

## INSURANCE AND REINSURANCE

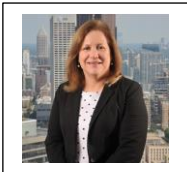
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### IN THIS ISSUE

*Karen Karabinos reports on jurisdictions finding coverage for the first thirteen days of seepage or leakage and how the damages are determined.*

## Seepage or Leakage: What Coverage Exists for the First 13 Days?

### ABOUT THE AUTHOR

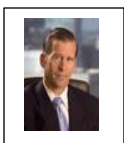


**Karen K. Karabinos** is a partner with Drew Eckl & Farnham in Atlanta, Georgia. She has been litigating cases for more the 33 years, with the last 22 focused on the complexities of first party property insurance law, including cyber insurance. She partners with her clients in their investigation and adjustment of property claims and in defending them in coverage, bad faith, arson, fraud and property damage cases in State and Federal Courts throughout Georgia and the Southeast. She can be reached at [karabinosk@deflaw.com](mailto:karabinosk@deflaw.com).

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The Insurance and Reinsurance Committee members, including U.S. and multinational attorneys, are lawyers who deal on a regular basis with issues of insurance availability, insurance coverage and related litigation at all levels of insurance above the primary level. The Committee offers presentations on these subjects at the Annual and Midyear Meetings.

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*The International Association of Defense Counsel serves a distinguished, invitation-only membership of corporate and insurance defense lawyers. The IADC dedicates itself to enhancing the development of skills, professionalism and camaraderie in the practice of law in order to serve and benefit the civil justice system, the legal profession, society and our members.*

Since 2017, several courts have held that the exclusion for damages caused by “seepage or leakage” of water which occurs “over a period of weeks, months, or years” does not bar coverage for damages occurring during the first 13 days. If a court finds such coverage exists, questions remain regarding the damages recoverable. For example, who will have the burden of separating the damages that may have occurred within the first 13 days of the leak from the remaining damages? In addition, what evidence is needed to differentiate such damages? Two opinions issued by the United States District for the Middle District of Georgia offer some insight.

In 2017, Judge Abrams penned the first Federal Court opinion in Georgia to hold that the term “weeks” in the exclusion is construed to mean at least fourteen days, and therefore, water losses occurring within the first 13 days are covered. *Taylor v. Foremost Ins. Co.*, 2017 WL 8777469, No. 5:15-cv-164 (M.D. Ga. August 31, 2017). In that case, the insured observed that a well supplying water to his rental property had broken. On the day of discovery, the well was fixed, but when the insured returned eight days later, he saw water “pouring out the front door.” *Id.* at \*1. Former tenants apparently had left a faucet on, but when the water was turned back on after it had been shut off during the repairs, the water ran causing structural damage to the insured’s home. Foremost denied coverage, in part, based on the exclusion barring coverage caused by “continuous on repeated seepage or leakage of water of

steam from within a plumbing, heating, fire protective sprinkler or air conditioning system or from within an appliance which occurs over a period of weeks, months, or years.” Foremost contended the exclusion applied “because the water occurred over eight days, which is greater than one week.” The insureds, however, argued that the term “weeks” applies to period of more than 14 days. Judge Abrams noted that the term was not defined in the policy, and was susceptible to one or more meanings, and was thus ambiguous. Due to the ambiguity, Judge Abrams held that the term “weeks” is construed to mean at least fourteen days, and therefore, the insured’s water loss that occurred over an eight-day period was covered.

In *Taylor*, Judge Abrams did not have to address how to assess the amount of damage that occurred within the first thirteen days versus the remaining period in which the water seeped or leaked. That issue, however, was recently addressed by her colleague Judge Self in *Landrum v. Allstate Insurance Company*. In that case, water seeped from a supply line running from the kitchen sink to the refrigerator ice maker for a 25-day period. 2019 WL 5068656 (5:18-cv-000458; October 9, 2019). Allstate denied the insured’s claim after its adjuster determined that, based on the extent of the mold growth, the water had been running for “enough time” to deny the insured’s claim under the “continuous or repeated seepage and leakage” exclusion.

While Judge Self recognized that based on *Taylor*, the insured's damages caused by the first 13 days would not be excluded, he found no guidance in that opinion on how to separate the damages caused by the first 13 days and those caused by the remaining 12 days. The damages in *Taylor* involved a leak lasting only eight days, thus clearly were less than 14 days.

The insured in *Landrum* cited two cases as guidance for Judge Self. In the first case, *Wheeler v. Allstate Insurance Company*, the insured's expert determined that the amount of flooding needed to cause the damage would have occurred in the first three days of the flood. 687 F. App'x 757, 758 (10<sup>th</sup> Circ. 2017). According to that expert, "the damages were not greater, because the flood continued longer than three days" Allstate's expert, however disagreed opining that there was no way to determine the extent of the damage that occurred during the first 13 days. *Id.*

In the second case, *Hicks v. American Integrity Insurance Company of Florida*, the insurance company denied the insured's water damage under the "seepage and leakage" exclusion based on its expert's determination that the water had been leaking for "five weeks or more." 214 So. 3d 925, 927 (Fla. Dist. Ct. App. 2018). The insured did not dispute the expert's findings but, based on the court's opinion in *Wheeler*, she sought coverage for damages that occurred during the first 13 days, which a forensic general contractor calculated as \$40,926.77. *Id.* at 926. Based on that

evidence, the district court thus reversed the trial court's order granting the insurer summary judgment and ordered partial summary judgment be entered in the insured's favor with the extent of the loss to be determined at trial.

Whereas the records in *Wheeler* and *Hicks* contained evidence of the damages that occurred during the first 13 days, Judge Self found that the insured's estimate in *Landrum* did not differentiate the damages that occurred in the first 13 days from the damages that occurred in the remaining 12 days of the leak. The judge held that there was "nothing in the record to suggest that such a differentiation has been, or even can be made." He also noted that the insured admitted "that her damage result from a 'water loss that occurred at the Property between March 11, 2018 and April 4, 2018' and not from a shorter period of that loss." *Id.* at \*4. Judge Self thus granted the insurer's motion for summary judgment in *Landrum*.

In those jurisdictions that are now finding coverage for the first 13 days of a water leak, the application of the "seepage or leakage" exclusion will focus on the evidence establishing the amount of water released that could have caused the damage within the first 13 days. But who bears the burden of proving the damages occurring in the first 13 days of damage? The courts in these cases appear to place this burden on the insured. The burden then shifts to the insurer "to provide that a particular loss was sustained after the thirteenth day and is

therefore not covered under the language of the exclusion provision.” *Hicks, supra* at 926. Thus, an insurer who is investigating and adjusting a water damage claim involving seepage or leakage of water should be armed with an expert who can differentiate between the damages during the applicable time periods at issue or make a compelling case why such a differentiation cannot be done.

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