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Construction and Application of "Fortuitous Event" Provision of All-Risk Insurance Policy

An all-risk policy creates coverage of a type not ordinarily present under other types of insurance and generally, an all-risk policy insures against risks of direct physical loss or damages from an external cause which is of a fortuitous nature; all-risk insurance generally covers fortuitous losses or events. A fortuitous event is an event which happens by chance, unexpectedly, or without known cause, one which is undesigned or which is unplanned. More specifically, the determination of whether a loss is "fortuitous," which is a condition precedent to coverage under an all-risk insurance plan, has three components: (1) a loss which was certain to occur cannot be considered fortuitous, and may not serve as the basis for recovery under an all-risk insurance policy; (2) in deciding whether a loss was fortuitous, a court should examine the parties' perception of risk at the time the policy was issued; and (3) ordinarily, a loss which could not reasonably be foreseen by the parties at the time the policy was issued is fortuitous. This article collects the cases in which the courts have construed and applied "fortuitous event" provisions in all-risk insurance policies.

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An all-risk policy creates coverage of a type not ordinarily present under other types of insurance, and generally, an all-risk policy insures against risks of direct physical loss or damages from an external cause which is of a fortuitous nature; all-risk insurance generally covers fortuitous losses or events. This article [1] collects and discusses the cases in which the courts have construed and applied "fortuitous event" provisions in all-risk [2] insurance policies. [3]

Note

Some opinions discussed in this article may be restricted by court rule as to publication and citation in briefs; readers are cautioned to check each case for restrictions. A number of jurisdictions may have rules, regulations, constitutional provisions, or legislative enactments directly bearing upon this subject. These provisions are discussed herein only to the extent and in the form that they are reflected in the court opinions that fall within the scope of this article. The reader is consequently advised to consult the appropriate statutory or regulatory compilations to ascertain the current status of all statutes discussed.

§ 2. Background and summary

[Cumulative Supplement]

An "all risk" insurance policy is a promise to pay for loss caused by a fortuitous or extraneous happening, but it is not a promise to pay for loss or damage which is almost certain to happen because of the nature and inherent qualities of the property insured.

All-risk insurance covers damage resulting from all risks other than those that are specifically excluded from coverage; if a risk is not specifically excluded, it is deemed covered. [4]

An all-risk policy, then, creates coverage of a type not ordinarily present under other types of insurance, and generally, an all-risk policy insures against risks of direct physical loss or damages from an external cause which is of a fortuitous nature; all-risk insurance generally covers fortuitous losses or events. A cause is external if damage which arises from it does not wholly result from an inherent defect in the subject matter insured or from the inherent deficient qualities, nature, and properties of the subject matter. [5]

A fortuitous event is an event which happens by chance, unexpectedly, or without known cause, one which is undesigned or which is unplanned. More specifically, the determination of whether a loss is "fortuitous," which is a condition precedent to coverage under an all-risk insurance plan, has three components: (1) a loss which was certain to occur cannot be considered fortuitous, and may not serve as the basis for recovery under an all-risk insurance policy; (2) in deciding whether a loss was fortuitous, a court should examine the parties' perception of risk at the time the policy was issued; and (3) ordinarily, a loss which could not reasonably be foreseen by the parties at the time the policy was issued is fortuitous. In determining whether a loss is fortuitous, it cannot be looked upon as a matter of hindsight. [6]

While there is some authority in the context of articulating the meaning of fortuity under all-risk coverage which focuses on whether an event is assumed by the parties to be, to a substantial extent, beyond the control of either party, this is often stated in the context of a case where that aspect of fortuity is determinative; in essence, the fortuity requirement relates to foreseeability, and a loss that could not reasonably be foreseen by the parties at the time the policy was issued is ordinarily fortuitous. It is doubtful that a single, simple definition is possible or even desirable. Thus, the fortuity concept in all-risk insurance has been said to be one which, at least so far as the parties were aware, was dependent on chance, and might be (1) beyond the power of any human being to bring the event to pass; (2) within the control of third persons; (3) a past event, such as the loss of a vessel, provided that the fact was unknown to the parties. [7]

The courts in a number of cases have construed and applied "fortuitous event" provisions in all-risk insurance policies. In a number of cases, for example, the courts addressed burden of proof issues (§ 4), and addressed the "loss-in-progress" doctrine in conjunction with the fortuitous event and fortuitous loss language applicable to the claim at issue (§ 5). In other such cases, the courts, construing and applying "fortuitous event" provisions in all-risk insurance policies, adjudicated whether a "fortuitous loss" or "fortuitous event" had been established, or whether such a finding was supportable, the court addressing whether the negligence of the insured or third parties was fortuitous (§ 6); whether a claimed "mysterious disappearance" was fortuitous (§ 9); general weather-related issues (§ 10); whether seasonal bad weather at sea was fortuitous (§ 11); whether wind-driven rain was fortuitous (§ 12); general theft and conversion issues (§ 13); a claim involving stolen art (§ 14); the purported theft of marine gas oil (§ 17); whether the negligence of third parties, or the failure of such parties, to maintain insured property was fortuitous (§ 18); whether a claimed title defect was fortuitous (§ 21); and claimed intentional or reckless conduct (§ 22). In additional cases, the courts, construing and applying "fortuitous event" provisions in all-risk insurance policies, held that a "fortuitous loss" or "fortuitous event" had been established, or that such a finding was supportable, the court addressing whether a party's improper storage was fortuitous (§ 7), whether a claimed act of conversion was fortuitous (§ 15), and the seizure of property by authorities or the seizure of such property under court order (§ 19) though other courts, given the particular circumstances presented, ruled to the contrary (§§ 8, 16, 20).

In several other cases, the courts, construing and applying "fortuitous event" provisions in all-risk insurance policies, adjudicated whether a "fortuitous loss" or "fortuitous event" had been established, or whether such a finding was supportable, the court addressing whether the condition of the ground upon which a building was constructed was fortuitous (§ 23); whether a claim regarding the sliding of a roof was fortuitous (§ 30); whether defective paneling was fortuitous (§ 31); a party's removal of building alterations (§ 32); the collapse of an exterior stone veneer wall (§ 33); residential water damage (§ 34); commercial building water damage (§ 35); the deterioration of concrete (§ 38); tunnel construction activities (§ 39); claimed damage due to building demolition activities (§ 40); and the purported failure of an artisan well (§ 43). In other such cases, the courts held that a "fortuitous loss" or "fortuitous event" had been established, or that such a finding was supportable, the court referencing a claim of defective design, construction, workmanship, or process (§ 24); addressing whether water pipes bursting or pipes leaking was fortuitous (§ 26); generally referencing a claim of roof damage (§ 28); referencing claimed mold damage (§ 36); and referencing asbestos removal activities (§ 41) though other courts, given the particular circumstances presented, ruled to the contrary (§§ 25, 27, 29, 37, 42).

In additional cases, the courts, construing and applying "fortuitous event" provisions in all-risk insurance policies, adjudicated whether a "fortuitous loss" or "fortuitous event" had been established, or whether such a finding was supportable, the court generally referencing claimed damage to a marine vessel (§ 44), referencing marine vessel hull damage (§ 45), referencing purported vandalism to a marine vessel (§ 46), referencing the sinking of a dock or the failure of a mooring pile (§ 49), referencing the purported failure of a bilge-pump system (§ 50), referencing the failure of a marine vessel mechanical system (§ 51), referencing damage purportedly caused by the use of a marine vessel as a fishing charter boat (§ 52), referencing damage related to certain equipment aboard a marine vessel (§ 53), referencing the deterioration of the battery of a marine vessel (§ 54), referencing damage related to the failure of a hose clamp (§ 55), and referencing damage related to an engine relief valve (§ 56). In other such cases, the courts held that a "fortuitous loss" or "fortuitous event" had been established, or that such a finding was supportable, or that an issue of fact in that regard had been presented, the court referencing the sinking of a marine vessel (§ 47) though other courts ruled to the contrary (§ 48).

In a number of cases, the courts, construing and applying "fortuitous event" provisions in all-risk insurance policies, adjudicated whether a "fortuitous loss" or "fortuitous event" had been established, or whether such a finding was supportable, the court referencing damage related to an oil and gas well compressor (§ 57), damage related to a refrigeration unit (§ 58), purported air conditioning damage (§ 59), purported aircraft engine damage (§ 60), damages related to the use or presence of vapor retardant (§ 61), damages related to an oil or gas pipeline (§ 62), damages due to groundwater contamination (§ 63), purported business income loss (§ 64), purported trade dress infringement (§ 65), damage related to the production of plastic bags (§ 66), and claimed damage or injury caused by bacterial material (§ 67).

CUMULATIVE SUPPLEMENT

Cases:

All-risk insurance policies cover all fortuitous losses or damages, other than those resulting from willful misconduct or fraudulent acts. S.O. Beach Corp. v. Great American Insurance Company of New York, 305 F. Supp. 3d 1359 (S.D. Fla. 2018).

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[END OF SUPPLEMENT]

§ 3. Practice pointers

An "all risks" policy creates a special type of coverage extending to risks not usually covered under other insurance, and recovery under such a policy will be allowed for all fortuitous losses unless the policy contains a specific provision expressly excluding the loss from coverage; additionally, unlike with a specific peril policy, the insured does not have to prove that the peril proximately causing the claimed loss was covered by the policy. [8]

Moreover, once the insured meets the light burden of establishing that a loss occurred due to some fortuitous event or circumstance, the burden shifts to the insurer to show that the loss is excluded by some language set out in the policy. [9]

However, under an all-risks policy, while the insured bears the burden of showing that it suffered a loss and that the loss is fortuitous, the insured need not demonstrate the precise cause of damage for the purpose of proving fortuity. [10]

In certain jurisdictions, the fortuity requirement under an all-risk insurance policy exists as a matter of public policy because it would encourage fraud to permit recovery on an insurance loss which is certain to occur. [11]

A loss which was certain to occur cannot be considered "fortuitous," and may not serve as the basis for recovery under an all-risk insurance policy, and in deciding whether a loss was "fortuitous" for purposes of an implied exclusion in an all-risk policy, a court should examine the parties' perception of the risk at the time the policy was issued. [12]

The "fortuity doctrine" precludes coverage under a risk insurance policy for both a "known loss," which is a loss the insured knew had occurred prior to making the insurance contract, and a "loss in progress," which occurs when the insured is, or should be, aware of an ongoing progressive loss at the time the policy is purchased. [13]

II. General Considerations

A. In General

§ 4. Burden of proof

[Cumulative Supplement]

The courts in the following cases, construing and applying "fortuitous event" provisions in all-risk insurance policies, addressed burden of proof issues.

Tenth Circuit

Leprino Foods Company v. Factory Mut. Ins. Co., 2007 WL 2221158 (D. Colo. 2007) In a case in which the plaintiff food company moved for summary judgment on the issue of coverage for its loss of contaminated cheese stored in a warehouse based on its view that the exception to the contamination exclusion provision in an all-risks insurance policy for contamination "directly resulting from other physical damage not excluded by this Policy" was satisfied by the undisputed fact that one of the contaminants was limonene, a chemical found in frozen fruit concentrate product also stored in that warehouse, where the plaintiff further contended that it was not necessary for it to prove an identifiable event causing the contamination although it had evidence of broken containers and spillage of products containing that substance, and where the defendant disputed the evidence, the court, on review, ruled that summary judgment could be entered only on the legal conclusion that the plaintiff bore no burden of identifying the cause within the warehouse.

Citing Adams-Arapahoe Joint School Dist. No. 28-J v. Continental Ins. Co., 891 F.2d 772, 57 Ed. Law Rep. 789 (10th Cir. 1989) (applying, in part, Colorado law), § 25, the court pointed out that the Tenth Circuit Court of Appeals interpreted an exclusion for corrosion in an all-risk insurance policy with an exception for loss resulting from a "peril not excluded in this policy" to limit the exclusion to naturally occurring corrosion, the court adding, however, that the court nonetheless required the insured to prove that the loss was "fortuitous," recognizing that the requirement that the loss be fortuitous is implied in all such insurance policies, as a result of which the *Adams-Arapahoe* court reversed the judgment for the insured because the trial court erroneously instructed the jury that the insurance company had the burden of proof that the loss was not fortuitous. The question in *Adams-Arapahoe* was whether the insured had knowledge of a substantial risk of roof collapse because of corrosion before it obtained the policy, the court stressed, and, similarly, in this case, the plaintiff would be required to prove that the loss was fortuitous because of some event or condition in the warehouse other than the mere storage of other food products with the cheese.

California

Metric Const. Co., Inc. v. Allianz Global Risks US Ins. Co., 2006 WL 3008451 (Cal. App. 2d Dist. 2006), unpublished/noncitable, (Oct. 24, 2006) In a case in which the defendant insurer issued an "all risks" insurance policy to the plaintiff construction company for the construction of a warehouse, said policy excluding coverage for the cost of repairing faulty workmanship in construction but, in an exception to the exclusion, covered damage to other parts of the building and its contents that resulted from the faulty workmanship, the plaintiff filed action seeking coverage of the costs of repairing a roof, the insurer claimed that the roof repairs were excluded as a cost of repairing faulty workmanship in constructing the roof, and the court, on review, affirming the trial court's entry of judgment in favor of the insurer, held that the trial court correctly assigned the burden of proof in its statement of decision by stating that the insured had the burden of establishing that it "sustained fortuitous loss that falls within [the] policy's basic coverage" and that the insurer had the burden of "establishing the applicability of an exclusion." There was no dispute at trial that the roof damage fell within the "basic coverage" provided by an all-risk insurance policy, and the trial court did not require the plaintiff to prove that the roof damage was covered by the policy, the court concluded.

New York

525 Fulton Street Holding Corp. v. Mission Nat. Ins. Co., 256 A.D.2d 243, 682 N.Y.S.2d 166 (1st Dep't 1998) The burden was on an insured suing to recover for residential water damage under an all-risk insurance policy to prove that water damage was caused by a "fortuitous" event, within the meaning of the policy, the court held, the court adding that the burden was not on the insurer to prove the contrary.

Avid Equities, Ltd. v. Commerce and Industry Ins. Co., 225 A.D.2d 446, 639 N.Y.S.2d 352 (1st Dep't 1996) In a case in which the plaintiffs brought an action seeking insurance coverage, the lower tribunal denied the plaintiffs' motion for partial summary judgment, they appealed, and the court, on review, affirmed, the court ruling that the plaintiffs' failure to sustain the initial burden of proving a fortuitous loss under an all-risk policy precluded partial summary judgment in their favor.

CUMULATIVE SUPPLEMENT

Cases:

In order to recover under an all-risk insurance policy, once the insured meets the light burden of establishing that a loss occurred due to some fortuitous event or circumstance, the burden shifts to the insurer to show that the loss is excluded by some language set out in the policy. Town Kitchen LLC v. Certain Underwriters at Lloyd's, London, 522 F. Supp. 3d 1216 (S.D. Fla. 2021).

Under New York law, an all-risk insured has the burden of establishing a prima facie case for recovery by proving three elements: (1) the existence of an all-risk policy, (2) an insurable interest in the subject of the insurance contract, and (3) the fortuitous loss of the covered property. Fabrique Innovations, Inc. v. Federal Insurance Company, 354 F. Supp. 3d 340 (S.D. N.Y. 2019) (applying New York law).

Under Virginia law, the insured has the initial burden of proof to establish that a claimed loss under an all risk insurance policy which covers all accidental or fortuitous direct physical losses, unless the cause of the loss is explicitly excluded under the contract, was fortuitous. Elegant Massage, LLC v. State Farm Mutual Automobile Insurance Company, 506 F. Supp. 3d 360 (E.D. Va. 2020) (applying Virginia law).

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[END OF SUPPLEMENT]

§ 5. Loss-in-progress doctrine

The courts in the following cases, construing and applying "fortuitous event" provisions in all-risk insurance policies, addressed the "loss-in-progress" doctrine in conjunction with the fortuitous event and fortuitous loss language applicable to the claim at issue.

Fifth Circuit

Liberty Mut. Ins. Co. v. Jotun Paints, Inc., 555 F. Supp. 2d 686 (E.D. La. 2008) In a case in which an insurer brought action seeking a declaration that it had no duty under primary commercial general liability (CGL) policies to defend or indemnify an insured in products liability actions against it, the insured filed a counterclaim seeking a declaration that the insurer had a duty to defend and indemnify it for its defense costs, a prior insurer intervened and asserted a counterclaim seeking a declaration that the plaintiff had a duty to defend and indemnify all lawsuits against the insured, the parties filed cross-motions for summary judgment, and the court, on review, noting that the insurer argued that the fortuity or loss-in-progress doctrine barred coverage in all of the cases involving an alleged defective coating, held that if the insured paint company had actually been aware, as opposed to should have been aware, that the subject coating was a defective coating before the effective date of the insurer's policies, the insurer's insurance policies would not cover that damage. With respect to the paint company's assertion that Louisiana does not recognize the loss-in-progress doctrine and, even if the doctrine were applicable, that the insurer could not demonstrate that the doctrine barred coverage under its policies, the court instructed that the fortuity doctrine relieves insurers from covering certain

behaviors that the insured undertook prior to purchasing the policy, and that, because the purpose of insurance is to protect insureds against unknown, or fortuitous, risks, fortuity is an inherent requirement of all-risk insurance policies.

Combining the principles of "known loss" and "loss in progress," the court declared, the fortuity doctrine holds that "[i]nsurance coverage is precluded where the insured is or should be aware of an ongoing progressive or known loss at the time the policy is purchased." However, the court indicated, there did not appear to be any Louisiana cases that suggested that an insurer is relieved from covering losses of which the insured should have been aware, but, rather, the cases merely state that if an insured was aware, the insurer is not liable for the losses. The manifestation theory incorporates the "loss-in-progress" rule that an insurer cannot insure against loss that is known or apparent to the insured, the court stated, such that the insurer on the risk at the time of discovered damage is liable for the entire loss, even if the property damage progresses after the policy expires. Reasoning thusly, the court concluded that if the insured had actually been aware that the coating was defective before the effective date of the plaintiff insurer's policies, the plaintiff's insurance policies would not cover that damage.

Texas

RLI Ins. Co. v. Maxxon Southwest Inc., 108 Fed. Appx. 194, 2004-2 Trade Cas. (CCH) ¶ 74536 (5th Cir. 2004) (applying Texas law) In a case in which a commercial general liability (CGL) insurer sought declaratory judgment that it owed no duty to defend or indemnify an insured construction products dealer against an antitrust action brought by the insured's competitor against the insured, an affiliated distributor, and their owner, the federal district court granted the insurer's motion for summary judgment, and denied the insured's motion for reconsideration, the insured and its affiliates appealed, and the court, on review, affirmed, the court holding that under Texas law, no "watershed event" was required to invoke the fortuity doctrine, and the loss-in-progress doctrine was also triggered by the allegations in the pleadings. Here, an examination of the allegations in the pleadings, as well as a consideration of the general rule that parties are charged with knowing the law, reflects that the district court properly applied the fortuity doctrine to bar coverage, the court concluded.

§ 6. Negligence of insured or third parties as fortuitous

The courts in the following cases, construing and applying "fortuitous event" provisions in all-risk insurance policies, adjudicated whether a "fortuitous loss" or "fortuitous event" had been established or whether such a finding was supportable, the court addressing whether the negligence of the insured or third-parties was fortuitous.

Second Circuit

Klockner Stadler Hurter Ltd. v. Insurance Co. of State of Pennsylvania, 780 F. Supp. 148 (S.D. N.Y. 1991) The court denied summary judgment to an insurer under a contractor's all-risk policy in an action by the insured for reimbursement for losses to an excavated construction site for an effluent treatment plant damaged by a landslide that occurred somewhere in the vicinity of the site although the insurer argued that the lack of a fortuitous loss precluded recovery as a matter of law since the loss was a result of negligence and therefore was not a fortuity since it was certain to occur. The parties agreed that the natural hillside close to the excavation had little stability because of pressure caused by seepage of high ground water at the top of the slope, and that the upper granule soils were underlined by a layer of soft clay, and the insured conceded that making the slope steeper made the slope less stable. The definition of a "fortuity" is an insured's loss of property or possession, "by some unexpected act," the court noted, the court expressing an inability to say that the insured knew or expected that the accident would occur. The parties had stipulated that the excavation site losses were due to negligence and that the available information, although limited, had indicated the potential for slope stability problems, the court pointed out, but the court could not determine from the insured's stipulation that it expected the land movement to occur.

The court disagreed with the insurer's addition of constructive knowledge to the definition of fortuity or accident, the court referencing the insurer's argument that the insured should have known that the excavated site loss would occur, and thus that the excavated site loss was a certainty and not a fortuity, thus implicitly arguing that a constructive expectation might be imposed upon the insured even when a loss occurred after insurance had been issued. The court observed that the insured had not intentionally caused the loss, and no evidence existed that the insured expected the loss. The insurer's submission of foreign law did not include any case law to support its implicit argument and, to the contrary, case law pointed to by both parties seemed dispositive on the issue, the court declared, the court noting that the opinion in an earlier English case implicitly equated the

meanings of "fortuity" and "accident" and that that court's opinion explained that the term "accident" included losses caused by the negligence of one's employees. The opinion distinguished only the instance in which damage was due to willful misconduct on the part of the insured, the court explained, the court adding that the case thus provided support for the proposition that subjective understanding, not constructive knowledge, was the touchstone for the definition of fortuity.

Federal Ins. Co. v. PGG Realty, LLC, 538 F. Supp. 2d 680 (S.D. N.Y. 2008), aff'd on other grounds, 340 Fed. Appx. 5, 2009 A.M.C. 2408 (2d Cir. 2009) Losses that arise from acts of nature or the insured's negligence are covered by all-risk marine hull insurance policy, the court held. With respect to the defendant's alleged failure to meet its burden of proof under the all risk policy, the court pointed out that under federal admiralty law, all-risk policies in marine insurance contracts only cover losses caused by fortuitous events. A loss is not fortuitous if it results from an inherent defect, ordinary wear and tear, or the insured's intentional misconduct, the court indicated. On the other hand, losses that arise from acts of nature or the insured's negligence are covered, the court continued, and it is well established that where negligence, even on the part of the employees of the insured, causes a loss, that loss is fortuitous and within the coverage of all risks insurance.

Sixth Circuit

General Am. Transp. Corp. v. Sun Ins. Office, Limited, 239 F. Supp. 844 (E.D. Tenn. 1965), judgment aff'd on other grounds, 369 F.2d 906 (6th Cir. 1966) and (rejected by, Scott v. Continental Ins. Co., 44 Cal. App. 4th 24, 51 Cal. Rptr. 2d 566 (4th Dist. 1996)) The court stated that the negligence of the insured's workers in making prefabrication welds, the failure of which caused the loss complained of, constituted a fortuitous event and was not a necessary or normal consequence of the work.

Ninth Circuit

Associated Engineers, Inc. v. American Nat. Fire Ins. Co., 175 F. Supp. 352 (N.D. Cal. 1959) The court, finding that an insured contractor was entitled to recover from its all-risk insurer damages covering materials and labor used in removing and replacing broken pipes and repairing leaky collars in a sanitary sewage system that the insured was constructing under contract, declared that the entire loss was clearly caused by negligence on the part of the insured, a fortuitous event and not a necessary or normal consequence of the work.

Alaska

Baugh-Belarde Const. Co. v. College Utilities Corp., 561 P.2d 1211 (Alaska 1977) A general contractor's builder's all-risk insurance policy, later extended by endorsement to cover subcontractors on the site to the extent of their interest in the project, covered a subcontractor for loss resulting from a fire allegedly due to the subcontractor's negligence, the court ruled, the court stating that it was well established that where negligence caused a loss, that loss was considered to be fortuitous and within the coverage of an all-risk policy unless the policy specifically excluded it from coverage. The court explained that the policy in this case contained a list of causes of physical loss specifically excluded from coverage, and negligence was not among them. Noting that the list of what the policy did not cover included the cost of making good faulty or defective workmanship, material, construction, or design, the court pointed out that the exclusion did not apply to damage resulting from such faulty or defective workmanship, material, construction, or design. If the policy expressly covered damage resulting from faulty workmanship, it clearly did not exclude losses arising from a subcontractor's negligence, as the insurer contended, the court concluded.

§ 7. Improper storage as fortuitous—Fortuity found

The courts in the following cases, construing and applying "fortuitous event" provisions in all-risk insurance policies held that a "fortuitous loss" or "fortuitous event" had been established or that such a finding was supportable, the court finding that a party's improper storage was fortuitous.

Second Circuit

Ingersoll Mill. Mach. Co. v. M/V Bodena, 829 F.2d 293, 1988 A.M.C. 223 (2d Cir. 1987) The circumstances surrounding the placement of cargo, consisting of specially designed machinery, on deck instead of below deck as instructed in the contract of carriage, and the resultant loss, could fairly be characterized as fortuitous. The carrier breached the contract of carriage by placing the cargo on deck, the court pointed out, noting that the shipper certainly did not engage in any intentional misconduct to cause the misplacement of its cargo and moreover, even if the carrier was negligent in placing the cargo outside the area of the ship's hold, all-risk coverage would still apply.

Fifth Circuit

Morrison Grain Co., Inc. v. Utica Mut. Ins. Co., 632 F.2d 424, 1982 A.M.C. 658, 7 Fed. R. Evid. Serv. 64 (5th Cir. 1980) (applying federal maritime law) The trial court had not erred in failing to impose on the purchaser of 5,500 net metric tons of urea the burden of showing that the loss of and damage to the urea was fortuitous, the court determined, the court noting that the trial court could have, and impliedly did, find with adequate support that there was no indication that the urea met its unfortunate end through anything but fortuitous circumstances. The court noted that the burden of demonstrating fortuity was not a particularly onerous one, the court explaining that the Restatement of Contracts § 291, comment A, defined a fortuitous event as an event that, so far as the parties to the contract were aware, was dependent on chance, it might be beyond the power of any human being to bring the event to pass, it might be within the control of third persons, and it might even be a past event, such as the loss of a vessel, provided that the fact was unknown to the parties. Courts that had considered the question had rejected the notion that the insured was required to show the precise cause of loss to demonstrate fortuity, the court asserted, the court noting that courts had held that a loss may be fortuitous even if occasioned by the negligence of the insured. Under either of the two theories as to the cause of damage to the urea in this case, that is, improper storage as the trial court had held, or inherent defect in the bags as the insurer contended, the damage was clearly fortuitous, the court declared, the court pointing out that the insurer did not seriously contend that either the purchaser or its assignor of the insurance policy was aware, before the fact, that the events producing loss were dependent on anything other than chance. The court stated that although the lower court might have failed to expressly place on the purchaser the burden of showing a fortuitous loss, the court would not mechanically erect barriers to recovery where the law, in fact, in no way compelled it to do so.

Seventh Circuit

Perzy v. Intercargo Corp., 827 F. Supp. 1365, 1994 A.M.C. 1805 (N.D. Ill. 1993), as corrected, (July 12, 1993) Although an insurer under an all-risk policy argued that the freezing during transit of 13 pallets of snowball paperweights was inevitable rather than the result of a fortuitous circumstance, particularly as the shipment was made in winter on a trip that lasted from the middle of February to the latter part of March, the court disagreed, the court pointing out that the insurer chose to ignore the uncontroverted evidence about the freak cold snap to which the paperweights were subjected during the last leg of their journey, overland truck travel in Europe. The court noted that the original truck bill of lading was expressly legended "sensitive to freezing," a legend also present on the paperweight cartons themselves, and thus even, if the occurrence of freezing temperatures while the goods were in transit had been likely, something that the record did not establish, any resulting damage would still have been dependent on the failure of the carriers to take appropriate precautions such as packing the paperweights in a temperature-controlled container. The court declared that it appeared that freezing was a "risk" dependent on the occurrence of other events, rather than a "certainty," and even accepting the insurer's contention that freezing was extremely likely at that time of year, the efficient cause of the freezing was the failure of some actor responsible for proper stowage to containerize or otherwise protect the insured property.

Ninth Circuit

Underwriters Subscribing to Lloyd's Ins. Cert. No. 80520 v. Magi, Inc., 790 F. Supp. 1043 (E.D. Wash. 1991) Damage to apples placed in cold storage under specified conditions of temperature, oxygen content, carbon dioxide content, and humidity was a fortuitous event within the meaning of the insurer's all-risk policy, the court ruled. Since the state supreme court had yet to define the word "fortuitous," and the parties did not agree upon its meaning, the court expressed the belief that the state supreme court would adopt a definition of the term "fortuitous" consistent with the modern trend and would include (a) a loss that was certain to occur could not be considered fortuitous, and might not serve as the basis for recovery under an all-risk policy; (b) in deciding whether a loss was fortuitous, a court should examine the parties' perception of risk at the time the policy was issued;

(c) ordinarily, a loss that could not reasonably be foreseen by the parties at the time the policy was issued was fortuitous. The question was not whether the damage was certain to occur because of the storage conditions chosen by the insured but whether it was reasonable for the insured to choose the conditions that may have caused the damage, the court stated.

A recognized expert regarding fruit storage had been consulted by the insured's agent and the expert advised the insured to store its apples at 31 degrees Fahrenheit, and to reduce the oxygen content in each room to 1.5%, the court pointed out. Commencing two years before the loss, the insured attempted to follow the expert's advice at least to the extent that its equipment would allow and no significant damage occurred to stored apples during the first two years in which the new environmental conditions were used, the court observed. Upon improvement of the insured's equipment, by the year of the loss the insured was storing its apples at 31 degrees Fahrenheit in an environment where the oxygen content was at, or slightly under, 2% although it never did meet the recommended 1.5%, the court elaborated. Prior to the loss, the expert was confident his recommendations were appropriate and although no industry-wide standard existed, the expert's recommendations were consistent with the then-prevailing practice, and thus, the insured's decision to follow the expert's recommendations were deemed reasonable, the court pointed out. The court concluded that neither the insurer nor the insured could have foreseen that the apples would be damaged by the storage conditions at the time the policy was issued such that, under the modern rule, the loss was fortuitous.

§ 8. Improper storage as fortuitous—Correlation between proof of fortuity and proof of "external cause"

The following authority, construing and applying "fortuitous event"provisions in all-risk insurance policies, discussed the correlation between a claimant's proof of fortuity and the claimant's need to establish an "external loss," the court addressing a claim that the loss under inquiry was caused by improper storage.

Kentucky

Delta Natural Gas Co., Inc. v. National Union Fire Ins. Co. of Pittsburgh, Pennsylvania, 2011 WL 2007706 (E.D. Ky. 2011) (applying Kentucky law) In an action arising from the alleged loss of natural gas from an underground storage well owned by the plaintiff natural gas company where the parties disagreed as to the elements of the plaintiffs' prima facie case, with the plaintiffs contending that the law required them to demonstrate the existence of an all-risks insurance policy and that there was a loss of covered property during the policy period due to a fortuitous event, and where the defendants asserted that the plaintiffs were required to show direct physical loss or damage to the property insured, occurring during the policy period, from an external cause, and not the result of inherent quality, wear and tear, or defect, the court, on review, held that the plaintiffs' contention that they did not need to establish an external cause of the loss was misplaced, the court stressing that plaintiffs' argument that they need not prove an external cause failed because proving an external cause was implicit in proving a fortuitous event, which the plaintiffs already conceded was part of their burden. The court agreed with the reasoning set forth in Avis v. Hartford Fire Ins. Co., 283 N.C. 142, 195 S.E.2d 545 (1973), § 31, where the court required the insured to prove an external cause as part of its burden of proof obligations even though the policy at issue in that case did not include the "external cause" language at issue in this case. The court ruled that the plaintiffs, in order to satisfy their initial burden of proof, had to prove direct physical loss or damage to property insured, occurring during the policy period, from an external cause, and not the result of inherent quality, wear and tear, or defect, the court adding, however, that while the plaintiffs would be required to come forward with evidence of some external cause, the plaintiffs would not be required to prove the precise cause of the loss.

§ 9. Mysterious disappearance as fortuitous

The following authority, construing and applying "fortuitous event" provisions in all-risk insurance policies, adjudicated whether a "fortuitous loss" or "fortuitous event" had been established, or whether such a finding was supportable, the court addressing whether a claimed "mysterious disappearance" was fortuitous.

Second Circuit

Atlantic Lines Ltd. v. American Motorists Ins. Co., 547 F.2d 11, 1976 A.M.C. 2522 (2d Cir. 1976) The loss of two containers and seven chassis belonging to the insured lessors was covered under the insurer's all-risk policy insuring for physical loss or damage to the property insured from any external cause where the policy contained no exclusion for unexplained loss,

mysterious disappearance, or loss or shortage disclosed on taking inventory, the court determined, the court stating that it could not believe that the average insured would not equate a mysterious disappearance with a fortuitous loss and would not believe that this was a risk or hazard against which he had insured when he purchased all-risk insurance. The court noted that it appeared that all-risk insurance arose for the very purpose of protecting the insured in those cases where there were difficulties of logical explanation or some mystery surrounded the disappearance of property. Tracers sent to the insured's agents and the carriers with whom it dealt had failed to uncover any of the lost items, the court pointed out. The court explained that it was generally held that where goods have mysteriously disappeared, an all-risk insured only needed to show that the loss occurred or to furnish the insurer with such explanation as it had in good faith received concerning the cause of the loss. Explaining that since carriers not wishing to insure against this broad risk customarily incorporated an exclusionary clause in their policies exempting such loss or disappearance but that there was no such exception in this policy, the court concluded that since the district court had found that the equipment had mysteriously disappeared, the insured was entitled to recover under its policy.

B. Weather-Related Issues

§ 10. Generally

The courts in the following cases, construing and applying "fortuitous event" provisions in all-risk insurance policies, adjudicated whether a "fortuitous loss" or "fortuitous event" had been established or whether such a finding was supportable, the court generally referencing weather-related issues.

Second Circuit

Federal Ins. Co. v. PGG Realty, LLC, 538 F. Supp. 2d 680 (S.D. N.Y. 2008), aff'd on other grounds, 340 Fed. Appx. 5, 2009 A.M.C. 2408 (2d Cir. 2009) In a case in which a marine insurer brought suit seeking declaratory judgment that it was not liable for any part of a loss occurring when an insured yacht capsized, the owner and its sole shareholder counterclaimed for breach of contract, and the court affirmed, the court ruling that the capsizing of a yacht during unexpectedly bad weather in which the vessel lost power was fortuitous and thus a covered loss under an all-risk marine hull insurance policy, where the loss of power during a storm was more probably than not a key ingredient in the vessel's failure to ride out the storm, but where the cause of loss of power was unexplained. The condition of the yacht that was endorsed by a marine survey as a good risk for "coastwise" and "fair weather" sailing did not breach the owner's absolute warranty of seaworthiness as owed to the marine insurer at the time coverage was bound, the court continued, where the yacht was not used for other types of travel, where its garage doors were "weather tight" if not watertight, where its exhaust fan design did not permit the entry of waters when the electric motors were engaged or when the damper was employed to keep waters out completely, where penetrations in the watertight aft engine room bulkhead that remained at the time coverage was bound were trivial, where any stability problems with the original design had been corrected, and where the lack of an automatic bilge pump and DC-powered fuel pump did not render the vessel unseaworthy.

Only this much, the court related, seemed probable: the yacht capsized because, in the face of severe weather, its loss of power prevented it from navigating through the storm. The severity of the weather, the court found, was entirely unforeseeable and unpredictable, and the cause of the loss of power remained unproven and largely speculative. The court pointed out that no one ever presented a coherent theory that was consistent with the facts and that adequately explained why the vessel capsized. Late in the trial, indeed, counsel were still "churning out new theories," such as that the vessel capsized because of a collision with the freighter that was trying to provide help, the court observed. The court stated that, the most it could find with any confidence was that the unexpectedly bad weather was a critical condition in the capsizing and that, more probably than not, the loss of power was the key ingredient in the boat's failure to ride out the storm. However, the court declared, the cause of the loss of power remained a riddle, the court adding that not every accident is explicable, though accidents still occur, which is why people have insurance. Reasoning thusly, the court concluded that the insurer was liable, up to the full limits of the all risks policy, for the loss of the subject vessel.

Missouri

Drury Co. v. Missouri United School Ins. Counsel, 455 S.W.3d 30 (Mo. Ct. App. E.D. 2014) In a case in which a roofing subcontractor brought action against a school district's builders risk insurer to recover for breach of contract and the vexatious

refusal to pay a claim for damage to a roof deck of a school addition, where the subcontractor also sued the school district for breach of contract, the trial court granted the subcontractor's summary judgment motion and dismissed suit against the school, an appeal and cross-appeal were taken, and the court affirmed, the court holding that under an all-risk insurance policy, recovery will be allowed for all fortuitous losses unless the policy contains a specific provision expressly excluding the loss from coverage, the court adding that the roof deck at issue was "covered property" because it was a material "installed or to be installed" at the district's building project; that it was "in the open" on the project's roof; that it was asserted that there were "several significant precipitation events" that winter, including "rain, snow, sleet and ice"; and that the roof deck sustained damage as a result of the weather. The district admitted that "weather conditions were wet that winter" and that "ice storms and winds" occurred, the court pointed out, and under the plain language of the policy, the damage to the roof deck resulting from "rain, snow, [or] sleet" was covered. The district argued that all-risk policies do not cover losses that are not fortuitous and that the respondent company's loss was not fortuitous, the court indicated.

The school district correctly noted that under an all-risk insurance policy, recovery will be allowed for all fortuitous losses, unless the policy contains a specific provision expressly excluding the loss from coverage, the court indicated. However, the court stressed, the court found distinguishable the federal case the school district primarily relied on to support its argument that the respondent's loss was not fortuitous, University of Cincinnati v. Arkwright Mut. Ins. Co., 51 F.3d 1277, 99 Ed. Law Rep. 723, 1995 FED App. 0116P (6th Cir. 1995) (applying Ohio law), the court pointing out that in that case, the Sixth Circuit, applying Ohio law, held that the insured's loss was not fortuitous because the insured undertook "deliberate damage-inducing actions with known consequences" when it made a business decision to remove asbestos from a building. In the instant case, by contrast, the court opined, the school district acknowledged that the respondent company attempted to protect the roof deck from the weather but claimed that the respondent's actions were inadequate. Unlike the situation in *University of Cincinnati*, the court related, the school district did not allege that the respondent undertook deliberate damage-inducing actions.

§ 11. Seasonal bad weather at sea as fortuitous

The following authority, construing and applying "fortuitous event" provisions in all-risk insurance policies, adjudicated whether a "fortuitous loss" or "fortuitous event" had been established, or whether such a finding was supportable, the court generally addressing whether seasonal bad weather at sea was fortuitous.

Louisiana

Anders v. Poland, 181 So. 2d 879, 1966 A.M.C. 1867 (La. Ct. App. 4th Cir. 1966) Damage to a cargo of antiques shipped by the insured from England to New Orleans was not covered under the insurer's policy indemnifying for loss resulting from all risks, excluding breakage, scratching, and bruising unless caused by accident to the vessel or conveyance, the court ruled, the court finding that the loss was due to heavy seas, not a fortuitous event. The vessel's chief officer stated in his deposition that the damage to the cargo resulted from high seas and heavy weather encountered in the North Atlantic after departing from Liverpool, that one of the two crates in which the antiques were packed broke loose from its shorings and fell over, and that items were damaged in the crate on which it fell, as a result of the rolling of the vessel in the heavy sea, the court commented. He further stated that although the weather was very bad, it was to be expected in that area at that time of year, the court continued, and the insured contended that the bad weather encountered was fortuitous and hence should be considered an accident to the vessel. The court noted that, historically, the all risks clause in marine insurance purported to cover loss from the casualties of the sea but did not indemnify for losses occasioned by the ordinary circumstances of a voyage and that the insured was to be indemnified only for loss resulting from extraordinary and fortuitous events. The court observed that the evidence clearly revealed that the weather conditions were to be expected on the voyage, and although the insured contended that the heavy sea was an accident and that it was fortuitous in nature, the court concluded that the difficulty encountered by the vessel was not an unusual hazard, it was not an extraordinary peril, and it was not an accident to the vessel within the meaning of the policy clause. Reasoning thusly, the court affirmed the summary judgment granted for the insurer.

§ 12. Wind-driven rain

The courts in the following cases, construing and applying "fortuitous event" provisions in all-risk insurance policies, adjudicated whether a "fortuitous loss" or "fortuitous event" had been established, or whether such a finding was supportable, the court addressing whether wind-driven rain was fortuitous.

New Jersey

Grossberg v. Chubb Ins. Co. of New Jersey, 2012 WL 3553002 (N.J. Super. Ct. App. Div. 2012) In a case in which the plaintiffs appealed from an order of the lower tribunal granting summary judgment to the defendant insurer, the court, affirming the ruling below, and noting that an "all-risk" policy creates a "special type of insurance extending to risks not usually contemplated," and recovery under the policy will generally be allowed, at least for all losses of a fortuitous nature, in the absence of fraud or other intentional misconduct of the insured, unless the policy contains a specific provision expressly excluding the loss from coverage, and further noting that a "fortuitous loss" has been defined as one that, so far as the parties to the insurance contract are aware, is dependent on chance, held that it had little trouble concluding that a loss occasioned by wind-driven rain would be a "covered loss" under the "all-risk" policy at issue, barring a specific exclusion from coverage. Here, the court stressed, both the plaintiffs' and the insurer's experts found that the deterioration and decay within the plaintiffs' property occurred as a consequence of the structure's repeated exposure to wind-driven rain being forced behind cedar siding. As the unambiguous language of the "Gradual or sudden loss" exclusion in the subject policy applied and negated application of the efficient proximate cause doctrine, the judgment of the trial court would be affirmed, the court concluded.

Washington

Dally Properties, LLC v. Truck Ins. Exchange, 2006 WL 909997 (W.D. Wash. 2006) (applying Washington law) In a matter brought by the defendant insurer, who was sued by the plaintiff for breach of insurance contract, bad faith claims handling, Consumer Protection Act Violations, and attorney's fees, for summary judgment, the insurer arguing that the peril was not covered in their policy, that the loss did not occur during their coverage, and that they handled the claim in good faith, the court, on review, held that the subject policy must be read to cover fortuitous weather conditions such as wind-driven rain. In an all-risk policy, perils that are not excluded are covered, the court continued, and here, because weather conditions were not mentioned in the policy, they were intended to be included, and, as the loss was caused by a nonexcluded peril, wind-driven rain, and an excluded peril, defective construction, the court stated that it must allow the trier of fact to determine the factual question of which peril was the efficient proximate cause of the loss.

C. Theft and Conversion

§ 13. Generally

The following authority, construing and applying "fortuitous event" provisions in all-risk insurance policies, adjudicated whether a "fortuitous loss" or "fortuitous event" had been established, or whether such a finding was supportable, the court generally referencing theft and conversion issues.

Pennsylvania

Morrisville Pharmacy, Inc. v. Hartford Cas. Ins. Co., 2010 WL 4323202 (E.D. Pa. 2010) (applying Pennsylvania law) In an action for breach of an insurance contract and bad faith under Pennsylvania law, where it was alleged that a party removed personal property from a pharmacy, the court held that if a loss had been suffered, the insurer could properly deny coverage on the grounds that, under Pennsylvania law, "all risk" policies do not cover direct physical losses stemming from nonfortuitous events. Whether an alleged loss is fortuitous is a question of law for the court, the court commented, and here, it was undisputed that the owner of the real property in which the pharmacy operated, after negotiations for the sale of the property apparently "stalled," removed the majority of the pharmacy's personal property, and that, when the plaintiff did not respond to a letter asking her to relinquish the now abandoned property, the woman reclaimed possession of her property by changing the lock. Any losses in this case arose from a business dispute between the property owner and the pharmacy owner, and the plaintiff could have foreseen the lockout on September 29, 2008 based on a letter of September 15, the court related. Therefore, any loss suffered by the plaintiff fell within a policy exclusion for losses arising from nonfortuitous events, the court explained.

Accordingly, had the plaintiff suffered any direct physical loss from the lock change, it would have fallen under this specific policy exclusion for nonfortuitous losses, the court concluded.

§ 14. Stolen art

The following authority, construing and applying "fortuitous event" provisions in all-risk insurance policies, adjudicated whether a "fortuitous loss" or "fortuitous event" had been established, or whether such a finding was supportable, the court referencing a claim involving stolen art.

New York

Renaissance Art Investors, LLC v. AXA Art Ins. Corp., 102 A.D.3d 604, 961 N.Y.S.2d 31 (1st Dep't 2013) Fraud engaged in by one of an insured's principals, and one of the insured's members, created by the fraudster for the purpose of holding objects of art purchased by the insured, was not "fortuitous" and thus was not compensable under an all risk property insurance policy, the court held. An insurer filed an action seeking declaratory judgment that it was not obligated to indemnify an insured under an all-risk insurance policy with respect to its claimed losses, the lower tribunal granted summary judgment for the insurer, the insured appealed, and the court, on review, affirmed, the court holding, inter alia, that fraud engaged in by one of the insured's principals was not "fortuitous." The court pointed out that the policies purchased by the plaintiff art investors corporation (RAI), which covered "losses" as that term was defined in the policies, contained an unambiguous exclusion, precluding coverage in the event of "[a]ny fraudulent, dishonest or criminal act or acts by: (a) You, anyone else with an interest in the property or your or their employees whether or not committed alone or in collusion with others, whether or not such act or acts be committed during the hours of employment; or (b) Anyone entrusted with the Covered Property."

The court rejected the assertion that the exclusion did not apply because RAI believed it was purchasing "all risk" coverage and that the term "all-risk" implies comprehensive coverage, including fraud. As a matter of law, insurance coverage, even under an all risk policy, extends only to fortuitous losses, and whether or not a loss is fortuitous is a legal question to be resolved by the court, the court related. Here, the motion court correctly determined that the fraud engaged in by one of RAI's principals, and by one of RAI's members, created for the purpose of holding objects of art purchased by RAI, was not fortuitous, the court declared. The court further rejected RAI's assertions that the exclusion clause did not apply to the "fraudster" or the gallery entrusted to hold the objects, simply because the fraudster turned out to be a thief. As the policies excluded coverage for fraudulent acts of the very nature which occurred here, summary judgment was properly awarded to the defendant art insurance corporation since it was not obligated to indemnify RAI for the loss of its art, the court declared.

§ 15. Conversion as fortuitous—Fortuity found

The courts in the following cases, construing and applying "fortuitous event" provisions in all-risk insurance policies, held that a "fortuitous loss" or "fortuitous event" had been established or that such a finding was supportable, the court addressing whether a claimed act of conversion was fortuitous.

Third Circuit

Intermetal Mexicana, S.A. v. Insurance Co. of North America, 866 F.2d 71 (3d Cir. 1989) Although the taking of equipment as a result of a valid court order issued on the previous day was not deemed a fortuitous event, the court found that when the debtors refused to allow the insured to regain possession of the insured property even after obtaining a court order overruling the earlier court order, the all-risk language contained in the insured's policy covered conversion. The court held that a fortuitous loss had occurred as a result of the conversion of the equipment in the face of a valid court order. It was reasonable to expect that a valid court order would be obeyed, the court stated, the court concluding that when parties fail to comply with a court order, in this case to return property pursuant to a valid court order, thereby converting such property, a fortuitous event had occurred.

New York

A & B Enterprises, Inc. v. Hartford Ins. Co., 198 A.D.2d 389, 604 N.Y.S.2d 166 (2d Dep't 1993) The court held that the taking of the insured's equipment by a subcontractor in a dispute over wages allegedly owed the subcontractor by the insured was covered under an all-risk policy because the loss was fortuitous. The loss was substantially beyond the control of the policyholder, the court explained, and the fact that there may have been a monetary dispute with the subcontractor was irrelevant to the issue of fortuity, the court continued because there was no evidence that the subcontractor had a legal claim to the equipment.

§ 16. Conversion as fortuitous—Fortuity not found

The following authority, construing and applying "fortuitous event" provisions in all-risk insurance policies, held, given the particular circumstances presented, that a "fortuitous loss" or "fortuitous event" had not been established, the court addressing whether a claimed act of conversion was fortuitous.

Massachusetts

Eveden, Inc. v. Northern Assur. Co. of America, 2014 WL 952643 (D. Mass. 2014) (applying Massachusetts law) In a case in which the plaintiff company, bringing an action against the defendant insurer, seeking recovery for a loss it claimed fell within the coverage provided under its "all risk" cargo insurance policy with the insurer, the plaintiff arguing that a third-party wrongfully converted its goods held at a facility, and that the wrongful conversion proximately caused the plaintiff's loss, the court held that the actions of the third-party did not amount to conversion or any fortuitous physical loss covered by the policy under inquiry. Loss resulting from conversion is both physical and fortuitous, and "all-risk language … covers conversion," the court commented. As such, the plaintiff relied on the theory that a wrongful conversion occurred to establish that there was a "fortuitous" "physical" loss that brought the loss within the scope of the policy, the court explained. The determinative question, the court elaborated, was whether the plaintiff's theory that there was a wrongful conversion was legally tenable. The losses claimed, the court explained, to have fallen within an "all risk" clause must have been "unforeseen" or "fortuitous." Whether a loss has been fortuitous is a question of law, the court continued, and there is nothing fortuitous about the fact that a creditor would resort to the courts to obtain collateral for unpaid debts. The placement of embargoes, and the ultimate judicial disposition of the property at the facility, constituted neither a physical casualty nor a fortuitous loss as would be necessary for recovery under the pertinent clause of the subject insurance policy, the court stated. The plaintiff, the court declared, did not meet its burden of proving a loss covered by the policy, for the undisputed facts demonstrated that, given the fact of the embargoes, the third-party had a legal obligation under Dominican law to refuse the plaintiff's demand to turn over any property held within the manufacturing facility. As such, the court stated, the actions of the third-party did not amount to conversion or a fortuitous loss covered by the policy.

§ 17. Theft of marine gas oil

The courts in the following cases, construing and applying "fortuitous event" provisions in all-risk insurance policies, adjudicated whether a "fortuitous loss" or "fortuitous event" had been established, or whether such a finding was supportable, the court referencing the purported theft of marine gas oil.

New York

AGCS Marine Insurance Company v. World Fuel Services, Inc., 187 F. Supp. 3d 428, 2016 A.M.C. 2487 (S.D. N.Y. 2016) (applying New York law) In a case in which an insurer brought an action against an insured, seeking a declaratory judgment that loss arising from the theft of a supply of marine gas oil worth about $17 million was not covered under an "all-risk" clause in its policy, the parties, after discovery, cross-moved for summary judgment, and the court, on review, held that under New York law, the insured's loss arising from the theft of a supply of marine gas oil was covered under the all-risk clause in the insurance policy, the court instructing that once the insured has met its prima facie burden with respect to demonstrating a fortuitous loss under an all-risk insurance policy, the burden shifts to the insurer to establish that an exclusion or exception to coverage applies, and to negate coverage under an insurance policy by virtue of an exclusion, an insurer must establish that the exclusion is stated in clear and unmistakable language, is subject to no other reasonable interpretation, and applies in the particular case and that its

interpretation of the exclusion is the only construction that could fairly be placed thereon. The court ruled that here, the insured made out a prima facie case that the oil was fortuitously lost while covered under an all-risk insurance policy.

Under an all risks insurance policy, the court explained, an insurer is liable for all losses which the insured suffered during the relevant policy periods regardless of when the occurrence which triggered those losses took place. Reasoning thusly, the court rejected the marine insurer's argument that losses experienced within the period of coverage, but caused by events predating attachment, were not covered by the subject policy. Given the particular circumstances presented, the court declared that the insured made out a prima facie case for recovery by establishing a fortuitous loss of insured cargo under an all-risk policy during the period of coverage, that is, before the cargo was lawfully "delivered." The burden shifted to the insurer to establish an applicable exception or exclusion, the court continued, and it attempted to do so by invoking the inherent-vice doctrine, an argument which would be rejected. The insured, the court concluded, was entitled to summary judgment under the all-risk clause of the subject policy.

Pennsylvania

PECO Energy Co. v. Boden, 64 F.3d 852, 42 Fed. R. Evid. Serv. 1354 (3d Cir. 1995) (applying Pennsylvania law) In a case in which an insured brought suit to recover for a series of thefts of fuel oil under all-risks cargo transit policies, the federal district court held that the combined thefts constituted a single occurrence and applied the single deductible set forth in the policy for the last year of coverage, the insurer appealed, and the court, on review, vacated and remanded, the court holding, inter alia, that all-risks insurance against losses taking place during the policy term covered losses sustained during the policy period regardless of when the theft occurred, the court, citing Compagnie des Bauxites de Guinee v. Insurance Co. of North America, 724 F.2d 369 (3d Cir. 1983), § 24, commenting that the court had predicted that Pennsylvania would adopt the Restatement of Contracts' requirement that an insured must prove that losses were fortuitous before it can recover under an all risks insurance policy. The Restatement of Contracts § 291, comment A, the court instructed, defines a fortuitous event as "an event which so far as the parties to the contract are aware, is dependent on chance. It may be beyond the power of any human being to bring the event to pass; it may be within the control of third persons; … provided that the fact is unknown to the parties." Here, the court pointed out, the jury found that the plaintiff energy company had no actual knowledge of the theft by an independent trucking company prior to November 1990 but should have known of the thefts as of March 1988.

The insurer argued that the plaintiff energy company had constructive knowledge of the independent trucking company's thefts after March 1988 and that the losses after that date were not fortuitous, the court explained. Proving fortuity is not particularly difficult, the court related, and a party must only show that a loss was unplanned and unintentional. Here, the court declared, the insurer simply did not present any law which suggested that risks about which a party should have known were not fortuitous. The insurer essentially argued that the energy company was negligent in not discovering the trucking company's thefts, the court continued, and both parties agreed that the policies in this case were "all risks" cargo transit insurance. The jury's determination that the trucking company's thefts were the proximate cause of the energy company's losses rendered the negligence element of the insurer's argument irrelevant, the court concluded, and the district court properly ruled that the energy company was not legally barred from recovering damages for losses after March 1988.

D. Additional Issues

§ 18. Third persons' neglect or failure to maintain insured property as fortuitous

The courts in the following cases, construing and applying "fortuitous event" provisions in all-risk insurance policies, adjudicated whether a "fortuitous loss" or "fortuitous event" had been established, or whether such a finding was supportable, the court addressing whether the negligence of third parties, or the failure of such parties, to maintain insured property was fortuitous.

Second Circuit

Redna Marine Corp. v. Poland, 46 F.R.D. 81, 1969 A.M.C. 1809 (S.D. N.Y. 1969) Damage to 11 grainveyors owned by the insured and leased by it to a corporation that used them in the discharge of grain from tanker vessels in foreign ports in the Middle East and Asia were covered under the insured's all-risk policy, the court determined, notwithstanding the insurer's contention

that the loss was not fortuitous. The surveyor for the underwriter had concluded that the loss was not fortuitous, but the court explained that whether a loss was fortuitous was a legal question to be resolved by the court, and the characterization of a loss as fortuitous was a legal conclusion to be distinguished from the facts upon which it was based. The surveyor's statement that he considered the loss not fortuitous was nothing more than a legal opinion, the court observed, the court explaining that it would be insufficient, in the absence of a proper factual basis, to raise an issue as to whether the losses were covered by the policy. The surveyor had found that the damage was caused by "neglect, poor maintenance, and excessive wear and tear," the court stated. These findings did not support his legal conclusion that the loss was not fortuitous, the court asserted, the court explaining that it was well established that where negligence, even on the part of the employees of the insured, caused a loss, that loss was fortuitous and within the coverage of all-risk insurance. Noting that in this case there was an express provision in the policy that the fact that damage might be attributable to the "wrongful acts or misconduct of the ship owners or their servants" would not prejudice the assured's right of recovery, the court pointed out that by the very terms of the policy, neglect or poor maintenance by the lessee who was in control and possession of the machines at the time the damage occurred would not bar the insured's recovery. The applicable law, the court concluded, foreclosed the insurers' contention that recovery was barred if the damage was the result of neglect or poor maintenance and furthermore, the wear and tear referred to in the report and affidavit, insofar as it was "excessive," would also be fortuitous in the legal sense since it would not be attributable to the ordinary use of the machines.

Oklahoma

Bank of Oklahoma, N.A. v. Continental Cas. Co., 1992 OK CIV APP 128, 849 P.2d 1091 (Ct. App. Div. 3 1992) Summary judgment granted to an insurer was reversed by the court in a case in which the insurer had claimed that nonmaintenance of residential property was normal wear and tear and not a fortuitous event. The only evidentiary material that the insurer submitted was the insurance policy, a proof of loss form, and a letter from the insured mortgage company stating that the mortgagor had deferred maintenance on the property for eight years and that the damage was the result of that lack of maintaining the property and not the result of vandalism, the court pointed out. The trial court had found that the undisputed facts demonstrated that the case involved damage resulting from normal wear and tear or deterioration to residential property rather than a "fortuitous event" and that the claims of the bank were therefor not covered by the policy in question, the court observed. Noting that the insurer did not identify any express policy exclusion that took the loss outside the scope of coverage, but instead relied on the implied exception of nonfortuity, the court explained that every all-risk contract of insurance contained an unnamed exclusion, that is, the loss must be fortuitous in nature. The court found that the facts presented did not support the trial court's conclusion. The court noted that the mortgage company's letter referred only to "deferred maintenance" or lack of maintenance, with no mention of wear and tear. The mortgagee had never admitted its loss was due to ordinary wear and tear, conceding that such loss would not be within the terms of the policy, but argued that excessive deterioration, when caused by neglect or failure to maintain the insured property, was a covered fortuitous loss, the court related. The mortgagee and the insurer could have reasonably expected some deterioration in the property from normal wear and tear, but not the more aggravated effects of the third party occupant's failure to maintain the property for eight years, the court observed. In the absence of any legal authority equating normal wear and tear with failure to reasonably maintain the insured property, the court found that the trial court had erred in granting summary judgment for the insurer.

§ 19. Seizure of property by authorities or under court order as fortuitous—Fortuity found

The courts in the following cases, construing and applying "fortuitous event" provisions in all-risk insurance policies, the court held that a "fortuitous loss" or "fortuitous event" had been established or that such a finding was supportable, the court referencing the seizure of property by authorities or the seizure of such property under court order.

Third Circuit

In re West Electronics, Inc., 128 B.R. 905, 25 Collier Bankr. Cas. 2d (MB) 203, Bankr. L. Rep. (CCH) ¶ 74100 (Bankr. D. N.J. 1991) An insurer's argument that damage to property seized under the auspices of the IRS should be excluded from coverage because it was not fortuitous was found to be without merit by the court. The insurer claimed that the loss resulted from the insured manufacturer's intentional failure both to pay its taxes and to comply with the terms of government contracts, the court pointed out. Acknowledging that in order to be compensable, the manufacturer's loss must have been fortuitous, the court explained that not only were the consequences of the manufacturer's nonpayment of taxes unforeseeable and unexpected, but

the conduct of the IRS was illegal. The fact that the manufacturer's own conduct was in the chain of causation did not alter that conclusion, the court declared, the court concluding that the loss was to be deemed fortuitous.

New York

International Multifoods Corp. v. Commercial Union Ins. Co., 309 F.3d 76, 2002 A.M.C. 2939 (2d Cir. 2002) (applying New York law) An insured demonstrated that it suffered a fortuitous loss, as required to recover under an all-risk policy under New York law, when its cargo of frozen foods was seized by Russian authorities, even though the parties could not establish what happened to the cargo after it was seized, given the insured's inability to recover its goods despite substantial good-faith efforts, the court held, where the insured's dispossession from the property was never remedied and resulted in considerable financial loss to the insured. As the federal district court correctly observed, the court pointed out, the plaintiff, as an all-risk insured, has the burden of establishing a prima facie case for recovery by proving: (1) the existence of an all-risk policy; (2) an insurable interest in the subject of the insurance contract; and (3) the fortuitous loss of the covered property. In this case, there was no dispute that the subject insurance policy was an all-risk policy and that the insured, by endorsement, had an insurable interest through the policy in the seized cargo, the court commented. The sole issue, the court continued, was whether the insured had suffered a fortuitous loss. The insurer, the court commented, argued that the insured failed to demonstrate a fortuitous loss because the evidence did not specifically explain what happened to the goods after the seizure by the Russian authorities and therefore did not prove a "loss." The court, disagreeing, instructed that the burden on the insured with respect to demonstrating a fortuitous loss under an "all-risks" policy such as the subject policy was "relatively light." All risk coverage, the court remarked, covers all losses which are fortuitous no matter what caused the loss, including the insured's negligence, unless the insured expressly advises otherwise. A loss is fortuitous unless it results from an inherent defect, ordinary wear and tear, or intentional misconduct of the insured, the court explained, and an insured satisfies its burden of proving that its loss resulted from an insured peril if the cargo was damaged while the policy was in force and the loss was fortuitous.

§ 20. Seizure of property by authorities or under court order as fortuitous—Fortuity not found

The following authority, construing and applying "fortuitous event" provisions in all-risk insurance policies, the court, given the particular circumstances presented, held that a "fortuitous loss" or "fortuitous event" had not been established or that such a finding was not supportable, the court referencing the seizure of property by authorities or the seizure of such property under court order.

Third Circuit

Intermetal Mexicana, S.A. v. Insurance Co. of North America, 866 F.2d 71 (3d Cir. 1989) In a case in which creditors had seized property insured under an all-risk policy as collateral for sums owed by the insured, the court found that there was nothing fortuitous about a creditor resorting to the courts to obtain collateral for unpaid debts, the court declaring that the taking of equipment as a result of a valid court order issued on the previous day was not a fortuitous event.

§ 21. Title defect as fortuitous

The following authority, construing and applying "fortuitous event" provisions in all-risk insurance policies, adjudicated whether a "fortuitous loss" or "fortuitous event" had been established or whether such a finding was supportable, the court addressing whether a claimed title defect was fortuitous.

Massachusetts

HRG Development Corp. v. Graphic Arts Mut. Ins. Co., 26 Mass. App. Ct. 374, 527 N.E.2d 1179 (1988) An all-risk policy insuring heavy construction equipment against risks of physical loss or damage from any external cause did not cover losses occasioned by a defect in title, the court ruled, the court apparently finding a title defect nonfortuitous. The insured had been sued for replevin in damages to obtain relief for the wrongful acquisition of certain heavy equipment and the plaintiff in that action alleged that it was the true owner of the equipment and that it had perfected its right to the equipment by registration, the

court indicated. The court explained that not only was it highly questionable whether an alleged defect in title was a "fortuitous loss" as that term had been defined, it was also evident that the loss or damage could have been covered by other insurance, that is, title insurance.

§ 22. Intentional or reckless conduct

[Cumulative Supplement]

The courts in the following cases, construing and applying "fortuitous event" provisions in all-risk insurance policies, adjudicated whether a "fortuitous loss" or "fortuitous event" had been established or whether such a finding was supportable, the court addressing claimed intentional or reckless conduct.

New York

New York State Elec. & Gas Corp. v. Lexington Ins. Co., 204 A.D.2d 226, 612 N.Y.S.2d 43 (1st Dep't 1994) In a case in which an action was brought for the down time of a generating plant under all risk policies, the lower tribunal entered an order and judgment, the insured appealed, and the court, on review, modified and affirmed, the court ruling that where the insured deliberately removed a blower spacer component from its generating plant for diagnostic testing and preventive maintenance, the resulting down time could not be deemed a fortuitous event beyond the insured's control within the meaning of the policies.

Vermont

City of Burlington v. Indemnity Ins. Co. of North America, 332 F.3d 38 (2d Cir. 2003) (applying Vermont law) Losses resulting from intentional misconduct or fraud of an insured do not qualify as fortuitous as that term is used to define limits of all-risk insurance coverage, the court held. An insured city brought action against property insurers, after they denied coverage for repair costs and consequential damages resulting from physical damage experienced in the boiler unit of a city-owned electric energy generating facility, the federal district court granted summary judgment for the insurers, and declined to change its ruling on reconsideration, the insured appealed, and the court, on review, held, inter alia, that the provision in "all risk" policies, limiting coverage to "direct physical loss or damage," precluded recovery for allegedly defective welds joining metal tubes of economizer unit of boiler that did not fail and leak regardless of whether welds complied with regulations governing boiler construction. All-risk policies like the city's policies with the defendant insurer covered all risks except those that are specifically excluded, the court stated. It has long been recognized, however, that "all-risk" does not mean all-loss, the court continued, and a loss that is inevitable is not a risk. This conceptual truth, the court instructed, has been expressed in terms of a requirement that to be covered, a loss must be fortuitous: "Damage, in other words, if it is to be covered by policies such as these, must be due to some fortuitous circumstance or casualty." Even in an "all risk" policy, the court stated, there must be a fortuitous event, a casualty, to give rise to any liability for insurance. The term "fortuity" names a problem, which is to identify which losses count as risks and are therefore covered, but does not solve it, the court noted, for it remains to be determined just when a loss qualifies as "fortuitous." It is beyond question that losses resulting from the intentional misconduct or fraud of the insured do not qualify as fortuitous as that term is used to define the limits of all-risk insurance coverage, the court commented, nor is it an insured loss which the assured brings about by its own act, for then the assured "has not merely exposed the goods to chance of injury, he has injured them himself."

CUMULATIVE SUPPLEMENT

Cases:

Under New York law, a loss is fortuitous, as would allow for recovery under an all-risk insurance policy, unless it results from an inherent defect, ordinary wear and tear, or intentional misconduct of the insured. Fabrique Innovations, Inc. v. Federal Insurance Company, 354 F. Supp. 3d 340 (S.D. N.Y. 2019)(applying New York law).

[Top of Section]

[END OF SUPPLEMENT]

III. Construction Matters and Structure-Related Issues

§ 23. Condition of ground on which building was constructed as fortuitous

The courts in the following cases, construing and applying "fortuitous event" provisions in all-risk insurance policies, adjudicated whether a "fortuitous loss" or "fortuitous event" had been established, or whether such a finding was supportable, the court addressing whether the condition of the ground upon which a building was constructed was fortuitous.

Third Circuit

Peters Tp. School Dist. v. Hartford Acc. and Indem. Co., 833 F.2d 32, 42 Ed. Law Rep. 1073, 26 Env't. Rep. Cas. (BNA) 2066 (3d Cir. 1987) Cracks in a school building that had to be closed for student occupancy, resulting from mine subsidence, that is, the earth under the school moving in a downward sinking and shifting fashion into mine voids, was "fortuitous," within the requirement for all-risk coverage, according to the definition enunciated in an earlier case, Compagnie des Bauxites de Guinee v. Insurance Co. of North America, 724 F.2d 369 (3d Cir. 1983) (applying Pennsylvania law), § 24, where it had been noted that a fortuitous event was an event which, so far as the parties to the contract were aware, was dependent on chance, the court explained. The court observed that a fortuitous event might be beyond the power of any human being to bring the event to pass, or it might be within the control of third persons provided that the fact was unknown to the parties. The thrust of the definition was that the occurrence be unplanned and unintentional in nature, the court concluded.

California

Sabella v. Wisler, 59 Cal. 2d 21, 27 Cal. Rptr. 689, 377 P.2d 889 (1963) In a case in which the insured's house settled to an uneven elevation to such an extent that its foundations and walls cracked, its floors became no longer level, and certain of its doors and windows could no longer be opened or closed, although the dwelling remained inhabitable and did not collapse, the court found to be without merit the all-risk insurer's contention that since the damage occurred as a result of the operation of forces inherent in uncompacted fill beneath the house and defective workmanship in the installation of a sewer outflow, it was inevitable that damage would occur to the house at some time, and thus, the loss was not fortuitous nor a risk properly the subject of insurance. The court pointed out that Cal. Ins. Code § 250 provided that any contingent or unknown event might be insured against and that it had been stated in an earlier case, Snapp v. State Farm Fire & Cas. Co., 206 Cal. App. 2d 827, 24 Cal. Rptr. 44 (2d Dist. 1962), this section, that such inevitability did not mean that, when the insurance contract was entered into, the event would not occur within the term of the policy.

Snapp v. State Farm Fire & Cas. Co., 206 Cal. App. 2d 827, 24 Cal. Rptr. 44 (2d Dist. 1962) Lateral movement of an insured residence due to unstable fill and an unusually heavy rainfall that resulted in damage to the structure, including its foundation, was a fortuitous event and came within the insureds' all-risk policy, the court ruled. The trial court had found that because of the instability of the fill, the earth movement that constituted a landslide was inevitable, but another finding expressly stated that the landslide was a fortuitous event and was not a risk excluded by the terms and conditions of the contract of insurance entered into by the parties, the court observed. This finding was supported by the evidence, the court declared, the court explaining that if sufficient information were available to geological experts, the possibility or probability of all earth movements might be forecast with accuracy. The court pointed out that, after any movement of land has occurred it might be said to have been "inevitable" with semantic correctness, but such inevitability did not alter the fact that at the time the contract of insurance was entered into, the event was only a contingency or risk that might or might not occur within the term of the policy.

Texas

Millers Mutual Fire Insurance Company v. Murrell, 367 S.W.2d 667 (Tex. 1963) Although an all-risk insurer contended that the earth movement that caused damage to the insured's home, that is, the filling and expansion of earth beneath the house causing

the walls, floors, ceilings, and foundation to buckle and partially collapse, was not a risk because it was not fortuitous but inevitable and that at least issues should have been submitted to the jury inquiring whether the loss was fortuitous or inevitable, the court, on review, disagreed. Acknowledging that all the expert witnesses, who, after the damage, examined the underlying structures of the earth, noted the capacity of the soil to absorb water, saw evidence of earth movement, and said that damage similar to that which had occurred was inevitable, the court pointed out that there was no indication as to who, at the time the insurance contract was executed, had certain knowledge that this damage was inevitable. The court perceived no error in the lower court's refusal to hold, or ask the jury whether, the damage sued for was inevitable in the sense that the peril was not a risk but a certainty that could not be insured against.

Virginia

Insurance Co. of North America, Inc. v. U.S. Gypsum Co., Inc., 870 F.2d 148 (4th Cir. 1989) (applying Virginia law) The court held that under Virginia law, the massive earth subsidence which occurred beneath a gypsum processing plant was "fortuitous" and, therefore, catastrophic losses resulting from the subsidence were covered by the all risk policy though there was certainty of subsidence because of mine activity.

Washington

MKB Constructors v. American Zurich Ins. Co., 49 F. Supp. 3d 814 (W.D. Wash. 2014) (applying Washington law) In a case in which an insured contractor commenced an action in diversity against an insurer, alleging a violation of the Washington's Insurance Fair Conduct Act (IFCA) and breach of a "Builders Risk" insurance policy, the parties moved for summary judgment, and the court, on review, held that the evidence raised a genuine issue of material fact as to whether earth settlement that occurred under a building pad was a fortuitous event. The insurer argued, inter alia, that any earth settlement that occurred under the building pad was not covered because it was not a fortuitous event, the court remarked. Insurance coverage under an all risk builders' risk insurance policy requires a fortuitous event, the court stated, and as a condition precedent to coverage under an all risk builders' risk insurance policy, the loss-causing instrumentality must have been brought about as the result of a "fortuitous event." The insurer, the court related, asserted that there was no fortuitous event because everyone expected the earth under the building pad to sink, and the plaintiff countered that any settlement over two inches during Phase I of building was fortuitous because a school district had told the bidding contractors to expect settlement of only two inches during Phase I. The court denied the insurer's motion summary judgment on this ground based upon the court's belief that there were factual issues concerning fortuity that were reserved for the jury. The test for fortuity is a subjective, not objective, one and involves questions of fact, the court concluded.

§ 24. Defective design, construction, workmanship, or process as fortuitous—Fortuity found

The courts in the following cases, construing and applying "fortuitous event" provisions in all-risk insurance policies, held that a "fortuitous loss" or "fortuitous event" had been established, or that such a finding was supportable, the court referencing a claim of defective design, construction, workmanship, or process.

Second Circuit

Standard Structural Steel Co. v. Bethlehem Steel Corp., 597 F. Supp. 164, 40 U.C.C. Rep. Serv. 1245 (D. Conn. 1984) Damage to equipment used to dismantle existing truss spans of a bridge was covered under a contractor's equipment-form all-risk insurance policy, the court ruled, the court finding that the insured had illustrated that fortuitous events caused the damage at issue. The court found that the damage to the equipment was caused by the insured's error or miscalculation in creating a faulty design in the construction and erection of cable guides. Such errors in miscalculation and design, the court noted, were not known to the insured when the policy was actually issued, and thus, this design defect was a fortuitous loss. The insured had proven its prima facie case concerning the accident, the court asserted, the court concluding that the loss therein suffered was fortuitous. The breaking of the positioning cables happened by chance and was clearly an accident in the layperson's understanding of that term, the court stated. As long as the loss was fortuitous and otherwise within the all-risk coverage, the insured did not have to prove exactly what caused the loss, the court stated, the court adding that the incidents causing this damage were fortuitous.

The precipitating forces were accidents as a layperson would understand that term, the court observed, the court noting that this particular jacking system had never been employed using the special kind of breach strand cable in this unique method of lifting operation and the resulting damage was not certain or inevitable. Acknowledging that the iron erection superintendent had warned about the possibility of deleterious consequences of using a small diameter cable guide, the court pointed out that neither contracting party knew of or recognized the seriousness of the problem at the significant controlling time, namely, at the time of the issuance of the insurance policy. In brief, a loss caused by an unknown design defect is one caused by a fortuitous event, the court said, the court concluding that the events causing the damage were fortuitousness.

Klockner Stadler Hurter Ltd. v. Insurance Co. of State of Pennsylvania, 780 F. Supp. 148 (S.D. N.Y. 1991) An insurer's motion for summary judgment was denied by the court in an insured's action for reimbursement for losses to high density storage tanks that cracked and leaked where the insurer had contended that a flaw in construction or design somehow "predestined" the storage tank leakage that followed, thus rendering the loss a certainty and not a fortuity covered by insurance. The tanks were constructed of a clay tile liner on the inside face of their walls, and through faulty workmanship, water was added to the concrete at some point between its original mixing and its being pumped into certain forms, thereby substantially reducing the strength of the concrete, the court noted. Cracks and leakage were observed during hydrostatic testing once the tanks had initially been filled to about 80% capacity, the court elaborated. Pointing out that the insured had rebutted the insurer's showing by pointing to the lack of evidence that it knew about the construction defects before the loss occurred, the court concluded that a showing either that the insured expected the tank leakage or that the leakage preceded the effective date of the policy would be necessary to raise a genuine issue of material fact as to lack of fortuity but that the insurer had not made such a showing.

Eighth Circuit

Pillsbury Co. v. Underwriters at Lloyd's, London, 705 F. Supp. 1396 (D. Minn. 1989) An all-risk insured's loss, resulting from the necessary destruction of numerous cans of corn thought to be imperfectly processed, was fortuitous despite a defect in its canning process since a loss caused by a defective design is fortuitous if the insured had reason to rely on it, the court declared. Although the insurer asserted that the insured was at fault for the loss, the court noted that the insurer had not made any evidentiary showing that the process failed because of intentional misconduct of the insured or that the insured thought its process was "marginal" prior to the year in question. Even if the loss resulted from the insured's negligence in designing or operating the process, it would still have been fortuitous, the court asserted, the court noting that the insured believed that the problem lay in underprocessing and that such underprocessing was the result of failure of the cans to rotate in the cooker as they were heated to improve the transfer of heat throughout their contents. The insurer also contended that the loss was not fortuitous because it resulted from an inherent condition of the property and argued further that since the existence of health-threatening organisms in the corn was a natural condition, the loss was not fortuitous, the court observed. The loss of corn to spoilage might be fortuitous even though it was an entirely natural occurrence, the court stated, the court adding that while the normal wear and tear or deterioration of property is not a fortuitous loss, inordinate decay due to failure of normal preservative measures may be. The insurer recognized that the policy covered the products against decay in various situations, such as losses caused by defective cans, and the court explained that a loss due to a defective canning process was not different. Declaring that the inherent nature of the corn that contributed to the loss did not defeat the insured's showing that the loss was fortuitous, the court explained that the burden then shifted to the insurer to show that the loss was excluded by some language set out in the policy.

Ninth Circuit

Kilroy Industries v. United Pacific Ins. Co., 608 F. Supp. 847 (C.D. Cal. 1985) The court held that an insured's loss of income, resulting from faulty workmanship on its building that led to an order to vacate because the building would be unsafe in the event of an earthquake, was fortuitous, notwithstanding the insurer's argument that the loss of income from faulty workmanship began prior to the effective date of the insurance contract, and therefore, the losses were not fortuitous but were, instead, inevitable. The court, noting that under all-risk policies, losses that are not fortuitous are not covered because the risk feature inherent in insurance is lacking, found as a matter of law that the loss was fortuitous because neither the insured nor the insurer were aware of the defects that resulted in the order issued by the county to vacate the building. The court observed that the insurer's argument implied that the faulty workmanship that occurred prior to the issuance of the policy, about which the insured had knowledge that caused the insured to bring suit against the general contractor, made it inevitable that a seismic problem would develop, an order to vacate would issue, and the insured would lose income thereby. This argument was made, according to the court, despite the fact that the insurer never disputed the insured's assertion that the order to vacate was based upon defects unknown

to the insured at the time the policy was issued. The court pointed out that the fact that at one time the insured lost income on account of one kind of faulty workmanship did not make it inevitable that an order to vacate based on another kind of faulty workmanship would later issue or that income would be lost because of it. Since the insured's claim was for income reduction only after it received the order to vacate, the insured's claim was for loss that was clearly fortuitous, the court concluded.

Tenth Circuit

Texas Eastern Transmission Corp. v. Marine Office-Appleton & Cox Corp., 579 F.2d 561, 3 Fed. R. Evid. Serv. 27 (10th Cir. 1978) The collapse of an underground storage cavern being constructed to hold barrels of liquefied petroleum gas was a fortuitous event within the terms of the plaintiff's all-risk insurance policy, the court held, where the cavern collapsed in the middle of the night, at a time when no one was in it, where the only persons known to be on the job site were two night security guards at the surface, and where there was no obvious earthquake, explosive sound, or other unusual phenomenon except popping and cracking of the tin shaft construction building and the settling of the earth. The court expressed the belief that the facts supported a finding that the parties intended to insure against collapse of the cavern under the circumstances that occurred here. When past experience indicated that this particular design would be satisfactory, and it was not, for some reason that was uncertain, a fortuitous event occurred within the loss provisions of the contract, the court concluded, the court affirming the judgment for the insureds.

Pennsylvania

Compagnie des Bauxites de Guinee v. Insurance Co. of North America, 724 F.2d 369 (3d Cir. 1983) (applying Pennsylvania law) The court rejected an all-risk insurer's argument that design defects in an insured's equipment and structure meant that the structural failure and ensuing business interruption were inevitable rather than fortuitous and that the insured could recover, as a matter of law, only for losses caused by a fortuitous event. The structural failure of the insured's equipment had apparently been caused by blocks of bauxite much larger than anticipated being fed into machinery that had been designed to accommodate the weight of crushed bauxite at 84 pounds per cubic foot rather than 159 pounds per cubic foot, the court noted. The insured claimed that only after the damage occurred did it learn that the engineer for the conveyer system had not followed the insured's specifications and that the structural engineers for the building and supports used an incorrect equation to compute the severe stresses to which the structure would be subjected, the court elaborated. The court found that the trial court had erred as a matter of law in holding that a loss arising from an unknown design defect was not caused by a fortuitous event.

The court asserted that the definition of a fortuitous event that Pennsylvania would adopt was an event that, so far as the parties to the contract were aware, was dependent on chance, might be beyond the power of any human being to bring to pass, might be within the control of third persons, or might even be a past event, such as the loss of a vessel, provided that the fact was unknown to the parties. The parties as well as the district court agreed that "accident" was a synonym for "fortuitous event," and that the Restatement's definition of a fortuitous event was consistent with Pennsylvania's definition of an accident, which emphasized its unplanned and unintentional nature, the court stressed. Damage resulting from an unknown design defect was obviously unplanned and unintentional, the court commented, and, noting that the district court had determined what was "certain" based on knowledge gained through hindsight, the court thought it inappropriate to cause the insured to suffer a forfeiture by concluding, with the aid of hindsight, that no fortuitous loss occurred, when at the time the insurance took effect only a risk was involved as far as the parties were aware. Based upon its belief that the Supreme Court of Pennsylvania would hold that a loss arising from an unknown design defect was one caused by a fortuitous event, the court reversed the district court's contrary conclusion.

Texas

Employers Cas. Co. v. Holm, 393 S.W.2d 363 (Tex. Civ. App. Houston 1965) Damage resulting from the construction of a shower stall without a shower pan, causing water to pass laterally into and under the wood and cork flooring of the insured's house, thereby causing it to rot and deteriorate to the point where the damaged floor had to be replaced, was fortuitous as required by all-risk policies since neither party knew or contemplated that there was any defect of any kind in the shower stall or that any damage would result therefrom to the flooring of the insured's house, the court stated. The court explained that so far as the parties were aware at the time the policy was issued, any loss such as that sued for would be dependent upon chance,

the court noting that an event is fortuitous as to the parties to the contract where they have no conception that any such event would occur when they entered into the contract of insurance.

Virginia

Fidelity and Guar. Ins. Underwriters, Inc. v. Allied Realty Co., Ltd., 238 Va. 458, 384 S.E.2d 613 (1989) The development of cracks in warehouse walls, after the insured had used cinderblocks to extend the rear wall above the roofline of the warehouses and used fill material and concrete between the rear cinderblock wall of the warehouses and the hillside on which five house trailers were placed, constituted a fortuitous event under the insurer's policy, spoken of in terms of both multiperil and all risk, the court ruled. The insurer contended that the insured knew that it was inevitable that the wall would fail structurally, and therefore, no insurable risk was covered by the policy, the court pointed out, a contention based upon a letter received by the insured from its construction engineer some six years prior to the discovery of cracks in the walls. The court could find no evidence to establish that, when the insured and insurer entered into the insurance contract, either of them knew that the retaining wall inevitably would fail to support the fill. Although the insured's own experts testified that they would have designed the wall differently, the court observed that there was no certainty that the wall would not support the fill or that the wall's failure was destined to occur within the time limits of the policy. The court stated that it would be inappropriate for the court, with the aid of hindsight, to determine that the insured's damage was not a fortuity such as was contemplated by the all-risk policy. When considering the parties' knowledge at the time they entered into the insurance contract, the court concluded that neither party regarded the loss as "inevitable."

§ 25. Defective design, construction, workmanship, or process as fortuitous—Fortuity not found or finding not supportable

[Cumulative Supplement]

The courts in the following cases, construing and applying "fortuitous event" provisions in all-risk insurance policies, held, given the particular circumstances presented, that a "fortuitous loss" or "fortuitous event" had not been established, or that such a finding was not supportable, the court referencing a claim of defective design, construction, workmanship, or process.

Fifth Circuit

U. S. Industries, Inc. v. Aetna Cas. & Sur. Co., 690 F.2d 459 (5th Cir. 1982) The court rejected the insured's contention that misjudgments and negligence in a welding process that resulted in a 240-foot steel cylindrical tower having to be dismantled and rebuilt were in the nature of a fortuitous event extraneous to the construction process so as not to be within a faulty workmanship exclusion clause.

Colorado

Adams-Arapahoe Joint School Dist. No. 28-J v. Continental Ins. Co., 891 F.2d 772, 57 Ed. Law Rep. 789 (10th Cir. 1989) (applying Colorado law) The court ruled that a judgment against an insurer under an all-risk policy had to be reversed and remanded because the jury instructions erroneously and prejudicially shifted part of the insured's burden of proving fortuitousness with regard to the collapse of the roof on the insured's school resulting from extensive corrosion throughout that portion of the roof which had been filled with gypsum-based concrete. Although the original plans called for a different roofing material, the general contractor received permission to use gypsum-based concrete instead because the material originally chosen would not cure properly in cold weather, the court related, and the roofing subcontractor discussed the proposed change with the concrete manufacturer, who said that some corrosion had been experienced when the gypsum-based concrete was applied to metal decking. The subcontractor notified the general contractor, who in turn informed the project's architect, the court continued, and after a meeting with the contractors and a district representative, the architect decided to proceed with the change but it was not clear whether the corrosion danger was discussed at this meeting although, at trial, representatives of the district denied ever having been informed of any increased risk. The insurer argued that the school district had expected the loss, rendering it nonfortuitous and therefore not covered, the court related, and the jury had been instructed that the school

district bore the burden of showing fortuitousness but that the insurer bore the burden of proof on its affirmative defense of the insured's expectation, or knowledge of a substantial risk, of collapse.

The court explained that the insurer bore the burden of proving the affirmative defense that would enable it to avoid the policy, but if the insurer's claim of the district's knowledge was not an affirmative defense but was interposed only to prevent the district from meeting its burden of proving fortuitousness, then the insurer did not bear the burden of proof on the knowledge issue. The court expressed the belief that the insurer did not plead the district's alleged knowledge of the increased risk of corrosion as an affirmative defense and that the argument was made merely to rebut the district's claim that the loss was fortuitous. The affirmative defense instruction should not have been given, the court asserted, since even if the insurer were asserting the district's knowledge both as an affirmative defense and as a rebuttal, the instruction, without further delineation, would have been erroneous. The court concluded that it had no reason to believe that the jury did not give effect to the improper instruction.

New York

80 Broad Street Co. v. U.S. Fire Insurance Co., 88 Misc. 2d 706, 389 N.Y.S.2d 214 (Sup 1975), judgment aff'd without opinion, 54 A.D.2d 888, 390 N.Y.S.2d 768 (1st Dep't 1976) Loss sustained as a result of the buckling of marble facing on a building subleased by the insured was not covered under a policy providing insurance against all risks of direct physical loss to the building subject to the standard provisions and stipulations, the court determined, the court finding that the insured's contention of a fortuitous event subsequent to events excluded by the policy brought the loss within an exception to the applicable exclusion. The insured's engineer attributed the buckling to failure to provide for masonry covering of steel beams called for in the city building code, the bending of galvanized metal anchors in the field before installation, causing the galvanizing to break and steel straps to rust, and failure to connect steel beams to steel plates placing them instead into the masonry backup opening joints and permitting moisture to penetrate, the court pointed out. The parties were in essential agreement that rain, frost, seepage, and rust and corrosion combined with the original improper construction to ultimately cause the buckling, the court commented. Although the insured insisted that an exception from the exclusion clause "unless loss by a peril not otherwise excluded ensued and then the company should be liable only for such ensuing loss," governed, and that negligent construction was a causative feature not otherwise excluded, the court was not persuaded by such argument, the court asserting that the alleged nonexcluded cause grew out of and was directly related to the excluded one and did not take on the character of a subsequent fortuitous event.

Virginia

Whitaker v. Nationwide Mut. Fire Ins. Co., 115 F. Supp. 2d 612 (E.D. Va. 1999) (applying Virginia law) An all-risks homeowner's insurance policy's coverage of fortuitous losses does not mandate coverage for the repair of construction defects as part of a direct physical loss, the court held, the court stating that the "direct physical loss" language provides a limitation on the types of fortuitous loss covered under the policy. The plaintiffs argued that "direct physical loss" was not defined, that construction defects are often found to be covered under an "all risks" policy, and that the Policy thus covered all loss that was not specifically excluded, the court pointed out. They argued that an all risks policy covers "fortuitous loss," which includes losses that were unknown and unexpected by the parties at the time they entered into the contract, the court indicated. However, the court stressed, an "all risks" policy's coverage of fortuitous losses does not mandate coverage for the repair of construction defects as part of a direct physical loss. The fact that the defective construction is unanticipated by either party does not automatically imply that such defects are covered by the policy, the court continued, and "direct physical loss" language provides a further limitation on the types of fortuitous loss covered under the Policy. Given the particular circumstances presented, the court concluded that construction defects were not covered.

CUMULATIVE SUPPLEMENT

Cases:

Under Colorado law, damage that is a result of faulty workmanship or deficient construction typically is not considered a fortuitous event or accident triggering coverage under a commercial property builders' risk policy. 5333 Mattress King LLC v. Hanover Insurance Company, 683 F. Supp. 3d 1188 (D. Colo. 2023) (applying Colorado law).

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[END OF SUPPLEMENT]

§ 26. Water pipes bursting or leaking as fortuitous—Fortuity found or issue of fact presented

The courts in the following cases, construing and applying "fortuitous event" provisions in all-risk insurance policies, held that a "fortuitous loss" or "fortuitous event" had been established, or that such a finding was supportable, or that an issue of fact in that regard had been presented, the court addressing whether water pipes bursting or pipes leaking was fortuitous.

California

Sabella v. Wisler, 59 Cal. 2d 21, 27 Cal. Rptr. 689, 377 P.2d 889 (1963) The court, addressing the issue of fortuity, and finding that the insured's loss was caused by a fortuitous loss, discussed concurrently the breaking of a water pipe beneath the insureds' house and the condition of uncompacted fill beneath the house (§ 23).

Massachusetts

Standard Elec. Supply Co., Inc. v. Norfolk & Dedham Mut. Fire Ins. Co., 1 Mass. App. Ct. 762, 307 N.E.2d 11 (1973) Loss from the bursting of a pipe on the premises of another, resulting in water damage to the insured's property, would seem to be the kind of "fortuitous loss" that was "not usually covered under other insurance" and against which an all-risk policy was designed to extend protection, the court declared, the court noting that the risk comprehended in an all-risk policy had been characterized as "a fortuitous event—a casualty," "losses by any accidental cause due to some fortuitous circumstance or casualty," "fortuitous (accidental)," resulting "from a fortuitous or a chance occurrence." The court found that the insured's loss was covered under such a policy.

Pennsylvania

Gatti v. Hanover Ins. Co., 601 F. Supp. 210 (E.D. Pa. 1985), judgment aff'd without opinion, 774 F.2d 1151 (3d Cir. 1985) (applying Pennsylvania law) Without extended discussion of the matter, the court, noting that the court of appeals, interpreting Pennsylvania law in another case, Compagnie des Bauxites de Guinee v. Insurance Co. of North America, 724 F.2d 369 (3d Cir. 1983) (applying Pennsylvania law), § 24, had defined a fortuitous event as an event which so far as the parties to the contract were aware was dependent on chance, concluded that leakage of large amounts of water from underground pipes after the water had passed through the insureds' meter was the result of a fortuitous event and thus was a risk covered by the insurers' all-risk policy.

Texas

SMI Realty Management Corp. v. Underwriters at Lloyd's, London, 179 S.W.3d 619 (Tex. App. Houston 1st Dist. 2005) Noting that, as a general rule, an all-risks policy creates a special type of coverage in which the insurer undertakes the risk for all losses of a fortuitous nature that, in the absence of the insured's fraud or other intentional misconduct, is not expressly excluded in the agreement, the court held that the appellant real estate management corporation's reading of the exclusionary language to limit "Leakage" of pipes to gradually occurring leaks was consistent with the overall purpose of all-risk policies to limit coverage to fortuitous events, the court adding that it seemed intuitive that gradual leaks are more likely to involve nonfortuitous events, while sudden, rapidly occurring leaks are more likely to involve fortuitous ones, and that here, a factual issue on whether the leak was rapid or gradual precluded summary judgment on the issue of coverage.

§ 27. Water pipes bursting or leaking as fortuitous—Fortuity not found or finding not supportable

The courts in the following cases, construing and applying "fortuitous event" provisions in all-risk insurance policies, held, given the particular circumstances presented, that a "fortuitous loss" or "fortuitous event" had not been established, or that such a finding was not supportable, the court addressing whether water pipes bursting or pipes leaking was fortuitous.

New York

525 Fulton Street Holding Corp. v. Mission Nat. Ins. Co., 256 A.D.2d 243, 682 N.Y.S.2d 166 (1st Dep't 1998) An insured sought to recover for water damage caused by a pipe leak under an all-risk insurance policy, the lower tribunal denied the insured's motion to reject a referee's report recommending the denial of its claim, and granted the defendant's cross-motion, the insured appealed, and the court, on review, affirmed, the court holding, inter alia, that the insured failed to satisfy the burden of proving that water damage to the insured residence was caused by a "fortuitous" event, within the meaning of the all-risk policy. In so ruling, the court reasoned that the record supported the referee's finding that the plaintiff failed to sustain its burden (§ 4), the court adding that the plaintiff's attempt to show that pipe corrosion was the cause of the leak that caused the damage was countered by the defendant's showing that pipe corrosion would have caused a slow leak detectable as it gradually grew larger and not the gushing of water that admittedly occurred and that a valve at or near the source of the leak had been smashed with a blunt instrument. The plaintiff's only rejoinder to this evidence of external physical force, that the valve deformity was caused when plaintiff's plumber struck the valve with a chisel while making repairs, was rebutted and at best raised an issue of credibility for the referee, the court concluded.

Barchester Realty Corp. v. New Hampshire Ins. Co., Inc., 48 Misc. 3d 1220(A), 22 N.Y.S.3d 137 (Sup 2015) In a case in which the plaintiff realty corporation owned an apartment building where the plaintiff suffered damage due to frozen pipes and where the defendant insurer disclaimed coverage on the grounds that the freezing of the pipes was not an accident or a "fortuitous" event, the court, on review, noting that the policy at issue was titled by the defendants as a "Special Multi-Peril Policy," which was an all-risks policy, held that an insured seeking to recover for a loss under an insurance policy has the burden of proving that a loss occurred and also that the loss was a covered event within the terms of the policy and that the loss had to be a "fortuitous event," which is defined in N.Y. Ins. Law § 1101(a)(2) as "any occurrence or failure to occur which is, or assumed by the parties to be, to a substantial extent beyond the control of either party," the court adding that here, the jury's verdict determining that the plaintiff did not met its burden of proof could be easily reconciled with a reasonable view of the evidence, as a result of which the plaintiff's motion to set aside the jury verdict and for an order granting a new trial would be denied in its entirety.

§ 28. Roof damage; generally—Fortuity found

[Cumulative Supplement]

The following authority, construing and applying "fortuitous event" provisions in all-risk insurance policies, held that a "fortuitous loss" or "fortuitous event" had been established or that such a finding was supportable, the court generally referencing a claim of roof damage.

Illinois

Crete-Monee School Dist. v. Indiana Ins. Co., 2000 WL 1222155 (N.D. Ill. 2000) (applying Illinois law) In an insurance dispute case in which before the court were cross-motions for summary judgment, the plaintiff insured maintained that damage to several of its schools' roofs was covered under the all-risk insurance policy issued by the defendant, the defendant insurer contended that the damage to the roofs was not a fortuitous loss and therefore, was not covered by the policy at issue, and the court, on review, granted the plaintiff's motion for summary judgment and denied the defendant's motion for summary judgment. A loss is fortuitous when it happens "by chance or accident, occurring unexpectedly or without known cause; [or when it is] accidental and undersigned," the court stated. The insurer correctly pointed out that the all-risk policy in this case, like any other all-risk policy, covered only those losses that were actually risked by the parties, the court commented. A loss that was, so far as the parties knew, an inevitable certainty at the time of contracting was not fortuitous and would not be covered by the resulting contract, the court explained. Thus, the court indicated, the court would be required to look to what the parties knew at the time of contracting to determine whether or not a loss was fortuitous. The facts of this case demonstrated that shatter damage

was caused by the combination of deterioration and cold temperature and, to some degree, pure chance, the court observed. A reason to reject the insurer's argument that the shatters were not fortuitous was that even if the court could say in hindsight that the deteriorated roofs were certain to shatter, there was no reason to believe that the parties expected the shatters at the time the policy was issued on September 1, 1993, the court stated. Given the particular circumstances presented, the court held that the January 18, 1994, shatters were fortuitous incidents which were unforeseen by the parties at the time they entered into the insurance contract. Accordingly, the shatters were covered by the all-risk policy, barring an express exclusion for such by the policy's terms, the court concluded.

CUMULATIVE SUPPLEMENT

Cases:

Under Wisconsin law, heaving of floor that insured discovered in its cold storage facility following roof collapse caused by heavy snow and ice was fortuitous as required for coverage under all-risk policy, although insured could have known about possibility of soil freezing; insured attempted to mitigate risk of freezing soil with a floor heating system, and nothing indicated that either party was aware that soil underneath facility was freezing when insurer issued policy. Hansen Storage Company Inc. v. Employers Mutual Casualty Company, 734 F. Supp. 3d 850 (E.D. Wis. 2024) (applying Wisconsin law).

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[END OF SUPPLEMENT]

§ 29. Roof damage; generally—Fortuity not found

The courts in the following cases, construing and applying "fortuitous event" provisions in all-risk insurance policies, held, given the particular circumstances presented, that a "fortuitous loss" or "fortuitous event" had not been established, the court generally referencing a claim of roof damage.

Seventh Circuit

Zaragon Holdings, Inc. v. Indian Harbor Ins. Co., 2011 WL 1374980 (N.D. Ill. 2011) In a case in which an insured sought coverage for damage to the roofs of certain buildings following a storm, the insurer argued that the insured could not establish a prima facie case of insurance coverage because the damage was not caused by a fortuitous event but was instead a known loss, the insurer further asserted that even if the insured could establish a prima facie case of coverage, the insurance policy excluded damage caused by "wear and tear" and deterioration, and argued, as well, that the insured could not meet its burden to show the extent and degree of any damage sustained by the storm, the court, noting that in order to recover under an all-risk insurance policy like the one in this case, the insured would be required to demonstrate that the loss had occurred and that it was caused by a fortuitous event, held that the insured failed to show that there was any genuine dispute as to whether the damage to the roofs was unexpected, the court adding that, instead, the record revealed that the insured knew several years prior to the storm that the roofs needed replacement. That is, the court explained, a report commissioned by the insured in 2002 advised the insured that the roofs in question had exceeded their usable life and were in need of replacement years before the September 2006 storm, and the insured had notice then of the immediate need for replacing the roof at one building and obtained an estimate for the replacement of the roofs for two other buildings.

Illinois

Johnson Press of America, Inc. v. Northern Ins. Co. of New York, 339 Ill. App. 3d 864, 274 Ill. Dec. 880, 791 N.E.2d 1291 (1st Dist. 2003) The collapse of the roof of an insured's dilapidated warehouse was not a fortuitous event that happened by chance or accident, as was required to come under a property insurance policy, but was expected, the court held, where architectural and structural engineering firms reported that, prior to the collapse, portions of the roof and second and first floors were missing, that the stairwell to the first and second floors was partially collapsed, and that there was fungal growth on beams. In this

case, there was no dispute that the plaintiff's warehouse roof collapsed, the court explained, and there was also no dispute that the policy was in effect at the time the collapse occurred. Consequently, in order to prevail, the plaintiff would need to show that its loss resulted from a fortuitous event, the court explained. "Fortuitous" means happening by chance or accident, or occurring unexpectedly or without known cause, the court instructed, and the Restatement of Contracts defines a fortuitous event as an event that, as far as the parties are aware, is dependent on chance (Restatement of Contracts § 291, comment A). The determination of whether a loss is fortuitous is a legal question for the court to determine, the court continued, the court reasoning that an all-risk policy covers only those losses that were actually risked by the parties. A loss that was, so far as the parties knew, an inevitable certainty at the time of contracting is not fortuitous and will not be covered by the resulting contract, the court explained. In this case, the court indicated, an architectural firm's inspector reported that, prior to the collapse, portions of the roof and second and first floors were missing. The stairwell to the first and second floors was partially collapsed, the court observed, and the inspector further observed that there was fungal growth on the beams. There were severe water stain marks on the roof beams and columns, the court explained, and there was water dripping in the basement and water damage on the walls of the building. As the plaintiff failed to establish a prima facie case that the loss was due to a fortuitous event, the insurer was not liable, the court concluded.

§ 30. Sliding of roof as fortuitous

The following authority, construing and applying "fortuitous event" provisions in all-risk insurance policies, adjudicated whether a "fortuitous loss" or "fortuitous event" had been established, or whether such a finding was supportable, the court addressing whether a claim regarding the sliding of a roof was fortuitous.

New York

David Danzeisen Realty Corp. v. Continental Ins. Co., 170 A.D.2d 432, 565 N.Y.S.2d 223 (2d Dep't 1991) The sliding of the roof of a building owned by the insured was a fortuitous event and thus covered under the insurer's all-risk policy, the court ruled. The insurer contended that the loss was not fortuitous because it was caused by the insured's failure to adequately repair the roof following a fire two years earlier, for which the insurer had paid the insured under a previous policy, the court pointed out. The court noted that a fortuitous event is any occurrence or failure to occur which is, or is assumed by the parties to be, to a substantial extent beyond the control of either party. There was no evidence in the record that the sliding of the roof was within the control of either party, the court asserted. It was shown that the insured had hired a roofing contractor to make the repairs following the fire and that the insured did not have any expertise in this area and therefore relied upon the contractor to do whatever was necessary to properly complete the job, the court explained, and the contractor testified that he would not have performed the repair if there were any danger to the structure. The court concluded that the loss was "to a substantial extent beyond the insured's control" and opined that the contention that the insured was negligent in failing to make proper repairs was unavailing since mere negligence of an insured was not a defense to coverage under an all-risk policy.

§ 31. Defective paneling as fortuitous

The following authority, construing and applying "fortuitous event" provisions in all-risk insurance policies, adjudicated whether a "fortuitous loss" or "fortuitous event" had been established, or whether such a finding was supportable, the court addressing whether defective paneling was fortuitous.

North Carolina

Avis v. Hartford Fire Ins. Co., 283 N.C. 142, 195 S.E.2d 545 (1973) Damage to woodwork and paneling was covered under the defendant insurer's all-risk policy as a loss resulting from a fortuitous event and not from the inherent quality of the property insured, the court ruled, where, as a result of the original coat of paint blistering and peeling, a painter had unsuccessfully attempted to remove the paint but when he tried to repaint the area the paint failed to stick and the paneling became stained and mottled and acquired a glossy, slick finish. The court explained that coverage under a policy insuring against all risks of physical loss existed only if the loss was fortuitous, that is, caused by a fortuitous event, and the word "fortuitous" meant, according to the standard dictionary definition, "occurring by chance without evident causal need or relation or without deliberate intention," an event not certain to occur, and the loss or damage must not result wholly from an inherent quality or defect in the subject matter,

that is, the damage must result from at least one extraneous cause. The loss or damage must not result from the intentional misconduct or fraud of the insured and the risk must be lawful, the court added.

There was no evidence or contention of intentional misconduct, fraud, or unlawfulness of risk here, the court noted, the court surmising that the insureds might have been negligent, but without more, such conduct would not operate to deny coverage on the basis of intentional conduct. Since the insurer did not deny coverage because of a specific exclusion contained in the policy, the court reasoned that if the loss was caused by a fortuitous event and was not solely the product of the inherent qualities of the insured property, the trial judge had properly concluded that the loss was within coverage of the policy. The court noted that while damage that inevitably occurs with the passage of time would not be covered since it did not involve the action of external forces, the loss here was not inevitable but fortuitous in that it was caused by extraneous events not certain to occur. Pointing out that insurers are not liable for property destroyed by the effect of its own inherent deficiencies or tendencies unless these tendencies are made active and destructive by a peril insured against, the court concluded that this loss, being fortuitous and not caused solely by an inherent defect, was within the coverage of the insurer's all-risk policy.

§ 32. Removal of building alterations

The following authority, construing and applying "fortuitous event" provisions in all-risk insurance policies, adjudicated whether a "fortuitous loss" or "fortuitous event" had been established, or whether such a finding was supportable, the court referencing a party's removal of building alterations.

Pennsylvania

Easy Corner, Inc. v. State National Insurance Co., Inc., 154 F. Supp. 3d 151 (E.D. Pa. 2016) (applying Pennsylvania law) In a case in which an insured brought a state court action against an all-risk policy insurer, alleging breach of contract for failure to pay the insured for damages suffered after a business dispute with the insured's former bar manager, the federal district court, entering judgment for the defendant, held that an implied fortuity exclusion barred coverage. In so ruling, the court pointed out that nothing about the former bar manager's removal of alterations he made to the insured bar at his own expense, including a disc jockey booth, new lighting behind the bar, and new wood on the bar top and sides, was dependent on chance, and therefore, Pennsylvania's implied fortuity exclusion barred coverage under the insured's all-risk policy, thus precluding an obligation by the insurer to pay the claim. Though the bar manager's actions may have been characterized as a theft or vandalism, the court continued, the insured's loss clearly arose from a business dispute not outside the parties' realm of control, as the insured had ample opportunity to correct or clarify throughout the bar manager's tenure that the insured expected the manager to leave such alterations in place at the time of his departure from employment. The "fortuity exclusion," as it has sometimes been labeled, should perhaps be called the nonfortuity exclusion, because it precludes coverage under all-risk policies for losses arising from nonfortuitous events, even if a loss would be otherwise covered under the insurance policy, the court commented. An event is fortuitous if, "so far as the parties to the contract are aware, [it] is dependent on chance," the court instructed as it cited Compagnie des Bauxites de Guinee v. Insurance Co. of North America, 724 F.2d 369 (3d Cir. 1983), § 24, and such an event "may be beyond the power of any human being to bring the event to pass; it may be within the control of third persons; it may even be a past event … provided that the fact is unknown to the parties." If the event is "expected or intended," it is not fortuitous, the court elaborated.

§ 33. Collapse of exterior stone veneer wall

The following authority, construing and applying "fortuitous event" provisions in all-risk insurance policies, adjudicated whether a "fortuitous loss" or "fortuitous event" had been established, or whether such a finding was supportable, the court referencing the collapse of an exterior stone veneer wall.

Pennsylvania

Fry v. Phoenix Ins. Co., 54 F. Supp. 3d 354 (E.D. Pa. 2014) (applying Pennsylvania law) The bulging and eventual collapse of a home's unrepaired and unbraced exterior stone veneer wall were certain to occur and were not "fortuitous" events, and thus, Pennsylvania's implied fortuity exclusion barred coverage under the insureds' homeowners' insurance policy, the court held,

where although the insureds were not aware until after the collapse that the wall collapsed because it contained no masonry anchors, they had been aware for nine years that the wall had structural deficiencies, including deteriorating mortar and little or no physical anchorage of the veneer wall to the wood frame, yet they failed to follow the recommendations of the experts to dismantle and rebuild the wall, and they failed to brace the wall until it could be repaired. Under Pennsylvania law, a lack-of-fortuity exclusion is implied in every all-risk policy, such as the Policy at issue in the instant case, and the insurer met its summary judgment burden to show that neither the 2011 bulge nor the 2012 collapse was fortuitous as a matter of law, the court held. The court opined that no reasonable jury could determine on the record presented that the bulging and eventual collapse of the unrepaired and unbraced wall were fortuitous events because the undisputed record demonstrated that they were certain to occur, and because the insurer demonstrated that the fortuity exclusion applied as a matter of law to exclude coverage, it was entitled to summary judgment on the breach of contract claim for the failure to pay both the 2011 and 2012 losses.

§ 34. Residential water damage

The courts in the following cases, construing and applying "fortuitous event" provisions in all-risk insurance policies, adjudicated whether a "fortuitous loss" or "fortuitous event" had been established, or whether such a finding was supportable, the court referencing residential water damage.

Illinois

McGrath v. American Family Mut. Ins. Co., 2008 WL 4531373 (N.D. Ill. 2008) (applying Illinois law) In a case dealing with a homeowner's all-risk policy, the court held that the loss to the interior of the plaintiff's residence due to moisture was a fortuitous event, such that the plaintiffs established a prima facie case. That is, the court explained, the plaintiffs' loss occurred because of moisture intrusion into the interior of the home, and upon an examination of the dwelling, the defendant's adjustor determined that the damage was caused by construction or design defects that allowed moisture to intrude into the home through the cinder block parapets. Similarly, the court continued, the defendant's expert attributed the damage to construction or design defects that allowed either external moisture into the dwelling or normal relative humidity levels inside the dwelling to migrate into the unvented attic and condense. No evidence had been presented that either party knew of these defects or expected the resulting loss, the court concluded.

Wallis v. Country Mut. Ins. Co., 309 Ill. App. 3d 566, 243 Ill. Dec. 344, 723 N.E.2d 376 (2d Dist. 2000) Insureds brought suit after an insurer refused to pay a claim for water damage to their home based on an excluded water damage peril in their all-risk homeowners' insurance policy, the lower tribunal, on the insurer's motion for summary judgment and the insureds' cross-motion for partial summary judgment on liability, entered summary judgment for the insurer, the insureds appealed, and the court, on review, affirmed, the court ruling that the insured was required to show that a loss occurred, that the loss resulted from a fortuitous event, and that the all-risk policy covering the property was in effect at the time of the loss to establish prima facie case for coverage, the court adding that here, the loss resulted from a fortuitous event. The papers on file with the trial court, the court stated, revealed undisputed facts demonstrating that the plaintiffs established a prima facie case. There was no doubt that the plaintiffs suffered a loss when their house sustained extensive water damage, the court continued, and the loss resulted from a fortuitous event. Water does not normally collect in the living quarters of a residence except in bathtubs, showers, sinks, and toilets, the court explained, and the water that collected in the house happened by chance or accident and was unexpected. Finally, the all-risk policy issued to the plaintiffs was in effect at the time the house sustained damage, the court declared. The court though did find that the water damage exclusion applied to bar insurance coverage.

Wisconsin

Strauss v. Chubb Indem. Ins. Co., 2013 WL 27344 (E.D. Wis. 2013), aff'd on other grounds, 771 F.3d 1026 (7th Cir. 2014) (applying Wisconsin law) Considering whether rainwater infiltration is considered "fortuitous" under Wisconsin law, the federal district court predicted, based upon Wisconsin case law concerning an all-risk policy, that the Wisconsin Supreme Court would hold that rainwater infiltration is fortuitous because rainwater infiltration is a risk attendant to home ownership but not a certain consequence like wear-and-tear.

§ 35. Commercial building water damage

The following authority, construing and applying "fortuitous event" provisions in all-risk insurance policies, adjudicated whether a "fortuitous loss" or "fortuitous event" had been established, or whether such a finding was supportable, the court referencing commercial building water damage.

New York

Atlas Assurance Co. of America v. Newark Center Building Co., 1998 WL 160933 (N.Y. Sup 1998) The defendant building company owned a five-story, block-wide, commercial building which was insured by the plaintiff insurer, and which was leased for approximately 30 years by the State of New Jersey, which moved out in 1991, the defendant, on January 28, 1994, claimed that extensive water damage occurred in the vacant building, due to roof cracks resulting from a period of extreme winter weather, the plaintiff insurance company refused any coverage whatsoever pursuant to the applicable all-risk policy, and sought a declaratory judgment upholding its view, and the court, on review, held that all of the water damage to the commercial building was caused by the fortuitous event of roof cracking on January 28, 1994, as a result of the weight of water on the roof. The evidence indicated that the roof was in good condition before the bad weather immediately preceding that date, as established by the plaintiff's inspectors' own reports, dated May 5, 1992, and July 21, 1993, as well as the plaintiff's payment on a windstorm claim a year earlier, after an inspection revealing absolutely nothing wrong with the roof, and no leaking anywhere, the court pointed out. The evidence also included testimony accepted by the court from various witnesses, including an individual who had been involved with the building as construction manager and consultant since it was erected, who recently took over the building management, and who was in the building, after a 1989 roof installation, 15 to 20 times a year, including a visit six to eight weeks before January 28, 1994, the court related. This individual testified that up through that last visit, he saw no evidence of water damage, leaks, cracking, or dropped water tiles, and at all times, the roof was intact and water tight, and the building viable and occupiable, the court concluded.

§ 36. Mold damage—Fortuity found

The courts in the following cases, construing and applying "fortuitous event" provisions in all-risk insurance policies, held that a "fortuitous loss" or "fortuitous event" had been established, or that such a finding was supportable, the court referencing claimed mold damage.

Wisconsin

Miller v. Safeco Ins. Co. of America, 683 F.3d 805 (7th Cir. 2012) (applying Wisconsin law) In a case in which an insurer argued that the policy under inquiry did not cover a loss from mold because of the lack of a fortuitous extraneous happening during the policy period, the court, noting that an all-risk policy is a promise to pay for loss caused by a fortuitous and extraneous happening, but that it is not a promise to pay for loss or damage which is almost certain to happen because of the nature and inherent qualities of the property, affirmed the finding of the trial court that neither party knew about or contemplated the damage's cause before the policy's issuance, and as such, the loss at issue was fortuitous. The insurer, the court continued, believed that because the home's inherent nature, a bad construction, caused the damage, the loss was not fortuitous. It has been held, the court related, that the term "accident" reflects the fortuity principle, but this just means that when a damage's cause is unexpected, and therefore accidental, it is also fortuitous. Moreover, the court commented, as the federal district court had initially found, neither of the parties knew about or contemplated the damage's cause before the policy's issuance.

Atlantic Mut. Ins. Companies v. Lotz, 384 F. Supp. 2d 1292 (E.D. Wis. 2005) (applying Wisconsin law) In a case in which an insurer sought declaratory judgment of no coverage under an all-risk insurance policy for rot and mold damage to a house, the insured homeowners counterclaimed for breach of contract, breach of implied covenant, and bad faith, the insurer moved for summary judgment, the insureds cross-moved for partial summary judgment on the issue of whether the damage in question constituted a covered occurrence under the policy, and the court, on review, held, inter alia, that the mold and rot damage satisfied the "fortuitous" and "incident" criteria of the policy's definition of covered occurrence. The insurer, the court observed, argued that the policy did not provide an initial grant of coverage for the insureds' claims of mold and rot damage, and further contended that the claims were not fortuitous, and moreover, did not constitute "occurrence[s]" within the policy period. The

court, disagreeing, stated that the subject policy was an "all risk" policy, and as such, it paid for losses "caused by a fortuitous and extraneous happening," but not losses that are "almost certain to happen because of the nature or inherent qualities of the property insured." Moreover, the court stated, the insurer argued that the mold and rot damage in the insureds' residence was not fortuitous because it was in existence at the time the home was insured. The insureds argued that the damage was fortuitous because it was discovered during the policy period and was unknown to the parties at the time the home was insured, the court indicated. Whether a loss is fortuitous if it was physically in existence at the time a property was insured, but unknown to the parties at the time the insurance policy was issued, appeared to be an open question in Wisconsin, the court remarked. Most courts, as well as the Restatement of Contracts, the court instructed, adhere to the view that a loss is fortuitous if neither party knew or contemplated there was a defect in the insured property at the time the insurance contract was issued. This view is both logical and reasonable in light of the relevant authorities, the court stressed, the court stating its belief that the Wisconsin Supreme Court would adhere to it. After all, if at the time the insurance policy is issued, neither party is aware a property contains defects, the parties are bargaining over the risk that the property is defect-free, the court commented. Thus, if a defect is ultimately uncovered, the loss is the product of a risk or chance, and it is properly characterized as a fortuitous loss.

§ 37. Mold damage—Fortuity not found

The following authority, construing and applying "fortuitous event" provisions in all-risk insurance policies, held, given the particular circumstances presented, that a "fortuitous loss" or "fortuitous event" had not been established, the court referencing claimed mold damage.

Florida

Church of the Palms-Presbyterian (U.S.A.), Inc. v. Cincinnati Ins. Co., 404 F. Supp. 2d 1339 (M.D. Fla. 2005), aff'd without opinion, 189 Fed. Appx. 932 (11th Cir. 2006) (applying Florida law) In a case in which a church brought an action against its property insurer, alleging a claim for breach of contract, based on an insurer's denial of coverage for mold damage, the insurer moved for summary judgment, and the court, on review, granted the motion, the court ruling that under Florida law, a fungus exclusion in an "all risk" property insurance policy unambiguously excluded coverage for mold damage in the church, although the policy did not specifically mention mold, where the parties agreed that mold was a fungus, the court adding that under Florida law, "all risk" insurance policies cover all fortuitous losses or damages other than those resulting from willful misconduct or fraudulent acts or which are otherwise expressly and plainly excluded from coverage in the policy itself and that here, no "fortuitous event" had occurred. The purpose of all-risk policies like the one at issue is to cover, unless specifically excluded by the policy's terms, losses from "fortuitous events" that are dependent upon chance, the court related. The church's policy, at least as it was relevant here, limited coverage on two separate fronts, mold infestation that occurred over a passage of time, or losses, unless they resulted in a covered cause of loss, caused by faulty, inadequate, or defective design; workmanship, repair, or construction; or materials. The parties, the court continued, did not dispute an expert's essential findings, that being, that the church's mold problems developed gradually and were not associated with a single covered fortuitous event. Hence, this was not a case where disputed material facts existed as to the dominant causes of the mold, the court concluded, and to interpret the exclusion as the Church argued would very nearly destroy the exclusion. Reasoning thusly, the court denied the plaintiff's motion for partial summary judgment and granted the defendant's motion for summary judgment.

§ 38. Deterioration of concrete

The following authority, construing and applying "fortuitous event" provisions in all-risk insurance policies, adjudicated whether a "fortuitous loss" or "fortuitous event" had been established, or whether such a finding was supportable, the court referencing the deterioration of concrete.

New York

Rapid Park Industries v. Great Northern Ins. Co., 2010 WL 4456856 (S.D. N.Y. 2010), aff'd on other grounds, 502 Fed. Appx. 40 (2d Cir. 2012) (applying New York law) In a case in which the plaintiffs leased and operated a parking garage in the lower levels of a building in Manhattan, the New York City Department of Buildings issued an order requiring the plaintiffs to vacate the garage, citing a deterioration in the concrete and a danger of collapse, the defendant insurer argued that the plaintiffs' claimed loss was not fortuitous, and hence not eligible for coverage, and, the court, on review, pointed out that the doctrine of fortuity

provides that even under "all-risks" policies, that is, policies that cover losses resulting from all risks except those explicitly excluded, the insurer is responsible for only those losses that are "fortuitous," a term that has been defined by New York courts to mean "happening by chance or accident." Broadly stated, the court instructed, the fortuity doctrine holds that insurance is not available for losses that the policyholder knows of, planned, intended, or is aware are substantially certain to occur. "Fortuitous event," the court indicated, has been defined to mean "any occurrence or failure to occur which is, or is assumed by the parties to be, to a substantial extent beyond the control of either party." There are a number of facts in the record suggesting that the loss here involved at least some element of fortuity, the court stressed, and indeed, the defendants' own engineering expert concluded both in his report and in other correspondence that the Department of Buildings' issuance of the Vacate Order was unexpected. It was stated, the court pointed out, that "[w]e have seen many garages in New York and other northern cities which were in worse condition than this one, yet no closure by the building department was mandated. We believe the building department inspector over-reacted to the conditions observed." An engineer stated in correspondence, the court continued, that he had no idea why the Department of Buildings "decided that [the garage] had to be closed in total." For that reason alone, summary judgment could not be granted on the basis of nonfortuity, the court concluded.

§ 39. Construction of tunnel

The following authority, construing and applying "fortuitous event" provisions in all-risk insurance policies, adjudicated whether a "fortuitous loss" or "fortuitous event" had been established, or whether such a finding was supportable, the court referencing tunnel construction activities.

Washington

Frank Coluccio Const. Co., Inc. v. King County, 136 Wash. App. 751, 150 P.3d 1147 (Div. 1 2007) Substantial evidence supported the finding that, in the context of a claim by a contractor against a county for breach of contract, based on the county's failure to provide all risk builders' risk insurance policy with regard to the construction of a tunnel under a waterway, the events giving rise to the losses were fortuitous, the court held, where the facts demonstrated that the losses suffered by the contractor and subcontractor, including a "blow in" of the access shaft, were not certain to occur and could not have been reasonably foreseen at the time the project contract was signed, or during construction. The determination of whether a loss is "fortuitous," which is a condition precedent to coverage under an all risk builders' risk insurance plan, the court instructed, has three components: (1) a loss which was certain to occur cannot be considered fortuitous, and may not serve as the basis for recovery under an all-risk insurance policy; (2) in deciding whether a loss was fortuitous, a court should examine the parties' perception of risk at the time the policy was issued; and (3) ordinarily, a loss which could not reasonably be foreseen by the parties at the time the policy was issued is fortuitous. The test for determining whether a loss is "fortuitous" under an all risk builders' risk insurance plan, is a subjective, not objective, one and involves questions of fact, the court explained.

§ 40. Building demolition

The following authority, construing and applying "fortuitous event" provisions in all-risk insurance policies, adjudicated whether a "fortuitous loss" or "fortuitous event" had been established, or whether such a finding was supportable, the court referencing claimed damage due to building demolition activities.

California

Jernigan v. Nationwide Mut. Ins. Co., 2006 WL 463521 (N.D. Cal. 2006) (applying California law) Where an insurer denied an insured's claim on the grounds that the plaintiff-trustees had participated in the decision to demolish a building, and that the loss was therefore not "fortuitous," as required to obtain policy benefits, and was also not covered pursuant to Cal. Ins. Code § 11580.9(f), which provides that "an insurer is not liable for a loss caused by willful act of the insured," the court, on review, reasoning that the plaintiff insureds failed to meet their burden of showing that the demolition of the building was a covered cause of loss, summary judgment would be granted on the plaintiffs' breach of contract claim. An "all-risk" policy, the court instructed, creates a special type of coverage extending to risks not usually covered under other insurance, and recovery under an "all-risk" policy will be allowed for all fortuitous losses not resulting from misconduct or fraud unless the policy contains a specific provision expressly excluding the loss from coverage.

§ 41. Asbestos removal—Fortuity found, or issue of fact presented

The following authority, construing and applying "fortuitous event" provisions in all-risk insurance policies, held that a "fortuitous loss" or "fortuitous event" had been established, or that such a finding was supportable, or that an issue of fact in that regard had been raised, the court referencing asbestos removal activities.

Connecticut

Yale University v. Cigna Ins. Co., 224 F. Supp. 2d 402, 171 Ed. Law Rep. 143 (D. Conn. 2002) (applying Connecticut law) Under Connecticut insurance law, the doctrine of fortuity would bar a university's recovery, under the applicable all risks policy, of the costs incurred for the voluntary removal of noncontaminating lead and asbestos from its buildings, the court held, the court stressing, though, that while the defendant insurer might successfully demonstrate that the University was aware, at the time of the issuance of the policies, of the contamination specified in applicable directives and that the University was, therefore, precluded as a matter of law from obtaining coverage for such losses, it simply did not follow that because the University was aware of specific prepolicy instances of contamination, it must therefore have been aware of any and all contamination on its campus at that time or of the imminence of contamination of any other site. The University sought a declaration that it was entitled to insurance coverage under certain third-party liability and first-party property policies for expenditures it incurred to address the presence of lead and asbestos in buildings it owned, the insurers moved for summary judgment, and the court, on review, held that asbestos and lead contamination was a distinct property loss ensuing from otherwise excluded losses, under all risks policies, of the defective nature of asbestos and lead paint and/or wear and tear to building materials containing those substances. Here, the court stated, the University met its burden of demonstrating a triable issue of fact as to whether some of the claimed "physical loss of or damage" to its property, in the form of asbestos or lead contamination, was fortuitous.

§ 42. Asbestos removal—Fortuity not found

The following authority, construing and applying "fortuitous event" provisions in all-risk insurance policies, held, given the particular circumstances presented, that a "fortuitous loss" or "fortuitous event" had not been established, or that such a finding was not supportable, the court referencing asbestos removal activities.

Ohio

University of Cincinnati v. Arkwright Mut. Ins. Co., 51 F.3d 1277, 99 Ed. Law Rep. 723, 1995 FED App. 0116P (6th Cir. 1995) (applying Ohio law) Damage to a plaintiff's building caused by the need to remove asbestos prior to demolition of the building was not a "fortuitous loss" covered by the plaintiff's all-risk policy, the court held, where removal of the asbestos was not even remotely fortuitous since the plaintiff voluntarily elected to demolish the building despite the knowledge that removal of the asbestos was required in order to effectuate demolition. The insured sought declaratory judgment that an all-risk insurance policy covered the cost of removing asbestos-containing materials (ACMs) from its building prior to demolition, a United States Magistrate Judge recommended summary judgment in favor of the insurer, the federal district court entered summary judgment in favor of the insurer, the insured appealed, and the court, on review, affirmed, the court ruling that the insured's removal of the ACMs was not "fortuitous" and, therefore, was not covered by all-risk property insurance policy under Ohio law, even if the asbestos removal was not contemplated when the policy was entered into, the court reasoning that the insured exercised discretion and voluntarily elected to remove ACMs from the building in order to move forward with the planned demolition and that the damage flowing from asbestos removal prior to demolition could thus not be deemed accidental or dependent upon chance. Under Ohio law, the court explained, any analysis of fortuity with regard to a property insurance policy involves an examination of whether the plaintiff caused and intended the consequences that resulted in a claim for damages. When an insured makes a deliberate decision to take action that produces known consequences and causes predictable damage to property, the damages sustained are not the result of a fortuitous event and, therefore, are not covered under an all-risk insurance policy, the court concluded.

§ 43. Failure of artisan well

The following authority, construing and applying "fortuitous event" provisions in all-risk insurance policies, adjudicated whether a "fortuitous loss" or "fortuitous event" had been established, or whether such a finding was supportable, the court referencing the purported failure of an artisan well.

New York

Vasile v. Hartford Acc. & Indem. Co., 213 A.D.2d 541, 624 N.Y.S.2d 56 (2d Dep't 1995) Plaintiff insureds were not entitled to recover under an all-risk policy for the failure of their artesian well to produce a sufficient quantity of potable water after many years of use, the court held, where the plaintiffs failed to demonstrate that a fortuitous event, separate from the nature and inherent qualities of the well itself, caused the claimed loss. An insured seeking to recover for a loss under an insurance policy has the burden of proving that a loss occurred and also that the loss was a covered event within the terms of the policy, the court instructed. Since the plaintiffs failed to demonstrate a fortuitous event causing the claimed loss separate from the nature and inherent qualities of the well itself, the court should have granted summary judgment to the defendant, dismissing the complaint, the court concluded.

IV. Marine Vessel-Related Damage

§ 44. Damage to vessel; generally

[Cumulative Supplement]

The following authority, construing and applying "fortuitous event" provisions in all-risk insurance policies, adjudicated whether a "fortuitous loss" or "fortuitous event" had been established, or whether such a finding was supportable, the court generally referencing claimed damage to a marine vessel.

Eleventh Circuit

Miami Yacht Charters, LLC v. National Union Fire Ins. Co. of Pittsburgh Pennsylvania, 2015 WL 520846 (S.D. Fla. 2015) In a case in which the plaintiffs brought an action against the defendant all-risk marine insurer for damage to an insured vessel, the court affirmed a ruling of the court of appeals that the plaintiffs met their burden to establish that the cause to the vessel was fortuitous.

CUMULATIVE SUPPLEMENT

Cases:

Owner of fishing vessel demonstrated that it was more likely than not that fire damage to vessel was for some reason other than a fire intentionally caused by owner or at his direction, such that loss was fortuitous, not intentional, and thus covered under marine insurance policy; while insurer's investigators noted mass of flammable resin and traces of petroleum products in the hull, mass of resin might have been left over from that day's repairs or added to tack down nearby baffles during original boat construction process, and fuel contamination could have come from a spill or leak from nearby fuel line during the fire. Perry v. Hanover Insurance Group, Inc., 621 F. Supp. 3d 113 (D. Me. 2022).

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[END OF SUPPLEMENT]

§ 45. Marine vessel hull damage

The following authority, construing and applying "fortuitous event" provisions in all-risk insurance policies, adjudicated whether a "fortuitous loss" or "fortuitous event" had been established, or whether such a finding was supportable, the court referencing marine vessel hull damage.

Florida

Axis Reinsurance Co. v. Resmondo, 2009 A.M.C. 2597, 2009 WL 1537903 (M.D. Fla. 2009) (applying Florida law) Pursuant to Florida law, recovery under an all risks policy is permitted for fortuitous losses not resulting from fraud or misconduct, and events are fortuitous if they arise from accidents or casualties of the sea and unforeseen events, and are not losses occasioned by incursion of water into a vessel's hull from defective, deteriorated or decayed conditions or ordinary wear and tear, the court held, such that the partial sinking of a vessel by water entering through a corroded fitting is not covered.

§ 46. Vandalism to marine vessel

The following authority, construing and applying "fortuitous event" provisions in all-risk insurance policies, adjudicated whether a "fortuitous loss" or "fortuitous event" had been established, or whether such a finding was supportable, the court referencing purported vandalism to a marine vessel.

Massachusetts

Schiappa v. National Marine Underwriters, Inc., 56 Mass. App. Ct. 161, 775 N.E.2d 791 (2002) An insured brought action against an insurer to enforce an "all-risk" insurance policy after his boat was stripped of most of its parts by a repair facility, the lower tribunal granted summary judgment in favor of the insurer, the insured appealed, and the court, on review, reversed and remanded, the court, ruling that the insurer's "all risk" policy covered the insured's boat, noted that as recovery under an "all-risks" policy generally requires only that the insured show that a fortuitous loss has occurred, in the case of a mysterious disappearance, a showing that loss has occurred is generally sufficient, although the insured may also be required to furnish a good faith explanation. In construing "all risk" policies of insurance, the court explained, the risk comprehended in such policy has been characterized as "a fortuitous event—a casualty." That type of protection extends to the kind of loss that is not usually covered under other insurance, the court explained. In this case, not only was there no doubt that removal of parts of the boat was a "fortuitous loss" as that term has been defined, the court explained, but it was also evident that other language contained in the insurance policy extended coverage for the damage to the insured's boat: "We may pay for loss in money or we may also repair or replace damaged or missing parts with parts of like kind or quality. If those parts are unavailable we will pay for the loss of those parts in money, at their current market value. Before we pay for or replace property stolen or presumed stolen, we may return it to you, with payment for any physical damage, less the applicable deductible."

This language, incident to the policy's "all risk" statement of coverage, encompassed the situation here, and the insured carried his burden by showing that he discovered his boat "stripped," that there were "missing parts" that he "presumed [were] stolen" while the boat was in the custody of the repair facility, the court remarked. The "missing parts" clause referred to coverage for "missing parts" that are "presumed stolen," the court indicated, and because recovery under an all-risks policy generally requires only that the insured show that a fortuitous loss has occurred, in the case of a mysterious disappearance, a showing that loss has occurred is generally sufficient. There was no question that the removal of parts from the insured's boat constituted "damage" under the subject policy, and, indeed, if "all risk" coverage were as narrow as asserted by the insurer, such a policy would have little utility, the court stressed.

§ 47. Sinking of vessel—Fortuity found or issue of fact presented

The following authority, construing and applying "fortuitous event" provisions in all-risk insurance policies, held that a "fortuitous loss" or "fortuitous event" had been established, or that such a finding was supportable, or that an issue of fact in that regard had been presented, the court referencing the sinking of a marine vessel.

Massachusetts

Markel American Ins. Co. v. Pajam Fishing Corp., 691 F. Supp. 2d 260, 2010 A.M.C. 1919 (D. Mass. 2010) (applying Massachusetts law) An insured owner of a fishing vessel that sank unexpectedly set forth sufficient evidence to raise a fact question regarding the "fortuitous loss" of the vessel, under Massachusetts law, precluding summary judgment in a declaratory action brought by the insurer seeking to deny coverage under an "all risk" marine policy, the court held, where the vessel's owner and crew testified that the fishing vessel had been well maintained, and that there was no intentional misconduct which caused the vessel to sink. The court pointed out that the subject policy did not contain any definition of "accidental physical loss." The term "accident" is to be broadly construed in a policy insuring against damage by accident, the court instructed, and in its common signification the word means an unexpected happening without intention or design. "Accidental" is synonymous with "fortuitous," the court continued, and the courts are practically agreed that the words "accident" and "accidental" mean that which happens "by chance or fortuitously, without intention or design, and which is unexpected, unusual, and unforeseen." A loss is fortuitous unless it results from an inherent defect, ordinary wear and tear, or intentional misconduct of the insured, the court explained.

Here, the court stressed, the defendant fishing corporation put forth sufficient facts to establish that the sinking was the result of a fortuitous, accidental event, as a result of which the insurer's motion for summary judgment would be denied. The insurer contended that the fishing corporation would have to prove the cause of the sinking in order to meet its burden of proving that there was coverage, but this argument, the court declared, was not persuasive. To establish a fortuitous loss it is generally sufficient for the insured to show only that the loss occurred, the court stated, and in the instant case, through the testimony of the vessel's owner and crew, the fishing corporation established that the vessel was well maintained and that there was no intentional misconduct which caused the vessel to sink. This was sufficient "to prove a fortuitous loss of the covered property," the court related, the court adding that the insured "need not prove the cause of the loss." "All risk" policies such as the one issued by the subject insurer cover the "fortuitous loss" of the goods insured unless such a loss is expressly excluded, the court noted, and here, the fishing corporation put forth sufficient evidence to establish that the loss was accidental as it was not the result of intentional misconduct of the insured, which would be sufficient to survive the insurer's motion for summary judgment.

§ 48. Sinking of vessel—Fortuity not found

[Cumulative Supplement]

The following authority, construing and applying "fortuitous event" provisions in all-risk insurance policies, held, given the particular circumstances presented, that a "fortuitous loss" or "fortuitous event" had not been established, or that such a finding was not supportable, the court referencing the sinking of a marine vessel.

Florida

International Ship Repair and Marine Services, Inc. v. St. Paul Fire and Marine Ins. Co., 944 F. Supp. 886, 1997 A.M.C. 1419 (M.D. Fla. 1996) (applying Florida law) An insured's failure to provide an argument or bring forth evidence to sustain its burden of showing that the sinking of its vessel was fortuitous precluded granting its motion for partial summary judgment that sought to dismiss the insurer's affirmative defenses to coverage on the ground that the marine insurance policy at issue was of an "all-risk" nature, the court held. Under Florida law, the court pointed out, an insurance policy is an "all-risk policy" when it provides coverage against all risks, the words typically being inserted in writing, covering every loss that may happen except by fraudulent acts of the insured. Moreover, the court stated, recovery under an all-risk insurance policy will be allowed for all fortuitous losses not resulting from misconduct or fraud unless the policy contains specific provision expressly excluding loss from coverage. To recover under such a policy, the court continued, the insured must prove only loss or damage to the insured's property while the policy was in force, with the burden then shifting to the insurer to prove that the loss arose from a cause that is excluded under the policy. The court noted, as it cited Restatement of Contracts § 291, comment A, that to recover under an all-risk policy, the insured has burden of proving that it suffered a fortuitous loss. In the instant case, the court concluded, the insured failed to present sufficient evidence to sustain its burden of showing that the vessel sinking was fortuitous.

CUMULATIVE SUPPLEMENT

Cases:

Under federal maritime law, insureds failed to establish that sinking of their vessel was fortuitous, and thus covered under marine all-risk insurance policy, despite their contention that loss was due to heavy rainfall, where there was no evidence that vessel was subject to heavy rains at relevant time, and there was no other indication of fortuity. Chartis Property Casualty Company v. Inganamort, 953 F.3d 231 (3d Cir. 2020).

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[END OF SUPPLEMENT]

§ 49. Sinking of dock or failure of mooring pile

The following authority, construing and applying "fortuitous event" provisions in all-risk insurance policies, adjudicated whether a "fortuitous loss" or "fortuitous event" had been established, or whether such a finding was supportable, the court referencing the sinking of a dock or the failure of a mooring pile.

First Circuit

Catlin (Syndicate 2003) at Lloyd's v. San Juan Towing & Marine Services, Inc., 974 F. Supp. 2d 64 (D.P.R. 2013) (applying federal uberrimae fidei doctrine law) In a case in which a marine insurer brought action against its insured, seeking to resolve a coverage dispute arising from the sinking of a floating dry dock, both parties moved for summary judgment, and the court, on review, held that it remained unclear whether the insured's damage occurred due to some fortuitous circumstance or casualty that was covered under the all risk policy, as a result of which summary judgment would be denied as to the insurer's motion for summary judgment. Under an all risk policy, the insured must show that the loss or damage suffered was fortuitous, the court noted, and an all risk policy will be allowed for all fortuitous losses not resulting from misconduct or fraud. Even an all risks policy is subject to the proposition that the damage must have been due to some fortuitous circumstance or casualty, the court indicated, and recovery under an all-risk policy will generally be allowed, at least for all losses of a fortuitous nature, in the absence of fraud or other intentional misconduct of the insured. Accordingly, the insured bore the initial burden of establishing that a loss occurred to the floating dock, and that it was due to some fortuitous event or circumstance, the court related. Here, the court stressed, the evidence tended to support conflicting inferences of why the dock sank. The testimony of shareholders of the insured company, the court continued, supported the inference that the drydock sank due to the running water from the fire hose and open manholes on the drydock's deck, and testimony from the insurer's expert that wasted bulkheads throughout the drydock allowed water ingress and progressive flooding also supported a conclusion that the drydock sank as a result of its poor condition. As the determination about the proximate cause of the insured's loss could "go both ways," the issue could not be definitely determined in the present context of the proceedings, the court concluded.

New York

Petroterminal De Panama, S.A. v. QBE Marine & Specialty Syndicate 1036, 2017 WL 253066 (S.D. N.Y. 2017) (applying New York law) The court held that the plaintiff sufficiently alleged fortuity for claims for breach of contract, specific performance, and declaratory judgment for issues relating to whether certain all-risk insurers were required to pay for damage caused by a fallen mooring pile. The parties disputed whether the loss was fortuitous. The court noted that on the one hand, the burden on the insured with respect to demonstrating a fortuitous loss under an all-risks policy is relatively light, and all risk coverage covers all losses which are fortuitous no matter what caused the loss, including the insured's negligence, unless the insured expressly advises otherwise, but on the other hand, a loss is fortuitous unless it results from an inherent defect, ordinary wear and tear, or intentional misconduct of the insured. The issue was whether the plaintiff satisfied its "relatively light" burden for fortuity that the cause of the collapsed pile was not ordinary wear and tear. The court noted that a fortuitous event is defined by New York Insurance Law as "any occurrence or failure to occur which is, or is assumed by the parties to be, to a substantial extent beyond the control of either party," N.Y. Ins. Law § 1101(a)(1), (2). However, "normal wear and tear" cannot be fortuitous because

under New York law it "is not an insurable risk, but a certainty." [14] The court found that the plaintiff met its burden for fortuity. First, the plaintiff introduced evidence that the pile was designed for infinite life and therefore should not have failed from wear and tear after only 28 years. Second, the plaintiff's expert identified indications that the pile collapsed because of an overload event instead of ordinary wear and tear. The plaintiff introduced evidence that the pile was designed for an infinite life, which contradicts the theory that regular wear and tear caused the pile's collapse after only 28 years. The engineer who designed the piles submitted a sworn declaration attached to these motions that the pile in this case was designed for indefinite fatigue life and would not fail absent "corrosion or a mishap." Another expert concluded that the pile failed from one or more overload events that caused cracks to develop in the pile. The court concluded that the plaintiff demonstrated fortuity because when a pile is designed for an infinite fatigue life, an overload event is "to a substantial extent beyond the control of either party," N.Y. Ins. Law § 1101(a)(1), (2). The plaintiff's motion for partial summary judgment was granted and the plaintiff met its prima facie burden to establish coverage under the all-risk policy.

§ 50. Failure of bilge-pump system

The courts in the following cases, construing and applying "fortuitous event" provisions in all-risk insurance policies, adjudicated whether a "fortuitous loss" or "fortuitous event" had been established, or whether such a finding was supportable, the court referencing the purported failure of a bilge-pump system.

Eleventh Circuit

Great Lakes Reinsurance (UK) PLC v. Kan-Do, Inc., 639 Fed. Appx. 599, 2016 A.M.C. 716 (11th Cir. 2016) The court held that an insured carried its "light" burden of establishing a fortuitous loss where the insured established that the boat sank because of water intrusion after the bilge-pump system failed and that the bilge-pump system failed because of a blown fuse. The court pointed out that no one knew what caused the fuse to blow, the court adding that the insured also presented evidence that the boat was well-maintained and that the insurer did not assert on appeal that the losses were caused by wear and tear or lack of maintenance. As such, the court related as it cited Morrison Grain Co., Inc. v. Utica Mut. Ins. Co., 632 F.2d 424, 1982 A.M.C. 658, 7 Fed. R. Evid. Serv. 64 (5th Cir. 1980), § 7, the blown fuse was consistent with an unexplained event that, "so far as the parties are aware, [was] dependent on chance." The insurer, the court observed, had contended that without any "evidence showing what fortuitous event caused the fuse to fail" or evidence that the bilge-pump system failed prematurely, the insured did not meet its burden of showing fortuity because a court cannot distinguish whether the loss was caused by a fortuitous event or a nonfortuitous event. Disagreeing, the court pointed out that it has long been held in cases such as *Morrison Grain Co.* that requiring insurance claimants to prove the "precise cause" of loss or damage in order to recover under an "all-risk" insurance policy is "inconsistent with the broad protective purposes of 'all risks' insurance."

In order to recover under an all-risk insurance policy, the court instructed, the insured must first show (1) a fortuitous loss (2) that occurred during the policy period, and here, it was undisputed that the loss occurred during the policy period. The insured's burden of showing a fortuitous loss is "not a particularly onerous one," the court indicated, and the courts have recognized that "all risks insurance arose for the very purpose of protecting the insured in those cases where difficulties of logical explanation or some mystery surround the (loss of or damage to) property." Therefore, the court continued, the insured need not prove "the precise cause of the loss or damage" to demonstrate fortuity. Under the circumstances presented in the instant case, the court stressed, where the plaintiff did not contend that the losses were caused by wear and tear or lack of maintenance, there was no need for the defendant to present evidence on the cause of the fuse's failure. Instead, the court concluded, it was enough to show that the bilge-pump system's failure was caused by a blown fuse.

Florida

IAG LLC v. National Union Fire Ins. Co. of Pittsburgh Pennsylvania, 2015 WL 5173055 (M.D. Fla. 2015) (applying Florida law) In a case in which the policy at issue was an "all-risk" policy of marine insurance, a policy which provided "coverage against all risks … covering every loss that may happen except by the fraudulent acts of the insured" and which provided coverage for risks not usually covered by other insurance policies, including "all fortuitous losses not resulting from misconduct or fraud, unless the policy contains a specific provision expressly excluding the loss from coverage," the court, noting that the effect of an all-risk policy is to broaden coverage and that the initial burden lies with the insured to prove that the damage or loss was

"fortuitous," held that the plaintiff met its initial burden of establishing that the failure of a vessel's bilge pumps was fortuitous. The burden of demonstrating a fortuitous event is not an onerous one, the court explained, and the plaintiff's burden of proof can be characterized as a "light one" whereby, to make a prima facie case for recovery, the plaintiff must show only that a loss has occurred. That is, the court explained, the insured is not required to prove "the precise cause of loss to demonstrate fortuity."

A "fortuitous event," the court indicated, has been defined "as an event which, so far as the parties to the contract are aware, is dependent on chance. It may be beyond the power of any human being to bring the event to pass; it may be within the control of third persons; it may even be a past event, as the loss of a vessel, provided that the fact is unknown to the parties." A loss may be deemed fortuitous or accidental where it was unforeseen, unexpected, unintended, unavoidable, or caused by the insured's own negligence, the court stated. Here, the court pointed out, the insurer argued that the loss was not fortuitous because it resulted from corrosion, erosion, and/or ordinary wear and tear while the plaintiff argued that the true "cause" of the loss was a failure of the bilge pumps due to an interruption in shore power, which would have been unforeseen, unexpected, unintended, and unavoidable by the plaintiff. Alternatively, even if the bilge pump failure was not deemed the cause of the loss, the plaintiff argued that the holes in certain air conditioning coils were not due to normal wear and tear and would also qualify as fortuitous, the court observed. The court noted that even if it were to assume that the insurer was correct about the "cause" of the loss, the plaintiff met its initial burden to show that the loss was "fortuitous." Moreover, the court continued, it was determined that the boat was connected to shore power at the time of the loss, and the fact that the boat was connected to shore power made the loss of power to the bilge pumps far more unexpected and unexplained. This failure of power was fortuitous, the court concluded.

Oklahoma

Blythe v. Essentia Ins. Co., 2013 WL 6835279 (N.D. Okla. 2013) (applying Oklahoma law) Where the plaintiffs argued that there was a dispute of fact as to whether an insured boat sank as a result of a power interruption to the bilge pump or what the insurer termed as "deterioration" to the hull of the boat, and where the insurer further asserted that, even assuming that there was a power interruption to the vessel, the sinking of the boat was not fortuitous because the eventual sinking of the boat was foreseeable given its condition, the court held that based upon the materials submitted by the parties which comprised the summary judgment record, there was a genuine dispute of material fact with respect to the plaintiffs' breach of contract claim. That is, the court explained, a jury could readily find that it was the interruption of power to the bilge pump which caused the sinking of the boat and that the loss of the boat was therefore fortuitous and not covered by a policy exclusion contained in the subject all-risk policy. Reasoning thusly, the court denied the insurer's request for summary judgment on the plaintiffs' breach of contract claim.

§ 51. Vessel mechanical system

The following authority, construing and applying "fortuitous event" provisions in all-risk insurance policies, adjudicated whether a "fortuitous loss" or "fortuitous event" had been established, or whether such a finding was supportable, the court referencing the failure of a marine vessel mechanical system.

Eleventh Circuit

Class Action of South Florida v. National Union Fire Ins. Co. of Pittsburgh, PA, 2013 WL 9759740 (S.D. Fla. 2013) In a case in which a defendant insurer introduced an affidavit and report of its expert, who concluded that the vessel sank due to the corrosion and erosion of the air conditioning pump's face plate, housing, impeller, and impeller blades, resulting in small holes therein, which allowed salt water to flow into the vessel's engine compartment and throughout the vessel, and where the defendant further contended that because the damage to the vessel resulted from wear and tear and from corrosion, it was specifically excluded from the insurance policy, the court held that the plaintiff insureds failed to meet their burden of proof as to fortuity. Although the parties agreed that the vessel was insured under an all-risk policy, they disagreed about which party carried the burden of proof to establish that a loss is "fortuitous," the court indicated. In the Eleventh Circuit, the insured must first show that the loss occurred during the coverage period and that the contract encompasses the loss, the court pointed out, and the burden then shifts to the insurer to prove that an exclusion in the contract applies. If the insurer demonstrates that an exclusion applies, then the burden shifts back to the insured to prove that the loss was fortuitous.

The policy at issue stated that the defendant would provide coverage for all "accidental, direct physical loss or damage" to the vessel, the court observed, but the policy did not define the term "accidental." However, the parties' pleadings reflected an understanding that the term "accident" is synonymous with "fortuitous," the court stated. According to Restatement of Contracts § 291, comment A, the court instructed, a fortuitous event is "an event which so far as the parties to the contract are aware, is dependent on chance. It may be beyond the power of any human being to bring to event to pass; it may be within the control of third persons; it may even be a past event, such as the loss of a vessel, provided that the fact is known to the parties." The burden of demonstrating a fortuitous event is not an onerous one, the court elaborated, and the courts considering the question have rejected the notion that the insured must show the precise cause of loss to demonstrate fortuity. Thus, a loss may be deemed fortuitous where it was unforeseen, unexpected, unintended, unavoidable, or caused by the insured's own negligence, the court stressed. Losses are not fortuitous, however, where they result from an inherent defect in the object damaged, from ordinary wear and tear or from the intentional misconduct of the insured, the court held. Here, the plaintiffs did not provide any support for their theory that a mechanical failure of unknown cause could, on its own, satisfy the plaintiffs' burden of proving fortuity, the court concluded.

§ 52. Vessel as fishing charter

The following authority, construing and applying "fortuitous event" provisions in all-risk insurance policies, adjudicated whether a "fortuitous loss" or "fortuitous event" had been established, or whether such a finding was supportable, the court referencing damage purportedly caused by the use of a marine vessel as a fishing charter boat.

Florida

Axis Reinsurance Co. v. Henley, 2009 WL 3416248 (N.D. Fla. 2009) (applying Florida law) An insured's failure to disclose that his marine vessel, a 34-foot Fountain open hull T-top, was advertised for offshore charter fishing trips amounted to an intentional concealment of a material fact, thus voiding all coverage of the insured's insurance policy, the court held, and the claim was not covered under the insurance contract because the loss was not proximately caused by a fortuitous event, the court noting, as to the issue whether the loss under inquiry was a fortuitous accident, that an all risk policy is one which provides coverage against all risks, the words typically being inserted in writing, covering every loss that may happen except by the fraudulent acts of the insured, and that, accordingly, "an all-risk policy will be allowed for all fortuitous losses not resulting from misconduct or fraud, unless the policy contains a specific provision expressly excluding the loss from coverage." In order to recover under an all risk policy, an insured must prove only the loss or damage to the insured's property while the policy was in force, with the burden then shifting to the insurer to prove that the loss arose from a cause that is excluded under the policy, the court continued, but the insured must show that the loss or damage was "fortuitous."

The court instructed that Restatement of Contracts § 291 defines a fortuitous event as "an event which so far as the parties to the contract are aware, is dependent on chance. It may be beyond the power of any human being to bring the event to pass; it may be within the control of third persons; it may even be a past event, such as the loss of a vessel, provided that the fact is unknown to the parties." In contrast, the court continued, "[a] loss is not considered fortuitous if it results from an inherent defect in the object damaged, from ordinary wear and tear, or from the intentional misconduct of the insured. However, loss due to the negligence of the insured or his agents has generally been held to be fortuitous and, absent express exclusion, is covered by an all risks policy." Fortuitous events are accidents or casualties of the seas, unforeseen and unexpected events, and are not losses occasioned by the incursion of water into a vessel's hull owing to the defective, deteriorated or decayed condition of the hull or ordinary wear and tear, the court elaborated. Here, the court declared, the loss was not a fortuitous loss, for water did not enter the vessel by waves over the sides, and the proximate cause of the loss was the wear and tear of the two bilge pumps and siphoning through the discharge hoses. The starboard bilge pump did not exist, and the port bilge pump was inoperable due to "wear," it did not operate on automatic, and it did not operate manually, either, the court explained. The loss, therefore, was not fortuitous and was not a risk covered by the policy, the court concluded.

§ 53. Equipment aboard vessel

The following authority, construing and applying "fortuitous event" provisions in all-risk insurance policies, adjudicated whether a "fortuitous loss" or "fortuitous event" had been established, or whether such a finding was supportable, the court referencing damage related to certain equipment aboard a marine vessel.

New York

Royal Indem. Co. v. Deep Sea Intern., 619 F. Supp. 2d 14, 2007 A.M.C. 1872 (S.D. N.Y. 2007) (applying New York law) To state a claim under an endorsement of a policy which covered the loss of scientific equipment aboard a research vessel on an all-risks basis, the insured owner of the vessel was required to prove that the loss of the equipment was "fortuitous," that is, that it did not result from an inherent defect, ordinary wear and tear, or intentional misconduct of the insured, the court noted as it ruled that a claim that the sinking was caused by a peril of the sea covered by the main perils clause of the policy required proof that the loss resulted from a fortuitous action of the sea, and that here, a genuine issue of material fact as to whether the insured owner intentionally chose inadequate methods to repair the vessel precluded summary judgment as to whether the loss of scientific equipment on board was a fortuitous loss covered by the policy insuring the vessel.

§ 54. Vessel battery deterioration

The following authority, construing and applying "fortuitous event" provisions in all-risk insurance policies, adjudicated whether a "fortuitous loss" or "fortuitous event" had been established, or whether such a finding was supportable, the court referencing the deterioration of the battery of a marine vessel.

Eleventh Circuit

Great Lakes Reinsurance (UK) PLC v. Soveral, 2007 A.M.C. 672, 2007 WL 646981 (S.D. Fla. 2007) Noting that an all-risk policy covers all fortuitous losses, except for those resulting from fraud or misconduct and unless the policy contains an exception from coverage, the court held that there was no accidental loss to support coverage for an all risks policy where the insured boat sank at a dock due to an accumulation of rain water when the bilge pumps failed to work because the boat's batteries were dead, the court adding that the deterioration of the battery constituted normal wear and tear, and rain entering an open boat during rainy season in the Bahamas is not fortuitous.

§ 55. Failure of hose clamp as fortuitous event

The following authority, construing and applying "fortuitous event" provisions in all-risk insurance policies, adjudicated whether a "fortuitous loss" or "fortuitous event" had been established, or whether such a finding was supportable, the court referencing damage related to the failure of a hose clamp.

New York

Great Lakes Reinsurance (UK) PLC v. Fortelni, 33 F. Supp. 3d 204 (E.D. N.Y. 2014) (applying New York law) The court held that under New York law, damage to a commercial vessel from raw seawater flooding the engine compartment resulting from the failure of a clamp used to secure a raw water hose connection was not an "accidental physical loss" covered by all-risk marine insurance policy, absent any showing that a fortuitous or chance event or occurrence caused the clamp to fail. A marine insurer brought a declaratory judgment action, seeking a determination that damage to an insured commercial vessel was not a covered "accidental physical loss" covered by an all-risks marine insurance policy, the insured asserted a counterclaim, seeking a declaration that the insurer breached the policy, the parties cross-moved for summary judgment, and the court, on review, granted the insurer's motion and denied the insured's motion, the court ruling that damage to the vessel was not covered by the policy.

The court deemed Federal Ins. Co. v. PGG Realty, LLC, 538 F. Supp. 2d 680 (S.D. N.Y. 2008), aff'd on other grounds, 340 Fed. Appx. 5, 2009 A.M.C. 2408 (2d Cir. 2009), § 10, to be an instructive case, wherein the court conducted a bench trial concerning a capsized vessel, and found that the vessel capsized, in large part, because of the fortuity of unforeseeable and unpredictable severe weather. The insured prevailed because it provided significant evidence that a fortuitous event, severe weather, was a

critical condition in causing the vessel to capsize, the court continued, but here, even after discovery, the plaintiff failed to point to any "fortuitous" event for purposes of the all-risk policy. This is not to say that only severe weather may qualify as a "fortuitous" event, the court explained, but where, as here, the defendant fails to point to any evidence of such an event, the defendant is foreclosed from recovery as a matter of law. The fact that testimony was received that the damage caused here would be covered by the policy was legally irrelevant, the court indicated. There were no material disputed issues of fact and therefore the coverage was an issue of law for the court to decide, rather than an insured's representative, the court ruled. As such, the court concluded, the plaintiff insurer was entitled to judgment as a matter of law.

§ 56. Engine relief valve

The following authority, construing and applying "fortuitous event" provisions in all-risk insurance policies, adjudicated whether a "fortuitous loss" or "fortuitous event" had been established, or whether such a finding was supportable, the court referencing damage related to an engine relief valve.

Florida

LaMadrid v. National Union Fire Ins. Co. of Pittsburgh, PA, 567 Fed. Appx. 695 (11th Cir. 2014) (applying Florida law) An unexplained failure of a vessel's engine's relief valve well before the end of the engine's projected life-span was an accidental and fortuitous loss under Florida law or federal maritime law, as required for coverage under an all-risk marine insurance policy, the court held, particularly where the policy did not exclude such mechanical failures. An insured commenced action in state court against an insurer, alleging breach of an all-risk marine insurance policy, the insurer removed the action on diversity grounds, the parties consented to the final disposition by the magistrate judge, the federal district court granted summary judgment in favor of the insurer, the insured appeal, and the court, on review, reversed and remanded, the court holding, inter alia, that the unexplained failure of the engine's relief valve was a fortuitous loss. The parties recognized and agreed that the policy at issue was an all-risk policy of marine insurance, which provided coverage against all risks covering every loss that may happen except by the fraudulent acts of the insured, the court indicated, and indeed, such a policy creates a special type of coverage that extends to risks not usually covered under other insurance, and recovery under an all-risk policy will be allowed for all fortuitous losses not resulting from misconduct or fraud unless the policy contains a specific provision expressly excluding the loss.

In order to recover under an all-risk policy, the insured must first show that a loss arose from a covered peril, the court indicated. In an action to recover under an all-risk policy, the insured must necessarily demonstrate that the damage or loss was fortuitous, the court continued, and notably, this burden of demonstrating fortuity is not a particularly onerous one. Based on the undisputed facts, the court explained, the appellants met their burden of demonstrating a fortuitous loss, and carried this light burden by presenting expert testimony on the cause of the engine's failure, namely the failure of the relief valve, and by establishing that the unexplained loss occurred well before the end of the engine's projected lifespan. To require the appellants to prove something more, such as the exact cause of the relief valve's failure, would be to require the insureds to prove the precise cause of the engine's failure, the court explained, and requiring an insured to prove that a loss arose from a covered peril with such specificity seems contrary to the aims of an all-risk insurance policy. Finding that the appellants sufficiently demonstrated their burden of demonstrating a fortuitous loss under the policy, the burden on remand would shift to the insurer to establish the applicability of one or more of the policy's exclusions, the court concluded.

V. Other Matters

A. Machinery- and Hardware-Related Issues

§ 57. Oil and gas well compressor

The following authority, construing and applying "fortuitous event" provisions in all-risk insurance policies, adjudicated whether a "fortuitous loss" or "fortuitous event" had been established, or whether such a finding was supportable, the court referencing damage related to an oil and gas well compressor.

Texas

WPS, Inc. v. Enervest Operating, L.L.C., 2010 WL 2244077 (Tex. App. Houston 1st Dist. 2010) In a case involving damage to a leased oil and gas well compressor, the court held that regardless of how different courts might interpret fortuity, the subject Rental Agreement's use of the term "external" in conjunction with all-risk or "all-perils insurance" clearly meant a policy that provided coverage only for those losses with "external" causes. The appellant, the court pointed out, had contended that the Rental Agreement "required insurance [that] would have covered all risks, irrespective of cause] if same were a fortuitous event," and that, accordingly, because a needle valve's breakage and resulting fire "were not anticipated by either [party] and [were] thus a fortuitous event," the loss "would have been covered by an all-risk policy] and as a result, the appellee was responsible for the cost of repairs, irrespective of the jury's finding."

§ 58. Refrigeration unit

The following authority, construing and applying "fortuitous event" provisions in all-risk insurance policies, adjudicated whether a "fortuitous loss" or "fortuitous event" had been established, or whether such a finding was supportable, the court referencing damage related to a refrigeration unit.

Virginia

St. Paul Fire & Marine Ins. Co. v. General Injectables & Vaccines, Inc., 2000 WL 270954 (W.D. Va. 2000) (applying Virginia law) In an action brought by the plaintiff insurer against the defendant insured, seeking a declaratory judgment that an all-risk policy it issued to the insured afforded no coverage for vaccines that were damaged when a refrigeration unit shut down, the insurer specifically contending that the loss was not fortuitous and, therefore, not covered, and that the loss was otherwise excluded by an "astonishing array of policy exclusions," the parties submitted the case to the court on stipulated facts, and the court, on review, found that the claimed loss was fortuitous and not excluded, as a result of which judgment would be entered for the insured.

§ 59. Air conditioning damage

The following authority, construing and applying "fortuitous event" provisions in all-risk insurance policies, adjudicated whether a "fortuitous loss" or "fortuitous event" had been established, or whether such a finding was supportable, the court referencing purported air conditioning damage.

Virginia

Acken v. Kroger Co., 58 F. Supp. 3d 620 (W.D. Va. 2014) (applying Virginia law) In a case in which a landlord brought action against a commercial tenant alleging breach of a lease agreement and negligence after the tenant failed to repair an air-conditioning system that was damaged by thieves, the tenant, following removal, moved for summary judgment, and the court, on review, held that the tenant was liable for the damage as a self-insurer, the court noting that pursuant to Virginia law, a "fortuitous loss," which an "all risk" insurer agrees to pay if not excluded, is essentially an event that is dependent on chance, an accident, or is unexpected. A fortuitous loss is one that does not result from any inherent defect in the property insured, ordinary wear and tear, or intentional misconduct, the court explained. Here, the parties did not dispute that the theft was an unexpected event, and the defendant company even acknowledged that "[t]he theft was an isolated incident" because "there had been no vandalism, theft, or other type of criminal activity at the Property or in its vicinity during the Lease," the court remarked. The defendant also did not allege any misconduct or negligence on the part of the plaintiffs that resulted in the theft, the court observed. Under the circumstances presented, the court concluded, the unexpected theft of the heating, ventilation, and air conditioning piping would constitute a fortuitous event for purposes of an all-risk insurance policy.

§ 60. Aircraft engine damage

The following authority, construing and applying "fortuitous event" provisions in all-risk insurance policies, adjudicated whether a "fortuitous loss" or "fortuitous event" had been established, or whether such a finding was supportable, the court referencing purported aircraft engine damage.

New York

Highland Capital Management, L.P. v. Global Aerospace Underwriting Managers Ltd., 488 Fed. Appx. 473 (2d Cir. 2012) (applying New York law) Pursuant to the law of New York, the court held, an all-risk insurance policy that provided an airline with coverage for physical damage to airframes and engines that the airline either bought with secured loans from a lender or leased from a lessor, which were coinsureds under the policy, unambiguously required that a determination as to whether the loss suffered to airframes and engines was fortuitous, and thus covered by the policy, had to be made from the perspective of the insureds collectively, rather than severally, pursuant to language in the policy's "cross liability" provision which indicated that the policy provided the same protection to each insured as though the policy were issued separately to each, except as to provisions covering accidental damage to airframes and engines (N.Y. Ins. Law § 1101(a)(2)). The lessor and lender to a since-defunct airline, as coinsureds under the airline's all-risk insurance policy that provided coverage for physical damage to airframes and engines, sued the insurers to recover for damage to airframes and engines that resulted from the airline's removal of parts for use with other aircraft, the federal district court granted partial summary judgment for the insurers, and, following a bench trial, entered judgment for the insurers, the lessor and lender appealed, and the court, on review, affirmed, the court holding, inter alia, that damage to the airframes and engines caused by the airline's intentional misconduct was not fortuitous, precluding coverage under New York law. The court so ruled despite an endorsement that extended coverage to the lessor's and lender's own interests in airframes and engines, which did not purport otherwise to expand coverage beyond fortuitous losses from the collective perspective of the insureds.

B. Additional Matters

§ 61. Vapor retardant

The following authority, construing and applying "fortuitous event" provisions in all-risk insurance policies, adjudicated whether a "fortuitous loss" or "fortuitous event" had been established, or whether such a finding was supportable, the court referencing damages related to the use or presence of vapor retardant.

Washington

Terminal Freezers Inc. v. U.S. Fire Ins., 2008 WL 2544898 (W.D. Wash. 2008), aff'd on other grounds, 345 Fed. Appx. 305 (9th Cir. 2009) (applying Washington law) Noting that an all-risk insurance policy generally affords recovery for losses considered "fortuitous" and that in every all risks policy, fortuity is essentially an implied exclusion, and that fortuity is required as a matter of public policy because permitting recovery on insurances losses that are certain to occur would encourage fraud, the court, noting that the facility of the plaintiff corporation was constructed with vapor retardants precisely because damage due to freezing water vapor was foreseeable, held that due to this use of vapor retardants, the court could not conclude that the risk of damage from water vapor was certain or sufficiently foreseeable such that the loss was not fortuitous. Washington courts, the court instructed, consider the following when tasked with determining whether a loss is fortuitous: "(a) a loss which was certain to occur cannot be considered fortuitous, and may not serve as the basis for recovery under an all-risk insurance policy; (b) in deciding whether a loss was fortuitous, a court should examine the parties' perception of risk at the time the policy was issued; (c) ordinarily, a loss which could not reasonably be foreseen by the parties at the time the policy was issued is fortuitous." While proving fortuity is a "condition precedent to coverage," the burden of proving fortuity is not particularly onerous, the court explained, and the test for determining fortuity is subjective and involves questions of fact.

§ 62. Oil or gas pipeline

The following authority, construing and applying "fortuitous event" provisions in all-risk insurance policies, adjudicated whether a "fortuitous loss" or "fortuitous event" had been established, or whether such a finding was supportable, the court referencing damages related to an oil or gas pipeline.

Colorado

MarkWest Hydrocarbon, Inc. v. Liberty Mut. Ins. Co., 558 F.3d 1184, 174 O.G.R. 1 (10th Cir. 2009) (applying Colorado law) In a case in which an insured brought action against insurers in state court seeking declaratory relief and damages for breach of contract and bad faith breach of an insurance contract after the insurers denied coverage for expenses sustained by the insured as a result of compliance with corrective action orders (CAOs) issued by the Office of Pipeline Safety after a bypass valve in a natural gas liquids (NGL) pipeline leased and operated by the insured failed, the federal district court, after the insurers removed the case, granted the insurers' motion for summary judgment, the insured appealed, and the court, on review, affirmed, the court ruling that costs incurred by the insured in complying with CAOs were not covered under its insurance policy. The policy under inquiry plainly indicated that the parties drafted and agreed to an "all-risk" insurance policy, the court pointed out. All-risk insurance policies are designed to cover any fortuitous loss not resulting from an excluded risk or from fraud by the insured, the court explained. A fortuitous event, the court explained, is an event which so far as the parties to the contract are aware, is dependent on chance, the court noted, the court adding that a fortuitous event is one that "is unexpected and not probable, and caused by an external force, that is, not resulting from an internal characteristic of the property." The policy at issue, the court continued, made it clear that it protected against unexpected fortuities but not the upkeep necessary for a 52-year old pipeline to remain safe to operate. It explicitly provided coverage only for "all risks of direct physical loss or damage … from any external cause," not normal wear-and-tear, the court indicated. It also excluded from coverage "any increase in loss resulting from … [e]nforcement of any ordinance or law regulating the use, construction, repair or demolition of any property," the court elaborated. So that regulators might impose safety standards regarding the "use" of the pipeline, the plaintiff-appellant would be required to absorb the expense of meeting those standards, the court opined. Such expenses are the cost of doing business properly internalized by a business, not the sort of unexpected fortuity all-risk policies are designed to cover, the court declared.

§ 63. Groundwater contamination

The following authority, construing and applying "fortuitous event" provisions in all-risk insurance policies, adjudicated whether a "fortuitous loss" or "fortuitous event" had been established, or whether such a finding was supportable, the court referencing damages due to groundwater contamination.

Fourth Circuit

Icarom, PLC v. Howard County, 178 F.3d 1284 (4th Cir. 1999) In a case in which the plaintiff insurer appealed an order of the district court declaring that the defendant County was entitled to coverage for the contamination of groundwater underneath three landfills owned by the County pursuant to the terms of an insurance policy issued by the insurer, the court, on review, affirmed. The evidence presented indicated that the county owned three landfills, and that the groundwater underneath each of the landfills was contaminated as a result of the byproducts of decomposing waste, and that the contamination at one site might have been exacerbated by hazardous waste leaking from drums illegally deposited on the property. The insurer brought a declaratory judgment action seeking a determination of its duty to insure the County for losses due to the contamination of the groundwater beneath the landfills pursuant to a policy issued by the insurer covering all risks to real and personal property owned or leased by the County, the court pointed out, and the plaintiff argued that the losses were not covered by the policy because they were not fortuitous. The court concluded that the district court correctly determined that the loss was fortuitous.

§ 64. Business income loss

The following authority, construing and applying "fortuitous event" provisions in all-risk insurance policies, adjudicated whether a "fortuitous loss" or "fortuitous event" had been established, or whether such a finding was supportable, the court referencing purported business income loss.

Louisiana

CXY Chemicals U.S.A. v. Gerling Global General Ins. Co., 991 F. Supp. 770 (E.D. La. 1998) (applying Louisiana law) An insured brought action against property insurers to recover for a business income loss at a sodium chlorate plant, the insured

moved for partial summary judgment, and the federal district court, on review, denied the motion, the court holding that a question of fact precluded summary judgment on whether the loss under inquiry was fortuitous. In addition to the express exclusions contained in a policy of insurance which provides coverage for "all risks," courts have imposed a necessity that the loss of the insured also be "fortuitous" in nature, the court explained. A policy of insurance insuring against all risks creates a special type of coverage that extends to risks not usually covered under other insurance, the court instructed, and recovery under an all-risk policy will be allowed for all fortuitous losses not resulting from misconduct or fraud, unless the policy contains a specific provision expressly excluding the loss from coverage. The defendants argued that the plaintiff was aware that to continue operating the plant without replacing anodes would inevitably lead to the exact event that transpired, the court continued, and these facts surrounding the determination of whether the damages alleged to have been sustained by the plaintiff were inevitable and, if so, whether the plaintiff knew of the inevitability of these damages were material to the question of whether the damages were "fortuitous" within the meaning of the "fortuity doctrine." If in fact the plaintiff knew that the plant would inevitably suffer the damages of which it now complains and proceeded forward despite that knowledge then the damages of which the plaintiff complains were not "fortuitous," the court explained. From the evidence submitted by the defendants in opposition to the plaintiff's motion, a reasonable jury could find that in fact the plaintiff had this knowledge, the court concluded, as a result of which the plaintiff was not entitled to summary judgment.

§ 65. Trade dress infringement

The following authority, construing and applying "fortuitous event" provisions in all-risk insurance policies, adjudicated whether a "fortuitous loss" or "fortuitous event" had been established, or whether such a finding was supportable, the court referencing purported trade dress infringement.

Texas

Two Pesos, Inc. v. Gulf Ins. Co., 901 S.W.2d 495 (Tex. App. Houston 14th Dist. 1995) A general liability insurer of a fast-food restaurant chain sought a declaration of coverage regarding the insured's competitor's claim seeking supplemental damages for trade dress infringement, the insured counterclaimed, alleging a bad faith denial of coverage, the lower tribunal granted summary judgment denying coverage and ordered that the insured take nothing on its counterclaims, the insured appealed, the court of appeals reversed and remanded the cause for trial, and the court, on review, affirmed, the court holding that the fortuity doctrine precluded coverage, and that the insurer had a reasonable basis for denying coverage, as a result of which it was not subject to bad faith liability to the insured. Under the fortuity doctrine, the court explained, coverage for the competitor's claim against the insured for trade dress infringement damages after having earlier obtained a judgment for trade dress infringement against the insured was precluded under the advertising injury coverage provisions of the insured's general liability even though those provisions did not contain an "occurrence" or "accident" requirement and did not specifically exclude many kinds of intentional conduct. The claim did not allege any new acts of infringement occurring during the policy period, but instead sought damages for continued infringement as found by the jury in the prior lawsuit, and thus constituted a known loss or loss in progress, the court concluded.

§ 66. Production of plastic bags

The following authority, construing and applying "fortuitous event" provisions in all-risk insurance policies, adjudicated whether a "fortuitous loss" or "fortuitous event" had been established, or whether such a finding was supportable, the court referencing damage related to the production of plastic bags.

Nevada

Fed. Ins. Co. v. Coast Converters, 339 P.3d 1281, 130 Nev. Adv. Op. No. 95 (Nev. 2014) A plastic bag manufacturer brought action against a property insurer to recover for breach of contract by paying a claim for defective bags under business interruption/extra expense coverage in an all-risk policy, not the property damage coverage with a $5 million limit, the lower tribunal entered judgment on a jury verdict for the manufacturer, an appeal and cross-appeal were taken, and the court, on review, vacated in part, reversed, and remanded, the court holding that scrap material produced after a date certain could not be categorized as property based on the implied requirement of fortuity, and as such, it could only be covered under the business

interruption/extra expense provision. It is well recognized that insurable loss of or damage to property must be occasioned by a fortuitous, noninevitable, and nonintentional event, the court explained as it cited in support City of Burlington v. Indemnity Ins. Co. of North America, 332 F.3d 38 (2d Cir. 2003) (applying Vermont law), § 22. The application of the implied requirement of fortuity to insurance contracts is universally recognized, the court pointed out. In other words, the court continued, a loss occasioned by the insured's own decision to act in a way that will predictably result in a loss is not fortuitous, and thus, such a loss is generally not covered, the court adding that the courts generally do not recognize deliberate actions that produce predictable and anticipated damages as fortuitous events under all-risk insurance policies. Further, the fortuity principle applies even if not explicitly written into the insurance contract, the court explained, and under the implied requirement of fortuity, the property damage provision could not apply to scrap produced as a result of the insured's decision to continue production despite being aware that damaged bags would be produced at a higher rate than normal.

§ 67. Bacterial material

The following authority, construing and applying "fortuitous event" provisions in all-risk insurance policies, adjudicated whether a "fortuitous loss" or "fortuitous event" had been established, or whether such a finding was supportable, the court referencing claimed damage or injury caused by bacterial material.

Florida

SeaSpecialties, Inc. v. Westport Ins. Corp., 2008 WL 4845037 (S.D. Fla. 2008) (applying Florida law) In a case in which the plaintiffs filed an action for breach of an insurance agreement and statutory bad faith when the insurers refused to cover a loss of property from listeria monocytogenes adulteration, the plaintiffs claimed that the "all-risk" policy provided by the defendants covered the listeria damage to its fish products, and the court, on review, held that the all-risk clause in the subject policy was broad, and that the allegations in the complaint sufficiently stated that a fortuitous loss had occurred. The court, in so ruling, pointed out that the subject clause read as follows: "This policy insures against all risk of direct physical loss or damage except as excluded, to covered property while on Described Premises or on land within 1000 feet thereof (except as respects pipelines owned or operated by the Insured) and while in the due course of Transit, provided such physical loss or damage occurs during the term of this policy."

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- **Construction and Application of External or Extraneous Cause or Event Provision of All-Risk Insurance Policy, 20 A.L.R.7th Art. 3**
- **Construction and Application of Earth Movement Exclusions in All-Risk Insurance Policy, 19 A.L.R.7th Art. 5**
- **What Constitutes "Ensuing Loss" Caused by Water Damage Within Coverage Provision of Property Insurance Policy, 14 A.L.R.7th Art. 6**
- **Construction and Application of Insurance Policies' Coverage Territory Clauses Excluding Occurrences Within or Without United States, 10 A.L.R.7th Art. 7**
- **Construction and Application of Insurance Exclusion for Deterioration, Corrosion, Wear and Tear, Rot, and Decay, 8 A.L.R.7th Art. 3**
- **Construction and Application of Insurance Exclusion for Bacteria, Mold, or Other Fungi, 7 A.L.R.7th Art. 5**
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- **Coverage under all-risk insurance, 30 A.L.R.5th 170**
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- Levin, Lewis, Phillips, Camp, Corcoran et. al., **Recent Developments in Property Insurance Coverage Litigation, 51 Tort Trial & Ins. Prac. L.J. 667 (2016)**

Additional References

- Appellate Materials, Brief of the **Appellant [Great Lakes Reinsurance (UK) PLC v. Kan-Do, Inc.], 2015 WL 4985819**
- Appellate Materials, Brief of the **Appellant [Great Lakes Reinsurance (UK) PLC v. Kan-Do, Inc.], 2015 WL 4264738**

Table of Cases, Laws, and Rules

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Footnotes

1 This article supersedes §§ 5 to 17.5 of Coverage under all-risk insurance, 30 A.L.R.5th 170.

2 The all-risk policies discussed in this article are limited to those covering an insured's property loss or damage; policies covering an insured's liability for loss or damage suffered by a third person are not discussed.

This article is limited to cases dealing with questions which are of particular significance with relation to the type of policy under consideration herein, and does not purport to discuss matters which, although arising in cases involving a policy of this type, are common to other types of insurance.

3 Since Property damage resulting from inadequate or improper design or construction of dwelling as within coverage of "all risks" homeowner's insurance policy, 41 A.L.R.4th 1095, collects cases involving whether property damage resulting from inadequate or improper design or construction of a dwelling is within coverage of "all risks" homeowner's insurance policy, such cases are not included in this article. Similarly excluded from the present treatment are cases involving all-risk yacht policies, discussed at Coverage under all-risks yacht policy, 75 A.L.R.3d 410, and cases involving "jeweler's block" policies, discussed at Construction and effect of "jeweler's block" policies or provisions contained therein, 22 A.L.R.5th 579.

Attention is drawn, as well, to: Construction and Application of External or Extraneous Cause or Event Provision of All-Risk Insurance Policy, 20 A.L.R.7th Art. 3, and Construction and Application of Earth Movement Exclusions in All-Risk Insurance Policy, 19 A.L.R.7th Art. 5.

4 Am. Jur. 2d, Insurance § 4.

5 C.J.S., Insurance § 1523.

6 C.J.S., Insurance § 1523.

7 Couch on Insurance 3d § 148:58.

8 See Association of Apartment Owners of Imperial Plaza v. Fireman's Fund Ins. Co., 939 F. Supp. 2d 1059 (D. Haw. 2013) (applying Hawaii law).

9 See Great Lakes Reinsurance (UK) PLC v. Kan-Do, Inc., 639 Fed. Appx. 599, 2016 A.M.C. 716 (11th Cir. 2016).

10 Churchill v. Factory Mut. Ins. Co., 234 F. Supp. 2d 1182 (W.D. Wash. 2002) (applying Washington law).

11 See Churchill v. Factory Mut. Ins. Co., 234 F. Supp. 2d 1182 (W.D. Wash. 2002) (applying Washington law).

12 See Churchill v. Factory Mut. Ins. Co., 234 F. Supp. 2d 1182 (W.D. Wash. 2002) (applying Washington law), where the court added that under Washington law, as predicted by the district court, ordinarily, a loss which could not reasonably be foreseen by the parties at the time all-risk policy was issued is "fortuitous."

13 Scottsdale Ins. Co. v. Travis, 68 S.W.3d 72 (Tex. App. Dallas 2001).

14 Contractors Realty Co., Inc. v. Insurance Co. of North America, 469 F. Supp. 1287, 1979 A.M.C. 1864 (S.D. N.Y. 1979) (rejected by, Standard Structural Steel Co. v. Bethlehem Steel Corp., 597 F. Supp. 164, 40 U.C.C. Rep. Serv. 1245 (D. Conn. 1984)) (applying New York law).

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