

Property Exclusions - Recent Decisions by the Courts

presented by

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“anyone we protect” means you and the following residents of your household:

1. relatives and wards;
 2. other persons in the care of anyone we protect
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Mitsock v. Erie Ins. Exch., 909 A.2d 828 (Pa. Super 2006).

The insured’s daughter and her fiancé had stored several items in the insured’s storage unit, which was destroyed by a fire. Erie paid for the damages sustained by the insured and her daughter but not for the daughter’s fiancé, concluding that he was not a “person in the care of” the insured at the time of the fire. The Superior Court of Pennsylvania reversed the Judgment of the Court of Common Pleas of Schuylkill County which ruled that the policy language “in the care of” was ambiguous. The Superior Court, relying on foreign jurisdictions, held the term “in the care of” should be interpreted in its common everyday meaning to ‘connote a level of support, guidance and responsibility that is most often present in situations where an insured cares for a minor child, an elderly person, or an incapacitated individual.’ Thus, the court determined “in the care of” was not ambiguous language. Here, the daughter’s fiancé was a 22 year-old recent college graduate at the time of the fire, temporarily living with his future mother-in-law until he and his fiancé could afford to buy or build a house. Although he lived with the insured, there was no evidence that he was financially supported by the insured, or that the insured provided him food, clothing, shelter or transportation. The Court therefore held that the daughter’s fiancé was not ‘in the care of’ the insured, and vacated the trial court’s order granting Plaintiffs’ summary judgment on the breach of contract claim.

We will not pay for loss or damage caused directly or indirectly by any of the following. Such loss or damage is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss.

b. Earth Movement

- (2) Landslide, including any earth sinking, rising or shifting related to such event.
- (4) Earth sinking (other than sinkhole collapse), rising or shifting including soil conditions which cause settling, cracking or other disarrangement of foundations or other parts of realty. Soil conditions include contraction, expansion, freezing, thawing, erosion, improperly compacted soil and the action of water under the ground surface.

g. Water

- (1) Flood, surface water, waves, tides, tidal waves, overflow of any body of water, or their spray, all whether driven by wind or not;
- (2) Mudslide or mud flow;
- (3) Water that backs up or overflows from a sewer, drain or sump.

T.H.E. Insurance Company v. Charles Boyer Children's Trust, 455 F.Supp.2d 284 (M.D.Pa. 2006).

The plaintiff insurance company sought a declaratory judgment that the insurance policy it issued to defendant insured did not cover the mud and water damage to its bowling alley following a heavy rainstorm. The insured filed a counterclaim asserting entitlement to coverage, bad faith liability under 42 Pa. Cons. Stat. § 8371, and fraud. Both parties moved for summary judgment. The insurance company contended that it was not obligated to cover the loss by reason of the policy's earth movement and water exclusions. The insured's principal argument was that its loss was specifically covered by the provision for damage caused by "collapse." The insured claimed that the door on the east side of the property "collapsed," as that term was used in the policy. In granting the insurance company's motion for summary judgment, the court found that the policy afforded coverage only if the use of defective material or methods in construction, remodeling, or renovation caused a collapse to occur "during the course of the construction, remodeling or renovation." The court found that it was evident that the damage to the bowling alley was caused by "surface water," whether it came from the parking lot or from the embankment south of the building. The court also found that there was no ambiguity in the policy at issue that would suggest that the exclusion for damage caused by surface water was ambiguous.

Earth Movement. We do not cover any loss caused by earth movement including volcanic eruptions, landslides, mud flows, and the sinking, rising, or shifting of land. But we do cover losses caused by the eruption of a volcano when the loss is the result of:

- a volcanic blast or airborne shock waves;
- ash, dust, or particulate matter; or
- lava flow.

We also insure ensuing covered loss due to fire, explosion, theft, or glass breakage unless another exclusion applies.

Totty v. Chubb Corp., 455 F.Supp.2d 376 (W.D.Pa. 2006).

Plaintiff insured sued defendants, a corporation and the insurer, seeking to recover under a homeowner's insurance policy for alleged structural damage to her property caused by vibrations from construction equipment used by the city to resurface her street and claiming that defendants acted in bad faith in violation of 42 Pa. Cons. Stat. § 8371. Defendants moved for summary judgment. The court first granted defendants' motion to dismiss the corporation as a defendant because the insured's policy categorically identified the insurer as the insurer, the corporation was not mentioned in the substantive terms of the contract, and the insured offered no evidence that the corporation was the alter ego, de facto insurer, or agent of the insurer. The court also granted the insurer's summary judgment on the insured's bad faith claim. After receiving the insured's claim, the insurer employed an expert, which determined that the property damage was related to foundation settlement. Thereafter, when the insured provided the insurer with evidence that vibrations from the road equipment densified the soil, causing the house to "settle," the insurer employed two additional experts, both of whom rejected the insured's new theory of causation. The insured did not argue that she was entitled to coverage under any of the theories of the insurer's experts. Thus, the insurer continued to have a reasonable basis to deny the insured's claim. The insured also failed to produce evidence to support her argument that the insurer's investigation of her claim was inadequate.

a. Newly Acquired or Constructed Property

- (1) You may extend the insurance provided by this Coverage Form to apply to:
 - (a) Your new buildings while being built on the described premises; and
 - (b) Buildings you acquire at locations, other than the described premises.

Budtel Associates, LP v. Continental Casualty Company, 915 A.2d 640 (Pa. Super. 2006).

In 2002, appellee Budtel, a limited partnership, met with Comptel, a corporation, and executed a joint venture agreement, creating a new entity named "Budtel Comptel, LLC." The joint venture agreement provided that entering into the joint venture agreement shall have no impact on the ownership right of each entity's assets and/or liabilities, that both Budtel and Comptel shall retain their individual identity, corporate officers, and employees. Subsequently in 2002, a pipe burst in a warehouse to which Budtel held title. Comptel's president then filed a claim with appellant Continental Casualty Company. Comptel relied upon a provision of the policy which stated that coverage may be extended to newly acquired buildings. Continental denied the claim. Appellees then brought the instant declaratory judgment action. The Court held that by virtue of the joint venture agreement, the right to use Budtel's warehouse vested in Budtel-Comptel, not Comptel itself. As such, since Comptel was the insured under the policy, the newly acquired property clause did not apply to the underlying incident.

Exclusions- Losses We Won't Cover

Property exclusions. All of the exclusions in your Property Protection, Business Income, Blanket Earnings And Expenses or other identified time element coverage forms apply to the Equipment Breakdown Coverage provided by this endorsement except:

- Boilers;
- Electrical damage;
- Electrical equipment; and
- Mechanical breakdown.

Contamination. We won't cover loss caused by or resulting from any kind of contamination of your covered products or covered property.

Defects or errors. We won't cover loss caused by or resulting from:

- defects or errors in the materials, design, development, distribution, processing, manufacturing, workmanship, testing, installation, alteration, or repair of covered property;

Pollution. We won't cover loss that is caused by or results from pollution unless the pollution is caused by or results from any of the following covered causes of loss:

- explosion;

Pollution means the actual, alleged, or threatened discharge, dispersal, release, leakage, seepage, migration, or escape of pollutants.

Pollutants mean any solid, liquid, gaseous or thermal irritant, or contaminant including;

- smoke, vapors, soot, fumes;
- acids, alkalis, chemicals; and
- waste or waste pollutants.

This exclusion applies regardless of any other cause or event that contributes concurrently or in sequence to the loss.

Wear, tear, deterioration, animals. We won't cover loss caused by or resulting from:

- wear and tear;
- deterioration, mold, wet or dry rot, rust, or corrosion;
- the inherent nature of the property.

Inherent nature means a latent defect or any quality in the property that causes it to deteriorate or destroy itself.

If loss from fire, smoke, lightning, wind, hail, explosion, vehicles, aircraft, vandalism, malicious mischief, civil disturbance, riot, leakage from fire extinguishing equipment, sinkhole collapse, volcanic action, building glass breakage, falling objects, weight of ice, snow, or sleet or water damage results, we'll pay for that resulting loss.

St. Mary's Area Water Auth. v. St. Paul Fire & Marine Ins. Co., 472 F. Supp. 2d 630 (M.D. Pa., February 2, 2007), 2007 U.S. Dist. LEXIS 34814 (M.D. Pa., May 11 2007).

Plaintiff Water Authority filed suit against Defendant insurance company for breach of contract. Plaintiff alleged that the insurer improperly refused to cover losses sustained after chlorine gas escaped from a "pigtail pipe" at the plaintiff's water treatment facility. Both parties filed for summary judgment as to whether the plaintiff was entitled to insurance coverage for the incident based on the policy. Plaintiff argued it was entitled to coverage under an endorsement for "mechanical breakdown." Defendant contended there was no mechanical breakdown, and also that five exclusions in the policy precluded coverage. Initially, the court concluded that this type of problem necessarily had to be a mechanical breakdown as the defendant's suggested definition of 'mechanical breakdown' requiring moving parts was not based in law. The court also concluded that there was no explosion that occurred, and therefore the explosion exception to the "Pollution" and "Wear, tear, deterioration, animals" exclusion would not apply. The court further concluded that the "Wear, tear, deterioration, animals" exclusion could not apply, or else it would render the mechanical breakdown endorsement illusory. The rationale was that the court could not envision a mechanical breakdown that was not caused by wear and tear, defects, and/or corrosion, all of which precluded coverage under the exclusion in the policy. The court also concluded that the contamination exclusion in the policy did not bar coverage, because the proximate cause of the loss was the mechanical breakdown, and not contamination. Accordingly, the court entered summary judgment for the plaintiff. Following the issuance of the above-summarized opinion, the Court vacated the Opinion in response to Defendant's Motion for Reconsideration. On reconsideration, the defendant presented evidence from other claims how the mechanical breakdown endorsement could apply absent conditions that would raise the "Wear, tear, deterioration, animals" exclusion. Specifically, the defendant demonstrated cases of a mechanical breakdown of a pump due caused by sand ingestion, mechanical breakdown of a pump due to an overheated bearing, a breakdown of a steel shaft of a rotostrainer due to rocks and debris, and a mechanical breakdown of a diesel engine block. In light of the evidence presented by the defendant, the Court concluded that the plaintiff could not meet its burden of proving that there was coverage under the policy, and therefore proving that the coverage was illusory. Therefore, as the coverage was not illusory, the "Wear, tear, deterioration, animals" exclusion did apply, and barred coverage. Accordingly, the Court vacated the judgment for the plaintiff, and entered judgment in favor of the defendant.

ADDITIONAL COVERAGES

- 11. Collapse. We insure for direct physical loss to covered property involving collapse of a building or any part of a building caused only by one or more of the following:
 - a. ...volcanic action,...weight of ice, snow or sleet, water damage, ... all only as insured against in this policy; ...
 - (2) water damage means accidental discharge or leakage of water or steam as the direct result of the breaking or cracking of any part of a system or appliance containing water or steam;

Collapse does not include settling, cracking, shrinking, bulging or expansion.

LOSSES NOT INSURED....

We do not insure under any coverage for any loss which would not have occurred in the absence of one or more of the following excluded events. We do not insure for such loss regardless of (a) the cause of the excluded event; or (b) other causes of the loss; or © whether other causes acted concurrently or in any sequence with the excluded event to produce the loss. ...

- b. Earth Movement, meaning the sinking, rising, shifting, expanding, or contracting of the earth, all whether combined with water or not. Earth movement includes but is not limited to earthquake, landslide, mudflow, sinkhole, subsidence and erosion. Earth movement also includes volcanic explosions or lava flow, except as specifically provided in Section I, ADDITIONAL COVERAGES for Volcanic Action.

Hughes v. State Farm Fire & Casualty Co., 2007 U.S. Dist. LEXIS 71962 (W.D. Pa. 2007).

Plaintiffs purchased a rental dwelling homeowner’s insurance policy from State Farm. While the policy was in effect, a sinkhole developed below Plaintiffs’ dwelling, causing severe damage to the structure. Plaintiffs reported this damage to State Farm, who denied the claim subsequent to an investigation. The Plaintiffs’ dwelling was damaged so severely that it ultimately collapsed. Plaintiffs’ expert opined that the loss of foundational support was caused by the erosional removal of soil into solution voids, and that this had been caused by the presence and actions of the uncontrolled release of water within the crawl space of the home. State Farm’s engineer opined that the water lines were broken because of the collapse of the structure and that the cause of the collapse of the structure could not be determined without a subsurface investigation with suitable test borings. Plaintiffs argued that they were entitled to coverage for their losses pursuant to the “Additional Coverages” section of the policy. State Farm argued that coverage for the damage to the Plaintiffs’ dwelling was specifically excluded under the “Losses Not Insured” section of the policy. The Court found that the “Additional Coverages” section did not provide coverage “over and above” the exclusions. First the Court reasoned that the very language in the “Additional Coverages” section upon which the Plaintiffs rely provides that water damage is covered “only as insured against in this policy.” Further, the Earth Movement Exclusion upon which State Farm relies specifically makes an exception for “Volcanic Action,” which

is listed in the “Additional Coverages” section. If the “Additional Coverages” section were meant to provide coverage “over and above” the coverage specifically excluded in the “Losses Not Insured” Section, it would have been completely unnecessary for State Farm to make an explicit exception for “Volcanic Action” in the definition of the term “earth movement.” There were eleven listings in the “Additional Coverages” section, and only the “Volcanic Action” listing is referenced in the definition of the term “earth movement.” Based on this reasoning, the Court held that the only reasonable construction of the words “Additional Coverages” is that the section provides coverage in *addition* to the coverage already provided for one’s dwelling, personal property, and loss of rents. Further holding that the damage caused to Plaintiffs’ dwelling fell within the earth movement exclusion, the Court granted State Farms Motion for Summary Judgment.

We will not pay for loss or damage cause by or resulting from any of the following: ...

- d. (1) Wear and tear;
- (2) ...decay, deterioration...or any quality in property that causes it to damage or destroy itself;
- ...
- k. Collapse, except as provided below in the Additional Coverage for Collapse. But if collapse results in a Covered Cause of Loss at the described premises, we will pay for the loss or damage caused by that covered cause of Loss. ...

Additional Coverage for Collapse.

We will pay for direct physical loss or damage to Covered Property, caused by collapse of a building insured under this Coverage Form, if the collapse is caused by one or more of the following:...lightning.

Christ Memorial Reformed Episcopal Church v. Guideone Elite Insurance Co., 2006 U.S. Dist. LEXIS 12713 (E.D. Pa. 2006).

On August 3, 2004, Plaintiff, Christ Memorial Reformed Episcopal Church's steeple collapsed. The steeple was built in 1887 and by the time it fell in 2004, it had a long history of deterioration. However, on the date that the steeple actually fell, it was struck by lightning. The parties filed cross-motions for summary judgment on the issue of insurance coverage. The Court found that under the provisions of the policy, specifically the above-quoted exclusion and the Additional Coverage for Collapse provision, it was clear that the insurance policy covers damage resulting from lightning, but not collapse due to lack of maintenance. The Court found that in this case, there was a material issue of fact as to whether lightning caused the steeple's collapse. Accordingly, in this case summary judgment was not appropriate.

B. Exclusions

1. We will not pay for loss or damage caused directly or indirectly by any of the following...
 - g. Water...
 - (2) mudslide or mudflow;
 - (3) Water that backs up or overflows from a sewer, drain or sump; or
 - (4) Water under the ground surface pressing on, or flowing or seeping through:
 - (a) Foundations, walls, floors or paved surfaces;
 - (b) Basements, whether paved or not; or
 - (c) Doors, windows or other openings.

Easy Sportswear, Inc. v. American Economy Insurance Co., 2007 U.S. Dist. LEXIS 86114 (W.D. Pa. 2007).

This case stems from damage to Plaintiff's property located at 819 Liberty Avenue, Pittsburgh, Pennsylvania, allegedly caused by "Hurricane Ivan" on or about September 17, 2004. In November 1999, Plaintiff purchased a business owners insurance policy, which was renewed on a yearly basis, and in effect from November 1, 2003 through November 1, 2004. On September 17, 2004, Plaintiff's employee noticed rain coming through the roof of the building at 819 Liberty Avenue, causing Plaintiff's inventory located on the sixth floor of the building to be damaged by water. Plaintiff filed suit for breach of contract and bad faith after AEI denied coverage. AEI argued that no coverage was owed, based on the above exclusion. The Court held that noticeably missing from the descriptive wording in the provision is "rain." Further, the Court, relying on a Pennsylvania Superior Court decision, stated that surface waters are commonly understood to be waters on the surface of ground, usually created by rain or snow, which are of a casual or vagrant character, following no definite course and having no substantial or permanent existence. The Court found that construing the provisions of the policy in favor of the insured, because the policy does not explicitly include "rain," under the canon of construction, *expressio unius est exclusio alterius*, the "water" provision did not include rain. Accordingly, the Court ruled that the exclusion did not apply to the facts of this case.

Losses We Do Not Cover Under Coverages A and B:

We do not cover loss to the property described in Coverage A-Dwelling Protection or Coverage B- Other Structures Protection consisting of or caused by:

2. Water or any other substance that backs up through sewers or drains.
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**Charles Campbell v. Allstate Insurance Co., 2006 Pa.D.&C. LEXIS 198 (C.P. Bucks 2006),
aff'd without opinion 2007 Pa.Super.LEXIS 443 (2007).**

On February 21, 2003, Plaintiff's residence sustained damages when a toilet overflowed and water flowed onto the bathroom floor of his home. When Plaintiff proceeded to his backyard to "check the system," he noticed that the ground was wet. Plaintiff took a grate cover off of the "sewer" and found a plastic bottle in the sewer, which he removed. Plaintiff then returned to the toilet, flushed it, and found it working properly. Defendant Allstate, the insurer of the property, denied coverage, claiming that the loss was not covered under the terms and conditions of the insurance policy. Plaintiff thereafter brought suit alleging breach of contract and bad faith. Allstate filed a Motion for Summary Judgment. The Court held that because Plaintiff's own deposition testimony established that the loss occurred from water backing up through a sewer or drain, the clear and unambiguous exclusion should be applied in granting summary judgment. The Court rejected Plaintiff's argument that the exclusion was "broad and vague" and that precedent on this exclusion holds that a "sewer" or "drain" can only begin at an insured's property line.

Exclusion B.2.k.(7)(a) of the Computer Endorsement

[eliminates from coverage any damaged caused by:]

- (a) Dampness or dryness of atmosphere, or changes in or extremes of temperature, unless such conditions result from physical damage caused by a covered cause of loss to an air conditioning unit or system, including equipment and parts, which is part of, or used with the electronic data processing equipment.
-

Providence Washington Insurance Co. v. Volpe and Koenig, P.C., 396 F.Supp.2d 542 (E.D. Pa. 2005).

Defendant issued a commercial property insurance policy to Plaintiff Volpe for the period of March 11, 2003 through March 11, 2004. On July 25, 2003, the computer system of Volpe, a law firm, "crashed." The technician who came to fix the problem found the temperature in the server room to be extremely hot due to a cooling failure. These heat issues caused the overheating of the file server that resulted in the loss of data and required hardware replacement. Volpe submitted an insurance claim to Defendant Providence Washington for the losses and expenses it had incurred in making the required repairs. Defendant denied coverage under the above exclusion. Defendant filed this instant declaratory judgment action, seeking a declaration that it owes no coverage under the policy. The Court stated that it was undisputed that a change in temperature occurred because of a cooling failure in the server room. Plaintiff contends that the clause is ambiguous and therefore the court should refuse to enforce it. The Court held that the exclusion at issue precludes coverage when the damage or loss occurs either due to changes in temperature or extremes of temperature. The "extremes of temperature" clause allows the insurer to deny coverage where constant, yet excessive, heat or cold caused the loss. The Court further found that, contrary to Volpe's argument that the exclusion allows Providence Washington to deny computer coverage in all cases where there is any detectable temperature fluctuation, the exclusion applies only when the damage or loss is caused by or results from the change in temperature; not in situations where there may have been a change in temperature but the damage or loss reported in the claim occurs due to some other factor. The Court held that giving the policy exclusion its natural, plain, and ordinary meaning, changes in or extremes of temperature clearly include indoor temperature unaffected by outdoor temperatures. Accordingly, the Court held that the property damage to Plaintiff's computer equipment is not covered under the policy, and therefore granted Defendant's Motion for Summary Judgment.

For an additional premium, we will cover direct physical loss to the property caused by: Sinkhole collapse meaning actual physical damage to covered property arising out of, or caused by, sudden settlement or collapse of the earth supporting such property only when such settlement or collapse results from subterranean voids created by the action of water on limestone or similar rock formations. The Section I - Earthquake and other Earth Movement exclusion does not apply to Sinkhole Collapse.

Betz v. Erie Insurance Exchange, 2007 Phila.Ct.Com.Pl. LEXIS 336 (C.P. Phila. 2007).

Plaintiffs alleged to have sustained a sudden and accidental direct physical loss to their Northhampton County property on or about September 18, 2004, which they alleged was caused by a sinkhole. On September 18, 2004, during a storm from Hurricane Ivan, Mr. and Mrs. Betz heard an explosion. They then discovered water in their basement that came up to the first step. Water was bubbling through a crack on the basement floor. There was also a gap discovered between the baseboard and laundry room floor where the floor had dropped. The area of the basement floor where the crack had formed was dry by the end of the day on September 18, 2004. Plaintiffs filed a timely insurance claim for water damage and damage caused by a crack in the slab in the basement and the garage. After Defendant denied the claim, Plaintiffs filed suit alleging breach of contract and bad faith, which resulted in a jury rendering a decision in favor of Plaintiffs and against Defendant Erie in the amount of \$48,415.38. Defendant filed an appeal, following the Court's denial of its Motion for Post-Trial Relief. Defendant argued that trial court erred when it did not enter judgment in favor of the defendant, as the damage was caused by events that were excluded under Plaintiffs' insurance policy. Without reasoning, the Court held that this portion of the policy was susceptible of different constructions and capable of being understood in more than one sense. Further, Defendant's insurance policy was ambiguous and was appropriately construed in Plaintiff's favor. Accordingly, the Court denied Erie's appeal.

[does not cover loss caused:]

4. ...to the interior of the building or the contents by rain, snow, sand or dust, whether driven by wind or not, unless the exterior of the building first sustains damage to its roof or walls by a covered loss...

We do not cover under Building(s)... loss caused directly by or indirectly regardless of any cause or event contributing concurrently or in any sequence to the loss...

10. by weather conditions, but only if weather conditions contribute in any way with a peril excluded in Part A. to produce the loss. ...
12. by faulty, inadequate, or defective
 - a. planning, zoning, development;
 - b. design, development of specifications, workmanship, construction;
 - c. material used in construction;
 - d. maintenance...

Goldsteins Rosenbergs-Raphel Sacks, Inc. v. Erie Insurance Exchange, 2005 Phila. Ct. Com. Pl. LEXIS 245 (C.P. Phila. 2005).

Plaintiff operated of a funeral home which was insured by Defendant Erie. The building in question has a series of roofs including a flat roof covering the majority of the structure, a canopy roof and a sloped roof covering the chapel. The subject of this action is the sloped chapel roof. The flat roof was repaired in February 2002 by a roofing contractor. Thereafter, the contractor returned to the property pursuant to a complaint by Plaintiff to repair the chapel roof which began leaking. The contractor discovered a hole the size of a quarter on the chapel roof and repaired it with roofing cement. Between September 26, 2002 and September 28, 2002, a rain storm dropped over two inches of rain in a forty-eight hour period. The rain and wind infiltrated the chapel roof resulting in interior damage to the chapel and contiguous area. Plaintiff submitted a claim to its insurer, Erie. Erie denied the claim, concluding that the damage was caused by a defect in the old roofing system that developed over the many years of life of the roof. Thereafter, Plaintiff instituted this breach of contract action against Erie. Erie filed the instant summary judgment motion, based on the weather exclusion. The Court found that Erie's policy specifically stated that a loss caused by weather conditions which contributes in any way with a peril excluded in Part A of the policy does not constitute a covered loss. Further, as set forth in the exclusion section, Part A of the policy excludes as a peril, defective design. The Court found that Defendant had produced evidence demonstrating that heavy rain and wind as well as the defective design of the roof concurrently contributed to Plaintiff's loss, and Plaintiff had not presented any evidence to rebut the claim that the chapel roof was defective. Accordingly, the Court granted Defendant's Motion for Summary Judgment.

[the policy was to cover]

The interest of the Insured in all real and personal property (including improvements and betterment) and their contents owned, used, or intended for use by the Insured (including those sample homes sold and leased to the insured), or hereafter constructed, erected, installed, or acquired including while in the course of construction, erection, installation, and assembly.

Toll Naval Associates v. Lexington Insurance Co., 2005 U.S. Dist. LEXIS 16393 (E.D. Pa. 2005).

Plaintiff Toll Naval Associates is a general partnership in the business of real estate development. Consistent with its standard business practice, which is to create one or more new business entities for each new project it undertakes, Toll Naval was formed for the sole purpose of owning and developing the site of the United States Naval Home. Defendants Lexington Insurance Company and Commercial Underwriters Insurance Company sold policies to Toll Brothers and were aware of its practice of holding its inventory of properties through a collection of distinct legal entities, each corresponding to a specific development project. Defendants sold Toll Naval two insurance policies, containing virtually identical provisions, and to cover the interests detailed in the above provision. The policies provided an overall limit of \$15 million in coverage for any one occurrence, but they also contained a limitation on coverage of \$1 million per occurrence for “newly acquired locations or unnamed locations; 120 day reporting required.” The claim at issue in this case was filed following a fire on February 3, 2003 which severely damaged Biddle Hall, a registered historic building on the site of the Naval Home. Defendants denied coverage for the fire, citing multiple reasons, one of which was that Toll did not include Naval Home on the schedule of properties in the Toll Brothers marketing submission for purposes of the fifteen million dollar limit, and the Naval home was not covered as an “unnamed location” for the purposes of the one million dollar sublimit provision, because Toll had failed to satisfy the 120 day reporting requirement in the provision. Plaintiff subsequently brought suit alleging breach of contract and bad faith. On the parties’ cross-motions for summary judgment, this Court determined that the relevant policy provisions are reasonably susceptible of more than one interpretation and therefore the issue of which policy limit applies is a question for the jury. Further, the Court stated that even if they were to hold, as a matter of law, that the one million dollar sublimit applies to plaintiff’s claim, the reporting requirement in the sublimit provision itself is ambiguous. As the Court found an ambiguity concerning which limit of liability applies and in addition, the reporting requirement, the Court denied the parties’ respective motions for summary judgment on Plaintiff’s breach of contract claim.

Insurance policy excludes losses to the residence which are caused by “wear, tear, marring, scratching, deterioration, inherent vice, latent defect or mechanical breakdown,” losses caused by insects, or against damage to the house caused by “continuous or repeated seepage or leakage of water or steam from a...(3) plumbing system, including from, ...tub installation.”

McMahon v. State Farm Fire and Casualty Company, 2007 U.S. Dist. LEXIS 34137 (2007).

In February 2005, Plaintiffs bought a home and an insurance policy from Defendant State Farm. Soon thereafter, Plaintiffs noticed small bugs and a strong odor coming from a closet in the front bedroom. Subsequently, Plaintiffs made a claim for water damage after learning that they needed to replace a drain pipe in their bathroom. State Farm denied the claim, stating that coverage was denied because the policy did not extend to plumbing that was replaced due to “wear, tear or deterioration” and that the policy did not cover water entering the home from below the surface of the ground. Plaintiffs’ filed a claim in the Philadelphia Country Court of Common Pleas alleging that State Farm acted in bad faith in violation of *42 Pa. Cons. Stat. §8731*, engaged in violations of the Pennsylvania Unfair Trade Practices and Consumer Protection Law, and breached the insurance contract entered into with Plaintiffs. State Farm removed the action to the District Court. Both Plaintiffs and Defendants sought summary judgment. The court determined that the policy insured against “accidental direct physical loss to the property” which included the dwelling and personal property. However, the court held that Plaintiffs did not present facts showing that they experienced an accidental direct physical loss, the court reasoned that the facts showed that the loss was caused by normal wear and tear and thus replacing the pipe was not an unexpected repair within the coverage of the policy. Furthermore, the court concluded that the water damage was excluded because Plaintiffs were not protected against damage to their house caused by “continuous or repeated seepage or leakage of water or steam from a...(3) plumbing system, including, from... tub installation.” Lastly, the court concluded that the Plaintiffs could not make a claim for the cost of the exterminator because the policy excluded losses from insects. Thus, the court granted summary judgment in favor of State Farm and against the Plaintiffs.

No action can be brought against us unless... the action is started within two years of the date of loss.

Smith v. Westfield Insurance Company, 2007 U.S. Dist. LEXIS 43996 (2007).

Plaintiffs purchased a newly constructed home and took out a homeowners' insurance policy from Defendant. Six months after moving into the house, Plaintiffs noticed water penetrating the interior of the home. Approximately three years later, Plaintiffs notified Defendant of the water damage and submitted a claim. Defendant denied the claim. Plaintiffs subsequently brought suit against Defendant insurance company. The court granted Defendant's motion to dismiss with Plaintiffs' leave to file an amended complaint, because the insurance company required that suits be brought within two years of the date of the loss. The court concluded that in order to be timely, the claim must have been brought by May 31, 2005 (as the loss allegedly occurred on June 1, 2003). Plaintiffs filed their amended complaint and sought damages for breach of contract and statutory bad faith by an insurer. Under the breach of contract claim there were two main issues: whether the date of the loss was within the time period provided for in the suit-limitation clause; and whether the type of loss claimed was covered by the insurance policy. Plaintiffs' amended complaint asserted that the date of loss was April 2, 2005 because a rainstorm caused damage to different areas of their home on that date. However, the date of loss was hotly contested, and Defendant alleged that the loss occurred on June 1, 2003 (six months after Plaintiffs moved into the home). The court determined that under the policy provisions, Plaintiffs could recover for any loss that occurred after June 23, 2004, *that resulted from* faulty construction, so long as the loss was not itself excluded under the policy, but Plaintiffs could not recover for faulty construction itself. However, the court held that it was not in a position to determine which losses occurred when and were caused by what. Therefore, the court denied summary judgment on the breach of contract claim, because there remained genuine issues of material fact.

We do not cover loss to the property described in Coverage A - Dwelling Protection or Coverage B - Other Structures Protection consisting or caused by:

...

14. Freezing of plumbing, fire protective sprinkler systems, heating or air conditioning systems or household appliances or discharge, leakage or overflow from within these systems or appliances caused by freezing, while the building structure is vacant, unoccupied or being constructed unless you have used reasonable care to:

- a) maintain heat in the building structure; or
- b) shut off the water supply and drain the system and appliance

Cecero v. Allstate Insurance Comapny, 2007 U.S. Dist. LEXIS 88961 (2007).

At the close of Plaintiff's case, Defendant moved for and was denied judgment as a matter of law on Plaintiff's breach of contract claim, arguing that the loss suffered by the Plaintiff, water damage resulting from a burst pipe in her kitchen, was subject to an exclusion in the policy. In its ground for new trial, Defendant argued that the Judge committed reversible error when he ruled that Plaintiff was occupying the property at the time of the loss and had taken reasonable steps to maintain heat in the property. Defendant maintained that the loss fell under an exclusion, because Plaintiff had not resided in the property for at least six month prior to the loss and therefore the building was not considered occupied. However, the court ruled that the Judge's denial of the *Rule 50* motion was not in error because there was sufficient evidence from which the jury could determine that the insured satisfied the policy requirements because she *intended to return* to after her convalescence - not that she physically occupied the home - and took reasonable steps to maintain heat in the property while she was hospitalized. Thus, the court held that because the language of this exclusion expressly permitted the property to be vacant, so long as the heat was maintained, the exclusion was not meant to be unequivocal. Therefore, the court held that the evidence was sufficient to support a reasonable verdict that the no occupancy exclusion did not apply because the heat was reasonably maintained and Plaintiff intended to return to the property. Accordingly, the Court denied Defendant's Motion for Judgment as a Matter of Law and Supplemental Motion for Post Trial Relief.

We will not pay for loss or damage caused directly or indirectly by any of the following...

Discharge, dispersal, seepage, migration, release or escape of "pollutants" unless the discharge, dispersal, seepage, migration, release or escape is itself caused by any of the "specified cause of loss." But if the discharge, dispersal, seepage migration, release or escape of "pollutants" results in a "specified causes of loss," we will pay for the loss or damage caused by that "specified cause of loss."

Additional Coverage Extension

Water Damage, Other Liquids, Powder or Molten Material Damage. If loss of damage caused by or resulting from covered water or other liquid, powder or molten material damage loss occurs, we will also pay the cost to tear out and replace any part of the building or structure to repair damage to the system or appliance form which the water or other substance escapes.

Lawrence Hartman, Jr. v. Motorist' Mutual Insurance Co., 2006 U.S. Dist. LEXIS 1719 (W.D. Pa., 2006).

This case involves the insurer's failure to pay for the damage caused to Plaintiff's new building when a ceiling-mounted oil furnace leaked approximately five (5) gallons of home heating oil into the building. Plaintiff is the owner and operator of a business which sells all-terrain vehicles, outdoor equipment, gasoline and other products. Defendant issued a business insurance policy to Plaintiff, which provided property, inland marine general liability, auto, garage umbrella coverage, and workers' compensation insurance for Plaintiff's business operations, as well as coverage for personal property, loss of use and personal liability. For property damage, the policy included replacement cost coverage subject to the terms, conditions and limitations of the policy. On April 3, 2001, Plaintiff suffered a loss when a seal on his oil furnace failed. As a result of the malfunctioning seal, the pump that supplied oil to the furnace activated and pumped approximately five gallons of heating oil into the attic of the building. When the seal failed, the oil was pumped through the furnace. The oil then came out of the furnace, soaked the insulation, melted the plastic, contacted the metal ceiling, ran out the seam of the ceiling and dripped into the retail are of the building, and damaged the carpet. The roof and ceiling, including the trusses, were also impacted by the oil. Defendant denied coverage based on the "pollution exclusion." Plaintiff thereafter brought suit for breach of contract and bad faith. Following a non-jury trial, the Court entered the following findings of fact and conclusions of law pursuant to Federal Rule of Civil Procedure 52(a), and found in favor of Plaintiff on the claim of breach of contract. Specifically, the Court found that, as a matter of law, the policy contains a provision which seems to distinguish between fuel and pollutants where heating oil is involved since that other provision would provide coverage for damage or loss as a result of leaking liquids- arguably heating oil- from heating equipment. The Court further noted, that in the absence of these additional provisions, the "pollution

exclusion" would not be ambiguous. However, based on the ambiguity here, the Court found in favor of Plaintiff on the breach of contract claim.

The policy also excludes coverage for “property damage” resulting from an “occurrence,” for:

I. “bodily injury” or “property damage”:

1. which is expected by, directed by, or intended by an “insured”;
2. that is the result of a criminal act of an “insured”; or
3. that is the result of an intentional and malicious act by or at the direction of an “insured”.

Styers v. Bedford Grange Mutual Insurance Co., 900 A.2d 895 (Pa. Super. 2006).

On December 22, 2001, Defendant Bedford Grange Mutual Insurance Company issued a policy of insurance to insure a home and real estate a 362 Long Run Road, Mill Hall, Pennsylvania. The policy also insured the policy holder against loss resulting from personal liability. On July 17, 2002, one of the Plaintiffs, Eric Styers entered and caused damage to the Cedar Run Trout Hatchery, resulting in property damage and release of a large number of fish into a nearby stream. The draining of water from the hatchery raceway or holding area allowed the seepage of water from an adjoining raceway, resulting in the death of some 8800 hatchery fish there. Plaintiff Eric Styers became personally liable for these damages. Defendant insurer denied Plaintiffs’ claim for coverage, relying on the “criminal acts” exclusion. Plaintiffs brought suit for breach of contract and bad faith, and the trial court, granted Preliminary Objections, to which this appeal to the Superior Court followed. The trial court took judicial notice of the criminal charges filed against Eric Styers, and then granted the preliminary objections on the basis of the “criminal acts” exclusion. The Superior Court held that the trial court erred in doing this, as the none of the facts or issues resolved in the criminal matter against Eric Styers were raised in an answer or new matter/affirmative defenses to the complaint pursuant to Pa.R.C.P. 1030. Therefore, the Court reversed the order of the trial court and remanded the case for further proceedings. This ruling is important for insurance companies, as it demonstrates the necessity of pleading the underlying criminal matter when denying a claim based on a “criminal acts” exclusion.

"If, at the time of the loss, the amount of the insurance in this policy on the damages building is 80% or more of the full replacement cost of the building immediately before the loss, we will pay the cost to repair or replace, after application of the deductible and without deduction for depreciation, but not more than the least of the following amounts:

- (1) the limit of liability under this policy that applies to the building;
- (2) the replacement cost of that part of the building damages; or
- (3) the necessary amount actually spent to repair or replace the damaged building.

The replacement cost will not exceed that necessary for the like construction and use on the same premises; regardless of whether the replacement building is located on the same or different premises."

Greene v. United Services Automobile Ass'n, 936 A.2d 1178 (Pa. Super. 2007)

Insureds brought action against insurer to recover for breach of contract of a homeowners' insurance policy for failing to pay costs to replace roof. Evidence showed that there was damage to one slope of a 12-slope roof rather than the entire roof. The trial court entered judgment in favor of the insurer, which was affirmed by the Superior Court of Pennsylvania. The Superior Court held that a damaged slope, rather than an entire roof, was "part of the building damaged" within the meaning of the policy requiring the insurer to pay cost for replacement of the part of the building damaged. The Court further held that using shingles similar to the damaged shingles, albeit not identical, satisfied the defendant insurer's obligation under the policy.



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