ZELLE LLP

Monday, May 11, 2026 ISSUE 2

The Zelle LLP

MIDWEST MONITOR

Heartland Insurance Review

We are please to present the second issue of the Midwest Monitor, your quarterly resource for news and issues concerning first and third-party property insurance law in the Midwest. Each issue brings you the latest trends and rulings shaping claims handling and litigation in Midwestern jurisdictions.

In this issue, you will find analyses of significant recent developments in the region, including an examination of first-party bad faith essentials in Wisconsin and Minnesota, a discussion of the critical role of competent and impartial umpires in the appraisal process, a recent decision interpreting the pollution exclusion in CGL policies, and the interplay between defective work exclusions and ensuing loss provisions in first-party litigation. We also provide a case law update addressing an Eighth Circuit decision regarding material misrepresentations and policy recission.

If you are interested in additional information regarding any of the topics discussed, please reach out to the author directly. If you would like to see any topics discuss in the Midwest Monitor, please reach out to the editors Laura Bartlow, Lindsey Davis, and Mackenzie Moy.

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Upcoming Events

You don't want to miss this!

May 12 – Steven Badger will present "Legal Issues in Appraisal - Global Perspective, CO Focus" at the Insurance Appraiser and Umpire Association (IAUA) Appraisal Conference in Denver, CO.

May 14 – Steven Badger will present at the Appraisal and Umpire Association (AUA) Insurance Appraisal and Claims Resolution Conference in Chicago, IL.

May 14 – Zelle will sponsor the Builder's Risk & Construction Symposium in New York, NY. **Matt Gonzalez** will participate in a breakout presentation, "Mega Projects: Multiple Perspectives on Delay Coverage."

May 19 – 20 – Steven Badger will present "PFAS and Insurance: Navigating Coverage, Exclusions, and Emerging Liabilities" at the PFAS Summit Europe in Brussels. **Jason Reeves** will attend the event.

May 27 – Steven Badger will present "Hot Topics and Emerging Trends in Weather Related Claims – 2026 Update" as part of the NAMIC Claims Webinar Series.

June 4 – Steven Badger will present at the Texas State Bar Insurance Law Conference in San Antonio, TX.

June 9-10 - PLRB 2026 Eastern Regional Adjusters Conference in Hartford, CT

- Jessica Port will present "The Ethics of Automation: Avoiding Bad Faith Claims in AI-Driven Claims Handling" with co-presenters Gene Strother (AdjustU) and Robin Roberson (Agentech).
- Brandt Johnson will present "Hail, Wind & High Water: Weather Data Sources and Experts Every Adjuster Should Know About" with Howard Altschule (FWC) and Annette Tarquinio (Engle Martin).
- Seth Jackson will present "Working with Public Adjusters to Resolve Claims" with Brandon Mann (Liberty Mutual Insurance) and Randy Ramsdell (Liberty Mutual Insurance).

June 10–12 – Shannon O'Malley and Laura Bartlow are presenting "Privilege, Privacy and Peril: A Claims Professional's Guide to Generative AI" at the Loss Executives Association (LEA) Spring Meeting & Educational Conference in Newport, RI

June 17 – Jason Reeves and **Hernán Cipriotti** will present "Bodily Injury Climate Change Claims" at the 2026 IRMI Energy Risk and Insurance Conference (ERIC), taking place June 15 – 17, 2026 in San Antonio, TX.

August 19 – Jennifer Gibbs will present "AI in Claims: Risks and Rewards" during a webinar hosted by the Windstorm Insurance Network.

"The Two Appraisers Will Select an Umpire"

Why A *Competent and Impartial* Umpire Is Crucial to the Appraisal Process

by Dennis Anderson

As those familiar with property insurance appraisal know, the outcome is often determined by the third member of the appraisal panel—the umpire—whose role is to resolve issues the two appraisers cannot agree on. Yet many insurance policy appraisal provisions provide little to no framework for who the appraisers can select to serve as umpire or what qualifications the umpire should have.

When a claim goes to appraisal, each party chooses its own appraiser, and the two appraisers choose an umpire. Most appraisal provisions specify that all three members of the panel must be "competent and impartial" (or "competent and disinterested"). But others only apply these requirements to the appraisers. For example, one common appraisal provision states that "each party will select a competent and impartial appraiser. The two appraisers will select an umpire." In this article, we discuss why the umpire should also be "competent and impartial," what that means in practice, and how to help ensure that the umpire in your appraisal measures up.

Appraisal provisions, statutes, and case law often provide little to no guidance about what it means for appraisers and umpires to be "competent." In our view, a "competent" appraiser is one who has the skills and experience to evaluate the type of loss at issue and independently assess the extent of damage, the cost of repair, and other issues an adjuster would typically be called on to assess in the investigation of a claim. The same goes for umpires. When the two appraisers can't reach agreement, an umpire who lacks the skill and experience to independently assess the disputed issue is less likely to really engage with it, and more likely to shift into a "mediator mode" focused on finding a numerical middle ground, regardless of the merits of the parties' positions. When one party has set their position ridiculously high (or low), the middle ground will not be a fair outcome consistent with the facts of the claim.

When it comes to being "impartial" (or "disinterested"), the basic question is whether the umpire can be trusted to resolve disagreements between the two appraisers objectively, based on the facts of the claim, without being swayed by self interest or other interests outside of the appraisal. For starters, the umpire must not have any financial stake in the outcome. The umpire is entitled to a fair fee (which the parties generally split 50/50) but must not be in a position to gain (or lose) depending on whether the appraisal award is higher or lower. This means the umpire must not have a financial stake in the building at issue or (for commercial claims) the business that owns it.

Less direct financial interests should also be considered. For example, does the umpire have a financial stake in the restoration company that provided the insured with an estimate for repairing its water-damaged property, and which is likely to get the job? If so, a higher appraisal award that would result in more profits for the restoration company would indirectly benefit the umpire, which creates a conflict of interest. Another consideration: Does the umpire get so many appointments through a connection with a certain appraiser that their income depends on the continued favor of that appraiser? If so, that umpire will be more likely to resolve disputes in favor of that appraiser's party. Does the umpire have a family connection with the insured? If so, the motivation to avoid an awkward dinner table conversation might motivate the umpire to err in favor of the insured.

What steps can insurers take to ensure the appointment of a competent and impartial appraiser? One is to make sure the policy's appraisal clause requires competence and impartiality, or similar requirements, for the appraisers and the umpire. Another is to add language spelling out what that means and clearly reserving the right to verify that the requirements are met. When working from a policy without these specifics, insurers can still seek agreement that the umpire will be competent and impartial. In most cases, the insured (or their representative, such as a public adjuster or attorney) will agree. If they will not, you may be in for litigation over umpire appointment—but that's a subject for another article.

The Ensuing-Loss Doctrine and Defective Work Exclusions: Recent Case Law and the Impact on Commercial Property Insurance Claims

by Mackenzie Moy

Commercial property and builder's risk disputes involving defective work continue to generate significant disputes and litigation. One of the most consequential battlegrounds remains the interpretation and application of the "ensuing loss" (or "resulting loss") clause. For claims professionals and coverage counsel alike, understanding how courts interpret these provisions is essential to sound claims handling and litigation strategy.

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Commercial property and builder's risk policies commonly exclude loss which is "caused by" or "resulting from" defective construction-related inputs, including planning, design, specifications, materials, workmanship, and maintenance. These exclusions reflect the fundamental risk-allocation premise that insurance is not a remedy for or warranty of a contractor's own defective work, but it may cover fortuitous physical loss or damage that flows from the defect, depending how the exception is stated.

Ensuing loss clauses are typically drafted as an exception to the exclusion; even if an excluded peril occurs, coverage is restored for certain subsequent loss as long as it is caused by a covered cause of loss and is not otherwise excluded. A recurring complication in claims and litigation is that the same factual narrative arising out of a construction defect can be characterized in multiple ways: as excluded costs meant to correct a defect, or as a covered ensuing loss. Courts across jurisdictions grapple with the boundary between repairs or replacement of the defective work itself and distinct physical damage attributable to a covered peril but nonetheless flowing from the excluded cause of loss.

Disputes over these clauses tend to cluster around three interpretative questions. First, is the insured identifying a new "peril" or merely describing a greater degree of damage to the same property from the excluded defect? Second, must the excluded defect lead to a separate covered peril or is it sufficient that a covered peril directly caused the claimed damage even if the covered peril was set in motion by the defect? Third, when the exception applies, is coverage restored to only other property damaged by the ensuing peril, or the entire loss, including the cost to replace or repair the defects?

Adding to these questions is the presence (or lack) of anti-concurrent-causation ("AC") language. ACC clauses aim to override common law causation rules by excluding loss caused "directly or indirectly" by an excluded peril "regardless of any other cause or event that contributes concurrently or in any sequence." Where present, ACC language can foreclose the argument that a covered peril concurrently contributed to the claimed loss. In practice, insurers' success on coverage questions involving a defective workmanship exclusion often hinges on whether the exclusion is paired with ACC language.

Key Decisions

Over the past decade, the Eighth Circuit and numerous state courts have decided several cases directly bearing on the interpretation of ensuing loss exceptions.

Eighth Circuit

Joseph Henderson & Sons, Inc. v. Travelers Property Casualty Ins. Co. of America, 956 F.3d 992 (8th Cir. 2020). Iowa City hired Joseph Henderson & Sons, Inc. to design and install a bio-solids building or a wastewater facility. The roof panels of the facility were damaged during a windstorm, and the builder's risk carrier denied coverage on the grounds that damage was caused wholly or partially by faulty workmanship. The policy's faulty workmanship exclusion contained an exception restoring coverage where "loss or damage by a Covered Cause of Loss results."

The Eighth Circuit affirmed the jury verdict for the insured, concluding that the faulty workmanship exclusion did not contain ACC language and was reasonably construed to preclude coverage *only* for damage caused by faulty workmanship alone, while preserving coverage when a covered event (like the windstorm) contributed to the damage. The court concluded the loss involved mixed causes and explained that coverage remains unless the excluded cause is the sole proximate cause of the loss.

For insurers, *Henderson* is an example of how important ACC language is to the question of coverage. The defective construction exclusion paired with a "results" exception without ACC language acts like a concurrent-cause carve back: if the jury can attribute any proximate causal role to a covered peril, the insurer may lose the exclusion as a defense.

Commercial Flooring Inc. v. RLI Insurance Company, No. 23-3531 (8th Cir. Mar. 19, 2025). A flooring subcontractor installed a vinyl gym floor and subcontracted out the painting of sports lines. The paint work was defective, including crooked lines, incorrect markings, and smudges. Because the paint could not be removed, the insured had to remove and replace the entire floor. The policy contained an exclusion for losses "caused by or resulting from…defects, errors, or omissions…relating to…workmanship or construction."

The Eighth Circuit affirmed summary judgment for the insurer, concluding the ensuing loss clause did not restore coverage because the insure failed to identify a specific covered peril. The faulty workmanship itself immediately damaged the floor, so the exclusion controls. The court held that an ensuing loss clause is triggered only when an excluded peril results in a distinct covered peril, when there are two separate events, and rejected the insured's attempt to label two types of damage (repainting versus replacing) as two perils. The court further reasoned that reading the ensuing loss clause to cover loss caused solely by faulty workmanship would nullify the workmanship exclusion.

State and District Court

Illinois – *Tracy Holdings LLC v. West Bend Mutual Insurance Company*, 333 F.Supp.3d 809 (C.D. Ill. 2018). The insured's hotel property was renovated and, following renovations, the insured discovered water damage to the windows. The policy contained a negligent work exclusion with an ensuing loss clause, as well as a repeated seepage exclusion without an ensuing loss clause. The insured argued that the ensuing loss clause in the negligent work exclusion also applied to the repeated seepage exclusion. The court disagreed, holding that the ensuing loss provision applies only to the negligent work exclusion, and is not a free-floating coverage restoration mechanism applicable across all exclusions.

Michigan – *19900 W. Nine Mile v. Hanover*, 676 F.Supp.3d 534 (E.D. Mich. 2023). The insured experienced interior water damage as a result of melting snow and ice, which infiltrated through openings resulting from faulty or defective maintenance. Although the policy at issue excluded faulty or defective maintenance, it included an ensuing loss provision stating that "if an excluded cause…results in a Covered Cause of Loss," the insurer will pay for the loss caused by the covered cause of loss. The trial court granted summary judgment for the insured, finding that the interior water damage caused by melting snow and ice was covered even though water entered through openings tied to faulty or defective maintenance. The court thus drew a line between covered interior water damage and excluded costs to repair the faulty roof itself: even when an excluded maintenance condition contributed to the loss, the resulting loss provision preserved coverage for the ensuing interior damage attributable to a covered cause of loss, while still excluding the defect or maintenance repair.

Missouri – *Cockerham v. American Family Mutual Insurance Company*, 561 S.W.3d 862 (Mo. Ct. App. 2018). The Missouri Court of Appeals held that a "resulting loss" exception in a homeowners' policy applied to damage to a telescope support system's piers and pole and to the home's foundation, all of which followed from a faulty concrete pour during construction of an addition to the residence. The policy at issue did not define "resulting loss," but the court concluded that the ordinary meaning is "when one loss

resulted from another loss caused by faulty construction such resulting loss was covered." *Cockerham* reinforces Missouri's broad, plain-language approach to ensuing loss provisions. Under this approach, courts enforce the exception according to its literal terms and do not judicially impose a requirement that an ensuing loss arise from a new, independent, and non-foreseeable cause separate from the original defect. This can have the effect of reinstating coverage, however, when the exception may be read to apply only in rare, non-foreseeable scenarios.

Wisconsin – *Cincinnati Ins. Co. v. Ropicky*, 16 N.W.3d 634 (Wisc. Ct. App. 2024). Homeowners sustained damage to their home during a rainstorm when water poured through a gap between the wall flashing and the gutter. The insurer determined the policy did not afford coverage for the loss under a construction defect exclusion. The court concluded that the loss was covered by the ensuing loss exception to the construction defect exclusion. The court held that an ensuing loss is not merely *any* loss occurring after an excluded peril, but the ensuing loss must have been a "likely or necessary consequence" and must "result from a cause in addition to the excluded cause." The court acknowledged that other courts read ensuing loss provisions more narrowly but declined to adopt a narrow approach.

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The ensuing loss provision remains one of the most active and unpredictable areas of commercial property coverage litigation. The contrast between *Henderson* and *Bob Robinson* at the Eighth Circuit illustrates how difference in policy language, particularly the presence or absence of ACC language, and the insured's ability to identify a truly separate coverage peril can be outcome determinative. Early and thorough causation analysis, separation of damages, and precise reservation of rights language are essential to get out ahead of these disputes.

First-Party Bad Faith Essentials: Minnesota vs. Wisconsin

by Megan Shutte

Clients regularly ask us for the basics of first-party bad faith in the many jurisdictions in which they issue policies or handle claims. In this edition of the *Midwest Monitor*, we provide Minnesota and Wisconsin first-party bad faith essentials. While this short summary cannot, of course, cover the finer details of bad faith law in these jurisdictions, this article addresses the most asked questions we receive: Does the jurisdiction apply statutory or common law bad faith? What damages are available if an insured succeeds on their bad faith claim? Does the jurisdiction have any special procedural rules for litigating bad faith claims? Does the jurisdiction recognize actions under an unfair insurance practices statute or regulation? And, what is the statute of limitations for bad faith claims?

We plan to periodically summarize bad faith law in other Midwestern states. Up first: the Badger State and the Gopher State. Although Minnesota and Wisconsin apply the same test to determine whether an insurer may be liable for bad faith, the tests are applied under different legal frameworks. Minnesota only recognizes bad faith via a statute that permits limited damages, while Wisconsin recognizes bad faith as an intentional tort that may allow an insured to recover punitive damages. Minnesota also has a unique procedural twist that depends on whether the claim is brought in state or federal court—which Wisconsin does not have.

Wisconsin

Bad Faith Standard. Bad faith is an independent tort under Wisconsin law. *Anderson v. Continental Insurance Co.*, 85 Wis. 2d 675, 271 N.W.2d 368 (1978). To prevail, the insured must prove two elements: (1) the absence of a reasonable basis for denying policy benefits, and (2) the insurer's knowledge or reckless disregard of that lack of reasonable basis. *Id.* at 376.The first prong is objective: would a reasonable insurer have denied or delayed payment under these facts and circumstances? *Id.* at 377. Courts examine whether the claim was properly investigated and whether the results were reasonably evaluated and reviewed by the insurer. *Id.* The insurer's subjective bad faith intent may be inferred "where there is a reckless disregard of a lack of a reasonable basis for denial" or a "reckless indifference to facts or to proofs submitted by the insured." *Id.* Insurers can challenge claims that are "fairly debatable"—on legal or factual grounds—without acting in bad faith. *Id.* at 368.

Damages. Wisconsin takes a broad view: insurers may be liable for "any damages which are the proximate result" of the insurer's bad faith conduct. *DeChant v. Monarch Life Ins. Co.*, 200 Wis. 2d 559, 571, 547 N.W.2d 592, 596 (1996). These may include compensatory damages, punitive damages, and even emotional distress damages—although emotional distress recovery requires severe distress plus substantial damages beyond loss of contract benefits. *Anderson*, 271 N.W.2d at 378. Punitive damages require proof of "evil intent" or "special ill-will or wanton disregard of duty." *Id.* at 379. Attorney's fees are recoverable as compensatory damages. *Roehl Transp., Inc. v. Liberty Mut. Ins. Co.*, 2010 WI 49, ¶ 183, 325 Wis. 2d 56, 123, 784 N.W.2d 542, 575. Policy proceeds may also be awarded when the insured forgoes a separate breach of contract claim. *Jones v. Secura Ins. Co.*, 2002 WI 11, ¶ 37, 249 Wis. 2d 623, 648, 638 N.W.2d 575, 587.

Procedure. Wisconsin imposes no special procedural barriers to asserting a bad faith claim. Insureds can plead bad faith alongside breach of contract from the outset in both state and federal court. "Historically, the two separate claims have gone together." *Brethorst v. Allstate Prop. & Cas. Ins. Co.*, 2011 WI 41, ¶ 50, 334 Wis. 2d 23, 46, 798 N.W.2d 467, 479. Notably, a bad faith claim can proceed without a separate breach-of-contract claim, provided the insured alleges they were entitled to payment under the policy and that the claim was not fairly debatable in order to proceed to discovery on their bad faith claim. *Id.* at 483.

Unfair Trade Practices. Wisconsin's unfair insurance practices statutes and regulations provide no private right of action. Instead, they are meant to aid enforcement by the insurance commissioner. *Kranzush v. Badger State Mut. Cas. Co.*, 103 Wis. 2d 56, 81, 307 N.W.2d 256, 269 (1981). However, violations of the unfair regulation are admissible as evidence to support a bad faith claim. *Heyden v. Safeco Title Ins. Co.*, 175 Wis. 2d 508, 526, 498 N.W.2d 905, 911 (Ct. App. 1993).

Statute of Limitations. Bad-faith claims carry a two-year statute of limitations as intentional torts. Wis. Stat. Ann. § 893.57; Jones, 638 N.W.2d at 577. The Wisconsin Supreme Court has held that a bad-faith claim may be pursued even after the statute of limitations expires on the insured's breach-of-contract claim. *Id.*

Minnesota

Bad Faith Standard. In 1979, the Minnesota Supreme Court declined to recognize a common law bad faith tort claim. *Haagenson v. National Farmers Union Property & Casualty Company*, 277 N.W.2d 648 (Minn. 1979). The legislature stepped in nearly three decades later, enacting Minn. Stat. Ann. § 604.18 in 2008 to create a statutory cause of action. The statute was expressly modeled after Wisconsin's *Anderson* framework and applies to policies requiring direct payment to insureds. It does not apply to "provisions of a written agreement obligating an insurer to defend an insured, reimburse an insured's defense expenses, provide for any other type of defense obligation, or provide indemnification for judgments or settlements."

The statutory test mirrors Wisconsin's two-prong framework. Under § 604.18, the court may award certain damages and costs if the insured can show: (1) the absence of a reasonable basis for denying policy benefits, and (2) the insurer knew of that lack of reasonable basis or acted in reckless disregard of it.

The first prong is objective: would a reasonable insurer not have denied policy benefits under the circumstances? *Peterson v. W. Nat'l Mut. Ins. Co*., 946 N.W.2d 903, 910 n.2 (Minn. 2020) (noting statute was adopted "nearly word for word" from *Anderson*). In applying the standard, the factfinder should consider the level of investigation a reasonable insurer would have conducted under the circumstances, how a reasonable insurer would have evaluated the claim in light of that investigation, and whether the investigation is fair—meaning, whether the insurer considered all of the facts and circumstances a reasonable insurer would consider relevant. *Id.*

The second prong is subjective: did the insurer know or recklessly disregard information that would have allowed it to know that it lacked an objectively reasonable basis for denial?
Damages. After the factfinder determines the amount owed under the insurance policy (i.e., after the court or jury decides the insured's breach-of-contract claim), the court determines the amount of costs owed in a "subsequent proceeding." *Id.* Importantly, an award under § 604.18 is not available if the claim "is resolved or confirmed by arbitration or appraisal." *Id.*

If the insured proves bad faith, available damages are capped. The court may award: (1) one-half of the proceeds awarded in excess of the insurer's pre-trial offer (made at least ten days before trial begins) or $250,000, whichever is less; and (2) reasonable attorney's fees up to $100,000 (non-duplicative of fees for the insured's action for policy proceeds). Punitive and exemplary damages are not available.

Procedure. Minnesota's statute creates an unusual procedural hurdle in state court. Under § 604.18, subd. 4(a), an insured cannot include bad faith claims in the initial complaint. § 604.18, subd. 4. Instead, they must later move to amend their pleading, alleging the "applicable legal basis" for awarding costs, supported by one or more affidavits. The state court will grant leave to amend a complaint to add bad faith only upon a showing of *prima facie* evidence of bad faith.

But federal court is different. The District of Minnesota has held that § 604.18's pleading requirements conflict with Federal Rules 8 and 15. *Selective Ins. Co. of S.C. v. Sela*, 353 F. Supp. 3d 847, 859 (D. Minn. 2018). Rule 8 requires that complaints request any and all relief sought. Rule 15 allows amendment without affidavits or *prima facie* showings. *Id.* at 858. Applying U.S. Supreme Court precedent, the District of Minnesota held in *Selective Insurance Company of South Carolina v. Sela* that the Federal Rules prevail. The practical result: complaints filed in the District of Minnesota must include bad faith claims from the start, notwithstanding § 604.18.

Unfair Trade Practices. Minnesota does not recognize a private right of action under the state's Unfair Claims Practices Act (M.S.A. § 72A.20). Enforcement is administrative only. *Morris v. Am. Family Mut. Ins. Co.*, 386 N.W.2d 233 (Minn.1986).

Statute of Limitations. The statute is silent on limitations, but Minn. Stat. Ann. § 541.05 provides a six-year period for actions upon statutory liabilities.

Illinois' Highest Court Finds that Government-Authorized Pollution is Still Pollution for Purposes of Pollution Exclusions in CGL Policies

by Nick Dolejsi

The Illinois Supreme Court recently provided much-needed clarity on the scope and application of pollution exclusions in commercial general liability insurance policies. In *Griffith Foods v. National Union Fire Ins. Co. of Pittsburgh, PA*, Case No. 131710 (Ill. Jan. 23, 2026), the court considered the following certified question: "what relevance, if any, does a permit or regulation authorizing emissions (generally or at any particular levels) play in assessing the application of a pollution exclusion within a standard-form commercial general liability policy." The court answered: none.

The background and context that led to this certified question is instructive. The policyholders were facing mass tort claims brought by residents who lived near the policyholders' medical-equipment sterilization facility. The plaintiff-residents alleged that the policyholders emitted ethylene oxide (EtO) from this facility for more than 35 years, which caused the plaintiff-residents to suffer a range of maladies, including cancer and other serious diseases. However, the Illinois Environmental Protection Agency (IEPA) had issued the policyholders a permit to emit EtO from the same facility.

The policyholders tendered the mass tort claims to their liability carrier. The liability carrier denied coverage under a standard pollution exclusion in its policy, which barred coverage for:

> "bodily injury or property damage arising out of the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon land, the atmosphere or any water course or body of water."

In response, the policyholders brought a declaratory judgment action in federal district court seeking an order that the insurer had a duty to defend the underlying mass tort claims. The federal district court sided with the policyholder and found that the pollution exclusion did not apply because "the policyholder had emitted the EtO pursuant to a permit issued by the Illinois Environmental Protection Agency." The insurer appealed to the Seventh Circuit, and the Seventh Circuit recognized an apparent conflict under the Illinois law:

- In *American States Insurance Co. v. Koloms*, 177 Ill. 2d 473, 687 N.E.2d 72 (1997), the Illinois Appellate Court found that standard pollution exclusions "only apply to injuries caused by traditional environmental pollution," and, therefore, held that a pollution exclusion did not bar coverage for carbon monoxide emissions from a defective furnace.
- However, in *Erie Insurance Exchange v. Imperial Marble Corp.*, 957 N.E.2d 1214 (2011), the Illinois Appellate Court found that a standard pollution exclusion did not apply to the "emission of hazardous materials in levels permitted by the IEPA."

Thus, on the one hand, the pollution exclusion applies to injuries caused by traditional environmental pollution (*Koloms*), but on the other hand, the exclusion does not apply to traditional environmental pollution when permitted by the IEPA (*Imperial Marble*). Faced with this uncertainty under Illinois law, the Seventh Circuit certified the question to the Illinois Supreme Court.

The Illinois Supreme Court answered the certified question as follows: "a permit or regulation authorizing emissions (generally or at any particular levels) has no relevance in assessing the application of a pollution exclusion within a standard-form commercial general liability policy." The court reasoned that the IEPA permit did not change the character or substance of the EtO emissions as pollution. Thus, under the current state of Illinois law, the application of a pollution exclusion in a commercial general liability policy does not depend upon whether a government agency granted a policyholder permission to emit hazardous materials.

Griffith Foods v. National Union Fire is a significant decision for liability insurers who write policies in Illinois. Under this ruling, the application of a standard pollution exclusion can no longer depend upon whether the policyholder had the government's permission to emit hazardous materials. And, for policyholders, it affirms that compliance with government regulations and permits will not overcome the plain language of a pollution exclusion in Illinois.

Case Law Update: Material Misrepresentations and Recission in the Eighth Circuit

by Eunbee Cho

In *Hiscox Dedicated Corporate Member, Ltd. v. Taylor*, 162 F.4th 919 (8th Cir. 2025) ("*Hiscox II*"), the Eighth Circuit delivered an opinion packed with fact-intensive inquiry and analysis of material misrepresentation in an insurance application and agency law. *Hiscox II* is the culmination of a protracted coverage dispute that spanned five years and resulted in two Eighth Circuit decisions. While the procedural history of *Hiscox Dedicated Corp. Member, Ltd. v. Taylor,* 53 F.4th 437 (8th Cir. 2022) ("*Hiscox I*") and *Hiscox II* are complicated, both are predicated on the same set of facts. In early 2018, Suzan Taylor filled out an industry standard ACORD application form to obtain property insurance coverage for her home in Hot Springs National Park, Arkansas. As relevant here, the application form asked: "Has applicant had a foreclosure, repossession, bankruptcy or filed for bankruptcy during the past five (5) years?" Taylor answered no. Thereafter, a High Value Homeowners property insurance policy was issued to Taylor by B&W, a multi-state insurance agency that Hiscox Syndicate 33, a Lloyd's of London underwriting syndicate, had authorized to serve as its general agent.

A few months later, a fire destroyed the insured property. Hiscox's adjuster reported several "red flags" raising the possibility of arson, but the cause of the fire remained inconclusive. Based on its investigation, Hiscox concluded that Taylor made several material misrepresentations in her application. Accordingly, the carrier rescinded the policy ab initio and returned the policy premium.

At the time of the application, foreclosure proceedings had been initiated on the Hot Springs property, but it had not yet been sold. Therefore, when the case was presented to the Eighth Circuit for the first time in *Hiscox I*, the court held that the question asking whether Taylor "had a foreclosure" was ambiguous in the circumstances because the term foreclosure could mean the foreclosure sale itself or, depending on the context, the process leading up to that sale. Applying an Arkansas rule that favors the insured when a policy term is deemed ambiguous, the Eighth Circuit adopted the interpretation of "foreclosure" more favorable to Taylor—defining it as the ultimate sale of the property—and held that Taylor's answer to the application question was not a misrepresentation.

Hiscox I, however, did not address the other material misrepresentation allegation that the insurer had raised—that Taylor failed to disclose that one of her other properties was sold in a foreclosure sale in 2016. On remand, the district court held that the foreclosure question was not ambiguous in the circumstances of that property because its foreclosure proceedings had started in 2014 and it was sold in a foreclosure sale in 2016—all within the five-year period specified in the application question. Thus, regardless of which reasonable meaning of the word "foreclosure" Taylor had used to interpret the application question, she should have answered that she did have a foreclosure in the past five years. In a second appeal to the Eighth Circuit, the *Hiscox II* court affirmed the district court's holding that Taylor's failure to disclose that information on her application constituted misrepresentation.

Under Arkansas law, if a misrepresentation is material to the risk, an insurer may rescind coverage even if the misrepresentation was made innocently and in good faith. A misrepresentation is material if the insurer can show that, had it known of the misrepresented facts, it would not have issued the policy. According to *Hiscox II*, uncontradicted testimony from the underwriters that they would not have issued the policy had they known of the misrepresented fact is sufficiently conclusive for a court to find that the misrepresentation was material. Thus, the appellate court held that the district court had properly relied on the underwriters' testimony and underwriting guidelines to find that Taylor's answer to the foreclosure question was a material misrepresentation because one of her properties had been sold in a foreclosure sale within the period specified by the question.

Hiscox II also involved a significant agency question. Taylor argued that the insurer could not rely on her misrepresentation because B&W, the insurer's general agent, had knowledge of the foreclosure. Applying general agency principles of Arkansas law, the district court

explained that knowledge of a general insurance agent is considered knowledge of its principal if the agent acquires that knowledge while acting within the scope of its agency relationship for the principal. In other words, if B&W had learned of the foreclosure while acting as an agent for Hiscox Syndicate 33, that knowledge would be imputed to the insurer. Here, B&W had learned of the foreclosure while acting as an agent for a different insurer. Thus, the district court held—and the *Hiscox II* court affirmed—that knowledge could not be imputed to Hiscox, and the insurer was entitled to rescind Taylor's policy ab initio based on her misrepresentation.

The *Hiscox I* decision serves as a cautionary tale to insurers that courts may find ambiguity in contractual language based on the facts of each case, rather than on the wording itself. *Hiscox II* highlights the fact-driven nature of the misrepresentation inquiry, demonstrating that the underwriter's decision-making process may be a conclusive factor in the court's consideration of whether a misrepresentation was material. Documentation of the kind of information that could disqualify an applicant from receiving coverage may support a misrepresentation defense.

Our Minneapolis office is proud of its attorneys' dedication to pro bono service in our community. In recent months our attorneys have volunteered extensively with Twin Cities Habeas Collective, a grassroots network of volunteer lawyers that were mobilized to provide emergency legal representation to individuals facing unlawful detention without adequate access to counsel. Recently, this organization was awarded the Community Impact Award by a local bar association for its work upholding the rule of law and protecting individual liberty.

For more information on any of the topics covered in this issue, or for any questions in general, feel free to reach out to any of our attorneys. Visit our website for contact information for all Zelle attorneys at zellelaw.com/attorneys.

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