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Does Your Water Damage Sublimit Really Limit Your Water Damages? It Depends...

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On June 29, 2022, Florida's Fourth District Court of Appeal issued a favorable decision for insurers, but on its face, the decision may seem to conflict with Fifth District law.

In *Herrington v. Certain Underwriters at Lloyd's London* (Florida Fourth DCA June 29, 2022), the court reviewed an order granting summary judgment to an insurer. The policyholder's home suffered damage caused by a water pipe leak, and while the insurer acknowledged coverage, it only paid the maximum under the policy's "water damage aggregate limitation" endorsement: $5,000. The policyholder claimed that the endorsement did not limit "tear-out" expenses, and thus the expenses related to tearing out and accessing the damaged plumbing should not be subject to the $5,000 cap.

The Fourth District disagreed, finding that the endorsement covered all such loss *arising out of* water damage, including tear-out and access damage. The court relied on the plain language of the endorsement and recognized that, to the extent an endorsement is inconsistent with the policy, the endorsement controls. Notably, the endorsement stated, "It is hereby understood and agreed that for such insurance as is afforded by this policy, loss(es) paid for damage *arising out of water* shall be subject to a maximum amount of $5,000 during the policy term." *Herrington* cited the Third District's decision in *Certain Interested Underwriters at Lloyd's London v. Pitu, Inc.* (Florida Third DCA 2012) (citing the Fifth District), for the proposition that "arising out of" is a broader term than "caused by," and instead, akin to "growing out of," "flowing from," and "incident to." The court declined to recognize a difference, however, between the terms "arising out of water" and "arising out of water damage." It thus affirmed summary judgment, holding that the insured's covered loss for water damage, including tear-out expenses, was limited to $5,000 by the endorsement.

On February 18, 2022, the Fifth District issued an opinion on the subject, which at first glance seems to be in conflict with *Herrington* and *Pitu*. In *Security First Insurance Company v. Vazquez* (Florida Fifth DCA 2022), the court reviewed an order granting summary judgment in favor of the policyholder in a water damage case. But, unlike in *Herrington*, it found that the endorsement did *not* limit "tear-out costs," and thus such expenses were not subject to the endorsement's $10,000 limit. The specific endorsement language at issue in *Vazquez* stated, "Sudden and accidental *direct* physical loss to covered property by discharge or overflow of water or steam from within a plumbing . . . system . . . ." and the limit of liability stated, "*all damage to covered property* provided by this endorsement is $10,000 per loss." The insurer argued that the limit applied to both water damage and tear-out costs, while the homeowners argued that the $10,000 limit only applied to the water damage.

The court acknowledged the insurer's claim that a water damage loss necessarily includes tear-out costs, but ultimately concluded that while that may be true, the limitation of liability provision did not use the term "water damage loss," but "damage to covered property." The court relied on the plain language of the limit of liability provision and found that it supported the homeowners' argument because the concrete slab that had to be removed was *not* damaged by the discharge or overflow of water. The court also pointed out that this specific policy had a mold endorsement that expressly included "[t]he cost to *tear out* and replace any part of the building or other covered property as needed to gain access to the fungi, mold . . ." but the court declined to

read that language into the water damage endorsement. Thus, the water damage endorsement *did not* also limit tear-out costs.

Importantly, the endorsement language in *Herrington* was distinct from the language in *Vazquez*. In *Herrington*, the endorsement limit accounted for *damage arising out of water*, which is more encompassing than the endorsement limit in *Vazquez*, which limited *all damage to covered property*. In fact, the Fifth District specifically acknowledged that the *Vazquez* endorsement did not state, "water damage loss," which made it unclear whether tear-out costs were included. Rather than a circuit split, the two decisions involve endorsements that are distinguishable. Nevertheless, policy drafters should be clear and specific when attempting to limit coverage for certain categories of loss, because when faced with the question of whether tear-out costs are subject to a water damage limitation, the answer is a lawyer's favorite: "It depends."

If you have any questions about these appellate opinions or any other first-party matter, please contact David B. Levin or Brian W. Fernandez at Baker Donelson.