Paper Title: Survey of Recent Developments in Water Damage Coverage and Litigation

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Session Title: **The Multiple Considerations of Water Damage Claims**

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Survey of Recent Developments in Water Damage Coverage and Litigation

The fall of dropping water wears away the stone.
Lucretius

I. Introduction

This paper will survey recent developments in water damage coverage and litigation. This paper is not intended to be an exhaustive discussion of the applicable insurance policies, coverages, or the law. It is designed to provide a snapshot of recent developments in the law across the country as well as an understanding of the environment in which the claims are being litigated.

II. Background for Water Damage Claims

Before exploring recent developments in the law surrounding water damage claims, it is important to understand the claims environment and the public experiences surrounding water damage claims that impact insureds, potential jurors, jurists, and policymakers.

A. Water Damage and Homeowners Claims Environment

Multiple studies in recent years have found that the number of water damage claims have surged in recent years. One report, prepared by Verisk Analytics' ISO unit, found that one in 50 homeowners filed a water damage claim each year, between 2013 and 2017. This 2.05% frequency rate increased from the 1.44% frequency rate annually for the period between 2005 and 2009. In 2019, Chubb released data outlining that the number of annual water claims costing more than $500,000 had doubled since 2015, while those over $1 million tripled.

Approximately 85% of homeowners have home insurance policies, according to data from the National Association of Insurance Commissioners (NAIC), 79.09% of which are HO-3 policies. Unfortunately, a ValuePenguin survey found that 47% of homeowners are unsure of what their insurance covers. J.D. Power similarly found that 52% of homeowners do not understand their coverage. Homeowners also do not understand the replacement value of their homes — a survey by Marshall & Swift/Boeckh found that 60% of homes are undervalued regarding insurance, with an average undervaluation of 17%.

The average payment per homeowners claim in the U.S. was $8,787, according to data from the Insurance Research Council, and there were five claims filed and paid per 100 insured homes in the last year. Claim frequency has decreased over the last two decades, whereas claim severity, the average amount paid per claim, has increased significantly.

The Insurance Services Office (ISO) found that 98.1% of homeowners insurance losses are due to property damage. Looking at the make-up of claims, wind and hail account for 34.4% of total losses, water damage and freezing 23.8%. And this data

only considers the personal property homeowner's insurance claims behavior. There are water damage claims across the property insurance policy spectrum.

B. Catastrophes and Water Damage Claims

In property insurance, the term "catastrophe" denotes a natural or man-made disaster that is unusually severe. An event is designated a catastrophe by the industry when claims are expected to reach a certain dollar threshold, currently set at $25 million, and more than a certain number of policyholders and insurance companies are affected.

In the United States, over the 20-year period, 1997 to 2016, events involving tornadoes, including other wind, hail and flood losses associated with tornadoes made up 39.9 percent of total catastrophe insured losses, adjusted for inflation. Hurricanes and tropical storms were the second largest cause of catastrophe losses, accounting for 38.2 percent of losses, followed by other wind/hail/flood (7.1 percent) and winter storms (6.7 percent). Terrorism and fires, including wildland fires, accounted for 5.9 percent and 2.0 percent of catastrophe losses, respectively. Civil disorders, water damage and utility services disruption combined represented about 0.2 percent of losses.

Natural catastrophe losses in the United States rose to an historic high in 2017 of $133 billion in 2020 dollars, the year of Hurricanes Harvey, Maria and Irma and costly California wildfires. Natural catastrophe losses fell in 2018 and 2019, but rose to $74.4 billion in 2020, up 88 percent from $39.6 billion in 2019. Natural catastrophe losses in the United States fell 36 percent in 2019 to $39.6 billion in 2020 dollars from $62.0 billion in 2018.

For 2021, the National Centers for Environmental Information, Billion-Dollar Weather and Climate Disasters reported the largest disaster events as follows:

Hurricane Ida	August 2021	$75 Billion
Winter Storm/Cold Wave	February 2021	$24 Billion
Western Wildfires	2021	$10.6 Billion
Western Drought & Heat	2021	$8.9 Billion
SE/Central Tornadoes	December 2021	$3.9 Billion
TX/OK Wind/Hail	April 2021	$3.3 Billion
SE Tornadoes	March 2021	$1.8 Billion

This data reflects the CPI-Adjusted Estimated Cost of the disaster without regard to whether the losses were insured.

1. Hurricanes

There were 21 named storms during the 2021 Hurricane season. Hurricane Ida, which made landfall in central Louisiana as a Category 4, brought tremendous wind and storm surge damage to the central Gulf Coast as well as significant inland flooding to the mid-Atlantic. There were seven hurricanes with four reaching Category 3 or higher - Grace, Ida, Larry and Sam. Ida and Sam were Category 4.

2021 trails only 2020, with 30 named storms and 2005, with 28 named storms, for most named storms in a single season. NOAA scientists have cited warmer than normal sea surface temperatures across the tropical Atlantic and La Niña conditions during peak season as the major settings for the season. The record-breaking 2020 hurricane season produced 30 named storms. The old record was set in 2005 when there were 28 storms. Fourteen became hurricanes and seven major storms (Category 3 or stronger).

2. Wildfires

In 2021, there were 52,729 wildfires, compared with 52,113 in 2020, according to the National Interagency Fire Center. About 6.6 million acres were burned, compared with 8.9 million in 2020. In 2020 there were 58,950 wildfires compared with 50,477 in 2019, according to the National Interagency Fire Center. About 10.1 million acres were burned in 2020, compared with 4.7 million acres in 2019. Six of the top 20 largest California wildfires fires occurred in 2020, according to CalFire's list.

3. Megacatastrophes

While $25 million is the catastrophe threshold, there have been five catastrophes that greatly exceeded that amount and are considered megacatastrophes. The first two, Hurricane Andrew (1992) and the Northridge earthquake (1994), were watershed events in that they were more destructive than most experts had predicted a disaster of this type would be. The third, the terrorist attack on the World Trade Center in 2001, changed perceptions about man-made risks worldwide. Hurricane Katrina (2005), the fourth, is not only the most expensive natural disaster on record but also an event that intensified discussion nationwide about the way disasters, natural and man-made, are managed. It also focused attention on the federal flood insurance program, see report on Flood Insurance. Hurricane Sandy, the fifth catastrophe, hit the New York metropolitan area in 2012. While Hurricane Katrina was a stronger storm and caused more damage ($41,100 billion compared to $18.750 billion) Hurricane Sandy hit a more populous area - as many as 15 percent of the total U.S. population experienced Sandy.

C. Flood Risk in the United States

1. Flood Claims

According to FEMA, 99% of counties in the United States were impacted by flooding between 1996 and 2019. Only 3% of homeowners believe they have a moderate to high risk of flooding within the next two years, according to a survey conducted by Swiss Re. The average payout on a flood claim from the National Flood Insurance Program (NFIP) was $52,000 in 2019. Swiss Re's survey shows that 43% of Americans believe their homeowners insurance covers them for flood damage. Only 15% of homeowners have flood coverage.

2. New study suggests more risk

In a new study, North Carolina State University researchers used artificial intelligence to predict where flood damage is likely to happen in the continental United States, going far beyond the information in the recent flood maps from the Federal Emergency Management Agency (FEMA). The study, "Predicting flood damage probability across the conterminous United States," was published online Feb. 21, 2022, in *Environmental Research Letters*.

In the study, researchers found a high probability of flood damage—including monetary damage, human injury, and loss of life—for more than a million square miles of land across the United States across a 14-year period. That was more than 790,000 square miles greater than flood risk zones identified by FEMA's maps.

To create their computer models, researchers used reported data of flood damage for the United States, along with other information such as whether land is close to a river or stream, type of land cover, soil type, and precipitation. The model used data from actual reported damage to predict areas of high flood damage likelihood for each pixel of mapped land. The researchers created separate models for each watershed in the United States.

In the study, they found a high probability of flood damage for more than 1.01 million square miles across the United States, while the mapped area in FEMA's 100-year flood plain is about 221,000 square miles. Researchers said there are factors that could help explain why the differences were so large, including that their machine-learning-based model assessed damage from floods of any frequency, while FEMA only includes flooding that would occur from storms that have a 1% chance of happening in any given year.

3. FEMA's Risk Rating 2.0

Perhaps anticipating that it needed to revamp the system, FEMA announced its new Risk Rating 2.0 to address its outdated rating methodology, citing advances in technology, access to data and an evolution in understanding flood risk. Phase One of Risk Rating 2.0 was effective for new policies on October 1, 2021, and goes through March 2022. Early results indicate that most households are now paying more for flood policies under Risk Rating 2.0.

Instead of using flood zones, Risk Rating 2.0 calculates flood insurance rates based on: Specific features of an individual property, including the foundation type and height of the lowest floor relative to the base flood elevation; Replacement cost of the house; Sources of flood including the chance of river flood, chance of coastal flooding and flooding due to heavy rainfall; Geographical variables such as a home's distance to water, the type and size of the nearest body of water, and the elevation of a house relative to the flooding source.

FEMA says the key benefits of Risk Rating 2.0 are: an individualized picture of the property's risk; More types of flood risks will be reflected in the rates; The latest

actuarial practices will be used to set rates based on actual risk; and reduced complexity for insurance agents who generate flood insurance quotes.

To develop Risk Rating 2.0 rates, FEMA says it used data from multiple sources, including: Existing FEMA flood mapping data; NFIP policy and claims data; National Oceanic and Atmospheric Administration data; Sea, Lake and Overhead Surges from Hurricanes (SLOSH) data; U.S. Army Corps of Engineer data sets; and Third-party sources such as commercially available structural and replacement cost data, and catastrophe flood models.

III. Recent Developments in the Law

Having surveyed the landscape against which property damage litigation and legislation takes place, recent legal and statutory decisions can be seen against the context from which they arose.

A. Procedural Issues

1. Federal pleading rules

A federal court in San Antonio granted an insurer's partial motion to dismiss because the insured failed to plead certain causes of action with factual particularity. *Janssen v. Allstate*, 2021 WL 42000618, Case No. SA-21-CV-00750-JKP centered on a coverage dispute arising from a hailstorm that allegedly damaged the insured's home. The insured filed suit in state court, asserting causes of action for breach of contract, violations of the Texas Insurance Code (TIC), breach of the duty of good faith and fair dealing, violations of the Texas Deceptive Trade Practices Act (DTPA), and common law fraud against the insurer. Once the case was removed to federal court, where stricter pleading requirements apply to Causes of action based on fraud, the insurer moved for dismissal of the fraud-related claims in the insured's petition because he did not plead any specific facts to support his claim.

The Court noted it had the power to dismiss such claims if a review of the pleadings called for dismissal, but the Court was also required to allow the party a change to amend his pleading to cure his defects—unless the defects could not be cured, or the party failed to amend after being given an opportunity to do so. Here, the insured's petition did not allege specific facts to support the insured's causes of action for common law fraud, Texas Insurance Code and DTPA violations; however, the Court concluded that a more careful or detailed drafting might overcome the deficiencies, so it was appropriate to allow the insured the opportunity to address the defects. As such, the Court granted the insured leave to amend his petition within twenty days; if the insured failed to do so, the motion would be granted in full and the causes of action would be dismissed.

2. Federal amount-in-controversy requirement

In some first-party suits against property insurers, particularly on relatively low-value residential claims, policyholders may agree in writing to limit their recoverable damages to an amount less than $75,000 in order to prevent the case from being removed to federal court. This occurred in *Gonzalez v. Meridian Security Ins. Co*., No. 4:20-CV-00643, 2021 WL 3190523 (E.D. Tex. July 28, 2021). After the plaintiffs invoked appraisal and obtained an award in the amount of $130,000, the insurer paid $75,000 in reliance on the stipulation. The plaintiffs accepted and cashed the $75,000 check, but immediately demanded payment of the remainder of the appraisal award, in violation of their prior stipulation. On receipt of the demand for more than $75,000, the insurer promptly removed the case to federal court, defeated the plaintiffs' motion to remand, and moved for summary judgment on the ground that it had fully paid the plaintiffs' recoverable damages as limited by the stipulation.

A federal district judge in Sherman disagreed, finding the stipulation was not a new contract that negated the terms of the appraisal clause, nor was it a waiver/estoppel or ratification based on either the express wording of the stipulation or the plaintiffs' conduct. Nor was the acceptance of the check an accord and satisfaction because the simultaneous demand for the rest of the award did not suggest an agreement to treat the obligation as fully satisfied. The court also denied the insurer's motion for summary judgment on extra-contractual claims and refused to find the plaintiffs' Prompt Payment claim barred by limitations, holding a four-year statute of limitations applies to those claims.

This outcome leaves insurers in a difficult position when plaintiffs purport to stipulate to limit their damages as a procedural stratagem. First, a stipulation purporting to limit damages, at least in the forms currently being offered by policyholder attorneys, cannot be accepted as an enforceable agreement. However, it begs the question whether a federal court will sustain a removal in the absence of evidence the plaintiff has actually sought more than $75,000 in damages. This could leave insurers in a double bind – litigating in state court, but discovering too late that the policyholder's agreement not to seek or accept more than $75,000 in damages was a ruse. This court's ruling suggests one feasible solution may be to write more strongly worded damage stipulations that expressly and irrevocably waive all contractual rights to recover more than $75,000 under the policy, regardless of the outcome of any appraisal award or jury award. And to remove cases when policyholder attorneys decline to agree to those terms.

3. 542A Removals in Texas

Federal courts of Texas have been grappling with the removal of weather-based insurance cases that name local adjusters under Texas Insurance Code § 542A.006 since it was passed in late 2017. A split among the four federal districts of Texas has been gradually developing during that time, with the Northern District strongly favoring remand of cases in which the insurer does not elect to accept its adjuster's

responsibility until after suit is filed, while the other districts have been somewhat less cohesive in their approach.

In *Valverde v. Maxum Cas. Ins. Co.*, No. 7:21-CV-00240, 2021 WL 3885269 (S.D. Tex. Aug. 31, 2021), a McAllen judge took a hard look at several opinions on this topic issued out of the Northern District, and openly rejected their reasoning. In this case, Maxum made its election to accept its in-state adjuster's liability after being sued and removed the case to federal court, seeking dismissal of the adjuster under §542A.006. Under these circumstances, Northern District courts have been reliably rejecting the removals and remanding the cases to the originating state courts.

In a lengthy and detailed opinion which appears to be designed to both persuade other district judges and potentially set the case up for eventual review by the Fifth Circuit, the court carefully traced the history of the voluntary-involuntary rule, examined modern Fifth Circuit opinions, and looked to commentary from other federal circuit courts on the intended scope and application of the rule. The court then closely examined the improper joinder rule and the most comprehensive statements on its operation by the Fifth Circuit, concluding Fifth Circuit precedent requires federal courts to determine improper joinder based on the facts that exist at the time of removal, ***not*** the time the suit is originally filed.

Finally, the court formulated this rule synthesizing all of its analysis:

"One rule is consistent with the Supreme Court and Fifth Circuit jurisprudence on 28 U.S.C. § 1446(b)(3), the improper joinder rule, and the voluntary-involuntary rule and governs this case: A case may not be removed from state court to federal court on the basis of federal diversity jurisdiction unless (1) the plaintiff voluntarily dismisses all out-of-state defendants, or (2) the plaintiff improperly joined all out-of-state defendants such that no out-of-state defendant may be restored to the case by any court."

Applying that rule, the court dismissed the local adjuster under §542A.006 and held that diversity jurisdiction existed.

This opinion appears to be a salvo in an ongoing jurisprudential duel between two federal judges who have each openly disagreed with and rejected the other's legal reasoning on this topic. This opinion included barbs such as, "… the Court does not find that the Fifth Circuit has left the law in such disarray that the Court is entitled to breezily remand a case over which diversity jurisdiction evidently attaches." Chapter 542A is now five years old, and the split between the federal districts only appears to be widening.

B. Evidentiary Issues

1. Expert Testimony

In *Dias v. GeoVera Specialty Insurance Company*, 543 F.Supp.3d 1282 (USDC – MD Florida, 2021), the court held that the insurer did not breach homeowner's insurance policy under Florida law by denying claim for roof damage due to wind, where the roof was 23 years old, the insured did not have direct recollection of witnessing storm on day indicated, and the insureds waited five months to file insurance claim and did so at suggestion of roofing salesman. The court also ruled that a public adjuster was not an appropriate expert in the insureds' action against the insurer alleging breach of homeowner's policy for denying claim for roof damage due to wind. The court noted that the adjuster inspected the roof only once, he did not review other records or documents, he based critical determinations on mere conjecture, he did not offer any methodology to support his opinion about timing and type of roof damage, and his opinion of date of loss was based solely on information from insureds, who received it from roofing company salesman who could not be found to establish how he arrived at particular date of damage.

2. Burden of Proof

a. Hail

In *Empire Pro Restoration, Inc. v. Citizens Property Ins. Corp.,* 322 So.3d 96, (Fl. DCA 4 Dist., 2021), the insured filed a breach of contract claim after insurer denied its claim under a homeowner's insurance policy for water damage caused a roof leak. In granting summary judgment for the insurer, the court set out a well-reasoned discussion of the burden of proof. An insured making a claim under an all-risks policy has the burden of proving that the insured property suffered a loss while the policy was in effect; the burden then shifts to the insurer to prove that the cause of the loss was excluded from coverage under the policy's terms. The court continued setting out that if there is an exception to an exclusion in an all-risks policy of an insurance contract, the burden once again is placed on the insured to demonstrate the exception to the exclusion. The court held that there was no evidence to explain what caused entry points for rain to enter and damage insured's home, and thus, insured could not prevail on its breach of contract against insurer for its denial of insured's claim based on an exclusion for loss due to rain causing water damage inside the home under the homeowner's insurance policy.

b. Water Damage

A federal judge in Houston granted summary judgment for a property insurer after the insured failed to demonstrate its claimed damages were actually caused by a burst pipe during the policy period, rather than the long history of other losses. *Henry v. Allstate Veh. & Prop. Ins. Co.*, No. 4:20-CV-310, 2021 WL 1132812 (S.D. Tex. Mar. 24, 2021). A homeowner submitted numerous claims over a period of ten years. One of the later of these claims was for a burst pipe in a second-floor bathroom, which caused water damage to the first floor kitchen below. Allstate denied the claim on the ground that it was not sudden and accidental but was actually the result of ongoing leakage from a faulty expansion joint.

There was evidence the homeowners had submitted at least four prior claims for water damage to the kitchen area, but their own testimony and their expert report failed to make any effort to distinguish between damage caused by the current loss versus previously reported losses that were years old, or that the loss being claimed was even a new one and not existing damage that had occurred over a year earlier. Because the homeowners could not establish coverage for the claim, the court also dismissed their extracontractual claims.

c. Mold

A federal magistrate judge in San Antonio conducted a careful examination of burdens of proof under a homeowners policy and recommended granting summary judgment in favor of the insurer. *Buchholz v. Crestbrook Ins. Co.*, No. 1-20-CV-449-RP, 2022 WL 378442 (W.D. Tex. Feb. 8, 2022) involved homeowners who bought a 10,000-square foot home and $6.4 million in homeowners insurance, with an endorsement adding an additional $1.6 million in "Biological Deterioration" coverage.

After discovering mold behind the wall of the indoor basketball court, the plaintiffs undertook an investigation of the entire house and discovered numerous latent water leaks and resulting mold in various areas of the house, which led to six insurance claims being made. Five of the claims were associated with specific water leaks, and the insurer determined they were covered and paid about $750,000 for repairs and mold remediation. The sixth claim focused on mold growth throughout the house that was not directly associated with any known water leak and whose cause was mysterious.

An engineer agreed to by both parties undertook an investigation to determine the cause of the mold, and concluded the house had a design flaw: both an improperly designed HVAC system and various finishes used throughout the house were preventing a normal "vapor drive" cycle and causing humidity from outside the house to enter the building envelope and then, instead of evaporating as it normally would, to condense and promote mold growth inside wall cavities. The insurer denied the sixth claim on the ground that it was caused by design defect, faulty workmanship, inherent vice, or latent defect, leading to this lawsuit.

The critical dispute was who owed the burden to either prove coverage or prove an exclusion. The policy was an all-risk policy, covering "all risk of accidental direct physical loss… except for losses excluded…" However, the Biological Deterioration endorsement's coverage was limited to "a covered cause of loss [that] results in Biological Deterioration or Damage to property…" Both sides moved for summary judgment, each contending the other owed the initial burden of proof. Based on the all-risk wording, the homeowners contended the mold claim was covered unless the insurer proved a specific exclusion. But based on the "covered cause of loss" wording in the endorsement, the insurer contended the burden was reversed and the homeowners must prove the cause of the mold.

Significantly, the homeowners appear to have based their entire litigation strategy on the premise that it was the insurer's burden to prove an exclusion. They responded to discovery by refusing to answer questions about the cause of the mold and failed to comply with a court order requiring them to supplement that discovery answer. Their retained expert (not the same expert who had inspected the house before suit) opined the insurer had failed to prove its alleged exclusions but declined to give any opinion on the actual cause of the mold. And in their briefing, they continued to rely on the premise that the all-risk nature of the policy meant they only had to show there had been a direct physical loss in order to meet their initial burden. The magistrate judge disagreed and concluded that even though the policy was an all-risk policy, the Biological Deterioration endorsement shifted the burden of proof to the homeowners to prove a "covered cause of loss," and by declining to present any evidence of the cause of the mold, they had not met that burden. The magistrate judge recommended summary judgment be granted for the insurer on both breach of contract and all extra-contractual causes of action.

A magistrate judge's report and recommendation is not yet law, and the parties have 14 days to file objections. However, magistrates' recommendations are usually adopted by the district judge.

C. Hurricanes

1. Wind v. Flood

A federal district court in Houston began its opinion by stating, "[t]his may be among the last of the many first-party property insurance disputes from Hurricane Harvey. The court hopes so[,]" and then agreed with an insurer who argued that it was entitled to judgment as a matter of law. *Laurence v. State Farm Lloyds, et al.*, Civil Action No. H-19-4314, 2021 WL 5587815 (S.D. Tex. Nov. 29, 2021) involved a dispute between State Farm Lloyds ("State Farm") and its insured ("Laurence") over whether the damages suffered by Laurence's property were from flooding, and therefore excluded, or from water intrusion coming from wind or hail damage to the buildings, and therefore covered.

Laurence held a homeowner's insurance policy issued by Liberty Insurance Corporation and a contractor insurance policy for his plumbing business issued by State Farm. After Hurricane Harvey hit, Laurence made a claim for damage to his property. State Farm investigated and concluded that all but a small amount of damage was from flooding, and the damage was below Laurence's deductible, so it did not pay his claim. Laurence followed with a suit alleging breach of contract, breach of the duty of good faith and fair dealing, and violations of the Texas Insurance Code.

State Farm responded by filing a motion for summary judgment, arguing that Laurence cannot show he was covered by the policy because the policy did not cover damage to buildings, only to business personal property, and the evidence showed no damage over the $1,000 deductible from wind-or hail-driven water (as

opposed to flood water). Such evidence included the declaration of State Farm's retained engineer, who stated that his inspection showed no conditions consistent with the effects of wind and revealed flood debris lines that were about 7 feet above the finished floor. State Farm also provided photographs showing the height of floodwater outside the property. Laurence, on the other hand, could not point to any evidence in the record showing that his business personal property was not damaged by flood water that exceeded his deductible. Once the Court concluded no coverage existed, it summarily dismissed Laurence's extra-contractual claims and granted State Farm's motion for summary judgment.

The U.S. Appeals Court for the Fifth Circuit affirmed the summary judgment the district court granted in favor of Playa Vista Conroe ("Playa Vista") regarding a Hurricane-Harvey related property damage claim made by Playa Vista with its insurer. *Playa Vista Conroe v. Ins. Co. of the West*, No. 20-203, 2021 WL 836715 (5th Cir. March 5, 2021) centered on a coverage dispute that arose after Hurricane Harvey hit the Texas coast in August 2017.

To prevent the Lake Conroe Dam from overflowing and failing, the San Jacinto River Authority released massive amounts of water from the dam, which Playa Vista claimed destroyed 22 of its boat slips. Playa Vista filed a notice of loss and made a claim under its policy. The insurer denied coverage, stating that the policy did not cover flooding caused by a hurricane or tropical storm.

Playa Vista subsequently filed notice and sent its insurer a pre-litigation demand letter under Ch. 542A of the Texas Insurance Code. When the insurer reiterated its denial of coverage, Playa Vista filed suit in state court. The case was removed to federal court, where the parties filed cross-motions for summary judgment. The district court denied the insurer's motion and granted Playa Vista's, resolving the breach of contract claim but leaving the issue of damages and attorney's fees for trial.

Two weeks prior to trial, the parties entered a stipulation in which they agreed Playa Vista insured $190,827.50 in damages and $50,000 in attorney's fees. The district court approved of and entered the stipulation. Playa Vista moved for final judgment, and the district court awarded it the damages and fees pursuant to the stipulation. The insurer then sought leave to file a second motion for summary judgment, arguing that the stipulation rendered the policy's exclusion for "acts or decisions . . . of any person, organization or governmental body" applicable. The district court denied the motion, and the insurer appealed.

On appeal, the Fifth Circuit held that Playa Vista established coverage, and the insurer failed to prove an exclusion applied. Playa Vista pointed to provisions in the policy that stated the insurer would not pay for loss or damage to docks unless a stated value was listed in a certain subsection or if a sub-limit of insurance in the Declaration or in an endorsement to the policy existed. Next, Playa vista showed that the Declaration included a provision that allocated a $220,000 sublimit of

insurance for coverage of boat slips. The Fifth Circuit concluded that such evidence established coverage, and the burden switched to the insurer to show an applicable exclusion.

The insurer pointed to three potential exclusions. The Fifth Circuit held them all to be irrelevant. First, the exclusion regarding "damage resulting from waterborne material involved in [a] flood" also included language that it was essentially inapplicable if flood coverage was endorsed or made a part of the policy, which was the case. Second, the exclusion regarding not paying for loss or damage caused by a flood arising from a hurricane or tropical storm did not apply because the policy's definition of "flood" did not apply to Playa Vista's boat slips because they existed on water, not on normally dry land—as the policy's definition specified. Third, the exclusion for flood damage to blat slips and docks did not apply because it only applies to "floods," and the policy's definition of "flood" excluded flood damage to property that normally appears on water rather than dry land. As the Court stated, "[I]t was [the insurer's] policy to draft, so [the insurer] must assume the perils of its chosen language.

Further, the Fifth Circuit held that, even if the "flood" exclusions applied, Playa Vista's summary judgment evidence show that the boat slips were not destroyed by a "flood"; rather, they were destroyed by a suction effect created by the water being released from the dam at such a high volume, which caused debris from all over Lake Conroe to be violently whipped around and destroy the boat slips as water drained out of the Lake.

Finally, as to the insurer's argument that the "governmental body" exclusion applied given that Playa Vista had agreed that the San Jacinto River Authority's release of water from the Lake Conroe Dam at an unprecedented rate and volume caused the debris to collide into the boat slips and docks, the Fifth Circuit concluded that the insurer's attempt at a legal "gotcha" must fail because the insurer failed to rely on the governmental body exclusion or raise it as an issue in its motion for summary judgment.

Given the above, the Fifth Circuit affirmed the district court's decision to grant Playa Vista's summary judgment.

2. Statute of Limitations

A state appeals court in Tyler upheld a trial court's ruling granting summary judgment in favor of an insurer based on the insurer's argument that an insured's suit was barred by the statute of limitations. *Abedinia v. Lighthouse Property Ins. Co.*, No. 12-20-00183-CV, 2021 WL 4898456 (Tex. App.—Tyler Oct. 20, 2021) involved a dispute between a homeowner and her homeowner's insurance carrier arising from a Hurricane Harvey claim.

On August 28, 2017, the insured's home reportedly suffered damage from Hurricane Harvey. On August 31, 2017, she filed a notice of claim with the insurer ("Lighthouse") for wind damage in accordance with the policy. On October 13, 2017, Lighthouse sent a letter to the claimant accepting the loss and detailing the amount of compensation owed under the policy, including a check as payment for the loss.

No other activity occurred on the claim until January 28, 2019, when Lighthouse received a letter of representation from the insured's attorney, who attempted to file a written notice on the claim. In response, Lighthouse informed the insured's attorney that the claimant had already filed a notice of claim on August 31, 2017. Because Lighthouse believed it acted properly in accepting and paying the loss, and because the claimant was contesting the amount paid, Lighthouse invoked the policy's appraisal provision and reserved all rights under the policy.

The insured's attorney then sent a demand letter dated March 14, 2019, and also invoked the appraisal process. When the appraisal process began, the insured's attorney sent a second demand On October 1, 2019, naming a different appraiser. On December 3, 2019, the insured's attorney filed a declaration for an umpire appointment after the parties' appraisers arrived at an impasse. On December 9, 2019, an umpire was appointed. On December 30, 2019, Lighthouse informed the umpire that it was no longer going to participate in appraisal because limitations passed on October 14, 2019. That same day, the claimant filed suit.

Lighthouse immediately followed by filing a motion for summary judgment on the issue of limitations, alleging that the claimant failed to bring suit within the applicable limitations period. The trial court granted Lighthouse's motion, and the claimant filed her appeal.

On appeal, the Court first acknowledged that, while the normal limitations period for a breach of contract claim is four years, parties may contractually agree to a shorter time period, so long as such period is not shorter than two years. Additionally, the Court stressed that a cause of action for breach of an insurance contract accrues (and thus starts the running of the limitations period) when the claimant has notice of facts sufficient to place them on notice of the breach.

The policy at issue contained a standard provision shortening the limitations period for claims for losses caused by windstorms or hail in the "catastrophe area," as defined by the Insurance Code, to two years and one day from the date the carrier accepts or rejects the claim. It was undisputed that the insured's loss was caused by a windstorm in the catastrophe area, so this provision controlled.

Lighthouse argued, and the Court agreed, that the insured's cause of action for breach of contract accrued on October 13, 2017, when Lighthouse accepted the claim and paid the amount it determined it owed. So the limitations ran on October 14, 2019, and the claimant did not file suit until December 30, 2019.

After quickly disposing of the insured's first argument that the statute allowing for parties to a contract to shorten the limitations period did not apply to insurance contracts, the Court turned to the insured's argument that the parties' invocation of the appraisal process tolled or restarted the limitations period. Again, the claimant could cite no authority to support its argument. Indeed, Lighthouse cited authority stating that the use of appraisal process has no bearing on any deadlines or enforcing any missed deadlines, which the Court held included the limitations period.

Accordingly, the Court affirmed the trial court's judgment granting summary judgment on the limitations issue in favor of Lighthouse.

3. Named Storm Coverage is Not Flood

In *Landmark American Insurance Company v. SCD Memorial Place II, L.L.C.*, No. 20-20389, 2022 WL 320316, (5th Cir., Feb. 3, 2022), the Court reviewed whether an insurance policy covered flood-related damage sustained by a building during Hurricane Harvey. The trial court determined that the policy provided coverage and granted summary judgment in favor of the insured. After consideration. The appellate court reversed and rendered judgment in favor of the insurer.

In 2016, Landmark issued an insurance policy to SCD that covered several properties and was effective from August 31, 2016, to September 7, 2017. The Landmark policy was a "deductible buy back policy." The deductible buy back policy may cover all or a portion of the deductible required by the primary policy, reducing the insured's out-of-pocket costs.

SCD's primary insurance policy was a "all risks" policy that covered "all risks of direct physical loss or damage including flood, earth movement, and equipment breakdown." The policy had a high deductible and thus, the insured purchased the separate Landmark policy to help cover the cost of that deductible. The "Insuring Clause" of the Landmark policy outlines the type of damage for which it would cover the deductible of the primary insurance policy. Specifically, Landmark agreed to indemnify the insured for damage "caused by any of such perils as are set forth in item 3 of the schedule, and which are also covered by ... the 'Primary Insurer(s).' "In August 2017, Hurricane Harvey made landfall. The parties agreed that Hurricane Harvey was a "Named Storm," as defined under the policies and also that it caused damage to one of SCD's insured properties.

Landmark argued that the policy covers the specified perils of "Windstorm or Hail" that are "associated with a Named Storm [here, Hurricane Harvey]" but not all perils associated with a Named Storm. In other words, it is a "named perils" rather than "all risks" policy, meaning it covers only the perils specified in the policy. SCD cited *Pan Am Equities, Inc. v. Lexington Insurance Company* for the proposition that Hurricane Harvey was a "Windstorm" and therefore the policy covers all perils associated it.

The Court agreed with Landmark because its interpretation aligned with "the plain meaning of the text of the policy." The Court noted that although "Windstorm" in another policy could include flood and hail damage, in the specific context of the Landmark policy, it is a specific peril "associated with a Named Storm." "Windstorm" did not expand the Landmark policy to include all the perils associated with Hurricane Harvey. The Court concluded that under its plain language, the Landmark policy does not apply to the type of damage that the SCD property sustained in connection with Hurricane Harvey. The Court reversed and rendered in favor of Landmark.

D. Flood Claims

1. Proof of Loss: FEMA Bulletin Impact

With limited exceptions, the issue of proof of loss in flood claims continue to generate litigation, especially when the proof of loss is not properly or timely completed.

In *Uddoh v. Selective Insurance Co. of America*, 772 F. App'x (3d Cir. 2019), the court held that the insured's proof of loss under a Standard Flood Insurance Program ("SFIP") policy that did not include the amount he was seeking to recover did not comply with regulatory requirements. The insured argued that FEMA waived the proof of loss requirement in a bulletin issued after Hurricane Sandy. The court found that the bulletin did not eliminate the proof of loss requirement; instead, it allowed an insurer's initial payment to be based on the adjuster's report. The insured's failure to submit a proper proof of loss precluded coverage.

The U.S. Court of Appeals for the Fifth Circuit affirmed a district court's summary judgment in favor of an insurer in a dispute involving an insurance claim for flood damage to the claimant's home. *Nguyen v. Tex. Farmers Ins. Co.*, No. 21-40266, 2021 WL 5579268 (5th Cir. Nov. 29, 2021). In August 2017, the claimant filed an insurance claim seeking additional reimbursements for flood damage sustained to her home following Hurricane Harvey. She had coverage under a Standard Flood Insurance Policy (SFIP) purchased though Texas Farmers Insurance Company ("Texas Farmers").

After Hurricane Harvey affected Texas with widespread and catastrophic flooding, the Federal Emergency Management Agency ("FEMA"), who sets the terms of the SFIP, exercised its authority to modify the terms of the SFIP. In so doing, FEMA waived the normal 60-day proof of loss deadline requirement and extended the deadline to 365 days (one year) from the date of loss. As such, the claimant here was required to submit the proof of loss by August 2018, which she admittedly failed to do. However, the claimant argued that the Bulletin issued by FEMA also waived the requirement to file a proof of loss when seeking additional reimbursements.

A review of the clear language of the Bulletin did not support the claimant's interpretation and, indeed, clearly stated that the condition waiver did not alter a policyholder's ability to submit a proof of loss seeking supplemental payments. Additionally, the sample payment letter attached to the Bulletin explicitly stated that policyholders requesting additional payments were required to submit a proof of loss within one year following the date of loss. As a result, the appeals court affirmed the district court's summary judgment in favor of Texas Farmers.

2. Proof of Loss: Timeliness

In *Migliaro v. Fidelity. National Indemnity Insurance Co.*, 880 F.3d 660 (3dCir. 2018), the court held that an insurer's rejection of a proof of loss under a Standard Flood Insurance Program ("SFIP") policy is not a *per se* denial of the claim, but it is a denial if the policyholder treats it as such and files suit against the insurer. Sandy damaged Migliaro's property. After receiving payment for his initial claim, Migliaro submitted a proof of loss for additional damages. Fidelity sent a letter titled "Rejection of Proof of Loss." The SFIP has a one-year statute of limitations, and insureds may not file suit under the SFIP until a claim has been denied in writing. The court held that, "[b]ecause a policyholder cannot bring suit until his claim has been denied in writing, Migliaro must have accepted that this had occurred when he brought suit" and "by bringing suit, Migliaro acknowledged that the letter constituted a written denial of his claim."

In *LCP West Monroe, LLC v. United States*, Civil Action No. 17-0372, 2018 U.S. Dist. LEXIS 84149 (W.D. La. May 18, 2018), LCP's buildings sustained flood damage during regional flooding in March 2016. FEMA authorized an extension of the 60-day period in which an insured must normally submit a proof of loss. LCP submitted timely proofs of loss to its insurer, Selective, which paid the claim. LCP submitted another proof of loss six months later, and that claim was denied. The court held that, when an insured submits a timely proof of loss and notifies its insurer that a supplement will follow, but the supplemental claim is not accompanied by a timely proof of loss, the supplemental claim may be denied.

3. State Law Preempted

Similarly, parties seeking to avoid federal preemption fight an uphill battle.

In *D & S Remodelers, Inc. v Wright National Flood Insurance Services, LLC*, 725 F. App'x 350 (6th Cir. 2018), the Sixth Circuit held that the National Flood Insurance Act ("NFIA") preempts state law claims arising from a flood insurer's handling of an insured's claim; therefore, claims by a plaintiff who is not a policyholder under a National Flood Insurance Program ("NFIP") policy may be preempted by the NFIA. D & S entered an open services contract after Sandy with the Foundry at Hunters Point Condominiums to provide floodwater-pumping services. D & S met with Foundry and a Colonial Claims Corp. adjuster. In the suit, D & S alleged the adjuster was the NFIP

insurer's agent and entered into oral agreements to expand the work to include decontamination. D & S claimed that Colonial represented that any insurance claim submitted to Foundry's insurer would be accepted and paid in full. D & S provided drying and decontamination services but was not paid. D & S sued Foundry, the flood insurer, and the adjuster. Defendants moved to dismiss the suit on grounds that the NFIA preempted D & S's claims. D & S argued that its claims arose from its contract, not claims handling, and the NFIA did not preempt its claims. The Sixth Circuit held that the NFIA preempts D & S's state law claims arising from Wright's handling of Foundry's claim.

E. Assignment of Benefits

Assignments continue to generate both litigation and legislative action. The litigation is generally driven by contractors who want to be paid directly by the insurers. There are, however, some exceptions like the first case here.

In *Sidiq v. Tower Hill Select Insurance Co.*, 276 So.3d 822 (Fla. Dist. Ct. App. 2019), the insureds sued after the insurer denied their water damage claim. The insurer argued that the insureds had no standing to sue because the insureds had assigned all their rights under the policy to a water damage mitigation company. Reasoning that the insureds did not intend to transfer all their rights under the policy, and the assignment to the water damage mitigation company was limited to the insureds' rights as to water mitigation services, the court ruled for the insureds.

In *Charter School Solutions v. GuideOne Mutual Insurance Co.*, 407 F. Supp. 3d 641 (W.D. Tex. 2019). the court held that a policy covering hail damage to property formerly owned by a debtor in bankruptcy remained an executory contract after the insurer terminated the policy and was validly assigned to a subsequent owner during the debtor's bankruptcy proceeding, notwithstanding the policy's non- assignment clause.

In *Capitol Property Management Corp. v. Nationwide Property and Casualty Insurance Co.*, 757 F. App'x 229 (4th Cir. 2018), the property manager of the insured condominium association, as its assignee, sued the insurers to recover insurance claim processing and construction management fees owed by the insured after a fire. The court held that, under Virginia law, the insurers had no legally enforceable obligation to pay the construction management fee because the assignment did not refer to that fee. The court also held that fee was a non-physical loss and did not fall within the policy's coverage for "direct physical loss." This fee was not a covered extra expense as the fee was not necessary to maintain the insured's operations or business activities, but rather represented outsourcing of the insured's duties after a loss. Finally, the court held that any expenses the insured's property manager incurred for an employee to perform specific tasks relating to the claim were not covered extra expense resulting from the fire.

In *Restoration 1 of Port St. Lucie v. Ark Royal Insurance Company*, 255 So.3d 344 (Fla. Dist. Ct. App. 2018), a contractor, who had an assignment of the insured's claim under a homeowner's policy, sued after the insurer refused to recognize the assignment and pay the contractor's claim. The court held that the policy provision requiring consent of all insureds and the mortgagee before the insureds' rights could be assigned was enforceable where the policy did not prohibit assignment or condition it on the insurer's consent. The court also held that a contractual blanket ban on all assignments of rights under a policy is impermissible.

F. Paying the Loss

1. ACV/RCV/Holdback

Carriers frequently defend both the specific decisions as to how they pay a property damage claim as well as the institutional practices that provide guidance for how claims are paid.

In *Accardi v. Hartford Underwriters Insurance Co.*, No. 18 CVS 2162, 2018 WL 5273971 (N.C. Sup. Ct. Oct. 22, 2018), the court held that the term ACV is unambiguous, which permitted the insurer to depreciate labor when calculating ACV. The court noted that the policy unambiguously allowed a deduction for depreciation when calculating ACV and there was no indication that labor and material costs should be treated differently in making that calculation.

In *Cranfield v. State Farm Fire & Casualty Co.*, 340 F. Supp. 3d 670 (N.D. Ohio Nov. 26, 2018), the court dismissed a putative class action, holding that the policy unambiguously included labor in the depreciation calculation. The court relied on *Black's Law Dictionary*, noting that "the methods of depreciation listed in *Black's Law Dictionary* focus on the whole product, rather than the component parts," and that labor's finished products are subject to wear and tear.

On the other hand, in *Stuart v. State Farm Fire and Casualty Co.*, 910 F.3d 371 (8th Cir. 2019), the court affirmed class certification for a class of homeowners alleging breach of contract for depreciating labor when making ACV payments based on Arkansas law. In 2013, the Arkansas Supreme Court had held that labor may not be depreciated. While that ruling was superseded by statute, the court allowed certification of a class of State Farm insureds who received ACV payments where labor was depreciated before December 6, 2013.

In *Lammert v. Auto-Owners (Mutual) Insurance Co*. 572 S.W.3d 170 (Tenn. 2019), the court held that "depreciation can only be applied to the cost of materials, not to labor costs."

In *Bosse v. Access Home Insurance Co.* 267 So.3d 1142 (La. Ct. App. Dec. 17, 2018), the court held that the insureds were not entitled to replacement cost value ("RCV") where they did not comply with the policy provisions for recovering it. The policies required the insureds to notify the insurer of intent to repair or replace damage within 180 days after the damage occurs. The court held that

since the insureds did not notify the insurer within 180 days of their intent to repair or replace, the insurer did not breach the policies by failing to pay the full RCV.

Similarly, in *Cushing v. Allstate Fire and Casualty Insurance Co.*, 104 N.Y.S.3d 456 (App. Div. 2019), the court held that the insureds were not entitled to replacement cost value ("RCV") The court enforced a provision limiting the insured's recovery to ACV where the building was not repaired or replaced within two years, as required by the policy.

2. Multiple Sublimits

The United States Bankruptcy Court in the Northern District of Georgia tackled the issue of which limits apply when a water damage claim includes multiple policy provisions, multiple causes of loss, and multiple factual situations that causes damage to the property under a commercial property policy. In *In re Covering Lodging, Inc.*, 635 B.R. 675 (N.D. Georgia Bank. – Atlanta Div., 2021), the court held that the extent damage was caused by both a water pipe break and a sewer back up, the policy limit of $1.9 million applied and not the lesser $100,000 sewer limit. The insurer argued that all of the damage was caused by the sewer back up and that the water pipe break was either concurrent or subsequent to the sewer back up. The insured argued that the water pipe break damaged all the areas and that the sewer back up contributed to the damage but was not separable from the damage caused by the water break.

In an extremely detailed opinion, the court analyzed the policy provisions potentially applicable to the loss. The court's opinion lays out the facts surrounding the evidence of damage to each area of the hotel that was allegedly damaged, including what types of water (Category 1, 2, or 3) were found where. The court sets out the amounts of damages claimed as well as a timeline for the loss and the claim handling. The court then sets forth the law as to insurance policy interpretation as well as the burden of proof. It surveys the state of the law in other jurisdictions as well as the commentators as it disposes of the anti-concurrent cause clause, various exclusions, and sublimits. The opinion also addresses the transfer of the property to a new owner and the impact on the claim. After disposing of the property damage question, the opinion goes on to address contents, stored contents, and lost income.

3. Florida's Water Damage Sublimit

Florida courts appear to be struggling with the "Limited Water Damage Endorsement" (LWDE) and whether it subjects claims for "tear out" to the applicable sublimit of the LWDE. For a discussion of the LWDE and how it interacts with other water damage endorsements, see *Archer v. Tower Hill Signature Insurance Co*., 313 So.3d 645 (Fla. 4 DCA 2021) (upholding summary judgment for insurer).

In *Security First Ins. Co. v. Vazquez*, 2022 WL 495211, — So. 3d — (Fla. 5th DCA February 18, 2022), the Court reviewed an order granting summary judgment in favor of the insureds. Like the typical cast iron pipe claim, the insureds had an overflow of water in the home stemming from deteriorated cast iron pipes, causing damage to the property. The insurer acknowledged coverage and only paid $10,000.00 under the LWD endorsement. The insureds claimed they were owed more for "tear out" and to replace the undamaged concrete slab which was necessary to access the pipes at issue. The insurer argued that the $10,000.00 limit applied to both the water damage and the "tear out" cost and no more was owed. Conversely, the insureds asserted that the $10,000.00 limit only applied to the water damage, thereby leaving "tear out" costs to be covered as part of the ensuing loss for water damage provision. The appellate court, reading the plain language of the policy, relied on the policy language stating "the limit of liability for *all damage to covered property provided* by this endorsement is $10,000.00 per loss," in determining the "tear out" costs were not "damage" but that "tear out" costs are referenced as an item to be covered as part of a loss under the ensuing loss for water damage provision. Thus, the "tear out" would be considered as part of the limits for the dwelling damage. The appellate court also pointed out that there was no sublimit for "tear out" costs in the LWD Endorsement, which the insurer could have put in the policy. Consequently, the appellate court found that although the LWD Endorsement could be read to include "tear out" costs, any ambiguity is construed against the insurer. Accordingly, the summary judgment in favor of the insured was affirmed.

Florida's Southern District Court reached a different conclusion in *Ramirez v. Scottsdale Insurance Co*., 548 F. Supp.3d 1318 (USDC S. Dist. Fla. 2021). The policy contained the LWDE and the insured argued, among other things, that additional limits should be available for tear out. In granting summary judgment to the insurer, the court held that LWDE applied to the entire claim. First, under Florida law, the court determined that removal of standing water from the insured's home, following the alleged drain line leak in the kitchen, constituted "direct physical loss to the property caused by the discharged water." As such the claim would be subject to policy's sublimit on water damage. Secondly, under Florida law, the court held that tearing out and replacing the pipe in the insured's home was the result of "accidental discharge or overflow of water" from within the plumbing system and thus was also subject to such sublimit. Florida's Southern District reached the same result on similar facts, policy language and reasoning in *Yanes v. National Specialty Insurance Co.*, 548 F.Supp.3d 1307 (USDC S.Dist. Fla. 2021).

It also looks like the courts will look for coverage under the LWDE, even with its lesser limits, considering the holding in *Dodge v. People's Trust Insurance Co.*, 321 S.3d 831 (Fla. 4th DCA 2021). In that case, the court held that rust and corrosion to pipes was an act of nature that triggered the LWDE. To reach that result, the court held that the phrase "act of nature" in a homeowner's insurance policy does not require an uncontrollable or unpreventable event, and the phrase excludes damage caused by an act of nature or natural forces:

"Corrosion, the chemical reaction between iron and moist air, is an act of nature or a naturally occurring force. Thus, the rust or corrosion occurred because of a natural act."

The court, therefore, held that the LWDE applied.

4. Fraudulent Contractors

In Texas, the Fort Worth Court of Appeals reversed a trial court judgment in a case where an insurer failed to pay additional amounts after a contractor stole some of the insurance proceeds meant for repairs. In *Argonaut Great Central Insurance Company v. MLLCA, Inc.,* 2021 WL 1919641, (Tex.App.—Fort Worth, May 13, 2021), the court examined a trial court's judgment after a jury found against Argonaut on claims for fraud and fraud by nondisclosure, breach of contract, insurance code violations, violations of the duty of good faith and fair dealing, and deceptive trade practices.

In November 2015, a hailstorm struck Decatur, Texas. The storm hit a gas station owned by MLLCA, damaging the roof of the station and the canopies over the gas pumps. MLLCA presented a claim to Argonaut which assigned the claim to an independent adjuster, Vericlaim. MLLCA arranged for a roofing company, RS Roofing, to submit an estimate for repairs. Vericlaim asked for an itemized bid that did not include certain repairs which were unnecessary, but RS Roofing would not provide one. Negotiations between Vericlaim and RS Roofing broke down over itemization and the scope of repairs, and RS Roofing became unresponsive. Argonaut requested another bid, so Vericlaim asked a contractor named Frank Walley to evaluate the damage and MLLCA ultimately decided to hire Walley as its contractor. Argonaut and Walley agreed on the total cost of repairs. Pursuant to the policy, the actual cash value amount would be disbursed first, followed by additional payments as the completion of repairs demanded. MLLCA agreed to the plan, but it asked to have the check made jointly payable to MLLCA and Walley. When the check was received, MLLCA endorsed it over to Walley.

Walley gave some of the proceeds back to MLLCA and did some of the work. However, Walley ultimately took the remaining funds without completing the work. MLLCA's owners used their own money to pay for the completion of repairs to the canopies, but not all the remaining work. Argonaut declined to release the remaining funds, because its obligation to pay the full repair cost would be triggered under the policy only if MLLCA documented more than the actual cash value payment in expenses on completed repairs.

MLLCA filed suit. At trial, MLLCA argued that Argonaut breached the policy by refusing to pay the remaining $95,000 in repair costs. The jury found against Argonaut on MLLCA's claims for fraud and fraud by nondisclosure, breach of contract, insurance code violations, violations of the duty of good faith and fair dealing, and deceptive trade practices. MLLCA elected to recover on its fraud

claims the trial court rendered judgment accordingly, with four alternative recoveries in the event the appellate court reversed the judgment on the fraud claims. Argonaut appealed, and MLLCA cross-appealed.

On appeal, Argonaut argued that there was insufficient evidence to support the fraud, DTPA and breach of contract claims. The court agreed. The court also found that because the policy had not been breached, and there was no evidence of independent injury to support the "narrow" exception, the claims for breach of the insurance code and the duty of good faith and fair dealing also failed. The court reversed the trial court's judgment and rendered judgment that MLLCA take nothing.

G. Matching

Matching disputes continue to be highly dependent on the individual facts of a particular case.

In *Villas at Winding Ridge v. State Farm Fire & Casualty Co.*, 942 F.3d 824 (7th Cir. 2019), the Seventh Circuit held that the insured's claim for matching was untimely because the insured raised it after the appraisal award was issued, despite knowing that matching would be an issue. The appraisers agreed that 20 of the insured's 33 buildings had no hail damage. The panel agreed as to minor hail damage to the roofing shingles on the remaining 13 buildings and awarded a 20% allowance to repair those shingles. The panel awarded ACV for roofing metals and RCV for elevation repairs and replacement shingles around new turtle roof vents on all 33 buildings. The insured challenged the award, seeking full replacement of all roofs on all 33 buildings so that they would have a uniform appearance. The court rejected that argument, upheld the appraisal award, and declared the request for matching untimely. The court rejected the argument that the information should be accepted to construe the policy language, concluding that extrinsic evidence was inappropriate because the policy language as to the amount owed for the damages was not ambiguous. Factually distinguishing controlling law in the jurisdiction, the court also rejected the argument that "comparable materials" required a reasonable color match because: (a) not all the roofs suffered physical damage; (b) there was no evidence of a uniform appearance before the loss or that the property would be devalued because of color inconsistencies; and (c) the panel did not award total replacement.

In *Windridge of Naperville Condominium Association v. Philadelphia Indemnity Insurance Co.*, 932 F.3d 1035 (7th Cir. 2019), a storm damaged a building's aluminum siding on its south and west sides, and replacement siding that matched the undamaged north and east sides was not available. The court required the insurer to pay for all four sides, reasoning that "a replacement cost policy, by definition, provides a 'make-whole' remedy" that must approximate the situation in which the insured would have been had no loss occurred.

H. Exclusions

1. Anti-Concurrent/Anti-Sequential Causation ("ACC")

The ACC can generate judicial opinions when it is in the policy and even when it is not.

In *Jackson v. Standard Fire Insurance Co.*, 406 F. Supp. 3d 480 (D. Md. 2019), the parties disputed how to apply the ACC clause to the loss when mold was one of the excluded perils. The parties agreed that (1) the loss was initially caused by water damage resulting from a toilet malfunction, (2) the water damage, coupled with humidity, led to mold growth throughout the house, and (3) the water damage was a covered peril. The insurer argued that mold caused additional damage throughout the house, and all damage was excluded by the ACC clause. The court interpreted the ACC clause to: (1) preclude coverage for damage to any items for which the excluded peril contributed to the loss; and (2) *not* exclude coverage for items where the evidence established the item was only damaged by the covered peril and was a total loss regardless of whether the excluded peril subsequently manifested.

The United States District Court, Southern District of Texas, granted summary judgment on all causes of action against Acadia related to a storm damage claim. *Advanced Indicator and Manufacturing, Inc. Acadia Insurance Company*, No. 4:18-CV-03059, 2021 WL 199617 (S.D. Tex., Jan. 19, 2021. In the lawsuit, Indicator submitted a claim for its roof that was damaged by Hurricane Harvey. After an investigation, Acadia found that the damage to the building was not exclusive to Harvey and denied the claim. Indicator sued Acadia for breach of contract, breach of the duty of faith and fair dealing, violating the Texas Insurance Code, and violating the Deceptive Trade Practices Act. Acadia moved for summary judgment.

In response to the summary judgement, the insured filed a response that included unsworn declarations by their expert Peter De La Mora and an unsworn report from expert Art Boutin. The court struck De La Mora's declaration because it was unsworn and struck Boutin's report because it was unsworn and not produced until after his deposition, in violation of the federal rules.

The court found Acadia's investigation of the claim was thorough. The court then turned its analysis to the concurrent causation doctrine and noted that a "failure to segregate covered and non-covered causes of loss is fatal to the whole claim." The court noted that even if Plaintiff's expert De La Mora's unsworn declaration were admissible, it still did not differentiate between damage caused by Harvey versus prior damage. Further, in regard to his testimony, the court found: "At best, de la Mora contradicts himself - at worst he ultimately admits there is more than one cause of damage to the property."

Because there was no competent evidence to apportion covered and non-covered damages to the property, the breach of contract claim failed. And because there was no breach of the policy contract, the extra-contractual claims also failed as a matter of law.

In *O.L. Matthews, M.D., P.C. v. Harleysville Insurance Co.*, 412 F. Supp. 3d 717 (E.D. Mich. 2019), the court held that *lack* of ACC language did not preclude enforcement of an exclusion because Michigan does not follow the efficient proximate cause doctrine. The case arose from a dispute over water damage from roof leaks at a doctor's office covered by an all-risk policy. The insurer denied coverage based on exclusions for "wear and tear" and "deterioration." The policyholder argued that, because the exclusions did not include ACC language, the insurer had to prove that the excluded causes were the only causes of the loss. The court rejected that argument, holding that "the default rule under Michigan law is that a loss is *not* covered when it is concurrently caused by the combination of a covered cause and an excluded cause."

2. Dishonest Acts

In *KA Together, Inc. v. Aspen Specialty Insurance Co.*, 362 F. Supp. 3d 281 (E.D. Pa. 2019), water damage followed a landlord-tenant dispute involving subletting to additional tenants and entrustment by the landlord to strangers to the rental agreement. The insured owned a mixed-use building. The lease for the third-floor apartment prohibited the tenant from transferring the lease or subletting the apartment without the insured's written consent. The tenant and his roommate, who was not listed on the lease, were arrested and removed from the property. The insured then discovered two additional individuals in the apartment who claimed they signed a lease with the roommate. The insured allowed the individuals to remain in the apartment for two weeks and gave them three extensions. The day after the individuals vacated the premises, the insured discovered water running and the drains blocked in the apartment, which caused water to flood the second-floor tenant's business. The insurer argued coverage was precluded under the exclusion for dishonest or criminal acts by anyone to whom the insured entrusted the apartment for any purpose. The court agreed, finding that a written contract is not needed to show entrustment. Because the insured did not attempt to retrieve the keys or change the locks to the apartment, he knowingly entrusted the apartment to the individuals. That relationship continued each time the insured gave them permission to stay on.

3. Cosmetic Damage Exclusion

In Texas, the San Antonio Court of Appeals affirmed on rehearing a judgment in favor of a policyholder on a residential hail claim and reinstated a previously overturned award of treble damages. *Allstate Veh. & Prop. Ins. Co. v. Reininger*, No. 04-19-0443-CV, 2021 WL 2445622 (Tex. App.—San Antonio June 16, 2021) involved a hail claim made regarding a home with a metal roof. The Allstate insurance policy contained a cosmetic damage exclusion which stated the policy

did not cover "[c]osmetic damage caused by hail to a metal roof surface, including but not limited to, indentations, dents, distortions, scratches, or marks, that change the appearance of a metal roof surface." It also stated, "We will not apply this exclusion to sudden and accidental direct physical damage to a metal roof surface caused by hail that results in water leaking through the metal roof surface."

This exclusion resulted in a battle of the experts over the question of whether hail damage to the metal roof was cosmetic or not. The jury found Allstate breached its contract, committed fraud, and knowingly violated the Texas Insurance Code, awarding treble damages for the knowing violation. In its original opinion issued last December, the court of appeals upheld the actual damages, but reversed the treble damage award.

After the original opinion was issued, both parties moved for rehearing. The court granted Reininger's motion and denied Allstate's. In the replacement opinion, the court repeated most of its original conclusions upholding the actual damages awarded by the jury, but also reinstated the jury's award of treble damages. The court stated there was evidence Reininger disputed the original finding of cosmetic damage, and that the adjuster did not follow company procedure requiring him to retain a structural engineer before denying the claim. Additionally, there was evidence showing Allstate knew Reininger had requested a second inspection and that his agent had also requested a second inspection, but Allstate closed its file without completing the requested inspection. The court concluded this evidence was sufficient to support the jury's finding of a knowing violation.

4. Water Damage v. Snow Melt

In *Goodrich v. Garrison Property and Casualty*, 526 F.Supp.3d 789 (USDC D. Nev. 2021), the insured homeowner brought bad faith action against insurer for breach of contract, breach of implied covenant of good faith and fair dealing, violation of Nevada's Unfair Claims Practices Act (UCPA), and declaratory relief, arising from the insurer's denial of the insured's claim under his homeowner's insurance policy for water damage to his home. Following removal, the insurer moved for summary judgment. Under Nevada law, where covered and noncovered perils contribute to a loss, the peril that set in motion the chain of events leading to the loss or the predominating cause is deemed the efficient proximate cause or legal cause of loss; generally, this determination is left to the trier of fact, but when the facts are settled or undisputed, the determination is for the court as a matter of law, and the court then evaluates the coverage of an insurance policy based on the determined efficient proximate cause of the loss.

The court explained that loss resulting from water damage could be "sudden and accidental" and still fall under water damage exclusion in homeowners' insurance policy, and thus fact that loss was sudden and accidental did not independently provide coverage under policy pursuant to Nevada law. In the insured's bad faith insurance action arising from his insurer's denial of insured claim for water damage resulting from snowmelt, where the policy, when considered as whole,

anticipated that the water damage may have arisen without anticipation and still be excluded. The court held that the loss to insured's home resulting from water damage caused by snowmelt fell within the plain and ordinary meaning of water damage exclusion, and thus there was no coverage under homeowner's insurance policy pursuant to Nevada law. The court also held that whether the intruding water was originally snowmelt or was from another source was of no consequence, as original source of intruding water did not control whether the exclusion applied. Here, the exclusion encompassed losses "arising from, caused by, or resulting from human or animal forces, any act of nature, or any other source" and snowmelt was an act of nature, and the water damage was efficient proximate cause of loss to insured's home.

5. Water Damage v. Collapse

In *Mazzarella v. Amica Mutual Insurance Co.*, 774 F. App'x 14, 16 (2d Cir. 2019), the complaint alleged damage to the basement walls and floors "caused by water and oxygen infiltration" and "rainwater entering the Residence." The court affirmed dismissal of the action because the policy excluded coverage for loss caused by "[w]ater," which included "surface water," "overflow of any body of water," "storm surge," water that "[b]acks up through sewers or drains," and water "below the surface of the ground, including water which exerts pressure on, or seeps, leaks, or flows through a building, sidewalk, driveway, patio, foundation, swimming pool, or other structure.

The Supreme Court of Mississippi held that water that accumulated under a house, which lead to moisture collecting under the house and causing its deterioration, was excluded and not collapse under the policy in *Mississippi Farm Bureau v. Hardin*, 323 So.3d 1034 (2021). The court held that damage to the insured homeowner's house did not result from a peril insured against under homeowner's insurance policy. The court determined that accidental discharge or overflow of water that occurred off the resident premises was not a peril insured against under the policy. The damage to the house was caused by moisture collecting under the house for a long period of time, leading to mold, rot, and deterioration. Excess moisture was caused by the town's decision to fill in a drainage ditch beside the house and the failure to maintain nearby drainage ditches, which resulted in water seeping under the house. The court held that damage to the insured homeowner's floor was excluded from coverage under the water damage exclusion in the homeowner's insurance policy.

6. Sewer Back Up

The Ohio Supreme Court held that there was no coverage for property damage to a bar that flooded when a sewer backed up in *AKC, Inc. v. United Specialty Insurance Co.,* __ N.E.3d __, 2021 WL 4557194 (Ohio 2021). In 2014, sewage from the local sewer system backed up into the Bank Nightclub. Citing an exclusion in the bar's policy for damage caused by water that backs up or overflows from a sewer, United Specialty denied the claim. AKC, attempting to draw a distinction between pure forms of water (e.g., rainwater) and less pure forms of water (e.g., sewage), argued

that there was coverage. In making this argument, AKC asked the court to hold that the policy was ambiguous and did not clearly exclude damage caused by sewage. The court declined to do so. The court held that the water damage exclusion was unambiguous and included damage caused by a sewer back up. United Specialty had argued, alternative, that the claim was also excluded by the pollutant's exclusion, but the court did not reach that issue.

7. Mold

Mold and water damage cases continue to generate new and interesting arguments as parties explore the contours of well-developed bodies of law.

a. Insured's Knowledge of Prior Mold

In *Keathy v. Grange Insurance Co. of Michigan*, No. 15-CV-11888, 2019 WL 423838 (E.D. Mich. Feb. 4, 2019), plaintiff bought a home in December with plans to renovate it before moving in, but the furnace stopped working and water pipes froze and burst, causing water damage. Plaintiff sought coverage for water damage and basement mold remediation. The insurer denied the water damage and mold claims due to late notice because the claim was not made until after the water-damaged areas had been gutted and repairs nearly completed. The insurer also denied the mold remediation claim because the policyholder had received a price adjustment on the purchase of the home after a home inspection revealed mold "throughout the basement," so the policyholder had notice of the mold issue before coverage incepted. The court granted summary judgment on both reasons for denying coverage. As to the mold claim, the court held that coverage was barred by a known loss provision in the policy, and by the common law known loss doctrine, which is "properly invoked" when the insured is aware of the claimed loss before coverage is bound.

b. Mold from Prior Construction Defects

While this case is still on appeal, the intermediate court in *Sky Harbor Atlanta NE, LLC v. Affiliated FM Insurance Co.,* __ F.Supp.3d __ (2021 WL 977274) (USDC N. Dist. GA – Atlanta Div., 2021) (appeal filed April 27, 2021), it is worth noting that the court held that, under Georgia law, the insured property manager was not entitled to coverage for claims related to mold purportedly discovered during renovation of the property. In this case, under the commercial property policies providing coverage for "direct physical loss or damage," the origin of the water intrusion which caused the mold damage was the result of defects existing since the original construction of the property. Therefore there was no actual change to condition of property which was occasioned by accident, external, or other fortuitous event. In doing so, the court held that the applicable policy language was clear and unambiguous.

c. Mold: Statute of Limitations

The Texas Court of Appeals, Austin, concluded that the district court abused its discretion in denying motion to dismiss based on statute of limitations. In *In re the Springs Condominiums,* No. 03-21-00493-CV, 2021 WL 5814292 (Tex. App.—Austin, Dec. 8, 2021, mem. op.), Caitlin Donovan began experiencing health problems after she moved into her apartment-home at Springs Condominiums. She saw her physician on March 27, 2019, for a visual contrast sensitivity test that screened for an illness called Chronic Inflammatory Response Syndrome (CIRS). On April 9, 2019, Donovan and her physician reviewed the results of her visual contrast sensitivity test, which were suggestive of a diagnosis of CIRS due to mold. Donovan's physician also provided her with an environmental relative moldiness index test kit to test for mold in her apartment. On May 3, 2019, Donovan received test results indicating toxic mold in her apartment.

On April 20, 2021 (two years and ten days after Donovan and her doctor reviewed the test results indicating a CIRS diagnosis due to mold, but less than two years after Donovan received the results indicating toxic mold in her apartment), Donovan filed suit against Springs Condominiums alleging a claim of negligence and damages resulting from mold exposure in her apartment. In response, Springs Condominiums filed a motion to dismiss contending that Donovan's claims had no legal basis because they were filed after the expiration of the statute of limitation. The district court denied the motion to dismiss, and Springs Condominiums filed a petition for writ of mandamus.

On mandamus, the Court of Appeals concluded that the district court abused its discretion in denying Springs Condominiums' motion to dismiss. The court reasoned that "Donovan had knowledge of her injury—and the limitations period for her personal-injury claims began—on April 9, 2019, the date that she and her physician reviewed her test results attributing her CIRS diagnosis to exposure to mold and that she was provided with the kit to test for mold in her apartment." "Once the defendant's wrongful conduct causes a legal injury, the injured party's claims based on that wrongful conduct accrue—and the limitations period begins to run—even if ... the claimant does not yet know the specific cause of the injury or the party responsible for it."

The Court of Appeals rejected Donovan's argument that the motion to dismiss could not be granted because the contention that her claim was time-barred required the district court to look beyond her original petition to determine whether Springs Condominiums had raised the affirmative defense of the statute of limitations in its answer. The court reasoned that "Rule 91a limits the scope of the court's factual inquiry—the court must take the allegations as true—but does not limit the scope of the court's legal inquiry in the same way." "When deciding a Rule 91a motion, a court may consider the defendant's pleadings if doing so is necessary to make the legal determination of whether an affirmative defense is properly before the court."

d. Mold: Texas Class Action

The Supreme Court of Texas ruled that Farmers Group Inc. did nothing wrong in replacing more comprehensive homeowners' policies with narrower ones, reversing an intermediate appellate court's ruling in favor of the class action plaintiffs. In *Farmers Group, Inc. v. Geter*, 2021 WL 1323407 (Tex., April 9, 2021), the court examined a trial court's judgment that Farmers breached an insurance contract when it decided not to renew certain homeowners policies.

Beginning in 2000, the Texas homeowners insurance market experienced a large increase in mold claims. Farmers and other insurers decided to stop offering HO-B policies and begin offering a "named peril" policy, known as the HO-A policy. The Texas Department of Insurance approved an enhanced HO-A policy, which Farmers intended to offer as a substitute for the HO-B policy. In 2002, Farmers sent a notice of non-renewal to its HO-B policyholders, including Geter. The notice stated that the policyholders' existing policies would not be renewed and that Farmers would no longer offer the HO-B policy.

Geter brought the suit in 2002 on behalf of the more than 400,000 HO-B policyholders in Texas. She claimed that Farmers did not have the right to non-renew HO-B policies. She sought and received class certification from the trial court. Geter argued that the mold claims that prompted Farmers to non-renew the HO-B policy were "claims for losses resulting from natural causes" which would have prohibited Farmers from refusing to renew the HO-B policy. The trial court granted summary judgment to Geter and the class holding that Farmers breached the insurance contract by not renewing the policies. The court held that each class member was entitled to renew his HO-B policy. The court later ordered Farmers to issue HO-B policies to class members wishing to renew them at a premium set by the trial court. The trial court rendered a final judgment in 2017. On appeal, the court of appeals affirmed the trial court's judgment insofar as the trial court held that Farmers breached the insurance contract when it refused to renew the HO-B policies. However, the court of appeals reversed the portion of the trial court's judgment ordering Farmers to issue the policies at a determined premium. The court of appeals remanded the case for a decision on the proper remedy, if any, for the class's breach-of-contract claim.

Referencing testimony from the Commissioner of the Texas Department of Insurance, and an opinion from the Attorney General of Texas, the Texas Supreme Court found that because the individual plaintiff and class members were not entitled to a renewal of their HO-B policies, all the plaintiffs' claims fail, and summary judgment for Farmers was proper. The court concluded that Farmers was entitled to summary judgment on Geter's breach-of-contract claim for non-renewal of the HO-B policies. The court reversed the court of appeals' judgment and rendered judgment that the plaintiff and the class take nothing on this claim. The court also reversed the judgment on the fee request of class counsel and remanded the case to the trial court for requests for attorney fees and costs.

IV. Florida Legislative Changes

Florida's property damage environment continues to generate highlights across the country as well as lively social media discussions. While the Florida legislature has taken some action, it is too early to tell, especially with the recent exodus of property insurers from the state and financial collapse of others, if the changes will be effective in turning the market or if it is too little too late.

A. 2020: Assignment of Benefits

On July 1, 2019, Florida's new Assignment of Benefits ("AOB") Reform Bill, went into effect. The bill amended Florida Statutes Section 627.422 and created Sections 627.7152 and 627.7153, which contain definitions and required provisions for assignment agreements executed under property insurance policies. The statute provides requirements with which an AOB must comply for the assignment to be valid.

B. 2021: Property Insurance Claims and Claims Handling

Hours before the close of Florida's 2021 annual legislative session, the Florida Legislature passed SB 76, legislating wide changes to the handling and litigation of property insurance claims. The bill affects both admitted insurers and surplus lines insurers.

1. Solicitation for roof claims

SB 76 creates Florida Statute § 489.147 prohibiting certain types of solicitations and the offering of something of value in exchange for a roof inspection or making a roof claim. Specifically, the new statute prohibits a contractor from using prohibited written or electronic advertisement that "encourages, instructs, or induces a consumer" to contact that contractor or public adjuster for purpose of making a claim for roof damage. A prohibited advertisement includes items such as door hangers, business cards, magnets, flyers, pamphlets, and emails. The new statute applies to both compensated employees of the contractor and to nonemployees "compensated for soliciting," the actions of whom are actions of the contractor. Additionally, unless the contractor is also a licensed public adjuster, the contractor cannot interpret an insurance policy or advise insureds of duties under an insurance policy.

When entering into a repair agreement with an insured, the contractor must also provide a "good faith estimate of the itemized and detailed cost of the services and materials" contemplated by the repair contract. Further, the contract must contain a notice that the contractor cannot engage in the solicitation restrictions imposed by the statute. If the contract does not contain such a notice, the insured may void the contract within 10 days after executing it.

Florida Statute § 489.147 also prohibits certain types of financial incentives in relation to roof claims. A contractor cannot provide anything of value, such as a rebate, gift card, coupon, or deductible waiver, to a residential property owner in

exchange for permitting a contractor to inspect the roof or for making an insurance claim for damage to the owner's roof. Finally, the new statute prohibits referral fees or rewards for the referral of any services payable by property insurance proceeds.

The bill creates a new subsection, subsection 20 of Florida Statute § 626.854 applying to public insurance adjusters. A public insurance adjuster cannot provide anything of value, such as a rebate, gift card, coupon, or deductible waiver, to a residential property owner in exchange for permitting a public adjuster or a public adjuster apprentice to inspect the roof or for making an insurance claim for damage to the owner's roof. The new statute similarly prohibits the public adjuster from receiving referral fees or rewards for the referral of any roof repair/replacement services payable by property insurance proceeds.

2. Deadlines for Submitting Property Insurance Claims

SB 76 expands Florida Statute § 627.70132, the claim notice statute, to expand the statute from only hurricane claims to apply to ***all*** property insurance claims. In addition, the bill expands the statute to apply to surplus lines insurers.

A claimant must provide notice of a claim or a "reopened claim" within two (2) years of the date of loss. A "supplemental claim" is barred unless notice of the supplemental claim is provided within three (3) years of the date of loss. A "reopened claim" is a claim that was previously closed but reopened for additional costs for loss or damage previously disclosed. A "supplemental claim" is a claim for additional loss or damage from the same peril previously adjusted or for costs incurred while completing repairs.

This change does not impact the five-year statute of limitations for filing a lawsuit under Florida Statute § 95.11.

3. Mandatory Pre-Suit Notice

SB 76 creates Florida Statute § 627.70152 applying to lawsuits arising under property insurance policies, except for lawsuits from an assignee of benefits. This new statute applies to both admitted and surplus lines insurers.

As a precondition to filing a lawsuit, a claimant must now provide a notice of intent to litigate at least ten (10) business days prior to filing a lawsuit, but not before a coverage determination under Florida Statute § 627.70131, commonly referred to as the "90 day" statute. The notice must be on a form provided by the Department of Financial Services, and the notice must be furnished to the insurer through the email address on file with the Department of Financial Services.

The mandatory pre-suit notice must contain, with specificity, the alleged act(s) or omission(s) giving rise to the lawsuit, an estimate of damages, if known, and, for

claims other than denied claims, an itemization of damages, attorney's fees and costs, as well as the disputed amount. Supporting documentation may be provided with the notice.

The insurer must have a procedure for analysis/investigation of the notice. An insurer must respond in writing within 10 business days of the notice by accepting coverage, continuing to deny coverage, or, with a denied claim, asserting the right to re-inspect the premises. Any re-inspection must be completed within fourteen (14) business days after the insurer's invoking of its right to re-inspect the premises. Following the re-inspection, the insurer can accept coverage or continue to deny coverage, as appropriate.

Unless the claim is denied, the insurer must respond by making a settlement offer or requiring alternative dispute resolution. Alternative dispute resolution must be completed within ninety (90) days. If not completed within that timeframe, the claimant may immediately file suit without providing additional notice to the insurer.

If the claimant does not comply with the mandatory pre-suit notice, the new statute requires a court to dismiss the lawsuit without prejudice.

This new notice requirement extends the five-year statute of limitations period under Florida Statute § 95.11 by the same amounts of time. If the statute of limitations time limits expires in thirty (30) days after conclusion of pre-suit process, the time limits are tolled for thirty (30) days.

4. Consolidation of Multiple Lawsuits

SB 76 creates Florida Statute § 627.70153 requiring parties to provide notice to the courts of ongoing, multiple actions involving the same property insurance policy for the same owner(s). Under this new statute, notice is required for multiple lawsuits by claimant(s) for lawsuits brought by the same claimant for multiple claims under the same property insurance policy, as well as for any lawsuits brought by assignees of insurance benefits. The court in the earliest lawsuit may consolidate all the lawsuits.

The new Florida Statute § 627.70153 allows a lawsuit filed in county court to be consolidated into a lawsuit in circuit court, if the circuit court jurisdiction is triggered by the total amount in controversy of all consolidated lawsuits.

5. Attorney's Fees and Costs in Property Lawsuits

SB 76 changes Florida Statutes §§ 626.9373 (applying to surplus lines insurers) and 627.428 (applying to admitted insurers) to indicate that, for lawsuits arising from residential or commercial property insurance policies (not brought by an assignee

of insurance benefits), the amount of fees and costs can only be awarded only as provided in Florida Statutes §§ 57.105 or 627.70152.

Under Florida Statute § 627.70152, SB 76 establishes a three-part framework to determine any entitlement to attorney's fees and costs in a lawsuit arising from a residential or commercial property policy. The framework analysis uses the "amount obtained" by the claimant, which is defined in the statute as "the damages recovered, if any, but . . . does not include any amount awarded for attorney fees, costs, or interest."

Under the first framework, each party pays its own fees and costs if the difference between the amount obtained by the claimant and the pre–suit settlement offer (excluding attorney fees and costs) is less than twenty percent (20%) of the disputed amount.

Under the second framework, if the difference between the amount obtained by the claimant and the pre–suit settlement offer (excluding attorney's fees and costs) is greater than twenty percent (20%) but less than fifty percent (50%) of the disputed amount, the insurer pays the claimant's fees and costs equal to the percentage of the disputed amount obtained times the total attorney's fees and costs.

Under the third framework, the insurer pays the full amount of the claimant's attorney's fees and costs if the difference between the amount obtained by the claimant and the pre–suit settlement offer (excluding attorney fees and costs) is greater than fifty percent (50%) of the disputed amount.

V. Conclusion

If current trends hold, water damage claims will continue to drive the vast majority of claims on property policies. As such, there is no reason to believe that claim disputes will drop or that litigation will not continue at least at the same rate. While there are well-developed bodies of law surrounding many of the issues, there continue to be creative and original ideas to explore the boundaries of the jurisprudence.

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