

RECENT DEVELOPMENTS IN PROPERTY
INSURANCE COVERAGE LITIGATION

*Jay M. Levin, William R. Lewis, Christina M. Phillips,
John A. Camp, Kelly M. Corcoran, Anthony B. Crawford,
Matthew P. Fortin, John V. Garaffa, Erin D. Guyton,
Craig A. Jacobson, Miranda A. Jannuzzi, Lauren A. Long,
Jonathan R. MacBride, Sean F. McAloon, Christina M.
Phillips, Stacey Stracener, Kyle A. Sturm, Kateri Tremblay,
and Zachary D. Ludens*

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Jay M. Levin is a member of Reed Smith LLP's Insurance Recovery Group in Philadelphia. William R. Lewis is a partner at Butler Weihmuller Katz Craig in Tampa. Christina M. Phillips is a partner at Childress Duffy, Limited in Chicago. Lauren A. Long, Anthony B. Crawford, and Miranda A. Jannuzzi are all associates of Reed Smith in Philadelphia, and Kateri Tremblay is an associate of Reed Smith in the firm's Pittsburgh office. John A. Camp is a shareholder, and Zachary D. Ludens is an associate at Carlton Fields Jordan Burt in Miami. Kelly M. Corcoran and Kyle A. Sturm are attorneys in Ball Janik's Insurance Recovery and Construction Defect Practice Groups, in the firm's Orlando and Portland, Oregon, offices, respectively. Matthew P. Fortin is an associate of Foran Glennon Palandech Ponzi & Rudloff, PC in Chicago. John V. Garaffa is a partner in the Coverage Practice Group of Butler Weihmuller Katz Craig in Tampa. Craig A. Jacobson is a partner in the Chicago office of Gordon Rees Scully Mansukhani, LLP. Jonathan R. MacBride is a member of Zelle Hofmann Voelbel & Mason, LLP in Philadelphia. Sean F. McAloon is an associate of Rivkin Radler, LLP, in Uniondale, New York. Stacey Stracener is a member of Carroll Warren & Parker, PLLC, in the firm's Jackson, Mississippi office, and Erin D. Guyton is an associate in the same office. Messrs. Levin and Lewis are past chairs of the Property Insurance Law Committee. Ms. Phillips is Chair-Elect of the Committee. Mesdames Brooks and Stracener and Messrs. Forin, Garaffa, MacBride, and McAloon are Committee vice-chairs.

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I. INTRODUCTION

Three years after Superstorm Sandy, litigation continues to wind through the courts. While many cases have been settled through mandatory mediation programs, hundreds of cases are still pending. The courts continue to urge settlement of Sandy cases and issue very short discovery schedules in those cases that do not settle. The courts have also been confronted with allegations that certain expert reports relied on by Write-Your-Own (WYO) insurers and the Federal Emergency Management Agency (FEMA) to deny Sandy claims were improperly altered, leading the judges overseeing Sandy cases in the district courts to hold hearings and FEMA to agree to reopen nearly 144,000 claims.

Given the extreme weather that is affecting most of the country and the El Niño that is expected in 2016, the issues in these cases, as well as other property insurance issues, are likely to arise in different contexts in numerous jurisdictions going forward. This article has cases on a broad range of property insurance disputes across the country.

II. SUPERSTORM SANDY

A. New York Cases

In *FETCH, NYC Inc. v. Allstate Insurance Co.*,¹ the Second Circuit held that the flood policy Allstate issued to the plaintiff duplicated a policy issued by Hartford and thus was void.² The court held that duplicate policies were not allowed and the policy with the later effective date was deemed cancelled.³ Because the National Flood Insurance Program (NFIP) is a federal program in which the government pays claims, “Congress cannot have intended . . . to allow double recovery for the same physical damage to the same physical property[.]”⁴

In *El-Ad 250 West, LLC v. Zurich American Insurance Co.*,⁵ the New York Appellate Division held that a \$5 million limit on flood damage in a builders’ risk policy capped losses for building delays caused by Sandy.⁶ The court rejected the plaintiff’s argument that the limit did not apply to non-physical losses, such as loss of rent.⁷ The court held that the delay in completion form, which incorporated the other policy terms by reference, applied the flood sublimit to all losses.⁸

1. 615 F. App’x 696 (2d Cir. 2015).

2. *Id.* at 696–97.

3. *Id.*

4. *Fetch NYC, Inc. v. Allstate Ins. Co.*, No. 14-3431 (S.D.N.Y. Sept. 17, 2014) (Forrest, J.).

5. 130 A.D.3d 459 (N.Y. App. Div. 2015).

6. *Id.*

7. *Id.*

8. *Id.*

In *Five Towns Nissan, LLC v. Universal Underwriters Insurance Co.*,⁹ that same court held that the trial court had ignored language in the time element coverage form that required that business interruption coverage must be triggered by a covered cause of loss.¹⁰ As the policy excluded flood, there was no business income (BI) coverage.¹¹

In *National Railroad Passenger Corp. v. Arch Specialty Insurance Co.*,¹² the U.S. District Court for the Southern District of New York rejected Amtrak's argument that Sandy storm surge was not flood and capped Amtrak's recovery at the \$125 million flood sublimit.¹³

In *Bamundo, Zwal & Schermerhorn, LLP v. Sentinel Insurance Co., Ltd.*,¹⁴ the court held that the plaintiff's business interruption loss, arising out of an evacuation order issued by the city as Sandy approached and which prohibited access to the plaintiff's office, was not covered under the policy's civil authority provision because the city issued the order as a direct result of flood.¹⁵ The civil authority coverage had to be triggered by a covered cause of loss and flood was excluded.¹⁶ Similarly, in *Newman Myers Kreines Gross Harris, P.C. v. Great Northern Insurance Co.*,¹⁷ the court held that the plaintiff's business interruption loss was not covered because the building housing the plaintiff's office did not sustain physical damage when Con Ed preemptively turned off the power.¹⁸

B. *New Jersey Cases*

In *Torre v. Liberty Mutual Fire Insurance Co.*,¹⁹ the Third Circuit held that the term "insured property" in the standard flood insurance policy (SFIP) does not include land.²⁰ The court therefore rejected the plaintiffs' argument that the policy covered the cost of removing sand and other debris deposited on their property by Sandy and held that debris removal coverage was limited to debris from their house.²¹

In *Riccio v. Allstate New Jersey Insurance Co.*,²² the New Jersey Appellate Division held that damage caused by toxic debris in floodwater could not be separated from damage from the flood itself, which was excluded under

9. 125 A.D.3d 580 (N.Y. App. Div. 2015).

10. *Id.* at 581.

11. *Id.*

12. 2015 WL 4940568 (S.D.N.Y. Aug. 3, 2015).

13. *Id.* at *1.

14. 2015 WL 1408873 (S.D.N.Y. Mar. 26, 2015).

15. *Id.* at *4.

16. *Id.*

17. 17 F. Supp. 3d 323 (S.D.N.Y. 2014).

18. *Id.* at 331-33.

19. 781 F.3d 651 (3d Cir. 2015).

20. *Id.* at 65.

21. *Id.*

22. 2015 WL 6181466 (N.J. Super. Ct. App. Div. Oct. 22, 2015).

the policy. The plaintiffs argued that the flood exclusion does not exclude losses caused primarily by water-borne “unhealthy substances, debris and materials.”²³ In rejecting the plaintiffs’ contention, the court noted that a contrary result would render the flood exclusion meaningless.²⁴

In a notable decision, the New Jersey Superior Court, Law Division, in *PSEG, Inc. v. Ace American Insurance Co.*,²⁵ held that damage from storm surge arising out of Sandy was not capped by a \$250 million flood sublimit.²⁶ Relying on two decisions, the court held that storm surge fell under coverage for “named windstorms,” which did not have a sublimit, because the flood exclusions in the policies did not specifically refer to storm surge, while the “named windstorm” coverage did.²⁷

In *Wakefern Food Corp. v. Lexington Insurance Co.*,²⁸ the court rejected the plaintiff’s argument that Sandy was no longer a named windstorm at the time it made landfall in New Jersey because by that point it had been reclassified as a “post-tropical cyclone.”²⁹

C. Other Issues

Troubling allegations have been leveled at WYO insurers accused of relying on altered engineers’ reports to deny Sandy claims and of failing to produce draft reports during discovery, which evidenced that final reports had been changed. In *In Re Hurricane Sandy Cases Raimey v. Wright National Flood Insurance Co.*,³⁰ Magistrate Judge Brown, one of three judges overseeing Sandy litigation in the Eastern District of New York, admonished U.S. Forensic, an engineering firm retained by Wright, for what he called “reprehensible gamesmanship” in connection with at least two Sandy claims.³¹ Wright retained U.S. Forensic to determine whether the plaintiffs’ homes were damaged by flood. U.S. Forensic was subsequently found to have altered the initial conclusions of its engineers in an apparent attempt to provide a basis to improperly deny coverage.³²

The court held that the evidence proved that U.S. Forensic “unfairly thwarted reasonable consideration of plaintiffs’ claims through the issuance of a baseless report.”³³ The court criticized the firm for its “misguided at-

23. *Id.* at *3.

24. *Id.* at *5.

25. 2015 WL 1384325 (N.J. Super Ct. Law Div. Mar. 23, 2015).

26. *Id.* at *8.

27. *Id.* at *3–5 (citing *SEACOR Holdings, Inc. v. Commonwealth Ins. Co.*, 635 F.3d 675 (5th Cir. 2011); *Pinnacle Entm’t, Inc. v. Allianz Global Risks U.S. Ins. Co.*, 2008 WL 6874270 (D. Nev. Mar. 26, 2008)).

28. No. MID–L–6483–13 (N.J. Super. Ct. Law Div. Oct. 29, 2014).

29. *Id.*

30. 303 F.R.D. 17 (E.D.N.Y. 2014).

31. *Id.* at 19.

32. *Id.*

33. *Id.*

tempt to defend these flawed practices” based on its “peer review” process, which actually raised concern that hundreds of reports may have been improperly altered.³⁴ The court also admonished Wright for ignoring prior orders to produce draft reports, which would have demonstrated that the conclusions in the final reports had been changed.³⁵ The court permitted the plaintiffs’ counsel to seek fees and costs and ordered all insurers in Sandy cases pending in the Eastern District to produce all draft engineers’ reports within thirty days.³⁶

In light of these allegations, FEMA agreed to reopen nearly 144,000 claims. In addition, FEMA is reviewing oversight of WYO insurers in connection with Sandy and is attempting to settle the actions. Accordingly, the courts have issued a number of blanket stays in cases involving WYO carriers to allow the settlement process to continue.

III. BUSINESS INTERRUPTION/CIVIL AUTHORITY

In *Citadel Broadcasting Corp. v. AXIS U.S. Insurance Co.*,³⁷ the Court of Appeal of Louisiana affirmed an award of nearly \$6 million in lost profits for Citadel Broadcasting arising out of Hurricane Katrina.³⁸ The court held that Citadel needed to prove its business interruption losses only with “reasonable certainty” and noted that “broad latitude is given” in the area of lost profits.³⁹

In *Verrill Farms, LLC v. Farm Family Casualty Insurance Co.*,⁴⁰ the Appeals Court of Massachusetts resolved a coverage dispute in which a policy’s business interruption and extra expense provisions created a gap in coverage.⁴¹ The court found:

The only rational reading of the policy, considering the contract as a whole as well as its purpose of making Verrill Farms whole, is that it requires the loss of business income to be determined by the difference between the amount of net profit or loss earned during the partial resumption of operations and the amount of net profit or loss that Verrill Farms would have earned had no fire occurred.⁴²

In *Fresno Rock Taco, LLC v. National Surety Insurance Corp.*,⁴³ the Eastern District of California answered the novel question of whether failure

34. *Id.*

35. *Id.*

36. *Id.* at 31–32.

37. 162 So. 3d 470 (La. Ct. App. 2015).

38. *Id.* at 475.

39. *Id.* at 474–75.

40. 18 N.E.3d 1125 (Mass. App. Ct. 2014).

41. *Id.* at 1130.

42. *Id.* at 1133–34.

43. 2015 WL 135720 (E.D. Cal. Jan. 8, 2015).

to pay a business interruption claim could subject an insurer to liability for an insured going out of business.⁴⁴ The court answered yes, finding that it was reasonably foreseeable that a business facing a covered loss that is not reimbursed in a timely fashion could fail where the damaged equipment was vital to the business.⁴⁵

IV. COLLAPSE

The definition of “collapse” remains unsettled in some jurisdictions. Washington adopted the majority “substantial impairment of structural integrity” standard this year. In 2012, a Washington federal court was required to decide the meaning of “collapse” in a property policy.⁴⁶ Because the Washington Supreme Court had not yet decided the issue, the district court left the question unresolved.⁴⁷ On appeal, the Ninth Circuit certified the question of how to define “collapse” to the Washington Supreme Court, which resolved the issue in 2015,⁴⁸ holding that “collapse” means “[a] substantial impairment of the structural integrity of a building or part of a building that renders such building or part of a building unfit for its function or unsafe[.]”⁴⁹ The “substantial impairment” must be one that is “so severe as to materially impair a building’s ability to remain upright.”⁵⁰ The court also noted that the policy at issue had specific language excluding mere “settling, cracking, shrinking, bulging, or expansion” from its definition of “collapse.”⁵¹ Therefore, the court cautioned that “substantial impairment” must mean something more than just “settling, cracking, shrinking, bulging, or expansion.”⁵²

A Wisconsin appeals court held that cracks that arose during construction of a Wisconsin couple’s home did not amount to a “collapse” under the “substantial impairment” standard.⁵³ In *Oboikovitz v. American Family Mutual Insurance Co.*, a couple’s home was damaged due to cracks in the foundation, walls, floor, and exterior cement pad.⁵⁴ The appellate panel

44. *Id.* at *18.

45. *Id.* at *21.

46. Queen Anne Park Homeowners Ass’n v. State Farm Fire & Cas. Co., 2012 WL 5456685 (W.D. Wash. Nov. 8, 2012).

47. *Id.* at *1. The “rubble-on-the-ground” standard is substantially the same as the “cave in” standard used in other jurisdictions.

48. Queen Anne Park Homeowners Ass’n v. State Farm Fire & Cas. Co., 763 F.3d 1232 (9th Cir. 2014).

49. Queen Anne Park Homeowners Ass’n v. State Farm Fire & Cas. Co., 352 P.3d 790, 791 (Wash. 2015).

50. *Id.* at 794 (footnote omitted).

51. *Id.*

52. *Id.*

53. *Oboikovitz v. Am. Family Mut. Ins. Co.*, 2015 WL 3458316, at *4 (Wis. Ct. App. June 2, 2015).

54. *Id.* at *1.

rejected coverage because the homeowners could not show that any damage that occurred during construction “materially impaired” the “basic structure” and “substantial integrity” of the home.⁵⁵

In contrast to *Oboikovitz*, the Court of Appeals of Kentucky adopted a strict “cave in” definition.⁵⁶ In *Kentucky Growers Insurance Co. v. Thiele*, the plaintiff sued its insurer for declining to cover structural damage to a home due to a termite infestation.⁵⁷ The insurer argued that the house had not “collapsed,” because, although the house suffered from bulging and sinking walls, there was no actual cave in.⁵⁸ The Court of Appeals examined Kentucky precedent and ruled that, because the structure was still standing, there had been no collapse.⁵⁹

Vermont adopted an intermediate standard, defining collapse as including a risk of “imminent collapse.”⁶⁰ The case involved structurally damaged balconies that the insurer refused to cover because, although there was decay, the balconies had not “collapsed.”⁶¹ The Supreme Court of Vermont decided to take a middle ground and ruled that “a risk of direct physical loss involving collapse” means a risk of “imminent collapse.”⁶²

V. COVERED PROPERTY

A. Structures

In *Drury Co. v. Missouri United School Insurance Counsel*,⁶³ a school district’s contractor entered into a subcontract with Drury to install a cementitious roof deck known as Tectum.⁶⁴ After Drury began installing the Tectum, rain and other precipitation (including ice storms) occurred and the Tectum suffered moisture damage.⁶⁵ The school district’s insurer denied the claim.⁶⁶ The policy’s builder’s risk section covered “all materials, equipment, fixtures installed or to be installed, . . . at a Member’s building project.”⁶⁷ The builder’s risk section also covered rain and snow damage to covered property “in the open.”⁶⁸ The Tectum was “cov-

55. *Id.* at *10.

56. *Kentucky Growers Ins. Co. v. Thiele*, 2015 WL 860465 (Ky. Ct. App. Feb. 27, 2015).

57. *Id.* at *1.

58. *Id.* at *2.

59. *Id.* at *4.

60. *Equinox on the Battenkill Mgmt. Ass’n v. Phila. Indem. Ins. Co.*, 2015 WL 4743065, at *6 (Vt. Aug. 7, 2015).

61. *Id.* at *1–2.

62. *Id.* at *6.

63. 455 S.W.3d 30 (Mo. Ct. App. 2014).

64. *Id.* at 33.

65. *Id.*

66. *Id.*

67. *Id.* at 35.

68. *Id.* at 36.

ered property” because it was material “installed or to be installed” at the building project and was “out in the open” on the roof.⁶⁹ Therefore, the precipitation damage to the Tectum was covered.⁷⁰

In *Trout Brook South Condominium Ass’n v. Harleysville Worcester Insurance Co.*,⁷¹ Trout Brook’s multiple condominium buildings were covered by a replacement cost value (RCV) policy issued by Harleysville.⁷² A hail storm caused damage to the buildings.⁷³ Trout Brook demanded that Harleysville pay to replace the entire roofs.⁷⁴ Harleysville refused, arguing that there was no coverage for undamaged shingles.⁷⁵ The federal court for the District of Minnesota rejected this argument, finding that it was “predicated on an unsupported definition of the term ‘covered property.’”⁷⁶ By Harleysville’s logic, each individual roof shingle was “covered property,” so there was no obligation to pay for shingles that were not damaged by hail.⁷⁷ The court rejected this reading of the policy as too narrow and found instead that each building was “covered property,” not individual attached or appurtenant items (such as shingles or siding).⁷⁸

B. Insurable Interest

In *Fairchild v. Bilbo*,⁷⁹ the Fairchilds entered into a lease-purchase agreement to lease/sell their home to the Bilbos.⁸⁰ Both maintained insurance on the structure and dwelling. A tornado destroyed the house.⁸¹ The Bilbos sued for insurance proceeds and the Fairchilds counterclaimed arguing, among other things, that the Bilbos lacked an insurable interest in the property.⁸² The Court of Appeals of Mississippi rejected this argument, explaining that “[a]ll that is required for one to have an insurable interest in property is that the insured will suffer an economic loss if the property is destroyed,” and that was true when the Bilbos took out their insurance policy.⁸³ The court also noted “the general rule is that [both] the lessor and lessee have an insurable interest in leased property.”⁸⁴

69. *Id.*

70. *Id.* at 36–37.

71. 995 F. Supp. 2d 1035 (D. Minn. 2014).

72. *Id.* at 1037.

73. *Id.*

74. *Id.*

75. *Id.* at 1038.

76. *Id.* at 1042.

77. *Id.*

78. *Id.*

79. 166 So. 3d 601 (Miss. Ct. App. 2015).

80. *Id.* at 604.

81. *Id.* at 604–05.

82. *Id.* at 606.

83. *Id.* (citing *Necaise v. U.S.A.A. Cas. Co.*, 644 So. 2d 253, 258 (Miss. 1992)).

84. *Id.* (citation omitted).

In *Colorado Hospitality Service, Inc. v. Auto-Owners Insurance Co.*,⁸⁵ a hail storm damaged the Ramada Englewood, which was owned by the Arapahoe County Public Airport Authority (ACPAA), leased to Centennial Hotel, LLC, and managed by Colorado Hospitality.⁸⁶ Colorado Hospitality sought coverage under its policy on the hotel.⁸⁷ Auto-Owners denied the claim, arguing that Colorado Hospitality did not have an insurable interest because it had no ownership interest in the hotel.⁸⁸ The federal court for the District of Colorado found “[a]scertaining the existence of an insurable interest focuses on the potential for economic loss, not ownership of the property that is damaged.”⁸⁹ Thus, the court concluded that Colorado Hospitality’s lack of ownership interest in the hotel was not dispositive.⁹⁰

In *Accident Cleaners, Inc. v. Universal Insurance Co.*,⁹¹ the Florida District Court of Appeal held that “a post-loss assignee [of an insurance claim was] not required to have an insurable interest [in the property] at the time of loss.”⁹² The court found that Florida’s statute governing enforceability of property insurance policies, Section 627.405, requires that the policyholder have an insurable interest at the time of loss and that the policyholder’s interest is imputed to the post-loss assignee.⁹³

VI. EXCLUSIONS

A. Causation

1. Generally

In *Amish Connection, Inc. v. State Farm Fire and Casualty Co.*,⁹⁴ the Supreme Court of Iowa addressed coverage under a rain exclusion in an insurance policy. The insured leased space in a shopping mall.⁹⁵ A heavy rainstorm caused no damage to the roof, windows, or exterior walls of the building.⁹⁶ The next morning, however, the mall maintenance staff discovered a hidden, corroded drainpipe had failed, flooding the back room of the insured’s rented space and soaking the carpet in much of the front showroom. The flooding caused substantial damage to the insured’s premises and prop-

85. 2015 WL 6098639 (D. Colo. Oct. 16, 2015).

86. *Id.* at *1.

87. *Id.*

88. *Id.* at *2.

89. *Id.* (citation omitted).

90. *Id.* at *3.

91. 2015 WL 1609973 (Fla. Dist. Ct. App. Apr. 10, 2015).

92. *Id.* at *1.

93. *Id.* at *2; see FLA. STAT. ANN. § 627.405 (2013).

94. 861 N.W.2d 230 (Iowa 2015).

95. *Id.* at 232.

96. *Id.* at 232–33.

erty.⁹⁷ The insurer denied the claim based on exclusions for “rust, corrosion and deterioration” and damage caused by rain.⁹⁸

In the subsequent suit, the insurer moved for summary judgment based on the rain exclusion.⁹⁹ The insured asserted that “the water damaging the interior [of the rented space] was no longer ‘rain,’ and the actual cause of the loss was the failure of the drainage pipe[.]”¹⁰⁰ The Iowa Supreme Court held that damage caused by “rainwater” is “caused by rain.”¹⁰¹ The court noted that “[w]ater does not damage property while merely falling through the air, but only after it strikes a surface.”¹⁰²

2. Anti-Concurrent/Anti-Sequential Causation

In *JAW The Pointe, L.L.C. v. Lexington Insurance Co.*,¹⁰³ the Texas Supreme Court held that, as a matter of first impression, the cost of demolishing and rebuilding an apartment complex to comply with city ordinances was excluded under an anti-concurrent-causation clause.¹⁰⁴ The insurance policy provided ordinance and law coverage, but only if the property damage that triggered the enforcement of the ordinances was covered.¹⁰⁵ In *JAW The Pointe, L.L.C.*, the property damage that triggered the ordinances resulted from both wind and flood.¹⁰⁶ The policy covered wind, but excluded flood with anti-concurrent-causation language.¹⁰⁷

The insured asserted the covered wind damage was sufficient to trigger enforcement of the ordinances so the wind damage was a “separate and independent” covered cause of loss.¹⁰⁸ In rejecting that argument, the Texas Supreme Court noted that the evidence conclusively established that the wind damage and the flood damage “combined to cause the city to enforce the ordinances[.]”¹⁰⁹ Thus, the anti-concurrent-causation clause precluded coverage.¹¹⁰

97. *Id.* at 233.

98. *Id.* at 234.

99. *Id.*

100. *Id.*

101. *Id.* at 236–37.

102. *Id.* at 237.

103. 460 S.W.3d 597 (Tex. 2015).

104. *Id.* at 599.

105. *Id.* at 606.

106. *Id.* at 607.

107. *Id.* at 604.

108. *Id.* at 606.

109. *Id.* at 609.

110. *Id.* at 609–10.

B. *Earth Movement*

In *YMCA of Pueblo v. Secura Insurance Cos.*,¹¹¹ the federal court for the District of Colorado held that an earth movement exclusion precluded coverage for damage to a pool in the YMCA facility.¹¹² Two days after discovering a leaking water line in a locker room, YMCA personnel “discovered and reported that the pool deck near the therapy pool and the surrounding block walls had shifted and collapsed.”¹¹³ Secura denied coverage based on an earth-movement exclusion.¹¹⁴ At trial, the parties agreed that soil settlement caused the damage, including causing water leaks, which compounded the soil settlement.¹¹⁵ The YMCA argued that the policy “provide[d] coverage for losses caused by water leaks when [the] leaks are caused by ‘settling, cracking, shrinking or expansion[.]’”¹¹⁶ The court held that the “settling, cracking, shrinking or expansion” clause “can apply only to . . . damage *not* caused by earth movement; when such damage *is* caused by earth movement, [the policy’s anti-concurrent causation provision] controls[.]”¹¹⁷

In *Stankova v. Metropolitan Property and Casualty Insurance Co.*,¹¹⁸ a massive wildfire destroyed the Stankovas’ detached garage and all the vegetation on a nearby hillside, but not the family’s house.¹¹⁹ One month later, a mudslide on the hillside destroyed the house.¹²⁰ Metropolitan agreed to cover the garage, but denied coverage for the house, relying on an earth movement exclusion.¹²¹ The Ninth Circuit found that, under Arizona’s definition of direct and proximate cause, “it [was] possible that the fire directly caused Stankova’s loss in ‘an unbroken sequence and connection between’ the wildfire and the destruction of the house.”¹²² The court held that “[a] reasonable factfinder could conclude that the destruction of the house was caused by the fire, which likely caused the mudslide, ‘the operation and influence of which could not be avoided.’”¹²³

C. *Vacancy*

In *Commerce Bank v. West Bend Mutual Insurance Co.*,¹²⁴ the policy contained a “standard mortgage clause” or “union mortgage clause,” allowing

111. 2015 WL 535953 (D. Colo. Feb. 6, 2015).

112. *Id.* at *5.

113. *Id.* at *1 (citation omitted).

114. *Id.* at *2.

115. *Id.*

116. *Id.* at *5.

117. *Id.*

118. 788 F.3d 1012 (9th Cir. 2015).

119. *Id.* at 1013.

120. *Id.*

121. *Id.* at 1014.

122. *Id.* at 1016 (citation omitted).

123. *Id.* (citation omitted).

124. 2015 WL 6498468 (Minn. Oct. 28, 2015).

the mortgage holder to recover in some circumstances even if the policyholder failed to comply with policy conditions.¹²⁵ The policy also contained a vacancy provision that excluded coverage for vandalism if the building was vacant for more than sixty days before the loss.¹²⁶ When Commerce Bank was added to the policy, the building had been vacant for more than sixty days.¹²⁷ Commerce Bank was aware of the vacancy, but West Bend was not.¹²⁸ Commerce Bank argued that the owner's failure to prevent the property from being vacant for sixty days constituted an "act" or "failure to comply with the terms of the policy."¹²⁹ The Supreme Court of Minnesota held that when the standard mortgage clause and the vacancy clause are read together, the mortgagee has coverage if there is a vacancy because of the acts of the owner.¹³⁰ If, however, "the vacancy is not due to the acts of the owner, the mortgagee does not have coverage."¹³¹

In *Southern Trust Insurance Co. v. Phillips*,¹³² a policy contained an exclusion for loss caused by "vandalism and malicious mischief, theft or attempted theft" if the dwelling was vacant.¹³³ The insurer denied coverage for an arson loss.¹³⁴ The Court of Appeals of Tennessee found that the policy consistently made distinctions between fire and vandalism and malicious mischief.¹³⁵ The vacancy exclusion excluded only "vandalism or malicious mischief, theft or attempted theft," which would lead the average policyholder to conclude that fire (and arson) was covered, while vandalism of a vacant dwelling was not.¹³⁶

In contrast, in *Botee v. Southern Fidelity Insurance Co.*,¹³⁷ the Florida District Court of Appeal held that the policy's vacancy exclusion, which excluded coverage for property damage caused by "vandalism and malicious mischief," included "arson."¹³⁸

125. *Id.* at *1.

126. *Id.* at *2.

127. *Id.*

128. *Id.*

129. *Id.* at *4.

130. *Id.* at *6.

131. *Id.*

132. 2015 WL 3612989 (Tenn. Ct. App. June 10, 2015).

133. *Id.* at *1.

134. *Id.*

135. *Id.* at *7.

136. *Id.*; see also *Hung Van Ong v. Fire Ins. Exch.*, 185 Cal. Rptr. 3d 524, 531 (App. Ct. 2015) (holding that damage caused by warming fire started by a transient that accidentally spread to other parts of the property did not result from vandalism or malicious mischief within meaning of vacancy exclusion).

137. 162 So. 3d 183 (Fla. Dist. Ct. App. 2015).

138. *Id.* at 188.

D. Dishonest Acts

In *United Specialty Insurance Co. v. Barry Inn Realty Inc.*,¹³⁹ a New York federal court considered the “entrustment” requirement of a “dishonest or criminal acts” exclusion.¹⁴⁰ The insured Barry Inn Realty entered into a lease where the tenant was to use a covered building only as a bar/restaurant.¹⁴¹ Unbeknown to Barry, the tenant grew marijuana, which caused significant damage to the property.¹⁴² The insurer denied coverage based on a “dishonest or criminal acts” exclusion that precluded coverage for “loss or damage caused directly or indirectly by dishonest or criminal acts by anyone to whom the insured entrusted the property for any purpose.”¹⁴³ The only disputed issue was whether Barry “entrusted” the property to the tenant.¹⁴⁴ The court held for the insurer, finding that the parties’ course of dealing established that Barry had accepted the tenant’s status and identity, thus establishing entrustment.¹⁴⁵ It was immaterial that the tenant had an undisclosed intent to grow marijuana on the premises.¹⁴⁶

E. Faulty Workmanship

In *Broome County v. Travelers Indemnity Co.*,¹⁴⁷ work during the construction of a parking garage under one of the insured’s buildings caused silica dust to migrate up an elevator shaft and disperse into the floors of the building.¹⁴⁸ The insurer denied coverage for the loss, based in part on the policy’s faulty workmanship exclusion.¹⁴⁹ Although the insured conceded that the loss was caused by inadequate protective barriers, the insured argued that the exclusion was ambiguous because faulty workmanship can relate to either “the flawed quality of a finished product” or a “flawed process” in the construction work.¹⁵⁰

The court acknowledged these two possible definitions of “workmanship,” but nevertheless found no ambiguity.¹⁵¹ The court concluded “the average insured would reasonably expect the exclusion to apply to faulty workmanship whether it was caused by a flawed process or measured by the flawed quality of the finished product.”¹⁵²

139. 2015 WL 5244664 (S.D.N.Y. Sept. 8, 2015).

140. *Id.* at *5–7.

141. *Id.* at *1.

142. *Id.*

143. *Id.* at *1–2.

144. *Id.* at *4–5.

145. *Id.* at *6–7.

146. *Id.* at *7.

147. 125 A.D.3d 1241 (N.Y. App. Div. 2015).

148. *Id.* at 1241.

149. *Id.*

150. *Id.* at 1243.

151. *Id.*

152. *Id.*

In *Lion Oil Co. v. National Union Fire Insurance Co.*,¹⁵³ the issue was whether policies providing contingent time element coverage were triggered by a rupture at a Lion Oil supplier's pipeline that caused Lion Oil to suffer contingent business interruption losses.¹⁵⁴ The rupture occurred along a defective seam weld in the supplier's pipeline.¹⁵⁵ National Union argued that "all losses suffered by Lion Oil constituted the 'cost of making good' faulty workmanship" and were therefore excluded under the policy's faulty workmanship exclusion.¹⁵⁶ The Western District of Arkansas held that the faulty workmanship exclusion was limited to the cost of making good faulty work—contingent financial loss and consequential damages stemming from the faulty work were not excluded.¹⁵⁷

Moda Furniture, LLC v. Chicago Title Land Trust Co.,¹⁵⁸ analyzed two lines of cases interpreting and applying ensuing loss clauses included in faulty workmanship exclusions. In *Moda*, the insured's landlord contracted to have the roof replaced at the insured's leased business premises.¹⁵⁹ When the roofers removed the roof, they did not protect the interior of the building from falling roof debris, causing approximately \$450,000 in damage to the insured's inventory.¹⁶⁰ The Appellate Court of Illinois acknowledged that the insured's claims triggered the faulty workmanship exclusion.¹⁶¹ As to whether the insured's loss fell within the ensuing loss exception, the language that was "the crux of the dispute between the parties can be described as obscure and less than clear."¹⁶² After analyzing cases from various jurisdictions, the court acknowledged that "other courts might determine that the damage to [the insured's] inventory was too closely connected to the roofer's alleged faulty workmanship" to fall within the ensuing loss exception.¹⁶³ But, because an interpretation in favor of the insured was also reasonable, the provision was ambiguous, and the court allowed coverage.¹⁶⁴

153. 2015 WL 5305231 (W.D. Ark. Sept. 10, 2015) (applying Arkansas law).

154. *Id.* at *1.

155. *Id.*

156. *Id.* at *6. The court stated that National Union was relying "on a 'but for' analysis, arguing that Lion Oil would not have sustained the contingent business interruption losses but for the defective welds." *Id.* Lion Oil argued that the faulty workmanship exclusion could not "apply to Lion Oil's contingent financial loss because Lion Oil is not making a claim for any costs it incurred to 'make good' or repair the faulty workmanship in the . . . pipeline." *Id.*

157. *Id.*

158. 35 N.E.3d 1139 (Ill. App. Ct. 2015).

159. *Id.* at 1141.

160. *Id.*

161. *Id.*

162. *Id.* at 1146.

163. *Id.* at 1155.

164. *Id.*

F. *Mold and Water Damage*

In *Wheeler v. Allstate Insurance Co.*,¹⁶⁵ the insured owned a seasonal cabin that was unoccupied during the 2010–2011 winter. In early 2011, a sink in the lower level of the cabin began to leak.¹⁶⁶ Months later, visitors to the cabin discovered four to five inches of water in the basement and extensive mold throughout the cabin.¹⁶⁷ Allstate denied the claim based on the policy’s seepage exclusion, and the insured sued.¹⁶⁸ The district court, applying Utah law, found the seepage/leakage exclusion to be clear, unambiguous, and applicable.¹⁶⁹ The insured argued that the “sudden and accidental” exception to the policy’s latent defect exclusion provided coverage for the loss notwithstanding the seepage/leakage exclusion.¹⁷⁰ The court also rejected this argument, stating that “loss can start as a sudden and accidental escape of water, but if ignored and allowed to continue, the resulting damage is NOT sudden and accidental.”¹⁷¹

G. *Ensuing Loss*

In *Performing Arts Community Improvement District v. ACE American Insurance Co.*,¹⁷² the district court, applying Missouri law, held that the failure of a retaining wall during installation of flowable backfill was not covered under an ensuing loss exception to a design error exclusion.¹⁷³ The insured, the Performing Arts Community Improvement District (PACID), conceded for purposes of summary judgment that the structural engineer committed a design error. However, PACID argued that the resulting excessive lateral pressure was the immediate cause of the wall failure, rather than the design error.¹⁷⁴ The court found the ensuing loss exception applied when there are two events: first, an event that is excluded from coverage that causes an excluded loss; followed by a distinct, non-excluded event, that causes an ensuing loss.¹⁷⁵ Applying this interpretation to the facts, the court concluded that the exception did not apply because the wall failure involved “only one event and only one loss, so there [was] nothing ‘ensuing.’”¹⁷⁶

165. 2015 WL 5714392 (D. Utah. Oct. 20, 2015).

166. *Id.* at *1.

167. *Id.*

168. *Id.*

169. *Id.* at *7.

170. *Id.*

171. *Id.* at *8.

172. 2015 WL 3491292 (W.D. Mo. June 3, 2015).

173. *Id.* at *6.

174. *Id.* at *2.

175. *Id.* at *4.

176. *Id.*

In *Broome County v. Travelers Indemnity Co.*,¹⁷⁷ faulty workmanship, namely the absence of protective barriers to prevent construction dust from migrating into the building, led to the dispersal of dust throughout the building.¹⁷⁸ The New York Appellate Division held that the ensuing loss exception exclusion did not apply because the loss, i.e., the spread of dust, was directly related to the original excluded risk, i.e., the failure to erect adequate dust barriers.¹⁷⁹

In *Lantheus Medical Imaging, Inc. v. Zurich American Insurance Co.*,¹⁸⁰ Lantheus sought coverage for its business income loss during a fifteen-month shutdown of a nuclear reactor for repairs after the reactor vessel wall ruptured as it was being refilled following a power outage.¹⁸¹ According to Lantheus' experts, a series of chemical processes had weakened the wall, leaving it susceptible to a breach.¹⁸² Refilling the vessel caused a surge in hydrostatic pressure that ruptured the wall. The policy contained an anti-concurrent cause exclusion for "loss or damage resulting from" "corrosion."¹⁸³ The Southern District of New York concluded that the chemical processes that weakened the wall constituted "corrosion," and thus the corrosion exclusion precluded coverage unless Lantheus could show an ensuing loss.¹⁸⁴

According to the court, the plain language of the exception called for a "narrow inquiry," namely whether the excluded peril—corrosion—resulted in a covered cause of loss.¹⁸⁵ Lantheus argued that the covered cause of loss was the sudden increase in hydrostatic pressure.¹⁸⁶ The court rejected that argument because the hydrostatic pressure did not result from the corrosion; rather, it was the result of refilling the vessel after the power outage.¹⁸⁷

In *Moda Furniture, LLC v. Chicago Title Land Trust Co.*,¹⁸⁸ a contractor's failure to cover a roof opening in the course of repairs allowed debris to fall onto and damage the insured's inventory of rugs, temporarily putting the insured out of business.¹⁸⁹ The policy excluded loss caused by faulty workmanship, but contained an ensuing loss exception.¹⁹⁰ One

177. 6 N.Y.S.3d 300 (App. Div. 2015).

178. *Id.* at 303.

179. *Id.* at 304. The ensuing loss exception is neither quoted nor paraphrased in the court's opinion.

180. 2015 WL 1914319 (S.D.N.Y. Apr. 28, 2015).

181. *Id.* at *1.

182. *Id.* at *2–3.

183. *Id.* at *2.

184. *Id.* at *14–16.

185. *Id.* at *17.

186. *Id.* at *18.

187. *Id.*

188. 35 N.E.3d 1139 (Ill. App. Ct. 2015).

189. *Id.* at 1141.

190. *Id.*

issue on appeal was whether Moda's complaint alleged both a "Covered Cause of Loss" and "resulting loss or damage."¹⁹¹ Given the policy's "broad" definition of "Covered Cause of Loss," the Appellate Court of Illinois concluded that there were at least two plausible ways in which Moda's allegations implicated the ensuing loss exception.¹⁹² First, the physical damage to Moda's inventory could be a "Covered Cause of Loss" that led to "resulting loss or damage" in the form of an economic injury.¹⁹³ The court believed this reasoning was supported by case law describing an ensuing loss as loss "to *other* property wholly separate from the defective property itself."¹⁹⁴ Second, Moda's allegations supported the view that the falling dirt and debris is a "Covered Cause of Loss" that resulted in physical damage to Moda's inventory.¹⁹⁵ As the ensuing loss exception was ambiguous,¹⁹⁶ the court held there was an ensuing loss.¹⁹⁷

In *National Railroad Passenger Corp. v. Arch Specialty Insurance Co.*,¹⁹⁸ the Southern District of New York held that damage caused by chlorides left behind by brackish seawater that had inundated Amtrak's tunnels during Sandy was not an "ensuing loss."¹⁹⁹ Under New York law, the court observed, an ensuing loss is "collateral or subsequent" to an excluded or sublimited loss.²⁰⁰ In order for there to be an ensuing loss, the flood must cause damage that, in turn, "creates a separate damage-causing agent" that brings about the "ensuing loss."²⁰¹ The court held that chloride was not a separate damage-causing agent created by damage from the flood; while the chloride did not exist until the floodwaters were pumped out of the tunnels, it was still caused by flood.²⁰² The "chloride damage" was not an ensuing loss because it was "directly related to the original [sublimited] risk," i.e., flood.²⁰³

In *Peek v. American Integrity Insurance Co. of Florida*,²⁰⁴ the Peeks claimed that the Chinese drywall emitted a noxious sulfur odor that forced them to vacate the home and resulted in corrosion and deteriora-

191. *Id.* at 1153.

192. *Id.* at 1154.

193. *Id.*

194. *Id.* (quoting *Swire Pac. Holdings v. Zurich Ins. Co.*, 139 F. Supp. 2d 1374, 1380 (S.D. Fla. 2001)).

195. *Id.* at 1154–55.

196. *Id.* at 1146 (describing the ensuing loss exception as "obscure and less than clear").

197. *Id.* at 1155.

198. 2015 WL 4940568 (S.D.N.Y. Aug. 3, 2015).

199. *Id.* at *8–9.

200. *Id.* at *8 (citing *Narob Dev. Corp. v. Ins. Co. of N. Am.*, 631 N.Y.S.2d 155, 156 (App. Div. 1995)).

201. *Id.*

202. *Id.*

203. *Id.* at *9.

204. 2015 WL 5616294, at *1 (Fla. Dist. Ct. App. Sept. 25, 2015).

tion in their air conditioning system and electrical components.²⁰⁵ The Peeks argued that the loss of use of their home due to odor and the damage to metals and electronics were ensuing losses “separate from any defective materials, pollutants, or corrosion.”²⁰⁶ The court disagreed, noting the odor and corrosion were directly related to the defective dry-wall, so they could not be covered as “ensuing losses.”²⁰⁷ To hold otherwise, the court explained, would “allow the ensuing loss provision to completely eviscerate and consume the design defect exclusion.”²⁰⁸

In *Divine Motel Group, LLC v. Rockbill Insurance Co.*,²⁰⁹ the Middle District of Florida held that damage to the interior of the insured’s hotel from Tropical Storm Debby was not covered under an ensuing loss exception. Wind-driven rain from the storm entered the building due to, among other things, inadequate maintenance, faulty design, and deficient repairs.²¹⁰ The court held that Divine could not rely on the ensuing loss exception because, for the exception to apply, the inadequate maintenance, faulty design, and deficient repairs had to “result in” a Covered Cause of Loss.²¹¹ While those perils resulted in the intrusion of rain from the storm, that intrusion was not a “covered cause of loss” unless the rain entered through an opening in the building envelope caused by a “Covered Cause of Loss.”²¹² The openings through which the rain entered were caused by inadequate maintenance, faulty design, or deficient repairs.²¹³ “The key factor missing from this circular argument,” the court explained, “is the identification of any cause of loss that is *not* excluded from the Policy’s coverage.”²¹⁴

VII. DAMAGES

A. *Hold Back*

In *Sherard v. Safeco Insurance Co. of America*,²¹⁵ both parties sought summary judgment on the issue of whether the assignment of the RCV hold-

205. *Id.*

206. *Id.* at *4.

207. *Id.*

208. *Id.* (citing *Swire Pac. Holdings, Inc. v. Zurich Ins. Co.*, 845 So. 2d 161, 167–68 (Fla. 2003)).

209. 2015 WL 4095449 (M.D. Fla. July 7, 2015).

210. *Id.* at *8.

211. *Id.* at *9.

212. *Id.*

213. *Id.*

214. *Id.*; see *Liberty Mut. Fire Ins. Co. v. Martinez*, 157 So. 3d 486 (Fla. Dist. Ct. App. 2015) (damage to a pool deck, rock garden, and waterfall caused when, during a tropical storm, subsurface water accumulated underneath the pool exerted hydrostatic pressure that caused the pool shell to lift out of the ground was not an ensuing loss).

215. 2015 WL 5918397, at *5 (W.D. Wash. Oct. 9, 2015).

back was valid.²¹⁶ The Sherards suffered a fire and were issued an actual cash value (ACV) payment. They purportedly assigned their RCV claim to their adult daughter.²¹⁷ The court agreed that Washington allowed post-loss assignments, reasoning that after the events giving rise to the insurance company's liability have occurred, the insurance company's risk could not be increased by a change in the insured's identity.²¹⁸ The court found, however, that the "requirement that an assignment must be post-loss is necessary but not sufficient where there exists an additional prerequisite to recovery."²¹⁹ Repairing or replacing was an additional prerequisite to recovering the holdback.

B. *Overhead and Profit*

In *Tuircuit v. Wright National Flood Insurance Co.*,²²⁰ the insured sued its flood insurer for flood damage that occurred as a result of Hurricane Isaac.²²¹ The Eastern District of Louisiana held that, when determining the ACV, a court "may use an estimate . . . taking into consideration actual expenses incurred to ensure the validity of that estimate."²²² The court concluded that, since the insureds hired a general contractor to initiate repairs, they had incurred or would incur the expense of a general contractor, and an award of overhead and profit was appropriate in calculating the ACV.²²³

In *Trudel v. American Family Mutual Insurance Co.*,²²⁴ the insureds sued their insurer for damages resulting from a hailstorm.²²⁵ The federal court for the District of Arizona held that, if the cost to repair and replace the damaged property was likely to require the services of a general contractor, overhead and profit should be included in determining the ACV of the claim.²²⁶

C. *Matching*

In *Alessi v. Mid-Century Insurance Co.*,²²⁷ hail damaged vinyl siding on the northern elevation of an insured's home.²²⁸ The insured sought to replace the siding on all four elevations of the home, and the insurer refused.²²⁹

216. *Id.* at *5.

217. *Id.* at *3.

218. *Id.*

219. *Id.*

220. 2014 WL 5685222 (E.D. La. Nov. 4, 2014).

221. *Id.* at *1.

222. *Id.* (citing *Stevens v. Allstate Ins. Co.*, 2014 WL 2882957, at *4 (E.D. La. 2014)).

223. *Tuircuit*, 2014 WL 5685222, at *1; see *Dwyer v. Fid. Nat'l Prop. & Cas. Ins. Co.*, 428 F. App'x 270, 271 (5th Cir. 2011).

224. 2014 WL 4053405 (D. Ariz. Aug. 15, 2014).

225. *Id.* at *1.

226. *Id.* at *7.

227. 464 S.W.3d 529 (Mo. Ct. App. 2015).

228. *Id.* at 530.

229. *Id.*

The insurer argued that the insurance policy limited coverage to the “replacement cost of that part of the building damaged for equivalent construction and use of the same premises.”²³⁰ In rejecting the insurer’s argument, the Missouri Court of Appeals held that the term “equivalent requires that the replacement be equal in value and virtually identical.”²³¹ The case was remanded for a jury to determine: (1) whether there was siding available on the market that is “virtually identical” to the siding on the undamaged elevations, or (2) “if a house with mismatched siding is equal in value to a house with matching siding.”²³²

D. *Other Insurance*

In *Moroney Body Works, Inc. v. Central Insurance Cos.*,²³³ a fire began at the insured’s facility and spread to a custom-built bookmobile the insured recently completed for a customer.²³⁴ The insured had two policies in place at the time of the fire: a commercial property policy and a garage policy.²³⁵ The insured settled with the garage insurer. The property insurer denied coverage under an “other insurance” clause in the policy.²³⁶ Because both policies insured “the same insured’s interest . . . in the same property . . . against the same risk,” the Appeals Court of Massachusetts held that the commercial insurer’s “other insurance” provision applied to exclude coverage until the garage policy limits were exhausted.²³⁷

VIII. OBLIGATIONS AND RIGHTS OF THE PARTIES

A. *Misrepresentation*

1. Misrepresentation Sufficient to Void the Policy or Decline Coverage

In *AIG Centennial Insurance Co. v. O’Neill*,²³⁸ an insured’s misrepresentation of the purchase price of a sport fishing boat was a material misrepresentation that voided the policy ab initio under the federal maritime doctrine of utmost good faith.²³⁹ The insured bought the boat for \$2.125 million, but listed the purchase price as \$2.35 million on the insurance application.²⁴⁰ The insured submitted a claim to AIG, which sued,

230. *Id.* at 531–32.

231. *Id.* at 532 (internal quotations omitted).

232. *Id.* at 533.

233. 35 N.E.3d 397 (Mass. App. Ct. 2015).

234. *Id.* at 398.

235. *Id.*

236. *Id.*

237. *Id.* at 400.

238. 782 F.3d 1296 (11th Cir. 2015) (applying Pennsylvania law).

239. *Id.* at 1304–05.

240. *Id.* at 1300.

seeking to void the policy ab initio.²⁴¹ On appeal, the Eleventh Circuit voided the policy because the insured misrepresented the purchase price by “almost a quarter-million dollars,” and the insurer offered testimony “that a vessel’s purchase price would hold sway over the mind of an insurer when determining whether to assume the underwriting risk.”²⁴²

The insurer in *Encompass Home & Auto Insurance Co. v. Harris*²⁴³ also sought to void a policy ab initio due to misrepresentations by the insureds in the application. The insureds purchased a foreclosure property for \$7,500.²⁴⁴ They did not advise the insurance agent how much they paid for the home nor did they provide photographs of the property.²⁴⁵ They represented to the agent that the home was updated and would be their primary residence.²⁴⁶ The application, which listed the replacement value as \$180,000, was signed by the insureds.²⁴⁷ Approximately a month after it was added to the insured’s preexisting policy, a fire occurred.²⁴⁸ The court determined that the insureds misrepresented that the home “was in ‘move-in’ condition, that they had completed a number of renovations, and that the property was their primary residence.”²⁴⁹ The failure to disclose the purchase price was also a misrepresentation, “particularly when considered in connection with the Defendants’ other misrepresentations.”²⁵⁰ These misrepresentations were material because they led the insurer to make a higher estimate of the property’s RCV than its market value warranted and led the insurer to issue the policy even though it was contrary to its underwriting guidelines to insure a home that was not owner-occupied.²⁵¹ The court voided the policy ab initio with respect to this property.²⁵²

2. Misrepresentation Insufficient to Void the Policy or Cancel Coverage

In *Metropolitan Property & Casualty Insurance Co. v. Calvin*,²⁵³ the insured’s previous home was destroyed by a fire.²⁵⁴ His insurer paid the claim, and he rebuilt on the same spot.²⁵⁵ When reconstruction was almost complete, the insured “spoke with an agent of State Farm Insurance to discuss

241. *Id.* at 1302.

242. *Id.* at 1304.

243. 2015 WL 1242459, at *1 (D. Md. Mar. 17, 2015).

244. *Id.*

245. *Id.* at *1–2.

246. *Id.*

247. *Id.* at *2–3.

248. *Id.* at *3.

249. *Id.* at *8.

250. *Id.*

251. *Id.*

252. *Id.* at *9.

253. 802 F.3d 933 (8th Cir. 2015).

254. *Id.* at 935.

255. *Id.* at 935–36.

homeowner's insurance," but the agent advised "that State Farm would not insure him because of the prior fire loss."²⁵⁶ The insured sought insurance from another agent.²⁵⁷ The insurer issued a policy covering the home in 2007, and the rebuilt home was destroyed by a fire four years later. The insurer sought to void the policy based on material misrepresentations in the application.

The insured testified that he had informed the agent that he had suffered a prior fire at the same location.²⁵⁸ The final application, however, did not disclose the prior fire.²⁵⁹ Although the application was signed, the space next to the question about prior losses, designated for the insured to initial, was blank.²⁶⁰ The question asking whether the insured had "any coverage declined, cancelled or non-renewed during the last 3 years" was marked "no."²⁶¹ The insurer contended that both these answers constituted material misrepresentations sufficient to void the policy.²⁶² Reversing summary judgment for the insurer, the Eighth Circuit determined that it was possible that the agent misstated the insured's response to the question about prior loss and that the State Farm agent's statement that State Farm would not issue a policy based on the prior loss did not clearly constitute a declination of coverage, thus creating a genuine issue of material fact warranting further proceedings.²⁶³

In *Hilborn v. Metropolitan Group Property & Casualty Insurance Co.*,²⁶⁴ the insureds' home burned down in what appeared to have been an intentionally set fire.²⁶⁵ The insurer believed that the wife was involved in causing the fire and that the husband was involved in making material misrepresentations regarding personal property losses sustained in the fire.²⁶⁶ The court held that the jury's verdict against the husband was against the clear weight of the evidence and granted a new trial only as to the husband.²⁶⁷ The federal court for the District of Arizona was "concerned about a potentially orchestrated plan" by the wife and recognized that a new trial could result in the husband receiving an insurance payment

256. *Id.* at 936.

257. *Id.*

258. *Id.*

259. *Id.*

260. *Id.*

261. *Id.* at 938.

262. *Id.* at 939.

263. *Id.*

264. 306 F.R.D. 651 (D. Idaho 2015). The facts relevant to this decision are set forth in the court's prior opinion on certain motions. *See Hilborn v. Metro. Group Prop. & Cas. Ins. Co.*, 2014 WL 1277140, at *1 (D. Idaho Mar. 27, 2014).

265. *Hilborn*, 306 F.R.D. at 653.

266. *Id.* at 653–55.

267. *Id.*

that would indirectly benefit his wife.²⁶⁸ The court emphasized, however, that “Idaho law provides that under fire policies, the actions of each insured must be considered separately and any penalty or exclusion based on a material misrepresentation applies only to the guilty insured.”²⁶⁹

3. Procedural Considerations

In *Henriquez-Disla v. Allstate Property & Casualty Insurance Co.*,²⁷⁰ the Eastern District of Pennsylvania concluded that an insurer’s “affirmative defense that [the insureds] made material misrepresentations in presenting their claims” must be proven by a preponderance of the evidence.²⁷¹ The insurer’s “[i]nsurance [f]raud counterclaim is governed by the clear and convincing evidence standard.”²⁷²

In *Allstate Indemnity Co. v. Dixon*,²⁷³ the Western District of Missouri held that Rule 9(b) applies to an insurer’s claims alleging misrepresentation during the claims process.²⁷⁴

B. Duties

1. Examinations Under Oath

In *Beasley v. GeoVera Specialty Insurance Co.*,²⁷⁵ the insureds claimed property damage from Hurricane Isaac.²⁷⁶ The carrier asked both insureds to submit to separate examinations under oath (EUO).²⁷⁷ The insureds sued and refused to submit to separate EUOs, claiming they were not required to do so because they were joint parties to the litigation.²⁷⁸ The trial court granted summary judgment to the insurer, finding that the insureds’ refusal to submit to separate EUOs breached the policy’s cooperation clause, prejudiced the insurer, and warranted dismissal of their claims.²⁷⁹

In *Eagley v. State Farm Insurance Co.*,²⁸⁰ the insureds submitted a fire claim. Less than a year before, they had made another fire loss claim, which the same insurer had paid.²⁸¹ The insureds appeared for EUOs, but refused to answer questions related to the prior claim’s additional living expense payment application based on relevance and the fact the prior

268. *Id.*

269. *Id.*

270. 2015 WL 1208150, at *1 (E.D. Pa. Mar. 17, 2015).

271. *Id.* at *3.

272. *Id.* at *4.

273. 304 F.R.D. 580 (W.D. Mo. 2015).

274. *Id.* at 581.

275. 2015 WL 2372328 (E.D. La. May 15, 2015).

276. *Id.* at *1.

277. *Id.*

278. *Id.* at *2.

279. *Id.* at *4–5.

280. 2015 WL 5714402 (W.D.N.Y. Sept. 29, 2015).

281. *Id.* at *1–2.

claim was subject to a pending criminal investigation.²⁸² The Western District of New York held that the insureds' refusal to answer questions for more than two years while the criminal matter was pending was a breach of the policy's cooperation clause that vitiated their claim.²⁸³

In *Henry v. State Farm Fire & Casualty Co.*,²⁸⁴ the insured submitted a claim for loss due to an intentionally set fire.²⁸⁵ The insurer asked for an EUO and financial documentation to determine whether the insured had an incentive to set the fire.²⁸⁶ At the EUO, the insured failed to produce any of the requested financial records, claiming that all of her financial records were destroyed in the fire.²⁸⁷ After the EUO, she refused to authorize the insurer to obtain her tax records and did not produce any financial records.²⁸⁸ The insurer denied the claim, and the insured sued.²⁸⁹ The insurer moved for summary judgment based on the insured's failure to produce the requested records. The insured argued that she had substantially complied with the cooperation clause by appearing for the EUO and explaining her records were lost in the fire.²⁹⁰ The trial court granted the motion for summary judgment, finding that, although the insured appeared for an EUO, the financial documents were material to the investigation and her failure to produce them was a breach of her duties under the policy.²⁹¹

2. Proof of Loss

In *Bowlers' Alley, Inc. v. Cincinnati Insurance Co.*,²⁹² the insured submitted an interim proof of loss with claims for property damage, debris removal, lost business income, general contractor fees, accounting services, and legal expenses arising from a flood at a bowling alley.²⁹³ While the interim proof of loss did provide some supporting documentation for the property damage claim, it did not include sufficient documentation on other portions of the claim.²⁹⁴ In litigation, the insurer moved for summary judgment on the entire claim, arguing the insured's failure to provide a proof of loss with documentation to support all of the claimed line items breached policy conditions.²⁹⁵ The court held that the insured's

282. *Id.* at *2–3.

283. *Id.* at *12.

284. 2015 WL 3603713 (E.D. Mich. June 5, 2015).

285. *Id.* at *2.

286. *Id.* at *3.

287. *Id.*

288. *Id.*

289. *Id.* at *4.

290. *Id.* at *7–8.

291. *Id.* at *11.

292. 2015 WL 3540039 (E.D. Mich. May 31, 2015).

293. *Id.* at *1.

294. *Id.*

295. *Id.*

failure to adequately support portions of its claim did not foreclose the insured from recovering for the portions it had supported.²⁹⁶ The court further noted that the fact the insurer need not pay the unsupported portions of a claim fully vindicated the insurer's rights under the policy.²⁹⁷

In *Ferraro v. Liberty Mutual Fire Insurance Co.*,²⁹⁸ a homeowner made a claim for flood damage under a standard flood insurance policy (SFIP) after Hurricane Isaac. The insured submitted a signed, sworn proof of loss, which was paid by the insurer, but then submitted a request for additional damage without a signed, sworn proof of loss.²⁹⁹ The insured later sued, and the insurer moved for summary judgment arguing that, under a SFIP, the insured was required by statute to submit a signed, sworn proof of loss for all damage within 240 days.³⁰⁰ The Fifth Circuit granted summary judgment, holding that a second sworn proof of loss for additional damage was required as a condition precedent to coverage.³⁰¹

C. Appraisal

1. Scope of Appraisal

In *El Toledo, LLC v. Sequoia Insurance Co.*,³⁰² the insured sought to compel appraisal on the extent of windstorm damage. The insurer did not object to appraisal, but instead requested that the court limit the appraiser's role of determining the "amount of loss" by identifying only the direct physical loss or damage from the subject storm and estimating the ACV and RCV of that damage.³⁰³ The insurer argued that, absent such instructions, there was an "inherent risk of a runaway appraisal."³⁰⁴ The court denied the limitation request, noting that the policy did not contemplate such directives and that "[the] appraisers and the umpire are not simply tasked with an accounting of damage to the property, but are also authorized to resolve issues of causation."³⁰⁵

In *Arvat Corporation v. Scottsdale Insurance Co.*,³⁰⁶ the insured sought to compel appraisal over the extent of damage arising from a water pipe leak.³⁰⁷ The insurer claimed appraisal was inappropriate given that it had paid the covered portion of the claim and denied coverage for the re-

296. *Id.* at *19–20.

297. *Id.* at *25.

298. 796 F.3d 529 (5th Cir. 2015).

299. *Id.* at 530.

300. *Id.* at 531.

301. *Id.* at 534.

302. 2015 WL 3457475 (D. Colo. May 29, 2015).

303. *Id.* at *2.

304. *Id.*

305. *Id.* (citation omitted).

306. 2015 WL 6504587 (S.D. Fla. Oct. 28, 2015).

307. *Id.* at *1.

maining portion.³⁰⁸ The Southern District of Florida granted the motion to compel appraisal, noting that the insurer had paid a portion of the loss and that the dispute was focused on the amount of covered loss, and not coverage for the loss.³⁰⁹ The court concluded that “[a]n appraiser is in the best position to determine a fair value for the covered damage.”³¹⁰

In *Auto-Owners Insurance Co. v. Summit Park Townhome Ass’n*,³¹¹ the insured sought to compel appraisal on the extent of hail storm damage. The insurer had paid a portion of the claim and then filed a declaratory judgment action claiming the remaining damage was not covered because it either predated the policy at issue or was not caused by a covered peril.³¹² The court held that appraisal was appropriate under the terms of the policy and that under Colorado law appraisers were permitted to address issues of causation.³¹³ Further, the court noted that the appraisal findings would not preclude the court from making coverage determinations because legal determinations are outside the scope of the appraisal process.³¹⁴

2. Timeliness of Demand or Refusal to Appraise

In *Nassar v. Liberty Mutual Fire Insurance Co.*,³¹⁵ the insured first demanded appraisal four years after filing suit.³¹⁶ The insured claimed the demand was timely because the parties had litigated motions for summary judgment on coverage and had ongoing settlement discussions during that time. The insured claimed that it made the demand only after settlement negotiations failed.³¹⁷ The Court of Appeals of Texas held that the appraisal demand was timely, noting that the appraisal waiver analysis starts when the parties reach an impasse in their negotiations over the value of a covered loss.³¹⁸

In *Hall v. Encompass Insurance Co. of America*,³¹⁹ the Western District of Washington found the insurer had waived the right to appraisal because the demand was not made within a reasonable time after the parties reached a disagreement on the value of the loss (three-and-a-half years after a fire), and the insureds were prejudiced by the delay.³²⁰

308. *Id.*

309. *Id.* at *2.

310. *Id.*

311. 2015 WL 5727667 (D. Colo. Apr. 14, 2015).

312. *Id.* at *1.

313. *Id.* at *2–3.

314. *Id.* at *4.

315. 2015 WL 5727667 (Tex. App. Sept. 29, 2015).

316. *Id.* at 1.

317. *Id.*

318. *Id.* at *8–9.

319. 2015 WL 5562221 (W.D. Wash. Sept. 21, 2015).

320. *Id.* at *10.

3. Enforcing and Modifying Appraisal Awards

In *D Boys, LLC v. Mid-Century Insurance Co.*,³²¹ a court-appointed umpire sided with the insured's valuation, issuing a binding appraisal award.³²² The Eastern District of Michigan held that the insurer's objection to the award was untimely because the insurer had not made it within ninety-one days of the award, and, moreover, there was no manifest error in the appraisal process.³²³

In *4100 Perimeter, Ltd. v. Hartford Casualty Insurance Co.*,³²⁴ the insurer paid various amounts for necessary storm damage repairs.³²⁵ Unsatisfied with the amount paid, the insured demanded appraisal.³²⁶ The umpire sided with the insured's appraiser, who determined that a complete replacement of the HVAC and roof systems was necessary, even though the insured had not requested replacement.³²⁷ The insurer rejected the appraisal award, and the insured then filed suit claiming breach of contract and bad faith for failing to pay the award.³²⁸ The Western District of Oklahoma granted the insurer summary judgment on the bad faith claim, finding no contractual or legal obligation to accept the award. The insurer had a reasonable basis for rejecting the award given that it included complete replacement of the HVAC and roof systems, even though the insured had not even requested replacement during the claim adjustment.³²⁹

4. Appraiser Qualifications

In *Cincinnati Specialty Underwriters Insurance Co. v. C.F.L.P. 1, LLC*,³³⁰ the insurer filed suit seeking appointment of an umpire to resolve a hail damage dispute.³³¹ The insured sought the appointment of a retired judge or mediator, arguing that any umpire with ties to the insurance industry would be "hopelessly biased."³³² The insurer argued for an umpire with property claim adjusting experience.³³³ The Western District of Kentucky sided with the insurer and appointed as umpire an independent adjuster proposed by the insurer.³³⁴ In so ruling, the court stated "it is hard

321. 92 F. Supp. 3d 644 (E.D. Mich. 2015).

322. *Id.* at 647.

323. *Id.* at 648-49.

324. 2015 WL 5008410 (W.D. Okla. Aug. 20, 2015).

325. *Id.* at *1.

326. *Id.*

327. *Id.*

328. *Id.*

329. *Id.* at *3-4.

330. 2015 WL 5793951 (W.D. Ky. Sept. 30, 2015).

331. *Id.* at *1.

332. *Id.* at *6.

333. *Id.*

334. *Id.* at *7.

to imagine how the umpire could reach this decision without conducting his or her own appraisal or at least having sufficient knowledge and experience in appraising to evaluate the work[.]”³³⁵

5. Miscellaneous Issues

In *Garden-Aire Village South Condo Ass’n v. QBE Insurance Corp.*,³³⁶ the insured submitted a Hurricane Wilma claim.³³⁷ However, the insured did not cooperate during the multi-year claim adjustment, failing to present basic information about the claim, a valid proof of loss, or a representative witness prepared to discuss the claim at an EUO.³³⁸ After five years, the insured filed suit and only then sought to compel appraisal.³³⁹ The Eleventh Circuit held that (1) the insured’s lack of cooperation prevented the insurer from determining the amount of the loss, (2) the parties therefore had no actual disagreement on damages, and (3) appraisal was unwarranted.³⁴⁰

*In re GuideOne National Insurance Co.*³⁴¹ dealt with whether a policy clause providing that appraisal could only be invoked by the insurer was against public policy.³⁴² The insured had asked to proceed with appraisal pursuant to the policy, and the insurer had declined on the basis that it alone could choose to demand appraisal.³⁴³ In noting that there were no Texas cases holding that a clause that allows appraisal to be instituted only by the insurer is against public policy, the Court of Appeals declined to find the clause was against public policy.³⁴⁴

In *Fitzgerald v. American Family Mutual Insurance Co.*,³⁴⁵ the insured asked the court to enter judgment on an appraisal award so it could seek statutory attorney fees.³⁴⁶ The insurer claimed that an appraisal award is not a “recovery” within the meaning of the statute because appraisal is a contractual procedure, not part of litigation.³⁴⁷ The insurer also argued that its willingness to pay the appraisal award made a monetary judgment unnecessary.³⁴⁸ The federal court for the District of Ore-

335. *Id.* at *6.

336. 591 F. App’x 868 (11th Cir. 2014).

337. *Id.* at 869.

338. *Id.* at 870.

339. *Id.* at 871.

340. *Id.* at 871–72.

341. 2015 WL 5766496 (Tex. App. Sept. 29, 2015).

342. *Id.* at *2.

343. *Id.* at *3.

344. *Id.*

345. 2015 WL 5896139 (D. Or. Oct. 6, 2015).

346. *Id.* at *3.

347. *Id.*

348. *Id.* at *4.

gon rejected the insurer's arguments and entered judgment for the insured on the award to permit the insured to seek attorney fees.³⁴⁹

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

In *One Call Property Services, Inc. v. Security First Insurance Co.*,³⁵⁰ One Call performed emergency water-removal services for Security First's insured. The insured then assigned his rights to the insurance proceeds under the Security First policy.³⁵¹ Security First denied the claim and One Call sued Security First for breach of contract.³⁵² Security First moved to dismiss the claim, arguing that the policy's anti-assignment provision, when read in conjunction with the loss-payment provision, precluded One Call, as the assignee, from suing to determine the amount of loss.³⁵³ The Florida District Court of Appeal reversed on three bases. First, the court reiterated that Florida law is clear that an insured may assign a post-loss claim even if the policy contains an anti-assignment provision.³⁵⁴ Second, the court held that "[a loss-payment provision] does not preclude an assignment of a post-loss claim, even when payment is not yet due."³⁵⁵ Third, the court held that an assignable right to benefits accrues on the date of the loss, even though payment is not yet due under the loss-payment clause.³⁵⁶

E. *Suit Limitations*

In *Holmes v. Safeco Insurance Co. of America*,³⁵⁷ the plaintiff's home was damaged by snow and ice.³⁵⁸ The insurer inspected the loss and made a partial payment. The plaintiff submitted an additional estimate and claim of further damages, which the insurer ultimately denied.³⁵⁹ The plaintiff sued, alleging that the insurer failed to pay the full RCV for the additional property damage that occurred as a result of the storm.³⁶⁰ Safeco moved for summary judgment because the plaintiff's action was not commenced within one year of the date of loss.³⁶¹ The plaintiff asserted that the action was timely because it was filed within the eighteen-month suit limitation period mandated by General Statutes

349. *Id.*

350. 165 So. 3d 749 (Fla. Dist. Ct. App. 2015).

351. *Id.* at 751.

352. *Id.*

353. *Id.*

354. *Id.* at 752-53.

355. *Id.* at 754.

356. *Id.*

357. 2015 WL 2344939 (Conn. Super. Ct. Apr. 16, 2015).

358. *Id.* at *1.

359. *Id.*

360. *Id.*

361. *Id.* at *2.

§ 38a-307 of the Standard Form Fire Policy Statute.³⁶² The insurer argued that the eighteen-month suit limitation period mandated by the General Statutes is not applicable to an “all risk policy.”³⁶³ Noting that the “all risk” policy was a comprehensive policy that insured various perils, including the peril of fire, the Superior Court of Connecticut ultimately concluded that it was “not a fire policy” and need not comply with the provisions of § 38a-307.³⁶⁴ Accordingly, the court applied the policy’s one-year limitation.³⁶⁵

In *Ameris Bank v. Lexington Insurance Co.*,³⁶⁶ Costal Biofuels was required to maintain insurance on equipment and identify Darby Bank as a mortgagee.³⁶⁷ A fire destroyed the equipment.³⁶⁸ Thereafter, the Georgia Department of Banking and Finance closed Darby Bank and appointed the FDIC as receiver.³⁶⁹ Ameris Bank subsequently acquired Darby’s assets and sued Lexington for failing to pay the claim.³⁷⁰ Lexington asserted that the claim was barred by the policy’s two-year suit limitation provision.³⁷¹ The bank claimed that the Financial Institutions Reform, Recovery and Enforcement Act of 1989 (FIRREA) gives the FDIC a six-year statute of limitations for breach of contract, and the six-year time period applied in the instant claim.³⁷² The Southern District of Georgia concluded that FIRREA’s purpose was to preserve assets of failed banks and therefore Ameris Bank, as assignee of the FDIC, came within the protection of the six-year limitation provision.³⁷³

In *B.S.C. Holding, Inc. v. Lexington Insurance Co.*,³⁷⁴ the Tenth Circuit concluded that Kansas law would not prohibit enforcement of suit limitation provisions.³⁷⁵ BSC argued that the twelve-month limitation provision was unenforceable under Kansas law as a matter of public policy.³⁷⁶ BSC argued that suit limitation provisions are indistinguishable from notice and proof of loss provisions.³⁷⁷ Because Kansas law protects insureds who fail to give timely notice or proof of their claims, Kansas law should

362. *Id.* at *3; see CONN. GEN. STAT. ANN. § 38a-307 (2014).

363. *Holmes*, 2015 WL 2344939, at *3.

364. *Id.* at *11.

365. *Id.*

366. 2015 WL 5680377 (S.D. Ga. Sept. 25, 2015).

367. *Id.* at *1.

368. *Id.*

369. *Id.* at *2.

370. *Id.*

371. *Id.*

372. *Id.* at *3–4.

373. *Id.*

374. 2015 WL 5333086 (10th Cir. Sept. 15, 2015).

375. *Id.* at *4.

376. *Id.* at *2.

377. *Id.* at *3.

similarly protect “those who fail to file timely suit, unless the insurer can show prejudice from the delay.”³⁷⁸ The Tenth Circuit disagreed and contrasted the notice-of-loss provisions, which provide a carrier with an opportunity to investigate,³⁷⁹ with suit limitation provisions, which enable an insurer to fix its present and future liabilities, close stale claim files, and encourage plaintiffs to use reasonable diligence in enforcing their rights.³⁸⁰ The Tenth Circuit concluded that suit limitation provisions are enforceable even in the absence of prejudice.³⁸¹

F. *Bad Faith*

In an issue of first impression, the Supreme Court of Pennsylvania decided that a policyholder may assign statutory bad faith claims to a third party claimant in *Allstate Property & Casualty Insurance Co. v. Wolfe*.³⁸² Although *Wolfe* involved an automobile insurance policy, its ruling has broad implications for property insurance policyholders as well. The Pennsylvania Supreme Court, on certification from the Third Circuit, addressed the issue as one of statutory construction.³⁸³ The court looked at the intent of the legislature when it enacted Section 8371³⁸⁴ and concluded that “consideration of the occasion and necessity for Section 8371, the object to be attained, the previous legal landscape, as well as the consequences of our interpretation, favor Wolfe’s position.”³⁸⁵ After ruling that Section 8371 damages may be assigned by an insured to an injured plaintiff and judgment creditor, the court returned the matter to the Third Circuit.³⁸⁶

Last year, we discussed Florida’s First District Court of Appeal ruling in *Perdido Sun Condominium Ass’n, Inc. v. Citizens Property Insurance Corp.*,³⁸⁷ which held that a “willful tort” statutory exception to an immunity statute permitted an action against a state-based insurer for bad faith refusal to settle a claim.³⁸⁸ The First District certified a conflict with the Fifth District Court of Appeal to the Supreme Court of Florida for resolution.³⁸⁹

The Supreme Court of Florida answered the question this year in *Citizens Property Insurance Corp. v. Perdido Sun Condominium Ass’n, Inc.*³⁹⁰ The

378. *Id.*

379. *Id.*

380. *Id.* at *4.

381. *Id.* at *5–7.

382. 105 A.3d 1181 (Pa. 2014).

383. *Id.* at 1186.

384. 42 PA. CON. STAT. ANN. § 8371.

385. *Wolfe*, 105 A.3d at 1188.

386. *Id.*

387. 129 So. 3d 1210 (Fla. Dist. Ct. App. 2014).

388. *Id.* at 1211–12.

389. *Id.* at 1213.

390. 164 So. 3d 663 (Fla. 2015).

court found “no support that the Legislature intended for Citizens to be liable for a breach of the duty to act in good faith by allowing its policyholders to bring a statutory first-party bad faith cause of action.”³⁹¹ Because “the Legislature never listed statutory first-party bad faith claims as one of the exceptions” to immunity, the court concluded that such claims do not fall within any exception to Citizens’ immunity under Section 627.351(6)(s)(1).³⁹² The court disagreed with the First District’s conclusion that bad-faith is a “willful tort” that falls into the statutory exception for willful torts.³⁹³

391. *Id.* at 666.

392. *Id.* (citing FLA. STAT. ANN. § 627.351(6)(s)(1)).

393. *Id.* at 668.

