Expert Witnesses on the Handling of Property Insurance Claims, an Update and Reprint From "CATClaims: Insurance Coverage For Natural and Man-Made Disasters"

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Chapter 2. Claim Handling Issues[1]

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Asterisks (***) indicate material omitted for ease of reference.

§ 2:1.Introduction and interpretation

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Courts often follow the claim adjustment process in reaching their decisions in noncatastrophe cases, although not necessarily in the same order in which insurance companies actually adjust claims.[1] There is every reason to think that courts will follow the same process when they are confronted with catastrophe claims.[2]

*** On the other hand, hurricanes and other catastrophes are often predicted to follow the crippling lead of hurricanes such as Charley, Frances, Ivan, and Jeanne in 2004 and of Hurricanes Katrina, Rita, and Wilma in 2005. The effect of catastrophic events like these, and the reason for this book, are very well described by a federal judge in Mississippi who has been flooded (you should pardon the expression) with catastrophe claims in the two years that have followed Hurricane Katrina and Hurricane Rita to date. The author of this Chapter inputs the following lengthy passage with some trembling in his fingers on the keyboard. Long quotations are not a substitute for analysis. Further, long quotations are often boring to a lot of readers. For the first time, perhaps in recorded history, the author of this Chapter nonetheless offers the following long quotation in this text. The federal judge who wrote it originally cannot legitimately be accused of a want of analysis, and the following observations are certainly not boring to most people concerned with catastrophes, in any case:

> In the wake of an insured's catastrophic loss of his dwelling and possessions in an event such as a hurricane, an event that poses two different risks (flood damage and wind damage), it is not unreasonable for the insured to seek to collect all his available insurance coverages, and it is not unreasonable or otherwise improper, when he does not know and cannot readily ascertain the actual cause of his losses, for the insured to assert that all of his losses may be payable under either policy. Faced with uncertainty, the insured may turn to any of his coverages for indemnity. In this situation it would be unrealistic and unfair to impose a burden on the insured to segregate his damages between wind and water losses at the peril of losing his insurance coverage if he errs in this endeavor. It is far more reasonable in these circumstances to allow the insured to make a claim for all his losses under both flood coverage and wind coverage if the damages cannot be readily segregated or if the source of the damage is uncertain. The question whether the insured's damages are recoverable, and, if so, under which policy, must ultimately be resolved through either negotiation or litigation.[4]

[FN1] *See Smith v. Westfield Ins. Co.,* 2007 WL 1740816 (E.D. Pa. June 15, 2007), in which the court's decision reflects the identical steps ordinarily taken by insurance companies in adjusting first-party property insurance claims, though not necessarily in the same sequence. With regard to the initial step, confirming coverage, in the court's eyes a coverage determination itself involves four distinct steps:

> The determination of coverage here involves four steps. The first step is whether there has been a loss …. The second step is whether the loss falls within a policy exclusion …. The third step is whether the ensuing loss is itself excluded by a specific policy provision …. The fourth step is whether there is an *exception* to the mold *exclusion.*

Smith v. Westfield Ins. Co., 2007 WL 1740816 *2 (E.D. Pa. June 15, 2007). *See generally* Dennis J. Wall, Litigation and Prevention of Insurer Bad Faith § 9:5 (2d Edition Thomson/West Publishing).

[FN2] *See, e.g., Schmermund v. Nationwide Mut. Ins. Co*., 2008 WL 5169396 *2 (S.D. Miss. 2008) (stating in case involving Hurricane Katrina claim "There are too many unanswered questions with respect to the manner in which this claim was handled and the decisions that were made.").

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[FN4] *Robichaux v. Nationwide Mut. Ins. Co.*, 2007 WL 2783325 *2 (S.D. Miss. 2007). This does not mean that policyholders should ever obtain double recoveries, i.e., that insureds should ever recover twice for the same element of damage, even as part of a catastrophe claim:

> A payment under an insurance policy, whether it is a flood policy or a homeowners policy, offsets, dollar for dollar, the total losses the insured has experienced. The insured's total loss constitutes an upper limit on his recovery from all his insurance policies, and this upper limit is reduced, dollar for dollar, by the payment and acceptance of insurance benefits. This prevents any double recovery, i.e., any recovery of two insurance payments for a single loss.
>
> But the payment and acceptance of insurance benefits does no more than that, and the assertion of a right to recovery, in the face of legitimate doubt or uncertainty as to the risk that caused the loss, does not estop an insured from claiming and collecting other insurance benefits that prove to be covered by a separate policy.

continued page 18

Insurance Law Committee

continued from page 17

Robichaux, 2007 WL 2783325 at *2–*3. The date of this decision, September 21, 2007, is 22 days after the date of the decision of a panel of the Fifth Circuit Court of Appeals in the case of *Leonard v. Nationwide Mut. Ins. Co.*, 499 F.3d 419 (5th Cir. 2007), *cert. denied*, 128 S. Ct. 1873 (U.S. April 14, 2008). The federal district judge took this occasion to write the above-quoted remarks in the context of an order denying a motion for reconsideration of an order of remand, not usually the occasion for an opinion at all, but certainly the occasion for an opinion under the circumstances extant on that date. In *Leonard*, the appellate panel affirmed a judgment entered by the same federal trial judge in a Mississippi case but in which the panel wrote a long opinion stating its authors' disagreement with the Mississippi federal trial judge's reasoning which would have invalidated an anticoncurrent cause clause under Mississippi law. The three members of the Fifth Circuit panel in *Leonard* are Texas lawyers. In basic terms, an anticoncurrent cause clause such as Nationwide's clause sought out and embraced by the appellate panel in *Leonard*, would force an insured to segregate her, his or its damages between wind and water losses at the peril of losing his insurance coverage for damages caused by wind if she, he or it errs in this endeavor. See § 7:5, *infra.*

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Dennis J. Wall, Esq. has been a member of the OCBA since 1978.

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[1]The following article highlights the frequent need for Expert Witness Testimony in insurance cases. It is an Update through February, 2010, from a Section of a Chapter that I wrote and updated recently about "Claim Handling Issues," in *"CAT Claims: Insurance Coverage for Natural and Man-Made Disasters"* (West Publishing Company. Copyrighted. All Rights Reserved. No Reproduction Or Any Other Use Of This Material May Be Made for Commercial Purposes.)

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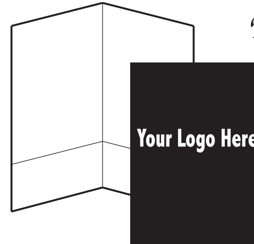

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