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Ten from '21 — The top ten property insurance decisions from 2021

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This article, written by attorneys who specialize in property insurance issues, reflects their choice of significant — and interesting — property insurance cases from the past year. The cases reflect the issues that are top of mind to the practitioner.

Earth movement

Case: *Naabani Twin Stars, LLC v. St. Paul Fire & Marine Insurance Company*[1]

In 2016, a building owned by Naabani Twin Stars, LLC and Twin Stars, Ltd. was damaged by an underground water pipe. Two geotechnical consultants Twin Stars hired agreed the water from the burst pipe caused soil compression and settlement, which in turn caused the damage to the building. Twin Stars filed a claim with its insurer, St. Paul Fire & Marine Insurance Company.

In the continuing saga of what can and cannot be appraised in a property insurance appraisal, the Tenth Circuit, in contrast to many other courts, has ruled appraisers can determine coverage issues.

St. Paul performed its own assessment of the building and later denied coverage for the loss because (1) there was no collapse as defined in the policy, and (2) the "earth movement" exclusion applied. Twin Stars sought declaratory judgment in New Mexico state court, and St. Paul removed the case to New Mexico District Court and moved for summary judgment. The district court granted summary judgment to St. Paul and dismissed Twin Stars' claims for coverage of its losses and alleged bad faith.

The court explained that the definition of collapse in the policy was unambiguous, and the damage to the building was excluded by the definition. But even if the building had suffered a collapse, coverage would have been precluded by the earth movement exclusion. Further, the court explained that Twin Stars did not provide sufficient evidence to demonstrate that St. Paul acted in bad faith because Twin Stars failed to show what in St. Paul's investigation would have changed had St. Paul investigated further.

Thus, the court held that whether the damage was caused by gradual soil movement or by abrupt soil movement because of the July 2016 leak, the earth movement exclusion nonetheless precluded coverage. The court affirmed summary judgment in favor of St. Paul.

Wind before storm may blow away flood exclusion

Case: *Doxey v. Aegis Security Insurance Company*[2]

An insured sought coverage for wind damage sustained to his home by Hurricane Laura under a property insurance policy that excluded coverage for damage "caused by, contributed to or aggravated by" flooding. The policy also contained an anti-concurrent causation clause, which excluded losses caused by excluded perils "regardless of any other cause or event contributing concurrently or in any sequence to the loss."

In support of its denial of coverage, the insurer provided an engineering report, which concluded that "it is more probable than not" that the covered structures were first damaged by winds and then were "completely displaced and destroyed by the estimated 16.6 foot storm surge." To contest the denial, the insured relied on an affidavit from an engineer, who opined that the wind force was sufficient to total all of the structures before the storm surge arrived.

The court noted that, according to the insured's expert, the wind — a covered peril — was powerful enough to independently destroy the insured property before the arrival of the flood. Therefore, a question of fact existed as to whether the storm, an excluded peril, in any way caused or contributed to the loss. Accordingly, the court allowed the coverage dispute to proceed to trial.

Umpire's impartiality

Case: *Milano v. State Farm Fire & Casualty Company*[3]

At issue was whether the umpire's past work for the appraisal for the insurer constituted "evident partiality" as required under the standards of the Federal Arbitration Act. The insureds did not discover the past work until after the appraisal award had been issued.

The court held that "whether an undisclosed past relationship establishes evident partiality depends on the 'materiality' of the relationship. (Cit. omitted)." Materiality turns "on the question

of how strongly that relationship tends to indicate the possibility of bias in favor or against one party, and not how closely that relationship appears to relate to the facts of the arbitration." According to the court, "past contacts do not amount to material bias."

Appraisers can decide causation according to 10th Circuit

Case: *BonBeck Parker, LLC v. Travelers Indemnity Company of America*[4]

In the continuing saga of what can and cannot be appraised in a property insurance appraisal, the Tenth Circuit, in contrast to many other courts, has ruled appraisers can determine coverage issues.

In *BonBeck*, a hailstorm damaged three buildings covered under a commercial property insurance policy. A dispute between the insured and insurer arose over whether the hailstorm caused all of the damage claimed. The insurer paid some of the claimed damage, but denied coverage for other claimed damage, asserting that it was caused by non-covered causes such as wear and tear. The insured invoked appraisal, and the Court of Appeals ruled that the wear and tear issue can be part of the appraisal process.

Suit limitations period

Case: *Presbyterian Healthcare Services v. Factory Mutual Insurance Company*[5]

A Court in New Mexico held that the insurer waived the 12-month suit limitation period as a result of the insurer's conduct in investigating the claim for more than 51 months after the loss occurred.

The insurer argued that the period was merely tolled and did not begin until the date it formally denied the claim in writing, fifteen months before the policyholder filed suit.

However, the court agreed with the insured that the provision which stated that the 12-month period began at the "inception of the loss" meant that the period expired 12 months after the loss occurred, but the insurer's conduct in actively investigating the claim well beyond the period, and not making a coverage decision within the 12-month period, constituted a waiver of the insurer's suit limitation defense.

Co-insurance

Case: *PrimeOne Insurance Company v. Grand Trumbull*[6]

The insured property suffered a fire loss which was accepted by the carrier. The insured sought the actual value and not the replacement cost. PrimeOne interpreted the policy to apply the co-insurance penalty against the replacement cost even if only actual cash value ("ACV") was sought. This resulted in a nearly $500,000 penalty.

Grand Trumbull maintained that the ACV number should be used and, if so, there would be no co-insurance penalty. The court ultimately held that because the policy referenced "RC" (replacement cost) in the co-insurance provision, that it only applies to that calculation. This is one of the very few reported cases concerning co-insurance.

Duty to maintain heat

Case: *Wells v. State Farm Fire and Casualty Insurance Company*[7]

An Illinois appellate court interpreted a policy requirement that the insureds "do [their] best" as requiring the insureds to use reasonable efforts to maintain heat based on their specific circumstances. In light of recent major freeze events, this policy language has become important.

A Court in New Mexico held that the insurer waived the 12-month suit limitation period as a result of the insurer's conduct in investigating the claim for more than 51 months after the loss occurred.

The court held that such reasonable efforts were not performed by the insureds when they turned the water back on the building, in the middle of the winter, without attempting to fix known problems with the furnace or replacing the heating pump, and only installed three space heaters, with lengthy extension cords, to heat parts of the building, leaving the space heaters unattended and knowing that they previously had problems with circuit breakers tripping.

Assignment of benefits

Case: *JPJ Services LLC. v. Hartford Insurance Company*[8]

Plaintiff sued for breach of contract for failure to pay an Irma claim. Plaintiff's claim was based upon an assignment of benefits obtained from the insured. The carrier filed a motion to dismiss arguing, first, that the Court lacked subject matter jurisdiction because the assignment was invalid and, second, under the doctrine of impossibility because the insured sold the property prior to the Plaintiff's contract for repairs. The repair contract and assignment were executed approximately 5 months after the insured sold the property.

The court found no legal support for the defendants' argument that as there was no insurable interest, there could be no assignment. Rather, the court found that the assignment transferred the rights to the claim, not the property and because the insured had an insurable interest at the time of the loss, that right was transferable. The court also found that the defense presented no evidence of "impossibility" or that the plaintiffs couldn't still make repairs to the property.

Evidence of when hail damage occurred

Case: *York v. Safeco Insurance Company of America*[9]

At issue was whether the hail damage to the insured's roof fell within Safeco's policy period. The court rejected the lay witness

testimony of the insured that she observed a hailstorm on a specific date as sufficient evidence. Missing from her testimony was any evidence that she personally observed that the damage was caused by hail on that date.

The court also rejected the insured's engineer's testimony regarding the date of loss. The engineer was told by the insured or her roofing consultant that the roof was damaged on a specific date. While he reviewed the photographs taken by his assistant, the engineer could not determine from those photographs the date the damage occurred.

Under Florida law, late notice creates a rebuttable presumption of prejudice to the insurer.

The court held that the engineer did not "provide evidence that allows an 'inference to the best explanation for the cause,' that 'eliminates other possible sources as highly improbable, or that 'demonstrates that the cause identified is highly probable.'"

Summary judgment for insurer in late-reported hurricane claim

Case: *LMP Holdings Inc. v. Scottsdale Insurance Company*[10]

The insured, LMP Holdings, Inc., owned a commercial property located in Miami, and claimed the property sustained damage from Hurricane Irma, which struck South Florida on September 10, 2017. The insured had its handyman make repairs and began to notice other issues over time but did not report a claim to Scottsdale until approximately two years and three months after the storm.

Scottsdale denied coverage for the loss, and the insured filed suit. Under Florida law, late notice creates a rebuttable presumption of prejudice to the insurer. When the undisputed factual record establishes that notice is so late that no reasonable juror could find it timely, Florida courts will deem the notice untimely as a matter of law.

The court held that, regardless of whether the insured believed the damages would not exceed the deductible, prompt notice is not excused because an insured might not be aware of the full extent of damage or that the damage would exceed the deductible.

Therefore, the burden shifted to the insured to put forth evidence to rebut the presumption of prejudice that arose from the insured's failure to provide prompt notice. The court held that the insured failed to meet its burden, as the only evidence the insured proffered to rebut the presumption of prejudice was that both parties' experts gave different opinions as to the causation of the damages sustained.

Further, the insured undertook several repairs prior to filing its claim with Scottsdale, so Scottsdale was prejudiced by not being able to inspect the property prior to those repairs and by not participating in the repair of the damages. The court found that the insured failed to proffer any evidence that an earlier inspection, and in particular, one conducted before the repairs were made, would not have impacted the investigation. Accordingly, the court granted summary judgment in favor of Scottsdale.

Notes

[1] *Naabani Twin Stars, LLC v. St. Paul Fire & Marine Ins. Co.*, No. 20-2168, 2021 WL 4737119, at *1 (10th Cir. Oct. 12, 2021).

[2] *Doxey v. Aegis Security Ins. Co.*, No. 2:21-CV-00825, 2021 WL 2383834 (W.D. La. Jun. 10, 2021).

[3] *Milano v. State Farm Fire & Cas. Co.*, No. 20CV179, 2021 WL 1723251 (E.D.N.Y. Apr. 29, 2021).

[4] *BonBeck Parker, LLC v. Travelers Indem. Co. of Am.*, 14 F.4th 1169 (10th Cir. 2021).

[5] *Presbyterian Healthcare Servs. v. Factory Mut. Ins. Co.*, 512 F. Supp. 3d 1169 (D.N.M. 2021).

[6] *PrimeOne Ins. Co. v. Grand Trumbull, LLC*, No. 20-1498, 2021 WL 3414170 (6th Cir. Aug. 5, 2021).

[7] *Wells v. State Farm Fire & Cas. Ins. Co.*, 2021 IL App (5th) 190460, 173 N.E.3d 613, appeal denied, 169 N.E.3d 351 (Ill. 2021).

[8] *JPJ Servs. LLC v. Hartford Ins. Co.*, No. 20-14335-CIV, 2021 WL 7540804 (S.D. Fla. Apr. 8, 2021).

[9] *York v. Safeco Insurance Company of America*, 540 F.Supp.3d 1049 (D. Colo. 2021)

[10] *LMP Holdings, Inc. v. Scottsdale Insurance Company*, 2021 WL 4900622 (S.D. Fla. 2021).

About the authors

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