SELECT TOPICS IN FIRST-PARTY PROPERTY HOMEOWNERS' INSURANCE

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Generally speaking, the first-party property side of homeowners' insurance contracts protects against physical loss to dwellings, other specified structures, and personal property, and provides for additional living expenses. When disputes under such policies arise, the focus - like with any other coverage dispute - is on the contract's insuring provisions, exclusions and conditions. This article provides a general overview of the first-party side of a typical Homeowners 3 policy form ("HO-3 Policy"), followed by a discussion of select cases dealing with various key provisions.

Practitioners are cautioned that this is only a broad outline of homeowners' first-party coverage. The policies, of course, are detailed and nuanced, go well-beyond and might differ from that which is discussed herein, and have generated a plethora of case law that is not always easy to reconcile. Whether defending or pursuing a coverage dispute, read and understand your policy and the case law.

The Anatomy of HO-3 First-Party Property Coverage

The HO-3 "Homeowners" Policy provides First-Party Property (Section I) and Third-Party Liability (Section II) personal lines coverage. It typically begins with a set of definitions cross-referenced by both sections, followed by the separate Section I and Section II coverage forms (each containing their own insuring provisions, exclusions and conditions). After the two coverage forms is a separate conditions form applicable to both sections, followed by any state-required or optional endorsements adding to or modifying the preceding provisions.[1]

[1] Some insurers might use a different form that is substantively similar to that described above, but combines the different forms into one.

The Insuring Provisions

The "Section I Property Coverages" form of an HO-3 Policy – the First-Party Property part (the focus of this article) – specifies the *type* of property covered as follows:

- Coverage A - Dwelling. This covers the insured's home and attached structures. It applies generally to the dwelling on the "residence premises," a defined and often-litigated term;

- Coverage B - Other Structures. This refers to, for example, a detached garage, shed or other structure that is part of the "residence premises," but separated from the dwelling itself;

- Coverage C - Personal Property. Subject to certain exceptions (*e.g.*, animals, motorized vehicles, property of boarders) and special limits, this covers personal property owned or used by an insured while it is "anywhere in the world";[2] and

- Coverage D - Loss of Use. This relates to additional living expenses and/or lost rent if the premises cannot be used after the loss or damage.[3]

The form then describes, in another subsection, the "Perils Insured Against." Broken down by the type of covered property (dwelling, other structures, personal property), it describes the types of events that trigger coverage. Under these provisions, an HO-3 Policy is typically a hybrid of an all-risk and named perils policy. Specifically, an HO-3 Policy normally covers the insured's dwelling and other structures on an all-risk basis – *i.e.*, it insures the dwelling "against risks of direct physical loss to property," unless excepted or excluded. On the opposite spectrum, the HO-3 Policy insures certain personal property on a named perils basis – *i.e.*, it applies only to those perils specifically listed in the policy.[4]

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[2] A HO-3 Policy will often provide "Special Limits of Liability" for valuable personal belongings, such as money, gold, silver, jewelry and furs.

[3] Following this is a list of "Additional Coverages" for, among other things, debris removal, reasonable repairs, trees, shrubs and other plants, and collapse.

[4] Such named perils include fire or lightning, windstorm or hail, explosion, riot or civil commotion, aircraft, vehicles, smoke, vandalism or malicious mischief, theft, falling objects, weight of ice, snow or sleet, accidental discharge or overflow of water or steam, freezing, among others.

Exclusions and Conditions

Next are the First-Party Property "Exclusions" – *i.e.*, the types of losses that, notwithstanding the preceding provisions, are *not* covered. These establish that the insurer will not cover loss resulting from, for example, the enforcement of an ordinance or law, earth movement, certain water damage, and other outlined circumstances.

Concluding the Section I First-Party Property form are the "Conditions" by which the insured must abide. In certain circumstances, a failure to meet conditions might vitiate coverage. Typical conditions include the timely filing of a sworn statement in proof of loss and submission to an examination under oath; the existence of an insured's "insurable interest" in the subject property; timely notice of the loss; and a time limitation in which suit may be brought against the insurer.

Illustrative Homeowners' Cases

***Dean v. Tower Insurance Co. of New York* ("Residence Premises")**

For the insured's dwelling and its adjacent structures to be covered property, the dwelling and/or other structures must be on the "residence premises," an often-litigated term in the context of First-Party Homeowners' coverage. The common definitions form of a HO-3 Policy defines "residence premises as "the one or two family dwelling, other structures, and grounds or that part of any other building where you [the named insured] reside and which is shown as the 'residence premises' in the Declarations."[5]

Thus, in order for coverage to apply, the insured must reside at the "residence premises" at the time of the loss. The "residence premises" definition has been subject to scrutiny in cases

[5] Some forms may use different language such as "… (a) [t]he one family dwelling where you reside; (b) [t]he two, three, or four family dwelling where you reside in at least one of the family units; or (c) [t]hat part of any other building where you reside; and which is shown as the 'residence premises' in the Declarations."

where the insured moves without advising the carrier, does not move into or delays moving into the dwelling, and/or rents out the dwelling and never lives there. Under such circumstances, insurers have successfully denied coverage based on the insured's lack of residency at the time of the loss or damage.[6] In so holding, courts have generally held that "the term 'reside' or 'residence' is not ambiguous [] and, therefore, must be accorded its plain and ordinary meaning."[7]

Courts have further held that "[t]he standard for determining residency for purposes of insurance coverage 'requires something more than temporary or physical presence and requires at least some degree of permanence and intention to remain.'"[8] This standard was clarified by the Court of Appeals in *Dean v. Tower Insurance Co. of New York*.[9] In *Dean*, the insureds procured a homeowners policy with the full intention of moving in after closing on the premises. Shortly after the closing, however, the insureds learned that the premises required termite remediation. The repairs were substantially complete when the premises sustained a fire. During the remediation, the insureds - although they had not yet moved in - were at the premises on a daily basis, ate there regularly and sometimes stayed overnight. Based on this fact pattern, the Court determined that "there are issues of fact as to whether [the insured's] daily presence in

[6] *See Neary v. Tower Ins.*, 94 A.D.3d 725, 726, 941 N.Y.S.2d 279, 280 (2d Dep't 2012) (insurer entitled to judgment as a matter of law by demonstrating insureds did not reside at the subject premises when the fire occurred); *Vela v. Tower Ins. Co.*, 83 A.D.3d 1050, 1051, 921 N.Y.S.2d 325, 327 (2d Dep't 2011) (granting insurer's summary judgment motion where insured was not living at the subject premises at the time the water damage occurred); *Milgrim v. Royal & Sunalliance Ins. Co.*, 75 A.D.3d. 587, 589, 906 N.Y.S.2d 572, 575 (2d Dep't 2010) (insurer "properly disclaimed coverage on the ground that the insured location, *i.e.*, the subject premises, was not [the insured's] 'residence premises,' as defined under the policy, on the date of the fire…").

[7] *Neary*, 94 A.D.3d at 726, 941 N.Y.S.2d at 280; *see also Vela*, 83 A.D.3d at 1051, 921 N.Y.S.2d at 327 (policy's "residence premises" provision is not ambiguous).

[8] *Vela*, 83 A.D.3d at 1051, 921 N.Y.S.2d at 326-27 ("[t]he [insured's] mere intention to reside at the premises was insufficient to satisfy the policy's 'residence premises' requirement"); *Gov't Emps. Ins. Co. v. Paolicelli*, 303 A.D.2d. 633, 633, 756 N.Y.S.2d 653, 654 (2d Dep't 2003).

[9] 19 N.Y.3d 704, 708, 979 N.E.2d 1143, 1145, 955 N.Y.S.2d 817, 818-19 (2012).

the house, coupled with his intent to eventually move in with his family, is sufficient to satisfy the insurance policy's requirements."[10] The Court held that, in that instance, since the term "reside" was not defined in the policy, the term "residence premises" was ambiguous, and that it is a "reasonable expectation" that "occupancy of the premises would satisfy the policy's requirements."[11]

Dean presents facts and circumstances that are generally distinguishable from situations where an insured intentionally moves (whether to another home or senior care facility), knowingly delays moving in, and/or rents out the premises and does not move in at all. Unlike these circumstances, the insureds in *Dean* actually intended to move into the "residence premises," but were prevented from doing so due to circumstances beyond their control. In other words, the findings in *Dean* were, as the Court recognized, based on "the circumstances of [that] case[.]"[12] Thus, *Dean* cannot stand for the broad proposition that the terms "reside" and "residence premises" are necessarily ambiguous in other contexts.[13]

***Brice v. State Farm Fire & Casualty Co.* (Earth Movement Exclusion)**

One of the more commonly litigated provisions is the earth movement exclusion which bars coverage for, among other things, loss caused by "earthquake," "mudslide," "sinkhole," "subsidence," and "any other earth sinking, rising or shifting." HO-3 policies will often include – either in the main "Homeowners" coverage form or in an endorsement – language explicitly

[10] *Id.* at 708-09, 979 N.E.2d at 1145, 955 N.Y.S.2d at 819.

[11] *Id.* at 709, 979 N.E.2d at 1145, 955 N.Y.S.2d at 819.

[12] *Id.* at 707, 979 N.E.2d at 1144, 955 N.Y.S.2d at 817.

[13] Courts continue to grant insurers summary judgment based on the lack of the insured's residency at the insured location at the time of the loss or damage. *See, e.g., Tower Ins. Co. v. Brown*, 130 A.D.3d 545, 545-46, 14 N.Y.S.3d 37, 38 (1st Dep't 2015) (insurer "made a *prima facie* showing that it is entitled to summary judgment based on the affidavit of its claim adjuster stating that he spoke with [the insured], who admitted that he did not reside at the premises when the incident occurred, as required by the policy"); *Azor v. Tower Ins. Co. of N.Y.*, No. 500979/15, 2015 WL 9244884, at *1 (Sup. Ct. Dec. 17, 2015) (same).

confirming that the exclusion applies to both natural and man-made events. Again, however, the entire policy should be carefully read when evaluating coverage.

By way of example, in *Brice v. State Farm Fire & Casualty Co.*,[14] the insured's residential apartment building was damaged in connection with excavation procedures on neighboring property after allegedly faulty underpinning caused earth to displace from beneath the insured's building.[15] The carrier disclaimed under an earth movement exclusion that applied to "sinking, rising, shifting, expanding or contracting of earth [… including, but not limited to] earthquake, landslide, mudflow, mudslide, sinkhole, subsidence, erosion or movement resulting from improper compaction, site selection or any other external forces...." whether the loss arose "from natural or external forces."[16] The Court accordingly held that coverage was excluded.[17]

***Platek v. Town of Hamburg* (Water Damage Exclusion and Ensuing Loss)**

Another commonly litigated provision is the water damage exclusion which typically bars coverage for flood and certain water back-up from sewers and drains.[18] In *Platek v. Town of Hamburg*,[19] the Court of Appeals recently addressed this exclusion and, more interestingly, the

[14] 761 F. Supp. 2d 96 (S.D.N.Y. 2010).

[15] *Id*. at 97.

[16] *Id*. at 100.

[17] Practitioners should note that many cases addressing the earth movement exclusion involve commercial property policies. These cases remain informative in determining the applicability of the earth movement exclusion in the homeowners' context. *See, e.g., Coney Island Auto Parts Unlimited, Inc. v. Charter Oak Fire Ins. Co.*, 619 F. App'x 28, 29-30 (2d Cir. 2015) (coverage excluded under earth movement exclusion where settlement of soil beneath the concrete slab of insured's building qualified as "earth sinking, rising or shifting"); *Bentoria Holdings, Inc. v. Travelers Indem. Co.*, 20 N.Y.3d 65, 68, 980 N.E.2d 504, 505, 956 N.Y.S.2d 456, 457 (2012).

[18] Note that some HO-3 policies may include an endorsement providing limited "Additional Coverage" for "Water Back-Up of Sewers and Drains."

[19] 24 N.Y.3d 688, 26 N.E.3d 1167, 3 N.Y.S.3d 312 (2015).

impact of certain "ensuing loss" language.[20]

In *Platek,* a subsurface water main adjacent to the insured's property burst and caused water to flood the basement. The insurer denied the resulting claim based on a provision barring coverage of loss caused by "[w]ater … on or below the surface of the ground, regardless of its source … which exerts pressure on, or flows, seeps or leaks through any part of the residence premises." That same exclusion, however, said that insurer would "cover sudden and accidental direct physical loss caused by fire, explosion or theft resulting from" the excluded event.[21]

The insured contended that its loss fell within the exclusion's "sudden and accidental" give back language because the damage occurred when the water main "suddenly exploded" due to "internal water pressure being exerted on the pipe walls." The insurer, however, asserted that "any 'loss caused by ... explosion' must 'result[ ] from' the explosion, [and] [h]ere, by contrast, any explosion 'occurred earlier, … when the water main broke.'"[22]

The Court agreed with the insurer, stating that the exception at hand was an "ensuing loss provision" which "'at least requires a *new loss* to property that is of a kind not excluded by the policy,"[23] and that, contrary to the insured's interpretation, the exception "does not create a 'grant-back' through which coverage may be had for the original excluded loss...."[24] The case provides an general explanation of "ensuing loss" provisions, including a historical perspective dating back to the San Francisco Earthquake of 1906.

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[20] An ensuing loss is a loss that follows an earlier loss. In first-party property insurance, the "ensuing loss" concept comes into play when the initial loss is excluded, but damage is caused by a covered peril occurring as a result of the excluded loss. One example of an "ensuing loss" is where an earthquake (an excluded loss) results in a fire sparked by gas emitted from pipes broken by the shaking of the earth that causes damage.

[21] *Platek*, 24 N.Y.3d at 691, 26 N.E.3d at 1169, 3 N.Y.S.3d at 314-15.

[22] *Id.* at 691-92, 26 N.E.3d at 1170, 3 N.Y.S.3d at 315.

[23] *Id.* at 695, 26 N.E.3d at 1172, 3 N.Y.S.3d at 318.

[24] *Id.*

***Squairs v. Safeco National Insurance Co.* (Wear and Tear; Collapse)**

Another exclusion often raised in homeowners' policy litigation is the "wear and tear" provision which bars coverage for, among other things, "deterioration," "latent defect," "wet or dry rot," and "settling" and/or "cracking" of "foundations, walls, floors, roofs or ceilings." A policy's "Additional Coverage" for "collapse" may – at times – also be implicated in this context.

This precise issue was addressed in *Squairs v. Safeco National Insurance Co.*,[25] where the insureds sought coverage for damage to their home when four exterior posts supporting a deck, which was structurally integrated into the second floor of the home, were damaged by hidden decay and rot.[26] The policy at issue contained the language noted above, expressly excluding coverage for "wear and tear," "wet or dry rot," *etc*. The court applied the language to exclude coverage for the insureds' damage due to rot and deterioration over time.[27]

The court also acknowledged that the policy provided coverage for "collapse" of a building or part of a building, and that the policy's definition of "collapse" required "an abrupt falling down or caving in of a building or any part of a building with the result that the building or part of the building cannot be occupied for its intended purpose." The policy further provided that "[a] building or any part of a building that is in danger of falling down or caving in is not considered to be in a state of collapse" and that "[a] building or any part of a building that is standing is not considered to be in a state of collapse even if it shows evidence of cracking, bulging, sagging, bending, leaning, settling, shrinkage or expansion."[28]

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[25] 136 A.D.3d 1393, 1394, 25 N.Y.S.3d 502, 503 (4th Dep't 2016).

[26] *Id.*

[27] *Id.*

[28] *Id.*

Relying on this unambiguous language and the record, the court determined that the insureds' home was standing and had never collapsed and, thus, the "collapse additional coverage" did not apply.[29] The court further rejected the insureds' contention that their home was in an "imminent state of collapse" based upon the above language and other established cases addressing similar language, recognizing that an out of plumb, cracked or almost falling down home does not rise to the level of a "collapse" under the specific policy definition at issue.[30]

***Fabozzi v. Lexington Ins. Co*. (Suit Limitations)**

Another frequently litigated policy provision is the suit limitations condition which imposes a contractual limitation on the time-frame in which an insured may sue an insurer. Under the current law - and depending upon the policy language at issue - there is a question as to when that limitation period actually begins to run - *i.e.*, from the date of the occurrence or the cause of action's accrual.

In *Myers, Smith & Granady, Inc. v. New York Property Insurance Underwriting Association,*[31] the Court of Appeals affirmed the Appellate Division's holding that the insured's action was time-barred because it was not brought within two years of the fire loss, as required by the policy. The suit limitation provision at issue provided: "No one may bring a legal action against us under this policy unless: (a) [t]here has been full compliance with all of the terms of this policy, and (b) [t]he action is brought within two years after the *date on which the direct*

[29] *Id.*

[30] *See e.g., Viscosi v. Preferred Mut. Ins. Co.*, 87 A.D.3d 1307, 1308, 930 N.Y.S.2d 165, 168 (4th Dep't 2011) (agreeing with insurer that ceiling – although noticeably bowed – "did not collapse within the meaning of the policy, which specifically states that 'any part of a building that is standing is not considered to be in a state of collapse even if it shows evidence of cracking, bulging, sagging, bending, leaning, settling, shrinkage or expansion'"). Practitioners are cautioned to read the particular policy language at issue in any case involving "additional coverage" for "collapse" and/or "imminent collapse."

[31] 85 N.Y.2d 832, 833, 647 N.E.2d 1348, 1348, 623 N.Y.S.2d 840, 840 (1995).

physical loss or damage occurred." Without analyzing policy language, the Court determined that the time to bring suit ran from the date of the occurrence.[32]

Cases since have followed *Myers* to hold that a suit limitations period starts to run from the date of the damage, even where the policy language at issue requires suit to be brought within two years after the "date of loss" (as opposed to "*date on which the direct physical loss or damage occurred*"). For example, in *Costello v. Allstate Insurance Co.*,[33] the court relied on *Myers* to reject the insured's argument that "the words 'date of the loss' … are ambiguous or mean anything different than the words 'after the inception of the loss.'"[34] The court stated that "[b]oth phrases have consistently been held to refer to the date of the catastrophe insured against, and not to the accrual date" of the claim against the insurer.[35]

Practitioners, however, should be cognizant of the Second Circuit's decision in *Fabozzi v. Lexington Insurance Co.*[36] In *Fabozzi*, the federal appellate court considered a suit limitations provision identical to that in *Costello* - requiring suit to be brought within two years after the "date of the loss" - but strayed from prior state court holdings. Specifically, it determined that the policy language at issue was "generic" and not equivalent to a more precise phrase, such as "after the inception of the loss."[37] In the absence of such precision, the court tied the limitations period to the time when the claim against the insurer accrued (*i.e.*, when the insurer denies

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[32] *Id.*

[33] 230 A.D.2d 763, 763, 646 N.Y.S.2d 695, 696 (2d Dep't 1996).

[34] *Id.*

[35] *Id.*

[36] 601 F.3d 88, 91-92 (2d Cir. 2010).

[37] *Id.* at 91.

coverage), and not the date of the physical loss.[38] The *Fabozzi* court also cited *Myers*, stating that it involved "highly specific limitations language" which required any action to be brought "within two years after the date on which the direct physical loss or damage occurred" and concluded that "[i]t is no surprise then that the Court of Appeals [in *Myers*] accepted, without any comment, that the limitations period ran from the date of the fire."[39]

Since *Fabozzi*, at least two Appellate Division cases have held that a suit limitations provision requiring suit to be brought within a certain time period "after the date of the loss" started to run as of date of the actual physical loss or damage.[40] Neither case mentioned *Fabozzi*. Some lower state courts, however, have cited favorably to *Fabozzi*.[41]

Subsequent to *Fabozzi*, some carriers have amended their suit limitations provisions to include more specific language, specifying for example, that the period will run from the "date of the occurrence causing loss or damage." In the past, courts have held that, under such language, a suit limitations period begins to run from the date of the loss or damage.[42]

Practitioners should thus be aware of the above distinctions and case law when evaluating the suit limitations condition. Practitioners should also be cognizant of recent decisions

[38] *Id*. at 93.

[39] *Id*. at 92.

[40] *See D'Angelo v. Allstate Ins. Co.*, 126 A.D.3d 931, 931, 6 N.Y.S.3d 135, 136 (2d Dep't 2015); *Vaccaro v. New York Cent. Mut. Fire Ins. Co.*, 116 A.D.3d 839, 840, 983 N.Y.S.2d 436, 436 (2d Dep't 2014).

[41] *See, e.g., Bardakjian v. Preferred Mut. Ins. Co.*, 40 Misc.3d 1209(A), 975 N.Y.S.2d 707 (Sup. Ct. 2013).

[42] *See, e.g., Blanar v. State Farm Ins. Cos.*, 34 A.D.3d 1333, 1333, 824 N.Y.S.2d 702, 703 (4th Dep't 2006) (complaint time-barred where insured failed to commence action for first-party homeowners coverage "within two years after the occurrence causing the loss or damage, as required by a provision in the policy").

discussing the "reasonableness" of a suit limitations condition in the context of claims seeking additional living expenses and/or payment for replacement of property.[43]

***Eagley v. State Farm Insurance Co.* (Failure to Cooperate During EUO)**

Courts also frequently deal with policy conditions, including, but not limited to, the insured's duty to submit to an examination under oath ("EUO"), produce records and documents, and submit timely proof of loss forms. *Eagley v. State Farm Insurance Co.*[44] recently addressed one common issue - whether the insureds had breached the obligation to cooperate by failing to answer specific questions during their EUOs.

In *Eagley*, the insureds sought coverage in connection with a 2011 fire loss, including a clam for additional living expenses. During their EUOs, the insureds were asked questions about a prior fire loss and similar claim for additional living expenses that had occurred in 2010. The insureds refused to answer these questions based on relevance and the pendency of a criminal investigation relative to the 2010 fire loss. The insurer's counsel maintained, however, that the questions were relevant to the insureds' current claim for additional living expenses.[45]

After the claim was denied and suit was brought, the court granted summary judgment to the insurer based on, among other things, the insureds' violation of the policy's EUO provision.[46] In evaluating this violation, the court applied a "failure to cooperate" standard – discussing that the insureds' refusal to answer questions at their EUOs must be deliberate and willful for the insurer to avoid coverage. The court stated that "[a]n insured's failure to cooperate is deemed

[43] *See, e.g., Executive Plaza, LLC v. Peerless Ins. Co.*, 22 N.Y.3d 511, 5 N.E.3d 989, 982 N.Y.S.2d 826 (2014); *Hirth v. Am. Ins. Co*., No. 15 Civ. 3245, 2016 WL 75420 (S.D.N.Y. Jan. 7, 2016).

[44] No. 13-CV-6653P, 2015 WL 5714402 (W.D.N.Y. Sept. 29, 2015).

[45] *Id*., at *2-5.

[46] *Id*., at *2.

willful where the insured's conduct 'is indicative of a pattern of non-cooperation [sic] for which no reasonable excuse for noncompliance has been proffered' [and …] a finding that the insured's failure to cooperate was willful generally extinguishes any right of the insured to be afforded a 'last opportunity' to comply with policy conditions.'"[47]

The court went on, stating that "[t]he law is clear that the failure to attend an EUO constitutes a material breach of an insurance policy [,] … that repeated, unexplained failures to attend warrant a finding of willfulness," and that "[a] policyholder cannot satisfy his or her duty to cooperate … by attending an EUO but refusing to answer material questions."[48] Finding such willfulness and stressing that the questions asked, but not answered, were "material," the court found for the insurer.

Eagley includes a detailed discussion of New York courts' treatment of "failure to cooperate" defenses, citing a plethora of cases and analyzing the burden that applies to such claims. The case illustrates the importance of taking a "case-by-case" approach when considering the viability of a failure to cooperate defense.

Conclusion

The above cases outline just a small sampling of the issues that may impact coverage under a typical homeowners policy. Practitioners are well advised to carefully review the exact policy language and to also be aware of all limitations, exclusions and conditions, as well as applicable, relevant case law, when evaluating coverage.

[47] *Id.*, at *6-8.

[48] *Id.*