contracting party

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201. *Id.*

202. *Id.* at 385–86.

203. *Id.*

204. No. 4D12-901, 2013 WL 1441294 (Fla. Dist. Ct. App. Apr. 10, 2013).

205. *Id.* at \*1.

206. *Id.* at \*1–2. See FLA. STAT. ANN. tit. 40, § 718.111(1)(b) (2005).

207. *Citizens Prop. Ins. Corp.*, 2013 WL 1441294, at \*6.

208. *Id.*

209. No. 03-13-00003-CV, 2013 WL 692441 (Tex. App. Feb. 21, 2013).

210. *Id.* at \*6.

would have entered the contract.”<sup>211</sup> The insured cited no authority supporting its position that the appraisal provision was unconscionable, and the court pointed out that the Texas Supreme Court “recognizes the general validity of such appraisal provisions absent illegality or waiver.”<sup>212</sup>

*b. Appraisal versus Arbitration*—While arbitrations can encompass the entire dispute between parties, appraisal is generally limited to deciding the amount of loss. There is a split, however, among the states regarding the extent to which appraisal should be treated the same as arbitration. Although the majority of states view appraisal as distinct from arbitration, some states consider appraisal to be analogous to it and apply principles from arbitration law to it.<sup>213</sup> Several courts addressed this distinction during the survey period.<sup>214</sup>

*c. Appraisal Not Condition Precedent to Insurer Filing a Declaratory Judgment Action*—In *Certain Underwriters at Lloyd’s London v. SSDD, LLC*,<sup>215</sup> a federal court in Missouri addressed the issue of whether complying with the appraisal provision in an insurance policy was a condition precedent to the insurer bringing a declaratory judgment action.<sup>216</sup> In part, the declaratory judgment action sought “rescission of the policy based on material misrepresentations and/or omissions in the [p]olicy application” or, in the alternative, “for a declaration that the policy [was] void based on concealment or misrepresentation of material facts concerning the [p]roperty [insured under the policy].”<sup>217</sup> The insured contended that “because it invoked its right to an appraisal under the [p]olicy” before the insurer filed the declaratory judgment action, the insurer must show “that it [had] sat-

211. *Id.* (citing *In re Olshan Found. Repair Co.*, 328 S.W.3d 883, 892 (Tex. 2010)).

212. *Id.* (citing *In re Universal Underwriters*, 345 S.W.3d 404, 407 (Tex. 2011)).

213. A nationwide review of the appraisal process including a complete review of how each of the 50 states views appraisal will be included in the soon-to-be-published book by J. RANDOLPH EVANS, STEPHEN BERRY & ROBIN BESAW, *APPRAISALS IN PROPERTY DAMAGE INSURANCE CLAIMS: LAW, STRATEGY, AND PRACTICAL ADVICE* (forthcoming 2014).

214. *Citizens Prop. Ins. Corp. v. Mango Hill #6 Condo. Ass’n, Inc.*, 117 So. 3d 1226, 1230 (Fla. Dist. Ct. App. 2013) (holding trial court could not confirm appraisal award pursuant to the Florida Arbitration Code because it is not applicable to appraisals); *Transcapitol Bank v. Merchants Mut. Ins. Co.*, No. 3:11 CV 1176, 2013 WL 322156, at \*2 (N.D. Ohio Jan. 28, 2013) (explaining under Ohio law, “an appraisal condition in an insurance policy is not subject to arbitration statutes”); *Contra Centrust Bank, N.A. v. Montpelier U.S. Ins. Co.*, No. 12-cv-9233, 2013 WL 1855838, at \*2 (N.D. Ill. May 1, 2013) (citing *Travis v. Am. Mfrs. Mut. Ins. Co.*, 782 N.E.2d 322, 324 (Ill. App. Ct. 2002)) (“Illinois courts have held that ‘an appraisal clause is analogous to an arbitration clause and is enforceable in a court of law in the same manner as an arbitration clause.’”); *San Souci Apts. v. Nat’l Surety Corp.*, No. CV-12-2389-PHX-GMS, 2013 WL 428091, at \*1 (D. Ariz. Feb. 4, 2013) (citing *Meineke v. Twin City Fire Ins. Co.*, 892 P.2d 1365, 1369 (Ariz. Ct. App. 1995)) (explaining “Arizona courts have held that ‘appraisal is analogous to arbitration’ and the ‘principles of arbitration law’ should be applied to proceedings involving appraisals”).

215. No. 4:13-CV-193 CAS, 2013 WL 2403843 (E.D. Mo. May 31, 2013).

216. *Id.* at \*3.

217. *Id.* at \*2.

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isfied all conditions precedent to the filing of its declaratory judgment action, including the appraisal provision,” or the complaint was “premature [and failed] to state a claim upon which relief may be granted.”<sup>218</sup> The court held that appraisal in this case was not a condition precedent to the insurer filing the action, explaining as follows:

Under Missouri law, whether an appraisal is a condition precedent to filing suit depends on whether the dispute[] between the insured and the insurer is properly characterized as a coverage dispute or a disagreement over the amount of loss. The Missouri Supreme Court has held that the appraisal process is not appropriate for resolving questions of coverage.<sup>219</sup>

#### D. *Bad Faith*

The Washington Supreme Court held that, in the context of first-party bad faith claims handling cases, courts must apply a presumption that no attorney-client privilege exists.<sup>220</sup> In *Cedell v. Farmers Insurance Co. of Washington*, the policyholder sued its insurer for bad faith claims handling, alleging the insurer made unreasonably low offers on its fire loss claim and was unresponsive.<sup>221</sup> When the insurer produced in discovery a “heavily redacted claims file,” the policyholder filed a motion to compel, alleging privilege claims are inapplicable in first-party bad faith cases.<sup>222</sup> Reasoning that “[f]irst party bad faith claims by insureds against their own insurer are unique and founded upon two important public policy pillars: that an insurance company has a quasi-fiduciary duty to its insured and that insurance contracts, practices, and procedures are highly regulated and of substantial public interest,” the court ruled that there is a presumption of no attorney-client privilege in such cases.<sup>223</sup> The court ruled, however, that the insurer can “overcome the presumption of discoverability” upon an “in camera showing” that “the attorney was providing counsel to the insurer and not engaged in a quasi-fiduciary function.”<sup>224</sup> In order to ensure that communications with counsel regarding coverage remain privileged, *Cedell* will require insurers to restrict attorneys from performing claims handling functions or, at minimum, segregate their claims handling work from their coverage work.<sup>225</sup>

In another case involving an insurer’s alleged undervaluation of its insured’s claim, the Tenth Circuit held that an insurer’s underpayment of a

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218. *Id.* at \*3.

219. *Id.* at \*8 (citations omitted).

220. *Cedell v. Farmers Ins. Co. of Wash.*, 295 P.3d 239, 246 (Wash. 2013).

221. *Id.* at 241–42.

222. *Id.* at 242–43 (citing *Soter v. Cowles Publ’g Co.*, 130 P.3d 840 (Wash. Ct. App. 2006), *aff’d*, 174 P.3d 60 (Wash. 2007)).

223. *Id.* at 246 (citations omitted).

224. *Id.*

225. *Id.* at 249.

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claim by \$200,000 raised the inference that the insurer had been “less than diligent in investigating” the policyholder’s fire loss claim, thereby breaching the implied obligation of good faith and fair dealing under Utah law.<sup>226</sup> In *Blakely v. USAA Casualty Insurance Co.*, the policyholders sued their insurer for bad faith after an appraisal determined that the insurer had “significantly undervalued” the claim, among other alleged claims handling improprieties.<sup>227</sup> The Tenth Circuit reasoned that the district court’s focus on the insureds’ overvaluation of their claim should not have been dispositive to its bad faith ruling, stating that “[a] jury could conclude Defendant breached its duties by undervaluing Plaintiffs’ loss, regardless of whether Plaintiffs overvalued their loss.”<sup>228</sup>

In another pro-policyholder development, the Florida Second District Court of Appeal held that an appraisal award constituted a “favorable resolution” of coverage necessary to sustain the policyholder’s bad faith claim.<sup>229</sup> Under Florida law, the court explained, a first-party insured may not bring a cause of action for bad faith before its claim for insurance benefits is resolved in its favor.<sup>230</sup> The decision in *Hunt v. State Farm Florida Insurance Co.*<sup>231</sup> is in accord with a 2012 decision from the Fourth District Court of Appeal<sup>232</sup> and a 2006 decision from the Florida Supreme Court holding that an appraisal award in the insured’s favor satisfies the “favorable resolution” prerequisite to a first-party bad faith action.<sup>233</sup>

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226. *Blakely v. USAA Cas. Ins. Co.*, 500 F. App’x 734, 740 (10th Cir. 2012).

227. *Id.* at 737.

228. *Id.* at 741.

229. *See* *Hunt v. State Farm Fla. Ins. Co.*, 112 So. 3d 547, 549 (Fla. Dist. Ct. App. 2013).

230. *Id.* (citing *Blanchard v. State Farm Mut. Auto. Ins. Co.*, 575 So. 2d 1289, 1291 (Fla. 1991)).

231. *Id.* at 547.

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

233. *Dadeland Depot, Inc. v. St. Paul Fire & Marine Ins. Co.*, 945 So. 2d 1216 (Fla. 2006).

