ATTACHMENT 14

Memorandum of Commonly Occurring Issues in Wind Claims –

Plaintiff's Counsel's Perspective (July 23, 2014)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

IN RE:

HURRICANE SANDY CASES

MEMORANDUM OF COMMONLY OCCURRING ISSUES IN WIND CLAIMS FROM PLAINTIFFS' COUNSEL'S PERSPECTIVE

This memorandum was prepared for the Court's Hurricane Sandy Arbitration/Mediation Training on July 30, 2014. The material for this memorandum was taken, in part, from the *Report of Plaintiff's Liaison Counsel In Response to Defendants' Report and List of Commonly Occurring Legal Issues,* which was filed by Plaintiffs' Liaison Counsel, Javier Delgado of Merlin Law Group, P.A. and Tracey Rannals Bryan of Gauthier, Houghtaling & Williams on March 14, 2014 in *In Re Hurricane Sandy Cases*, Case No. 1:14-mc-00041, in the U.S. District Court for the Eastern District of New York (Dkt. 280).[1]

INTRODUCTION

A windstorm/hurricane such as Superstorm Sandy by its very nature results in a wide range of damage caused by different covered and potentially excluded perils at different times during the storm. These perils include wind, flood, storm surge, fire, power outage, sewage back-up, etc. The

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[1] The following law firms assisted in the legal research and analysis contained in Dkt. 280:

1. Gauthier, Houghtaling & Williams
2. Merlin Law Group, P.A.
3. Leav & Steinberg, LLP;
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5. Wilkofsky, Friedman, Karel & Cummings;
6. Wolff & Samson, PC;
7. The Rain Law Firm;
8. Nesenoff & Miltenberg LLP;
9. Lerner, Arnold & Winston, LLP;
10. Ellis Ged & Bodden, P.A.;
11. Fensterstock & Partners LLP; and
12. Touro Law Center
13. Law Office of Mitchell Winn

difficulty for the Court, as experienced by prior courts[2], is deciding whether an insurance policy that covers wind damage but excludes flood damage, or vice versa, will provide insurance coverage when the property is damaged by a covered peril and damage also occurs from an excluded peril.

In the analysis of the circumstance presented above, a clause that is now standard in many insurance policies known as the anti-concurrent causation (ACC) clause will emerge as one of the most hotly debated clauses between the insured and the insurance carrier in Superstorm Sandy cases. It is important to consider that the ACC clause is a fairly new provision that was not tested in the context of a hurricane loss until Katrina, resulting in an Erie-guess by the Fifth Circuit that was later criticized by the Mississippi Supreme Court.[3] The burden of proof required under a flood policy versus a wind policy will be equally important. A wind policy is often written as an "all risk" insurance policy, and a flood policy is written as a named peril policy.

COMMONLY OCCURRING LEGAL ISSUES IN WIND CLAIMS

A. Fortuity

The burden of proving causation differs in first-party property insurance cases depending on whether the policy is a specified peril policy or an "all risk" policy. Under a specified peril policy, the insured has the burden of proving that the loss was caused by a specifically enumerated peril.[4] Alternatively, under an "all risk" policy, by contrast, "the insurer has the burden of proving that the cause of the loss is an excepted cause."[5]

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[2] *Leonard v. Nationwide Mutual Insurance Company,* 499 F.3d 491 (5th Cir. 2007) (making an "Erie" guess on Mississippi law) criticized by *Corban v. United Services Automobile Association*, 20 So.3d 601 (Miss. 2009) (applying the proper analysis under Mississippi Law in determining how to evaluate insurance coverage in Hurricane Katrina cases where the damages stem from both the covered peril of wind and the excluded peril of flood, and assessing whether or not the ACC clause applied in a Hurricane case).

[3] *Id.*

[4] *Strubble v. United Services Auto. Assn.*, 35 Cal. App. 3d 498, 504, 110 Cal. Rptr. 828, 831 (Cal Ct App 1973).

[5] *Mission Nat'l Ins. Co. v. Coachella Val. Water Dist.*, 210 Cal App. 3d 484, 492, 258 Cal Rptr 639, 643 (Cal Ct App 1989). *Accord, Garvey v. State Farm Fire & Casualty Co.*, 48 Cal. 3d 395, 406, 257 Cal. Rptr. 292, 298, 770 P.2d 704, 710 (1989).

Under an all risk policy, the insured has the burden to establish a *prima facie* case for recovery. The insured need only prove the existence of the all risk policy, and the loss of the covered property.[6] The very purpose of an all risk policy is to protect the insured in cases where it is difficult to explain the damage to the property; thus, the insured need not establish the cause of the loss as part of its case.[7]

Where an insured has met the burden of showing that a valid insurance policy was in full force and effect and that the insured incurred a presumptively covered loss, the burden of proof shifts to the insurer to demonstrate that an exclusion contained in the policy defeats the claim.[8] To negate coverage by virtue of an exclusion, an insurer must establish that the exclusion is stated in clear and unmistakable language, that it 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.[9]

Under an all-risk policy, the insurance carrier has a difficult burden to meet once the policyholder demonstrates a loss was sustained during the policy period. An essential purpose of all-risk insurance policies is to provide coverage when the exact cause of the loss cannot be established. "All risk insurance arose for the very purpose of protecting the insured in those cases where difficulties of logical explanation or some mystery surround the loss or damage to property."[10]

One New York Court noted that under an all-risk policy, losses caused by *any* fortuitous peril not specifically excluded under the policy will be covered. According to the Court:

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[6] *Pan American World Airways, Inc. v. Aetna Casualty and Surety Co.,* 505 F.2d 989, 999 (2d Cir.1974).
[7] *Atl. Lines Ltd. v. Am. Motorists Ins. Co.,* 547 F.2d 11, 13 (2d Cir.1976); *Holiday Inns Inc. v. Aetna Ins. Co.,* 571 F.Supp. 1460, 1463 (S.D.N.Y.1983).
[8] *Throgs Neck Bagels, Inc. v. GA Ins. Co. of New York,* 241 A.D.2d 66, 671 N.Y.S.2d 66 (1st Dep't 1998).
[9] *Throgs Neck Bagels, Inc. v. GA Ins. Co. of New York,* 241 A.D.2d 66, 671 N.Y.S.2d 66 (1st Dep't 1998); *Salimbene v. Merchants Mut. Ins. Co.*, 217 A.D.2d 991, 629 N.Y.S.2d 913 (4th Dep't 1995); *General Acc. Ins. Co. of America v. Idbar Realty Corp.*, 163 Misc. 2d 809, 622 N.Y.S.2d 417 (Sup 1994), order aff'd as modified on other grounds, 229 A.D.2d 515, 646 N.Y.S.2d 138 (2d Dep't 1996).
[10] *Formosa Plastics v. Sturge*, 684 F. Supp. 359, 366 (S.D. N.Y. 1987)

> An insured making a claim under an all-risk policy has the initial burden to establish a *prima facie* case for recovery. An insured meets this burden by showing: "(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. ***This burden has been characterized as "relatively light."***[11]

Thus, an insured under an all-risk policy needs only to show fortuitous loss and once that burden is met, the burden shifts to the insurer to establish that an exclusion applies.[12]

In New Jersey, an "all risk" policy covers all fortuitous losses that an insured peril proximately causes (unless an exclusion applies). *Zurich Am. Ins. Co. v. Keating Bldg. Corp.,* 513 F. Supp. 2d 55, 68 (D.N.J. 2007).

New Jersey's Appellate Division addressed the issue of who bears the burden of proof as to a policy exclusion. In *Advance Piece Dye Works, Inc. v. Travelers Indem. Co.*,[13] the policy provided coverage for goods of others in the insured's possession against all risks from any external cause, but excluding mysterious disappearance or theft by dishonest employees. The Superior Court, Appellate Division, held that the burden of proof that the loss was within the mysterious disappearance exclusion was on the insurer. Furthermore, the Supreme Court of New Jersey held, "the burden is on the insurer to bring the case within the policy's exclusion."[14] Therefore, the insurer's burden is a "heavy one" to negate coverage by virtue of exclusions in an all-risk policy.

B. Insurable Interest

To insure property against a risk of loss, the insured must have an insurable interest in that property; without an insurable interest, the insured could suffer no loss. However, once an insurable interest has been established at the inception of the policy, it is typically not invalidated by a later

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[11] *Channel Fabrics, Inc. v. Hartford Fire Ins. Co.*, 2012 WL 3283484 (S.D. N.Y. August 13, 2012).
[12] *Id.*
[13] 64 N.J. Super. 405, 166 A.2d 173 (1960)
[14] *Burd v. Sussex Mut. Ins. Co.*, 56 N.J. 383, 399 (1970).

transfer of the policy by assignment to a person who lacks a direct insurable interest in the property.[15]

In Tiemann v Citizens' Ins. Co., the plaintiffs were the owners of the insured property. The defendant had agreed to insure the plaintiffs "against all direct loss or damage by fire to the amount of six thousand dollars to the following described property." When the fire occurred the property was damaged in the amount of $1,050. The fact that the plaintiffs had offered to sell the property before the fire at the price they subsequently obtained, notwithstanding the impairment of its value by the fire, did not release the defendant from liability.[16]

C. Rules of Construction For Interpreting Insurance Policies

As stated above, a policyholder bears the initial burden of showing that the insurance contract covers the loss and that a loss of property occurred.[17]

Under New York law, the ordinary rules of contract interpretation apply to insurance policies.[18] Contract interpretation is a legal question for the court to decide.[19]

An insurance policy, like most contracts, is to be read in light of common speech and the reasonable expectations of a businessperson.[20] A written contract is to be interpreted so as to give effect to the intention of the parties as expressed in the clear language of the contract.[21]

Courts generally adhere to the rule that when an insurance policy is clear and unambiguous, the language of the policy controls – and courts are bound to enforce the express terms as they are

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[15] 31 N.Y. Prac., New York Insurance Law § 14:3 (2013-2014 ed.) (citing *Taylor v. Allstate Ins. Co.*, 214 A.D.2d 610 (2d Dep't 1995).

[16] 76 AD 5, 9-10 [1st Dept 1902]

[17] *Servidone Constr. Corp. v. Security Ins. Co. of Hartford,* 64 N.Y.2d 419, 423-425 (1985); *Roundabout Theatre Co. v. Continental Cas. Co.*, 302 A.D. 2d 1, 751 N.Y.S.2d 4, 7 (1st Dep't. 2002)(emphasizing that the policyholder bears the affirmative burden of proving coverage; burden remains the same under an "all risk" policy); *Int'l Paper Co. v. Cont'l Cas. Co.*, 35 N.Y.2d 322, 361 N.Y.S.2d 873 (1974).

[18] *Accessories Biz, Inc. v. Linda & Jay Keane, Inc.*, 533 F.Supp.2d 381, 386 (S.D.N.Y. 2008).

[19] *Int'l Multifoods Corp. v. Commercial Union Ins. Co.*, 309 F.3d 76, 83 (2d Cir.2002).

[20] *Gen. Motors Acceptance Corp. v. Nationwide Ins. Co.,* 4 N.Y.3d 451, 796 N.Y.S.2d 2 (2005); *Belt Painting Corp. v. TIG Ins. Co.*, 100 N.Y.2d 377, 383, 763 N.Y.S.2d 790 (2003).

[21] *Cruden v. Bank of N.Y.*, 957 F.2d 961, 976 (2d Cir.1992).

written.[22] Contract language is ambiguous if it is capable of more than one meaning when viewed objectively by a reasonably intelligent person who has examined the context of the entire integrated agreement and who is cognizant of the customs, practices, usages and terminology as generally understood in the particular trade or business.[23]

Where the policy language is ambiguous, "the court must interpret the language in context with regard to its purpose and effect in the policy and the apparent intent of the parties."[24] Only if the ambiguity remains unresolved, then it will be construed in favor of the insured.[25]

While the insured has the burden of proving that a valid policy was in existence on the relevant date and that a loss of property occurred, the insurer has the burden of showing that a claim falls within a policy exclusion.[26] In addition, "[t]he ambiguities in an insurance policy are construed against the insurer, particularly when found in an exclusionary clause."[27] To negate coverage 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."[28]

Policy exclusions cannot be extended by interpretation or implication, but must be given a strict and narrow construction.[29] Whether an ambiguity exists in an insurance policy is a question of law for the Court.[30]

New Jersey courts adhere to the following guidelines when interpreting insurance policies[31]:

> In interpreting insurance contracts the basic rule is to determine the intention of the parties from the language of the policy, giving effect to all of its parts so as to

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[22] *Accessories Biz*, 533 F.Supp.2d at 386.
[23] *Am. Home Assur. Co. v. Hapag Lloyd Container Linie, GMBH*, 446 F.3d 313, 316 (2d Cir.2006).
[24] *Rainbow*, 72 N.Y.2d at 106.
[25] *Id.*
[26] *Int'l Paper Co. v. Cont'l Cas. Co.*, 35 N.Y.2d 322, 361 N.Y.S.2d 873 (1974).
[27] *Ace Wire & Cable Co. v. Aetna Cas. & Sur. Co.*, 60 N.Y.2d 390, 469 N.Y.S.2d 655, 457 N.E.2d 761 (N.Y. 1983).
[28] *Cont'l Cas. Co. v. Rapid–Am. Corp.*, 80 N.Y.2d 640, 593 N.Y.S.2d 966 (N.Y. 1993).
[29] *Inc. Vill. of Cedarhurst v. Hanover Ins. Co.*, 89 N.Y.2d 293, 298, 653 N.Y.S.2d 68 (1996).
[30] *U.S. Underwriters Ins. Co. v. Tauber*, 604 F.Supp.2d 521, 527 (E.D.N.Y. 2009).
[31] *Stone v. Royal Ins. Co.*, 211 N.J. Super. 246, 248-49, 511 A.2d 717, 718-19 (App. Div. 1986).

accord a reasonable meaning to its terms. *Caruso v. John Hancock &c., Insurance Co.,* 136 *N.J.L.* 597, 598, 57 *A.*2d 359 (E. & A.1947); *Tooker v. Hartford Acc. & Indemn. Co.,* 128 *N.J.Super.* 217, 222-223, 319 *A.*2d 743 (App.Div.1974). When the terms of a policy are clear and unambiguous ****719** the court must enforce the contract as it finds it; the court cannot make a better contract for the parties than ***249** they themselves made. *Flynn v. Hartford Fire Insurance Co.,* 146 *N.J.Super.* 484, 488, 370 *A.*2d 61 (App.Div.1977), certif. den. 75 *N.J.* 5, 379 *A.*2d 236 (1977); *Am. Leg. Hosp. v. St. Paul's Fire Ins. Co.,* 106 *N.J.Super.* 393, 397, 256 *A.*2d 57 (App.Div.1969). Rules of construction favoring the insured cannot be employed to disregard the clear intent of the policy language. *Weedo v. Stone-E-Brick, Inc.,* 81 *N.J.* 233, 246-247, 405 *A.*2d 788 (1979).

However, where an ambiguity exists, it must be resolved against the insurer. *DiOrio v. New Jersey Manufacturers Insurance Company,* 79 *N.J.* 257, 269, 398 *A.*2d 1274 (1979); *Bryan Const. Co. Inc. v. Employers Surplus Lines Ins. Co.,* 60 *N.J.* 375, 377, 290 *A.*2d 138 (1972). If the controlling language will support two meanings, one favorable to the insurer and the other to the insured, the interpretation favoring coverage should be applied. *Corcoran v. Hartford Fire Ins. Co.,* 132 *N.J.Super.* 234, 243, 333 *A.*2d 293 (App.Div.1975). "Accordingly, such contracts are to be interpreted in a manner that recognizes the reasonable expectation of the insured." *Zuckerman v. Nat. Union Fire Ins.,* 100 *N.J.* 304, 320-321, 495 *A.*2d 395 (1985). Coverage clauses should be interpreted liberally, whereas those of exclusion should be strictly construed. *Butler v. Bonner & Barnewall Inc.,* 56 *N.J.* 567, 576, 267 *A.*2d 527 (1970); *Ellmex Const. Co., Inc. v. Republic Ins. Co.,* 202 *N.J.Super.* 195, 205, 494 *A.*2d 339 (App.Div.1985). Even if a particular phrase or term is capable of being interpreted in the manner sought by the insurer, "where another interpretation favorable to the insured reasonably can be made that construction must be applied." 202 *N.J.Super.* at 204, 494 *A.*2d 339.

D. An Insured Person Is Presumed to Understand the Terms of The Policy

Some New York courts have held that once an insured has received his or her policy, the insured is presumed to have read and understood it and cannot rely on the broker's representations[32] that the policy covers what is requested.[33] Other courts, including the New York Court of Appeals, have not strictly followed this rule and do not find it a bar to recovery. These courts have held that

[32] Insurance agents have a common-law duty to obtain requested coverage for their clients within a reasonable time or inform the client of the inability to do so; however, they have no continuing duty to advise, guide or direct a client to obtain additional coverage. *See Murphy v. Kuhn,* 90 N.Y.2d 266, 270, 660 N.Y.S.2d 371 (1997). To set forth a case for negligence or breach of contract against an insurance broker, a plaintiff must establish that a specific request was made to the broker for the coverage that was not provided in the policy. *See Hoffend & Sons, Inc. v. Rose & Kiernan, Inc.,* 7 N.Y.3d 152, 155 (2006). A general request for coverage will not satisfy the requirement of a specific request for a certain type of coverage. *Id.* at 158.

[33] *Busker on Roof Ltd. Partnership Co. v. Warrington,* 283 A.D.2d 376, 377, 725 N.Y.S.2d 45 (1st Dept. 2001).

an insured can maintain an action for breach of contract and negligence to procure adequate insurance coverage.[34]

In *American Building Supply*, a recent New York Court of Appeals decision, the insured sued the broker for failure to procure general liability coverage for the insured's employees in case of injury, which was a requirement of the insured's commercial lease agreement.[35] Although the insured informed the broker of its coverage requirements the policy was issued with a cross-liability exclusion that barred coverage for injury.[36] The insured did not read the policy upon receipt, nor did the broker.[37]

The court held that receipt and presumed reading of the policy does not automatically bar an action for negligence against the broker where the insured requested specific coverage, and that an insured may look to the expertise of its broker for insurance matters.[38] The court observed the split of authority on this issue, but considered the facts of the case similar to those in which the appellate courts did not enforce the presumption if specific coverage was requested.[39]

In *Aden v. Forth* [40], the New Jersey Supreme Court held that an agent cannot use the comparative fault defense that his client failed to read his or her insurance policy in order to reduce or eliminate liability to the insured. In analyzing the broker liability issue, the Supreme Court looked to professional liability case law stating "[t]he view that comparative or contributory negligence generally may not be charged when a professional breaches his or her duty to a client

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[34] *American Bldg. Supply Corp. v. Petrocelli Group, Inc.*, 19 N.Y.3d 730, 736, 955 N.Y.S.2d 854 (2012); *Kyes v. Northbrook Prop. & Cas. Ins. Co.*, 278 A.D.2d 736, 737-738, 717 N.Y.S.2d 757 (3d Dept. 2000)(finding existence of viable question of fact pertaining to whether insured had right to rely upon broker's presumed obedience to insured's instructions in procuring proper coverage); *Reilly v. Progressive Ins. Co.*, 288 A.D.2d 365, 366, 733 N.Y.S.2d 220 (2d Dept. 2001)(observing that insured made specific request for coverage, thus failure to read policy does not preclude broker's potential liability).

[35] *Id.*

[36] *Id.*

[37] *Id.*

[38] *Id.*

[39] *Id.*

[40] 169 N.J. 64, 776 A.2d 792 (2001)

reflects our heightened expectations of professional services in this State."[41] Accordingly, the majority decision found:

> [T]he comparative negligence defense is unavailable to a professional insurance broker who asserts that the client failed to read the policy and failed to detect the broker's own negligence. It is the broker, not the insured, who is the expert and the client is entitled to rely on that professional's expertise in faithfully performing the very job he or she was hired to do. [42]

E. Causation

Significantly, when a loss occurs "sequentially in a chain of causation to produce" a single loss, New Jersey will look to the cause that set the chain of events in motion. [43] If the "moving cause" was covered, the loss is covered. [44] If a loss occurs from multiple causes, only some of which are covered, that "combine to produce an indivisible loss," there is a burden-of-proof issue. [45] In this instance, it is up to the insured to prove the amount of damages emanating from a covered peril. [46]

New Jersey courts, which also utilize the term "efficient proximate cause", apply a broader interpretation of the standard that is favorable to insureds, finding coverage so long as there is a covered cause within the chain of events: "with regard to sequential causes of loss, our courts have determined that an insured deserves coverage where the included cause of loss is either the first or last step in the chain of causation which leads to the loss."[47] Furthermore, "it is for the fact-finder to determine which part of the damage was due to the included cause of loss and for which the insured is entitled to coverage."[48]

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[41] *Aden,* 169 *N.J.* at 75.
[42] *Id.* at 69-70.
[43] *Flomerfelt v. Cardiello*, 997 A.2d 991, 1000 (N.J. 2009).
[44] *Id.*
[45] *Auto Lenders Acceptance Corp. v. Gentilini Ford Inc.*, 854 A.2d 378 (N.J. 2004).
[46] *Flomerfelt*, 997 A.2d at 1000. *See also Newman v. Great Am. Ins. Co.*, 207 A.2d 167 (N.J. Super. Ct. App. Div. 1965), *and Simonetti v. Selective Ins. Co.*, 859 A.2d 694, 700 (N.J. Super. Ct. App. Div. 2004).
[47] *Simonetti,* 859 A.2d at 700.
[48] *Id.*.

In New York, the efficient proximate cause doctrine has been applied for over 100 years, even in situations involving hurricane or high wind[49]. In *The G.R. Booth,* the United States Supreme Court examined several early first party insurance cases where the doctrines of proximate cause and efficient proximate cause were relied upon to evaluate coverage.[50]

The Court noted that generally, in determining the cause of loss, the proximate cause to which the loss is attributed is or may be the dominant or efficient cause.[51] More recent cases in New York have also applied the efficient proximate cause doctrine.[52]

F. Exclusions

a. Applicable Burden of Proof between Insured and Insurer

As stated above, the burden of proving an affirmative defense on an insurance policy is upon the insurer; conversely, the burden to establish coverage and a duty to indemnify lies with the insured.[53]

b. Anti-Concurrent Causation (ACC) Clause

The analysis should first begin with the question: Is the ACC clause applicable to a Superstorm Sandy case where the property was damaged by covered and excluded perils? This analysis has been applied in Hurricane Katrina cases, as further explained below. It is also important to understand the ACC clause and its origins.

This Court's ruling on the ACC clause will impact every insured that suffered damage from wind and water to the insured property. As explained by William F. "Chip" Merlin, Jr., *in Corban*

[49] *Protzman v. Eagle Fire Co. of New York,* 272 A.D. 319 (1st Dep't 1947); *The G.R. Booth,* 171 U.S. 450 (1898).
[50] 171 U.S. 450 (1898) citing *Waters vs. Insurance Company,* 11 PET. 312; *Insurance Company vs. Tweed,* 7 WALL. 44; *Insurance Company vs. Transportation Co.*, 12 WALL. 194; and *Insurance Co. vs. Boon*, 96 US 117.
[51] 31 New York Practice, New York Insurance Law Section 15:4 (213-214 Ed.) citing *Toncin vs. California Insurance Company of San Francisco,* 294 N.Y. 326, 62 N.E.2d 215, 160 A.L.R. 944 (1945).
[52] In *Kosich v. Metro. Prop. & Cas. Ins. Co.,* 214 A.D.2d 992, 626 N.Y.S.2d 618 (1995), the Court concluded that plaintiffs' losses were caused by asbestos contamination, coverage for which was specifically excluded under the policy issued. Here, the contractor's cutting into vinyl flooring with a chain saw set in motion a chain of events that ultimately resulted in plaintiffs' losses. Plaintiffs' losses, however, were proximately caused by asbestos contamination and losses caused by "contamination" are specifically excluded from coverage. *Gravino v. Allstate Ins. Co.,* 73 A.D.3d 1447, 1449, 902 N.Y.S.2d 725, 726 (2010); *Ocean Partners, LLC v. N. River Ins. Co.,* 546 F. Supp. 2d 101, 115 (S.D.N.Y. 2008).
[53] *Acerra v. Gutmann*, 294 A.D. 2d 384 (2d Dep't 2002).

v. USAA: A Case for Providing Far too Little Because It was Rendered Far too Late, the United States Fifth Circuit Court of Appeals' "Erie guess" on Mississippi law resulted in over two years of underpaid insurance claims and forced settlements that would otherwise not have been accepted by policyholders who had spent thousands on insurance premiums.[54]

In response to the concurrent causation doctrine[55] relied upon by the courts as the default rule in insurance coverage litigation[56], insurance companies began inserting the ACC clause into property policies in the 1980s and 1990s to prevent court decisions requiring the insurance carrier to provide insurance coverage where the damage to the property was caused by both a covered and an excluded peril.[57]

There are typically two forms of ACC clauses.[58] In response to these new forms, courts initially found the ACC Clause valid and enforceable.[59]

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[54] 79 Miss. L.J. Supra 129 (2009).

[55] *37 A.L.R. 6th 657,* citing Lertner, Simpson, Bjrokman Law and Practice of Insurance Coverage Litigation §52.9, construction and application of Anti Concurrent Causation (ACC) clauses and insurance policies (2014). Before the advent of the ACC clause the courts routinely relied on the concurrent cause doctrine to find that the insurance company was responsible for paying the damages resulting from the entire event whenever two of more perils appreciably contributed to the loss and at least one of the perils was covered under subject insurance company.

[56] In 1973, the California Supreme Court decided in *State Farm Mut. Auto Ins. Co. vs. Partridge,* 514 P.2d 123, 131 (Cal. 1973), finding that a loss was covered by an insurance policy, even if other excluded causes combined to produce the loss. *Eric S. Knutsen, Confusion about Causation in Insurance: Solutions for Catastrophic Losses,* 61 Ala. L Rev. 957, footnote 67, the California Supreme Court later restricted the liberal concurring causation approach to cases involving only liability insurance in *Garvey vs. State Farm Fire and Casualty Company*, 48 Cal 3d 395, 770 P.2d 704, 714 (Cal. 1989), and instead adopted the dominant or proximate cause approach for property insurance cases involving concurrent causation. *Id.* at footnote 67.

[57] David Rossmiller, "*ACC Clauses at the Heart of Wind vs. Wave Debates"* Claims Journal, March 14, 2013.

[58] The first ACC clause is the short form that states: "we do not cover loss to any property resulting directly or indirectly from any of the following. Such loss or damages excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss."[58] 37 A.L.R 6th 657 (2014).
The second ACC clause is referred to as the long form which states: "we do not insure under any coverage for any loss which would not have occurred in the absence of one or more of the following excluded events. We do not insure proofs of loss regardless of: (a) the cause of the excluded event; or (b) other causes of loss; or (c) whether other causes acted concurrently or any sequence with the excluded event to produce the loss; or (d) whether the event occurs suddenly or gradually, involved isolated or widespread damage, arises from natural or external forces, or occurs as a result of any combination of these."[58] *Id.* at 37 A.L.R. 6th 657, §3 Standard ACC Clauses

[59] One of the first cases that held the ACC Clause in the insurance policy valid was the District Court of Nevada in 1991 applying Nevada law. *See Shroader vs. State Farm Fire and Cas.*, 770 F.Supp. 558 (D. Nev. 1991). See also, 37 A.L,R. 6th 657 II Validity of ACC Clause §4 ACC Clause held valid (2014).

Throughout the years, different theories interpreting the ACC clause have evolved. The more conservative approach is to find that there is no coverage for any portion of the loss so long as the damage was caused by both a covered and non-covered event. The liberal approach states that if property is damaged by both a covered and non-covered peril, then coverage exists for the entire amount of the loss. Finally, the majority approach to concurrent causation is to determine the efficient or dominant proximate cause. This approach validates the insurers' contractual rights and obligations as well as the insured's reasonable expectation of coverage, requiring courts to determine the covered dominant or efficient proximate cause.[60] This approach is in line with the reasonable expectations of the consumer, and does not provide either side with a windfall.[61]

The issue of whether the ACC clause applied in a hurricane case (Hurricane Katrina) was hotly debated by the parties and ultimately decided by the Mississippi Supreme Court in *Corban v. United Services Auto. Assn.*[62]

The Corban home sat several hundred feet from the Mississippi Gulf Coast and was significantly damaged, along with personal property inside after Hurricane Katrina.[63] After receiving the maximum flood coverage afforded by the NFIP, the Corbans were left with over $1 million in uncompensated losses.[64] The lower court concluded that pursuant to the earlier decision

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[60] See *Peter Nash Swisher, Why Won't My Homeowners Insurance Cover My Loss?*: Reassessing Property Insurance Concurrent Causation Coverage Disputes, 88 Tul. L. Rev. 515 (page 533-534 Feb 2014).

[61] Peter Swisher argues that the dominant or efficient concurrent causation approach is justified not only because it honors the reasonably expectation of the policyholder's coverage, is supported by the well established insurance rationale of liberally resolving any ambiguity in insurance coverage disputes in favor of the insured (the non-drafting party), and strictly construing such ambiguities against the insurer (the drafting party). *Id.* at 534-535; citing to Robert E. Keeton and Alan Widiss, Insurance Law 553-59 (1988); William Mark Lashner, note, a common law alternative to the doctrine to reasonable expectation in the construction of insurance contracts 57 NYU L Rev. 1175 (1982).

[62] 20 So.3d 601 (Miss. 2009).

[63] *Id.* at 605-06.

[64] *Id.* at 606-07.

of the United States Fifth Circuit Court or Appeals in *Leonard*[65] and *Tuepker*[66], the Corbans could not recover for the wind damage under their homeowner's policy.[67]

After an interlocutory appeal, the Mississippi Supreme Court framed the issues:

(1) Whether the court erred in finding that "storm surge" is included in the "water damage" exclusion.
(2) Whether the court erred in finding that the ACC clause applicable.
(3) Which party bears the burden of proof? (a discussion on the court's ruling on this topic can be found under the burden of proof section).

In answering the first issue, the Court concluded that "storm surge" was contained unambiguously within the "water damage" exclusion of the policy.[68]

In deciding whether the lower court erred in finding that ACC clause applicable, the Mississippi Supreme Court reasoned that a hurricane includes a number of weather conditions, elements, and/or forces, at times acting dependently, at other times independently.[69] The Court reasoned in accord with the U.S. District Court for the Southern District of Mississippi, in *Dickinson v. Nationwide Mut. Fire Ins. Co.,*[70]

> It is clear to me that storm surge flooding cannot be a cause (directly or indirectly) of damage that occurs before the storm surge flooding reaches the insured property, i.e. before the excluded peril of flooding occurs....
> Wind damage that precedes the arrival of the storm surge and damage that happens after the storm surge arrives are separate losses from separate causes, and not concurrent causes or sequential causes of the same loss[.]...
> Wind damage that precedes the flood damage happens in a sequence of events, but the wind damage is not caused, directly or indirectly, by storm surge flooding, and the damage done by the wind is therefore not a part of "'the loss"' the ACC refers to.

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[65] *Leonard v. Nationwide Mut. Ins. Co.*, 499 F.3d 419 (5th Cir. 2007).
[66] *Tuepker v. State Farm Fire & Cas. Co.*, 507 F.3d 346 (5th Cir. 2007).
[67] *Id.* at 607-08.
[68] *Id.* at 608.
[69] *Id.* at 614 -16. The court examined the term "concurrently" in the ACC clause, defined as 1. occurring at the same time. 2. Operating in Conjunction. 3. Meeting or tending to meet at the same point: Convergent. An insurer cannot avoid its obligation to indemnify the insured based upon an event which occurs after a covered loss but cautioning that the same principle applies in reverse, in the case of an excluded loss caused by an excluded peril.
The Court also examined the term "in any sequence" in the ACC clause, to mean "sequentially" defined as, 1. Forming or marked by a sequence, as of notes of or units." Webster's II New College Dictionary at 1008. See also Garner, A Dictionary of Modern Legal Usage at 795 ("'sequential' means 'forming a sequence or consequence.'") and found that the term conflicts with other provisions of the USAA policy thereby creating an ambiguity allowing the provision most favorable to the insured to stand.
[70] 2008 WL 1913957, at 2-4 (S.D. Miss.2008).

> Since the ACC does not apply to this separate wind damage, the wind damage is a covered loss. The insurance benefits that apply to this covered loss vest in the insured at the time the loss occurs.[71]

The *Corban* court did not agree and could not find support for the Fifth Circuit's "Erie-guess" in *Tuepke*r and *Leonard* and stated: "only when facts in a given case establish a truly "'concurrent'" cause, i.e., wind and flood simultaneously converging and operating in conjunction to damage the property, would we find, under Mississippi law, that there is an "'indivisible'" loss which would trigger application of the ACC clause.[72] These are issues of fact for jury determination.[73]

Other states, in addition to Mississippi, have dealt with the same or similar issues resulting from a hurricane loss and the ACC clause in the standard insurance policy.[74] In addition, more recent decisions applying Mississippi law have applied the analysis and conclusion of *Corban.*[75] Other states have interpreted the ACC clause to require an analysis of efficient proximate cause to determine coverage.[76]

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[71] *Id.* at 617, citing *Dickinson v. Nationwide Mut. Fire Ins. Co.*, 2008 WL 1913957, at 2-4 (S.D. Mass. 2008); see also; *Pitts v. Am. Sec. Life Ins. Co.*, 931 F.2d 351, 358 (5th Cir. 1991); *Bland v. Bland,* 629 So.2d 582, 589 (Miss. 1993).

[72] *Id.* at 618.

[73] *Id.*

[74] In Florida, a recent opinion from the Second District Court of Appeal held that the efficient proximate cause theory should be applied to a hurricane loss where the insurance policy has an ACC clause, disagreeing with the concurrent causation standard set in place by Florida's Third District Court of Appeals. *American Home Assur., Inc. vs. Sebo*, 2013 WL 5225271 (Fla. 2d DCA 2013). In *Sebo,* in October 2005 Hurricane Wilma struck Naples and caused damage to the Sebo residence. In April 2006, the insurer denied coverage for most of the claimed losses, relying on the ACC clause, and claiming that damage to the home were due to more than one cause of loss including several excluded causes such as defective construction, rain, and wind. Thus the carrier claimed no coverage existed. The *Sebo* court did not accept the insurer's position, and found that causation of the loss should be examined under an efficient proximate cause analysis.

[75] *Hoover vs. United Services Automobile Association,* 125 S.3d 636 (2013), (finding that the *Hoovers* satisfied the burden required by *Corbin and* were entitled to payment unless the insurer could prove that the causes of the losses are excluded by the policies in this case of flood damage. The ultimate allocation of wind and water damage is a question of fact. *Penthouse Owners Association, Inc. vs. Certain Underwriters at Lloyds London,* 612 F. 3d 389-390 (U.S. Ca. 5th 2010).

[76] In North Carolina, Courts have applied the dominant or efficient proximate cause doctrine in cases involving loss from hurricane. *Harrison vs. Insurance Co.*, 11 N.C. App. 367, 181 S.E. 2d 253 (1971); *Wood vs. Insurance Company*, 245 N.C. 383, 96 S.E. 2d 28 (1957); and *Miller vs. Insurance Association*, 198 N.C. 572, 152 S.E. 684 (1930). See also *Erie Insurance Exchange vs. Bledsoe*, 141 N.C. App. 331 (N.C. C.A. 2000), (although not a hurricane loss, the court reasoned the homeowner's policy provide coverage for property loss so long as a non-excluded cause is either the sole or the concurrent cause of the injury giving rise to liability; the excluded cause must be the sole cause in order to exclude coverage).

New Jersey has not fully decided the issue of whether an anti-concurrent causation clause will be enforced in an insurance policy. [77]

While New York courts have upheld certain ACC clauses if the nature of the damage is truly "*concurrent*" within the definition of the clause,[78] it is undisputed that the ACC clause in the context of a hurricane loss has not been analyzed by a Court in New York.

In sum, a strong case exists for New Jersey and New York courts to adopt an efficient proximate cause analysis in reviewing Superstorm Sandy cases, in spite of the existence of an ACC clause.

c. Weather Conditions Exclusion

Defendants may assert that some insurers' policies contain a "weather conditions" exclusion which may apply to bar coverage for loss caused by water damage. In New York, Defendants may rely on *Hamm v. Allstate Prop. & Cas. Ins. Co.*,[79] to support their contention that weather conditions that contribute in any way with a cause of event excluded by the policy should additionally be excluded. Yet, other federal courts have not agreed with such blanket exclusions.

Two decisions by judges presiding over Hurricane Katrina cases are instructive regarding the "weather conditions" exclusion and the application of such an exclusion to the cases before this Court will be an issue of fact for the Court.

First, in *Leonard v. Nationwide Mut. Ins. Co.*,[80] an exclusion in a homeowners' insurance policy for loss resulting directly or indirectly from "weather conditions," if another excluded peril contributed to loss, was held to be ambiguous. The policy as a whole provided explicitly for

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In Georgia, the standard in the presence of an ACC clause is the Efficient Proximate Cause Doctrine. *Burgess v.. Allstate Ins. Co.*, 334 F.Supp. 2d 1351(N.D.Ga. 2003)(in evaluating whether there is coverage for a water leak, the efficient proximate cause doctrine applies when two or more identifiable causes contribute to a single property loss.

[77] *Assurance Co. of America, Inc. v. Jay-Mar, Inc.*, 38 F.Supp.2d 349 (D.N.J. 1999)

[78] See Doc. Number 273;14-mc:0041-CLP-GBR-RER, *Jahier v. Liberty Mut. Group,* 64 A.D.3d 683, 883 N.Y.S.2d 283 (2d Dept. 2009).

[79] 908 F. Supp. 2d 656, 659 (W.D. Pa. 2012).

[80] 438 F. Supp. 2d 684 (S.D. Miss. 2006). *aff'd but criticized*, 499 F.3d 419 (5th Cir. 2007).

windstorm coverage, and then purported to exclude same coverage if windstorm was viewed as a weather condition, and an excluded peril, such as a flood, occurred at approximately the same time. Therefore, the Court found that coverage would have been illusory for insureds who faced a risk of flood damage.

Second, in *Buente v. Allstate Ins. Co.*,[81] policyholders alleged that damage to their property was caused by "hurricane, wind, rain, and/or storm surge" from Hurricane Katrina. The insurer relied upon a weather condition exclusion. The policy also contained a hurricane deductible endorsement which would require a higher deductible payment by the policyholders in the event of hurricane damage and provided that it would "cover damages sustained in a hurricane because of the effects of rain, hurricane winds, and objects that might be carried by those winds."[82] The Court found "the policy is ambiguous and its weather exclusion therefore unenforceable in the context of losses attributable to wind and rain that occur during a hurricane." [83]

G. Damages and Valuation

RCV or ACV:

Policies of insurance often state the insured must set forth an *intention* to rebuild within 180 days as a condition precedent to receiving the replacement value of the insured's property. Under such a policy, a letter sent to the carrier within six months of the loss expressing the insured's intention to seek this recovery should suffice. Policies requiring that the insured *complete* the repair or rebuild within 180 days of receiving the actual cash value payment have been upheld by New York courts.[84] However, New York courts have also taken into consideration that insureds may be financially unable to repair or replace their property without first receiving replacement costs.[85]

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[81] 422 F. Supp. 2d 690 (S.D. Miss. 2006).
[82] *Id.* at 696.
[83] *Id.* at 696.
[84] In *Woodhams v. Allstate Fire and Casualty Company*, 453 Fed.Appx. 108 (2d Cir. 2010), the insureds brought a class action arising out of the insurers' practice of requiring insureds who suffer real property losses due to fire to replace or complete their repairs within a 180-day window to receive reimbursement for the cost of the replacement or repair. The

The *Zaitchick* court awarded the insureds the full replacement cost of their house and reasoned that "plaintiffs were refused any monies under the insurance contract. Not surprisingly, they were unable to replace their home. This conduct by defendant made it impossible for plaintiffs to fulfill the condition precedent, and therefore, excuses plaintiffs from performance of the replacement condition." *Id.* at 217.

Furthermore, New York courts have held that while actual replacement of the property is a condition precedent to collecting replacement proceeds, it is not a condition precedent to valuing a hypothetical replacement cost.[86]

Accordingly, although New York courts have upheld provisions requiring the completion of repairs within 180 days of the loss, they will also look to the insured's specific situation in

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Court held that the policy did not violate New York state law and that the insurer did not breach the terms of the policy. (*See also, Sher v. Allstate Insurance Co.*, 947 F.Supp.2d 370 (S.D.N.Y. 2013).

[85] In *Zaitchick v. American Motorists Ins. Co.*, 554 F.Supp.209 (S.D.N.Y. 1982), *aff'd without opinion*, 742 F.2d 1441 (2d Cir. 1983), *cert. denied*, 464 U.S. 851, 104 S.Ct. 162, 78 L.Ed.2d 148 (1984), there was a dispute over damages arising from a fire that destroyed a house. The insurance policy, allowed for either payment of actual cash value or replacement cost. The policy required the insured to actually replace the house before receiving an award of replacement costs. The court found that the defendant insurance company wrongfully refused to pay the insured the actual cash value of the house, and because of this wrongful denial, the insureds did not have the funds to finance the replacement of their home.

[86] In *Woodworth v. Erie Ins. Co.*, 743 F.Supp.2d 201 (W.D.N.Y. 2010), the insured brought an action against the insurer for breach of contract after the insureds' home was completely destroyed by an explosion and fire. Specifically, the insureds' breach of contract claim was based on the insurer's failure to engage in an appraisal process with respect to replacement cost. The policy at issue stated "in the event of a loss, [the insurer] will pay [the insureds] either the actual cash value of the property or, if [the insureds] replace or rebuild the property, the cost of replacing or rebuilding." *Id.* The court expressly stated that its previous analysis in stating "the amount of loss, if any, attributable to repairing or replacing the home cannot be determined until the repair or replacement is completed" was incorrect. Instead, the Court followed the analysis set forth by Judge Mukasey in *SR Intern. Business Ins. Co. Ltd. v. World Trade Center Properties, LLC*, 445 F.Supp.2d 320, 333 (S.D.N.Y. 2006). This more accurate interpretation of New York law was as follows:

> Although actual replacement is a condition precedent to *collecting* replacement proceeds, it is not a condition precedent to *valuing* hypothetical replacement cost...To the contrary, the facts underlying several cases demonstrate that hypothetical replacement cost is routinely calculated prior to the determination of whether a policyholder is entitled to recover replacement cost. *See, e.g., D.R. Watson Holdings, LLC v. Caliber One Indem. Co.*, 15 A.D.3d 969, 969, 789 N.Y.S.2d 787, 787 (4th Dept. 2005); *Harrington v. Amica Mut. Ins. Co.*, 223 A.D, 222, 224, 645 N.Y.S.2d 221, 222 (4th Dept. 1996); *Kumar v. Travelers Ins. Co.*, 211 A.D.2d 128, 130, 627 N.Y.S.2d 185 at 186 (4th Dep't 1995)... This timing makes sense because the early calculation of hypothetical replacement cost informs the insured of the upper limit on the funds available for rebuilding and can thus influence the insured's decision as to whether and how to rebuild.

The court also noted that "[w]hile rebuilding the house may be a condition precedent to payment, it is not a condition precedent to valuation of the loss." *Woodworth* at 212.

determining whether it is wrongful for an insurer to refuse to pay the insured more than the actual cash value basis prior to the completion of the repairs.[87]

In *Ward v. Merrimack Mut. Fire Ins. Co.*[88], the insurer refused to pay the insured's fire damage claim unless the insured repaired or replaced the building. The New Jersey Supreme Court, Appellate Division noted:

> The insured's intention to repair or replace the damaged structure is not enough to trigger the carrier's obligation to pay. *National Tea Co. v. Commerce & Indus. Ins. Co.*, 119 *Ill.App.*3d 195, 74 *Ill.Dec.* 704, 456 *N.E.*2d 206, 212 (1983); *Hilley v. Allstate Ins. Co.*, 562 *So.*2d 184, 189 (Ala.1990); *BSF, Inc. v. Cason,* 175 *Ga.App.* 271, 333 *S.E.*2d 154, 157 (1985). To excuse the condition precedent, the facts must show that "the promisor [insurer] has *caused* the non-performance of the condition.... If the promisee [insured] could not or would not have performed the condition, or it would not have happened whatever had been the promisor's conduct, the condition is not excused." 5 *Williston on Contracts* § 677 (Jaeger ed.1961) (emphasis added).[89]

Therefore, although an insured would normally have to repair or replace damaged property in order to recover the replacement cost value of the damaged property, an insurer will be estopped from arguing that an insured cannot demand replacement costs when it has not repaired or replaced the property when the insurer's conduct frustrates the insured's ability to satisfy the precondition.

Off-Set/Credit Under Homeowners Policy for Amount Paid Under Flood

Each case should be reviewed separately based on the applicable facts and circumstances.

H. Policy Conditions

Duty to Cooperate

In New York, an insured's state law claim cannot be invalidated or diminished for failure to submit a proof of loss unless the insurer after the loss or damage provides the insured with written notice that it desires a proof of loss to be furnished and provides a suitable blank form or forms.

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[87] Id. refer to footnotes 36-37.
[88] 332 N.J. Super. 515, 753 A.2d 1214, 1218-21 (N.J. Super. Ct. App. Div. 2000)
[89] 332 N.J. Super. At 526-27, 753 A.2d at 1214, 1220 (N.J. Super. Ct. App. Div. 2000)

The insured is deemed to have complied with the insurer's proof of loss request if the proof of loss form is provided to the insurer within 60 days after the receipt of the notice and forms, or within any longer period of time specified in the notice by the insurer.[90]

An insurer may, by waiver or estoppel, lose its right to defeat a recovery because of the insured's failure to comply with policy provisions as to notice or proofs of loss.[91]

Whether or not the insured complied with a condition in the insurance policy is determined on a case by cases basis and usually presents a genuine issue of material fact for a jury. [92] [93]

New Jersey courts have held that an insurer has a right to request specific financial documents which are relevant to a property insurance claim, and where the insured fails to substantially comply with such a request for information which is material to the investigation, the insured may be in breach of his or her contractual duty to cooperate under the policy.[94]

I. Extra Contractual Claims

It is anticipated that Plaintiffs in many cases will have extra-contractual or consequential damages claims. Certain New York decisions dismissed fraudulent misrepresentation and inducement, breach of the implied covenant of good faith and fair dealing, bad faith denial of coverage, and New York General Business Law claims *only because* the specific allegations in those complaints did not allege duties or misconduct outside of the breaches of the express terms of the insurance contract.[95]

In New Jersey, consequential damages may be recoverable in a bad faith claim:

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[90] N.Y. Ins. Law § 3407 (McKinney)

[91] *Co. v. New York Susquehanna and Western Ry.* Corp., 275 A.D.2d 977, 713 N.Y.S.2d 624 (4th Dep't 2000); *Santa v. Capitol Specialty Ins., Ltd.*, 96 A.D.3d 638, 949 N.Y.S.2d 15 (1st Dep't 2012).

[92] *Gulf Ins. Co. v. Stradford*, 873 N.Y.S.2d 713 (2d Dep't 2009) (genuine issues of material fact as to whether an insured violated a policy's cooperation clause precluded summary judgment for an insurer.)

[93] 29 N.Y.Prac., Sum. Jdgmt. & Rel. Term. Motions § 1:16

[94] *DeMasi v. Lexington Ins. Co.*, A-3206-08T3, 2010 WL 3075674 (N.J. Super. Ct. App. Div. July 23, 2010))

[95] *Funk v. Allstate Ins. Co.*, No. 13 CV 5933 (JS) (GRB) (E.D.N.Y. Dec. 13, 2013) and *Dufficy v. Nationwide Mut. Fire Ins. Co.*, No. 13 CV 6010 (SJF) (AKT) (E.D.N.Y. Dec. 2, 2013).

> In the case of processing delay, bad faith is established by showing that no valid reasons existed to delay processing the claim and the insurance company knew or recklessly disregarded the fact that no valid reasons supported the delay. In either case (denial or delay), liability may be imposed for consequential economic losses that are fairly within the contemplation of the insurance company.[96]

For these reasons, any conclusion about the potential viability of extra-contractual or consequential damages claims is fact-intensive and specific to each case.

J. Lender Placed Policies

Plaintiff homeowners who are not the "named insureds" under a lender-placed insurance policy have standing to sue. While New Jersey and New York courts have not been confronted with this precise question, the courts that have looked at this issue often conclude that homeowners are third-party beneficiaries to the lender-placed insurance policies, and as such have standing to sue for its breach.[97] This is especially so where the lender-placed policy names the homeowner as the "borrower" or "mortgagor," or the lender-placed policy covers losses in excess of the mortgagee's loss.[98]

K. Coverage for Interior Damages

The following is a typical affirmative defense filed by Defendants in cases pending in this Court: "[I]nterior damages are not covered because there was no physical damage to exterior roofs or walls."

During a hurricane, it is not unusual to have water damage to the interior of a building without any actual physical damage to the exterior of the building. For example, wind driven rain can seep into a home or business around balconies, doors and windows even though there was no physical damage to the building that caused an opening.

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[96] *Pickett v. Lloyd's,* 131 N.J. 457, 481, 621 A.2d 445, 457-58 (1993)

[97] *Fawkes v. Balboa Ins. Co.*, 2012 WL 527168 (M.D.Fla. Feb. 17, 2012) (*reconsideration* denied); *Conyers v. Balboa Ins. Co.*, 935 F. Supp. 2d 1312 (M.D.Fla. 2013); *Lee v. Safeco Ins. Co. of America*, 2008 WL 2622997 (E.D. La. July 2, 2008) (collecting cases after Hurricane Katrina); *Lumpkins v. Balboa Ins. Co.*, 812 F. Supp. 2d 1280 (N.D.Ok. 2011).

[98] *See id.*

Some insurance policies contain water exclusions or limitations of coverage to the interior of the building, or the property contained in the interior of the building, unless a windstorm damages the exterior roof or walls of the structure through which the water enters. This policy limitation/exclusion is often referred to as the wind-driven rain exclusion.

An example of the typical wind-driven rain policy limitation/exclusion is:

> "We will not pay for loss or damage to the interior of any building or structure, or the property inside the building or structure, caused by rain, snow, sleet, sand or dust whether driven by windstorm or not, unless the direct force of Hurricane, other Wind, or Hail damages the building or structure causing an opening in the roof or wall and the rain, snow, sleet, sand or dust enters through this opening."

Therefore, the important inquiry is not whether the rain damage occurred but whether that damage was the result of physical damage caused by the wind. Undoubtedly, an expert will be needed to establish proximate cause that the interior damage was caused by the wind and that the resultant interior damages are covered despite the absence of a clear opening.

Plaintiffs are aware that some New York courts have barred recovery for interior damage where there is not an exterior opening.[99] It is evident that in cases where there is interior damage

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[99] In *Kennel Delites, Inc. v. T.L.S. NYC Real Estate, LLC*, 49 A.D.3d 302 (1st Dept. 2008), the First Department dismissed a portion of the plaintiff's claim for recovery of the policy for interior property damage and business income losses. The policy in effect barred recovery for interior property damage and business income losses caused by rain. Plaintiff contended that the damage was due to debris and mortar that fell from a neighboring building, which then clogged its roof drain, causing the rainwater to accumulate and later enter the building. The Court held that a reasonable person would conclude that the damage occurred from the rainwater that fell from the previous evening's storm and would look no further for alternate causes. The insured was allowed to continue their claim for roof damage.
In *Fernandes v. Allstate Ins. Co.*, 305 A.D.2d 1065 (4th Dept. 2003), the Appellate Division granted an insurer's motion for a directed verdict. The policy provided coverage for property damage caused by windstorm. The provision excluded any loss caused by "frost, cold weather, ice, snow or sleet, whether wind driven or not... as well as any loss inside a dwelling caused by rain, snow, sleet, unless the wind first damages the roof and the wind forces rain, sleet, snow, through the opening."
The homeowner in the case claimed that her roof collapse on January 17, 1999 was proximately caused by a windstorm that occurred on Labor Day weekend in 1998. Plaintiff's expert was precluded from offering his opinion at trial because it was not based on facts in the record or personally known to the witness. The Court was deliberate to note that "there was simply no valid line of reasoning and permissible inferences" which could possibly lead a trier of fact to see the causal connection.
In *A&B Furniture, Inc. v. Pitrock Realty Corp.*, 16 Misc.3d 1131, 847 N.Y.S.2d 900 (Sup. Ct. Kings Cnty. 2007) the trial court dismissed plaintiff's complaint against the insurer's following a storm that caused a roof to collapse and cause further damage to plaintiff's inventory. Investigation revealed that the collapse occurred from accumulating water on the roof and not from windstorm.

without an exterior opening, or a question of what caused the exterior damage that allowed for the interior damage, proximate cause will need to be established by expert testimony in a manner that allows for a reasonable inference to be drawn by the trier of fact.

L. Mitigation of Damages

The following is a typical affirmative defense filed by insurers:

> "If any of the Plaintiffs' damages are a result of failure by the Plaintiffs to take reasonable steps to mitigate the loss, those damages are not recoverable."

In *Royal Indemnity Co. v. Grunberg*[100], the insurer brought a declaratory judgment action when the insured sought indemnification for costs to prevent an imminent collapse of the insured dwelling. The policy expressly covered a "collapse" or "partial collapse" due to defective materials or methods of construction and the risk of imminent collapse had been caused by substandard foundation materials and improper site preparation and construction. The New York court, in holding that the insured was entitled to recovery, refused to interpret the language of the policy insuring against loss as a result of "collapse" to require that an actual complete collapse must have occurred in order to permit recovery, finding that the mandate to make necessary repairs to protect the property from further damage permitted recovery for the costs of repair where the degree of proven structural impairment was sufficient to constitute a "collapse" in most jurisdictions and created the imminent danger of total collapse. [101]

The court held "thus, since it has been demonstrated that the building did not first sustain actual damage to its roof and fall by the direct force of the wind which caused water damage due to water entering the building through openings made by the wind (*see Protzmann v. Eagle Fire Ins. Co. of NY*, 272 App.Div. 319, 320 [1947]) and that wind was not the proximate, efficient, and dominant cause of the water damage (*see Album Realty Corp.*, 80 N.Y.2d at 1010) or the direct cause of the damage to plaintiff's property (compare *Mawardi v. New York Prop. Ins. Underwriting Assn.*, 183 A.D.2d 756, 757 [1992]), plaintiff's claim was not covered under the subject policy issued by Tower (*see Litrenta v. New Hampshire Ins. Co.*, 203 A.D.2d 261, 262 [1994])."

[100] 155 A.D.2d 187, 553 N.Y.S.2d 527 (3d Dep't 1990).

[101] *Royal Indemnity Co.*, 155 A.D.2d at 189-90, 553 N.Y.S.2d at 529.

In *Klein's Moving & Storage, Inc. v. Westport Ins. Corp.,*[102] the insured sustained damages to its warehouse storage facility following a fire and sought the costs of the direct physical damage and the costs of what insured believed to be a "mitigation" of further losses. The policy contained a provision spelling out the insured's duties in the event of a loss, and required the insured to "[t]ake all reasonable steps to protect the Covered Property from further damage and keep a record of your expenses necessary to protect the Covered Property, for consideration in the settlement of this claim".[103] Following the fire, the insured believed it necessary to move and manipulate the remaining contents in the warehouse while the damaged portions of the facility were cleaned, repaired and repainted, which amounted to $30,851.25.[104] The insurance company made payments for the direct physical losses sustained, but refused to pay for any of the costs associated with moving and manipulating the warehouse contents despite the insured's demand.[105] The court determined that the insurance company had no obligation under the policy to compensate the insured for the costs incurred in moving property within its warehouse so as to permit cleaning, painting and restoration of the premises because it did not consider painting and repairs "covered causes of loss", nor did such activities prevent further direct loss to covered property.[106]

In New Jersey, a plaintiff has a duty to mitigate damages when "the defendant has already committed an actionable wrong, whether tort or breach of contract, then this doctrine limits the plaintiff's recovery by disallowing only those items of damages which could reasonably have been averted ..."[107] It is well settled that the duty to mitigate begins upon the plaintiff's knowledge of the

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[102] 196 Misc. 2d 735, 766 N.Y.S.2d 495 (Sup. Ct. Kings Co. 2003).
[103] *Klein's Moving & Storage, Inc.,* 196 Misc. 2d at 736, 766 N.Y.S.2d at 497.
[104] *Id.*
[105] *Id.*
[106] *Klein's Moving & Storage, Inc.*, 196 Misc. 2d at 740, 766 N.Y.S.2d at 500.
[107] *Ostrowshi v. Azzara,* 111 N.J. 429, 545 A.2d 148, 151 (N.J.1988).

defendant's breach. [108] However, there is no duty to mitigate until the plaintiff s aware that the defendant's actions have constituted a breach. [109]

While an insured has a duty to mitigate damage once some damage has occurred of which it has knowledge, the insured has no duty to lessen damage that occurred before it was informed and able to mitigate.[110] Therefore, in cases where an insured takes steps to minimize the harm already incurred, the insured is lessening an already vested damage recovery right and is, therefore, entitled to reimbursement for its reasonable expenses from its insurer.[111]

M. Depreciation

In a first party property insurance policy, depreciation is the difference between the replacement cost value (RCV) and actual cash value (ACV). The important issue to consider is whether or not depreciation should be applied. If it is determined that depreciation should be applied, then what is the proper rate of depreciation?[112] Depreciation should arguably not apply to intangibles such as labor, since depreciation is physical deterioration applied to materials.[113] Several jurisdictions, including New York follow the principle that partial losses requiring repair are never depreciated.[114]

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[108] Restatement (Second) of Contracts cmt. f (1981) (The injured party is expected to arrange a substitute transaction within a reasonable time after he learns of the breach.)

[109] *Koppers Co. Inc. v. Aetna Cas. & Sur. Co.* 98 F.3d 1440, 1448 (3d Cir.1996) ("[D]uty to mitigate its damages arises upon defendant's breach of contract ... [I]n the context of an insurance contract ... upon insurer's breach by failing to indemnify the insured, the insured has a duty to mitigate its damages".)

[110] *McNeilab, Inc. v. N. River Ins. Co.,* 645 F. Supp. 525, 551 (D.N.J. 1986)

[111] *Id.*, citing *Chemical Applications Co. v. Home Indem. Co.,* 425 F.Supp. 777 (D.Mass.1977).

[112] Don Wood, P.A. and, John Wood, J.D., "Insurance Recovery After Hurricane Sandy: Correcting the Improper Depreciation of Intangibles Under Property Insurance Policies", NYSBA Tort, Insurance & Compensation Law Section Journal (Winter 2013 Vol.42, No.1. p. 19.)

[113] *Id.* at 22.

[114] *Id.* at 20, citing to *Am. Reliance Ins. Co. v. Perez*, 689 So.2d 290 (Fla. 3d DCA 1997); *Eshan Realty Corp. v. Stuyvesant Insurance Co. of New York*, 202 N.Y.S.2d 899, aff'd, 12 A.D.2d 818, 210 N.Y.S.2d 256 (1961), aff'd, 11 N.Y.2d 707 (1962); *Thomas V. Am. Family Mut. Ins. Co.*, 233 Kan. 775 (1983).

In *Goorland v. New York Property Ins. Underwriting Ass'n*[115] the court examined the depreciation issues cited as follows:

> In *Lazaroff v Northwestern National Insurance Company of Milwaukee, Wis.*, (121 N.Y.S.2d 122 [Sup Ct, New York County], affd 281 App Div 672, 117 N.Y.S.2d 690 [1st Dept 1952]) the court found that the insurer's obligation was to "reimburse the plaintiff for the cost of repairs with materials of the kind and quality damaged without deduction for depreciation." *Id.* at 123, 117 N.Y.S.2d 690; *Eshan Realty Corporation v Stuyvesant Insurance Company* (25 Misc.2d 828, 202 N.Y.S.2d 899, supra)(same); see also *Boskowitz v. Continental Insurance Company,* 175 App Div 18, 161 N.Y.S. 680 (1st Dept 1916)(court called for insurer to pay cost to repair or replace with materials of like kind and quality, and did not require consideration of depreciation).

In other cases, after the New York court's reading of the policy, depreciation was properly considered.[116]

In *Elberon Bathing Co., Inc. v. Ambassador Ins. Co., Inc.,* the insurance company issued an excess fire policy insuring the plaintiff "to the extent of the actual cash value of the property at the time of the loss, but not exceeding the amount which it would cost to repair or replace the property with material of like kind and quality."[117] The appraisal was based on replacement cost, without deduction for depreciation. The New Jersey Supreme Court held that such a standard "contravenes the measure of recovery provided for in the policy, that being "actual cash value."[118]

N. Overhead and Profit

The following is another typical affirmative defense filed by insurers:

> "In an abundance of caution, Defendant asserts as an affirmative defense that if the subject property has been sold prior to repairs being made, Plaintiffs are not entitled to overhead and profit. Further, Defendant asserts as an affirmative defense that FEMA Claims Manual regarding overhead and profit and FEMA's Bulletins."

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[115] 2011 WL 1456287 (Slip Opinion, Unpublished).
[116] *Id.*; See also *Incardona v Home Indemnity Company, 60* AD2d 749 (4th Dept 1977); *Sebring v. Firemen's Insurance Company of Newark, N.J.,* 227 App Div 103, 237 N.Y.S. 120 (4th Dept 1929).
[117] 77 N.J. 1, 389 A.2d 439, 8 A.L.R.4th 519 (1978)
[118] 77 N.J. 1, 6, 389 A.2d 439, 441 (1978)

Under New York law, costs to replace damaged buildings or structures include "profit and overhead whenever it is reasonably likely that a general contractor will be needed to repair or replace the damage."[119] In fact, an insurance company must provide coverage for profit and overhead even if the replacement work is never performed, so long as the work is of the type that would require the services of a general contractor.[120] One court, interpreting a policy that covered "the cost to repair or replace property with new materials of like kind and quality," determined that since overhead and profit are "well-recognized types of costs," a policy that does not explicitly exclude such costs will be deemed to cover them.[121] Unless an insurance company can show that it has provided "the only fair construction of the policy" *in question,* the policy will be read in the policyholder's favor to include any reasonable costs that are not explicitly excluded.[122] New York's stance aligns with the vast majority of other jurisdictions that have considered the issue.[123]

The general rule in adjusting insurance claims with respect to overhead and profit is if there are three trades or more required to fix the damaged property, then overhead and profit should be included in the estimate.[124]

In homeowners' insurance policies which provided that until damaged property was actually repaired or replaced, the insurer would pay actual cash value of damage not to exceed replacement cost or policy limits, the policies were reasonably interpreted to include contractor's profit and overhead whenever it was reasonably likely that contractor would be needed to repair or replace damage, regardless of whether repairs or replacement actually occurred.[125]

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[119] *Mazzocki v. State Farm Fire &. Corp.,* 766 N.Y.S.2d 719, 722 (App. Div. 2003).
[120] *Id.* at 722-23.
[121] *Mills v. Foremost Ins. Co.,* 511 F.3d 1300, 1305 (11th Cir. 2008).
[122] *Mazzocki supra..*
[123] See, e.g., *Mills,* 511 F.3d at 1305; *Tritschler v. Allstate Ins. Co.,* 144 P.3d 519, 529 (Ariz. Ct. App. 2006); *Salesin v. State Farm Fire &. Co.,* 581 N.W.2d 781, 786 (Mich. Ct. App. 1998); *Mee v. Safeco Ins. Co. of Am.,* 908 A.2d 344, 350 (Pa. Super. Ct. 2006); *Gilderman v. State Farm Ins. Co.,* 649 A.2d 941, 945 (Pa. Super. Ct. 1994).
[124] Markham, "Property Loss Adjusting", AIC 35 2nd Ed., American Institute for CPCU, Insurance Institute of America (p.8-9.): "As a general rule, the contractor's markup is justified if restoring the loss requires three or more trades."
[125] *Mazzocki,* supra.

O. Appraisal

New Jersey law provides that either party, the insured or insurer can invoke appraisal even when coverage is disputed. *See Ward v. Merrimack Mut. Fire Ins. Co.*, 332 N.J. Super. 515, 528, 753 A.2d 1214, 1221 (N.J. Super. Ct. App. Div. 2000) (citing *Hala Cleaners, Inc. v. Sussex Mut. Ins. Co.*, 115 N.J. Super. 11, 12-13, 277 A.2d 897 (Ch. Div. 1971)). The law in New Jersey does not clearly define the scope of appraisal or whether causation can be determined in appraisal as part of the "amount of loss"; however these issues will become clearer as Superstorm Sandy claims are litigated.

A favorable appraisal award will not bar a subsequent bad faith action in New Jersey. In *Bello v. Merrimak Mutual Fire Insurance Company*, [126] the policyholder suffered a windstorm loss that damaged his roof and retaining wall. There was a dispute over the cause of damage to the retaining wall. The carrier demanded appraisal, but the policyholder instead filed suit on several grounds but did not include a bad faith count. The policyholder sought over $400,000 for repairs to the retaining wall and another $200,000 for landscape repairs. The carrier offered a settlement of approximately $62,000. Upon the insurer's motion, the Court compelled appraisal, resulting in a $100,750 appraisal award for the policyholder, which the carrier paid. "Thereafter, on motion, all contract claims against [the adjuster] were dismissed. And, by an order dated October 10, 2010, the trial judge allowed plaintiff to amend his complaint to add a claim alleging defendant's bad faith in delaying the resolution of his claim." The matter ultimately went to trial with a verdict exceeding $850,000 for the policyholder. That amount included almost $225,000 in attorneys' fees and costs. The New Jersey Supreme Court denied certification on December 12, 2012,[127] ending this case and allowing that a favorable appraisal award will not bar a subsequent bad faith action in New Jersey.

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[126] *Bello v. Merrimack Mut. Fire Ins. Co.*, 2012 WL 2848642 (N.J. App. July 12, 2012).
[127] *Bello v. Merrimack Mut. Fire Ins. Co.*, 212 N.J. 464 (2012).

COMMONLY OCCURRING LEGAL ISSUES IN CLAIMS AGAINST INSURANCE AGENTS

In New Jersey, an insurance broker owes a fiduciary duty of care to the insured. [128] "A broker is not an 'order taker' who is responsible only for completing forms and accepting commissions."[129] Further, "an insurance broker who agrees to procure a specific insurance policy for another but fails to do so may be liable for damages resulting from such negligence."[130] Accordingly, if someone asked his or her broker to obtain a policy to protect the property and that person is underinsured, the liability will likely be on the broker. The average person is not an expert on policy language and coverage and may not know how to read a policy. "Liability resulting from the negligent procurement of insurance is premised on the theory that a broker 'ordinarily invites [clients] to rely upon his expertise in procuring insurance that best suits their requirements'.[131] Accordingly, the law requires an insurance broker to possess reasonable knowledge of the types of policies, their different terms, and the coverage available in the area in which his principal seeks to be protected.[132]

In order to establish a prima facie case of negligence against an insurance broker, the plaintiff must demonstrate any one of the following:

1. the broker neglects to procure the insurance;
2. the broker secures a policy that is either void or materially deficient; or
3. the policy does not provide the coverage the broker undertook to supply.[133]

New Jersey law in professional negligence matters will generally seek to put the plaintiff in the position they would have been in, but for the negligence. This holds true for insurance broker negligence. The damages which may be recovered for breach of an agreement to furnish an

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[128] *Aden v. Fortsh*, 169 N.J. 64, 78, (2001).
[129] *Id.*
[130] *Id.*
[131] *Id.* (quoting *Rider v. Lynch*, 42 N.J. 465, 477, (1964)).
[132] *Rider, supra.*
[133] *President v. Jenkins*, 180 N.J. 550, (2004); *See also Rider v. Lynch*, 42 N.J. 465, 476, (1964).

insurance policy is the loss sustained by reason of the breach, 'the amount that would have been due under the policy provided it had been obtained.'[134]

CONCLUSION

We hope that this analysis is helpful to the Court and to our colleagues handling and resolving Superstorm Sandy claims.

Respectfully Submitted,

Dated this **23rd** day of **July, 2014.**

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[134] *Robinson v. Janay*, 105 N.J. Super. 585, 591 (App. Div. 1969) (quoting 43 Am.Jur.2d, Insurance, § 174, p. 231), cert. denied, 54 N.J. 508, (1969); *see also Cromartie v. Carteret Sav. & Loan*, 277 N.J. Super. 88, 99 (App.Div.1994).

ATTACHMENT 15

List of Commonly Occurring Issues in Non-NFIP Cases ("Wind")

Submitted on Behalf of Defendant Insurers (July 23, 2014)

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY
----------X

IN RE HURRICANE SANDY CASES
----------X

THIS DOCUMENT APPLIES TO THE JULY 30, 2014 HURRICANE SANDY ARBITRATOR TRAINING CONFERENCE
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LIST OF COMMONLY OCCURRING LEGAL ISSUES IN NON NFIP CASES ("WIND") SUBMITTED ON BEHALF OF DEFENDANT INSURERS

COMMONLY OCCURRING ISSUES

A. Fortuity

In order to recover under an all-risk policy, the insured must show a "fortuitous" loss of the covered property. See *Appalachian Ins. Co. v. Liberty Mut. Ins. Co.*, 676 F.2d 56, 63 (3d Cir. 1982). The insured bears the initial burden of demonstrating that it has suffered a fortuitous physical loss of or damage to a covered property and, if the insured sustains this burden, the burden then shifts to the insurer to demonstrate that the claimed losses are otherwise excluded from coverage. See *CPC Int'l v. Hartford Accident & Indem. Co.*, 316 N.J. Super. 351 (App. Div. 1998) ("...each policy encompasses the concept of fortuity by requiring that an event, in order to be insurable, must in some way be accidental or uncertain."), *Ariston Airline & Catering Supply Co. v. Forbes*, 211 N.J. 472 (N.J. Super. Ct. 1986).

B. Insurable Interest

An insured must have an "insurable interest" in property covered by a first-party property insurance policy. N.J.S.A. 17:37A-8. An "insurable interest" is defined by statute to mean "any lawful and substantial economic interest in the safety or preservation of property from loss, destruction or pecuniary damage." N.J.S.A. 17:37A-8(a). An insured cannot recover under the insurance policy if he or she does not have an insurance interest at the time of the loss. See

Shotmeyer v. N.J. Realty Title Ins. Co., 195 N.J. 72 (2008); *Balentine v. N.J. Ins. Underwriting Ass'n*, 406 N.J. Super. 137 (App. Div. 2009).

C. Rules of Construction For Interpreting Insurance Policies

New Jersey Courts have consistently recognized that insurance policies are contracts of adhesion and, as such, are subject to special rules of interpretation. *Longobardi v. Chubb Insurance Company*, 121 N.J. 530, 537 (1999); *Meier v. New Jersey Life Insurance Company*, 101 N.J. 597, 611-12 (1986). An insurance policy generally should be interpreted according to its plain and ordinary meaning. *Longobardi*, 121 N.J. at 537.

The test for ambiguity is whether the policy's phrasing is "so confusing that the average policyholder cannot make out the boundaries of coverage." *Weedo v. Stone-E-Brick, Inc.*, 81 N.J. 233, 247 (1979). Whether the contract terms are clear or ambiguous is a question of law. *Newport Associates Development Company v. The Travelers Indem. Co.*, 162 F.3d 789, 792 (3d Cir. 1998). In determining whether a contract is ambiguous, a court must consider the words of the agreement, alternative meanings suggested by counsel and extrinsic evidence offered in support of those meanings. *Pennbarr Corp. v. Insurance Co. of North America*, 976 F.2d 145, 151 (3d Cir. 1992). If the non-moving party presents a reasonable alternative reading of the contract, then a question of fact as to the meaning of the contract exists which can only be resolved at trial. *Tigg Corp. v. Dow Corning Corp.*, 822 F.2d 358, 361 (3d Cir. 1987).

In the absence of an ambiguity in the language of an insurance policy, a Court should not engage in a strained construction to support the imposition of liability. *Progressive Casualty v. Hurley*, 166 N.J. 260 (2001); *Brynildson v. Ambassador Insurance Company*, 113 N.J. Super 514, 518 (Law Div. 1971). In the absence of any ambiguity, courts "should not write for the insured a better policy of insurance than the one purchased." *Longobardi*, 121 N.J. at 537; see

also *President v. Jenkins*, 180 N.J. 550, 562 (2004); *Kampf v. Franklin Life Insurance Company*, 33 N.J. 36, 43 (1960) ("when the terms of an insurance contract are clear, it is the function of the court to enforce it as written and not to make a better contract for either of the parties").

D. An Insured Person Is Expected to Read the Policy

Under New Jersey Law, an insured is held to an elemental "principle of business morality and decency" namely, "[w]hen an insured purchases an original policy of insurance he may be expected to read it and the law may fairly impose upon him such restrictions, conditions and limitations as the average insured would ascertain from such reading." *Morrison v. Am. Int'l Ins. Co. of Am.*, 381 N.J. Super. 532, 542 (App. Div. 2005). An insured is chargeable with knowledge of the contents of their policy absent fraud or unconscionable conduct by the insurer. See *Botti v. CNA Insurance Company,* 361 N.J. 217 (2003); *Edwards v. Prudential Prop. & Cas. Co.*, 357 N.J. Super. 196, 204 (App. Div. 2003). The insured will only be held to that which would be reasonably apparently if the policy were read. *Herhardt v. Cont'l Ins. Cos.*, 48 N.J. 291 (1966).

E. Exclusions

a. Applicable Burden of Proof between Insured and Insurer:

Given that many claims may consist of damage caused by wind, a covered peril, and flood, an excluded peril, the applicable burdens of proof for the insured and insurer will be disputed.

New Jersey courts have recognized that the insured generally bears the burden of establishing that a claim is within the basic policy. *Cobra Products, Inc. v. Federal Ins. Co.*, 317 N.J. Super. 392 (App. Div. 1998) (citing *Diamond Shamrock Chemicals v. Aetna*, 258 N.J. Super 167, 216). However, the burden is on the insurer to establish that a claimed loss falls within a policy exclusion. *Figuera v. Hartford Ins. Co.*, 241 N.J. Super. 578, 583 (App. Div. 1990);

United Rental Equip. Co. v. Aetna Life & Cas. Ins. Co., 74 N.J 92, 99 (1977); *Burd v. Sussex Mut. Ins. Co.*, 56 N.J. 383, 399 (1970); *Pettinato v. Cigna Prop. & Cas. Cos.*, 303 N.J. Super. 576, 581-82 (Law Div. 1997). When the insured offers sufficient credible evidence to establish a prima facie loss within the coverage of a policy, the burden of proving that the loss falls within the exclusionary provisions of the policy shifts to the insurer. *Flomerfelt v. Cardiello*, 202 N.J. 432, 464-65 (2010).

Exclusionary clauses are to be strictly construed and "are enforceable only if clearly applicable, are narrowly read and any ambiguities are resolved in favor of the insured." *Mazzilli v. Accident & Cas. Ins. Co.,* 35 N.J. 1 (1961*); Morrone v. Harleysville Mut. Ins. Co.,* 283 *N.J. Super.* 411, 420 (App. Div. 1996.)

Courts consider whether the insurer could have used more precise language such that the matter would be beyond a reasonable question. *Aetna Ins. Co. v. Weiss,* 174 N.J. Super. 292, 296 (App. Div. 1980). Although exclusionary language should be strictly construed, this principle cannot operate to invalidate a clear and unambiguous exclusion. *Sinopoli v. N. River Ins. Co.*, 244 N.J. Super. 245 (App. Div. 1990); *Westchester Fire Ins. Co. v. Cont'l Ins. Cos.*, 126 N.J. Super. 29, 41 (App. Div. 1973), *aff'd o.b.*, 65 N.J. 152 (1974). The burden is on the insurer to demonstrate that the exclusion bars coverage, and that the insured's interpretation of the exclusion is entirely unreasonable. *Aetna v. Weiss, supra.*

b. Anti-Concurrent Causation Policy Provisions:

Generally, in proving a loss that is insured under a contract of insurance, the insured has the burden of demonstrating that the loss or damage to the insured property was caused by a peril covered under the insurance contract. The traditional standard of property insurance law has been what is known as the "proximate, moving, or efficient cause standard." See *R. Dennis Withers,*

Proximate Cause and Multiple Causation in First-Party Insurance Cases, 20 Forum 256 (January 1985). New Jersey law conforms with this standard. Under New Jersey law, an insured is entitled to coverage where the included cause of loss is "not necessarily the last act in a chain of events which is, therefore, regarded as the proximate cause, but the efficient or predominant cause which sets into motion the chain of events producing the loss". *Franklin Packaging Co. v. Cal. Union Ins. Co.*, 171 N.J.Super. 188, 191 (App.Div. 1979).

Many homeowners' policies contain anti-concurrent causation provisions, which bar coverage for an excluded loss even if a covered loss also contributed to the damage. For instance, some Homeowners' policies contain an anti-concurrent cause provision, which bars coverage for loss caused directly or indirectly by water damage, "regardless of any other cause or event contributing concurrently or in any sequence to the loss."[1] Courts in New Jersey and elsewhere have enforced anti-concurrent causation language. In *Assurance Company of America, Inc. v. Jay-Mar, Inc.*, 38 F.Supp.2d 349 (U.S. Dist. LEXIS 1839), the United States District Court for the District of New Jersey enforced this language in an exclusion concerning surface water flooding. Due to heavy rains, water entered Jay-Mar's premises from the ground level, causing substantial damage. Jay-Mar believed that the damage its property sustained was due to the backup or overflow of rainwater from nearby storm sewers, a cause of loss covered by its insurance policy. Believing that the damage was caused by surface water flooding, a cause of loss not covered by the policy, Assurance denied Jay-Mar's claim for coverage.

The Assurance Policy contained a Water Exclusion, including an anti-concurrent clause. The court noted that where included and excluded causes of loss occur concurrently, New

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[1] For example, the Policy may provide as follows:

We do not insure for loss caused directly or indirectly by any of the following. Such loss is excluded regardless of any other cause or event contributing concurrently or in any sequence to the loss. . . . c. Water Damage, meaning: (I) flood...."

Jersey's lower courts have not been predisposed to find coverage. Therefore, the court rejected Jay-Mar's argument that the part of the insurance policy provision excluding from coverage losses occasioned by simultaneously occurring included and excluded causes violates the state's public policy.

With regard to sequential causes of loss, the *Assurance* court noted that no New Jersey court has addressed whether an exclusionary provision dealing with sequential causes of loss like the one at issue, violates the state's public policy. Therefore, the court looked outside this jurisdiction for guidance. The court recognized that most courts that have addressed this issue have found that exclusionary language designed to avoid the "efficient proximate clause" doctrine is enforceable. Because the New Jersey Supreme Court has not provided any reason to believe otherwise, the court ruled that New Jersey would follow the majority rule regarding loss due to sequential causes and ruled that "there is no violation of public policy when parties to an insurance contract agree that there will be no coverage for loss due to sequential causes even where the first or last cause is an included cause of loss." Therefore, the court ruled that if Jay-Mar's loss was caused in any part by flood or surface water, it may not recover from Assurance.

While the Supreme Court of New Jersey has still not addressed the enforceability of sequential loss provisions in a Water Exclusion, the Superior Court of New Jersey, Appellate Division enforced such a provision in a Mold Exclusion in *Petrick v. State Farm Fire and Casualty Company*, 2010 N.J. Super. Unpub. LEXIS 1964 (N.J. Super. Ct. App. Div. Aug. 13, 2010). In *Petrick*, water infiltrated plaintiff's home during a 2005 Nor'easter. The infiltration resulted in water damage to the interior of the home and the development of a severe mold condition that impaired the building's structural integrity. The policy at issue contained a Fungus Exclusion Endorsement with a sequential loss provisions excluding coverage for damage caused

by fungus regardless of "other causes of the loss" or "whether other causes acted concurrently or in any sequence with the excluded event to produce the loss." An exception to that exclusion was provided in a limited coverage endorsement for fungus limiting coverage to $50,000, and that amount was paid to plaintiffs. The court, citing *Assurance*, noted that plaintiffs had made no compelling public policy arguments against the enforcement of the sequential loss provision and found the anti-sequential clause contained in State Farm's policy enforceable. The Appellate Division noted that this was not contrary to public policy "particularly since another policy rider restored limited coverage for this risk." *Id.* at 16.

c. Wear and Tear & Faulty Workmanship Exclusions:

Many homeowners' policies contain exclusions for loss caused by (1) wear and tear or deterioration and (2) faulty, inadequate or defective design or workmanship. Courts in New Jersey have enforced these exclusions where the evidence supports the loss being caused by one of these excluded perils. In *Grossberg v. Chubb Insurance Co. of N.J.*, 2012 N.J. Super. Unpub. LEXIS 1981 (Aug. 20, 2012), the Superior Court of New Jersey, Appellate Division ruled that exclusionary language avoiding the application of the efficient proximate cause doctrine was enforceable. There, the plaintiffs owned a vacation property that sustained rot damage to its siding which ultimately left the premises in danger of collapse. Experts retained by both the plaintiffs and Chubb determined that the decay had been caused in part by long term exposure to wind and wind-driven rain. The all-risk policy included the following exclusion:

> We do not provide coverage for the presence of wear and tear, gradual deterioration, rust, corrosion, dry or wet rot, or warping, however caused, or any loss caused by wear and tear, gradual deterioration, rust, bacteria, corrosion, dry and wet rot, or warping...

The plaintiffs argued that the loss was covered, as it was initially caused by wind, a covered cause of loss, even though the policy excludes other contributing causes. Chubb, on the other hand, argued that efficient proximate cause doctrine did not apply because the policy

excluded the loss "however caused." The court ultimately found for Chubb, explaining that while New Jersey courts rule in favor of coverage where a covered cause of loss was either the first or last step in the chain of causation, "it makes no difference what the cause of the excluded loss may have been, and the sequence of causes is likewise irrelevant." *Id.* at 16.

In *Weedo v. Stone-E-Brick*, 81 N.J. 233 (1979), a homeowner brought a claim against a contractor that poured a concrete floor in a veranda and applied stucco masonry to the exterior of the home. After completion there were cracks in the stucco and other signs of faulty workmanship, which the plaintiffs had to remove and replace. Stone-E-Brick sought coverage under a general liability policy with Pennsylvania National against the homeowner's claim to recover the cost of removal and replacement. The New Jersey Supreme Court upheld the Insurer's denial of coverage finding that the claim was for faulty workmanship, not for damage to property other than the insured's work.

F. Damages and Valuation

a. RCV or ACV

Where an insured seeks to recover under a policy on a replacement cost value basis (RCV), rather than a depreciated actual cash value (ACV) basis, the "actual repair of the property is a condition precedent to recovering on a replacement cost basis." *Executive Plaza, LLC v. Peerless Ins. Co.*, 717 F.3d 114, 117 (2d Cir. 2013). See also *Ward v. Merrimack Mut. Fire. Ins. Co.*, 332 N.J. Super. 515 (App. Div. 2000).

b. Off-Set/Credit Under Homeowners Policy For Amount Paid Under Flood

For those claims where insureds have already recovered for damage to their property caused by flood under a flood insurance policy, that insured's homeowner's insurer should be entitled to a credit or off-set for the flood payments to the extent the insured seeks to recover the

same damages under the homeowners policy. See *Bradley v. Allstate Ins. Co.*, 620 F.3d 509 (5th Cir. 2010) (recognizing the rule against double recovery and finding that in order to determine amount potentially recoverable by insured under homeowners policy for uncompensated losses, insurance payments already received from the flood insurer should be deducted from total actual loss). New Jersey courts have also recognized the rule that prohibits double recovery for the same damages under two different insurance policies. See *Frazier v. N.J. Mfrs. Ins. Co.*, 142 N.J. 590, 603 (finding that payment from two different sources for the same injury should be prevented).

G. Policy Conditions

a. Duty to Cooperate

A cooperation clause is a material condition of the policy. *Dougherty v. Hanover Ins. Co.*, 114 N.J. Super. 483 (1971). By requiring their insureds to offer whatever cooperation and assistance is warranted and necessary in the investigation of a claim, insurers hope to discover fraudulent claims and to avoid overpaying in the case of real claims. *Appleman on Insurance 2d*, §138.2 (2007). The purpose of cooperation clauses is also to provide the insurer with an early opportunity to make a timely and adequate investigation of the facts, to locate witnesses, and to prepare its defense. To that end, cooperation clauses are subjected to the common and ordinary meaning of their language, not to a strained or technical construction. *Id.*

Cooperation clauses have been held to be material conditions of the policy. *Pearl Assurance Co. v. Watts*, 58 N.J. Super. 483 (1959); *Sutera v. Provident Inc. Co.*, 67 N.J. Super. 554 (1961). Since these provisions have been regarded as conditions precedent, no rights would accrue under the policy until they were satisfied. Therefore, the breach of the cooperation

provision will preclude recovery under the policy. See also, *Appleman on Insurance 2d*, §138.5 (2007); *Whittle v. Associated Indem. Corp.*, 130 N.J.L. 576 (E. & A. 1943).

H. Extra Contractual Claims

a. Claims under the New Jersey Consumer Fraud Act, N.J.S.A 56:8-1 et seq.

The New Jersey Consumer Fraud Act allows private plaintiffs to bring suit if they are harmed by an unconscionable commercial practice. See, e.g., *Cox v. Sears Roebuck & Co.*, 138 N.J. 2, (N.J. 1994). Under the NJCFA, the act, use or employment by any person of any unconscionable commercial practice, deception, fraud, false pretense, false promise, misrepresentation, or knowing, concealment, suppression, or omission of any material fact with intent that others rely upon such concealment, suppression or omission, in connection with the sale...or with the subsequent performance of such person as aforesaid, whether or not any person has in fact been misled, deceived or damaged thereby, is declared to be an unlawful practice. N.J.S.A. 56:8-2. If a defendant is found to have committed an unconscionable commercial practice, the statute imposes mandatory treble damages and attorney's fees. N.J.S.A. 56:8-19. However, to recover attorney's fees under the Consumer Fraud Act, the plaintiff must prove an ascertainable loss. *Cox v. Sears Roebuck & Co.*, 138 N.J. at 10.

b. Bad Faith Claims

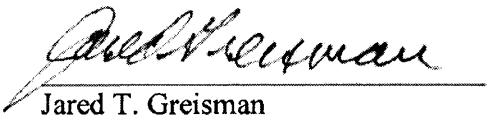
In *Miglicio v. HCM Claim Mgmt. Corp.*, 288 N.J. Super. 331 (App. Div. 1995), the court held that to demonstrate bad faith, "'a plaintiff must show the absence of a reasonable basis for denying the benefits of the policy and the defendant's knowledge or reckless disregard or the lack of a reasonable basis for denying the claim.'" (quoting *Pickett v. Lloyd's*, 131 N.J. 457 (1993). Where there is a "reckless indifference to facts or to proofs submitted by the insured," the fact finder may infer or impute to the insurer, knowledge of the lack of a reasonable basis for

denying the claim. *Id.* Bad faith is not demonstrated by negligence or mistake, but rather a showing that the insurer's conduct is "unreasonable and the insurer knows that the conduct is unreasonable, or that it recklessly disregards the fact that the conduct is unreasonable." *Id.* at 474. If the insurer satisfies the burden of demonstrating that the insured's claim is "fairly debatable," then no liability in tort and, consequently, no extra-contractual damages will be assessed. *Id.*

In *Beekman v. Excelsior Ins. Co.*, 2014 U.S. Dist. LEXIS 21864 (D.N.J. Feb. 21, 2014), the court dismissed plaintiff's claims for bad faith, punitive damages and attorneys' fees but denied defendants' motion to dismiss the fourth count alleging violation of the New Jersey Consumer Fraud Act (CFA). First, the court dismissed the second count of the Complaint, holding that claims that defendants acted "unreasonably" do not support a finding that defendants breached the covenant of good faith and fair dealing. The court further stated that to prove such a claim, a party "must provide evidence sufficient to support a conclusion that the party alleged to have acted in bad faith has engaged in some conduct that denied the benefit of the bargain originally intended by the parties." *Brunswick Hills Racquet Club, Inc. v. Route 18 Shopping Ctr. Assocs.*, 182 N.J. 210, 224 (quoting *Williston on Contracts* § 63:22 at 513-14 (Lord ed. 2002)). The court also dismissed plaintiff's punitive damages, finding that "absent egregious circumstances, no right to recover for emotional distress or punitive damages exists for an insurer's allegedly wrongful refusal to pay a claim." *Pickett v. Lloyd's*, 131 N.J. 457, 475 (1993). The court further held that plaintiff is not entitled to an award of attorneys' fees, finding that *Rule 4:42-9(a)(6)* does not apply to first party claims.

However, the court denied defendants' motion to dismiss the fourth claim of plaintiff's Complaint alleging violation of the New Jersey CFA. Plaintiff alleged that defendants were deceptive in the adjustment of plaintiff's claim and that defendants' deception was part of an "ongoing general business practice." The court relied on *Weiss v. First Unum Life Ins. Co.*, 482 F.3d 254, 266 (3d Cir. 2007), wherein the plaintiff alleged that his insurance carrier had created a scheme to deny insurance benefits. There, the Third Circuit concluded that "while the New Jersey Supreme Court has been silent as to this specific application of CFA, its sweeping statements regarding the application of the CFA to deter and punish deceptive insurance practices makes us question why it would not conclude that the performance in the providing of benefits, not just sales, is covered, so that treble damages would be available for this claim under the CFA." *Id.* Other New Jersey courts, however, have held that the CFA does not apply to insurance benefits coverage. See *Capogross v. State Farm Ins. Co.*, 2009 U.S. Dist. LEXIS 97544 (D.N.J. Oct. 21, 2009).

Dated: Holmdel, New Jersey
July 23, 2014



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ATTACHMENT 16

Personal Insurance Issues -- View From the Defense Bar

HURRICANE SANDY TRAINING SESSION
U.S. DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

VIEW FROM THE DEFENSE BAR

July 23, 2014

This presentation is intended to provide a general overview of the types of coverage typically included in a property insurance policy. The descriptions contained herein do not necessarily reflect the views of any particular insurer. Nor are the descriptions contained herein necessarily applicable to any particular property insurance claim; each claim must be evaluated based on the specific facts of the claim, the terms and conditions of the applicable insurance policy, and the applicable case law.

OVERVIEW OF PERSONAL INSURANCE FORMS

- **Homeowners** - This is the most common PI policy. It applies to owner-occupied dwellings and covers the dwelling, other structures, personal property and additional living expenses.

- **Condo/Co-Op Unit Owners** - Contains building coverage for an individual unit as well as coverage for contents and additional living expenses.

- **Renters** - Provides contents and additional living expense coverage.

COVERED PROPERTY

- **Coverage A – Dwelling**
  - Primarily single family dwellings; however, PI policies can also cover two, three and four family dwellings provided the named insured resides in one of the units.
  - Land is not covered, including land on which the dwelling is located.
  - Includes items permanently affixed to the dwelling (*e.g.*, a carport, attached garage, attached deck, etc.)
- **Coverage B – Other Structures**
  - Covers other structures on the residence premises set apart from the dwelling by clear space. Common examples would include a detached garage or shed.
- **Coverage C – Personal Property (Contents)**
  - Covers the insureds' contents anywhere in the world; however, coverage may be limited for property away from the residence premises.
  - Coverage includes property of others at the residence premises.

PERSONAL INSURANCE – LOSS OF USE (HOMEOWNERS)

- **Loss of Use**
  - If a loss covered under the property policy makes the residence premises uninhabitable, the policy will cover any necessary increase in living expenses incurred so that the household can maintain its normal standard of living.
  - Coverage is subject to a monetary limit and lasts for the shortest time required to repair or rebuild the damage or, if the insured permanently relocates, the shortest time for the household to settle elsewhere.
  - Coverage includes Fair Rental Value for the part of the residence premises held for rental.

PERSONAL INSURANCE – LOSS OF USE (HOMEOWNERS)

- Coverage also includes limited civil authority coverage. This applies when the residence premises has not been damaged; however, a civil authority prohibits the insured(s) from use of the residence premises as a result of direct physical loss or damage to a neighboring premises caused by Peril Insured Against.
- This is a frequent coverage issue during widespread catastrophe as a hurricane. In a hurricane, insureds are often evacuated due to damage to neighboring property caused by excluded perils such as flooding, and therefore civil authority coverage is not triggered if the evacuation was due to damage caused by flooding and not due to damage caused by wind.
- It is also important to note that coverage is only available if there is damage to a neighboring premises. Precautionary evacuations – in the absence of any physical loss or damage to a neighboring premises caused by a Peril Insured Against – will generally not trigger coverage.

PERSONAL INSURANCE – PERILS INSURED AGAINST (COVERAGE A&B)

- Coverage A & B (dwelling and other structures) is most often written on an "all risks" or "open perils" basis. This means that the policy insures against all risks of direct physical loss unless the cause of loss is specifically limited or excluded.

- Under open peril coverage, the Insured's burden is to show that there was loss or damage to Covered Property during the policy period. The burden then shifts to the insurer to show that one of the exclusions or limitations applies. Where there is some damage caused by a covered cause of loss (wind) and other damage caused by an excluded cause of loss (flood), courts have placed the burden on the insured to demonstrate an appropriate segregation of the damage between covered and excluded causes.

PERSONAL INSURANCE – PERILS INSURED AGAINST (COVERAGE C)

- Many or most homeowners policies insure personal property on a named peril basis. This coverage places the burden on the insured to show that one of the specifically enumerated perils caused the loss.

- These perils usually include the following:
  - Fire or lightning
  - Windstorm or hail (note that this does not include interior water damage unless there is a storm created opening through which the water enters)
  - Explosion
  - Riot or civil commotion
  - Aircraft
  - Vehicles
  - Smoke
  - Vandalism and Malicious Mischief

PERSONAL INSURANCE – PERILS INSURED AGAINST (COVERAGE C, CONT.)

- Theft
- Falling Objects
- Weight of Ice, Snow or Sleet
- Accidental Discharge or Overflow of Water or Steam
- Sudden and Accidental Tearing apart, Cracking, Burning or Bulging of a Steam or Hot Water Heating System, an Air Conditioning System, or an Appliance for Heating Water
- Freezing (subject to requirement that the insureds use reasonable care to maintain heat)
- Sudden and Accidental Damage from Artificially Generated Electrical Current
- Volcanic Eruption

WATER EXCLUSION

- Virtually all Personal Insurance Policies contain a water exclusion. In most cases the water exclusion will exclude the following perils:
  - Flood
  - Surface Water
  - Waves
  - Tidal water
  - Overflow of a body or water or spray from any of these
  - Water or Waterborne material which backs up through sewers or drains or which overflows or is discharged from a sump.
  - Water or water-borne material below the surface of the ground which exerts pressure on or seeps or leaks through a building.

Because these perils are almost always excluded under a homeowners policy, coverage for these perils is typically available through the NFIP flood program.

ANTI-CONCURRENT CAUSATION PREFACE

- The water damage exclusion is typically subject to the "anti-concurrent causation" (ACC) preface. This language provides that "(The insurer) does not insure for loss caused directly or indirectly by (flood). Such loss is excluded regardless of any other cause or event contributing concurrently or in any sequence to the loss."

- One effect of the ACC preface is to make clear that there is no coverage for damage caused by flood even where wind or windstorm contributes to the flooding.

ANTI-CONCURRENT CAUSATION PREFACE (CONT.)

Here are two examples of the effect of the ACC preface in losses involving flooding:

First, if flood waters carry a car into the front of a building, causing the car to damage the building, both the flood damage to the building and the damage to the building from the impact of the car would be excluded. The vehicle may be an immediate cause of the impact damage; however, because flooding caused the vehicle impact (the winds were not strong enough to push the car into the building; it was the water), under the ACC clause, there is no coverage for the impact damage.

Second, if during a hurricane, a home sustains damage to the roof from wind (a covered cause of loss) and then the first floor of the home is inundated by floodwaters (an excluded cause of loss), the wind damage to the roof is covered but the flood damage to the first floor is not. The effect of the ACC clause is to

preclude coverage for the first floor flood damage on the theory that wind or windstorm caused the flooding.

OTHER EXCLUSIONS – POWER FAILURE

- Most policies contain an exclusion for loss caused by or resulting from power failure. This typically applies to power failures that arise from damage away from the residence premises, such as damage to power lines, transformers or other equipment owned by a utility company.

- This exclusion does not apply to the loss of power caused by covered damage at the residence premises.

- Because power failure is excluded, most policies will not provide loss of use coverage purely due to an off-premises power failure. This was a common claim arising out of Sandy. By endorsement some business insurance policies provide limited business interruption insurance for power outages caused by certain perils; however, power outages – without damage to Covered Property – will generally not trigger loss of use coverage under homeowners policies.

SEWER BACKUP AND SUMP OVERFLOW

- Many insurers sell endorsements that provide limited coverage for sewer backup and sump overflow losses. The terms of these endorsements and amounts of coverage vary.

- As discussed, the anti-concurrent cause (ACC) preface to the water exclusion provides that the loss caused by an excluded cause of loss is excluded regardless of whether any other cause or event contributes to cause that loss. Therefore, when flooding causes a backup of sump or sewer water, that loss is excluded. The endorsements provide coverage when the backup is not caused by flooding but instead by, for example, a blockage in the sewer line.

LOSS PAYMENT

- Most policies provide replacement cost coverage for buildings (under Coverage A or B). With respect to property valued at replacement cost, most policies provide that, if the replacement cost exceeds a certain threshold (e.g., $2,500), the insured is not entitled to more than the actual cash value until the property is actually repaired or replaced. In most jurisdictions, actual cash value is the replacement cost less depreciation.

- Replacement cost generally excludes increased costs of construction due to the enforcement of ordinance or laws regulating the repair or rebuilding of the property (code upgrades). Policies typically provide limited amounts of coverage for these increased costs, and these benefits are generally only available if they are incurred.

- Other types of property and some building items are valued on an actual cash value basis (however, most policies include endorsements that cover these items at RCV as well):
  - Personal property
  - Awnings, carpeting, household appliances, outdoor antennas and outdoor equipment, whether or not attached to the buildings
  - Structures that are not buildings (e.g., sidewalks, play sets)

ATTACHMENT 17

Fifteen (15) Steps to Better Arbitrations/Mediations in Storm Events–

Merlin Law Group

In Re Hurricane Sandy Cases

U.S. District Court for the District of New Jersey Arbitrator Training Conference

July 30, 2014

Presented by:
William F. "Chip" Merlin, Jr., Esq.
Robert T. Trautmann, Esq.

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15 Steps to Better Arbitrations/Mediations in Storm Events

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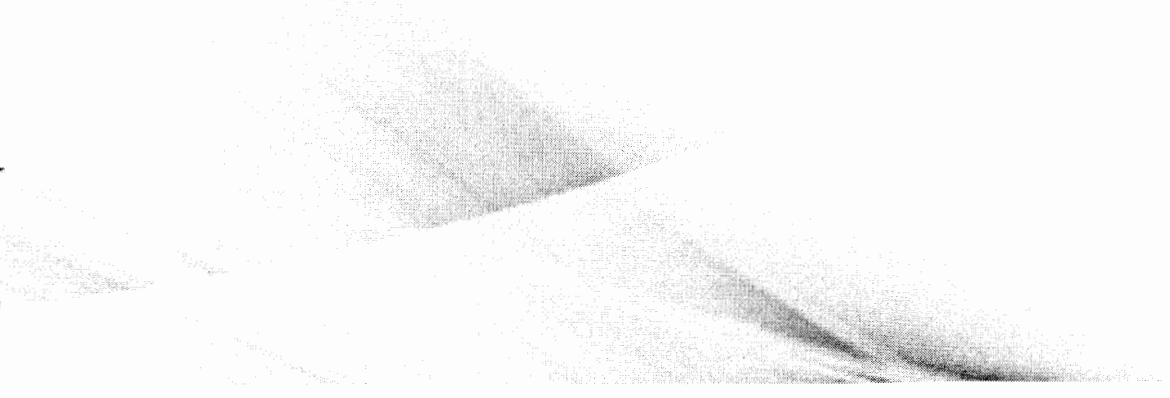

#1

- Exchange Crucial Documents At Least A Week Beforehand

- Authority at Mediation

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#2

- Estimates of Damage, Actual Expenditures, Payments and Demands Must be Catalogued

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#3

- Determine If All Undisputed Damages Were Paid

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#4

- Identify Coverage Issues

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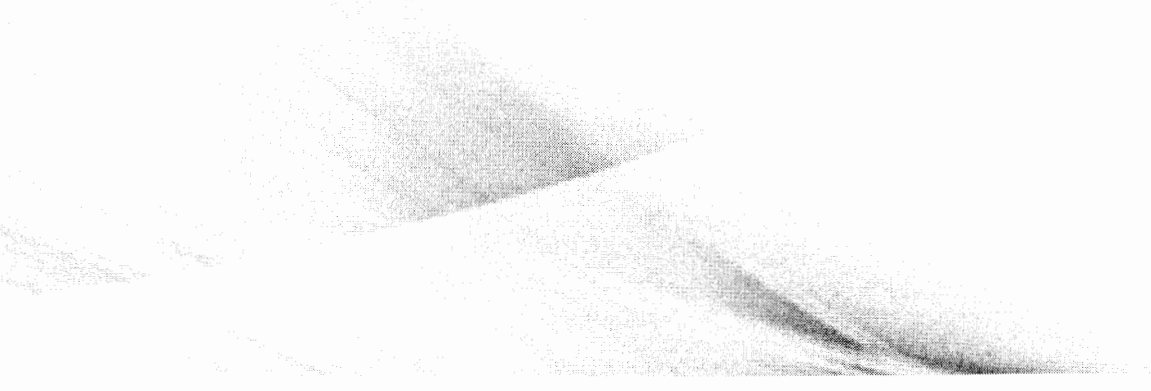

#4

A. Conditions Precedent Not Being Met

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#4

B. Claimed Damage to Property Not Being Covered

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#4

C. Causation Exclusions--- Defendant Must Specifically Cite

Example: A wear and tear exclusion does not exclude coverage unless the ONLY cause of the loss is wear and tear

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#4

D. Limitations on Recovery to Actual Cash Value or Other Limitations

Replacement Cost Value (RCV)= The actual cost in today's dollars to repair or replace property back to pre-loss condition.

"New" for "Old"

Depreciation= The deduction based on the age and useful life of that property

Replacement Cost Value
- Depreciation
= **Actual Cash Value**

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#5

- If Flood and Wind Damage---

Determine How Much Has Been Paid by Flood and Wind to Date Versus Total Damage

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#6

- Burdens of Proof---**Big Deal**
  - All Risk
  - Named Peril

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"All Risk" Policy vs. "Specified Peril" Policy

- All Risk Policy:
  - Covers all risks of direct physical loss or damage, except those specifically excepted or excluded

- Named Peril Policy:
  - Only those risks which are specifically named are covered

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All Risk Policy

- An "all- risk" policy covers all fortuitous losses unless an exclusion applies. *Ariston Airline & Catering Supply Co., Inc. v. Forbes,* 211 N.J.Super. 472, 511 A.2d 1278 (Law Div.1986).
- The party claiming loss must demonstrate that the property was **physically damaged.** *Port Auth. of New York & New Jersey v. Affiliated FM Ins. Co.,* 245 F. Supp. 2d 563 (D.N.J. 2001) *aff'd,* 311 F.3d 226 (3d Cir. 2002).

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Shifting of Burden of Proof

- Under an all-risk policy, it is the insured's burden to establish a relevant loss. *DNA Plant Technology Corp. v. Navigators Insurance Company,* 941 F.Supp. 42 (D.N.J.1996).
- Then, the burden shifts to the insurer to show that a loss within the meaning of the insuring agreement is otherwise excluded. *Princeton Ins. Co. v. Chunmuang,* 151 N.J. 80, 698 A.2d 9 (1997).

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#7

- Personal Property---Usually a Named Peril

- If water damage, may need extra causation proof

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#8

- Proof---Eyewitnesses and Neighborhood

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#9

- Proof---Estimates Supported with Photos

- How Can Party Show Damage to Trier of Fact?

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#10

- Proof---Meteorologists and Engineers

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#11

- If Wind vs. Water Case---Understand Concurrent Cause, Sequential Cause and Proximate Cause

- Read Merlin's Law Review Article

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Concurrent Causation Doctrine

The insurance company is responsible for paying for the damage resulting from the entire event whenever two or more perils appreciably contribute to the loss and least one of the perils is covered by an insurance policy.

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Efficient or Dominant Proximate Cause Doctrine

- New Jersey Courts enforce the efficient proximate cause rule. *Assurance Co. of Am., Inc. v. Jay-Mar, Inc.*, 38 F. Supp. 2d 349, 353 (D.N.J. 1999)
- An insured is normally afforded coverage where an "included cause of loss is either the first or last step in the chain or causation which leads to the loss."
- This is on a case by case basis, depending on the facts and circumstances.

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Corban v. United Services Auto Ass'n
20 So.3d 601 (Miss. 2009)

Wind damage that precedes the flood damage happens in a sequence of events, but the wind damage is not caused, directly or indirectly, by storm surge flooding, and the damage done by the wind is therefore not a part of "the loss" the ACC refers to. Since the ACC does not apply to this separate wind damage, the wind damage is a covered loss. The insurance benefits that apply to this covered loss vest in the insured at the time the loss occurs.

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ACC Clauses and Efficient Proximate Cause in New Jersey

•Recent cases in New Jersey applying dominant/efficient proximate cause:

- *DEB Associates v. Greater New York Mut. Ins. Co.*, 407 N.J. Super. 287, 970 A.2d 1074 (App. Div. 2009) (windstorm damage)
- *Simonetti v. Selective Ins. Co.*, 859 A.2d 694, 700 (N.J. Super. App. Div. 2004)
    - There is coverage so long as there is a covered cause within the chain of events: "with regard to sequential causes of loss, our courts have determined that an insured deserves coverage where the included cause of loss is either the first or last step in the chain of causation which leads to the loss."

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#12

- Damages---Price or Scope of How to Repair
  - Price is easier; details of scope requires digging

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#13

- Legal Issues Leading to Summary Judgment

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#14

- Issues of Delay and Failure to Investigate

- Bad Faith

- Biased Experts

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#15

- Future Costs of Litigation to Prove Case

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BIOGRAPHIES OF NON-JUDICIAL PANELISTS

Dennis Abbott, Esquire

David R. Charles

Ramoncito J. "Chito" deBorja, Deputy Associate Chief Counsel, FEMA Office of Chief Counsel

Christopher W. Gerold, Esquire

Eric M. Hurwitz, Esquire

William F. "Chip" Merlin, Jr., Esquire

Michael Pacchione

Seth A. Schmeeckle, Esquire

A. Daniel Thorne

Russell M. Tinsley

Robert T. Trautmann, Esquire

William "Bill" Treas, Esquire

Dennis Abbott

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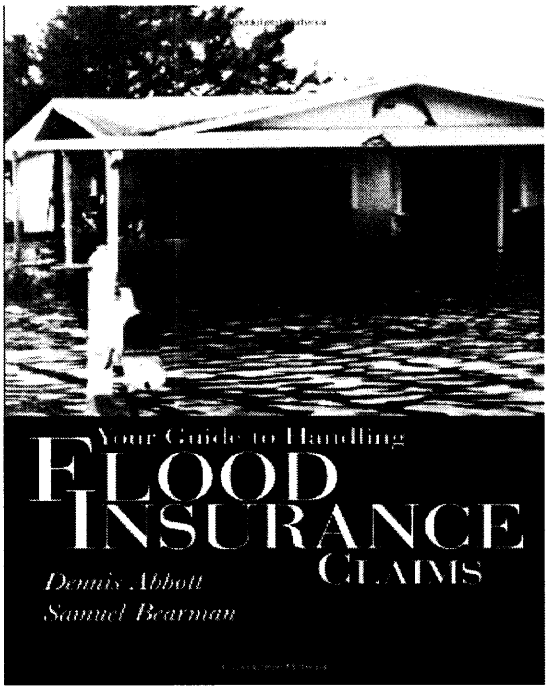
(850) 438-1000
dennis@floodhelpteam.com

Charles Dennis Abbott was born and raised in Pell City, a small community near Birmingham, Alabama. He attended Auburn University, where he received his undergraduate degree, and then received his Juris Doctor (JD) from Cumberland School of Law, Samford University.

After graduation from law school, Mr. Abbott practiced law in Alabama for 27 years. During this period of time, he engaged in private practice but also served as an Assistant District Attorney for the 13th Judicial Circuit on a part-time basis for nine years and as a municipal judge for several communities, including Pell City, where he served for 11 years.

Mr. Abbott moved to Destin, Florida, after winding up his Alabama law practice. After Hurricane Ivan struck the Gulf Coast in 2004, he became involved, on a private consulting basis, with the administration of hurricane claims, including both flood and wind claims. He has provided consulting services for the administration of over 200 flood claims arising from Hurricane Ivan and Katrina. In 2009, Mr. Abbott authored the only known book exclusively about flood insurance – "Your Guide to Handling Flood Insurance Claims." Since 2009, Mr. Abbott has consulted on more than 500 additional flood claims including Hurricane Ike and Sandy claims.



David R. Charles biography

David R. Charles has spent his entire career in disaster relief, including 33 years handling insurance claims, representing both insurance companies and policyholders. He's worked every major disaster in the US since 1977 from the Northridge Quake to Hurricanes Andrew, Ike, and Katrina to the World Trade Center. He's handled every kind of claim imaginable from simple roof repair to $30 million commercial losses.

With close to 30 years representing insurance companies, including his role as Senior Executive General Adjuster for the largest independent adjuster firm in the US, he understands the inner workings of the claims departments and knows how to successfully navigate the barriers and delay tactics often employed by insurance carriers. Mr. Charles is uniquely qualified to represent the policyholder and ensure that our clients are treated fairly and paid promptly, for the full amount available under the insurance contract.

Background

Mr. Charles' journey into the world of disaster relief began with personal experience. While happily enjoying life as a college student and preparing for law school, his hometown of Matewan, West Virginia was hit by the historic flood of 1977. He returned home and saw first-hand the devastation caused by natural disasters and the effect such destruction had on friends, loved ones, and his own community.

He also witnessed the massive disaster relief effort and knew immediately he was destined to spend his career in this profession. His first few years were spent with FEMA, but he began to see that the best way to help the people most affected by catastrophes was by getting their homes back to the way they were before disaster struck. He then made the switch to the insurance sector and has remained there ever since.

Mr. Charles spent most of the next 30 years representing insurance companies in settling claims with policyholders on catastrophic losses. He's represented virtually all of the major insurance companies doing business in the US including: State Farm, Allstate, Hartford, Liberty Mutual, Lloyds of London, Nationwide, American Family, the California Earthquake Authority, USAA, Chubb, Farmers, Farm Bureau, Lexington, American Reliable, and many others.

After the attacks of 9/11 on the World Trade Center, he was chosen as one of only two adjusters from a company of over 3,500 nationwide to be on the ground in the immediate aftermath working commercial claims. He counts this as one of the greatest honors of his career.

After the historic Atlantic hurricane season of 2005, he noticed a change gradually taking place in the payment of claims philosophy within the insurance industry. He became increasingly frustrated at what he viewed as the unfair treatment of the policyholder by the insurance carriers in the settlement of claims. Eventually, this frustration led him to begin advocating on behalf of the policyholders, bringing them on level footing with the carriers.

Since becoming a public adjuster, Mr. Charles has settled hundreds of claims worth millions of dollars while representing homeowners, businesses, condominium associations, and other commercial enterprises. He's also been recognized as an expert witness in federal court on large loss claims.

In 2010, he was the lead investigator and lead expert witness in a U.S. Federal Court case where an insurance company had offered nothing to a large condominium complex occupied primarily by the elderly and low income families. The case was settled on behalf of the policyholders in the amount of a $4.4 million judgment and $3.3 million in punitive damages and bad faith.

Mr. Charles is a member of the Board of Directors of the Texas Association of Public Insurance Adjusters. He also served as Chairman of the Ethics Committee.

Professional Profile

A diversified senior adjuster and appraiser with a reputation as a leader within the insurance industry during many years working as an appraiser and all lines property adjuster and in catastrophe claims situations; experienced in Commercial Policies, Homeowner, Mobile Home, Flood and NFIP direct. Background includes extensive catastrophe adjusting both as an independent with many insurance carriers and as a public adjuster working for industry leaders in that profession. Involved in the negotiation, litigation and final settlement of complex and difficult claims. Experience in examining and reviewing incoming claims. Technical skills include large property damage estimating using Integra Claim, Simsol, and Xactimate. Admitted as expert witness in 3rd District Federal Court in Miami, FL.

Certifications:

Florida DFS certified Appraiser and Mediator
WIND Network certified Umpire
North Carolina Adjusters license
Florida Adjusters license
Texas Adjusters license
Michigan Adjusters license
Mississippi Adjusters license
Louisiana Adjusters license
New Jersey Adjusters license
Georgia Adjusters license
South Carolina Adjusters license
Tennessee Adjusters license
California Earthquake Authority certified
NFIP certified in all categories

Work History

2013 Master Claims Consultants, LLC
Founder and President of a full service insurance claims company. Master Claims Consultants provides public adjusting, expert witness services, litigation support, appraisal representation, umpiring services, estimating and analysis, and consulting services. Clients range from homeowners to large commercial concerns.

2012 – 2013 Avallone and Bellistri
Took position as Claims Director for a New York law firm. Managed entire Hurricane Sandy claims operation. Public face of the company, speaking at town hall meetings and making television appearances. Established standards of claims investigation and litigation support. Negotiated all claims to conclusion.

2011 – 2012 Catastrophic Claims Consultants
President and CEO. Full responsibility for all aspects of sales and execution of claims. Supervision of field staff. Public face of the company in many civic events and marketing opportunities. Providing litigation support and expert witness work.

2009 – 2011 Keys Claims Consultants
Became a public adjuster and went to work for George Keys. In charge or preparing cases, coordinating investigations and handling files as a Public Adjuster and appraiser. With Keys Claims Consultants workload consisted of full responsibility for 75 commercial claims with estimates totaling $182,000,000 in property damage.

2008 – Suit Alternative, International
Worked as an appraiser for Suits Alternative, International. Represented Allstate, Tower Hill, and State Farm in appraisals. Also represented Nationwide on Hurricane Ike flood claims on Galveston Island.

2006 - 2008 - ProJust
After completing Katrina assignments, joined ProJust, Inc. as a Senior Executive General Adjuster. Approved by the Florida DFS to act as a Mediator and Appraiser for Citizens claims in dispute. Handled hundreds of appraisals for Citizens. Handled mainly complex large loss appraisals, many over 15 million dollars in damages. Day in and day out dealt with attorneys, public adjusters, engineers, accountants and a variety of other experts on large loss claims in dispute.

2005 Hurricane Season – Hurricane Katrina
Worked commercial claims from Hurricane Katrina for T.M. Mayfield and Company in Gulfport, Mississippi. Worked residential claims for American Reliable through White Adjusting Company in Louisiana until mid December. Commercial claims included many multi-million dollar claims, including the Harrison County School System's 7 million dollar claim. Handled several hotel total losses, several office parks, a marina, a medical facility, and a variety of other complicated large losses.

April 2004 - September 2005 Pinehurst Claims Service
After returning to Pinehurst, North Carolina in April, founded Pinehurst Claims Service Adjusted property losses throughout North Carolina and also in catastrophe sites throughout the country. Clients included The Hartford, Lexington, Lloyds of London and American Reliable.

2001 – 2004 Wardlaw Claims Service
Took an assignment with Wardlaw Claims Service, working mold claims for Farmers in Dallas, TX. Also handled foundation claims on this assignment. Became an expert in all aspects of mold claims, remediation, and the various testing and evaluation methods involved in this challenging niche of the insurance industry.

Transferred to the California mold operation with Farmers to work mold claims in the Los Angeles area. In late October of 2003, temporarily moved over to the Farmers Catastrophe team and worked on the large loss unit, handling total loss fire claims from the Big Bear firestorm that totaled over 2,800 homes. Upon completion of that assignment, worked the Paso Robles earthquake, still on the large loss team. Once that assignment was completed, transferred back to the mold team and worked there until the mold team disbanded in April of 2004.

1990 – 2001 Pilot & Associates
Relocated to Pinehurst, North Carolina and began working exclusively for Pilot & Associates. Handled many multi-million dollar claims in Hurricane Andrew and the Northridge Quake, working for State Farm. Served on the State Farm Commercial Team out of their Westlake office for the Northridge Quake. Certified in all categories of State Farm and the National Flood Insurance Program. Handled property claims of all types. Expertise included large loss estimating as well as normal everyday type claims

Over the years with Pilot, worked every major storm and dozens of minor ones throughout the United States. The last catastrophe assignment worked with Pilot was as an Executive General Adjuster on the World Trade Center disaster in New York.

1982 – 1990 National Computer Estimating
Founded NCE as a combination catastrophe claims service and computer software development and marketing company. Specialized in flood work, participating in every major storm in the 80's. Software was published by McGraw-Hill, Marshall and Swift, and Byrd Software and was widely used by adjusters and contractors all over the country.

1980 – 1982 Nationwide Claims Service
Worked as an insurance claims adjuster on the storm trail. Specialized in flood insurance adjusting all over the United States. Promoted to storm supervisor in last year with Nationwide

1977 – 1980 FEMA
Started as a field inspector for the FEMA disaster relief program. Duties included flood plain determination, housing inspector, MRP inspector and later supervisor, and supervision of contractors performing repairs to flooded dwellings.

Case Studies

In his distinguished 36 year career, Mr. Charles has handled thousands of claims of all types. Here are examples of the types of outcomes he's negotiated in three claims resolution methods - Public Adjusting, Appraisal and Litigation.

Public Adjusting

Parkway Village

Insured by Farmers, this strip mall in Memphis, Tennessee was damaged in a fire. Farmers initially offered $220,000. Mr. Charles negotiated a final settlement of $1,200,000 for the complex.

Appraisal

Kirkwood Village

Insured by Zurich, this condo complex in Florida was denied payment from Hurricane Wilma. Zurich calculated the damages to be less than their $500,000 deductible.

Mr. Charles represented Kirkwood Village in the appraisal process, and won an award for $2,750,000. The policy limits for the complex was $3,500,000.

Litigation

Royal Bahamian

Insured by QBE, Mr. Charles was the adjuster in charge. He coordinated the preparation of the claims package, including the engineering, fenestration and consulting contractor's reports. He testified as the expert witness for the Royal Bahamian in US Federal Court in Miami.

QBE had originally closed the claim with their calculation that their damages were less than their $750,000 deductible. Royal Bahamian prevailed at trial, and was awarded $4,400,000 in property damages and an additional $3,300,000 in bad faith and punitive damages.

RAMONCITO J. DEBORJA

Ramoncito "Chito" deBorja is a Deputy Associate Chief Counsel with the Department of Homeland Security, Federal Emergency Management Agency, Office of Chief Counsel in the Federal Insurance and Mitigation Administration Legal Division. Mr. deBorja is responsible for handling, overseeing, and coordinating litigation arising out of programs nationwide administered by the Federal Insurance and Mitigation Administration ("FIMA"). A substantial portion of Mr. deBorja's practice area involves litigation dealing with the National Flood Program ("NFIP"), a program administered by FIMA. Prior to becoming a Deputy Associate Chief Counsel with FEMA in 2010, Mr. deBorja served as a Trial Attorney beginning in 1999. Mr. deBorja also served as an Assistant City Solicitor with the City of Philadelphia Law Department from 1995 through 1999. Mr. deBorja is a 1994 graduate of the Syracuse University College of Law. He earned his Bachelor of Arts degree in 1991 from California State University, Long Beach. Mr. deBorja is licensed to practice law in the state of Pennsylvania.

WOLFF · SAMSON

CHRISTOPHER W. GEROLD

Attorney

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Fax (973) 530-2261
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PRACTICES

- Disaster Recovery Claims
- Flood Insurance
- Securities Regulation and Litigation

Christopher Gerold is a attorney in the Disaster Recovery Claims and Securities Litigation and Regulation Groups at Wolff & Samson. Chris is a life long summer resident of Ortley Beach, who has committed himself to helping homeowners, businesses and condominium associations maximize their recovery from their insurance carriers. Chris focuses on representing clients in disputes with their flood insurance companies, which include Write Your Own and FEMA Direct policies. Combined with Wolff & Samson's team of attorneys and consultants, Chris offers clients an opportunity to fully recover their losses.

Chris is also the author of Wolff & Samson's Flood Insurance Blog: www.floodinsuranceattorneys.com, which is currently the only known blog devoted exclusively to flood insurance issues. Chris has been quoted in the Bergen Record, Newsday, Newsweek, and The Star Ledger for his work helping Sandy victims. Chris has also lectured at Tuoro Law School on flood insurance issues.

Prior to Superstorm Sandy, Chris' primary practice involved representing financial firms and professionals in arbitrations, court actions, administrative proceedings, internal investigations, and investigations by securities regulators, including the Securities and Exchange Commission (SEC), Financial Industry Regulatory Authority (FINRA), the Bureau of Securities, and various other federal and state authorities.

Prior Experience

From 2005 to 2010, Chris was a Deputy Attorney General in the Securities Fraud Prosecution Section of the New Jersey Attorney General's Office. As counsel to the New Jersey Bureau of Securities, Chris investigated and prosecuted as lead trial attorney complex securities law violations.

Prior to attending law school, Chris was a Series 7 and 63 registered Financial Advisor at a financial services company.

EDUCATION

- Seton Hall University School of Law (J.D., 2005)
- Villanova University (B.S., 1999)

BAR & COURT ADMISSIONS

- New Jersey State Court and the District of New Jersey
- New York State Court and the Southern and Eastern Districts of New York

MEMBERSHIPS/AFFILIATIONS

- Securities Industry and Financial Markets Association
- Morris County Chamber of Commerce - Government Affairs Committee
- New Jersey Business & Industry Association - Legal Affairs Committee

PRACTICE AREAS

Mortgage & Lending Litigation
Products Liability & Mass Tort Litigation
Insurance
Health Care
Fidelity & Surety
Construction
Banking & Financial Services
E-Discovery Team

BAR ADMISSIONS

New Jersey
Pennsylvania
Maryland

COURT ADMISSIONS

U.S. District Court for the District of New Jersey
U.S. District Court for the Middle District of Pennsylvania
U.S. District Court for the Eastern District of Pennsylvania
U.S. District Court for the District of Maryland
U.S. Court of Appeals for the Third Circuit
U.S. Court of Appeals for the Fourth Circuit
U.S. Court of Appeals for the Sixth Circuit

EDUCATION

J.D., *magna cum laude*, Boston University School of Law, 1999
B.A., *magna cum laude*, University of Texas at Austin, *Phi Beta Kappa*, 1996

MEMBERSHIPS

American Bar Association, Consumer Financial Services Committee
American Bar Association, Fidelity & Surety Law Section
Defense Research Institute, Drug and Medical Device and Commercial Litigation Committees
ACA International, Members' Attorney Program
New Jersey State Bar Association
Stradley Ronon Hiring Committee
Secretary, Philharmonic of Southern New Jersey
Board of Directors, Philharmonic of Southern New Jersey

STRADLEY RONON
ATTORNEYS AT LAW

Eric M. Hurwitz

Partner
Cherry Hill, N.J., office

ehurwitz@stradley.com | 856.321.2406

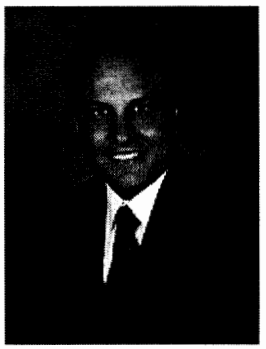
As a partner in Stradley Ronon's Litigation Practice Group, Eric Hurwitz handles a wide range of legal disputes, including insurance, fidelity and surety, consumer financial services, and commercial litigation. Mr. Hurwitz has appeared in federal and state trial and appellate courts, as well as mediations and arbitrations, both regionally and throughout the country. His experience includes defending insurance carriers in coverage litigation, including claims against Write Your Own Insurance Companies who issue flood insurance policies under the National Flood Insurance Program. He also represents property-casualty insurers in other commercial and personal lines coverage disputes, including homeowners and motor vehicle litigation.

Some of his other representations include:

- defending sureties in litigation arising from payment and performance bond claims stemming from Pennsylvania, Delaware and New Jersey construction projects
- defending claims against banks, mortgage lenders and servicers, auto finance companies, debt collection companies and other financial services companies, for alleged violations of both federal and state laws
- representing multi-national companies in litigation and regulatory matters stemming from alleged injuries from exposure to pharmaceutical products
- representing both owners and contractors in a range of construction disputes, involving construction defect, breach of contract and mechanics' lien claims

Mr. Hurwitz is a frequent author on topics that include performance and payment bond claims under Pennsylvania law; various exclusions under the commercial crime insurance policy; and litigation risk in the wake of the Dodd-Frank Wall Street Reform and Consumer Protection Act.

In 2011 Mr. Hurwitz was named to the *New Jersey Law Journal's* "40 under 40" list, which is comprised of the top 40 young professionals in the New Jersey legal community.



WILLIAM F. MERLIN, JR., ESQUIRE

Florida Board Certified Civil Trial Lawyer
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777 S. Harbour Island Boulevard, Suite 950, Tampa, FL 33602
PH (813) 229-1000
FAX (813) 229-3692
EMAIL: wmerlin@MerlinLawGroup.com

EDUCATION

- Juris Doctorate, University of Florida, 1982
- Bachelor of Science, Business Administration, University of Florida, 1980

EDUCATIONAL HONORS

- Law Review – Executive Editor
- Moot Court
- Florida Blue Key Leadership Honorary
- Omicron Delta Kappa Scholastic Honorary
- SAVANT Leadership Honorary
- Who's Who Among College and University Students

EXPERIENTIAL DIGEST

- *1996 - Present*

Merlin Law Group, P.A.

Practice limited to Insurance Dispute Resolution, Insurance Claim Documentation and Presentation, and Insurance-Related Litigation on Behalf of Policyholders and Claimants; Bad Faith Litigation; Civil Trial; Insurance Agent Negligence.

- *1985-1996*

William F. Merlin, Jr., P.A.

Practice limited to Insurance Dispute Litigation on Behalf of Policyholders and Claimants; Bad Faith Litigation, Civil Trial

- *1982-1985*

Butler, Burnette & Freeman, P.A.

Property Insurance Defense

PUBLIC SPEAKING ENGAGEMENTS, SEMINAR PAPERS AND AWARDS

- **AV Rated Martindale Hubble**

- Recognized in Best Lawyers in America by Martindale Hubble
- **Award,** LexisNexis Insurance Law Center Person of the Year 2008 Policyholder Attorney of the Year, Honorable Mention, 2008
- **Award,** *Florida's SuperLawyers,* 2007-2013
- **Award,** *National Association of Public Insurance Adjusters (NAPIA) Co-Person of the Year,* 2007
- **Award**, *Florida Trend's* 2004-2012 Florida Legal Elite; one of 800+ attorneys (or 1.6% of lawyers practicing in the State of Florida) – one of seven in the field of Insurance Law.
- **Award**, 2002, Outstanding Amicus Brief of the Year, United Policyholders (ATLA Winter Convention 2002)
- **Award**, 1990 Eagle Talon, *For Dedication to the Highest Ideals of The Academy of Florida Trial Lawyers.*
- Speaker, *Use of Experts: What to Watch For, How to Vet Them, and How to Marginalize Insurance Company Experts,* NAPIA Mid-Year Meeting 2014
- Speaker, Eastern District of New York, Storm Sandy Mediator Training, May 2014
- Speaker, *What Public Insurance Adjusters Ethically Should and Should Not Include in Their Claim File,* and *Vacancy and Occupancy Defenses,* GAPIA Annual Meeting 2014
- Speaker, *What Public Insurance Adjusters Ethically Should and Should Not Include in Their Claim File* and *Case Law, Statutory and Regulatory Update*, RMAPIA Spring Meeting 2014
- Speaker, *Current Changes to Policies, Coverage and Case Law,* FAPIA Spring 2014
- Speaker, *Texas Measure of Damages for First Party Property Losses*, 2014 TAPIA Winter Meeting
- Speaker, *Gulf Coast & Southeast Insurance Case Law Updat*e, WIND 2013, WIND 2014
- Speaker, *Making the Expert Opinion Count & Current Issues of Concern to Public Adjusters*, NAPIA Mid-Year Meeting 2012
- Speaker, *First Party Property Insurance Cases of Interest to Public Adjusters,* NAPIA Fall Meeting, 2012
- Speaker, *Practical Lessons Public adjusters Can Learn From Recent Litigation Against Insurers*, FAPIA Fall Conference 2012

- Speaker, *The Theory of Indemnity and What Constitutes a Loss*, FPCC Conference 2012
- Speaker, *Trying Your Catastrophe Claim in the Court of Public Opinion*, FJA Meeting 2012
- Speaker, *What Should be in a Claim File,* FAPIA Spring Conference, May 2012
- Speaker, *Business Interruption,* FAPIA Spring Conference, May 2012
- Speaker, *The Ultimate Seminar for Public Adjusters-CALIFORNIA CLAIMS, Business Interruption, Wildfires, Ethics & the Public Adjuster's Role in Litigation,* April 2012
- Speaker, *Turning Disaster Into Opportunity- What Restoration Professionals Can Do to Help Catastrophe Victims, Contribute to Economic Recovery and Make a Profit,* Restoration Contractors Symposium, Modesto, CA., March 2012
- Speaker, *Appraisals, Ethics, and Bad Faith Issues*, TAPIA Spring Conference 2012
- Speaker, *Practical and Legal Lessons From Hurricane Experts,* Seminar for New York and New Jersey Public Adjusters, 2012
- Speaker, *Uncovering Soot and Ash, a Wildfire Claims Seminar,* CE Seminar for California Public Adjusters, 2012
- Speaker, *Trends Involving All Risk Coverage and Claims for the Policyholder's Perspective,* Willis RE Managing Extremes, 2012
- Speaker, *Don't Get Burnt Adjusting Wildfire Claims!,* TAPIA Fall Conference, November 2011
- Speaker, *What Should Be in a Claim File,* FPCC, October 2011
- Speaker, *Anticipating Manmade and Natural Disaster Trends That Impact Business,* SAFOB, September 2011
- Speaker, *Ethical Requirements of Public Adjusters and What Experienced and Advanced Public Adjusters Should Have Included in Their Claim,* FAPIA Summer Conference, July 2011
- Speaker, *The Ultimate Seminar for Public Adjusters, Ethical Issues for Presenting Claims,* CE Seminar for Public Adjusters, May 2011
- Speaker, *Gulf Coast Case Law,* WIND and Texas WIND 2010
- Speaker, *The Legal, Ethical and Practical Adjustment Issues from Windstorm Claims to Walls, Windows, and Roofs,* FAPIA Winter Conference 2010

- Speaker, *Proofs of Loss, EUOs, & Requests for Documentation,* FAPIA Winter Conference, 2010

- Speaker, *Learning From Those on the Other Side of Claims Negotiation: Persuasive, Professional, and Ethical Techniques of Adjustment for the Policyholder,* FAPIA, June 2010

- Speaker, *Understanding the Valuation Issues of the Gulf Oil Spill,* HB Litigation Conferences Presents Oil in the Gulf – Litigation and Insurance Coverage, June 2010

- Speaker, *Fantastic Adjustment Results Through Professionalism and Ethical Conduct: Tips From the Masters and Lessons From the School of Hard Knocks,* NAPIA Annual Meeting, June 2010

- Speaker, *What Texas Public Adjusters Should be Doing Ethically and Professionally Regarding Hurricanes Dolly and Ike Claims,* TAPIA Annual Meeting, 2010

- Speaker, *The Ultimate Roofing Seminar,* CE Seminar for Public Adjusters, April 2010

- Speaker, *The Ultimate Seminar for Public Adjusters: Ethical Issues for Presenting Claims,* CE Seminar for Public Adjusters, April 2010

- Speaker, *Learning From Those on the Other Side of Claims Negotiations: Persuasive, Professional and Ethical Techniques of Adjustment for the Policyholder,* FAPIA Summer Conference, 2010

- Speaker, *The Legal, Ethical and Practical Adjustment Issues from Windstorm Claims to Walls, Windows, and Roofs,* WIND 2010

- Speaker, *Gulf Coast Case Law Update,* WIND January 2010

- Speaker, *Hospitality Industry Insurance Litigation Update,* The Hospitality Law Conference 2009

- Speaker, *Completing and Complying With the Technical and Practical Requirements of Proofs, Loss, Examinations Under Oath, Request for Documents, Inspection of Premises, and General Requests for Cooperation,* FAPIA Mid-Year 2009

- Speaker, *Discovery of Insurer Misconduct – Uncovering Pattern & Practice* Insurance Bad Faith and Settlement Institute 360 Advocacy Institute 2009

- Speaker, *Science of Roof Damages,* First Party Claims Conference, 2009

- Speaker, *Fully Understanding How Windstorms Affect Buildings is Crucial to Proper Adjustment and Valuation,* NAPIA FPCC Conference 2009

- Speaker, *Subrogation Do's and Don'ts, NAPIA FPCC Conference 2009*

- Speaker, *Speed Adjusting, A Fast and Furious Look at the Concerns and Considerations of Insurance Claims and How They Can Affect Public Adjusting,* FAPIA Summer Conference 2009

- Speaker, *The Merlin Guide: How to ethically and efficiently adjust claims in Texas*, Seminar for Texas Public Adjusters, 2009

- Speaker, *The Process Matters: Appraisals, Prompt Payment and Bad Faith in Texas,* Seminar for Texas Public Adjusters, 2009

- Speaker, *Fact or Fiction: Expert analysis of Hurricane Ike*, Seminar for Texas Public Adjusters, 2009

- Speaker, *Maximizing Recovery: Best practices and surrounding Law and Ordinance coverage, ACV, RCV, Matching, and Building Codes,* Seminar for Texas Public Adjusters, 2009

- Speaker, *Successful Solicitations and Salutations: Sell and Close Right to Succeed*, FAPIA, 2009

- Speaker, *Electronic Discovery Concerns for Adjusters, Insurers, and Policyholders: What you May Not Know Can Hurt You,* WIND 2009, January 27, 2009

- Speaker, *How Ethical and Knowledgeable Claims Handling Adds Value to Your Clients Claim,* 2008 NAPIA Mid-Year Meeting, December 6, 2008

- Speaker, *What Even Seasoned Attorneys Need to Know About Current Techniques of Persuasion When Discussing Issues of Insurer Misconduct,* Florida Justice Association, 2008

- Speaker, *How Ethical and Knowledgeable Claims Handling Adds Value to your Clients Claim,* NAPIA 2008

- Speaker, *Delay of Game,* Panel Discussion of Specific Types of Business Interruption Claims, NAPIA/MAPIA, 2008

- Speaker, *The Perfect Game, Best Practices for Claims Handling When it Comes to Maximizing the Recovery for a Client,* NAPIA/MAPIA, 2008

- Speaker, *The Rules of the Game, A discussion comparing and contrasting the rules, regulations, and requirements for Northeastern U.S. and the Gulf Coast states,* NAPIA/MAPIA, October 24, 2008

- Speaker, *Is Your Association really Ready for Another Hurricane in 2008*?, CAI North Gulf Coast Chapter, March 19, 2008

- Speaker, *Hurricane Coverage and Litigation Issues, Including Florida's New Valued Policy Law and the Question of Concurrent Causation*; Florida Justice Association Annual Workhorse Seminar, Orlando, FL, February 14, 2008

- Speaker, *Who's on First? Excess Policies and Multiple Insurers*; 2008 Windstorm Conference, Jacksonville, FL, February 4-8, 2008

- Speaker, *RULES OF THE ROAD – A Different Methodology For Proving Duty and Breach*, Florida Justice Association 2007 Winter CLE Seminar, Beaver Creek, CO, December 13-17, 2007

- Speaker, *Establishing the Right Trial Theme for Your Bad Faith Case*; National Advanced Forum on Bad Faith Litigation, Miami, FL, November 11, 2007

- Speaker, *Ten Things a Florida Public Adjuster Can do to Raise Professionalism and Become More Successful*; 2007 FAPIA Summer Conference, Captiva Island, FL, August 10, 2007.

- Speaker, *Plugging the Gaps: Dealing with Inconsistent Terms in Your Layered Insurance*; 2007 Risk Insurance Management Society Conference, New Orleans, LA, April 30, 2007.

- Speaker, *Coming Up With Evidence Out of the Blue – Creative Bad Faith Discovery*; American Association for Justice Mid-Year Convention, Miami Beach, FL, February 11, 2007.

- Speaker, *Unfair Claims Practices*; Academy of Florida Trial Lawyers 2006 Winter Seminar, Snowmass, CO, December 15, 2006.

- Speaker, *Practical and Legal Lessons from the 2004 and 2005 Hurricanes for Every Policyholder Representative*; National Association of Public Insurance Adjusters 2006 Mid Year Meeting, San Francisco, CA, December 1, 2006.

- Speaker, *Peace of Mind: Getting Adequate Insurance Protection*; APCM's 2006 Regional Conference – Florida Region, Lake Buena Vista, FL, November 10, 2006.

- Speaker, *Dealing With Disaster: How to Survive Being Flooded Out, Burned Up, or Blown Away*; 2006 Community Associations Institute, Inc. 2006 National Conference, Palm Springs, CA, May 4, 2006.

- Speaker, *Property Insurance 101: What Else to We Cover? Extra Coverages*; American Bar Association's Tort and Trial Section Presents Emerging Issues in Homeowner's Insurance, Carlsbad, CA, April 27, 2006.

- Speaker, *How to Apply Coinsurance Deductible Clauses in Property Insurance Policies*; 2006 Florida Association of Public Insurance Adjusters Semi Annual Meeting, Tallahassee, FL, April 4, 2006.

- Speaker, *Condominium Leadership Before & After a Hurricane Catastrophe*; Seventh Annual Windstorm Insurance Conference, Orlando, FL, February 10, 2006.

- Speaker/Panelist, *The Return of the Hurricane Panel: Part II*; Seventh Annual Windstorm Insurance Conference, Orlando, FL, February 9, 2006.

- Speaker, *The First Party Bad Faith Claim*; Academy of Florida Trial Lawyers Winter Seminar, Vail, CO, December 15-18, 2005.

- Speaker, *Limiting-or Expanding- the Scope of Discovery in the Bad Faith Case Post-*Campbell *and* Saldi; American Conference Institute12th Advanced Forum on Litigating Bad Faith and Punitive Damages, Miami Beach, FL, November 15 & 16, 2005.

- Speaker, *Recovering from Catastrophe: A Lesson in Leadership*; Community Associations Institute, Inc. Community Leadership Forum, Atlanta, GA October 20, 2005.

- Co-Chairperson and Speaker/Co-Presenter, *The Unlicensed Practice of Law and Unlicensed Public Adjusting*, Sixth Annual Windstorm Insurance Conference, Tampa, FL, February, 2005.

- Speaker, *Insurance Companies' Obligations to Arrive at Good Faith Evaluation of Damages*; National Association of Public Insurance Adjusters Annual Convention; Farmington, PA, June, 2004.

- Speaker, *Case Law Up-Date on Insurance*, Florida Bar Annual Convention, Boca Raton, FL, June, 2004.

- Speaker, *Perfected Bad Faith? Instructions for Filing a Civil Remedy Notice of Insurer Violation*; Florida Association of Public Insurance Adjusters; Tallahassee, FL; April, 2004.

- Speaker, *Why Can't We Just All Get Along*?, Windstorm Conference, New Orleans, LA, February, 2004

- Speaker, *How To Handle a Mold Claim*, Tampa Bay Paralegal Association, Tampa, FL, February, 2004

- Speaker, *Insurance Company Obligations to Arrive at Good Faith Evaluations of Damage*, Florida Association Public Insurance Adjusters Convention, Hollywood, FL, August, 2003

- Speaker, *Utilizing Computer Software In the Claims Evaluation Process: Can It Be Done in Good Faith*?, American Conference Institute 9th Annual Advanced Forum on Litigating Bad Faith and Punitive Damages, San Francisco, CA, April, 2003

- Speaker, *The Perspective from the Plaintiff's Bar: Is It Always Bad Faith if You Can't Agree on Amount?,* ABA Tort Trial and Insurance Practice Section, CLE Program/Seminar, Property Insurance Law; New Orleans, LA, March, 2003

- Speaker, *Insurance Company Obligations to Arrive at Good Faith Evaluations of Damage*, 2003 FAPIA Winter Convention; Tallahassee, FL; March 2003

- Speaker, *Dispelling the Mysteries of the Deductible Clause: The Policyholder's Perspective*, Florida Windstorm Conference; Orlando, FL; February, 2003

- Speaker, *Practical Considerations for Plaintiff Attorneys Handling Mold Claims,* Harris Martin's Mold Litigation: Beyond the Basics 2002 Conference, Miami, FL, October, 2002.

- Speaker, *Claims Adjustment Rules: What Insurance Companies Recognize, Lawyers Need to Learn and Judges Must Recognize,* American Trial Lawyers Association Convention, Atlanta, GA, July, 2002.

- Speaker, *Withholding Overhead and Profit is Wrong if Insurance Companies Are Trying to Act Right,* NAPIA Convention, Uncasville, CT, June, 2002.

- Speaker, *Practical Considerations for Plaintiff Attorneys Handling Mold Claims*, American Conference Institute, New York, NY, April, 2002.

- Speaker, *The Rules of Claims Adjustment: What Insurance Companies Recognize and Lawyers Need to Learn;* Ontario Trial Lawyers Convention, Toronto, Canada, April, 2002.

- Speaker, *Withholding Overhead and Profit is Wrong if Insurance Companies Are Trying To Act Right*; Florida Windstorm Conference, Orlando, FL, February, 2002.

- Speaker, *Practical Considerations for Plaintiff Attorneys Handling Personal Injury and First Party Mold Claims*, American Conference Institute, Miami, FL, December, 2001.

- Speaker, *Bad Faith Bullies, DUI Drivers, Bankrupt Insureds, Insolvent Insurers and PIP Bad Faith,* 2001 Insurance Bad Faith Seminar, Academy of Florida Trial Lawyers, Tampa, FL, September, 2001.

- Speaker, *Practical Considerations for Public Adjusters Recovering Mold Claims*, Florida Association Public Insurance Adjusters, St. Petersburg, FL, August, 2001.

- Speaker, *Allstate and Colossus: How to Deal With Them in 2001*, Vermont Trial Lawyers Association, Burlington, VT, July, 2001.

- Panel, *Florida Condominium Loss Adjusting Symposium*, Florida Windstorm Conference Orlando, FL, June, 2001.

- Speaker, *How to Hammer Allstate*, Michigan Trial Lawyers Association, Novi, Michigan, March, 2001.

- Speaker, *The Myth, Truth and Role of The American Trial Lawyer,* Australian Plaintiff Lawyers Association, Brisbane, Australia, February, 2001.

- Speaker, *Fees, Fees and More Fees,* DCA Seminars, Ft. Lauderdale and Tampa, FL, November, 2000.

- Speaker, *Breaking the Grip of the Good Hands People from Allstate,* Academy of Florida Trial Lawyers, September, 2000.

- Speaker, *Colossus: What We Know Today;* Association of Trial Lawyers of America; Chicago, Illinois; August, 2000.

- Speaker, *Collision Course With the Colossus Program: How To Deal With It;* American Trial Lawyers Association, New Orleans, Louisiana; May, 2000.

- Speaker, *Unfair Claims Actions In The Aftermath of Talat,* Winter Meeting of Florida Association of Public Insurance Adjusters, Tallahassee, FL, April 2000.

- Speaker, *The Allstate Uninsured Motorist Claim,* Connecticut Trial Lawyers Association, Waterbury, CN, April, 2000.

- Chairperson and Speaker, American Conference Institute On Bad Faith and Punitive Damages, San Francisco, CA, March, 2000.

- Speaker, *Overcoming Allstate's Trade Secrets and Work-Product Objections,* Kentucky Trial Lawyers Association, Louisville, KY, March, 2000.

- Speaker, *Protecting the Blown-Away Policyholder: Good Faith Claims Handling After Hurricanes and Other Windstorms*, Florida Windstorm Conference, Orlando, FL, February, 2000.

- Speaker, *Overcoming Allstate's Trade Secrets and Work-Product Objections,* Arkansas Trial Lawyers Association, "How to Hammer Allstate Seminar", Little Rock, Ark., February, 2000.

- Speaker, *Allstate Telephone Seminar: Taking the Driver's Seat Against Allstate, State Farm and Others 'When You've Been Dolfed'*, ATLA National Telephone Seminar, December, 1999.

- Speaker, *Diego & Chip's Excellent Bad Faith Seminar*, DCA Seminars, Ft. Lauderdale, FL, December, 1999.

- Speaker, *Allstate Bad Faith Conduct and the Uninsured Motorist Claim*, Connecticut Trial Lawyers Association Seminar, "How to Hammer Allstate," Trumbell, Conn., October, 1999.

- Television Appearance, *Legally Speaking,* Tampa, FL; August, 1999.

- Speaker, *Claims Professionalism, Unfair Claims Practices, and Claims Negotiation,* Annual Meeting Florida Association of Public Insurance Adjusters, Key Biscayne, FL, August 1999.

- Speaker, *How To Maximize Bad Faith Punitive Damage Awards Through "Pooling,"* Mealey's Bad Faith Litigation Conference, Boston, MA; May 1999.

- Speaker, *Discovery of Bad Faith Claims From the Plaintiff's Perspective*, American Bar Association, San Francisco, CA April 1999.

- Published Interview, *The Plaintiff's Perspective,* Mealey's Bad Faith Reporter, February 1999.

- Speaker, *First Party Casualty Claims From the Plaintiff's Perspective,* January, 1999, DCA Seminars, Inc., Miami & Tampa, FL, January 1999.

- Speaker, *Unfair Claims Practices,* Mid-Year Meeting of National Association of Public Insurance Adjusters, Orlando, FL, December 1997.

- Speaker, *Overcoming Allstate's Trade Secret and Work-Product Objections,* Montana Trial Lawyers Association, Missoula, MN February 1997.

- Speaker, *Does this Insurance Policy Cover Anything? An Insured's Perspective of the Late Twentieth Century All-Risk Policy",* American Bar Association, National Institute On Insurance Coverage, Orlando, FL, 1994.

- Speaker, *The Plaintiff's Attorney; Champion of the Oppressed or Modern Day 49er,* Cajun Club, Tampa, FL, 1993.

- Speaker, *Discovery From the Insured's Viewpoint,* 1993 National Institute on Arson, American Bar Association, New Orleans, Louisiana.

- Speaker, *Actual Cash Value and the Broad Evidence Rule in the Wake of Hurricane Andrew,* National Association of Public Insurance Adjusters Annual Convention, Miami, FL, 1992.

- Paper & Videotape Presentation, *Collecting From Your Insurer in the Wake of Hurricane Andrew*, National Association of Public Insurance Adjusters Annual Convention, United Policy Holders, Miami, FL, 1992.

- Guest Lecturer, *The Role of the Civil Attorney Following Fire Damage and Injury,* Pinellas County Junior College, St. Petersburg, FL, 1991.

- Speaker, *Cross-Examining the Fire Expert,* Florida Advisory Committee on Arson Prevention and Association of Arson Investigators, 1991.

- Speaker, *Examinations Under Oath and the Proof of Loss*, National Association Of Public Insurance Adjusters Annual Convention, Carmel, CA, 1985.

PROFESSIONAL AFFILIATIONS

- **Member of The Florida, Mississippi, Texas, California, Tennessee, New York, New Jersey, and District of Columbia Bar**

- **Florida Bar Board of Legal Specialization and Education**
  - Board Certified Civil Trial Lawyer

- **American Association for Justice / AAJ** (*Formerly known as the* Association of Trial Lawyers of America / ATLA)
  - Insurance Oversight Committee
  - Bad Faith Insurance Litigation Group, Chairperson 1996-1998
  - President's Club Member
  - *Founding Officer,* Property and Fire Loss Insurance Litigation Group 1993

- **Florida Justice Association / FJA** (*Formerly known as the* Academy of Florida Trial Lawyers / AFTL)
  - *Eagle Benefactor Membership Status*

- **American Bar Association**

  - *Co-Chairperson,* Subcommittee on Business Interruption Coverage, Insurance Coverage Committee 1994-1995

  - *Co-Chairperson* – Task Force to revise the standard appraisal clause in insurance policies 1993-1994

  - *Vice-Chairperson* – Subcommittee on Property Insurance Law 1988-1998

  - Tort & Injury Practice Section

  - Litigation Section

- **Hillsborough County Bar Association**

- **Windstorm Insurance Network**
    - *Secretary - 2010*
    - *Co-Chair* of 2005 Annual Conference
    - *Board of Directors* 2004 – 2009

- **Citizen's Property Insurance Corporation Mission Review Task Force**, 2008 – 2009, Appointed by Gov. Crist

OTHER PUBLICATIONS

- 2010, Author, *Corban v. USAA: A Case Providing Far Too Little Because It Was Rendered Far Too Late*, Mississippi Law Journal

- 2007, Co-Author, *Lessons learned after the storms*, Trial, Journal for the American Association for Justice

- 2006, Author, *Property Coverage and Full Recovery*, Florida Community Association Journal

- 2004, Author, *Practical Considerations for Plaintiff Attorneys Handling First-Party Insurance Claims*, Mold – A Mold Property and Personal Injury Litigation Magazine

- 2000, Author, *Colossus: Taking on a Giant*, Trial, Journal of the Association of Trial Lawyers of America

- 1993, Author, *Discovery From the Insured's Viewpoint,* American Bar Association, National Institute on Arson

- 1990, Author, *Pollution and Environmental Losses Under First Party Policies; The Insured's View,* American Bar Association

- 1987, Author, *Bad Faith Insurance Actions*, Matthew Bender

- 1984, Associate Editor, *Supplement to Homeowner's Policy Annotations,* American Bar Association

- 1983, Associate Editor, *Supplement to Property Insurance Annotations,* American Bar Association

- 1981, Comment, *Conflict of Laws – Torts: Significant Relationships v. Lex Loci Delicti – Florida Enters the Modern Era,* 33 Fla. L. Rev. 359, 436 (1981).

Alliance
ADJUSTMENT GROUP

Established 1999

Your Partner in Property Damage Claims

MICHAEL PACCHIONE, MBA, CPCU

Alliance Adjustment Group
263 N. Main Street
Doylestown PA 18901
267-880-3000

Professional Experience

Alliance Adjustment Group, *Chief Operating Officer* 2011-present
Manage staff of licensed public adjusters responsible for resolving a range of property damage losses on behalf of residential, commercial, and rental property owners. Hire, direct, and train adjusters to effectively analyze policy coverages, accurately evaluate damages, and professionally negotiate with representatives of insurance companies. Responsible for managing office staff, developing efficient work processes, and implementing strategies for business development.

State Farm Fire & Casualty Company, *Team Manager* 1995-2011
Managed a unit of claim representatives in a complex coverage territory. Responsible for property damage losses under various residential and commercial policies. Created staffing and financial plans for claim unit and section. Extensive experience with litigation and catastrophe response. Previous management positions involved process improvement for the Northeast Zone and implementation of a contractor direct repair program in Pennsylvania.

Education

West Chester University, West Chester PA
Executive Masters Business Administration, September 2004
GPA 3.90/4.0

Pennsylvania State University, Harrisburg PA
B.S. Marketing, May 1995
GPA: 3.96/4.0

Professional Designations

Chartered Property Casualty Underwriter
The American Institute for CPCU (AICPCU)

The CPCU designation is widely considered the premier designation in the property and casualty insurance industry and is held by just 2% of all those employed in the industry.

Associate in Claims
Insurance Institute of America

Technical Designations

Applied Structural Drying
Institute of Inspection, Cleaning, and Restoration Certification (IICRC)

Water Damage Restoration
Institute of Inspection, Cleaning, and Restoration Certification (IICRC)

SETH A. SCHMEECKLE

PHONE 504 568 1990 EMAIL LinkedIn VCARD

Elected to Phi Beta Kappa after having earned a B.S. in Biochemistry and minors in Chemistry, Math, Psychology, and Zoology & Physiology in 1997, Mr. Schmeeckle's undergraduate training developed his analytical and problem solving skills. Applying those skills during law school led Mr. Schmeeckle to earn a seat on the Louisiana Law Review from 1998-2000. Mr. Schmeeckle became a shareholder of the firm in 2006.

Mr. Schmeeckle's practice areas focus on the representation and counseling of insurance companies in liaiblity coverage and property coverage disputes in both Louisiana and Texas. He strives to provide his insurer clients with a focused and innovative solution to the most complex of issues. Mr. Schmeeckle has argued before the Louisiana Supreme Court, the United States Court of Appeals for the Fifth Circuit, the state appellate courts, and state and federal district courts on behalf of his insurer clients.

Liability Coverage

Mr. Schmeeckle's liability coverage practice involves all claims arising under general liability policies and employer's liability/worker's compensation policies of insurance. Special focus in Mr. Schmeeckle's practice area concern construction defect coverage related litigation and the additional insured issues associated with those claims. Additionally, he has significant experience in general liability coverage disputes involving environmental, toxic tort, and long-latent disease issues. Throughout his career, Mr. Schmeeckle has guided insurers through their litigation concerning the validity of various exclusions in liability policies, provided pre-litigation counseling, developed both reservation of rights letters and cost sharing agreements, litigated bad faith issues focused on demands for policy limits and the reasonability of settlements, and handled class actions. On occasion, Mr. Schmeeckle has been able to expand his coverage litigation into the admiralty realm.

Liability Coverage Representative Cases

- *Maldonado v. Kiewet Louisiana Co.*, (La. App. 1st Cir. 3/24/14), 2014 WL 120744 (no additional insured status extended to General Contractor under Subcontractor's policy for multi-million dollar bodily injury trial verdict despite the plaintiff being an employee of the Subcontractor because the plaintiff's allegations did not contain any allegations of fault attributable to the Subcontractor/Employer)
- *Weinstein, et al, LLC v. Anthony Hinyard D/B/A Acadian Paint Contracting, et al*, (La. 3rd Cir. 3/11/13), unpublished (reversal in favor of insurer finding the "owned property" exclusion and the "real estate manager" exclusion barred coverage in a multi-million dollar construction defect case)
- *Burrows v. Executive Property Management Co.*, (La. App. 4th Cir. 3/12/14), 2014 WL 1028541 (employer's liability exclusion precluded coverage for injuries occurring during course and scope of employment despite contention by plaintiff that they were alleging non-employment related causes of negligence)

AREAS OF PRACTICE

Environmental & Toxic Tort Liability Coverage

Marine Insurance Coverage

Construction Defect Liability Coverage

Oil & Gas Liability Coverage

Professional Liability Coverage

Employer's Liability Coverage

Public Sector Coverage

Property Insurance Coverage

Bad Faith Claims Litigation

ADMISSIONS

Louisiana

Texas

EDUCATION

Louisiana State University, B.S., 1997

Louisiana State University School of Law, J.D., 2000

RECOGNITION

AV Rated

Super Lawyers: 2014

New Orleans Magazine Top 50

AFFILIATIONS

Federal Bar Association

Louisiana State Bar Association

New Orleans Bar Association

NEW ORLEANS OFFICE

601 Poydras Street, Suite 2775

New Orleans, Louisiana 70130

Phone 504 568 1990

Facsimile 504 310 9195

BATON ROUGE OFFICE

9311 Bluebonnet Blvd., Suite A

Baton Rouge, Louisiana 70810

Phone 504 568 1990

Facsimile 504 310 9195

- *In re Jillian Morrison, L.L.C.*, (5th Cir. 6/4/12), 482 Fed. Appx. 872 (question of additional insured status not ripe where party seeking additional insured status has not yet been sued)
- *Leaming v. Century Vina, Inc.*, (La. App. 4th Cir. 6/1/05), 908 So. 2d 21 (no additional insured status extended to Lessor under Lessee's policy where injury occurred in the shopping mall parking lot which where parking not was part of the lease and Lessee was not responsible for maintaining the parking lot but rather the Lessor)
- *Little v. USAA Cas. Ins. Co.*, (5th Cir. 4/2/10) (breach of contract case by employer against policyholder did not seek damages for malicious prosecution and therefore Coverage B was not implicated and no defense of the policyholder was required)
- *St. Paul Fire & Marine Ins. Co. v. Board of Com'rs of Port of New Orleans*, (5th Cir. 3/15/11), (where maritime jurisdiction applied, the New York choice-of-law provisions were valid and insurers were entitled to deny coverage based on the lack of timely notice)

Property Coverage

Mr. Schmeeckle's property coverage practice has spanned Hurricanes Katrina, Rita, Ike, Gustav, Isaac and Superstorm Sandy. His work involves pre-litigation counseling, the taking of examinations under oath, and the handling of appraisals to litigating both residential and commercial property losses. Included in his property coverage practice is the litigation of key coverage issues surrounding the viability of the water damage exclusion, overhead & profit issues, the meaning of "expenses incurred," lack of coverage for fallen trees which caused no damage, valued policy law issues, the proper methodology for calculating Business Income losses both generally and those associated with the actions of civil authority, and bad faith claims.

Property Coverage Representative Cases

- *Hoffman v. Travelers Indem. Co. of America.*, (La. 5/7/14), 2014 WL 1800079) (term "expenses incurred" means only those expenses for which an insured is responsible after application of a contractual write-down amount such that policyholder had been properly compensated and class action of which she was the lone class representative was dismissed)
- *Legier & Company, APAC v. The Travelers Indemnity Company of Connecticut*, (E.D. La. 4/28/10) 2010 WL 1731202 (appropriate formula for calculating "actual loss of business income" is [projected net income minus total projected operating expenses] + [actual continuing normal operating expenses (including payroll] – gross profits actually earned)
- *Commstop v. Travelers Indem. Co. Connecticut*, (W.D. La. 5/17/12), 2012 WL 1883461 (decrease in business income due to increased difficulty in patrons accessing store as a result of a construction project did not trigger either civil authority coverage or business income coverage)
- *Nguyen v. St. Paul Travelers Ins. Co.*, (E.D. La. 10/6/08), 2008 WL 4534395 (class action premised on general contractor overhead & profit dismissed because defendant has right to individually assess the damage being repaired to determine if a general contractor was warranted such that class treatment was not appropriate)
- *In re: Katrina Canal Breaches Litigation*, (5th Cir. 8/2/07), 495 F.3d 191 (water damage exclusion barred coverage resulting from levee failures inundating homes with water).
- *Chauvin v. State Farm Fire & Cas. Co.*, (5th Cir. 8/6/07), 495 F.3d 232 (Louisiana's Valued Policy Law did not apply where total loss of home was caused by both covered and uncovered causes of loss)

Lawyer: 2013

Super Lawyers Rising Star:
2013, 2012

New Orleans CityBusiness
Leadership in Law Top 50 Lawyer
Recipient: 2010

SETH A. SCHMEECKLE

MATTERS OF NOTE

Publications

• C. Austin Holliday and Seth A. Schmeeckle, *Setoon, Starr and Beyond*, Insurance Coverage Law Bulletin (Nov. 2013)

• Heather N. Sharp and Seth A. Schmeeckle, *New ISO Forms Impact Construction*

Organization and Management of Large Insurance Defense Groups

• In 2002, Mr. Schmeeckle commenced his service as Deputy Liaison Counsel in the *Bryson Adams, et al. v. Environmental Purification Advancement Corporation, et al*, Civil Action No. 99-1998, USDC-WDLA involving the organized defense effort of more than fifty different families of liability insurers.

Contracts, Insurance Coverage Law Bulletin (Sept. 2013)

• Sara E. Coury and Seth A. Schmeeckle, *Civil Authority Provisions in Property Policies*, Insurance Coverage Law Bulletin (Nov. 2012)

• Travis B. Wilkinson and Seth A. Schmeeckle, *Coverage Issues Under Homeowners' Insurance Policies in Chinese Drywall Cases*, Insurance Coverage Law Bulletin, Vol. 10, No. 8 (Sep. 2011)

• Wystan M. Ackerman and Seth A. Schmeeckle, *Handling the Flood of Coverage Litigation: Lessons Learned from Katrina*, Coverage, Vol. 20, No. 3 (May/June 2010)

• Anne E. Briard and Seth A. Schmeeckle, *Is an Insurer Obligated to Defend the Prosecution of Affirmative Claims on Behalf of Its Insured?*, Insurance Coverage Law Bulletin, Vol. 8, No. 4 (May 2009)

• Gregory C. Fahrenholt and Seth A. Schmeeckle, *A New Approach: Disclaiming Coverage for Arson to a Vacant Building in Standard Fire Policy States*, Insurance Coverage Law Bulletin, Vol. 7, No. 10 (Nov. 2008).

• Seth A. Schmeeckle and Ralph S. Hubbard III, *Selecting Defense Counsel and Controlling the Defense: Who Makes the Call When Rights are Reserved?*, Insurance Coverage Law Bulletin, Vol. 3, No. 3 (Apr. 2004).

Speeches and Addresses

• USDC EDNY Storm Sandy Mediation Training (May 22, 2014)

• HarrisMartin's Superstorm Sandy Insurance Coverage Litigation Conference (Feb. 26, 2013)

• ABA YLD Spring Conference: Insurance Coverage in Times of Natural Disaster (May 15, 2009)

• CNA Commercial and Property Casualty Insurance Company: Catastrophic Claims (Aug. 16, 2007)

• Following Hurricane Katrina in 2005, Mr. Schmeeckle was named co-Liaison Counsel for the Defendants in the *In Re Canal Breaches Consolidated Litigation*, No. 05-4182, USDC-EDLA, to serve as one of two Liaison Counsel for the defendants involved in the post-Katrina levee breach litigation wherein Mr. Schmeeckle was charged with the coordination of the alleged defendant tortfeasors, defendant general liability insurers, and more than 200 defendant first party insurers.

• In 2007, Mr. Schmeeckle served the first party insurance industry as Coordinating Counsel for a large volume of first party insurers in the consolidated litigation before Judge Eldon E. Fallon of the USDC-EDLA involving a multitude of lawsuits filed by Chase Home Finance LLC against various first party insurance carriers alleging a myriad of Hurricane Katrina theories of recovery.

• In 2010, Mr. Schmeeckle was selected to the Insurance Steering Committee for the *In Re: Chinese Manufactured Drywall Products Liability Litigation*, No. 09-md-2047 USDC-EDLA representing both liability and property insurers.

• In 2013, Mr. Schmeeckle was selected to the Insurance Steering Committee for the *In Re: Hurricane Sandy Cases*, No. 14 MC 41 USDC-EDNY representing a property insurer.

A. DANIEL THORNE

A. Daniel Thorne is an Insurance Examiner with the Federal Emergency Management Agency's ("FEMA") Federal Insurance and Mitigation Administration ("FIMA"). Dan's primary responsibilities include the review of formal appeals submitted to the Agency by policyholders for denied flood insurance claims, and the review of flood insurance inquiries to the Agency from Federal, state and local officials. Dan is responsible for issuing written appeal determinations on behalf of FIMA's Claims and Appeals Branch. Dan's other responsibilities include: auditing National Flood Insurance Program ("NFIP") insurers' claim handling activities and claim payments; contributing to NFIP policymaking; providing claim handling guidance; and reviewing NFIP training materials.

Prior to joining FIMA in November 2012, Dan owned and operated an independent adjusting firm, Thorne Claim Service, Inc. (established in 1995), mentoring adjusters and handling flood loss assignments nationwide from NFIP insurers. Dan's experience in flood claim adjusting include: industrial, major commercial, total losses, buildings under-construction, multi-peril flood losses, mobile-homes, dwellings, and condominium buildings.

Dan worked for an independent adjusting firm, Bellmon Adjusters, Inc., serving as the principal File Examiner and General Adjuster. Dan has also served as a Claim Examiner and General Adjuster with the NFIP.

In 1990 Dan graduated with a Bachelor's of Arts from Virginia Tech and State University in Blacksburg, Virginia, and in 2012 received two industry designations from the Institute of Inspection, Cleaning and Restoration ("IICRC"). Dan is also responsible for establishing Formal Appeals procedural guidelines for NFIP insurers, and is the point of contact for the Claims and Appeal Branch on the following FEMA Bulletins: Claims Guidance for Structural Drying and Other Related Item, W-13025a (May 14, 2013) and Sandy Supplemental Claims, W-13027a (May 16, 2013).

RUSSELL M. TINSLEY

Russell M. Tinsley began his career with the Federal Emergency Management Agency ("FEMA") in January 2005 as the Insurance Program Specialist.

In this position, Mr. Tinsley was directly involved in the creation of the Appeals rule specified by the Flood Insurance Reform Act of 2004 as well as the National Flood Insurance Program's ("NFIP") Flood Insurance Claims Handbook, the Acknowledgement form and the Loss History form. In response to Hurricane Katrina Mr. Tinsley was assigned to develop the Expedited Claim Process project and evaluate its impact on the NFIP's service to policyholders and other stakeholders. Mr. Tinsley conducts operational reviews of WYO carriers and answers inquiries from insureds, Members of Congress and the Executive Branch.

Mr. Tinsley has been an all-lines insurance claims adjuster for more than 35 years. He has worked as an independent adjuster and manager for a large multi-national independent adjusting firm and Insurance Management Solutions Group, a business process outsourcer. Mr. Tinsley has held staff claims positions as a regional general adjuster with USAA and as a technical administrator with Bankers Insurance Group. In all of these positions he was actively involved in catastrophe response to a variety of events from windstorms and hail to hurricanes to fire storms and floods as well as daily property and casualty claims. Following Hurricane Irene Mr. Tinsley was assigned to the FEMA Joint Field Office ("JFO") in Raleigh, North Carolina as the NFIP Liaison to the Federal Coordinating Officer ("FCO") in standing-up a NFIP claims hotline for North Carolina and participating in community meetings throughout eastern North Carolina. Mr. Tinsley was most recently the NFIP Liaison to the FCO at FEMA's JFO in Forest Hills, New York in response to Meteorological Event Sandy.

Mr. Tinsley has presented flood claims continuing education classes in Florida, Mississippi and Louisiana. He has conducted numerous workshop presentations and participated as a panel member at the National Flood Conferences since 2000. He participated as a panelist on the subject of "Identifying Coastal Hazards and Improving Resiliency" during the fourth annual Rhode Island Energy and Environmental Leaders Day sponsored by Senator Sheldon Whitehouse.

Mr. Tinsley currently holds the title of Insurance Examiner and reports directly to the Director of Claims, Federal Insurance and Mitigation Administration ("FIMA"). His current duties also include problem resolution involving NFIP stakeholders; acting as a claims liaison with WYO carriers; annual review of the NFIP adjuster fee schedule; and monitoring claims training and presentations for content, delivery and conduct.

Mr. Tinsley is the FIMA, Claims and Appeals point of contact regarding the implementation and requirements of the flood claims portions of the Biggert-Waters Flood Insurance Reform Act of 2012 (BW-12) with particular focus on the development of Subtitle B – Alternative Loss Allocation or the "COASTAL Act of 2012. He also served as the joint point of contact, along with Mr. James Sadler (Director of FIMA Claims and Appeals), in the development of the Fiscal Year 2013 Report to Congress regarding the Engineering Analysis of Flood-In-Progress Determinations pursuant to BW-12 Section 100227(a).

Mr. Tinsley is a graduate of Stetson University and has held the Associate in Claims designation from the IIA/AICPCU since 1979. He has been licensed as an All-Lines Adjuster in Florida since 1975.

Robert T. Trautmann, Esq.

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125 Half Mile Road, Suite 200, Red Bank, NJ 07701
PH (732) 933-2700
FAX (732) 933-2702
EMAIL: rtrautmann@MerlinLawGroup.com

EDUCATION

- Juris Doctorate, Seton Hall University School of Law, 2005
- Bachelor of Arts, Political Science, Rutgers, The State University of New Jersey-New Brunswick, 2002

EDUCATIONAL HONORS

- Dean's Scholar
- Competitor, Eugene Gressman Moot Court
- Captain & President, Rutgers' Rugby Football Club
- Member, Phi Gamma Delta

EXPERIENTIAL DIGEST

- January 2013-present
  Litigation Attorney
  Merlin Law Group, P.A.
- April 2011-January 2013
  Staff Counsel
  Farmers Insurance
- November 2005-April 2011
  Litigation Attorney
  Trautmann & Associates

PUBLIC SPEAKING ENGAGEMENTS, SEMINAR PAPERS & AWARDS

- Speaker: *"What We Have Learned And Are Seeing In The Field From Hurricane Sandy"*
  New York, NY, 2013

PROFESSIONAL AFFILIATIONS

- Member of The New Jersey and North Carolina Bar
- Member of The Franklin Township Board of Education, 2013-2014
- Member of The New Jersey State Bar Association
- Member of The Somerset County Bar Association
- Member of The Somerset County Civil Practice Committee, 2013-2014
- General Counsel of Love True (non-profit)
- Past President of The Morris County Rugby Football Club

William ("Bill") Treas

Biographical Information

Bill Treas is a partner with the law firm of Nielsen, Carter & Treas, LLC in New Orleans, Louisiana. The firm represents most of the major insurance company participants in the National Flood Insurance Program (NFIP) on a national basis. He is head of the litigation department for the firm and is responsible for all NFIP trials for the WYO companies the firm represents. Mr. Treas has been involved in NFIP litigation for over a decade starting with cases stemming from Tropical Storm Allison in 2001 and managing massive amounts of litigation from Hurricanes Katrina and Ike. Mr. Treas has tried several NFIP cases all over the country and has spoken at flood program conferences and training sessions. Mr. Treas is admitted to practice in several courts including: the U.S. Supreme Court, U.S. Court of Appeals for the Fifth Circuit, U.S. Court of Appeals for the Sixth Circuit, U.S. Court of Appeals for the Ninth Circuit, U.S. District Courts for the Eastern, Middle, and Western Districts of Louisiana, U.S. District Court for the Northern District of Florida, U.S. District Courts for the Eastern and Southern Districts of Texas, and the Louisiana Supreme Court.