RECENT DEVELOPMENTS IN PROPERTY INSURANCE LAW

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From a layperson's perspective, the most newsworthy developments in property insurance law during the survey period probably continued to be the legal issues surrounding Hurricane Katrina and other recent powerful storms that gave rise to property insurance disputes in the Gulf Coast states. To some extent, the public perception is accurate, but—away from the front pages of the morning paper—property insurance law continued to grow and develop in other areas, only some of which related to hurricane damage claims. For example, issues of coverage for mold, causation of water damage, and appraisal all gave rise to interesting cases during the survey period, and some of those decisions will help outline how property insurance law applies to claims arising from the next unfortunately inevitable major hurricane. Other issues, such as coverage for collapse and the application of the faulty workmanship exclusion, were in play in significant cases in the survey period. Although absent from the public eye, developments in those areas, especially where novel or contentious questions are settled, continue to help policyholders and insurers alike better manage their property risks and claims.

I. APPRAISAL

A. *Scope of Appraisal*

Although it is not unusual for courts to be faced with questions regarding the scope of completed appraisal proceedings, in *State Farm Lloyds v. Johnson*,[1] the Supreme Court of Texas was tasked with determining whether an appraisal should proceed where the scope of the appraisal was chal-

1. 290 S.W.3d 886, 893 (Tex. 2009).

lenged before it began. In that case, the insurer declined to participate in an appraisal of hail damage on the grounds that the parties' dispute concerned causation and not the amount of the loss.[2] Specifically, the insurer contended that hail had only damaged shingles on the ridgeline of the insured's roof, but the insured's contractor concluded that replacement of the entire roof was necessary.[3] Although the court acknowledged the well-established rule that damage questions are the province of appraisers while liability questions are reserved for courts, it eschewed preemptive judicial intervention in the appraisal process and concluded that the appraisal should not be thwarted "merely because there might be a causation question that exceeds the scope of appraisal."[4]

Relying heavily on *Johnson*, a Texas federal court granted an insured's motion to compel appraisal with respect to alleged property damage and business interruption losses, notwithstanding the insurer's arguments that the only issues for resolution were the duration of the period of restoration and other issues regarding the scope of covered damage.[5] However, in *Pearl River County School District v. RSUI Indemnity Co.*,[6] a federal court in Mississippi declined to follow *Johnson* and denied an insured's motion to compel appraisal where the court determined that coverage issues existed, and held that the court itself was required to determine coverage issues prior to submitting the matter for appraisal of the subject losses.

B. *Timeliness of Demand or Refusal to Appraise*

In *Dwyer v. Fidelity National Property & Casualty Insurance Co.*,[7] the Fifth Circuit reversed the trial court below and held that a so-called write–your–own flood insurer participating in the National Flood Insurance Program did not waive its appraisal rights under a standard flood insurance policy even though it sought appraisal on the eve of trial. The court reasoned that the insurer did not "sit on its rights" because it had responded promptly upon first learning, just weeks before trial, that the insured disputed only the amount of the loss and not coverage or other issues.[8]

On the other hand, in *QBE Insurance Corp. v. Dome Condominium Ass'n*,[9] a federal court sitting in Florida held that an insurer lost its right to invoke

2. *Id.* at 888.
3. *Id.* at 887.
4. *Id.* at 893.
5. Molzan, Inc. v. United Fire & Casualty Co., No. H-09-01045, 2009 WL 2215092, at *4–5 (S.D. Tex. July 23, 2009).
6. No. 1:08CV364HSO-JMR, 2009 WL 2553267, at *1 (S.D. Miss. Aug. 17, 2009).
7. 565 F.3d 284, 288 (5th Cir. 2009).
8. *Id.*
9. No. 08-20906-CIV, 2009 WL 3241284, at *3 (S.D. Fla. Sept. 17, 2009), *recon. denied*, 2009 WL 3241250 (S.D. Fla. Oct. 7, 2009).

appraisal where it failed to notify the insured of its right to participate in a mediation program through the Florida Department of Financial Services as required under Florida Statute § 627.7015(2). Significantly, the court found that the insured's subsequent participation in two mediation sessions and in the appraisal process did not waive the statute's notification requirement, and the related appraisal forfeiture provision was automatic.[10] In *Lyon v. American Family Mutual Insurance Co.*,[11] a federal court sitting in Illinois concluded that an insurer's five-month delay in demanding appraisal after learning from the insured that it intended to "pursue [its] rights to the fullest" was unreasonable and resulted in a forfeiture of the insurer's appraisal rights.

C. *Enforcing and Modifying Appraisal Awards*

In *Farmers Automobile Insurance Ass'n v. Union Pacific Railway Co.*,[12] Wisconsin's highest court affirmed a lower court's decision not to modify or vacate an appraisal award on the basis of the insured's argument that the appraisers did not understand their task. In that case, the insured contended that communications between the appraisers reflected inappropriate judgments concerning certain features of the home for which the insured sought replacement and improperly took into consideration a design proposal for a replacement home that was smaller than the damaged home.[13] However, the court found that the appraisal award, which itemized the components of the valuation and gave the replacement cost and actual cash value for each, did not indicate on its face that there was any misunderstanding, and the court declined to "second guess" the appraisers' process.[14] The court also rejected the insured's argument that the appraisal process was not binding upon the insured, observing that the insured affirmatively agreed to participate in the appraisal process.[15]

In *Citizens Property Insurance Corp. v. Cuban-Hebrew Congregation of Miami, Inc.*,[16] a Florida appellate court held that where appraisers had determined the overall amount of loss but did not reduce the award for prior payments to the insured or the deductible, the insurer was permitted to make these deductions from the award without seeking a modification of the award.

10. *Id.*
11. 644 F. Supp. 2d 1071, 1073-74 (N.D. Ill. 2009). A later-filed supplemental opinion citing additional facts reinforced the court's conclusion. *See* Lyon v. Am. Family Mut. Ins. Co., No. 08 C 7319, 2009 WL 2421576 (N.D. Ill. Aug. 3, 2009).
12. 768 N.W.2d 596, 608–09 (Wis. 2009).
13. *Id.* at 608.
14. *Id.*
15. *Id.* at 608-09.
16. 5 So. 3d 709, 711 (Fla. Dist. Ct. App. 2009).

D. *Appraiser Qualifications*

In *Carriage Court Condominium Owners Ass'n v. State Farm Fire & Casualty Co.*,[17] a federal district court sitting in Louisiana declined to remove an umpire prior to the rendering of an appraisal decision where the umpire's stated intention of resolving pricing disputes only after each appraiser had completed his independent appraisal was not motivated by bias or incompetence. However, the insured's ability to challenge the competence of the umpire after an appraisal decision had been rendered was not foreclosed.[18]

E. *Miscellaneous Issues*

In *Farber v. American National Property & Casualty Co.*,[19] a Louisiana appellate court held that a lower court did not err in confirming an appraisal award that was rendered in spite of the insurer's lack of participation in the appraisal process. In that case, after sending several letters related to the appraisal to the insurer that went unanswered, the insured requested that the judge appoint an umpire.[20] The insurer was not copied on the letter requesting the appointment, or the judge's letter confirming that an umpire had been selected.[21] The insurer was held to be barred from challenging the award that the umpire ultimately entered because the insurer did not seek to vacate or modify the award within three months of the award.[22]

II. COLLAPSE

Cases involving coverage for building collapse during the survey period dealt primarily with two issues: whether common provisions regarding collapse caused by hidden decay were ambiguous, and the factual showing required to demonstrate that a covered collapse has occurred.

The Second Circuit held that a policy's endorsement for coverage of a collapse caused by hidden decay was ambiguous in the context of a claim involving damage to a building that was short of its complete destruction. In *Dalton v. Harleysville Worcester Mutual Insurance Co.*,[23] the policyholder discovered structural damage to a wall that required the building be vacated. The insurer denied coverage for the subsequent claim, asserting that the damage to the wall was excluded "bulging," and not a covered "collapse . . . caused . . . by . . . hidden decay." The district court granted the

17. No. 07-7715, 2009 WL 1565937, at *4 (E.D. La. May 28, 2009).
18. *Id.*
19. 999 So. 2d 328, 333–34 (La. Ct. App. 2008).
20. *Id.* at 330–31.
21. *Id.* at 331.
22. *Id.* at 334.
23. 557 F.3d 88, 89 (2d Cir. 2009).

insurer's motion for summary judgment, agreeing that the damage was the excluded bulging and, in any event, was not a collapse under New York case law, which required "total or near total destruction" of the building.[24] The policyholder appealed, arguing that the damage was caused by hidden decay, and that other New York cases allow coverage for a collapse where a building suffers "substantial impairment of its structural integrity," a condition short of total destruction.[25] The Second Circuit agreed and reversed the grant of summary judgment to the insurer.[26] The court noted conflicting New York appellate court rulings on whether a collapse needs to be "total destruction" of a building or just "substantial impairment," and found the provision for coverage caused by hidden decay to be ambiguous.[27] Given this ambiguity, the court held that the policy should be read in favor of coverage.[28]

In another case involving a claim for collapse caused by hidden decay, the Eleventh Circuit held that it was harmless error for a district court to instruct a jury regarding the policyholder's claim that the phrase "hidden from view" in an insurance policy was ambiguous where the district court had not decided that the phrase was ambiguous as a matter of law.[29]

The other prevalent line of cases involving collapse during the survey period focused on the factual showing required to demonstrate that a covered collapse had occurred. In *Rouland v. Pacific Specialty Insurance Co.*,[30] a California appellate court held that the policyholder raised a triable issue of fact regarding the cause of the collapse of a balcony on the policyholder's house. Reversing the trial court's grant of summary judgment to the insurer, the appellate court favorably noted an affidavit from the policyholder's expert asserting that the cause of the collapse could have been corrosion of an underlying sewer pipe—and not, as the insurer contended, the subsequent landslide.

On the same issue, a New York trial court in *Hudson 500 LLC v. Tower Insurance Co. of New York*[31] denied cross-motions for summary judgment filed by the insurer and policyholder in a claim involving the partial collapse of a Manhattan building, holding that triable issues of fact remained about whether the cause of the collapse was covered hidden decay or excluded poor maintenance known to (and within the control of) the policyholder. A federal court in Oregon reached a similar conclusion in a case

24. *Id.*
25. *Id.* at 91.
26. *Id.*
27. *Id.* at 92.
28. *Id.* at 93.
29. Johnston v. Companion Prop. & Cas. Ins. Co., 318 Fed. App'x 861, 865 (11th Cir. 2009).
30. No. G040299, 2009 WL 826405, at *1 (Cal. Ct. App. 2009).
31. 875 N.Y.S.2d 429, 434-35 (N.Y. Sup. Ct. Nov. 20, 2008).

involving the collapse of an insured hotel, holding that conflicting reports from experts on the cause of the collapse and the policyholder's knowledge of claimed hidden decay precluded summary judgment on the parties' cross-motions.[32]

III. COVERED PROPERTY

A. *Personal Property*

In *Nationwide Mutual Insurance Co. v. Regency Furniture, Inc.*,[33] the court held that vandalized HVAC units located on the roof of the premises leased by the policyholder were not the business personal property of the policyholder; rather, the HVAC units were the property of the building owner. The court reasoned that personal property is a "thing," and the HVAC units ceased to be a "thing," once they were affixed to the building.[34]

In *Trophy Tracks, Inc. v. Massachusetts Bay Insurance Co.*,[35] the court held that business personal property destroyed at an unscheduled location was not covered property. The location was not listed on the location schedule, and the fact that the address appeared at the top of each page of the declarations did not create any ambiguity as to which premises were insured.[36]

B. *Insurable Interest*

In *Plaisance v. Scottsdale Insurance Co.*,[37] the named insured and the owner of the property brought suit against their insurer for windstorm damage caused by Hurricane Katrina. The insurer moved for summary judgment on the grounds that the named insured had no insurable interest because he did not own the property, and the owner could not recover because it was not named as an insured in the policy.[38] The court held that the named insured could recover because he had a substantial economic interest in the property, including a lifetime right to occupancy, the right to rent and purchase the property at below-market-value prices, the right to sublet and collect rents, and the right to will the property.[39] With respect to the owner, however, the court agreed with the insurer and held that the owner of the property could not recover because it was not named as an insured, additional insured, or third-party beneficiary under the policy.[40]

32. Malbco Holdings, LLC v. AMCO Ins. Co., 629 F. Supp. 2d 1185, 1197-99 (D. Or. 2009).
33. 963 A.2d 253, 257-64 (Md. Ct. Spec. App. 2009).
34. *Id.* at 264.
35. 673 S.E.2d 787, 789-90 (N.C. Ct. App. 2009).
36. *Id.*
37. No. 07-6357, 2008 WL 4372888, at *1 (E.D. La. Sept. 22, 2008).
38. *Id.* at *2.
39. *Id.* at *3.
40. *Id.* at *2.

In *Balentine v. New Jersey Insurance Underwriting Ass'n*,[41] the court held that under New Jersey law, title ownership was enough to confer an insurable interest to a property. The court noted that although another person used the property for business purposes and paid the taxes, insurance premiums, utilities, and other expenses, the insured titleholder had an insurable pecuniary interest because he could still be held liable for unpaid taxes and third-party claims related to the property.[42]

A federal court in Virginia in *Tiger Fibers, LLC v. Aspen Specialty Insurance Co*.[43] held that a property lessee had an insurable property interest under the lessee's insurance policy in light of the substantial legal and economic interests it had under the property lease, including a five-year lease and an option to purchase the property. The court further noted that although the landlord was required to purchase property insurance under the lease and the insured had never exercised the purchase option, the lessee's interests were nevertheless enough to create an insurable interest.[44]

IV. DUTIES

A. *Examinations Under Oath*

In *Wells v. Farmers Alliance Mutual Insurance Co*.,[45] the insurer requested that the policyholder submit to an examination under oath (EUO); however, the policyholder filed suit prior to the EUO date and did not appear. The court held that the cooperation clause of the policy was valid and enforceable under Missouri law, but it was a question for the jury whether the policyholder's failure to appear was a failure to cooperate.[46] The court reasoned that the jury should determine if the policyholder satisfied the requirements of the cooperation clause where the policyholder provided the requested information through his deposition and written discovery during the litigation of the case.[47]

Several other courts during the survey period also upheld policy provisions requiring a policyholder to submit to an EUO as a condition precedent to recovery under the policy.[48]

41. 966 A.2d 1098, 1099 (N.J. Super. Ct. App. Div. 2009).
42. *Id*. at 1101–02.
43. 594 F. Supp. 2d 630, 651 (E.D. Va. 2009).
44. *Id*.
45. No. 2:07CV00036 ERW, 2009 WL 1259977, at *3 (E.D. Mo. May 4, 2009).
46. *Id*. at *5.
47. *Id*.
48. Mosadegh v. State Farm Fire & Cas. Co., 330 Fed. App'x 65, 66 (5th Cir. 2009); Ward v. Horace Mann Ins. Co., 4:07-CV-76-F, 2008 WL 4933961, at *9 (E.D.N.C. Nov. 18, 2008), *aff'd*, 326 Fed. App'x 699 (4th Cir. 2009); Guideone Mut. Ins. Co. v. Rock, No. 1:06-CV-218-SA-JAD, 2009 WL 1854452, at *6–7 (N.D. Miss. June 29, 2009). *See also* Caribbean I Owners' Ass'n v. Great Am. Ins. Co. of N.Y., 600 F. Supp. 2d 1228, 1249 (S.D. Ala. Feb. 12, 2009).

B. *Proof of Loss*

In *Korbel v. Lexington Insurance Co.*,[49] the court held that for purposes of Louisiana statutory bad faith claims, satisfactory proof of loss is defined as that which is sufficient to fully apprise the insurer of the policyholder's claims. Sufficient proof of loss can be based on the information obtained by the adjuster during his investigation—no formal proof of loss is required.[50]

V. EXCLUSIONS

A. *Causation*

The Mississippi Supreme Court addressed a significant issue spotlighted by Hurricane Katrina: the impact of the anticoncurrent causation clause on covered and uncovered causes of damage. In *Corban v. United Services Automobile Ass'n*,[51] that court held that a homeowners' policy's anticoncurrent causation clause does not bar coverage for wind losses (a covered peril) where both wind and water damage were caused by Hurricane Katrina, but the wind-related loss occurred prior to the storm surge water damage (an excluded peril). Finding that indemnity for the wind losses vests at the time of the loss, the court stated that "the anticoncurrent cause provision is not applicable and does not come into play because each force causes its own separate damage independent of the damage caused by the other even when the same item of property is damaged by both forces acting separately and sequentially."[52] This case provides substantial guidance for federal courts that had previously made so-called *Erie* guesses when applying Mississippi law to wind and water damage claims, and further assists state trial courts after the Mississippi attorney general's state court suit challenging the validity of anticoncurrent causation clauses in favor of the efficient proximate cause doctrine was dismissed.[53]

Other cases during the survey period that addressed wind and water damage claims have reached different results on application of the anticoncurrent causation clause to bar coverage. Some have agreed that the anticoncurrent causation provision does not bar coverage for damage caused exclusively by wind and shown to have preceded water damage.[54]

49. 308 Fed. App'x 800, 803 (5th Cir. 2009).
50. *Id.* at 804.
51. 20 So. 3d 601, 617-18 (Miss. 2009).
52. *Id.* at 616-17 (citation omitted).
53. *See* Hood v. Miss. Farm Bur. Ins. Co., No. G-2005-1642, slip op. at 1 (Miss. Ch. Ct. Hinds Cty. Jan. 23, 2007).
54. *See, e.g.*, Politz v. Nationwide Mut. Fire Ins. Co., No. 1:08CV18 LTS-RHW, 2009 WL 909261, at *2 (S.D. Miss. Mar. 27, 2009) (finding that an anticoncurrent causation provision

Most, however, have applied anticoncurrent cause provisions to preclude coverage.[55]

A Pennsylvania federal district court in *White v. West American Insurance Co*.[56] found that the anticoncurrent causation preface to a water damage exclusion barred coverage for all damages, even those caused by a utility company's opening of floodgates that, according to the insured, caused water not to flood, but to seep up through the ground.[57]

Similarly, the South Carolina Supreme Court, in *South Carolina Farm Bureau Mutual Insurance Co. v. Durham*,[58] reversed the trial court's decision finding coverage under a homeowners' policy, holding in a case of first impression that the policy's anticoncurrent preface to a below-surface water exclusion barred coverage. After the insureds drained their swimming pool and failed to open a plug that would have released pressure on the base of the pool, the pool "floated" out of its foundation as the result of hydrostatic pressure.[59] The court found that despite the fact that the pool draining error was a covered peril, and even though the underground water pressure was not the sole cause of the loss or even the proximate cause, it was a cause of the loss; the exclusion applied.[60]

In an unpublished decision, *Rouland v. Pacific Specialty Insurance Co*.,[61] a California appellate court reversed the trial court's entry of summary judg-

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to a flood exclusion, which stated that loss by flood is excluded "even if another peril or event contributed concurrently or in any sequence to cause the loss," did not have the effect of excluding coverage for hurricane wind damage if it occurred before storm surge could have caused flood damage to the same property); Cameron Parish School Bd. v. RSUI Indem. Co., No. 2:06 CV 1970, 2008 WL 4821649, at *1 (W.D. La. Oct. 29, 2008) (holding that the jury must determine whether damages were caused exclusively by wind, flood, or wind "concurrently or in any sequence with water").

55. *See, e.g.*, Arctic Slope Regional Corp. v. Affiliated FM Ins. Co., 564 F.3d 707, 711 (5th Cir. 2009) (holding that the anticoncurrent causation preface meant that a flood exclusion unambiguously barred coverage for damage caused by Hurricane Rita storm surge damage caused by wind and water working together, notwithstanding a manuscripted "wind and hail" form providing coverage for "direct or indirect action of wind and/or hail and all loss or damage resulting therefrom whether caused by wind . . . or by any other peril . . . including, but not limited to, loss or damage caused when water, in any state, . . . is driven or otherwise transported by wind onto or into said location"); Stewart Enters., Inc. v. RSUI Indem. Co., No. 07-4514, 2009 WL 1668502, at *6 (E.D. La. June 15, 2009) (finding that the anticoncurrent causation clause applied to all flood losses that occurred concurrently or sequentially with any other cause); *see also* Iroquois On The Beach, Inc. v. Gen. Star Indem. Co., 550 F.3d 585, 588 (6th Cir. 2008) (finding that Michigan has rejected the efficient proximate cause doctrine, as the "default rule" is that a loss is not covered by the combination of a covered cause and an excluded cause); TMW Enters., Inc. v. Fed. Ins. Co., No. 07-cv-12230, 2009 WL 928227, at *3 (E.D. Mich. Mar. 31, 2009) (same).

56. No. 4:06-CV-2453, 2008 WL 5146555, at *7 (M.D. Pa. Dec. 8, 2008).

57. *Id*.

58. 671 S.E.2d 610, 614 (S.C. 2009).

59. *Id*. at 611–12.

60. *Id*. at 613.

61. No. G040299, 2009 WL 826405, at *6–8 (Cal. Ct. App. Mar. 30, 2009).

ment in favor of the insurer, remanding the case back to the trial court after finding that a triable issue existed as to whether either an earth movement exclusion or a water damage exclusion was applicable under California law if the efficient proximate cause of the losses was a covered peril, such as collapse due to hidden decay. Finding that losses after a landslide may have been caused by decay and corrosion of a pipe wall, the court stated that "[w]hen a loss is caused by a combination of a covered and specifically excluded risks, the loss is covered if the covered risk was the efficient proximate cause of the loss."[62]

B. *Earth Movement*

The Michigan Court of Appeals in *Acorn Investment Co. v. Michigan Basic Property Insurance Ass'n*[63] found an earth movement exclusion applicable to bar some of the insured's losses arising from a flooded house after vandals removed the water meter, copper pipes, and other fixtures. After reversing the trial court's determination that a covered peril (vandalism) was not shown, the court "reject[ed] plaintiff's argument that the [earth movement] exclusion does not apply to the damage to the basement walls of the insured property."[64] This damage, according to the court, was barred by the earth movement exclusion and application of its anticoncurrent cause provision.[65] As a result, the court remanded the case back to the trial court to determine the amount of loss resulting from vandalism that was not barred by the earth movement exclusion.[66]

A Virginia federal district court held in *Piankatank River Golf Club, Inc. v. Selective Insurance Co.*[67] that the earth movement exclusion in a commercial property policy did not apply to an insured's claim after an earthen barrier collapsed in the aftermath of Tropical Storm Ernesto and sent a wall of water and debris onto the insured's golf course. The court determined that the failure of the barrier was neither a "landslide" nor the result of "earth sinking, rising, or shifting," but, rather, was a complete destruction of the barrier.[68]

In *Pioneer Tower Owners Ass'n v. State Farm Fire & Casualty Co.*,[69] the New York Court of Appeals affirmed two lower court opinions finding

62. *Id.* at *7 (citation omitted).
63. No. 284234, 2009 WL 2952677, at *2–3 (Mich. Ct. App. Sept. 15, 2009).
64. *Id.* at *3.
65. *Id.* at *4.
66. *Id.*
67. No. 3:08cv606, 2009 WL 1024652, at *8 (E.D. Va. Apr. 15, 2009).
68. *Id.* Significantly, the court, in dicta, stated that the policy's water damage exclusion would have barred coverage in toto through the anticoncurrent cause provision had that exclusion not been removed by endorsement. *Id.* at *7.
69. 908 N.E.2d 875, 876 (N.Y. 2009).

coverage for a policyholder due to ambiguity in the policy's earth movement exclusion. The exclusion supported two reasonable interpretations, one that the exclusion applied to any "cracking or settling," the other that it did not apply to intentional removal of earth during excavation of an adjacent building.[70] Applying insurance contract rules of construction, the court concluded that it was bound to adopt the interpretation that narrowed the exclusion and resulted in coverage.[71] The court also noted that other courts, including two New York intermediate appellate court decisions, had found earth movement exclusions inapplicable to losses caused by excavation.[72]

C. *Vacancy*

A Michigan appellate court in *Johnson v. State Farm Fire & Casualty Co.*[73] affirmed the trial court's finding that a vandalism/vacancy exclusion that would have barred coverage for a dwelling damaged by arson but left vacant for more than thirty consecutive days was void. The court held the exclusion contravened a Michigan statute that required that vacancy exclusions take effect only after sixty days of vacancy.[74] The appellate court also agreed with the trial court that the policy treated fire and arson as separate perils, and Michigan law requires that arson exclusions must be expressly listed as an excluded peril.[75]

A Texas appellate court in *Central Mutual Insurance Co. v. KPE Firstplace Land, LLC*[76] affirmed the trial court's holding that a vacancy exclusion barring coverage for vandalism in a building that had been vacant for more than sixty days was not applicable. Because the Texas Supreme Court recently declined to adopt a universal "manifestation" trigger, the court held that the exclusion's phrase stating "[i]f the building where loss or damage occurs has been vacant for more than 60 consecutive days" could reasonably be construed to mean that the trigger is the date upon which the property becomes damaged.[77] As the insurer could not satisfy its burden of proving that the theft of copper coils from a rooftop air conditioning unit actually occurred more than sixty days after the property became vacant, it could not prove that the exclusion applied.[78]

70. *Id.* at 877.
71. *Id.* at 877-78.
72. *Id.* at 878.
73. No. 278267, 2008 WL 4724322, at *4 (Mich. Ct. App. Oct. 28, 2008).
74. *Id.* at *4 n.1.
75. *Id.* at *4.
76. 271 S.W.3d 454, 456-58 (Tex. App. 2008).
77. *Id.* at 461.
78. *Id.*

In an unpublished decision, the Tenth Circuit applied a vacancy exclusion in *Saiz v. Charter Oak Insurance Co*.[79] to deny coverage for a water damage claim where a restaurant building's sprinkler head had been deliberately tampered with (satisfying the vandalism prong of the exclusion), and the owner had closed the restaurant but was using a small part of the building as an office. Finding a vacancy because less than 31 percent of the building had been used for "customary operations," the Tenth Circuit affirmed the district court's entry of summary judgment in the insurer's favor.[80]

In *Ellis v. Farm Bureau Insurance Co*.,[81] the Michigan Supreme Court reversed the appellate court's and trial court's holdings that a vacancy exclusion was not applicable where the insurer was on notice of the vacancy. The court found that the unambiguous language of the vacancy exclusion barred coverage, despite the agent's knowledge of prolonged renovation activity, as the house had been vacant for more than sixty days prior to vandals entering the house and setting it on fire.[82]

On the other hand, the Western District of Oklahoma in *Kirkes v. Guideone Mutual Insurance Co*.[83] reached a contrary conclusion in a case addressing coverage for arson damages to two houses owned by the same insured but insured under separate homeowners' policies. The court found the term "vacant" ambiguous, as it could be construed to mean either that the house was empty or abandoned, or that it was not being used as a residence.[84] With respect to the other house, the court denied the insurer's motion for summary judgment, finding that the jury must determine whether the insured reported the vacancy to its agent.[85] The court also denied the insurer's motion for summary judgment based on the insurer's failure to establish that the arson damages were caused by the vacancy.[86]

D. *Dishonest Acts*

In *Bray & Gillespie IX, LLC v. Hartford Fire Insurance Co*.,[87] a federal district court in Florida denied two insurers' joint summary judgment motion,

79. 299 Fed. App'x 836, 837-38 (10th Cir. 2009).
80. *Id*.
81. 760 N.W.2d 212, 212 (Mich. 2008).
82. *Id. But see* Marketfare Canal, LLC v. United Fire & Cas. Co., 594 F. Supp. 2d 724, 731–32 (E.D. La. 2009) (finding that an insurer waived the right to rely on a vacancy exclusion when it accepted the insured's premium payment with full knowledge that the premises were vacant).
83. No. Civ.-07-1345-C, 2009 WL 395254, at *1 (W.D. Okla. Feb. 17, 2009).
84. *Id*. at *3. *But see* Eddie v. Scottsdale Ins. Co., No. 07-CV-3457 (KMK), 2009 WL 1321648, at *5 (S.D.N.Y. May 8, 2009) (finding the terms "vacant" and "unoccupied" to be unambiguous in applying a vacancy exclusion).
85. *Id*. at *4.
86. *Id*.
87. No. 6:07-cv-326-Orl-DAB, 2009 WL 1513400, at *10 (M.D. Fla. May 27, 2009).

which was based, in part, on the dishonest acts exclusion in their respective commercial property policies. At issue was whether a beachside resort had received a demolition order from the local government.[88] Finding facts in dispute, the court noted that the insurers must prove "whether any 'misrepresentations' were *intentional* acts of fraud. This is not a negligible burden."[89]

In *New Hampshire Insurance Co. v. Blue Water Off Shore, LLC*,[90] a federal district court found as a matter of law that a dishonesty exclusion that barred coverage for criminal acts was not ambiguous. The insured argued that the exclusion was ambiguous in two respects: (1) whether it applied if there had been no conviction, and (2) whether it applied to misdemeanors.[91] Rejecting the insured's arguments, the court looked to dictionary definitions, as well as case law applying the exclusion to both preconviction claims and misdemeanors.[92]

E. *Water Damage*

Two Fifth Circuit cases helped clarify the burden inherent in application of the water damage exclusion. In *Dickerson v. Lexington Insurance Co.*,[93] the Fifth Circuit, applying Louisiana law, affirmed the district court's holding in a Hurricane Katrina case that the burden of allocating causation of losses between wind damage and flood damage fell on the insurer. This burden of proof ruling is significant when viewed against the backdrop of Louisiana federal district court decisions suggesting that the insured bears the burden of proving and segregating covered wind damage from excluded flood damage in hurricane loss cases. Also interesting is that the Fifth Circuit did not address the homeowners' policy's anticoncurrent causation preface to the water damage exclusion.

In *Panatelli v. State Farm Fire Insurance Co.*,[94] the Fifth Circuit applied the same burden-shifting standard in affirming the district court's holding that the insured's inability to rebut the insurer's proof that damage to her home was caused by flooding, and not wind-driven water, barred coverage under the homeowners' policy's water damage exclusion. The holding in this case confirms a line of precedent from post-Katrina courts that have consistently rejected insureds' claims that storm surge was wind-driven

88. *Id.*
89. *Id.* at *9 (emphasis in original).
90. No. 07-0754-WS-M, 2009 WL 1509458, at *5 (S.D. Ala. May 4, 2009).
91. *Id.* at *2.
92. *Id.* at *3.
93. 556 F.3d 290, 294-95 (5th Cir. 2009).
94. 304 Fed. App'x 290, 291 (5th Cir. 2008), *cert. denied*, 129 S. Ct. 2875, *reh'g denied*, 130 S. Ct. 45 (2009).

water that is not excluded by water damage exclusions and/or anticoncurrent causation provisions.[95]

Other courts in the Gulf Coast states also addressed the scope of this exclusion.[96] In *St. Joseph's Condominium Ass'n v. Pacific Insurance Co.*,[97] a Louisiana federal district court entered summary judgment in an insurer's favor after the insured claimed that damage resulting from water overflowing from an above-ground gutter system was not barred by the policy's exclusion for losses flowing from "water that backs up or overflows from a sewer, drain or sump." Holding that the plain and ordinary meaning of a drain includes a gutter, the court found "no reason to distinguish between overflow from an above-ground gutter or drain and overflow from an underground gutter or drain."[98]

The Mississippi Supreme Court in *U.S. Fidelity & Guaranty Co. v. Martin*[99] affirmed a lower court's denial of summary judgment on the grounds of ambiguity where the policy included a water damage exclusion and an endorsement providing coverage for sewer or drain backup. Finding that the anticoncurrent causation clause, which included the phrase "[u]nless as otherwise stated, the following exclusions apply," created an ambiguity, the court stated that the policy "must be interpreted as a whole to cover damage caused by water from sewer or drain backup, even when some damage may have resulted from flood, surface water, or overflow [of] any body of water."[100]

F. *Faulty Workmanship*

In *Freedman v. State Farm Insurance Co.*,[101] the homeowners found mold and water damage in their house and traced the damage to a nail that had been used to hang drywall five years earlier and which had penetrated through a water pipe. The policyholder argued that the loss should be covered under the efficient proximate cause doctrine.[102] The policy contained

95. *See also* Grilletta v. Lexington Ins. Co., 558 F.3d 359, 364-65 (5th Cir. 2009) (applying the same standard as in *Dickerson* and finding that the insurer failed to meet its burden of proving the Hurricane Katrina storm surge, rather than wind, destroyed the insured's home).

96. Other cases touching on the water damage exclusion include *Northrop Grumman Corp. v. Factory Mutual Insurance Co.*, 563 F.3d 777, 788 (9th Cir. 2009) (reversing a district court's finding that an excess policy's flood exclusion was ambiguous in response to the insured's claim of ambiguity based on differing language in the primary policy), and *Dillard University v. Lexington Insurance Co.*, No. 06-4138, 2009 WL 1565943, at *2 (E.D. La. June 3, 2009) (finding that the ensuing loss exception to a flood policy's sublimits required an event separable from the flood damage).

97. No. 07-0359, 2008 WL 4717463, at *1 (E.D. La. Oct. 27, 2008).

98. *Id.* at *4.

99. 998 So. 2d 956, 961–62 (Miss. 2008).

100. *Id.* at 961, 963–64.

101. 93 Cal. Rptr. 3d 296, 298 (Ct. App. 2009).

102. *Id.* at 299.

a conditional faulty workmanship exclusion, which applied only in conjunction with other exclusions.[103] The court found that the policy unambiguously excluded defective workmanship whenever it interacted with an excluded peril.[104] In this case, the excluded perils were corrosion and water damage, including continuous or repeated seepage or leakage.[105] The trial court granted summary judgment for the insurer, and a California court of appeals affirmed.[106]

A South Carolina court in *Auto Owners Insurance Co., Inc. v. Newman*[107] confirmed an arbitrator's finding that defective stucco allowed moisture intrusion into the structure, which resulted in substantial water damage to the home's exterior sheathing and wooden framing. Agreeing with the policyholder, the court found this established that there was property damage beyond that of the defective work product itself, and, therefore, the claim was not merely for faulty workmanship typically excluded under a general liability policy.[108]

The case of *Michigan Millers Mutual Insurance Co. v. DG&G Co.*[109] involved a defect, errors, and omissions provision that excluded loss "caused by deficiencies or defects in design, development, specifications, materials, manufacturing, mixing, processing, testing, workmanship, or caused by latent or inherent defects." This exclusion excluded loss caused by an intentional use of water at a cotton gin that caused the cotton to develop mold, mildew, and "hard spots."[110]

VI. WHO IS AN "INSURED"?

In *Balentine v. New Jersey Insurance Underwriting Association*,[111] a New Jersey appellate court found that New Jersey law does not require more than title ownership for there to be an insurable interest. The court in that case held that title ownership was sufficient to confer an insurable interest on the named insured under a vandalism policy because the policyholder could be held liable for unpaid taxes and liable to injured third parties as the property owner.[112]

103. *Id.*
104. *Id.* at 301–02.
105. *Id.* at 299.
106. *Id.* at 299, 302.
107. 385 S.C. 187, 190–91 (2009).
108. *Id.* at 194.
109. 569 F.3d 807, 813 (8th Cir. 2009).
110. *Id.*
111. 966 A.2d 1098, 1099 (N.J. Super. Ct. App. Div. 2009).
112. *Id.* at 1101–02.

In *3218 Magazine, LLC v. Lloyds of London*,[113] a Louisiana appellate court held that a restaurant, which did not appear as a named insured on a commercial property policy, had no right to sue the insurer for first-party losses sustained at the premises as a result of a hurricane. Additionally, the restaurant could not be the loss payee on amounts paid by the insurer for the loss.[114] The restaurant was not left without a cause of action, however, because it alleged facts that supported a right of action for reformation of the insurance policy.[115] As a result, the court affirmed the trial court's judgment but allowed the restaurant the opportunity to amend or supplement its pleadings.[116]

VII. MISREPRESENTATION

The law on misrepresentations that can void coverage varies from state to state. In some states, an insurance company does not need to show that the alleged misrepresentations were intentional, only that the misrepresentations were material and the insurance company would not have issued the policy had the correct information been provided.[117] In other states, the insurance company needs to show that the policyholder's omission was intentional and that the information was material.[118]

This year, there were a handful of decisions that may make it easier for an insurer to void a policy on the ground of policyholder misrepresentations. For example, the First Circuit, applying Rhode Island law, suggested that a prospective policyholder has the duty to volunteer information to qualify misleading prior statements and could not present only favorable information and delete less favorable information on the same point even if no follow-up questions are asked.[119] One of the more draconian decisions for policyholders on this point was *Minnesota Lawyers Mutual Insurance Co. v. Hancock*.[120] In this case, the court held that the insurer was entitled to rescind the policy because it demonstrated by clear proof that the application contained a false statement and that the false statement was material to the company's decision to issue the policy to the firm.[121] The fact that

113. 10 So. 3d 242, 243–44 (La. Ct. App. 2009).
114. *Id.*
115. *Id.* at 244.
116. *Id.* at 245.
117. *See, e.g.*, Rafi v. Rutgers Cas. Ins. Co., 872 N.Y.S.2d 799, 800 (N.Y. App. Div. 2009). *See also* Pope v. Mercury Indem. Co. of Ga., 677 S.E.2d 693, 698 (Ga. Ct. App. 2009).
118. Cedar Hill Hardware & Constr. Supply, Inc. v. Ins. Corp. of Hannover, 563 F.3d 329, 346–50 (8th Cir. 2009).
119. *See* Commonwealth Land Title Ins. Co. v. IDC Prop., Inc., 547 F.3d 15, 22 (1st Cir. 2008).
120. 600 F. Supp. 2d 702 (E.D. Va. 2009).
121. *Id.* at 707–09.

the person submitting the application did not know that his partner was embezzling money was immaterial.[122] Another negative decision for policyholders was *Guideone Specialty Mutual Insurance Co. v. Congregation Adas Yereim*.[123] In this case, a federal court in New York held that the insurance company's unreasonable delay in seeking to rescind a premises liability policy after learning of the alleged misrepresentation was not sufficient to estop the insurer from belatedly pursuing rescission.[124] Policyholders seeking to estop their insurer from rescinding insurance policies, this court held, must demonstrate not only an unreasonable delay, but also prejudice resulting from that delay.[125]

VIII. MOLD

A. *Covered Water Damage Required*

A significant case during the survey period confirmed that, in Texas at least, the requirement of covered water damage to sustain a mold claim does not fade away over time. In *Pierre v. Potomac Insurance Co. of Illinois*,[126] burst water pipes caused water and mold damage to the insured's shopping mall. The insured brought suit in a federal court in Texas and the insurer paid an initial sum and a later appraisal award amount for the actual cash value to repair the mold damage, but the insured was unsatisfied with the amount, and the court allowed the insured to reopen the lawsuit to pursue additional recovery.[127] The insured testified during his examination under oath that mold damage was present when he first discovered the water damage, but he later submitted an affidavit in support of a motion for summary judgment that stated the damage was caused solely by water before mold appeared.[128] For the first time, nearly five years after the insured filed his claim and three years after the lawsuit was filed, the insurer argued that the policy's fungus exclusion precluded coverage for the mold damage.[129] The insured, opposing the insurer's motion for summary judgment, argued that the damage should be covered based upon the insured's affidavit that stated the damage was caused solely by water before mold appeared.[130] The court granted summary judgment for the insurer, finding that the delay in asserting the fungus exclusion did not preclude its use and that the insured

122. *Id*. at 709.
123. 593 F. Supp. 2d 471 (E.D.N.Y. 2009).
124. *Id*. at 484.
125. *Id*.
126. 583 F. Supp. 2d 806, 807 (N.D. Tex. 2008).
127. *Id*. at 807.
128. *Id*. at 808.
129. *Id*. at 807.
130. *Id*. at 807–08.

had failed to offer any competent evidence showing that the claimed damage was caused by covered water rather than excluded fungus.[131]

B. *Mold Exclusions Applied*

The mold exclusion was at issue in an Ohio appellate court during the survey period. In *Ross v. Ohio Fair Plan Underwriting Ass'n*,[132] the insureds' basement sustained water damage and mold damage from flooding when a stream on a neighbor's property overflowed its banks. The insureds claimed that the water entered the basement while their sump pump was still operational, before the power went out and the sump pump ceased operating.[133] The insureds further claimed that the mold damage was covered under the accidental discharge exception to the policy's mold exclusion because the water backed up through a storm drain pipe below the basement floor that was designed to conduct water from beneath the basement to the stream on the neighbor's property.[134]

The insurer brought a motion for summary judgment contending that the policy's exclusions for water damage and power failure applied to the water damage, and that the mold exclusion expressly excluded the mold damage claim.[135] The insureds argued, in response, that they were entitled to mold coverage under their theory because the storm drain was "off the residence premises" because the drain "goes into the neighbor's stream, which is off the residence premises."[136] The appellate court upheld the trial court's grant of summary judgment to the insurer, finding that there was no mold coverage because the drain pipe from which the insureds alleged the water originated was located on, rather than off, the residence premises.[137] The court explained:

> [t]he policy clearly and unambiguously only provides coverage for mold damage that results from accidental discharge or overflow of water from within a storm drain off the residence premises. Such is not the case here, as the overflow of water into the basement occurred from a drain on the residence premises.[138]

C. *As Ensuing Loss*

In *Garcia v. State Farm Lloyds*,[139] an insured brought suit against its insurer to recover for water and mold damage. The insurer moved to dismiss

131. *Id.* at 809–10.
132. No. 07 CA 000010, 2008 WL 2571848, at *1 (Ohio Ct. App. May 23, 2008).
133. *Id.*
134. *Id.* at *5.
135. *Id.*
136. *Id.*
137. *Id.* at *6.
138. *Id.*
139. 287 S.W.3d 809, 815 (Tex. App. 2009).

the mold damage claim, arguing there was no ensuing loss coverage for mold resulting from a covered water leak based upon the recent *Fiess* decision.[140] The appellate court upheld the trial court's decision to grant the motion.[141]

IX. OTHER INSURANCE

In *Gresham v. Standard Fire Insurance Co.*,[142] the policyholders of a homeowners' insurance policy sought coverage for flood damages from their insurer pursuant to the "other insurance" provision of their policy. The insurer opposed the motion on the basis that the homeowners' policy simply excluded coverage for flood damage regardless of the "other insurance" clause.[143] The federal court for the Eastern District of Louisiana agreed, denying the policyholders' motion and holding that the "other insurance" clause in the policy did not create coverage for flood damages otherwise excluded under the policy.[144]

X. SUIT LIMITATIONS

The suit limitations provisions in two policies were applied as written by two courts during the survey period. First, in *Thornton v. Georgia Farm Bureau Mutual Insurance Co.*,[145] the policyholder failed to file suit within the one year time period prescribed by the policy. The court upheld the limitation provision relying on a Georgia statute that expressly states an insurer does not waive a limitation period by investigating the claim or engaging in negotiations towards settlement.[146] The court noted that, in its view, it was time for the Georgia legislature to consider whether a limitation period should be tolled while a claim is being processed.[147]

Also, in *Prime Medica Assocs. v. Valley Forge Insurance Co.*,[148] the court enforced the policy's two year suit limitation provision. Although the suit limitation provision was not mentioned in the denial letter, it was included in four other letters to the policyholder.[149] Thus, the court held that the insurer did not waive the limitation and was not estopped from asserting it.[150]

140. *Id.* (citing Fiess v. State Farm Lloyds, 202 S.W.3d 744, 753 (Tex. 2006)).
141. *Id.* at 824.
142. No. 07-4579, 2008 WL 4186881, at *1 (E.D. La. Sept. 9, 2008).
143. *Id.* at *2
144. *Id.* at *3.
145. 676 S.E.2d 814, 815 (Ga. Ct. App. Mar. 27, 2009).
146. *Id.* at 816–17.
147. *Id.* at 817–18.
148. 970 A.2d 1149, 1158 (Pa. Super. Ct. Mar. 5, 2009).
149. *Id.* at 1155, 1158.
150. *Id.*

XI. DAMAGES

Issues surrounding overhead and profit calculations as a proportion of covered damages continued to be litigated during the survey period, and three cases on this point are worthy of mention. First, in *Nguyen v. St. Paul Travelers Insurance Co.*,[151] policyholders filed a class action lawsuit against their homeowners' insurers alleging that the class was entitled to payments for overhead and profit as part of the insurers' payments for actual cash value for hurricane repairs. Further, the policyholders asserted that the use of three or more trades for repairs conclusively establishes the need for a general contractor.[152] The federal court for the Eastern District of Louisiana determined that the policyholders' class action claims did not meet the predominance test, which required that questions of law or fact common to all class members predominate over questions affecting individuals.[153] The determination of the need for a general contractor's services required a factual determination as to each individual case.[154] The court also declined to rule that the use of three or more trades established the need for the services of a general contractor as a matter of law.[155] However, the court found that under Louisiana's definition of actual cash value, which is measured by replacement cost less depreciation, a contractor's overhead and profit must be included regardless of whether the policyholder acts as his own general contractor or whether repairs are ever made.[156]

In *Goff v. State Farm Florida Insurance Co.*,[157] a Florida appellate court determined that a homeowner's insurer could properly withhold a portion of the contractor's profit and overhead as part of the depreciation reduction to the actual cash value payment to the policyholders.

In *Moore v. Travelers*,[158] the Eleventh Circuit affirmed a Georgia federal court's order granting the insurer's motion to compel appraisal of the policyholder's overhead and profit claim. The Eleventh Circuit agreed that such a claim was a dispute over the amount of the loss rather than coverage and, thus, appraisal of the same was a condition precedent to filing suit.[159]

XII. VALUED POLICY LAW

Application of valued policy laws (VPLs) in many states—especially along the Gulf Coast—continues to be a difficult issue in the wake of Hurricane

151. No. 06-4130, 2008 WL 4534395, at *3–4 (E.D. La. Oct. 6, 2008).
152. *Id.* at *4.
153. *Id.* at *8.
154. *Id.* at *9.
155. *Id.* at *5.
156. *Id.* at *3, *5–6.
157. 999 So. 2d 684, 689–90 (Fla. Dist. Ct. App. 2009).
158. 321 Fed. App'x 911, 913 (11th Cir. 2009).
159. *Id.*

Katrina, and the application of these statutes continues to be a significant driver of post-Katrina litigation. Given the significance of this issue, we highlight five decisions released during the survey period. First, in *Cameron Parish School Board v. RSUI Indemnity Co.*,[160] the federal court for the Western District of Louisiana found that Louisiana's VPL would not require payment of a policyholder's claim for wind and flood damages where the policy excluded damages caused by flood.

In *Halmekangas v. State Farm Insurance Co.*,[161] a Hurricane Katrina case also applying Louisiana's VPL, the Eastern District of Louisiana partially granted the insurer's motion for summary judgment. The policyholder sought damages after a fire caused a total loss of his property five days after the first floor of the building was damaged by flood and he was compensated by his flood insurer.[162] Although the district court agreed with the insurer that the policyholder could not recover twice for the same damages, the policyholder was entitled to prove the cause of damages incurred in order to apportion the same and recover for any uncompensated damage up to the full pre-Katrina value of the property.[163]

The VPL can apply to losses not related to hurricanes on the Gulf Coast, of course. In *Cincinnati Insurance Co. v. Bluewood, Inc.*,[164] the Eighth Circuit reviewed the district court's finding that Missouri's VPL applies only to cases involving losses caused by fire. The Eighth Circuit noted that Missouri had not yet addressed whether Missouri's VPL applied to non-fire losses, but affirmed the district court's ruling finding that the most natural reading of the statute limited its application to fire losses only.[165]

Two federal district courts also interpreted VPLs in non-Katrina claims during the survey period. In *Wickman v. State Farm Fire & Casualty Co.*,[166] the Eastern District of Wisconsin found that Wisconsin's VPL did not apply to the policyholder's claim to require payment of full policy limits where the policyholder's home was only partially damaged by fire. Further, the home could not be considered a constructive total loss because demolition was never ordered by the local authorities.[167] Also, in *Haught v. State Farm General Insurance Co.*,[168] the Eastern District of Missouri found that while an insurer may be able to obtain summary judgment as to whether a

160. No. 2:06 CV 1970, 2008 WL 4191268, at *2 (W.D. La. Sept. 8, 2008).
161. No. 06-3942, 2008 WL 5381603, at *2 (E.D. La. Dec. 19, 2008).
162. *Id.* at *1.
163. *Id.* at *2.
164. 560 F.3d 798, 802 (8th Cir. 2009).
165. *Id.* at 804–05.
166. 616 F. Supp. 2d 909, 916–17 (E.D. Wis. 2009).
167. *Id.* at 917–18.
168. 2:08 CV 20 DDN, 2009 WL 2235937, at *8–9 (E.D. Mo. July 27, 2009).

structure was a total loss, the policyholder had established a triable issue as to whether his home was a total loss for purposes of Missouri's VPL. The district court pointed out that under Missouri law, in a case concerning personal property coverage, the question of whether the loss was a total loss or partial loss would always be a question for the jury where the fact was disputed.[169]

XIII. OCCURRENCE

In *Basler Turbo Conversions, LLC v. HCC Insurance Co.*,[170] the U.S. District Court for the Eastern District of Wisconsin found that a series of thefts committed over a period of six months by two individuals working together required the application of a separate deductible to each incident of theft as a separate loss or occurrence, rather than one occurrence and one deductible as the policyholder argued.

The Southern District of West Virginia in *Beckley Mechanical, Inc. v. Erie Insurance Co*.[171] held that the policyholder's claim under its employee dishonesty policy, resulting from an employee's embezzlement of funds by writing over two hundred checks to herself over a period of six years, was considered a single occurrence and, therefore, subject to the $10,000 per occurrence limit for loss caused by employee dishonesty. The district court noted that the policy unambiguously provided that a "series of acts" would be considered one occurrence.[172]

And, in *Budway Enterprises, Inc. v. Federal Insurance Co.*,[173] the Central District of California considered whether a policyholder's two claims for theft constituted one occurrence under a motor truck cargo insurance policy. The policyholder argued that the fact that two shipments were stolen, with two separate bills of lading and loaded on two separate trailers attached to two separate tractors, constituted two occurrences under the policy, and, thus, each would be subject to the $100,000 per occurrence policy limit.[174] The district court dismissed the policyholder's complaint for breach of contract finding that the policyholder failed to allege sufficient facts to show that there were at least two separate causes of theft to support two occurrences as required under California's cause standard in determining the number of occurrences covered by an insurance policy.[175]

169. *Id.* at *9.
170. 601 F. Supp. 2d 1082, 1090–91 (E.D. Wis. 2009).
171. No. 5:07-cv-00652, 2009 WL 973358, at *3–4 (S.D. W. Va. Apr. 9, 2009).
172. *Id.* at *4.
173. No. EDCV 09-448-VAP (OPx), 2009 WL 1014899, at *1 (C.D. Cal. Apr. 14, 2009).
174. *Id.* at *4.
175. *Id.* at *4–6.

XIV. BAD FAITH

As in past years, most reported cases during the survey period that addressed bad faith claims denied those claims. A handful of notable cases, however, affirmed bad faith verdicts in favor of policyholders, and some did so in ways that suggest insurers in certain states need to be very cognizant of possible bad faith penalties. For example, in *Louisiana Bag Co. v. Audubon Indemnity Co.*,[176] the Louisiana Supreme Court affirmed a lower court's imposition of statutory bad faith damages to a policyholder where the insurer failed to pay the claim within thirty days of receipt as required by the statute. Significantly, the court held that even though the insurer needed additional time to investigate the complex loss, its failure to pay the undisputed portion of the claim as required by the statute was "arbitrary and capricious."[177] The court also rejected the insurer's argument that the policyholder could not identify specific "arbitrary and capricious" conduct, holding that "proof of specific acts or proof of the insurer's state of mind is generally not required" to meet the statutory standard.[178]

Also in Louisiana, an appellate court in *Neal Auction Co. v. Lafayette Insurance Co.*[179] affirmed almost all of a bad faith verdict in a claim arising from Hurricane Katrina, reversing only the portion of a statutory penalty that the trial court had applied to the claim retroactively. The statutory penalty had been increased by a law enacted after the policyholder had made its claim. By holding that the proper measure for bad faith damages arising out of Hurricane Katrina claims under Louisiana Statutes 22:658 is 25 percent of the covered damages, and not the 50 percent award provided by an amendment to that law in August 2006, *Neal Auction* may be significant for any ongoing Katrina-related bad faith claims.[180] Also during the survey period, the Supreme Court of Alabama affirmed a bad faith verdict in *State Farm Fire & Casualty Co. v. Wonderful Counselor Apostolic Faith Church*.[181]

In a significant Indiana case, the Indiana Court of Appeals affirmed an award of consequential damages for breach of the insurance contract to a policyholder in excess of the insurance policy's limits in *Rockford Mutual Insurance Co. v. Pirtle*.[182] In so holding, the court clarified earlier Indiana bad faith case law that suggested otherwise.[183]

176. 999 So. 2d 1104, 1106 (La. 2008).
177. *Id.* at 1116–20.
178. *Id.* at 1121.
179. 13 So. 3d 1135, 1147 (La. Ct. App. 2009).
180. *See id.* at 1144–46.
181. 12 So. 3d 662, 663 (Ala. 2008).
182. 911 N.E.2d 60, 68 (Ind. Ct. App. 2009).
183. *Id.*