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SURVEY OF PROPERTY COVERAGE ISSUES RELATED TO THE DEEPWATER HORIZON GULF OIL SPILL

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INTRODUCTION

On April 20, 2010, the Deepwater Horizon submersible drilling platform was in the process of completing an 18,360 foot well approximately 45 miles off the coast of Louisiana. At 9:45 a.m., the rig suffered a catastrophic failure following two explosions, the second occurring immediately after the first.

In the wake of those explosions, the well began to spew oil into the Gulf of Mexico. Initially, it was reported that the leak was contained to one area of the well. The initial estimates had the well leaking 1,000 barrels (or 42,000 gallons) per day. However, eight days after the incident, a second leak was discovered. The experts revised their initial estimates to 5,000 barrels (or 210,000 gallons) per day. As time went on, and additional information became available, the leaks proved to be far worse. Certain estimates had the leak at nearly 60,000 barrels (or 2.5 million gallons) per day. At that rate, the well discharged in a single month nearly 10 times the total volume of oil spilled in the Valdez disaster.

What does this mean to the insurance industry? It is clear that such a catastrophe will have a meaningful impact on insurers with exposures in the Gulf Coast. The extent of this impact is difficult to predict with any accuracy, as the degree to which claims will be presented to insurers (as opposed to BP) is, as yet, undetermined. But we do know that the oil spill is already having a significant effect on industries throughout the Gulf Coast. As a result of the spill, the hotel, restaurant, and marine related industries (to name a few), are already seeing significant impacts on their businesses.

In addition to the financial impact the Gulf Oil Spill is currently having on local industry, meteorological experts are predicting that this hurricane season could be one of the worst in recent years. The spectre of a significant storm, or series of storms, moving through the area of the Gulf where the oil slick is located raises the potential for devastating direct and contingent losses. Hurricane force winds, heavy rain, and storm surges would have the potential to spread the oil within the Gulf, carry oil on shore and into river basins and ports, and cause damage to buildings/property, vehicles, watercraft, and equipment, and could result in a significant disruption of shipping traffic in the Gulf ports and/or the Mississippi River. How and the extent to which hurricanes might bring the oil onto shore causing additional property damage (requiring clean-up to insured property), are among the questions and fears citizens and business owners in the Gulf Coast must face as they head into the 2010 hurricane season. As these issues develop, we expect additional legal questions to surface, creating further policy considerations for insurers. The combination of "ordinary" windstorm damage with the added oil contamination could increase the volume, severity, and legal complexity of the claims arising out of the hurricane season.

In order to facilitate insurers' review of claims arising out of the Deepwater Horizon Gulf Oil Spill, we have prepared this Publication as a reference guide. The goal of this paper is to identify some of the key issues arising out of this event, and then summarize the law in the various affected states regarding those issues.

Purpose and Intended Use of Publication

This Publication has been provided to the clients of Chartwell for use by their employees, agents, independent adjusters and/or designees, and is intended to be for informational purposes only.

Chartwell has identified a number of issues for consideration related to the adjustment of property damage and business interruption claims in various states primarily affected by the Deepwater Horizon Gulf Oil Spill. The research and findings in this Publication may be used by trained insurance claims professional in resolving coverage questions, but must be considered along with other applicable laws, regulations, generally accepted insurance industry practices and standards for the relevant locale, company guidelines and directives, and the training and experience of the claims professionals.

Format and Method of Preparation

Chartwell attorneys identified and performed basic research concerning several topics we believe will be of interest to property insurers, adjusters, and policyholders in the wake of the Deepwater Horizon Gulf Oil Spill. A general search was conducted for the rule of law or, in the absence of a bright line rule, guidance on each of the identified topics for each state. Relevant authorities of particular interest appearing in the search results for each topic were selected and edited for notation in summary form.

No Warranty, Advice, or Recommendation

The Publication is not offered as legal advice, and the information herein should be used in resolving claims-related issues only after consultation with counsel. Although every effort was made to include in this Publication a summary of the most relevant statutory and decisional authority on the identified topics, Chartwell does not warrant or represent that the information contained herein is exhaustive as to any topic. Nothing in the Publication is intended to be construed as a recommendation or legal advice as to any claim or category of claims, and the information provided should be used accordingly.

Please be mindful that the law continues to evolve and change over time, that the cases, statutes, and other citations in this Publication may be overruled, distinguishable from, or inapplicable to your particular loss or occurrence. It is important to confirm the current status of the law, whether statutory or decisional, prior to relying upon it in connection with a final coverage position. Chartwell attorneys are prepared to perform all necessary follow-up research, and to assist insurers in providing its policyholders with prompt, appropriate responses to the difficult coverage questions that are expected to arise out of the Deepwater Horizon Gulf Oil Spill.

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I. Anticipated Coverage Issues

1. BUSINESS INTERRUPTION - - CESSATION OF OPERATIONS - - PARTIAL VS. COMPLETE

Business interruption losses are triggered by a suspension or interruption of operations. Questions regarding the availability of BI coverage typically arise when the business only suffers partial suspension or incomplete interruption of operations. The question becomes even more troubling if the policy does not specify whether a complete suspension or interruption is required. We provide below a summary of whether and how the courts in the affected jurisdictions have addressed/resolved this issue.

a. ALABAMA

* **Rule:** Complete suspension of business at one location may trigger BI coverage at other, non-suspended locations.

* *Cincinnati Ins. Co. v. Washer & Refrigeration Supply Co.*, 2008 U.S. Dist. LEXIS 112464 (S.D. Ala. Aug. 8, 2008). The court analyzed the insured's misapprehension of the "necessary suspension" provision of the policy, which required that direct physical loss cause suspension to the insured's operations before BI would be covered. The court concluded that the insured's business was clearly "suspended" at its Mobile, Alabama locations due to Katrina *et. al.* The insured closed its other regional locations for a period, but the evidence showed that they could have continued operating if not for certain uncovered causes (*e.g.*, power outage). However, "the suspension of property damage at the Mobile locations could have caused problems at WRS's other locations. Thus, the property damage at the Mobile locations may entitle [the insured] to business interruption and extra expense coverage for these locations as well."

b. FLORIDA

***** **Rule:** A reduction in capacity does not trigger business interruption coverage.

***** *Hotel Properties, Ltd. v. Heritage Ins. of America*, 456 So. 2d 1249 (Fla. Dist. Ct. App. 1984) (mere diminution in hotel occupancy, as opposed to actual closing, does not constitute business interruption). A leased restaurant on the insured hotel's premises was damaged by fire, resulting in a significant decrease in room occupancy. The court affirmed the court below, holding that the impact of the loss of the restaurant on occupancy did not amount to business interruption under the policies in question.

* *Ramada Inn Ramogreen, Inc. v. Travelers Indem. Co. of America*, 835 F.2d 812 (11th Cir. 1988) (decrease in hotel occupancy due to loss of a restaurant not covered under hotel BI policy). Plaintiff owned and operated a restaurant located within its hotel complex; the restaurant was lost to fire. As in *Hotel Properties*, *supra*, the plaintiff experienced diminished

occupancy. The insured argued that the subject policy provided business interruption for loss of business, that the hotel and restaurant were "mutually dependent," and that the diminution in occupancy was a direct result of the restaurant fire. The Eleventh Circuit affirmed the trial court's decision in favor of the insurer, explaining that Ramada misconstrued the nature of "mutual dependence." Relying upon the BI definitions, the court offered the following analysis: "recovery is intended when the loss is due to inability to use the premises where the damage occurs … this is not the situation in the instant case where the hotel operation was able to accommodate the same number of patrons, albeit their actual number of customers may have been reduced. The concept of mutual dependency is more appropriately applied to four hotel buildings, which altogether comprise a single unit. If any one of them were sufficiently damaged, a portion of the hotel operation would be suspended. The insurance policy clearly provides for this situation by allotting an aggregate sum which encompasses damage to any one of the four buildings."

c. LOUISIANA

***** **Rule:** A complete shutdown is required to trigger business interruption coverage.

* *Evans v. Lafayette Ins. Co.*, 2007 U.S. Dist. LEXIS 92885, (E.D. La. Dec. 18, 2007) (a law firm suffered a "necessary suspension" of business due to the closing of its New Orleans location after Hurricane Katrina, despite the fact that some attorneys and employees were able to work remotely from other locations).

Note: The court denied the insurer's motion to dismiss, concluding that business operations were clearly suspended at the New Orleans office. The policy's BI provision provided coverage for actual loss sustained "due to the necessary suspension of your 'operations' during the 'period of restoration'." "Operations" was defined as "your business activities occurring at the described premises." The policy grouped all of the insured's locations together as a single "described premises" on the declaration page, but policy forms for each office location differed. There was also a separate policy form applying to the New Orleans location only, which referred to the office as the "described premises."

The court interpreted these provisions to mean that a "total cessation of business was required under the policy language," and that this had occurred at the New Orleans location - - *i.e.*, at the "described premises." "The fact that New Orleans office employees worked from remote locations does not prevent a complete cessation of the business from occurring in Louisiana." The court characterized the insured's use of its other office space as an effort to satisfy its duty to mitigate the loss.

* *Courtenay, Hunter & Fontana*, 2008 U.S. Dist. LEXIS 63650 (E.D. La. Aug. 19, 2008) (**Unreported decision)** Court held that the period of restoration ended when the insured resumed its operations. Plaintiff's contention that a suspension, no matter how brief, triggers business income losses during the entire "Period of Restoration" is simply not supported by the policy language. Assuming that Plaintiff resumed its operations in New Orleans as of November 7, 2005, which means that its "operations" at the premises were no longer suspended, then

business income losses would not be covered under the Business Income section 5(f)(1) of the policy after that date.

d. MISSISSIPPI

***** We were unable to find any Mississippi case law discussing cessation of operations - - partial versus complete - - at the time of this writing.

e. TEXAS

***** **Rule:** A work slowdown does not trigger business interruption coverage.

***** *Royal Indemnity Ins. Co. v. Mikob Properties, Inc.*, 940 F. Supp. 155, 160 (S.D. Tex. 1996) (insured not entitled to rental income lost on two of its three apartment buildings in a complex (apartments "A" and "B") after the third apartment ("C") was destroyed by fire and certain amenities near apartment C were unusable). The policy included a standard BI provision for loss due to necessary suspension of operations, but did not provide any language relating to partial suspensions. The insured argued that "because the Policy insured the entire premises, which include the three apartment buildings and the amenities necessary for a 'waterfront community lifestyle,' the policy covers the rental income lost by the complex as a whole." In other words, the insured argued that the complex as a whole depended on the amenities, creating "mutual dependency." The court disagreed that mutual dependency applied; since buildings A and B continued to operate after the fire, operations at those locations were not suspended. *Id.* at 157-58 (*relying on Ramada Inn Ramogreen, Inc. v. Travelers Indemn. Co. of America*, 835 F.2d 812, 814 (11th Cir. 1988)). "A reduction in the 'quality of life' in the undamaged parts of the premises does not trigger the business interruption clause." *Id.* at 159 (citing *Keetch v. Mutual of Enumclaw Ins. Co.*, 66 Wash. App. 208, 212, 831 P.2d 784, 787 (1992)). "[I]f the insured premises are still operating, the business interruption clause does not cover a decrease in income." *Id.* at 160.

* *Quality Oilfield Products, Inc. v. Michigan Mut. Ins. Co.*, 971 S.W.2d 635 (Tex. App. 1998) (court found that "interruption of business," although not defined, unambiguously meant "suspension of operations" and did not include "work slowdown."); *see also Ramada Inn Ramogreen, Inc. v. Travelers Indemn. Co. of America*, 835 F.2d 812, 814 (11th Cir. 1988); *Royal Indem. Co. v. Mikob Properties,* Inc. 940 F. Supp. 155, 159 (S.D. Tex. 1996).

2. CONCURRENT CAUSATION/EFFICIENT PROXIMATE CAUSE/ANTI-CONCURRENT CAUSATION

In order to recover for the cost to repair direct physical loss or damage, and for business interruption arising out of that physical loss or damage, the insured must demonstrate a causal connection between the insured peril and the physical loss or damage/suspension of business operations. Insurers are often required to make a determination as to whether the loss is caused by a covered peril, an excluded peril, or a combination of covered and/or excluded perils. The outcome of this analysis is generally critical to the coverage determination. In the case of the oil

spill, we anticipate that policyholders will argue that their losses are caused by the explosion at the Deepwater Horizon rig. Is the cause of the loss actually the presence of oil (a contaminant) on the insured's property (or the property of a direct supplier, customer, or attraction property)? Moreover, what if a hurricane carries the oil onto insured property? What is the cause of the loss? Did the oil contamination cause the property damage, or is it more properly characterized as damage caused by wind and/or water from the hurricane? Or, is it a confluence or concurrence of events? In order to address these issues, one should consider the rules governing concurrent causation, efficient proximate cause, and anti-concurrent causation.

a. ALABAMA

* **Rule:** Alabama is an efficient proximate cause jurisdiction; anti-concurrent causation provisions are permissible.

* Overall, there is very limited authority in Alabama addressing concurrent causation in the property insurance context.

* *State Farm Fire & Casualty Co. v. Slade*, 747 So.2d 293, 313 (Ala. 1999). The Alabama Supreme Court was asked to evaluate whether coverage existed for a claim involving potential concurrent causation - - from lightning (not excluded) and earth movement (excluded). In that case, the insured argued that lightning caused the soil movement which resulted in the loss. The State Farm policy contained an earth movement exclusion which stated that loss caused by earth movement was excluded regardless of the cause of the earth movement, "whether other causes acted concurrently or in any sequence with [earth movement]," or whether the earth movement arose from "natural or external forces." *Id.* at 311. The court looked to the language of the policy to determine if coverage was afforded to the insured, and concluded that because the earth movement exclusion was broad and unambiguous, even if the lightning resulted in or occurred in conjunction with the earth movement, the loss was excluded in light of the policy language.

* Under Alabama law, the efficient proximate cause is "the active efficient cause that sets in motion a chain of events which brings about a result without the intervention of any force started, and working actively from a new and independent source." *Slade*, 747 So.2d at 313. Under this standard, a jury may find that a covered event was the "proximate cause of the loss" and that a non-covered event was "but an intervening agency which could reasonably have been foreseen or anticipated, but an incident in the chain of events." *Id*.

* Per *Slade*, an insurance company can craft stricter coverage as long as the policy is approved by the Department of Insurance. It therefore appears that Alabama would permit an anti-concurrent causation clause.

* Alabama is an efficient proximate cause jurisdiction. *Western Assurance Co. v. Hann*, 78 So. 232 (Ala. 1917). Proximate cause in an insurance policy context is treated the same as proximate cause in the law of negligence.

* **Note:** However, in recent decisions, the Alabama Supreme Court found that the *Western Assurance* court did not state a principle of public policy in crafting the efficient proximate cause rule and, therefore, an insurance company can craft stricter coverage as long as the policy is approved by the Department of Insurance.

b. FLORIDA

* **Rule:** Efficient proximate cause and concurrent causation doctrines are not mutually exclusive; anti-concurrent causation provisions are permissible.

* *Wallach v. Rosenberg*, 527 So. 2d 1386 (Fla. Dist. Ct. App. 1988). The Court of Appeals of Florida, Third District, analyzed the question of whether there was coverage where the collapse of a seawall was caused by both negligence (covered) and "water pressure caused by storm" (excluded). The court found that liability coverage was precluded under a homeowner's policy. The court rejected defendant's (and his insured's) argument that the efficient proximate cause doctrine applied, and that the weather was the efficient proximate cause of the loss, thus precluding coverage. The *Wallach* court distinguished between the "concurrent causation" doctrine and the "efficient proximate cause" doctrine by citing to and relying upon the seminal case of *Insurance Co. v. Partridge*, 10 Cal.3d 94, 109 Cal. Rptr. 811, 514 P.2d 123 (1973):

> Although there may be some question whether either of the two causes in the instant case can be properly characterized as *the* 'prime,' 'moving' or 'efficient' cause of the accident, we believe that coverage under a liability insurance policy is equally available to an insured whenever an insured risk constitutes simply *a* concurrent proximate cause of the injuries. That multiple causes may have effectuated the loss does not negate any single cause; that multiple acts concurred in the infliction of injury does not nullify any single contributory act.

Id. at 1388 (quoting *Partridge*, 514 P.2d at 130) (emphasis in *Partridge*). Following *Partridge*, the *Wallach* court adopted the rule that "a jury may find coverage where an insured risk constitutes a concurrent cause of the loss even where 'the insured risk [is] not…the prime or efficient cause of the accident.' " *Id.* at 1387 (quoting Couch on Insurance 2d §44:268).

* In *Palucci v. Liberty Mutual Fire Ins. Co.*, 190 F. Sup. 2d 1312 (M.D. Fla. 2002), the Middle District of Florida expanded upon *Wallach*, noting that the efficient proximate cause and concurrent causation doctrines are "not mutually exclusive." *Id.* at 1319. "The efficient proximate cause doctrine applies where the perils are dependent. Causes are independent [and the concurrent causation doctrine applies] when they are unrelated such as an earthquake and a lightning strike, or a windstorm and wood rot, causes are dependent [and efficient proximate cause doctrine applies] where one peril instigates or sets in motion the other, such as an earthquake which breaks a gas main that starts a fire." *Id.* The *Palucci* decision involved a question of first party coverage; the court expressly stated that it did not agree with subsequent California case law that limited the holding of *Partridge*, on which *Wallach* relied, to the third party context, and concluded that that concurrent causation "is the prevailing default standard in Florida."

* Florida applies an efficient proximate cause rule, providing that where different causes concur to produce loss, the efficient cause, the one that sets the others in motion, is the cause to which the loss is to be attributed. *Hartford Accident and Indem. Co. v.Phelps*, 294 So. 2d 362 (Fla. Dist. Ct. App. 1974); *Sabella v. Wisler*, 59 Cal. 2d 21, 27 Cal. Rptr. 689, 377 P.2d 889 (1963).

* Anti-concurrent causation clauses are permissible under Florida Law. *See Palucci v. Liberty Mutual Fire Ins. Co.*, 190 F. Supp. 2d 1312 (M.D. Fla. 2002).

* *Guideone Elite Ins. Co. v. Old Cutler Presbyterian Church, Inc.*, 420 F.3d 1317 (11th Cir. 2005) (where crime of rape (uncovered) and robbery (covered) both occurred, crimes were independent; crime of robbery gave rise to liability coverage).

* *Transamerica Ins. Co. v. Snell*, 627 So.2d. 1275 (Fla. Dist. Ct. App. 1993) (concurrent causation doctrine is applicable only when the multiple causes are not related and dependent, and involve a separate and distinct risk).

c. LOUISIANA

* **Rule:** It is sufficient to show that a peril was the efficient cause of the loss, notwithstanding that another peril contributed; anti-concurrent causation provisions are permissible.

* Some courts have held that if a covered peril causes an excluded peril, then coverage may be available. *See e.g., Lorio v. Aetna Ins. Co.,* 232 So.2d 490 (La. 1970) ("if a windstorm is the dominant and efficient cause of the loss, the insured may recover notwithstanding that another cause or causes contributed to the damage suffered.")

* In certain circumstances, only a portion of a loss may be covered. *See e.g., Urrate v. Argonaut Great Central Ins. Co.,* 881 So.2d 787 (La. Ct. App. 2004); *Ludlow Corp. v. Arkwright-Boston Mfgrs. Mut. Ins. Co.*, 317 So.2d 47 (Miss. 1975). It will be necessary (to the extent possible) to determine the sequence and timing of the damage.

* *In Re Katrina Canal Breaches Litigation*, 495 F.3d 191, 222 n. 8 (5th Cir. 2007) ("express[ing] no opinion" as to the extent to which Louisiana applies the efficient proximate rule in all-risk context since rule was inapplicable where the only cause of plaintiffs' property damage was flood).

* Nevertheless, efficient proximate cause appears to be the default rule. *See Cameron Parish School Board v. RSUI Indemnity Co.*, 620 F. Supp. 2d 772, 780 (W.D. La. 2008); *Lorio v. Aetna Ins. Co.*, 232 So.2d 490, 493 (La. 1970) ("if a windstorm is the dominant and efficient cause of the loss, the insured may recover notwithstanding that another cause or causes contributed to the damage suffered.")*; Milan v. Providence Washington Ins. Co.*, 227 F. Supp. 251 (E.D. La. 1964) (windstorm was the proximate cause of the damage; that a structural defect in the building may have been a contributing factor is immaterial. If the damage would not have occurred in the absence of a windstorm, the loss is covered).

* *Norwich Union Fire Ins. Soc. v. Board of Commissioners of Port of New Orleans*, 141 F.2d 600 (La. Ct. App. 1944) (if loss flowed reasonably from the event and if no intermediate controlling and self-sufficient cause intervened, the event is the proximate cause of the loss).

* *In Re Katrina Canal Breaches Litigation*, 495 F.3d 191, 222 n. 8 (5th Cir. 2007) (anti-concurrent causation clauses apply where a combination of forces cause damage); *Tuepker v. State Farm Fire & Cas. Co.*, 507 F.3d 346 (5th Cir. 2007) (applying Mississippi law).

* Anti-concurrent causation clauses appear to be valid and enforceable in Louisiana. *Arctic Slope Regional Corp. v. Affiliated FM Ins. Co.*, 564 F.3d 707 (5th Cir. 2009); *Leonard v. Nationwide Mut. Ins. Co.*, 499 F.3d 419 (5th Cir. 2007).

* It is sufficient to show that the particular peril was the efficient cause of the loss notwithstanding that another cause contributed to the loss. *Riche v. State Farm Fire & Cas. Co.*, 356 So.2d 101 (La. Ct. App. 1978).

d. MISSISSIPPI

* **Rule:** Mississippi is an efficient proximate cause jurisdiction; anti-concurrent causation provisions are permissible.

* *Corban v. United Services Auto. Ass'n*, 20 So. 3d 601 (Miss. 2009) (court provided a thorough analysis of the applicability of an anti-concurrent causation clause, concluding that such clauses apply "only if and when covered and excluded perils contemporaneously converge, operating in conjunction, to cause damage resulting in loss to the insured property"). Thus, if perils occur in sequence, and not concurrently, the anti-concurrent causation provision would not apply. "The 'in any sequence' language [of the anti-concurrent causation clause] … may not be used to divest the insureds of their right to be indemnified for covered losses." *Id.* at 615. If a covered loss occurs first in sequence, the insurer may not point to a second, un-covered event in order to apply the anti-concurrent causation clause and avoid providing coverage. Thus, if the perils do not "converge" but operate separately, the anti-concurrent clause is inapplicable. "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 [anti-concurrent causation] clause." *Id.* at 618.

Note: The *Corban* holding rejected the conclusions reached by *Tuepker v. State Farm Fire & Cas. Co.*, 507 F.3d 346 (5th Cir. 2007) and *Leonard v. Nationwide Mut. Ins. Co.*, 499 F.3d 419 (5th Cir. 2007) regarding the applicability of anti-concurrent causation clauses under Mississippi law. *See Bossier v. State Farm Fire and Cas. Ins. Co.*, 2009 U.S. Dist. LEXIS 94308 (S.D. Miss. Oct. 9, 2009) (noting adoption by *Corban* court of Southern District opinion in *Dickinson v. Nationwide Mut. Ins. Co.*, 2008 U.S. Dist. LEXIS 34354 (S.D. Miss. 2008)).

* *Urrate v. Argonaut Great Central Ins. Co.*, 881 So.2d 787 (La. Ct. App. 2004) (in certain circumstances, only a portion of a loss may be covered); *Ludlow Corp. v. Arkwright-Boston Mfrs. Mut. Ins. Co.*, 317 So.2d 47 (Miss. 1975) (it is necessary (to the extent possible) to determine the sequence and timing of the damage).

* *Kemp v. American Universal Ins. Co.*, 391 F.2d 533, 534-55 (5th Cir. 1968) (applying Mississippi law) (Mississippi is an "efficient proximate cause" jurisdiction; covered peril must be the proximate or efficient cause of loss, regardless of whether other factors contributed to the loss). For coverage to be found, it is sufficient to show that the proximate or efficient cause of the loss was covered notwithstanding that other factors contributed to the cause. *Grace v. Lititz Mutual Ins. Co.*, 257 So.2d 217 (Miss. 1972).

e. TEXAS

* **Rule:** Texas is an efficient proximate cause jurisdiction; however, where two or more causes combine and result in a loss and there is no "efficient cause," recovery is limited to the portion of damage caused by the covered peril. Anti-concurrent causation provisions are permissible.

* Texas follows the unique rule that where two or more causes combine and result in a loss, and there is no "efficient cause," the insured may only recover that portion of the damage caused solely by the covered peril. *National Union Fire Ins. Co. v. Puget Plastics Corp.*, 649 F. Supp. 2d 613, 646 (S.D. Tex. 2009) (citing *Wallis v. United Servs. Auto Ass'n*, 2 S.W.3d 300 (Tex. App. 1999)); *Feiss v. State Farm Lloyds*, 392 F.3d 802 (5th Cir. 2004); *All Saints Catholic Church v. United Nat. Ins. Co.*, 257 S.W.3d 800 (Tex. App. 2008). Damages are thus apportioned between covered and uncovered claims. *Id.* at 649-50 (citing *Willcox v. Am Home Assur. Co.*, 90 F. Supp. 850 (S.D. Tex. 1995)). The insured has both the burden of proving coverage as well as presenting "evidence upon which the fact-finder on coverage can allocate and segregate covered losses from non-covered losses … because allocation is central to the claim for coverage, an insured's failure to carry its burden of proof on allocation is fatal to the claim." *Id.* at 651. However, the amount of damages need not be shown with "mathematical precision," but there must be enough to form a reasonable basis for the jury's findings. *Id.*

* On the other hand, a plaintiff does not need to prove what damages are "'solely attributable' to the covered loss." *Travelers Personal Security Ins. Co. v. McClelland*, 189 S.W.3d 846 (Tex. App. 2006) (explaining *State Farm v. Rodriguez*, 88 S.W.3d 313, 321 (Tex. App. 1999)).

* *Lexington Ins. Co. v. Unity/Waterford-Fair Oaks, LTD*, 2002 U.S. Dist. LEXIS 3594 (N.D. Tex. March 5, 2002) (anti-concurrent causation clause excluding all losses caused directly or indirectly by, *inter alia*, inadequate maintenance, "regardless of any other cause or event contributing concurrently or in any sequence to the loss" applied to preclude coverage for roof damage). The court did not cite any Texas cases, but noted that the application of anti-concurrent causation clauses "is well established in those jurisdictions that have considered the question." *See also ARM Props. Mgmt. Group v. RSUI Indem. Co.*, 642 F. Supp. 2d 592 (W.D.

Tex. 2009) (analyzing application of an anti-concurrent causation clause in federal case applying Texas law).

* *Providence Washington Ins. Co. v. Cooper*, 223 S.W.2d 329 (Tex. App. 1949) (an insured may recover if the covered cause is the "efficient cause," "though there may have been other [non-covered] contributing causes").

* *Fidelity Southern Fire. Ins. Co. v. T.B. Crow*, 390 S.W.2d 788 (Tex. App.1965) provides a succinct description of both the concurrent causation and efficient proximate cause doctrines, both of which apply in Texas:

> The rule in Texas is that where a loss is occasioned by a risk which is within the coverage of the policy, and a risk which is within the exclusion of the policy, that plaintiff may recover if plaintiff is able to segregate the damages occasioned by the covered risk from the damage occasioned by the excluded risk within the exclusion of his policy. *See Franklin Fire Ins. Co. of Philadelphia v. Smith, 103 S.W. 2d 470*; *93 ALR 2d 145*, p. 165,166-171. We also think that the rule in Texas is to the effect that where a loss occurs under a standard fire, windstorm and extended coverage policy within the coverage of the policy, and such loss is contributed to by an excluded risk of the policy, the plaintiff may, nevertheless, recover if plaintiff proves that the dominant efficient cause of the loss is the covered risk.

Id. at 793.

3. CONTAMINATION/POLLUTION

As tar balls appear on the shores of each affected state, and as oil begins to reach and cause damage to property, one must consider how the courts of a particular state define the terms "contamination" and "pollution" in the context of policies affording first party coverage, and whether the type of loss suffered in each case fits within the judicially accepted definition of those terms.

a. ALABAMA

* **Rule:** The principal factors in determining contamination coverage are the source of the contamination, whether the contaminant directly caused the damage, the specific language of the exclusion, and whether the policy gives back coverage where contamination or pollution is the result of a covered peril (*e.g., explosion, fire).*

* The Northern District of Alabama discussed the applicability of a pollution exclusion clause in the first-party context in *Haman, Inc. v. St. Paul Fire & Marine Ins. Co.*, 18 F. Supp. 2d 1306, 1309 (N.D. Ala. 1998), concluding that a hotel's business loss and clean-up costs were not covered where an extermination company used a toxic substance (methyl parathion) to treat the hotel. The policy excluded damage caused by the "release, discharge,

dispersal, seepage, migration, or escape" of pollutants, unless these events were caused by one of a list of covered causes of loss, such as fire, lightening, explosion, windstorm, etc. The court rejected plaintiff's claim that "a person of ordinary intelligence" would not consider methyl parathion to be a pollutant since it has "legitimate" uses. Noting that it is a highly regulated chemical, approved only for use in open fields, the court found that plaintiff could not "seriously analogize a substance which cannot be used in the presence of humans to ordinary household products." Further, even if the pollution provision did not exclude coverage for the incident, damages were excluded under a separate exclusion for damages caused by, *inter alia*, "contamination." Citing a definition provided in *Am. Cas. Co. of Reading, Pa. v. A.L. Myrick*, 304 F.2d 179, 183 (5th Cir. 1962), the court found that "contamination" connotes a "condition of impurity resulting from a mixture or contact with a foreign substance." Given that the hotel became uninhabitable due to contact with this "foreign substance," contamination had in fact occurred.

* Many property insurance policies contain a "pollution exclusion" clause that specifically excludes losses caused by certain types of pollutants and contaminants. Alabama typically construes the "pollution exclusion" clause to exclude only industrial pollution and contamination. *See Molton, Allen and Williams, Inc. v. St. Paul Fire and Marine Ins. Co.*, 347 So.2d 95, 99 (Ala. 1977). The perceived rationale behind the insertion of these exclusion clauses is to prevent property owners/insureds from benefiting from polluting their land and environment. *See U. S. Fidelity and Guar. Co. v. Armstrong*, 479 So.2d 1164, 1168 (Ala. 1985).

* In order to warrant coverage, the insured must prove that the contamination was not the result of intentional use of industry-related contaminants, but rather the result of unintentional, unexpected and/or accidental contamination. Some insurance policies explicitly state that the contamination exclusion does not apply to contamination that is unexpected or unintentional. *See, e.g., Molton*, 347 So. 2d at 97 ("but this exclusion does not apply if such discharge, dispersal, release or escape is sudden or accidental").

* Alabama courts have addressed the definition of "sudden" contamination, stating that it does not mean "abrupt, but rather that it means unexpected, or happening without notice." *Associated Scrap Metal, Inc. v. Royal Globe Ins. Co.*, 927 F. Supp. 432, 438 (S.D. Ala. 1995), *aff'd*, 127 F.3d 37 (11th Cir. 1997) (there is no distinction between gradual and non-gradual pollution; the issue turns on whether the contamination is accidental).

Note: Although the trend in Alabama clearly favors a finding that damage from industrial contaminants is excluded, the courts have taken special pains to make clear that outcomes on these contested issues will vary depending on the wording of the specific exclusionary clause under consideration. For instance, an Alabama court has held that raw sewage was not an excluded contaminant, but made clear that it could, in other instances, qualify as an excluded loss, depending upon the specific language of the policy at issue. *See Armstrong*, 479 So.2d at 1168.

b. FLORIDA

* **Rule:** The principal factors in determining contamination coverage are the source of the contamination, whether the contaminant directly caused the damage, and the specific language of the exclusion.

* As is true of case law in the other Gulf states affected by the Deepwater Horizon oil spill, Florida decisions addressing the applicability of pollution or contamination exclusions in the first party insurance context are sparse. In *Florida Farm Bureau Ins. Co. v. Birge*, 659 So. 2d. 310 (Fla. Dist. Ct. App. 1994), the Court of Appeals affirmed the trial court's holding that damage caused by a sewer malfunction was not unambiguously excluded from coverage under a homeowner's policy. The insurer denied coverage based on the existence of an exclusion for damage resulting from "water" or "pollutants or contaminants." Noting that ambiguous policy language must be construed in favor of the insured, the court found that "the average homeowner's examination of the insurance contract would not reveal the applicability of theses exclusions to this type of disaster." *Id.* The court noted that the insurance company could have used clearer language to exclude damage from a "backup of raw sewage." *Id.*

* Other Florida cases consistently favor the insured with respect to policy interpretation, although, in the third party context, the Supreme Court of Florida declined to adopt the doctrine of reasonable expectations. *Deni Associates of Florida v. State Farm Fire & Cas. Ins. Co.*, 711 So. 2d 1135 (Fla. 1998). The Florida Supreme Court approved two decisions from the appellate court in two unrelated cases (one involving an ammonia spill and the other involving sprayed insecticides), where the lower court declined to adopt the doctrine for the reason that Florida courts construe ambiguous language against the insurer, rendering the doctrine unnecessary. The court also held that two similar pollution exclusions in the subject CGL policies were unambiguous. The subject provisions excluded liability coverage for property damage "arising out of the actual, alleged or threatened discharge, dispersal, release or escape of pollutants," and defined "pollutants" as "any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalines, chemicals and waste." *Id.* at 1137.

* In general, Florida courts have not limited environmental or contamination exclusions to environmental or industrial pollution, but extend them to other types of contamination. *Deni*, *supra.*; *Nova Cas. Co. v. Waserstein*, 424 F. Supp. 2d 1325 (S.D. Fla. 2006) (interpreting and relying on *Deni*, the question of whether a substance is a "pollutant" should be determined by seeing whether it fits the policy's definition, using plain, ordinary language).

c. LOUISIANA

* **Rule:** The principal factors in determining contamination coverage are the source of the contamination, whether the contaminant directly caused the damage, and the specific language of the exclusion.

* Although a third party case, *Doerr v. Mobil Oil Corp.*, 774 So.2d 119 (La. 2000), stands for the proposition that pollution exclusions do not exclude every type of pollution. Further, they do not automatically exclude unintentional pollution. Instead, if the clear meaning of the insurance contract cannot be interpreted from the policy, extrinsic evidence of the parties' intent is allowed to be examined. The court reasoned as follows:

> In light of the origin of pollution exclusions, as well as the ambiguous nature and absurd consequences which attend a strict reading of these provisions, we now find that the total pollution exclusion was neither designed nor intended to be read strictly to exclude coverage for all interactions with irritants or contaminants of any kind. Instead, we find that it is appropriate to construe [a] pollution exclusion clause in light of its general purpose, which is to exclude coverage for environmental pollution, and under such interpretation, [the] clause will not be applied to all contact with substances that may be classified as pollutants. The applicability of a total pollution exclusion in any given case must necessarily turn on several considerations:
>
> > (1) Whether the insured is a "polluter" within the meaning of the exclusion;
> > (2) Whether the injury-causing substance is a "pollutant" within the meaning of the exclusion; and
> > (3) Whether there was a "discharge, dispersal, seepage, migration, release or escape" of a pollutant by the insured within the meaning of the policy.

If the plain meaning is evident from the language of the contract, then it will be followed. Otherwise, extrinsic evidence is allowed to determine the parties' intent. Extrinsic evidence here suggested that the pollution exclusion does not apply to every type of pollution possible, but instead only to certain types of pollution, which will be determined by the factors above.

* An additional consideration is whether the pollution discharge is "accidental" or "intended." In *Greifer v. Travelers Ins. Co.*, 919 So. 2d 758 (La. Ct. App. 2005), a case involving claims for coverage under a third party liability policy, the plaintiff property owners sued a pipe cleaning company and Exxon Mobil for environmental property damage. The court applied the *Doerr* factors, noting that "the nature of the insured's business and whether the insured's business presented a risk of pollution are of paramount consideration and are clearly the most important factors in the 'polluter' test." The court found that the pipe cleaning company was a "polluter": "[o]il drilling and related activities present a clear and obvious risk of pollution … materials extracted from the ground through oilfield drill pipe, such as oil, sludge, grease, salt water, and other hazardous and/or toxic oil production waste, are all potential pollutants." *Id.* at 768-69. Whether "discharge, dispersal, seepage, migration, release or escape" occurred depends on factors such as whether the pollutant was intentionally or negligently discharged, and whether the actions of the polluter were active or passive. The pipe cleaning company's discharge was found to be intended and not accidental - - the fact that the company did not intend the damages

that arose from the discharge did not alter the applicability of the pollution exclusions found in the defendants' liability policies.

* *Thompson v. Temple*, 580 So. 2d 1133 (La. Ct. App. 1991) (based on the parties' intent, pollution exclusion within a homeowner's policy does not exclude injuries caused by carbon monoxide gas leaking from a gas heater). The Louisiana Court of Appeal discussed the applicability of a "pollution exclusion" contained within a standard homeowner's policy, where coverage for "bodily injury or property damage which results in any manner from the discharge, disposal, release or escape of: a) vapors, fumes, acids, toxic chemicals, toxic liquids or toxic gases; b) waste materials or other irritants, contaminants, or pollutants." The homeowners were injured by carbon monoxide gas that leaked from bathroom heater. In interpreting the meaning of the exclusion, the court considered the intent of the parties and noted that pollution exclusions "are intended to exclude coverage for active industrial polluters, when businesses knowingly emit pollutants over extended periods of time." *Id.* at 1134. The situation was "totally different" from a leaking gas heater within a home. The *Thompson* decision falls in line with analysis offered in *Doerr* regarding the "purpose" of environmental pollution exclusions, and extends the rationale to the first party context.

d. MISSISSIPPI

* **Rule:** The principal factors in determining contamination coverage are the source of the contamination, whether the contaminant directly caused the damage, and the specific language of the exclusion.

* Unlike Alabama, Mississippi state courts have not adjudicated the effect of "pollution exclusion" clauses. "Apparently the Mississippi Supreme Court has yet to decide a case involving a pollution exclusion of any kind in an insurance policy." *Eott Energy Pipeline Ltd. Partnership v. Hattiesburg Speedway, Inc.*, 303 F. Supp. 2d 819, 821 (S.D. Miss. 2004). In 1996, the Fifth Circuit stated "[w]ith regard to insurance, Mississippi is a 'decision poor' state. Mississippi state courts have not interpreted any pollution exclusions." *American States Ins. Co. v. Nethery*, 79 F.3d 473, 475 (5th Cir. 1996).

* Mississippi federal courts, however, have addressed the issue. Specifically, the federal courts have addressed the effects of a "total pollution exclusion", one in which even "sudden" or "accidental" contamination is not covered. In *Eott*, 303 F. Supp. 2d at 825, the exclusion clause did not limit its exclusion to contamination that was intentional or industry-related. Instead, it wholly excluded all damage from contamination, stating that "this insurance does not apply to … property damage which would not have occurred … but for the actual … discharge … release or escape of pollutants at any time." *Id.* Hence, the Court determined that the following losses were excluded: (1) the cost of cleaning up the oil spill, (2) the cost of complying with regulatory authorities because of the spill, and (3) the cost of the oil lost in the spill. *See id.* **Note:** However, the court held that "the damage for the repair of the pipeline is clearly not excluded by the pollution exclusion" because "[d]amage to the pipeline was not caused by the release of the pollutant." *Id.* In actuality, the damage to the pipeline was caused by the motor grader blade striking the pipe. Hence, the Court reasoned that "[i]f the pipeline had been empty at the time of the puncture, and there had been no escape of pollutant, this damage

(repair of the pipeline) would have been the same." *Id.* As a result, the total pollution exclusion operated to exclude losses that were directly caused by the contaminant.

* *American States Ins. Co. v. F.H.S., Inc.*, 843 F. Supp. 187, 188 (S.D. Miss. 1994) (damage caused by the release of ammonia not covered because the pollution exclusion defined "pollutant" to include any "gaseous . . . irritant or contaminant", which would include ammonia).

* In *Harrison v. R.R. Morrison & Son, Inc.*, 862 So. 2d 1065 (La. App. 2nd Cir. 2003) (applying Mississippi law), the Louisiana Court of Appeals held that a pollution exclusion under a liability policy excluded gasoline that seeped from the insured's property onto neighboring properties; therefore, the defendant's insurer was under no obligation to provide defense and indemnity. Given the general nature of the exclusion and that the definition of pollutant included "liquid … contaminant[s]," the exclusion was unambiguous, and therefore excluded coverage.

e. TEXAS

* **Rule:** The principal factors in determining contamination coverage are the source of the contamination, whether the contaminant directly caused the damage, and the specific language of the exclusion.

* *American Cas. Co. of Reading, Pennsylvania v. A.L. Myrick*, 304 F.2d 179 (5th Cir. 1962) is an often-cited case discussing the application of a contamination exclusion in the first party insurance context. Plaintiff sought coverage from its insurer for goods damaged by ammonia contamination that occurred when coils within the insured's refrigerator unit malfunctioned, allowing ammonia to escape. The insured argued, among other things, that there was no "contamination." According to the court,

> 'Contamination' connotes a condition of impurity resulting from mixture or contact with a foreign substance. In its charge, the trial court defined the term as meaning the '* * * state of being contaminated; an impurity; that which contaminates; to make inferior or impure by mixture; an impairment of purity; loss of purity resulting from mixture or contact.' This definition is consistent with common understanding, see Webster's New International Dictionary, contamination, contaminate, which is the proper criterion for construing words in an insurance policy.

Id. at 183 (citations omitted). The court's analysis of the contamination issue is significant. First, it found that there was ample expert testimony showing that the combination of ammonia and water creates ammonia hydroxide, a highly caustic substance if consumed. Second, the Court rejected the insured's argument that the ammonia was an "external cause" and not "contamination," finding this to be a misreading of the policy provisions. A proper reading requires the introductory "external cause" coverage language to be read together with the "contamination" exclusion. "The cause of the loss was the contamination of the goods by the contact of the ammonia gas, which was, it may be said, a cause external to the goods, but nevertheless the result was contamination and excluded from coverage unless caused by or

resulting from an explosion. … To say that there was an external cause which was the proximate cause of the loss does not eliminate the exclusion from the contract. We cannot rewrite the policy." *Id*. (citations omitted).

* *Auten v. Employers National Ins. Co.*, 722 S.W.2d 468 (Tex. App. 1986): The court considered the applicability of a contamination exclusion where plaintiffs suffered physical damage due to improperly applied pesticides in their home. The plaintiffs' all risk policy excluded "loss caused by … contamination." Citing *A.L. Myrick*, the court found that a contamination occurs when a condition of impairment or impurity results from mixture or contact with a foreign substance. There was no doubt that the pesticide was a *foreign* substance. "The word 'foreign' is synonymous with 'inappropriate.'" *Id.* at 469 (citing Webster's Third New International Dictionary 889 (1981)).

4. CONTINGENT BUSINESS INTERRUPTION ISSUES

Issue: The Deepwater Horizon Gulf Oil Spill is having, and will continue to have, a significant financial impact on various industries throughout the Gulf Coast region and beyond. Businesses, including hotels, restaurants, vacation clubs/condominiums, and marine-related industries (to name just a few) in the Gulf states are experiencing significant losses in revenue. Many of these companies may never suffer any property damage from the oil spill. Instead, it may be that suppliers, customers, nearby attraction properties, or a property that supplied power to an insured property, suffered the physical damage, causing a policyholder to lose revenue. Depending on the wording of the CBI provisions, and the existence/breadth of any applicable pollution and/or contamination exclusions, claims for CBI losses will present a variety of issues requiring close analysis.

a. ALABAMA

* We were unable to find any Alabama case law discussing contingent business interruption at the time of this writing.

b. FLORIDA

***** We were unable to find any Florida case law discussing contingent business interruption at the time of this writing.

c. LOUISIANA

* **Rule:** CBI provision, rather than BI provision, applies if loss is to property not operated by insured.

* **Note:** The aftermath of September 11 has taught the insurance industry to expect claims for contingent business interruption losses from policyholders in locations remote from the affected region. For example, numerous owners of airports, food purveyors, and hotels around the county filed claims for a decrease in airline reservations related to airport closures.

See, e.g., 730 Bienville Partners, Ltd. v. Assurance Co. of America 2002 WL 31996014 (E.D. La. Oct. 1, 2002). This case involved an extension of coverage in the event of interruption by civil authority.

* *CII Carbon, L.L.C. v. National Union Fire Ins. Co. of La.,* Inc., 918 So. 2d 1060 (La. Ct. App. 2005): The Court analyzed the difference between BI and CBI coverage afforded by the policy. The insured operated a coke plant that supplied steam power to adjoining plants that made chemical products. One of the adjoining plants, owned by Kaiser Aluminum, housed equipment that was part of the steam power process, and was leased by the plaintiff. Kaiser's plant sustained a massive explosion that damaged the steam equipment located within the Kaiser plant. The equipment was thereafter repaired; however, Kaiser was not in need of the steam power for several months after the repair was made, as the remainder of its property was still being repaired. Plaintiff argued that business interruption coverage applied through the time that Kaiser was able to accept steam. The appellate court found that the trial court did not err in its determination that the equipment was "repaired" at the time it was operable, not at the time it was usable. Although "repair" was not defined in the policy, its general prevailing meaning, "to restore to sound condition after damage or injury," indicated that the operational date was the cutoff date for the purpose of applying the BI provisions. Further, because the leased equipment was damaged, which was "not operated by the Insured," per the terms of the policy, CBI applied to losses suffered by the plaintiff during the period when the Kaiser plant could not accept steam.

d. MISSISSIPPI

* **Rule:** BI valuation (and likely CBI valuation) is based on historical income, not future income.

* Although not a CBI case *per se*, the court's decision in *Catlin Synd., Ltd. v. Imperial Palace of Miss., Inc.* 600 F.3d 511 (5th Cir. 2010) addressed claim valuation and time element issues, and may be of use in evaluating the merits of CBI claims in Mississippi.

Imperial Palace operated a casino in Biloxi, Mississippi. The casino was forced to shut down for several months following hurricane Katrina. Upon re-opening, the casino experienced much greater revenues than it had before the hurricane. This was arguably due to the fact that the casino was the first to re-open in the region.

A dispute arose between Imperial and one of its insurers, Catlin, as to the extent of coverage provided by the subject policy's business interruption provision, which provided:

> Experience of the business—In determining the amount of the Time Element loss as insured against by this policy, due consideration shall be given to experience of the business before the loss and the probable experience thereafter had no loss occurred.

The casino operators argued that the provision was ambiguous, and therefore sales figures after reopening should also be taken into account. Catlin argued that the business

interruption provision clearly indicated that only historical sales figures should be considered when determining loss.

The Fifth Circuit affirmed the district court's holding that only historical sales figures should be considered in the BI calculation, citing to its decision in *Finger Furniture Co. v. Commonwealth Insurance Co.*, 404 F.3d 312 (5th Cir. 2005) in support of its analysis. Although *Finger Furniture* was decided under Texas law, the court found no significant difference between the states' laws on this issue and found the decision to be instructive.

e. TEXAS

* **Rule:** BI valuation (and likely CBI valuation) is based on historical income, not future income.

* In *Finger Furniture*, *supra*, a tropical storm caused the plaintiff's stores to close for two days. Plaintiff's business boomed after the storm, as it slashed prices. The BI wording differed from the wording at issue in *Imperial Palace* only slightly, in that it referenced the "date of the damage or destruction." The *Finger Furniture* court explained that "[h]istorical sales figures reflect a business's experience before the date of the damage or destruction and predict a company's probable experience had the loss not occurred," and that "[t]he strongest and most reliable evidence of what a business would have done had the catastrophe not occurred is what it had been doing in the period just before the interruption." *Id*. The court declined to consider post-interruption sales, since the BI provision said nothing about taking the future into account; "[t]he contract language does not suggest that the insurer can look prospectively to what occurred after the loss to determine whether its insured incurred a business-interruption loss." *Id*.

5. ENSUING/RESULTING LOSS

Policies often carve out exceptions for loss resulting from excluded perils. Or, conversely, certain excluded perils may fit within the coverage provided if they result from a covered event. Insurers should reasonably anticipate claims seeking coverage for losses that result from contamination of the Gulf, beaches, rivers, ports, real or personal property, equipment, etc. One must consider how the courts of a particular state define the terms "ensuing" and "resulting" loss in the context of policies affording first party coverage, and whether the type of loss suffered in each case fits within the judicially accepted definition of those terms.

a. ALABAMA

* **Rule:** For damage to be covered by an ensuing loss exception, a peril separate from the excluded peril must ensue.

* *Schloss v. Cincinnati Ins. Co.*, 54 F. Supp. 2d 1090 (M.D. Ala. 1999) Here, a plaintiff homeowner sought coverage for substantial rotting in the stud structure of his home, which he discovered during renovations. The subject policy excluded rot, but provided that "any

ensuing loss not excluded is covered." The insured argued that the cost to repair the rotted studs and to remove and replace the roof were covered "ensuing loss." The court disagreed, finding that the costs were to repair rotted members:

> [T]he ensuing loss clause means that if a specified uncovered loss occurs, here rot, then a separate loss which follows as a result of the specified, uncovered loss which would otherwise be covered remains covered.
> Removal and replacement of the roof and other finished aspects was done in order to correct the rot and to prevent future rot. … These costs, are, therefore, part of the cost of repair of the rot, not a separate ensuing loss.
> * * * *
> The cost of repairing the rot is excluded from the policy because it is the loss caused by the rot, but if the rot also causes wood to fall and damage the floor, for example, then the cost of the repair for that ensuing loss is covered.

Id. at 1094-96.

b. FLORIDA

* **Rule:** An ensuing loss exception is not applicable if the ensuing loss is directly related to an excluded risk.

* *Swire Pacific Holdings, Inc. v. Zurich Ins. Co.*, 139 F. Supp. 2d 1374 (S.D. Fla. 2001) provides an excellent summary of the ensuing loss issue. The insured sought coverage under a first party property policy for costs incurred in re-designing a building, which became necessary due to defects in plans prepared by a structural engineer retained for plaintiff's condominium construction project. The policy excluded "loss or damage caused by fault, defect, error, or omission in design, plan or specification, but this exclusion shall not apply to physical loss or damage resulting from such fault, defect, error or omission in design, plan or specification." First, the court found the exclusion for design defects to be unambiguous. Second, the court rejected the plaintiff's contention that the costs it incurred in remedying the design defect fell within the ensuing loss exception clause, and that the demolition of non-defective portions of the building was resulting physical loss. The court explained that, generally speaking, "an ensuing loss provision does not cover loss caused by the excluded peril, but rather covers loss caused to other property wholly separate from the defective property itself." *Id.* at 1380.

***** *Nat'l Union Fire Ins. Co. v. Texpak Group N.V.*, 906 So. 2d. 300 (Fla. Dist. Ct. App. 2005) (Applying the rules of *Swire*, the Florida District Court of Appeal reiterated that an ensuing loss exception is not applicable if the ensuing loss is directly related to an excluded risk).

c. LOUISIANA

* **Rule:** Ensuing damage must be separable event in that the damage and the ensuing loss must be different in kind, not just degree; but the mere fact that an excluded act or

event is the "but for" cause of the ensuing loss does not necessarily preclude coverage for the ensuing loss.

* *Holden v. Connex-Metalina*, 2000 U.S. Dist. Lexis 18822 (E.D. La. Dec. 22, 2000). The insured's crane toppled and fell into the Mississippi River during overload testing; it appeared that the crane fell due to defective imbalance in its trolley and boom. Holden's all-risk policy excluded faulty workmanship "unless loss not otherwise excluded hereunder ensues and then only for loss or damage caused by the ensuing loss." The court determined that the costs associated with the purchase of a replacement crane, repairing damage to the dock and leasing a temporary crane were covered under the ensuing loss provision. The court explained that it was guided by three precepts: 1) damage that falls under the exclusion and the ensuing damage must be separable events in that the damage and the ensuing loss must be different in kind, not just degree; 2) the mere fact that an excluded act or event is the "but for" cause of the ensuing loss does not necessarily preclude coverage for the ensuing loss; 3) catastrophic damages to a machine caused by its own mechanical breakdown may be considered ensuing loss. Following these rules, the court held that "the unbalance triggered a series of ensuing events that led to the complete destruction of the crane and other property. The destruction of the crane as a whole is not co-extensive with the defect that put the crane out of balance."

* **Note:** The *Holden* decision departs from jurisprudence from other jurisdictions, and represents what might be considered a **minority view** concerning the application of ensuing loss clauses.

d. MISSISSIPPI

* **Rule:** For resulting damage exception to apply, there must be loss to other property wholly separate from the defective property itself.

* In *Rhoden v. State Farm Fire and Cas. Co.*, 32 F. Supp. 2d 907 (S.D. Miss. 1998), the court held that plaintiffs' claim for damages at their home (*i.e.*, cracks in bathroom and driveway, separation between new addition and original home, sticking doors) were excluded under the subject policy's earth movement exclusion, settling/cracking exclusion, and defect in construction exclusion. With regard to the defective construction exclusion, the policy provided "[h]owever, we do insure for any resulting loss from items [listed in sections] unless the resulting loss is itself a Loss Not Insured by this Section." The court rejected the plaintiffs' argument that the exclusion covered "loss which consists of defective construction but does not exclude loss which results from defective construction." *Id.* at 914. The court noted that, even if it adopted this view, the "resulting loss" nevertheless fell within other exclusions included in the section, *i.e.*, the earth movement and settling/cracking exclusions.

e. TEXAS

* **Rule:** For resulting damage exception to apply, there must be loss to other property wholly separate from the defective property itself.

* *Alton Ochsner Medical Foundation v. Allendale Mut. Ins. Co.*, 219 F.3d 501 (5th Cir. 2000). The plaintiff sought coverage under an all-risk policy for cracking in the foundation of a newly constructed building. During construction, plaintiff discovered minor cracking but made repairs without filing a claim. Thereafter, severe cracking developed, at which point the plaintiff filed a claim and discovered that the cracking was due to defects in workmanship. Such defects were excluded by the policy, "unless physical damage not excluded by this Policy results, in which event, this Policy will cover only such resulting damage." The court rejected plaintiff's claim that if the initial, minor cracking was excluded, then the greater cracking was "resulting physical damage." Cracking due to faulty workmanship was excluded from the policy; the insured failed to identify any "resulting damage" not excluded by the policy that would allow it to avoid express exclusions for cracking, faulty workmanship or design. "The only costs for which [plaintiff] seeks indemnity is the cost of correcting the faulty construction of the Tower's foundation."

* *U.S. Industries v. Aetna Cas. & Surety Co.*, 690 F.2d 459 (5th Cir. 1982). The insured, a general contractor, was hired to build a steel cylindrical tower, which involved fabricating steel plates, welding them together, stacking them, and finally heat-treating the "skin" of the tower. The contractor used excessive heat in the final phase, causing the metal to wrinkle and the tower to lean. The contractor sought coverage for the costs of dismantling and rebuilding the tower. The court held that a "faulty workmanship" exclusion applied. *See also Dow Chemical Co. v. Royal Indemnity Co.*, 635 F.2d 379 (5th Cir. 1981).

6. INGRESS/EGRESS - - PREVENTION OF ACCESS; INTERRUPTION BY GOVERNMENTAL/CIVIL/MILITARY AUTHORITY

As the oil progresses into the Gulf Coast and the waterways connected thereto, restrictions are being imposed by authorities preventing, limiting and/or delaying entrance into those waterways, or onto land, by vessels or vehicles that have been contaminated by the spill. In the event access to certain waterways, ports or property is restricted, limited or prohibited, businesses will likely sustain direct or contingent BI losses as result. Often, policies will be extended to include coverage for such losses, but how courts interpret the various wordings may vary.

Closely related to the ingress/egress coverage, is coverage for loss caused by interruption from governmental, civil, or military authority. Specifically, businesses may also incur losses in revenue as a result of an order levied by a governmental, civil, or military authority that prevents an insured from conducting its business.

a. ALABAMA

* We were unable to find any Alabama case law applying to ingress/egress or interruption by governmental, civil, or military authority at the time of this writing.

b. FLORIDA

***** We were unable to locate any Florida case law applying to ingress/egress or interruption by governmental, civil, or military authority at the time of this writing.

c. LOUISIANA

* **Rule:** An order by Civil Authority must formally forbid or prevent access to the insured premises; total prevention is required.

* *730 Bienville Partners, Ltd. v. Assurance Co. of America*, 2002 WL 31996014 (E.D. La. Sept. 30, 2002). In *Bienville*, the court considered the application of a "civil authority" extension of coverage which provided business income and necessary extra expense "caused by action of civil authority that prohibits access to your premises due to direct physical loss of or damage to property, other than at the 'covered premises,' caused by or resulting from any Covered Cause of Loss." The plaintiff claimed that the FAA's closure of all airports after September 11 kept guests from getting to the plaintiff's hotels; therefore, the civil authority extension provided coverage. The court disagreed, explaining that, while the FAA's mandatory closures may have made it more difficult for guests to get to plaintiff's hotels in New Orleans, "the FAA hardly 'prohibited' access to the hotels." *Id.* at *6.

* *Kean, Miller, Hawthorne, D'Armond McCowan & Jarman v. National Fire Insurance Company of Hartford*, 2007 U.S. Dist. LEXIS 64849, *11 (M.D. La. 2007) (Despite declaration of a state of emergency by Governor of Louisiana following Hurricane Katrina, and requests by the Louisiana State Police and local government officials that residents stay off the streets, no coverage for insured's claim under a civil authority clause; civil authority order must actually *prohibit* access to the insured premises). This means that an order by Civil Authority must formally forbid or prevent access to the insured premises. *Id*. at *22 (following *St. Paul Mercury Ins. Co. v. Magnolia Lady, Inc*., 1999 WL 33537191 (N.D. Miss. 1999)); *see also Southern Hospitality, Inc. v. Zurich American Insurance Company*, 393 F.3d 1137 (10th Cir. 2004) ("prohibited" means to "formally forbid" or "prevent").

d. MISSISSIPPI

* **Rule:** For coverage to apply, total prevention of access is required.

* *St. Paul Mercury Ins. Co. v. Magnolia Lady, Inc*., 1999 U.S. Dist. LEXIS 17895 (N.D. Miss. November 4, 1999). The plaintiff casino in this case lost 80% of its business due to the government shutting down a bridge; the court ruled that access was not totally denied and the insurance company prevailed.

Note: *Magnolia Lady* has been followed by *Kean, Miller, Hawthorne, D'Armond, McCowan & Jarman, L.L.P, v. Nat'l Fire Ins. Co.*, 2007 U.S. Dist. LEXIS 64849 (M.D. La. Aug. 2, 2007).

e. TEXAS

***** **Rule:** A direct nexus between the order and the suspension of the insured's business is required.

***** *S. Tex. Med. Clinics, P.A. v. CNA Fin. Corp.*, 2008 U.S. Dist. LEXIS 11460 (S.D. Tex. Feb. 15, 2008). The Southern District of Texas held that the Plaintiff was not entitled to coverage for lost revenue arising out of the court-ordered evacuation of Wharton County, Texas. The court reviewed the civil authority coverage provisions and the scope and basis for the evacuation order.

The insured, located in Texas, submitted a claim under their civil authority coverage for lost revenue while the clinics were closed, arguing that the Judge had issued the civil authority order due to hurricane damage to property in Florida. The policy language stated that "the civil authority order must be one that 'prohibits access to the described premises *due to* direct physical loss of or damage to property, other than at the described premises, caused by or resulting from any Covered Cause of Loss.'" The defendant insurance company denied the claim on the ground that the Judge had not issued the evacuation order due to property damage in Florida, but instead because of the *potential* for damage to Wharton County.

The Court found for the defendant insurance company. In his deposition, the Judge who issued the civil authority order stated that "the damage to property in Florida and offshore was not a causal factor in his decision to order an evacuation in Wharton County, Texas." The court found that the Judge's decision to evacuate was based on the anticipated damage if the hurricane made landfall near Wharton County, Texas. Adopting the reasoning of the Second Circuit in *United Air Lines, Inc. v. Ins. Co. of State of Pa*, 439 F.3d. 128 (2d Cir. 2006), the court held that when the only relevance of prior damage to other property in deciding whether to issue a civil authority order is to provide a basis for fearing future damage, the causal link between the prior damage and the civil authority order is missing. The court noted that there appears to be a majority rule among other jurisdictions which requires a "direct nexus" between the civil authority's action and the prohibition of access to the insured's premises. *South Texas Medical Clinics*, 2008 U.S. Dist. LEXIS 11460, *29-30 (S.D. Tex. 2008); *see also United Air Lines, Inc. v. Insurance Company of the State of Pennsylvania*, 439 F.3d 128 (2nd Cir. 2006); *Syufy Enterprises v. Home Insurance Company of Indiana*, 1995 U.S. Dist. LEXIS 3771 (N.D. Cal. Mar. 22, 1995); *Southern Hospitality, Inc. v. Zurich American Insurance*, 393 F.3d 1137 (10th Cir. 2004); and *Kean, Miller, Hawthorne, D'Armond McCowan & Jarman v. National Fire Insurance Company of Hartford*, 2007 U.S. Dist. LEXIS 64849 (M.D. La. Aug. 2, 2007).

* *See also Houston Casualty Company v. Lexington Ins. Co.*, 2006 U.S. Dist. LEXIS 45027 (S.D. Tex. June 15, 2006) (Actual physical harm to the insured's premises would not be required to trigger coverage under a civil authority clause).

* *Travelers Indemnity Company v. Pollard Friendly Ford Company*, 512 S.W.2d 375 (Tex. App. 1974) (Civil authority provision applies to the situation where insured's buildings do not suffer a direct loss, but the area is blocked off by civil authorities thereby denying access to insured's business by its customers).

7. LOSS PAYEES AND MORTGAGEES

In the current economy, where property owners are more frequently going into foreclosure or bankruptcy, lenders are becoming increasingly involved in the presentation, negotiation and resolution of insurance claims. It is critical to know whether the lender is a loss payee or a mortgagee under the policy, and to understand the differences in rights flowing to each under the policy.

a. ALABAMA

* **Rule:** Alabama courts recognize the distinction between the rights of mortgagees when named in a policy under a loss payee provision or a standard mortgagee clause.

* *Baldwin Mut. Ins. Co., Inc. v. Henderson*, 580 So.2d 574, 575 (Ala. 1991) (Alabama is a "title theory" state, with mortgagees holding legal title to the property and mortgagors retaining the "equity of redemption" in the property; mortgagees, as loss payees, have a valid insurable interest in the insured property).

* *Alabama Farm Bureau Mut. Cas. Ins. Co., Inc. v. Williams*, 530 So.2d 1371, 1374 (Ala. 1988) (Under a typical "loss payable" clause, the mortgagee has the first right to the insurance proceeds up to the full amount of the mortgage).

* *Norwest Mortgage, Inc. v. Nationwide Mut. Fire Ins. Co.*, 718 So.2d 15, 17 (Ala. 1998) (Discussing the distinction between a "loss payable" clause and a "standard mortgage" clause. Loss payee's interest in policy proceeds are subject to any limitations or defenses available to the insurer as against the insured - - standard mortgagee's right to recover policy proceeds are unaffected by any conduct on the part of the insured which may trigger a limitation or defense as to coverage).

* *International Surplus Lines Ins. Co. v. Associates Commercial Corp.*, 514 So.2d 1326, 1327 (Ala. 1987) (Explaining that under a "standard mortgage" clause, an independent or separate contract exists between the mortgagee and the insurer); *see also United States Fire Ins. Co. v. Hecht*, 164 So. 65 (Ala. 1935).

b. FLORIDA

* **Rule:** Florida courts recognize the distinction between the rights of mortgagees when named in a policy under a loss payee provision or a standard mortgagee clause.

* *Florida Marine Towing, Inc. v. United Nat'l Ins. Co.*, 686 So.2d. 711 (Fla. Dist. Ct. App. 1997) (Where a mortgagee is a loss payee on the insurance policy, the mortgagee's right of recovery is no greater than the right of the mortgagor/insured; however, where the mortgagee is an additional insured, the mortgagee's coverage is not adversely affected by any wrongful act of the mortgagor).

* *Transamerica Leasing, Inc. v. The Inst. Of London Underwriters*, 338 F.Supp.2d 1299 (S.D. Fla. 2004) (Finding that the plaintiff was a loss payee under the policy, the court underwent analysis of the issue whether a loss payee could sue under the policy. Applying English law, the court held that a loss payee does not, absent an assignment, have standing to sue under an insurance policy. Since the court further found that there had been no contractual or statutory assignment, the Plaintiff had no standing to sue under the policy as a loss payee).

* *Lazslo Lenart v. OCWEN Financial Corp.*, 869 So.2d. 588 (Fla. Dist Ct. App. 2004) (The court of Appeals clarified that there was a distinction between "foreclosure after loss" cases and "foreclosure before loss" cases, and concluded that the loss payee's insurable interest here, given that the foreclosure occurred post-loss, was limited to any deficiency of the security debt after the foreclosure, plus interest).

c. LOUISIANA

* **Rule:** Louisiana courts recognize the distinction between the rights of mortgagees when named in a policy under a loss payee provision or a standard mortgagee clause.

* *Midland Mortgage Co. v. State Farm Fire & Casualty Co. et al*, 2009 U.S. Dist. Lexis 52716 (E.D. La. June 23, 2009). Hurricane Katrina caused damaged to the insured property. Plaintiff mortgagee then sued defendant insurers for failing to name Midland as the payee or co-payee on the insurance policy or, in the alternative, for failing to pay Midland insurance proceeds owed to it. The court found that where a mortgagor has taken out insurance made payable to a mortgagee as interest may appear, or for the benefit of the mortgagee, the mortgagee is entitled to the proceeds of the policy to the extent of his mortgage debt. The court noted, also, that an insurance policy may include one of two types of provisions controlling the mortgagee's rights - - a loss payable clause or a standard mortgage clause. Under the former, the mortgagee shall be the first paid from the policy proceeds as his interest may appear. The intent of this clause is to protect the mortgagee's interest (*i.e.*, the balance of the mortgage). However, the contract remains one between the insurer and the insured. Thus, the mortgagee can only recover to the extent the named insured can recover. To the contrary, a standard mortgage clause creates a separate contract of insurance between the insurer and the mortgagee to ensure that the mortgagee is protected from any loss resulting from the acts or neglect of the mortgagor/owner. Thus, even if the named insured does something to prevent coverage under the policy, the mortgagee may still be entitled to payment.

d. MISSISSIPPI

* **Rule:** Mississippi courts recognize the distinction between the rights of mortgagees when named in a policy under a loss payee provision or a standard mortgagee clause.

* The case law in Mississippi adjudicating the rights of additional payees focuses on the rights of mortgagees. The general rule regarding mortgagees as loss payees was articulated in *Employers Mut. Cas. Co. v. Standard Drug Co.*, 234 So.2d 330, 332-33 (Miss. 1970):

> [I]f the mortgagor covenants to keep the mortgaged property insured for the better security of the mortgagee [sic], the latter will have an equitable lien upon the proceeds of insurance carried by the mortgagor, in case of a loss, to the extent of his interest in the property destroyed, even though the policy contains no mortgage clause and is payable to the mortgagor. (emphasis added)

* *Nationwide Mut. Fire Ins. Co. v. Dungan* 634 F. Supp. 674, 684 (S.D. Miss. 1986), *aff'd*, 818 F.2d 1239 (5th Cir. 1987) (under a typical "loss payable" or "open-mortgage" clause, the mortgagee is only entitled to receive the amount due on its mortgage out of funds recovered by or due the insured, and the loss-payable clause does not make the mortgagee a party to the contract; the mortgagee occupies the status of a "mere equitable lienholder as to the insurance proceeds"); *see also Hartford Fire Ins. Co. v. Associates Capital Corp.*, 313 So.2d 404, 407 (Miss. 1975).

e. TEXAS

* **Rule:** Texas courts recognize the distinction between the rights of mortgagees when named in a policy under a loss payee provision or a standard mortgagee clause.

***** *U.S. Bank Nat'l Ass'n v. Safeguard Ins. Co.*, 422 F. Supp. 2d. 698, 703 (N.D. Tex. 2006) (Texas courts recognize the equitable lien doctrine, which provides that where "'a mortgagor is charged with the duty of obtaining insurance on a property with loss payable to the mortgagee, but the policy does not contain such a provision, equity will treat the policy as having contained the loss payable provision and entitle the mortgagee to recover under the policy); *see also Beneficial Standard Life Ins. Co. v. Trinity Nat'l Bank*, 763 S.W.2d 52, 55 (Tex. App. 1988, *writ denied*).

* *Fid. & Guar. Ins. Corp. v. Super-Cold S.W. Co*., 225 S.W.2d 924, 927 (Tex. App. 1949) (An agreement between a mortgagor and a mortgagee under which the mortgagor is charged with the duty of procuring insurance for the benefit of the mortgagee, will encumber the proceeds of that insurance with a lien in favor of the mortgagee. If the insurer is not informed of such an agreement, it is not bound thereby; but, after the information is given to it, the duty rests upon the insurer to treat the proceeds of the policy as though such a provision was written into the policy).

* *U.S. Bank Nat'l Ass'n v. Safeguard Ins. Co.*, 422 F. Supp. 2d. 698 (N.D. Tex. 2006) (the mortgagee bears the burden of proving its entitlement to the insurance policy proceeds under the equitable lien doctrine, including the doctrinal requirement that there be a deficiency on the mortgage).

8. NUMBER OF OCCURRENCES

We expect disputes between commercial assureds and their insurers as to whether their losses from the Deepwater Horizon Gulf Oil Spill are the result of one or multiple occurrences.

At the outset, there will be the issue of whether the explosion at the oil rig causing the leak, or the presence of oil/tar balls on or near a particular insured property, is the occurrence (or one of multiple occurrences).

a. ALABAMA

* **Rule:** As long as the injuries stem from one proximate cause there is a single occurrence; but if the cause is interrupted or replaced by another cause, then more than one accident or occurrence has taken place.

* *United States Fire Ins. Co. v. Safeco Ins. Co.*, 444 So. 2d 844 (Ala. 1983) (in construing the meaning of the term "occurrence" for purposes of determining the deductible due from the insured, the Alabama Supreme Court stated that as long as the injuries stem from one proximate cause there is a single occurrence - - but if the cause is interrupted or replaced by another cause, the chain of causation is broken and more than one accident or occurrence has taken place); *see also Appalachian Ins. Co. v. Liberty Mut. Ins. Co.*, 676 F.2d 56, 61 (3d Cir. 1982).

* *St. Paul Fire & Marine Ins. Co. v. Christiansen Marine, Inc.*, 893 So. 2d 1124 (Ala. 2004) (The fact seven barges all being towed by a single tug were involved in an incident giving rise to Christiansen Marine's damage does not establish that there were seven "occurrences" for purposes of calculating the deductible due under the policy); s*ee also State Farm & Cas. Co. v. Myrick*, 611 F. Supp. 2d 1287, 2009 U.S. Dist. LEXIS 32325 (M.D. Ala. 2009); *QBE Ins. Corp. v. Witherington*, 2008 U.S. Dist. LEXIS 84734 (S.D. Ala. Oct. 16, 2008).

b. FLORIDA

* **Rule:** It is the insured's burden to show that the loss was attributable to one or more occurrences.

* *Appalachian Ins. Co. v. Unites Postal Sav. Ass'n.*, 422 So.2d. 332 (Fla. Dist. Ct. App. 1982) (where the insurer is not contending that the loss arose from a cause that is excluded from the policy, and the loss is in fact covered, it is the insured's burden to show that the loss was attributable to one or more occurrences).

c. LOUISIANA

* We were unable to find any Louisiana case law discussing number of occurrences at the time of this writing.

d. MISSISSIPPI

* **Rule:** Number of occurrences is determined by the cause or causes of the resulting injury.

* *Universal Underwriters Ins. Co. v. Buddy Jones Ford Lincoln-Mercury*, 734 So. 2d 173 (Miss.1999) (court found that policy did not *unambiguously* state that multiple injuries may be treated as a single occurrence, the policy was deemed to be ambiguous, and each of the 175 acts of embezzlement was deemed a separate occurrence); *see also Business Interiors, Inc. v. Aetna Cas. & Sur. Co.*, 751 F.2d 361 (10th Cir. 1984).

e. TEXAS

* **Rule:** Number of occurrences depends upon the events that cause the injuries and give rise to the insured's liability rather than on the number of injurious effects.

* *Goose Creek Consolidated School District v. Continental Ca. Co.*, 658 S.W.2d 338 (Tex. App. 1983) is an often-cited Texas decision discussing number of occurrences. There, the court considered the number of loss occurrences under an all risk policy and found arson damage to two different buildings at different times constituted separate occurrences. *Goose Creek* involved two fires to neighboring schools that were set by the same individuals a short time a part. Continental paid all claims but applied two deductibles. In reaching its decision, the court determined that "event," as used in the occurrence definition, was "something that happens." The court refused to consider the underlying cause because the fires "happened" to different buildings, at different times, and one did not cause the other. Therefore, the court determined that the fires constituted separate events.

* *U.E. Texas One-Barrington, Ltd. v. General Star Indemnity Co.*, 332 F.3d 274 (5th Cir. 2003), involved an apartment complex that suffered foundation movement and above-ground damage as a result of moisture changes in the soils. It was discovered that 19 buildings in the apartment complex experienced plumbing leaks. In addition, the parties stipulated that the leaks under any particular building foundation only affected the foundation of that particular building and did not contribute to the movement of any other building foundation at the property, nor did they cause any other plumbing leaks.

In following *Goose Creek*, the court stated that (under Texas law) the proper analysis in determining the number of occurrences is to focus on "the events that cause the injuries and give rise to the insured's liability, rather than on the number of injurious effects." The court stated that the "overarching cause" is not relevant to the analysis, but rather the specific events that gave rise to the liability. Therefore, the court found that each leak constituted a separate occurrence. The court in *U.E. Texas One-Barrington* stated that looking to the installation of the plumbing as the event is far too broad: "To look this far back would render any damage to the complex occurring at any time related to the plumbing as arising from the same event."

* *Utica Nat. Ins. Co. of Tex. v. American Indmen. Co.*, 141 S.W.3d 198, 203 (Tex. 2004) (term "arise out of" means that there is simply a "causal connection or relation" which has been interpreted to mean that there is "but for" causation, though not necessarily direct or proximate causation); *Mid-Century Ins. Co. v. Lindsey*, 997 S.W.2d 153, 156 (Tex.1999).

* *Red Ball Motor Freight, Inc. v. Employer Mut. Liab. Ins. Co.*, 189 F.2d 374, 378 (5th Cir. 1951); *Am. States Ins. Co. v. Bailey*, 133 F.3d 363, 370 (5th Cir. 1998) (court

interpreted "arising out of" to exclude a requirement for proximate cause - - to "arise out of" an event means that "but for" that event, the losses would not have occurred.).

9. ORDINANCE OR LAW

In the event an insured has suffered covered physical damage arising out of the Deepwater Horizon Gulf Oil Spill requiring repairs, an ordinance or law may dictate the manner in which those repairs are performed. If such case, a question could arise as to whether increased repair costs attributable to that ordinance or law were covered.

a. ALABAMA

* We were unable to find any Alabama case law applying to "ordinance or law" at the time of this writing.

b. FLORIDA

* **Rule:** The enforcement of ordinance or law must have caused the loss in order for such an exclusion to apply.

* *State Farm Fire and Cas. Co. v. Metropolitan Date County*, 639 So. 2d 63 (Fla. Ct. App. 1994). In the wake of Hurricane Andrew, Dade County, Florida, required many homeowners to make structural improvements to their homes in order to bring them into compliance with the South Florida Building Code, including, in some cases, raising their elevations. The County instituted a declaratory judgment action against State Farm seeking a declaration that the company's replacement-cost homeowners insurance policies provided coverage for the costs of code upgrades and elevation alterations. The "ordinance or law" clause in the policies provided that State Farm was not responsible for loss caused by the enforcement of ordinances or laws regulating home construction, and an "increased cost limitation" clause excluded any increased costs of repairs incurred by bringing the home into compliance with ordinances. The appellate court reversed summary judgment in favor of the plaintiff, agreeing with State Farm's argument that the policy provisions excluded liability as to additional expenses for conforming to code, and financing structural improvements were also excluded; State Farm was thus liable only for damage caused by the hurricane itself. Further, the policies were not rendered ambiguous because the terms "enforcement" and "increased cost" were not defined.

c. LOUISIANA

* **Rule:** If damages sustained are directly or indirectly related to the enforcement of an ordinance or law, exclusion of same will apply, regardless of the reason for action.

* *Estopinal v. Parish of St. Bernard*, 32 So. 3d 991 (La. Ct. App. 2010). Plaintiff sued the defendant insurer, alleging that the cost to repair their house which was wrongfully demolished pursuant to a local housing ordinance was covered by their all-risk policy. The insurer pointed to the policy exclusion for losses caused by "enforcement of any ordinance or law regulating the use, construction, repair, or demolition of a building or other structure,"

whether caused "directly or indirectly" and "regardless of any other cause or event contributing to the loss." The court held that "it does not matter … whether the enforcing agencies or its agents 'intended' to demolish [the property], made a mistake … misinterpreted and/or misapplied the ordinance to the subject policy … if the damages sustained were 'directly or indirectly' related to the enforcement of an ordinance or law pertaining to demolition activities, the exclusion will apply." *See also Sweeney v. Schreveport*, 584 So. 2d 1248 (La. Ct. App. 1991).

* *Royal Cloud Nine, LLC v. Lafayette Ins. Co.*, 987 So. 2d 355 (La. Ct. App. 2008). Court held that a law or ordinance exclusion did not apply to a claim to repair hurricane damage to the roof of a building on the National Register of Historic Places. The insured was required to use natural slate to replace the roof, per its rating on the register. The roof damage resulted from Hurricane Katrina, not from the National Register's replacement requirements.

* *Haas v. Audubon Indem. Co.*, 722 So. 2d 1022 (La. Ct. App. 1998) (ordinance or law exclusion did not bar coverage for asbestos abatement that was necessitated by the theft of pipes and resulting flood when the water was turned on - - cause of loss was vandalism, not the enforcement of the law requiring asbestos abatement).

d. MISSISSIPPI

* We were unable to find any Mississippi case law applying to "ordinance or law" at the time of this writing.

e. TEXAS

* We were unable to find any Texas case law directly on point at the time of this writing.

* *Laird v. CMI Lloyds*, 2008 Tex. App. LEXIS 9822 (Tex. App. Aug. 7, 2008) (held that provision in a homeowners policy that provided an extension of coverage for increased costs due to the enforcement of codes and statutes that regulated the construction or repair of buildings did not cover mold remediation costs in excess of a mold remediation coverage limit).

10. OTHER INSURANCE

As assureds begin to make claims for damage or lost income from the Deepwater Horizon Gulf Oil Spill, one question insurers should consider is whether there is any other insurance that may apply to that loss. For example, we note that BP has stated publicly that it will pay (indemnify claimants) for all legitimate losses arising out of the spill. Whether or not BP stands behind this bold declaration remains to be seen. BP, self-insured for these losses has set aside (or reserved) funds for claims; whether this fund can be properly characterized as an indemnity pool, arguably "insurance," available to claimants is subject to debate.

a. ALABAMA

* **Rule:** Determination of which insurance coverage is primary and which, if any, is secondary is dependent upon the exact language of each policy.

* *Blackburn v. Fidelity and Deposit Co. of Maryland*, 667 So. 2d 661 (Ala. 1995), (Alabama Supreme Court noted that, under Alabama law, "the determination of which insurance coverage is primary and which, if any, is secondary is dependent upon the exact language of each policy"). *See also Isler v. Federated Guar. Mut. Ins. Co.*, 567 So.2d 1264 (Ala. 1990) (The purpose of an "other insurance" clause is to limit the insurance company's liability when a person is insured under two or more policies covering the same risks); *Gaught v. Evans*, 361 So. 2d 1027, 1028 (Ala. 1978).

b. FLORIDA

* **Rule:** Where two policies cover the same occurrence and contain the same other insurance provisions, each insurer is liable for a pro-rata share of a settlement or judgment.

* *National Union Fire Ins. Co. v. Travelers Ins. Co.*, 214 F.3d 1269 (11th Cir. 2000) (in apportioning contractual responsibilities among insurers, the parties' intent "is to be measured solely by the language of the policies unless the language is ambiguous"); *see also Towne Realty, Inc. v. Safeco Ins. Co. of Am.*, 854 F.2d 1264 (11th Cir. 1988).

* *Twin City Fire Ins. Co v. Fireman's Fund Ins. Co.*, 386 F. Supp. 2d 1272, 1278 (S.D. Fla. 2005) (where two policies cover the same occurrence and contain the same other insurance provisions, Florida follows the rule of "mutual repugnancy," with the effect that each insurer is liable for a pro-rata share of a settlement or judgment).

* *Sentry Ins. Co. v. Aetna Ins. Co.*, 450, So. 2d 1233 (Fla. Dist. Ct. App. 1984) (if there is no conflict, but the provisions can be "ranked" in accord with the type of other insurance clauses contained in the policies, the language as provided in the policies should dictate the outcome); s*ee also Insurance Company of North America v. Avis Rent-A-Car System, Inc.*, 348 So.2d 1149 (Fla. 1977) (In cases where more than one insurer's policy provides coverage for a loss, it is appropriate to review the insurance contracts to see if the documents address the "ranking" or contribution of other insurers).

c. LOUISIANA

* **Rule:** Courts must attempt to give effect to both other insurance clauses and to find them mutually repugnant *only if* the insured is left with no coverage.

* *Bradley v. Allstate Ins. Co.*, 606 F.3d 215 (5th Cir. 2010) (Under Louisiana law, an insured may recover all available coverages so long as there is no double recovery); *see Cole v. Celotex*, 599 So. 2d 1058, 1080 (La. 1992); 15A *Couch on Insurance* § 56:34 (2d ed. 1983).

* *Efferson v. Kaiser Aluminum & Chemical Corp.*, 816 F. Supp. 1103 (E.D. La. 1993) (where there is a conflict between an escape clause and a pro-rata clause, the policy containing the pro-rata clause is primarily liable; thus, "absent direction from the Supreme Court of Louisiana to the contrary," the court determined that the proper approach under Louisiana law is to "attempt to give effect to both 'other insurance' clauses and to find them mutually repugnant only if the insured is left with no coverage"); *see also Citgo Petroleum Corp. v. Yeargin, Inc.*, 690 So. 2d 154 (La. Ct. App. 1997) (noting that neither state supreme court nor courts of appeal had dealt with conflicting escape and pro rata other insurance clauses, but that federal court cases have held that the clauses are not mutually repugnant).

d. MISSISSIPPI

* **Rule:** When two policies are indistinguishable in meaning and intent, they will be deemed "mutually repugnant" and benefits under the policies will be pro-rated.

* *Guidant Mut. Ins. Co. v. Indemnity Ins. Co.*, 13 So. 2d 1270, 1276 (Miss. 2009) (when there is a conflict in the policies, and the "two policies are indistinguishable in meaning and intent," the clauses should be found "mutually repugnant and must be disregarded"); *see also Allstate Ins. Co. v. Chicago Ins. Co.*, 676 So. 2d 271, 275 (Miss. 1996); *Travelers Indem. Co. v. Chappell*, 246 So. 2d 498, 504 (Miss. 1971) (where competing insurance policies each contain conflicting "other insurance" clauses or "excessive coverage" clauses, the clauses shall not be applied and benefits under the policies shall instead be pro-rated according to the coverage limits of each policy).

e. TEXAS

* **Rule:** If "other insurance" clauses can be harmonized so that one is primary, they should be; if the clauses conflict, the policies are pro-rated.

* *Travelers Lloyds Ins. Co. v. Pacific Employers Ins. Co.*, 602 F.3d 677 (5th Cir. 2010) (for the purpose of applying "other insurance" clauses in insurance policies, a self-insurer does not provide other, collectible insurance).

* *Hardware Dealers Mut. Fire Ins. Co. v. Farmers Ins. Exch.*, 444 S.W.2d 583, 585-87 (Tex. 1969) (in the case of competing "other insurance" clauses, a Texas court must determine whether the clauses can be harmonized (*i.e.*, so that one is primary) or if they conflict; if the clauses conflict, the policies are pro-rated).

11. PERIOD OF RESTORATION ISSUES

The Deepwater Horizon Gulf Oil Spill has affected many industries in the Gulf Coast. For some of these industries, the affect could be long term. One such example is tourism, which may be affected for years to come. In this regard, if people are unwilling to vacation in the Gulf Coast, a host of industries, such as hotels, restaurants, sport fishing, and other marine-related businesses, will suffer long term revenue losses. Assureds will almost certainly attempt to recover these future losses. What is the date on which the indemnity period commences? For

what period into the future can the insured realistically expect to recover? Typically, coverage for BI is limited to losses sustained during the "period of restoration," a term that is defined in most policies. Accordingly, it is important to understand how courts in the affected jurisdictions interpret this period and resolve issues concerning the calculation of the period and the scope of the available coverage.

a. ALABAMA

* **Rule:** Period of restoration is determined by the time it should take for the property to be repaired after the loss; to "resume" operations does not mean that the business be as prosperous as before, but that the business is operating again.

* *Cincinnati Ins. Co. v. Washer & Refrigeration Supply Co.*, 2008 U.S. Dist. LEXIS 112464 (S.D. Ala. Aug. 8, 2008). Plaintiff sought coverage from Cincinnati Insurance for property loss, business interruption and extra expense resulting from various tropical storms and hurricanes that hit the Gulf Coast area in 2004 and 2005. Plaintiff, a wholesale distributor of appliances and mechanical parts, had several locations throughout the Gulf Coast Region. The policy provided for "the actual loss of Business Income you sustain due to the necessary 'suspension' of your 'operations' during the 'period of restoration'. The 'suspension' must be caused by direct physical loss of or damage to property …" The "period of restoration" was defined as beginning 72 hours after direct physical loss, or "immediately after the time of direct physical loss or damage for Extra Expense coverage," where caused by or resulting from a covered cause of loss, and ending on the earlier of 1) the date when the property should be repaired, rebuilt, or replaced with reasonable speed and similar quality; or 2) the date when business is resumed at a new permanent location. "Suspension" was defined as either a slowdown or if part of the premises was rendered untenantable. The policy also contained an extended business income provision, extending from the time the property was actually repaired, rebuilt or replaced and operations are resumed, through "the date you could restore your 'operations' with reasonable speed, to the level which would generate the business income amount that would have existed if no direct physical loss or damage had occurred," or 30 days from the date the property is actually repaired, rebuilt or replaced. The extended BI provision did not apply to loss of income "incurred as a result of unfavorable business conditions caused by the impact of the Covered Cause of Loss in the area where the described premises are located."

On motions for summary judgment, the court found that there were issues of material fact as to the total amount of plaintiff's covered losses. However, the court concluded that plaintiff was entitled to approximately 60 days of extra expense coverage from the date Hurricane Katrina hit plaintiff's affected property in Mobile, Alabama, based on the fact that Plaintiff was able to relocate its warehouse in this location within this time frame. Plaintiff's argument that a slowdown in its business qualified as a "suspension" of business was invalid; while Plaintiff's business was certainly suspended in Mobile through the time it was resumed in its new location, any further slowdown was not caused by direct physical loss but due to unfavorable business conditions in the region. The court explained that "suspension" is merely a requirement of the BI coverage provision; the "period of restoration" is not dependent on the definition of "suspension" but simply depends on the time it should take for the property to be

repaired after the loss. "To 'resume' operations does not require that the business be as prosperous as before, but that the business is operating again."

b. FLORIDA

* **Rule:** Lack of business due to factors other than covered cause of loss does not entitle insured to continued BI coverage.

* *Dictiomatic, Inc. v. United States Fidelity & Guaranty Co.*, 958 F. Supp. 594 (S.D. Fla. 1997). The Southern District of Florida held that an insured's lack of sales was due to factors other than Hurricane Andrew, and for this reason it was not entitled to business interruption coverage. "Under the terms of the policy, [the insured] is entitled to recover its actual loss of business income during the period of time necessary to restore the business operation. The insurance policy defines the period of restoration as beginning on the date of the direct physical damage to the business premises and ending on the date when the business premises should have been repaired, rebuilt or replaced with reasonable speed and similar quality." Therefore, the period of restoration ran from the date of the direct physical loss caused by Hurricane Andrew and ending on the date when the insured was back on the premises and up and running.

c. LOUISIANA

* **Rule:** Period of restoration is the amount of time to repair the property exercising due diligence.

* *United Land Investors, Inc. v. Northern Ins. Co. of America*, 476 So.2d 432 (La. Ct. App. 1985) (policy in question provided that the insurer would pay actual losses sustained from the date of loss until the building can, with due diligence, be repaired; court rejected insurer's argument that there was a 6-month business interruption cut-off date in the policy; *but see Shelter Mut. Ins. Co. v. Culbertson's Ltd., Inc*., 1999 WL 461826 (E.D. La. 1999) (12-month business interruption limitation upheld).

d. MISSISSIPPI

* **Rule:** Period of restoration is limited to the time to repair the damaged property.

* *Gregory v. Continental Ins. Co.*, 575 So.2d 534 (Miss. 1991) (court determined that the period of restoration for damage to a restaurant located on a golf course was limited to the time to restore the restaurant only, and not to restore the entire golf course facility).

e. TEXAS

* **Rule:** The period of restoration is the time between the occurrence of the covered loss and the date upon which business is resumed.

* *Rimkus Consulting Group, Inc. v. Hartford Casualty Ins. Co.*, 552 F.Supp.2d 637 (S.D. Tex. 2007). After Hurricane Katrina, the plaintiff, a company providing engineering, accounting and consulting services, sustained physical damage to its offices, which they were forced to close in August 2005. To continue providing services to clients, plaintiff relocated to temporary offices and rented hotel rooms and apartments for its staff, until December 2005 when the Plaintiff moved into a new permanent office space. To recover these costs, plaintiff filed several claims with its insurer, the defendant, to recover BI losses, temporary living expenses for displaced employees working at temporary offices, and additional rent to resume operations at new location.

In evaluating whether the defendant insurer was obligated to pay these additional expenses, the court referred to the period of restoration as "the time between the occurrence of the covered loss and the date upon which business is resumed …" in December 2005, when the plaintiff moved into its new office space.

* **Note:** As there was no dispute between the parties regarding the restoration period, the comments on this point should be treated as *dicta*.

II. Unfair Claims Practices / Bad Faith

As insurers begin to receive notice of potential claims arising from the Deepwater Horizon Gulf Oil Spill, it is important to know the law in the affected jurisdictions relating to standards for claims handling practices and bad faith. We provide below a summary of some of the relevant cases, statutes and/or regulations.

1. BAD FAITH

a. ALABAMA

* **Rule:** Breach of contract by the insurance company is a prerequisite for a bad faith claim.

* *Ronald M. Poarch v. Alpha Mutual Insurance Co*., 799 So.2d 949 (Ala. Civ. App. 2000). The court held that a breach of contract by the insurance company is a prerequisite for a bad faith claim, and that the elements of a claim of bad faith refusal to pay are:

> (a) breach of an insurance contract;
> (b) an intentional refusal to pay the claim;
> (c) the absence of any reasonably legitimate or arguable reason for that refusal;
> (d) the insurer's actual knowledge of the absence of any legitimate or arguable reason; and
> (e) if the insured relies upon the intentional failure to determine the existence of a lawful basis, the insured must prove the insurer's intentional failure to determine whether there is a legitimate or arguable reason to refuse to pay the claim.

* "In short, plaintiff must go beyond a mere showing of nonpayment and prove a *bad faith* nonpayment without any reasonable ground for dispute. Or, stated differently the plaintiff must show that the insurance company had no legal or factual defense to the insurance claim." *Id.* at 953 (quoting *National Security Fire & Casualty Co. v. Bowen*, 417 So. 2d 179 (Ala. 1982)).

* Alabama has adopted a Trade Practices Law, Ala. Code 1975 § 27-12-1*et seq.*, applicable to the business of insurance. Section 27-12-2 of the Act prohibits any trade practice which is defined in the Act or determined to be an unfair method of competition or an unfair or deceptive act or practice in the business of insurance. The following subsection addresses claim settlement practices:

> No insurer shall, without just cause, refuse to pay or settle claims arising under coverages provided by its policies in this state and with such frequency as to indicate a general business practice in this state, which general business practice is evidenced by:

(1) A substantial increase in the number of complaints against the insurer received by the insurance department;
(2) A substantial increase in the number of lawsuits against the insurer or its insureds by claimants; and
(3) Other relevant evidence.

Ala. Code 1975 § 27-12-24. The Act does not, however, create a private cause of action for bad faith. *See* section 16, *infra*.

* In *Neal v. State Farm Fire & Casualty Co.*, 908 F.2d 923 (11th Cir. 1990), the court reviewed the validity of a bad faith claim for a delay in payment on a claim. Neal sued State Farm, alleging that the insurer's four-month delay between the destruction of Neal's insured house and vehicle and State Farm's confirmation of coverage extension constituted breach of contract and bad faith refusal to pay. Upon removal, the district court granted Neal's motion for summary judgment on the contract claim and State Farm's motion for summary judgment on the bad faith claim. Neal appealed. After reviewing the elements of a bad faith claim, the court rejected Neal's argument that the four month delay was unreasonable and therefore constituted bad faith. Neal's lawsuit was premature; consequently, the summary judgment was affirmed.

* For a thorough summary of the evolution of the tort of bad faith in Alabama, *see State Farm Fire & Cas. Co. v. Balmer*, 672 F. Supp. 1395 (M.D. Ala. 1987), *aff'd*, 891 F.2d 874 (11th Cir. (Ala.) 1990). The court noted that the inquiry in a bad faith claim ultimately depends upon whether there is a debatable reason for denying the claim. This debatable reason could be a question of fact or a question of law. The court ruled that the threshold determination of whether this debatable reason exists is critical since, in the "normal" and "ordinary" case, the existence of such debatable reason precludes the issue of bad faith from being submitted to the jury. The only exception to this rule involves cases in which the existence of the insurer's lawful basis is itself a question of fact or the insurer relies upon evidence it has created itself in formulating the basis for refusal to pay the insured's claim. The court further held that although it was distressed by the manner in which the fire loss was investigated, once it was determined that a debatable reason existed for the denial of the claim, at the time that the insurer denied the claim, questions of whether the claim was properly investigated and evaluated became moot.

* In *Adams v. Auto Owners Ins. Co.*, 655 So.2d 969 (Ala. 1995), the insured's roof was allegedly damaged in a windstorm. The insured's experts believed the roof was damaged by wind, while the insurer's believed the roof was old and worn. The insurer denied payment, and the insured filed suit for bad faith. The Alabama Supreme Court held that the insured must go beyond a mere showing of nonpayment. The burden is to prove a bad faith nonpayment, *i.e.*, a nonpayment without any reasonable ground for dispute. The insurer denied payment on the basis of two on-site investigations conducted independently by an adjuster and engineer, each of which concluded the roof deteriorated through age. The *Adams* court found that these opinions provided a legitimate basis for denying the insured's claim.

b. FLORIDA

* **Rule:** Cause of action for bad faith in claim settlement negotiations does not accrue in a first-party action until the coverage issue in the underlying case is determined in favor of the insured.

* *Blanchard v. State Farm Mut. Auto. Ins. Co.*, 575 So.2d 1289 (Fla.1991) (cause of action for bad faith in claim settlement negotiations does not accrue in a first-party action under Section 624.155 of the Florida Statutes, until the coverage issue in the underlying case is determined in favor of the insured); *Lane v. Provident Life & Accident Ins. Co.*, 71 F.Supp.2d 1255, 1256 (S.D. Fla. 1999) (court extends holding in *Blanchard* to include bad faith in claims handling process).

* *Bray & Gillespie Management LLC v. Lexington Ins. Co.*, No. 6:07-cv-222-Orl-19KRS, 2007 WL 2915939, *8 (M.D. Fla. Oct. 5, 2007) (United States District Court for the Middle District of Florida acknowledged the law recognized in Florida stating, "[i]t is well established that a statutory claim of bad faith failure to settle does not accrue until the underlying action for the insurance benefits is resolved in favor of the insured. …"); *Vanguard Fire & Cas. Co. v. Golmon*, 955 So.2d 591, 593 (Fla. Dist. Ct. App. 2006) (the existence of liability and the extent of damages are elements of a statutory cause of action for bad faith that must be determined before a statutory cause of action will lie); *see also Vest v. Travelers Ins. Co.*, 753 So.2d 1270 (Fla. 2000); *Brookins v. Goodson*, 640 So.2d 110 (Fla. Dist. Ct. App. 1994), *rev. denied*, 648 So.2d 724 (Fla.1994), *State Farm Mut. Auto. Ins. Co. v. Laforet*, 658 So.2d 55 (Fla. 1995); *Imhof v. Nationwide Mut. Ins. Co.*, 643 So.2d 617 (Fla. 1994).

* *Cunningham v. Standard Guar. Ins. Co.*, 630 So.2d 179, 181-82 (Fla.1994) (where a party files a complaint that fails to allege the existence of a judgment against the insurance carrier, the complaint will be dismissed for failure to state a cause of action).

c. LOUISIANA

* **Rule:** Standards for proving and remedies available or against carriers who commit bad faith are statutory.

* In Louisiana, the standards for proving and remedies available or against carriers who commit bad faith are statutory. A review of the applicable statutes is required for a complete understanding of the standards. However, it can be said, generally, that an "arbitrary or capricious" failure to pay policy benefits may expose an insurer to bad faith.

A. Statutes

1. State Statutory Provision Corresponding to Section 4 of the NAIC Model Act.

* Louisiana has adopted LSA-R.S. 22:1964(14), which corresponds to Section 4 of the NAIC Model Act. The following provisions of the Louisiana law differ significantly from or have no counterpart in Section 4 of the Model Act:

§ 22:1964. Methods, acts, and practices which are defined herein as unfair or deceptive

The following are declared to be unfair methods of competition and unfair or deceptive acts or practices in the business of insurance:
* * * *
(k) Making known to insureds or claimants a policy of appealing from arbitration awards in favor of insureds or claimants for the purpose of compelling them to accept settlements or compromises less than the amount awarded in arbitration.

(l) Delaying the investigation or payment of claims by requiring an insured, claimant, or the physician of either to submit a preliminary claim report and then requiring the subsequent submission of formal proof of loss forms, both of which submissions contain substantially the same information.

(m) Failing to promptly settle claims, where liability has become reasonably clear, under one portion of the insurance policy coverage in order to influence settlements under other portions of the insurance policy coverage.

2. Other Relevant Statutes

§ 22:1973. Good faith duty; claims settlement practices; cause of action; penalties

A. An insurer, including but not limited to a foreign line and surplus line insurer, owes to his insured a duty of good faith and fair dealing. The insurer has an affirmative duty to adjust claims fairly and promptly and to make a reasonable effort to settle claims with the insured or the claimant, or both. Any insurer who breaches these duties shall be liable for any damages sustained as a result of the breach.

B. Any one of the following acts, if knowingly committed or performed by an insurer, constitutes a breach of the insurer's duties imposed in Subsection A:

(1) Misrepresenting pertinent facts or insurance policy provisions relating to any coverages at issue.

(2) Failing to pay a settlement within thirty days after an agreement is reduced to writing.

(3) Denying coverage or attempting to settle a claim on the basis of an application which the insurer knows was altered without notice to, or knowledge or consent of, the insured.

(4) Misleading a claimant as to the applicable prescriptive period.

(5) Failing to pay the amount of any claim due any person insured by the contract within sixty days after receipt of satisfactory proof of loss from the claimant when such failure is arbitrary, capricious, or without probable cause.

(6) Failing to pay claims pursuant to R.S. 22:1893 when such failure is arbitrary, capricious, or without probable cause.

§ 22:1892. Payment and adjustment of claims, policies other than life and health and accident; personal vehicle damage claims; extension of time to respond to claims during emergency or disaster; penalties; arson-related claims suspension

A. (1) All insurers issuing any type of contract, other than those specified in R.S. 22:1811, 1821, and Chapter 10 of Title 23 of the Louisiana Revised Statutes of 1950, shall pay the amount of any claim due any insured within thirty days after receipt of satisfactory proofs of loss from the insured or any party in interest. The insurer shall notify the insurance producer of record of all such payments for property damage claims made in accordance with this Paragraph.

* * * *

(3) Except in the case of catastrophic loss, the insurer shall initiate loss adjustment of a property damage claim and of a claim for reasonable medical expenses within fourteen days after notification of loss by the claimant. In the case of catastrophic loss, the insurer shall initiate loss adjustment of a property damage claim within thirty days after notification of loss by the claimant except that the commissioner may promulgate a rule for extending the time period for initiating a loss adjustment for damages arising from a presidentially declared emergency or disaster or a gubernatorially declared emergency or disaster up to an additional thirty days. Thereafter, only one additional extension of the period of time for initiating a loss adjustment may be allowed and must be approved by the Senate Committee on Insurance and the House Committee on Insurance, voting separately. Failure to comply with the provisions of this Paragraph shall subject the insurer to the penalties provided in R.S. 22:1973.

(4) All insurers shall make a written offer to settle any property damage claim, including a third-party claim, within thirty days after receipt of satisfactory proofs of loss of that claim.

B. (1) Failure to make such payment within thirty days after receipt of such satisfactory written proofs and demand therefor or failure to make a written offer to settle any property damage claim, including a third-party claim, within thirty days after receipt of satisfactory proofs of loss of that claim, as provided in Paragraphs (A)(1) and (4), respectively, or failure to make such payment within thirty days after written agreement or settlement as provided in Paragraph (A)(2), when such failure is found to be arbitrary, capricious, or without probable cause,

shall subject the insurer to a penalty, in addition to the amount of the loss, of fifty percent damages on the amount found to be due from the insurer to the insured, or one thousand dollars, whichever is greater, payable to the insured, or to any of said employees, or in the event a partial payment or tender has been made, fifty percent of the difference between the amount paid or tendered and the amount found to be due as well as reasonable attorney fees and costs. Such penalties, if awarded, shall not be used by the insurer in computing either past or prospective loss experience for the purpose of setting rates or making rate filings.

* * * *

C. (1) All claims brought by insureds, worker's compensation claimants, or third parties against an insurer shall be paid by check or draft of the insurer to the order of the claimant to whom payment of the claim is due pursuant to the policy provisions, or his attorney, or upon direction of such claimant to one specified; provided, however, that the check or draft shall be made jointly to the claimant and the employer when the employer has advanced the claims payment to the claimant. Such check or draft shall be paid jointly until the amount of the advanced claims payment has been recovered by the employer.

(2) No insurer shall intentionally or unreasonably delay, for more than three calendar days, exclusive of Saturdays, Sundays, and legal holidays, after presentation for collection, the processing of any properly executed and endorsed check or draft issued in settlement of an insurance claim.

(3) Any insurer violating this Subsection shall pay the insured or claimant a penalty of two hundred dollars or fifteen percent of the face amount of the check or draft, whichever is greater.

****

* *Real Asset Management, Inc. v. Lloyd's of London*, 61 F.3d 1223 (5th Cir. 1995). The court upheld the district court's award of penalties and attorneys' fees against insurers who breach the duty of good faith under LSA-R.S. 22:1220 in withholding insurance benefits and delaying authorization for the insured to install a temporary roof, thereby breaching the duty of good faith under LSA-R.S. 22:1220(B)(5). Further, penalties were appropriate under both LSA-R.S. 22:1220(C) and LSA-R.S. 22:658, and attorneys' fees were also appropriate. ***Note:*** *Louisiana's relevant statutes have been recodified.*

* *Grilletta v. Lexington Ins. Co.*, 558 F.3d 359 (5th Cir. 2009). The court held that insurer was subject to statutory penalties under LSA-R.S. 22:658B(1) on plaintiff's *entire* claim, not just the undisputed portion which the court found was improperly withheld: "if part of a claim for property damage is not disputed, the failure of the insurer to pay the undisputed portion of the claim within the statutory period, that delay will subject the insurer to penalties on the entire claim." The Court went on to state that failure to pay a claim is "arbitrary and capricious" if it is "unjustified, without reasonable or probable cause or excuse." *See also Warner v. Liberty*

Mut. Fire Ins. Co., 543 So. 2d 511, 515 (La. Ct. App. 1989); *Reed v. State Farm Mut. Auto Ins. Co.*, 857 So. 2d 1012, 1021 (La. 2003) (defining "vexatious").

* *Kemp v. Republic Nat. Life Ins. Co.*, 649 F.2d 337 (5th Cir. 1981) (in cases where the insured fails to show that the insurer's action in denying coverage was arbitrary and capricious, insured is not entitled to recovery of interest and attorney fees).

d. MISSISSIPPI

* **Rule:** Mississippi allows recovery of extra-contractual damages when an insurance company tortiously breaches an insurance contract.

* *Essinger v. Liberty Mutual Fire Ins. Co.*, 529 F.3d 264, 270 (5th Cir. 2008) (Mississippi allows recovery of extra-contractual damages when an insurance company tortiously breaches an insurance contract).

* An insurer is obligated to perform a prompt and adequate investigation and to deal with the claimant in good faith, making a reasonable decision based on the investigation. Plaintiff's burden in proving "bad faith" is to establish that a proper investigation by the insurer would have shown that the defenses were without merit.

* *Windmon v. Marshall*, 926 So. 2d 867 (Miss. 2006) sets forth the rule of law in Mississippi. Burden in proving a claim for bad faith refusal to pay goes beyond proving mere negligence in performing the investigation. The level of negligence in conducting the investigation must be such that a proper investigation by the insurer would easily adduce evidence showing its defenses to be without merit. However, if there is a reasonably arguable basis to deny the claim, then the insured is not entitled to have the jury consider any bad faith award against the insurance company; *see also Murphree v. Federal Ins. Co.*, 707 So.2d 523, 529 (Miss. 1997) (insured bears a "heavy burden," and must prove that there was no reasonably arguable basis for denying the claim); *Blue Cross & Blue Shield v. Campbell*, 466 So.2d 833, 844 (Miss. 1984); *Liberty Mut. Ins. Co. v. McKneely*, 862 So.2d 530, 534 (Miss. 2003); *Bankers Life & Cas. Co. v. Crenshaw*, 483 So.2d 254 (Miss. 1985); *Universal Life Ins. Co. v. Veasley*, 610 So.2d 290, 293 (Miss. 1992).

* *Reed v. Nationwide Mut. Fire Ins. Co.*, 2007 U.S. Dist. LEXIS 83517 (S.D. Miss. November 9, 2007) (where insured is seeking punitive damages, burden is on the insured to show, by a preponderance of the evidence, both an absence of an arguable reason for insurer's denial of claim, and malice or gross negligence or reckless disregard for their rights); *see also Hans Constr. Co. Inc. v. Phoenix Assurance Co.*, 995 F.2d 53, 55 (5th Cir. 1993) (under Mississippi law, if an insurer has a legitimate or arguable reason for denying coverage, punitive damages are unavailable).

* *AmFed Cos., LLC v. Jordan*, 34 So. 3d 1177 (Miss. Ct. App. 2009) ("Reckless" is defined as "careless, heedless, inattentive; indifferent to consequences"); *Turner v. City of Ruleville*, 735 So. 2d 226, 229 (Miss. 1999).

* *Southern United Life Ins. Co. v. Caves*, 481 So. 2d 764 (Miss. 1985) (when an insured is not entitled to a directed verdict on the underlying claim against the insurer, the issue of bad faith punitive damages should ordinarily not be submitted to the jury).

* *Essinger v. Liberty Mutual Fire Ins. Co.*, 529 F.3d 264, 270 (5th Cir. 2008) (a court will consider the following questions: (1) Was there a refusal to pay a claim or to honor an obligation? (2) Was the claim actually owed? (3) Was there no arguable basis for the company's actions? (4) Did the company's actions amount to an intentional wrong or occur due to gross negligence?

e. TEXAS

* **Rule:** Evidence showing merely a *bona fide coverage dispute* is not sufficient to demonstrate bad faith; but an insurer may breach its duty of good faith by failing to reasonably investigate a claim.

* The Texas Supreme Court set forth the duty of good faith and fair dealing in the seminal case *Universe Life Ins. Co. v. Giles*, 950 S.W.2d 48 (Tex. 1997). Specifically, the court stated that an insurer breaches this duty by denying or delaying a claim when the insurer's liability has become reasonably clear. This case also reaffirmed that an insurer may breach its duty of good faith and fair dealing by failing to reasonably investigate a claim.

* Additionally, the Texas Supreme Court has held that evidence showing merely a *bona fide coverage dispute* is not sufficient to demonstrate bad faith. *State Farm Fire & Cas. Co. v. Simmons*, 963 S.W.2d 42 (Tex. 1998), *citing State Farm Lloyds v. Nicolau*, 951 S.W.2d 444, 448 (Tex. 1997); *Transportation Ins. Co. v. Moriel*, 879 S.W.2d 10, 17 (Tex. 1994).

* The Texas Insurance Code also provides a basis for a claim for bad faith under chapter 541 "Unfair Methods of Competition and Unfair or Deceptive Acts or Practices." Specifically it is important to note the following provisions:

* **Sec. 541.060. UNFAIR SETTLEMENT PRACTICES.**

> (a) It is an unfair method of competition or an unfair or deceptive act or practice in the business of insurance to engage in the following unfair settlement practices with respect to a claim by an insured or beneficiary:
>
> > (1) misrepresenting to a claimant a material fact or policy provision relating to coverage at issue;
> > (2) failing to attempt in good faith to effectuate a prompt, fair, and equitable settlement of:
> >
> > > (A) a claim with respect to which the insurer's liability has become reasonably clear; or
> > > (B) a claim under one portion of a policy with respect to which the insurer's liability has become reasonably clear to influence the

claimant to settle another claim under another portion of the coverage unless payment under one portion of the coverage constitutes evidence of liability under another portion;

(3) failing to promptly provide to a policyholder a reasonable explanation of the basis in the policy, in relation to the facts or applicable law, for the insurer's denial of a claim or offer of a compromise settlement of a claim;
(4) failing within a reasonable time to:

(A) affirm or deny coverage of a claim to a policyholder; or
(B) submit a reservation of rights to a policyholder;

(5) refusing, failing, or unreasonably delaying a settlement offer under applicable first-party coverage on the basis that other coverage may be available or that third parties are responsible for the damages suffered, except as may be specifically provided in the policy;
(6) undertaking to enforce a full and final release of a claim from a policyholder when only a partial payment has been made, unless the payment is a compromise settlement of a doubtful or disputed claim;
(7) refusing to pay a claim without conducting a reasonable investigation with respect to the claim;
(8) with respect to a Texas personal automobile insurance policy, delaying or refusing settlement of a claim solely because there is other insurance of a different kind available to satisfy all or part of the loss forming the basis of that claim; or
(9) requiring a claimant as a condition of settling a claim to produce the claimant's federal income tax returns for examination or investigation by the person unless:

(A) a court orders the claimant to produce those tax returns;
(B) the claim involves a fire loss; or
(C) the claim involves lost profits or income.

(b) Subsection (a) does not provide a cause of action to a third party asserting one or more claims against an insured covered under a liability insurance policy.

Added by Acts 2003, 78th Leg., ch. 1274, Sec. 2, eff. April 1, 2005.

Sec. 542.056. NOTICE OF ACCEPTANCE OR REJECTION OF CLAIM.

(a) Except as provided by Subsection (b) or (d), an insurer shall notify a claimant in writing of the acceptance or rejection of a claim not later than the 15th business day after the date the insurer receives all items, statements, and forms required by the insurer to secure final proof of loss.
(b) If an insurer has a reasonable basis to believe that a loss resulted from arson, the insurer shall notify the claimant in writing of the acceptance or rejection of the

claim not later than the 30th day after the date the insurer receives all items, statements, and forms required by the insurer.
(c) If the insurer rejects the claim, the notice required by Subsection (a) or (b) must state the reasons for the rejection.
(d) If the insurer is unable to accept or reject the claim within the period specified by Subsection (a) or (b), the insurer, within that same period, shall notify the claimant of the reasons that the insurer needs additional time. The insurer shall accept or reject the claim not later than the 45th day after the date the insurer notifies a claimant under this subsection.

Added by Acts 2003, 78th Leg., ch. 1274, Sec. 2, eff. April 1, 2005.

2. INVESTIGATION OF CLAIM

a. ALABAMA

* An insurer's obligation to pay or evaluate the validity of an insured's claim does not arise until the insured has complied with the terms of the contract with respect to submitting claims. *Nationwide Ins. Co. v. Nilsen*, 745 So.2d 264, 267 (Ala. 1999) (citing *United Ins. Co. of America v. Cope*, 630 So.2d 407, 411 (Ala. 1993)); *followed by Caribbean I Owners' Ass'n v. Great Am. Ins. Co.*, 600 F. Supp. 2d 1228, 1249 (S.D. Ala. 2009).

* Insurer's mere investigation of the loss for its own satisfaction, without more, would not constitute a waiver of the insured's breach of the stipulations for a sworn statement of the circumstances of the loss. *Ray v. Fidelity-Phoenix Fire Ins. Co.*, 65 So. 536, 538 (Ala. 1914).

b. FLORIDA

* Under Section 626.9541(1)(i) of the Florida Statutes, "unfair claim settlement practices" include:

> 3. Committing or performing with such frequency as to indicate a general business practice any of the following:
> * * * *
> d. Denying claims without conducting reasonable investigations based upon available information;
>
> e. Failing to affirm or deny full or partial coverage of claims, and, as to partial coverage, the dollar amount or extent of coverage, or failing to provide a written statement that the claim is being investigated, upon the written request of the insured within 30 days after proof-of-loss statements have been completed;

Despite the language of § 626.9541(1)(i)(d), however, the section does not create a legal duty for the insurance company to conduct a reasonable investigation; it only creates a civil action where the insurance company has denied a claim without conducting a reasonable investigation. *See*

Silhan v. Allstate Insurance Co., 236 F.Supp.2d 1303, 1311 (N.D. Fl. 2002). Nevertheless, from the language of § 626.9541(1)(i)(e), some investigation is required prior to the proof-of-loss statements having been completed, and a statement must be provided as to same if requested by the insured within thirty (30) days of the proof-of-loss statements' completion.

c. LOUISIANA

* Except in the case of catastrophic loss, the insurer shall initiate loss adjustment of a property damage claim and of a claim for reasonable medical expenses within fourteen (14) days after notification of loss by the claimant. In the case of catastrophic loss, the insurer shall initiate loss adjustment of a property damages claim within thirty (30) days of after notification of loss by the claimant. Failure to comply with the provisions of this paragraph shall subject the insurer to the penalties provided in LSA-R.S. § 22:1892.

* *Toerner v. Henry*, 812 So.2d 755 (La.App. 1 Cir. 2002) (an insurer's statutory duty to initiate loss adjustment of a property damage claim and of a claim for reasonable medical expenses within fourteen days after notification of the loss requires the insurer to take reasonable steps to gather necessary information beyond the simple opening of a file, but does not require a thorough investigation in that period).

* None of the following acts by or on behalf of an insurer shall be deemed to constitute a waiver of any provision of a policy or of any defense of the insurer thereunder:

> (1) Acknowledgement of the receipt of notice of loss or claim under the policy.
>
> (2) Furnishing forms for reporting a loss or claim, for giving information relative thereto, or for making proof of loss, or receiving or acknowledging receipt of any such forms or proofs completed or incomplete.
>
> (3) Investigating any loss or claim under any policy or engaging in negotiations looking toward a possible settlement of any such loss or claim.

LSA-R.S. 22:879.

* LSA-R.S. 22:572. Written catastrophe response plans:

> Every insurer writing any form of commercial or residential property insurance, automobile insurance, marine, or inland marine insurance or writing life or health and accident insurance shall maintain a written catastrophe response plan or plan that describes how the insurer will respond to a catastrophe affecting its policyholders. Additionally, each health maintenance organization, managing general agent, and third-party administrator shall maintain a written catastrophe response plan or plan that describes how it will respond to a catastrophe affecting its business operations. During an examination required by R.S. 22:1981, or at such other time as the commissioner deems appropriate, he shall review the

written catastrophe response plan of each insurer, health maintenance organization, managing general agent, and third-party administrator, the insurance written, and the response plan most appropriate for the type of insureds or business operations at issue. The written catastrophe response plan of each insurer, health maintenance organization, managing general agent, and third-party administrator shall be deemed to be confidential, proprietary information subject to the protections of the Uniform Trade Secrets Act, pursuant to Chapter 13-A of Title 51 of the Louisiana Revised Statutes of 1950, shall not be subject to the public records disclosures of R.S. 44:1, and shall not be made public by the commissioner.

d. MISSISSIPPI

* *Bass v. California Life Ins. Co.*, 581 So. 2d 1087 (Miss. 1991); (an insurance adjuster, agent or other entities may not be held liable for simple negligence in connection with adjusting a claim but "can only incur independent liability when his conduct constitutes gross negligence, malice, or reckless disregard for the rights of the insured"); *Rogers v. Nationwide Prop. & Cas. Ins. Co.*, 433 F. Supp. 2d 772 (D. Miss. 2006); *Gallagher Bassett Servs. v. Jeffcoat*, 887 So. 2d 777 (Miss. 2004).

* *Canal Ins. Co. v. Howell*, 248 Miss. 678, 160 So.2d 218 (Miss. 1964). An insurer's adjuster has no authority to extend coverage to cover liability which is expressly excluded by the terms of the policy but an adjuster can settle claims lying within terms set out in the policy. An adjuster is a special agent for the insurer and his powers and authority are usually co-extensive with the business entrusted to his care, namely, the ascertainment and adjustment of the loss. When an insurer's adjuster, acting for and on behalf of the insurer, adjusts a loss, the insurer is estopped to deny his authority to act on behalf of insurer. *See also* Miss. Code § 83-17-1 (defining an “agent” for insurance purposes).

* *Langston v. Bigelow*, 820 So.2d 752 (Miss. App. 2002). Insurance adjuster who inspected insured's commercial building for storm damage did not breach any duty owed to insured, for purposes of establishing claim against insurer for negligence in investigation, despite insured's claims that adjuster was not qualified to inspect building and did not interview other tenants of building concerning the storm, where adjuster testified that he thoroughly investigated insured's claim. *See also Taylor v. Southern Farm Bureau Cas. Co.*, 954 So. 2d 1045 (Miss. Ct. App. 2007).

e. TEXAS

* The requirements for claims adjustment in Texas are codified in the Texas Insurance Code. Specifically, it is important to note that Chapter 542 sets forth provisions regarding processing and settlement of claims. Specifically, it is important to take note of Subchapter B. regarding ‘Prompt Payment of Claims,’ which states, in part, as follows:

SUBCHAPTER B. PROMPT PAYMENT OF CLAIMS

Sec. 542.051. DEFINITIONS. In this subchapter:

(1) "Business day" means a day other than a Saturday, Sunday, or holiday recognized by this state.

(2) "Claim" means a first-party claim that:

(A) is made by an insured or policyholder under an insurance policy or contract or by a beneficiary named in the policy or contract; and

(B) must be paid by the insurer directly to the insured or beneficiary.

(3) "Claimant" means a person making a claim.

(4) "Notice of claim" means any written notification provided by a claimant to an insurer that reasonably apprises the insurer of the facts relating to the claim.

Added by Acts 2003, 78th Leg., ch. 1274, Sec. 2, eff. April 1, 2005.

Sec. 542.055. RECEIPT OF NOTICE OF CLAIM.

(a) Not later than the 15th day or, if the insurer is an eligible surplus lines insurer, the 30th business day after the date an insurer receives notice of a claim, the insurer shall:

(1) acknowledge receipt of the claim;

(2) commence any investigation of the claim; and

(3) request from the claimant all items, statements, and forms that the insurer reasonably believes, at that time, will be required from the claimant.

(b) An insurer may make additional requests for information if during the investigation of the claim the additional requests are necessary.

(c) If the acknowledgment of receipt of a claim is not made in writing, the insurer shall make a record of the date, manner, and content of the acknowledgment.

Added by Acts 2003, 78th Leg., ch. 1274, Sec. 2, eff. April 1, 2005.

Sec. 542.056. NOTICE OF ACCEPTANCE OR REJECTION OF CLAIM.

(a) Except as provided by Subsection (b) or (d), an insurer shall notify a claimant in writing of the acceptance or rejection of a claim not later than the 15th business day after the date the insurer receives all items, statements, and forms required by the insurer to secure final proof of loss.

(b) If an insurer has a reasonable basis to believe that a loss resulted from arson, the insurer shall notify the claimant in writing of the acceptance or rejection of the claim not later than the 30th day after the date the insurer receives all items, statements, and forms required by the insurer.

(c) If the insurer rejects the claim, the notice required by Subsection (a) or (b) must state the reasons for the rejection.

(d) If the insurer is unable to accept or reject the claim within the period specified by Subsection (a) or (b), the insurer, within that same period, shall notify the claimant of the reasons that the insurer needs additional time. The insurer shall

accept or reject the claim not later than the 45th day after the date the insurer notifies a claimant under this subsection.

Added by Acts 2003, 78th Leg., ch. 1274, Sec. 2, eff. April 1, 2005.

Sec. 542.057. PAYMENT OF CLAIM.

(a) Except as otherwise provided by this section, if an insurer notifies a claimant under Section 542.056 that the insurer will pay a claim or part of a claim, the insurer shall pay the claim not later than the fifth business day after the date notice is made.

(b) If payment of the claim or part of the claim is conditioned on the performance of an act by the claimant, the insurer shall pay the claim not later than the fifth business day after the date the act is performed.

(c) If the insurer is an eligible surplus lines insurer, the insurer shall pay the claim not later than the 20th business day after the notice or the date the act is performed, as applicable.

Added by Acts 2003, 78th Leg., ch. 1274, Sec. 2, eff. April 1, 2005.

Sec. 542.058. DELAY IN PAYMENT OF CLAIM.

(a) Except as otherwise provided, if an insurer, after receiving all items, statements, and forms reasonably requested and required under Section 542.055, delays payment of the claim for a period exceeding the period specified by other applicable statutes or, if other statutes do not specify a period, for more than 60 days, the insurer shall pay damages and other items as provided by Section 542.060.

(b) Subsection (a) does not apply in a case in which it is found as a result of arbitration or litigation that a claim received by an insurer is invalid and should not be paid by the insurer.

(c) A life insurer that receives notice of an adverse, bona fide claim to all or part of the proceeds of the policy before the applicable payment deadline under Subsection (a) shall pay the claim or properly file an interpleader action and tender the benefits into the registry of the court not later than the 90th day after the date the insurer receives all items, statements, and forms reasonably requested and required under Section 542.055. A life insurer that delays payment of the claim or the filing of an interpleader and tender of policy proceeds for more than 90 days shall pay damages and other items as provided by Section 542.060 until the claim is paid or an interpleader is properly filed.

Added by Acts 2003, 78th Leg., ch. 1274, Sec. 2, eff. April 1, 2005.Amended by:
Acts 2009, 81st Leg., R.S., Ch. 833, Sec. 1, eff. June 19, 2009.

Sec. 542.059. EXTENSION OF DEADLINES.

(a) A court may grant a request by a guaranty association for an extension of the periods under this subchapter on a showing of good cause and after reasonable notice to policyholders.

(b) In the event of a weather-related catastrophe or major natural disaster, as defined by the commissioner, the claim-handling deadlines imposed under this subchapter are extended for an additional 15 days.

Added by Acts 2003, 78th Leg., ch. 1274, Sec. 2, eff. April 1, 2005.

Sec. 542.060. LIABILITY FOR VIOLATION OF SUBCHAPTER.

(a) If an insurer that is liable for a claim under an insurance policy is not in compliance with this subchapter, the insurer is liable to pay the holder of the policy or the beneficiary making the claim under the policy, in addition to the amount of the claim, interest on the amount of the claim at the rate of 18 percent a year as damages, together with reasonable attorney's fees.

(b) If a suit is filed, the attorney's fees shall be taxed as part of the costs in the case.

Added by Acts 2003, 78th Leg., ch. 1274, Sec. 2, eff. April 1, 2005.

* The requirements, at least as far as deadlines are concerned, for the investigation of a claim in Texas are contained in Texas Insurance Code § 542.055. Under that section,

> (a) Not later than the 15th day or, if the insurer is an eligible surplus lines insurer, the 30th business day after the date an insurer receives notice of a claim, the insurer shall:
>
> > (1) acknowledge receipt of the claim;
> > (2) commence any investigation of the claim; and
> > (3) request from the claimant all items, statements, and forms that the insurer reasonably believes, at that time, will be required from the claimant.
>
> (b) An insurer may make additional requests for information if during the investigation of the claim the additional requests are necessary.
> (c) If the acknowledgment of receipt of a claim is not made in writing, the insurer shall make a record of the date, manner, and content of the acknowledgment.

In regards to additional requests for information under § 542.055(b), the request may be in the form of an examination under oath ("EUO"). *See Poteet v. Kaiser*, 2007 Tex. App. LEXIS 9749, *25 (Tex. App. Fort Worth Dec. 13, 2007). Moreover, even though the investigation must commence within 15 days from the date the insurer receives notice of the claim, the EUO does not. *Id*. Additionally, it is the insurer, not the insured, that has the duty to reasonably investigate the claim. *Id*. at *27. Finally, there appears to be an implicit requirement in Texas that if an insurer is not able to obtain information after a request, it must use other known avenues to obtain that information if it is necessary for resolving the claim. See *Ressler v. General American Life Insurance Company*, 561 F.Supp.2d 691 (E.D. Tex. 2007) (*citing Minnesota Life Insurance Company v. Vasquez*, 192 S.W.3d 774, 779 n.26 (Tex. 2006)).

3. UNFAIR CLAIMS PRACTICES ACT (OR EQUIVALENT)

a. ALABAMA

* Alabama does not have legislation equivalent to the NAIC model code, "Unfair Claims Settlement Practices Law." However, the Alabama Trade Practices Act is considered to be "related" to the NAIC Unfair Trade Practices Law, and is applicable to the business of Insurance.

* Alabama's Trade Practices Act, is codified at Ala. Code 1975 §27-12-1 through §27-12-24. The section that addresses the payment of claims by insurance companies is §27-12-24. Refusal of insurer to pay or settle claims:

> No insurer shall, without just cause, refuse to pay or settle claims arising under coverages provided by its policies in this state and with

> such frequency as to indicate a general business practice in this state, which general business practice is evidenced by:
>
> (1) A substantial increase in the number of complaints against the insurer received by the insurance department;
>
> (2) A substantial increase in the number of lawsuits against the insurer or its insureds by claimants; and
>
> (3) Other relevant evidence

* The Alabama Trade Practices Act establishes, for the business of insurance, a schedule of rules, regulations, and penalties to regulate improper trade practices that plaintiffs allege. Specifically, the Act provides the following:

> No person shall enter into any agreement to commit or, by any concerted action, commit any act of boycott, coercion or intimidation resulting in, or tending to result in, unreasonable restraint of, or monopoly in, the business of insurance.

Ala. Code § 27-12-8.

* The Trade Practices Act, however, does not provide for a private cause of action. In *Allen v. State Farm Fire & Casualty Co*, 59 F. Supp.2d 1217 (S.D. Ala. 1999) (citing *Farlow v. Union Central Life Ins. Co.*, 874 F.2d 791, 795 (11th Cir. 1989)). The Court held that no right of private action exists to assert improper trade practices.

> The Trade Practices Law does not provide for a private cause of action, however. That law delegates its enforcement to the insurance commissioner by specifically granting the commissioner several remedies and establishing the procedures for pursuing such remedies. The establishment of these specific administrative procedures and enforcement provisions implies that the Alabama legislature intended to make such remedies exclusive, and that no section of the Trade Practices Law creates a private cause of action.

b. FLORIDA

***** In Florida, the equivalent of the Unfair Claims Practices Act can be found in the Florida Statutes as the Unfair Insurance Trade Practices. As an initial matter, a civil remedy is created in § 624.155 for violations of several statutes by an insurer:

> (1) Any person may bring a civil action against an insurer when such person is damaged:

(a) By a violation of any of the following provisions by the insurer:

1. Section 626.9541(1)(i), (o), or (x);
2. Section 626.9551;
3. Section 626.9705;
4. Section 626.9706;
5. Section 626.9707; or
6. Section 627.7283.

* For the purposes of this paper, only § 626.9541(1)(i) is relevant. That section sets forth "Unfair claims settlement practices," as follows:

(i) *Unfair claim settlement practices.*

1. Attempting to settle claims on the basis of an application, when serving as a binder or intended to become a part of the policy, or any other material document which was altered without notice to, or knowledge or consent of, the insured;

2. A material misrepresentation made to an insured or any other person having an interest in the proceeds payable under such contract or policy, for the purpose and with the intent of effecting settlement of such claims, loss, or damage under such contract or policy on less favorable terms than those provided in, and contemplated by, such contract or policy; or

3. Committing or performing with such frequency as to indicate a general business practice any of the following:

a. Failing to adopt and implement standards for the proper investigation of claims;
b. Misrepresenting pertinent facts or insurance policy provisions relating to coverages at issue;

c. Failing to acknowledge and act promptly upon communications with respect to claims;

d. Denying claims without conducting reasonable investigations based upon available information;

e. Failing to affirm or deny full or partial coverage of claims, and, as to partial coverage, the dollar amount or extent of coverage, or failing to provide a written statement that the claim is being investigated, upon the written request of the insured within 30 days after proof-of-loss statements have been completed;

f. Failing to promptly provide a reasonable explanation in writing to the insured of the basis in the insurance policy, in relation to the facts or applicable law, for denial of a claim or for the offer of a compromise settlement;

g. Failing to promptly notify the insured of any additional information necessary for the processing of a claim; or

h. Failing to clearly explain the nature of the requested information and the reasons why such information is necessary.

4. Failing to pay undisputed amounts of partial or full benefits owed under first-party property insurance policies within 90 days after an insurer receives notice of a residential property insurance claim, determines the amounts of partial or full benefits, and agrees to coverage, unless payment of the undisputed benefits is prevented by an act of God, prevented by the impossibility of performance, or due to actions by the insured or claimant that constitute fraud, lack of cooperation, or intentional misrepresentation regarding the claim for which benefits are owed.

c. LOUISIANA

* Louisiana has adopted LSA-R.S. 22:1964(14) (unfair claims settlement practices), which corresponds to Section 4 of the NAIC Model Act. The section states as follows:

(14) *Unfair claims settlement practices.* --Committing or performing with such frequency as to indicate a general business practice any of the following:

(a) Misrepresenting pertinent facts or insurance policy provisions relating to coverages at issue.
(b) Failing to acknowledge and act reasonably promptly upon communications with respect to claims arising under insurance policies.
(c) Failing to adopt and implement reasonable standards for the prompt investigation of claims arising under insurance policies.
(d) Refusing to pay claims without conducting a reasonable investigation based upon all available information.
(e) Failing to affirm or deny coverage of claims within a reasonable time after proof of loss statements have been completed.
(f) Not attempting in good faith to effectuate prompt, fair, and equitable settlements of claims in which liability has become reasonably clear.
(g) Compelling insureds to institute litigation to recover amounts due under an insurance policy by offering substantially less than the amounts ultimately recovered in actions brought by such insureds.
(h) Attempting to settle a claim for less than the amount to which a reasonable man would have believed he was entitled by reference to written or printed advertising material accompanying or made part of an application.

(i) Attempting to settle claims on the basis of an application which was altered without notice to, or knowledge or consent of, the insured.
(j) Making claims payments to insureds or beneficiaries not accompanied by statement setting forth the coverage under which the payments are being made.
(k) Making known to insureds or claimants a policy of appealing from arbitration awards in favor of insureds or claimants for the purpose of compelling them to accept settlements or compromises less than the amount awarded in arbitration.
(l) Delaying the investigation or payment of claims by requiring an insured, claimant, or the physician of either to submit a preliminary claim report and then requiring the subsequent submission of formal proof of loss forms, both of which submissions contain substantially the same information.
(m) Failing to promptly settle claims, where liability has become reasonably clear, under one portion of the insurance policy coverage in order to influence settlements under other portions of the insurance policy coverage.
(n) Failing to promptly provide a reasonable explanation of the basis in the insurance policy in relation to the facts or applicable law for denial of a claim or for the offer of a compromise settlement.
(o) Failing to provide forms necessary to present claims within fifteen calendar days of a request with reasonable explanations regarding their use, if the insurer maintains the forms for that purpose.

* In addition, LSA-R.S. Ann. §22:1973 Good faith duty, claims settlement practices; causes of action; penalties, states as follows:

A. An insurer, including but not limited to a foreign line and surplus line insurer, owes to his insured a duty of good faith and fair dealing**.** The insurer has an affirmative duty to adjust claims fairly and promptly and to make a reasonable effort to settle claims with the insured or the claimant, or both. Any insurer who breaches these duties shall be liable for any damages
sustained as a result of the breach.

B. Any one of the following acts, if knowingly committed or performed by an insurer, constitutes a breach of the insurer's duties imposed in Subsection A:

(1) Misrepresenting pertinent facts or insurance policy provisions relating to any coverages at issue.
(2) Failing to pay a settlement within thirty days after an agreement is reduced to writing.
(3) Denying coverage or attempting to settle a claim on the basis of an application which the insurer knows was altered without notice to, or knowledge or consent of, the insured.
(4) Misleading a claimant as to the applicable prescriptive period.

(5) Failing to pay the amount of any claim due any person insured by the contract within sixty days after receipt of satisfactory proof of loss from the claimant when such failure is arbitrary, capricious, or without probable cause.
(6) Failing to pay claims pursuant to R.S. 22:1893 when such failure is arbitrary, capricious, or without probable cause.

d. MISSISSIPPI

* Mississippi does not have legislation equivalent to the NAIC Model Code or an Unfair Claims Settlement Practices law. However, the Mississippi Trade Practices Act is considered to be "related" to the NAIC Unfair Trade Practices Law, and is applicable to the business of insurance. *See* Miss. Code Ann. §§ 75-21-1 -75 (proscribing deceptive trade practices). *See also* Miss. Code Ann. §§ 83-5-29 -51 (prohibits unfair methods of competition and deceptive trade practices in the insurance industry). However, there is no provision for private civil action under this section of the code, which is controlled by the commissioner of insurance. *Watson v. First Commonwealth Life Ins. Co.*, 686 F. Supp. 153 (S.D. Miss. 1988).

e. TEXAS

* The Texas equivalent of the Unfair Claims Practices Act is the Unfair Claim Settlement Practices Act, codified at Tx. Ins. Code § 542.001, *et seq.* Pursuant to § 542.003:

(a) An insurer engaging in business in this state may not engage in an unfair claim settlement practice.

(b) Any of the following acts by an insurer constitutes unfair claim settlement practices:

(1) knowingly misrepresenting to a claimant pertinent facts or policy provisions relating to coverage at issue;
(2) failing to acknowledge with reasonable promptness pertinent communications relating to a claim arising under the insurer's policy;
(3) failing to adopt and implement reasonable standards for the prompt investigation of claims arising under the insurer's policies
(4) not attempting in good faith to effect a prompt, fair, and equitable settlement of a claim submitted in which liability has become reasonably clear;
(5) compelling a policyholder to institute a suit to recover an amount due under a policy by offering substantially less than the amount ultimately recovered in a suit brought by the policyholder;
(6) failing to maintain the information required by Section 542.005; or
(7) committing another act the commissioner determines by rule constitutes an unfair claim settlement practice.

Section 542.054 provides that the subchapter of the Insurance Code covering the prompt payment of claims "… shall be liberally construed to promote the prompt payment of insurance claims." This liberal construction to receipt of the notice of a claim (§ 542.055), notice of acceptance or rejection of a claim (§ 542.056), payment of a claim (§ 542.057), delay in payment of a claim (§ 542.058) and, most importantly, penalties (§ 542.060). With respect to penalties, §542.060 creates the following:

> If an insurer that is liable for a claim under an insurance policy is not in compliance with this subchapter, the insurer is liable to pay the holder of the policy or the beneficiary making the claim under the policy, in addition to the amount of the claim, interest on the amount of the claim at the rate of 18 percent a year as damages, together with reasonable attorney's fees.

III. Subrogation / Recovery

The preceding sections identify some key first party coverage issues that we expect insurers will have to consider in evaluating claims and resolving coverage issues arising as a result of the Gulf Oil Spill. Insurers may also wish to consider whether they will be able to recover amounts paid to their assureds under the policy from potentially responsible third parties. The following discussion provides a summary of some rules that must be considered when deciding whether or not to pursue a recovery action.

I. APPLICABILITY OF DISCOVERY RULE

a. ALABAMA

* **Rule:** The discovery rule is applicable only to fraud actions.

* *Henson v. Celtic Life Insurance Company*, 621 So.2d 1268, 1274 (Ala. 1993); *see also Piazza v. Ebsco Industries, Inc.*, 273 F.3d 1341 (11th Cir. 2001) (*citing Henson*, 621 So.2d at 1274) (holding "[t]he Alabama discovery rule tolls the statute of limitations for fraud claims, but not for negligence claims."); *Russel Petroleum Corp. v. Environ Products*, 333 F.Supp.2d 1228, 1232 (M.D. Ala. 2004).

b. FLORIDA

* **Rule:** Florida follows the delayed discovery doctrine.

* *Butler University v. Bahssin*, 892 So.2d 1087, 1091 (Fla. Dist. Ct. App. 2004) (*citing Keller v. Reed*, 603 So.2d 717, 719 (Fla. Dist. Ct. App. 1992)). "Florida follows the discovery rule, known in Florida as the 'delayed discovery doctrine.'" Yet, while there is a statutory basis for the delayed accrual for claims such as fraud, "[a]side from…the delayed accrual of a cause of action in cases of fraud, products liability, professional and medical malpractice, and intentional torts based on abuse, there is no other statutory basis for the delayed discovery rule." *Davis v. Monohan*, 832 So.2d 709, 709 (Fla. 2002).

* *McLean v. GMAC Mortgage Corp.*, 2008 U.S. Dist. LEXIS 36143, *50 (S.D. Fla. May 2, 2008) (*quoting Beck v. Lazard Freres & Co., LLC*, 175 F.3d 913, 914 (11th Cir. 1999)). "[U]nlike a fraud claim, 'there is no discovery rule in § 95.11(2)(b) and … actions for breach of contract are barred five years after the cause of action accrued regardless of whether the plaintiff knew it had that claim."

c. LOUISIANA

* **Rule:** The discovery rule provides that prescription commences on the date the injured party discovers or should have discovered the facts upon which his cause of action is based

***** *Eastin v. Entergy Corp.*, 865 So.2d 49, 55 (La. 2004) (*quoting Griffin v. Kinberger*, 507 So.2d 821 (La. 1987)); *Lott v. Haley*, 370 So.2d 521 (La. 1979)). Louisiana recognizes the existence and applicability of the discovery rule, which it defines in the following way: "the discovery rule provides that prescription commences on the date the injured party discovers or should have discovered the facts upon which his cause of action is based." However, the Supreme Court of Louisiana has held that "[t]his standard is exceedingly stringent and should be applied only in exceptional circumstances." *Eastin*, 865 So.2d at 55. These "circumstances" include medical malpractice actions, long-latency diseases and torts involving juveniles; or, put another way, cases where the plaintiffs were prevented from knowing of their damages until some time after the action or inaction of the defendant. *Id*. at 55, n. 4.

d. MISSISSIPPI

***** **Rule:** In analyzing what the plaintiff must discover in order to trigger the running of the statute of limitations, Mississippi courts ordinarily are guided by the wording of the relevant statute's discovery provision.

***** *Angle v. Koppers*, 2010 Miss. LEXIS 273, at *9-10 (Miss. May 27, 2010) (quoting *Caves v. Yarbrough*, 991 So. 2d 142, 154-55 (Miss. 2008)). Mississippi statutes of limitation often provide a specific rule of accrual and discovery. "Not all discovery rules are created equal. In analyzing what the plaintiff must discover in order to trigger the running of the statute of limitations, we ordinarily are guided by the wording of a statute's discovery provision."

> Miss. Stat. Ann. § 15-1-49. provides:
> § 15-1-49. Limitations applicable to actions not otherwise specifically provided for
>
> (1) All actions for which no other period of limitation is prescribed shall be commenced within three (3) years next after the cause of such action accrued, and not after.
>
> (2) In actions for which no other period of limitation is prescribed and which involve latent injury or disease, the cause of action does not accrue until the plaintiff has discovered, or by reasonable diligence should have discovered, the injury.
>
> (3) The provisions of subsection (2) of this section shall apply to all pending and subsequently filed actions.

This "catch all" statute applies to contract, fraud, and most negligence actions (although there are more particular statutes for certain injuries; e.g., six-year statute of limitations for injury to property arising out of deficiencies in construction or improvements to real property. § 15-1-41). As can be read, the statute itself provides the rule for accrual: if the injury is "latent," the cause of action does not accrue until the plaintiff has or should have discovered the injury by reasonable diligence.

Section 15-1-61 provides a separate accrual rule for fraudulent concealment of a cause of action:

> § 15-1-67. Effect of fraudulent concealment of cause of action
>
> If a person liable to any personal action shall fraudulently conceal the cause of action from the knowledge of the person entitled thereto, the cause of action shall be deemed to have first accrued at, and not before, the time at which such fraud shall be, or with reasonable diligence might have been, first known or discovered.

The "fraudulent concealment doctrine" applies to any cause of action. *Robinson v. Cobb*, 763 So. 2d 883, 887 (Miss. 2000).

e. TEXAS

* **Rule:** The Texas Legislature has adopted the discovery rule in some case, but rejected it in others.

* *Kuzniar v. State Farm Lloyds*, 52 S.W.3d. 759,760 (Tex. App. 2001). Accrual will be deferred if either the cause of action is not discovered as a result of fraud or fraudulent concealment, or the cause of action is one that is "inherently undiscoverable."

* *Via Net v. TIG Ins. Co.*, 211 S.W.3d 310 (Tex. 2006)**.** The Texas Legislature has adopted the discovery rule in some case, but rejected it in others. Where the Legislature is silent on this issue, the Texas Courts have restricted the discovery rule to "exceptional cases to avoid defeating the purpose" behind statutes of limitation.

II. CLAIM ACCRUAL

a. ALABAMA

* **Rule:** A cause of action accrues once the party is entitled to maintain a cause of action thereon.

* *Russel Petroleum Corp. v. Environ Products*, 333 F.Supp.2d 1228, 1232 (M.D. Ala. 2004) (*quoting Spain v. Brown & Williamson Tobacco Corp.*, 872 So.2d 101, 114 (Ala. 2003)). In Alabama "the statute of limitations begins to run when the cause of action 'accrues,' which occurs 'as soon as the party in whose favor it arises is entitled to maintain a cause of action thereon,' even if the 'full amount of damages' is not apparent at the time the legal injury occurs."

* *Russel Petroleum Corp.*, 333 F.Supp.2d at 1232 (*quoting Ex Parte Floyd*, 796 So.2d 303, 308 (Ala. 2001)). Under Alabama law, "the 'legal injury' does not always occur

when the 'act complained of' occurs. In some cases, the plaintiff's injury 'only comes as a result of, and in furtherance and subsequent development of, the act defendant has done.'"

b. FLORIDA

* **Rule:** Statute governs when a claim begins to accrue.

* *McLean v. GMAC Mortgage Corp.*, 2008 U.S. Dist. LEXIS 36143, *49 (S.D. Fla. 2008) (*quoting Beck v. Lazard Freres & Co., LLC*, 175 F.3d 913, 914 (11th Cir. 1999)). In Florida, statute governs when a claim begins to accrue. Under Fla. Stat. § 95.031(1), for example, a cause of action accrues when the last element constituting the cause of action occurs. Thus, by way of example, the limitations period for a breach of contract claim begins to run when the last element constituting the cause of action occurs. However, in cases of fraud, the limitations period begins from the time the facts giving rise to the cause of action were discovered or should have been discovered with the exercise of due diligence. Fla. Stat. § 95.031(2)(a).

c. LOUISIANA

***** **Rule:** A prescriptive period begins once the plaintiff discovers, or should have discovered, the damage.

***** *Delpit v. Ansell, Inc.*, 2004 U.S. Dist. LEXIS 4434, *8 (E.D. La. 2004) (prescriptive period does not commence until actual and appreciable damages result; when the potential plaintiff discovers or should have discovered the wrongful conduct, the damage, and the relationship between them, the statute begins to run). *See also Luckett v. Delta Airlines, Inc.*, 171 F.3d 295, 299 (5th Cir. 1999).

* Under Louisiana Civil Code Article 3492, delictual actions (such as negligence and fraud) are subject to a prescription of one year. Furthermore, "[t]his prescription commences to run from the day injury or damage is sustained." La. C.C. Art. 3492.

d. MISSISSIPPI

***** **Rule:** A cause of action accrues when it comes into existence as an enforceable claim.

***** *Weathers v. Metro. Life Ins. Co.*, 14 So. 3d 688 (Miss. 2009) (cause of action accrues "when it comes into existence as an enforceable claim, that is, when the right to sue becomes vested;" statute begins to run when all of the elements of the cause of action are present); *see also Caves v. Yarbrough*, 991 So. 2d 142, 147 (Miss. 2008); *Bullard v. Guardian Life Ins. Co. of Am.*, 941 So. 2d 812 (Miss. 2006).

* *Owens-Illinois v. Edwards*, 573 So. 2d 704 (Miss. 1990) (cause of action accrues and the limitations period begins to run when the plaintiff can reasonably be held to have

knowledge of the injury; discovery is an issue of fact to be decided by a jury when there is a genuine dispute"); *see also Donald v. AMOCO Prod. Co.,* 735 So. 2d 161 (Miss. 1999)).

e. TEXAS

* **Rule:** A cause of action generally accrues when a wrongful act causes a legal injury, irrespective of when the plaintiff learns of that injury

* *Kuzniar v. State Farm Lloyds*, 52 S.W.3d. 759,760 (Tex. App. 2001) (Texas Courts apply a "legal injury rule" to issues of claim accrual; cause of action generally accrues when a wrongful act causes a legal injury, irrespective of when the plaintiff learns of that injury or if all resulting damages have yet to occur).

III. REAL PARTY IN INTEREST

a. ALABAMA

* **Rule:** The insurer becomes a party in interest, not the real party in interest.

* Rule 17(a) of the Alabama Rules of Civil Procedure states:

> [e]very action shall be prosecuted in the name of the real party in interest. An executor, administrator, guardian, bailee, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute may sue in that person's own name without joining the party for whose benefit the action is brought…

* *Ex Parte Cassidy*, 772 So.2d 445, 446 (Ala. 2000) (the rule regarding when a subrogee could recover on a subrogation claim, and therein became a real party in interest, is that a subrogee is not entitled to recover unless the insured has had a full recovery"); *see also International Underwriters/Brokers, Inc. v. Liao*, 548 So.2d 163, 164-65 (Ala. 1989)).

* *Broadnax v. Griswold*, 17 So.3d 656 (Ala. Civ. App. 2008) (insurer becomes *a* party in interest, not *the* real party in interest, meaning that "payment of a loss by an insurer gives that insurer subrogation rights to reimbursement … but does not divest the insured of the legal right to pursue an action against a party responsible for that loss").

b. FLORIDA

* **Rule:** Although a subrogee or assignee can sue in his own name, he is not compelled to do so.

* *Holyoke Mutual Insurance Company v. Concrete Equipment, Inc.*, 394 So.2d 193, 197 (Fla. Dist. Ct. App. 1981) (subrogee or assignee can sue in his own name, but is not compelled to do so; an insurance company claiming by way of subrogation can sue in the name

of its insured and cannot be compelled to sue in its own name); *see also Amendments to the Florida Rules of Civil Procedure (2 Year Cycle) and Florida Rule of Appellate Procedure 9.110*, 858 So.2d 1013 (Fla. 2003).

c. LOUISIANA

***** We were not able to find any Louisiana statute or case law applying subrogation and a "party in interest" at the time of the writing of this paper.

d. MISSISSIPPI

***** **Rule:** If the subrogor has no pecuniary interest in the claim, the action shall be brought in the name of the subrogee; if the subrogor has a pecuniary interest in the claim, the action shall be brought in the names of the subrogor and the subrogee.

***** Rule 17 of the Mississippi Rules of Civil Procedure governs who must bring suit in cases of subrogation. Under Rule 17(b),

> In subrogation cases, regardless of whether subrogation has occurred by operation of law, assignment, loan receipt, or otherwise, if the subrogor no longer has a pecuniary interest in the claim the action shall be brought in the name of the subrogee. If the subrogor still has a pecuniary interest in the claim, the action shall be brought in the names of the subrogor and the subrogee.

* **Note:** Federal courts have interpreted this to mean that "if an insurer has paid the entire claim, it is the real party in interest who must sue in its own name." *See Alexander v. Elzie*, 621 So.2d 909, 912 (Miss. 1992).

e. TEXAS

* **Rule:** The insurance carrier may sue in its own name or in the insured's name.

* *Prudential Prop. & Cas. Co. v. Dow Chevrolet-Olds*, 10 S.W.3d 97 (Tex. App. 1999). In a subrogation action there is only one cause of action for the insured's injuries, which belongs to the insured. The insurer is not obligated to wait for an insured to assert this claim in order for the insurer to recover. Furthermore, "[w]hen an insurer asserts this type of claim without the insured, the insurance carrier may sue in its own name or in the insured's name." *Id* at 100, *citing*, *Camden Fire Ins. Ass'n v. Eckel*, 14 S.W.2d 1020, 1021-22 (Tex. 1929); *Jaskolski v. Jahn*, 410 S.W.2d 858, 859 (Tex. App. 1966); *Fort Worth & Denver Ry. Co. v. Ferguson*, 261 S.W.2d 874 (Tex. App. 1953).

* The Texas Insurance Code specifically defines "party in interest" as follows:

> (17) "Party in interest" means the commissioner, a 10 percent or greater equity security holder in the insolvent insurer, any affected guaranty association, any

nondomiciliary commissioner for a jurisdiction in which the insurer has outstanding claims liabilities, and any of the following parties that have filed a request for inclusion on the service list under Section 443.007:

> (A) an insurer that ceded to or assumed business from the insolvent insurer; and
> (B) an equity shareholder, policyholder, third-party claimant, creditor, and any other person, including any indenture trustee, with a financial or regulatory interest in the receivership proceeding.

Tex. Ins. Code 443.004 (2010)

IV. STATUTES OF LIMITATIONS

Below are statutes of limitations for contract and various tort claims in the affected jurisdictions.

Topic	ALABAMA	FLORIDA	LOUISIANA[1]	MISSISSIPPI	TEXAS
Breach of Contract	6 years	5 years	10 years	3 years	4 years[2]
Negligence	2 years	4 years	1 year	3 years	2 years
Gross Negligence	2 years	4 years	1 year	3 years	2 years
Fraud	2 years	4 years	1 year	3 years	4 years
Trespass	6 years	4 years	1 year	3 years	2 years

V. OIL POLLUTION ACT OF 1990 AND OTHER REGULATIONS PRESCRIBED BY THE UNITED STATES COAST GUARD

Set out below are select provisions of the Oil Pollution Act of 1990 and regulations prescribed by the United States Coast Guard regarding the submission of claims against the Oil Spill Liability Trust Fund (the "Fund"); these excerpts relate to the statutory limitations period and notice requirements for claims against responsible parties and/or the Fund:

[1] In Louisiana it is not called "statute of limitations," but "prescriptive period."
[2] It is important to note that although contract actions are generally subject to a four-year statute of limitations, an insurer may limit provisions for filing suit through contractual provisions. While these provisions are valid and enforceable, an insurance policy may not create a limitation shorter than 2 years. *Sheppard v. Travelers Lloyds of Texas Ins. Co.*, 2009 Tex.App. LEXIS 8020 (Tex.App. 2009).

33 CFR 136.101 Time limitation on claims.

(a) Except as provided under section 1012(h)(3) of the Act (*33 U.S.C. 2712(h)(3)*) (minors and incompetents), the Fund will consider a claim only if presented in writing to the Director, NPFC, within the following time limits:

(1) For damages, within three years after—

(i) The date on which the injury and its connection with the incident in question were reasonably discoverable with the exercise of due care.

(ii) In the case of natural resources damages under section 1002(b)(2)(A) of the Act (*33 U.S.C. 2702(b)(2)(A)*), the date under paragraph (a)(1)(i) of this section, or within three years from the date of completion of the natural resources damage assessment under section 1006(e) of the Act (*33 U.S.C. 2706(e)*), whichever is later.

(2) For removal costs, within six years after the date of completion of all removal actions for the incident. As used in this paragraph, "date of completion of all removal actions" is defined as the actual date of completion of all removal actions for the incident or the date the FOSC determines that the removal actions which form the basis for the costs being claimed are completed, whichever is earlier.

(b) Unless the Director, NPFC, directs in writing that the claim be submitted elsewhere, a claim is deemed presented on the date the claim is actually received at the Director National Pollution Funds Center, NPFC MS 7100, U.S. Coast Guard, 4200 Wilson Blvd., Suite 1000, Arlington, VA 20598-7100. If the Director, NPFC, directs that the claim be presented elsewhere, the claim is deemed presented on the date the claim is actually received at the address in the directive.

33 CRF 2712. Uses of the Fund

" … (h) Period of limitations for claims.

(1) Removal costs. No claim may be presented under this title for recovery of removal costs for an incident unless the claim is presented within 6 years after the date of completion of all removal actions for that incident.

(2) Damages. No claim may be presented under this section for recovery of damages unless the claim is presented within 3 years after the date on which the injury and its connection with the discharge in question were reasonably discoverable with the exercise of due care, or in the case of natural resource damages under section 1002(b)(2)(A) [*33 USCS § 2702(b)(2)(A)*], if later, the date of completion of the natural resources damage assessment under section

1006(e) [*33 USCS § 2706(e)*].

(3) Minors and incompetents. The time limitations contained in this subsection shall not begin to run—

(A) against a minor until the earlier of the date when such minor reaches 18 years of age or the date on which a legal representative is duly appointed for the minor, or

(B) against an incompetent person until the earlier of the date on which such incompetent's incompetency ends or the date on which a legal representative is duly appointed for the incompetent. …"

33 U.S.C. § 2713. Claims procedure

(a) Presentation: Except as provided in subsection (b) of this section, all claims for removal costs or damages shall be presented first to the responsible party or guarantor of the source designated under section 2714(a) of this title.

(b) Presentation to Fund

(1) In general: Claims for removal costs or damages may be presented first to the Fund--

(A) if the President has advertised or otherwise notified claimants in accordance with section 2714(c) of this title;

(B) by a responsible party who may assert a claim under section 2708 of this title;

(C) by the Governor of a State for removal costs incurred by that State; or

(D) by a United States claimant in a case where a foreign offshore unit has discharged oil causing damage for which the Fund is liable under section 2712(a) of this title.

(2) Limitation on presenting claim: No claim of a person against the Fund may be approved or certified during the pendency of an action by the person in court to recover costs which are the subject of the claim.

(c) Election: If a claim is presented in accordance with subsection (a) of this section and--

(1) each person to whom the claim is presented denies all liability for the claim, or

(2) the claim is not settled by any person by payment within 90 days after the date upon which (A) the claim was presented, or (B) advertising was begun pursuant to section 2714(b) of this title, whichever is later, the claimant may elect to commence an action in court against the responsible party or guarantor or to present the claim to the Fund.

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Christopher L. Troy is a 1984 graduate of Villanova University and a 1987 graduate of the Suffolk University School of Law. Mr. Troy is admitted to the Pennsylvania and California (inactive) Bars, the United States District Court for the Eastern District of Pennsylvania and the United States District Court for the Middle District of Pennsylvania. He is a member of the Philadelphia and Pennsylvania Bar Associations, and the Loss Executive Association. For more than 20 years, he has maintained a practice focused on analysis of insurance and reinsurance coverage issues arising under various first party property insurance and reinsurance agreements; subrogation/recovery actions; appraisals of property damage and "business interruption" valuations; and defense of business/property owners, contractors, design professionals and manufacturers.

He is a member of the Tort, Trial and Insurance Practice Sections of the American Bar Association, serving in the following leadership roles: Property Insurance Law Committee, Chair (August 2003-present); Vice-Chair (1998-2003); and Newsletter Editor (1997-1998). He is also on the Editorial Board for the *Insurance Law Reporter*. Mr. Troy has tried numerous cases to verdict in state and federal court in several jurisdictions and has lectured frequently on insurance coverage and trial practice issues for the Tort, Trial and Insurance Practice Section of the American Bar Association, the Loss Executives Association as well as for various property claims associations, insurance industry clients, and forensic consultants.

BAR ADMISSIONS
Pennsylvania
California
United States District Court for the Eastern District of PA
United States District Court for the Middle District of PA

PRACTICE AREA
Subrogation

EDUCATION
Suffolk University School of Law (J.D., 1987)
Villanova University (B.A., 1984)

PROFESSIONAL ASSOCIATIONS
Pennsylvania Bar Association
Philadelphia Bar Association
Loss Executive Association
American Bar Association: Tort, Trial and Insurance Practice Section

PRESENTATIONS/ PUBLICATIONS
Bad Faith and Punitive Damages, Annotations to First-Party Insurance Cases, Statutes and Regulations, Second Edition (2000), ABA Publication

Recent Developments in Property Insurance Law, Tort and Insurance Law Journal, Vol. 34, No. 2

The Sue and Labor Clause: Coverage for the Near-Miss Catastrophe, presented at the ABA Property Insurance Law Committee Mid-Year Meeting, April 2001, St. Thomas, V.I.

"Electrifying" Changes to Federal Discovery Rules, The Brief, Tort, Trial and Insurance Practice Section, Spring 2007, Vol. 36, No. 3

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Nicholas A. Pasciullo is the Director, Complex Property and Energy for The Chartwell Law Offices LLP. For over two decades, Mr. Pasciullo has counseled and represented domestic and international property and casualty insurance companies on traditional and emerging legal issues. His practice principally involves first-party insurance and reinsurance coverage and litigation under manuscript, specialty property and commercial insurance contracts. Mr. Pasciullo has extensive experience in complex and multi-party litigation, representing domestic, London, Bermuda and European clients in state and federal jurisdictions.

Mr. Pasciullo is also a certified Federal Court Mediator and successfully utilizes alternative dispute resolution methods to assists clients in expediting resolution of complex matters in appropriate cases.

Mr. Pasciullo's practice primarily focuses on coverage and defense of Underwriters of:

- Refinery, Power Generation, Pipeline.
- Commercial, Industrial and Multi-Residential
- CAT Losses, including Resorts, Golf Courses, Media and Commercial, Industrial and Multi-Residential Properties
- Green Buildings

Mr. Pasciullo is a frequent speaker and lecturer on legal topics of interest to the insurance industry directly to Underwriters and at educational conferences for insurance companies and trade associations including the Loss Executives Association and the Property Loss Research Bureau. Mr. Pasciullo is also the creator and owner of the CyberInsurance Institute, a non-profit educational organization dedicated to providing continuing education credits to claims representatives.

BAR ADMISSIONS
Supreme Court of Pennsylvania
Third Circuit Court of Appeals
United States District Court for the Western District of Pennsylvania
United States District Court for the Eastern District of Pennsylvania
Supreme Court of Ohio
United States District Court for the Northern District of Ohio United States Claims Court

PRACTICE AREAS
Commercial First Party Property Coverage and Defense
Builders Risk Coverage and Defense
Subrogation and Recovery
Bad Faith Prevention and Defense
Mediation

EDUCATION
Antioch School of Law (J.D., 1982)
Antioch University (B.A., 1979)

PROFESSIONAL ASSOCIATIONS
Loss Executives Association
Pennsylvania Bar Association
Ohio Bar Association
Allegheny County Bar Association

PRESENTATIONS/ PUBLICATIONS

Loss Executives Association 2010 Winter Meeting, “Practical, Ethical, Monetary and Precedent-setting

Considerations of Functional Replacement”, January 2010

Underwriters at Lloyd’s and London Underwriters, “Impact of Bankruptcy or Foreclosure on Period of Indemnity”, November 2009

London Underwriters, “Managing Expectations of the Assured”, October 2008

London Underwriters, “Logic Modeling and Claims” and “Modern Approach to ADR”, August 2008

Loss Executives Association 2008 Summer Meeting, “The Adjuster’s Toolkit – Utilizing logic Modeling in Managing Claims”, June 2008

Loss Executives Association 2007 Summer Meeting, “Managing Expectations”, June 2007

AEGIS Claims Conference, “Electronic Discovery for Claims Departments and Claims Representatives”, October 2006

Loss Executives Association 2005 Summer Meeting, “Records Retention & The Electronic Courtroom”, June 2005

Loss Executives Association 2005 Winter Meeting, General Session Presentation, “Identity Theft: Concerns and Defenses”, January 2005

Loss Executives Association 2004 Summer Meeting, “Electronic Risks and Losses Update”, June 2004

Property Loss Research Bureau 2004 Claims Conference, “Computer In-Security”, April 2004

Property Loss Research Bureau 2003 Claims Conference, “Appraisal and Alternative Dispute Resolution”, March 2003

Loss Executives Association 2003 Summer Meeting, “Electronic Risks and Losses”, June 2003

Property Loss Research Bureau 2002 Claims Conference, “CyberInsurance Risk and Loss Assessment Today and Tomorrow”, April 2002

Property Loss Research Bureau 2001 Claims Conference, “Responding to CyberInsurance Vulnerabilities”, March 2001

Loss Executives Association 2001 Winter Meeting, “CyberInsurance Risk and Loss Assessment, February 2001

Property Loss Research Bureau 2000 Claims Conference, “Adjustment of Motor Cargo Legal Liability Claims”, March 2000

Internet Society (ISOC), Network and Distributed System Security Symposium, “The Economics of In-Security”, February 2000

Loss Executives Association 2000 Winter Meeting, “Y2K, the First 30 Days”, January 2000

First Party Year 2000 Roundtable, “From Sea Trade to E-Trade: Confronting Sue and Labor in E-Commerce”, August 1999

Loss Executives Association 1999 Summer Meeting, entitled, “Year 2000 Workshop: From Claim to Resolution”, June 1999

Property Loss Research Bureau 1999 Claims Conference, entitled, “A Critical Analysis of Coverage Issues”, April 1999

Western Pennsylvania League of Financial Institutions, entitled, “From Here to 2001,” addressing e-commerce issues of concern to financial institutions and trustees, April, 1999

Loss Executives Association 1999 Winter Meeting, entitled “Analytical Techniques and Phased Goal-Based Procedures for Evaluation of E-Commerce Issues”, January, 1999

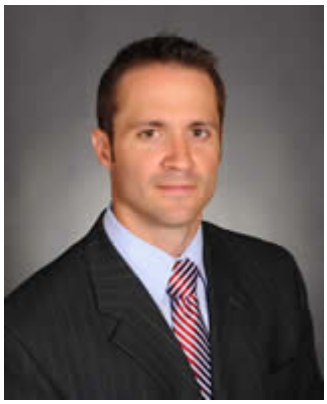
“From Here to 2001, Not Quite Eternity,” with Dr. Thomas Longstaff, Assistant Director, CERT, joint publication with the Software Engineering Institute, Carnegie Mellon University, March 1999

American Iron & Steel Institute at its “Legal Implications of the Year 2000 Problem for Steel Companies” seminar for general counsel and chief financial officers, October, 1998

Boiler and Machinery Roundtable at its summer meeting, concerning terminology used in boiler and machinery insurance, September, 1998
Loss Executives Association 1998 Winter Meeting, “Reverse and Comparative Bad Faith”, January 1998

“Turning the Tables: Reverse Bad Faith Gains Acceptance in Court,” Claims Magazine, September 1998

Loss Executives Association 1998 Summer Meeting, “Reverse and Comparative Bad Faith”, June 1998



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Matthew Gonzalez is a Partner in Chartwell's New York City office. He is a 1999 graduate of the University of Delaware (B.A.) and a 2002 graduate of Fordham University School of Law (J.D.). While at Fordham, Mr. Gonzalez was a member of the Fordham International Law Journal and interned for the Honorable Justice Nicholas H. Politan in the United States District Court, District of New Jersey. Mr. Gonzalez is admitted to the New York Bar and the Southern District of New York. Mr. Gonzalez is also a member of the New York Boiler and Machinery Association.

Mr. Gonzalez has focused his practice on the analysis of insurance and reinsurance coverage issues arising under various first party property insurance and reinsurance agreements. Mr. Gonzalez also has significant commercial litigation experience including coverage defense and subrogation/recovery actions.

BAR ADMISSIONS
State of New York
Southern District of New York

PRACTICE AREAS
First Party Property Insurance Coverage
Subrogation/Recovery
Property and General Liability Defense
Commerical Litigation

EDUCATION
Fordham University School of Law (JD, 2002)
University of Delaware (BA, 1999)

PROFESSIONAL ASSOCIATIONS
Boiler and Machinery Association of New York

PRESENTATIONS
Post Loss Foreclosure and Bankruptcy, November 2009

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Michael J. Alivernini is a Partner in Chartwell's Philadelphia office. He is a graduate of Villanova University and Widener University School of Law. Mr. Alivernini is admitted to the Pennsylvania, New Jersey and District of Columbia Bars, the United States District Court of the Eastern District of Pennsylvania, the United States District Court for the Middle District of Pennsylvania and the United States District Court for the District of New Jersey. He is a member of the Pennsylvania Bar Associations. Mr. Alivernini is co-author of an article entitled: Do Pennsylvania Lawyers Have an Ethical Duty to Advise Clients about ADR?

Mr. Alivernini has represented the firm's clients in a number of large loss property subrogation matters in which has negotiated substantial recoveries and he has participated in numerous jury trials in securing favorable jury verdicts. Mr. Alivernini practices in the areas of subrogation/recovery, surety and fidelity litigation, property and general liability defense, and first party property insurance coverage. He has handled losses ranging from roof collapse, fires and explosions to boiler and machinery breakdown.

BAR ADMISSIONS
Pennsylvania
New Jersey
District of Columbia
United States District Court for the Eastern District of PA
United States District Court for the Middle District of PA
United States District Court for the District of New Jersey

PRACTICE AREAS
Subrogation/Recovery
Property and General Liability Defense
Surety and Fidelity Litigation
Commerical Litigation
First Party Property Insurance Coverage

EDUCATION
Widener University School of Law (J.D., 2001)
Villanova University (B.S., 1998)

PROFESSIONAL ASSOCIATIONS
Pennsylvania Bar Association

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Kenneth D. Goldberg is the Senior Partner of the New York office. He is a 1970 graduate of Queens College of the City University of New York and a 1974 graduate of Brooklyn Law School where he was an editor of the Brooklyn Law Review. He is admitted in the State of New York, the Second Circuit Court of Appeals and the Southern, Eastern and Northern Districts of the United States District Courts located in New York.

For more than 30 years he has handled a wide variety of litigations, developing broad based expertise not only in all aspects of commercial litigation and arbitration but in all facets of the representation of insurance carriers and self-insureds. His broad and diverse client base includes numerous property and casualty insurers; several of the leading Fortune 500 companies, including one of the largest credit and charge card companies in the world and one of the leading automotive finance companies in the country; the largest private university in the United States; and one of the leading internet based companies presently doing business in that growing market.

He has successfully represented his clients in both Federal and State courts, and before the American Arbitration Association, in New York State and a number of other jurisdictions. He has expanded his practice to incorporate complex mediation, having recently acted as a private mediator in a dispute between two multi-state corporations. He has also used his training as an educator to travel throughout the country to provide seminars to his clients on numerous legal issues.

BAR ADMISSIONS
State of New York
United States District Court for the Southern District of New York United States District Court for the Eastern District of New York
United States District Court for the Northern District of New York
United States Court of Appeals for the Second Circuit

PRACTICE AREAS
Insurance Coverage Issues
Subrogation/ Recovery
Property and Cargo Loss
Liability and General Casualty Defense
Transportation Defense
Personal Injury Defense
Property Damage Defense
Construction Defense
Errors and Omission Defense
Defense of Self-Insured Entities
Commercial Litigation

Consumer Credit Defense
Defense of Businesses
Mediation and Arbitration

EDUCATION
Brooklyn Law School (J.D., 1974)
Queens College of the City University of New York (B.A., Cum Laude, 1970)

PROFESSIONAL ASSOCIATIONS
Defense Research Institute
Trucking Industry Defense Association

PUBLICATIONS/PRESENTATIONS
The Pension Dilemma: An Analysis of Discord between the IRS and the NLRB, 39 Brooklyn Law Review 684 (1973)

REPORTED CASES
Dunn v. Nissan Motor Co., Ltd., 262 A.D. 2d 444(2nd Dept., 1999)
Karp v. Siegel and American Express, 1988 WL 314769(SDNY, 1998)
Fireman's Fund Insurance Co. V. Schuster Films,811 F. Supp. 978(SDNY, 1993)
Ige v. Command Security Corporation, 2002 WL 720944(EDNY,2002)
Sievert v. Molef et al, 220 A.D. 2d 403 (2nd Dept., 1995)
Mid-Hudson v. All City, 282 A.D. 2d 723 (2d Dept., 2001)

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Danielle Sullivan Kaminski is a Partner in Chartwell's New York City office. She is a 1995 graduate of Binghamton University and a 1998 graduate of Fordham University School of Law. At Fordham, Ms. Kaminski was an editor of the Fordham Urban Law Journal and Fordham Moot Court Board. Ms. Kaminski also interned with the Honorable Joseph M. McLaughlin, Circuit Judge, Second Circuit Court of Appeals.

Ms. Kaminski concentrates her practice in the areas of first-party property, subrogation, transportation, and construction law. Ms. Kaminski handles complex subrogation matters, including losses caused by fires, explosions, structural collapses, boiler, machinery and equipment failures, gas and water leaks. In addition, Ms. Kaminski regularly provides clients with coverage opinions and defends matters involving comprehensive general liability, errors & omissions, builders' risk, marine, aviation and motor carrier/trucker policies.

Prior to joining Chartwell, Ms. Kaminski practiced at several international and national law firms in the areas of large property subrogation and transportation law. In addition, Ms. Kaminski acted as national coordinating counsel for a global transport and logistics corporation. Ms. Kaminski has significant experience handling transportation related matters involving lost and damaged cargo, hull losses and major casualties, including losses caused by floods, tsunamis and hurricanes, from coverage, defense and subrogation standpoints. Ms. Kaminski is routinely asked to evaluate matters involving the various international, federal and state laws and regulations relevant to transportation claims, including COGSA and Carmack. Also, Ms. Kaminski has experience defending employment discrimination, premises liability and products liability matters.

Ms. Kaminski is a frequent speaker before insurance and industry groups on property and transportation related issues. Ms. Kaminski is often called upon by insurance companies to present in-house CE seminars focusing on various areas of interest.

Ms. Kaminski is licensed to practice law in the state and federal courts of New York and New Jersey, and before the United States Supreme Court. She has successfully litigated cases in state and federal courts throughout the United States. She has also arbitrated, mediated and negotiated numerous complex and high profile disputes.

BAR ADMISSIONS
State of New York
State of New Jersey
United States District Court, Southern District of New York
United States District Court, Eastern District of New York
United States District Court, District of New Jersey
United States Supreme Court

PRACTICE AREAS
Subrogation/Recovery
First Party Property Insurance Coverage
Transportation Law
Construction Law

EDUCATION
Fordham University School of Law (JD, 1998)
Binghamton University, State University of New York (BA, 1995)

PROFESSIONAL ASSOCIATIONS
Maritime Law Association of the United States
Special Board Liaison Committee on CLE
Carriage of Goods (COGSA) Committee
Subcommittee on Cargo Liabilities
YLC
New York State Bar Association

PRESENTATIONS
“Complying with Rules and Regulations of the New York Board of Professional Engineering and Land Surveying” – Seminar on Legal Issues for New York Professional Engineers (June 9, 2008).

Uniformity Committee Meeting –Maritime Law Association of the United States (April 30, 2008).

“Thorny Issues with the Commercial Property Policy” – PLRB/LIRB Central Regional Adjusters Conference (Sept. 9 - 10, 2008); PLRB/LIRB Eastern Regional Adjusters Conference (June 3 - 4, 2008).

“Carriage of Goods by Land, Sea and Air” – 2008 PLRB Nat’l Convention, Boston, MA (April 2008).

“Thorny Issues with the Businessowners Policy” – PLRB/LIRB Central Regional Adjusters Conference (Sept. 18 - 19, 2007); PLRB/LIRB Eastern Regional Adjusters Conference (June 12 - 13, 2007).

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Jonathan R. MacBride is a Partner in Chartwell's Philadelphia Office. He is a 1989 graduate of Colby College and a 1995 graduate of Temple University School of Law. Mr. MacBride worked in the Philadelphia District Attorney's Office from 1995-1999. He is admitted to the Pennsylvania and New Jersey Bars, and the United States District Court for the Eastern District of Pennsylvania and the United States District Court for the District of New Jersey, and is a member of the American, Philadelphia, and Montgomery County Bar Associations. His practice for the last 10 years has focused on first party property insurance, bad faith defense, subrogation, and products and professional liability defense. He has handled losses ranging from fires, explosions, and boiler and machinery breakdown to representing insurance markets in large natural catastrophe related losses. He has also represented the firm's clients in defending claims that arise out of fraud or arson. As an Assistant District Attorney, Mr. MacBride spent two years investigating insurance fraud in the Special Investigations Unit. In addition to his first party property work, he has handled complex liability defense cases, including cases involving death and serious bodily injury. Mr. MacBride has handled cases for his clients throughout the Eastern United States, including Maryland, Washington, D.C., Virginia, West Virginia, and Florida. Mr. MacBride has been a frequent contributor to seminars that relate to his areas of practice. Mr. MacBride was selected in a survey of his peers as a "Rising Star" by Law & Politics Magazine in 2006 and 2007.

BAR ADMISSIONS
Pennsylvania
New Jersey
United States District Court for the District of New Jersey
United States District Court for the Eastern District of PA

PRACTICE AREAS
Subrogation
First Party Property Insurance
Bad Faith Defense
Products and Professional Liability

EDUCATION
Temple University School of Law (J.D., 1995)
Colby College (B.A., 1989)

PROFESSIONAL ASSOCIATIONS
Pennsylvania Bar Association
Montgomery County Bar Association
American Bar Association

Sergio C. Muñiz, Jr.

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Sergio C. Muñiz, Jr., is an associate in the Melbourne, Florida office. He is a 1994 graduate of the United States Air Force Academy and a 2000 graduate of The University of Texas School of Law. He is admitted to the Texas and Florida Bars, and admitted to practice in a number of Federal Courts. Mr. Muñiz has served as an Air Force JAG Officer, focusing on government contracts and contractor disputes. He has experience in a wide variety of matters including insurance coverage, surety and fidelity litigation, government contract litigation under the Contract Disputes Act, real estate title defense and litigation, insurance defense and other commercial litigation matters. Mr. Muñiz has also experience representing creditors in bankruptcy court proceedings.

Mr. Muñiz has focused his practice representing insurance companies in insurance coverage litigation and representing sureties in construction payment and performance bond litigation involving both small and large projects, public and private contracts. As a derivative of surety and fidelity litigation, he also has experience in construction litigation. He also has an extensive background in federal government claims and the litigation of disputes before various agencies dealing with contract appeals. In addition to pursuing contractor claims and appeals in the U.S. Court of Federal Claims and Agency Board of Contract Appeals, he can also defend contractors against government claims.

BAR ADMISSIONS
Texas
Florida
U.S. District Court for the Northern District of Florida
U.S. District Court for the
Middle District of Florida
U.S. District Court for the Southern District of Florida
U.S. Bankruptcy Court for the Middle District of Florida
U.S. Court of Federal Claims

PRACTICE AREAS
Federal Government Contracts
Construction Litigation
Commercial Litigation
Surety & Fidelity Law
Architect and Engineer Defense
Real Estate Law & Litigation
Insurance Coverage and Defense

EDUCATION
University of Texas School of Law (J.D., 2000)
United States Air Force Academy (B.S., 1994)

PROFESSIONAL ASSOCIATIONS
Florida Bar Association
Texas Bar Association
Trial Lawyers Section of the Florida Bar
City, County, & Local Government Law Section of the Florida Bar
Young Lawyers Division of the Florida Bar
United States Air Force Reserves

Michael J. Needleman

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Michael J. Needleman is a 2001 *cum laude* graduate of the Widener University School of Law. Mr. Needleman concentrates his practice primarily in insurance defense and civil litigation matters, focusing on first and third party defense matters; products liability defense; subrogation and employment practices litigation in state and federal courts in Pennsylvania and New Jersey. Mr. Needleman also handles a variety of insurance-related matters, including coverage determination and litigation and bad faith defense.

Mr. Needleman is a former Law Clerk to the Honorable Theodore Z. Davis, P.J. Ch. of the Superior Court of New Jersey, and Judicial Extern to the Honorable Delores K. Sloviter, of the United States Court of Appeals for the Third Circuit.

BAR ADMISSIONS
Supreme Court of New Jersey
Supreme Court of Pennsylvania
United States Court of Appeals for the Third Circuit
United States District Court for the District of New Jersey
United States District Court for the Eastern District of Pennsylvania
United States District Court for the Middle District of Pennsylvania

PRACTICE AREA
Employment Law
General Civil Litigation

EDUCATION
Widener University School of Law, Wilmington, Delaware
Juris Doctor Degree, *cum laude*, 2001
American University, Washington, DC
Bachelor of Arts Degree, 1997

PROFESSIONAL ORGANIZATIONS
Pennsylvania Bar Association
Philadelphia Bar Association
Camden County Bar Association, Civil Rights Committee
Philadelphia Volunteer Lawyers for the Arts
United States District Court for the Eastern District of Pennsylvania Employment Panel

David J. Samlin

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David J. Samlin is an associate in Chartwell's Philadelphia office. He obtained his J.D. from the Villanova University School of Law in 2009 and his B.A. in Classical Civilizations and Political Science from the University of Michigan in 2006.

While at Villanova, David served as the Editor-in-Chief of the Villanova Environmental Law Journal, where he oversaw the publication of Issues I and II of Volume XX of the Journal. David also had an article published in Volume XIX, Issue II of the Journal entitled *Groce v. PA Department of Environmental Protection: Affirmative Combustion in Pennsylvania* while serving as a Staff Writer for the Journal.

Prior to joining Chartwell, David served as summer law clerk with the United States Department of Environmental Protection, Office of Regional Counsel, Region III in Philadelphia. While at the EPA, David worked in the Air Branch, covering issues under the Clean Air Act and Toxic Substances Control Act. He also worked as Judicial Intern for the Honorable Phyllis R. Streitel of the Chester County Court of Common Pleas in West Chester, PA.

David is licensed to practice law in both Pennsylvania and New Jersey.

BAR ADMISSIONS
Pennsylvania
New Jersey

PRACTICE AREAS
Subrogation/Recovery
Property and General Liability Defense

EDUCATION
Villanova University School of Law (J.D., 2009)
University of Michigan (B.A., 2006)

PROFESSIONAL ASSOCIATIONS
Pennsylvania Bar Association
Philadelphia Bar Association
Delaware Valley Environmental American Inn of Court

PUBLICATIONS/PRESENTATIONS

Megan E. Shutte

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Megan E. Shutte is a 2000 (B.A.) and 2003 (M.A.) graduate of Trinity College and a 2007 graduate of Villanova University School of Law. Ms. Shutte was an Editor of the Villanova Environmental Law Journal and her 2007 casenote, Wast Management Disposal Services of Pennsylvania v. DEP: Considering the Parameters of the Deliberative Process Privilege in the EHB Setting, was published in the Journal. Ms. Shutte is admitted to the Pennsylvania and New Jersey Bars and concentrates her practice in the areas of first party property insurance coverage, subrogation, products liability and commercial litigation.

BAR ADMISSIONS
Pennsylvania
New Jersey

PRACTICE AREAS
First Party Property Insurance Coverage
Subrogation
Products Liability
Commercial Litigation

EDUCATION
Villanova University School of Law (J.D., 2007)
Trinity College (B.A., 2000)

Geoffrey W. Veith

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Geoffrey W. Veith is a 1978 graduate of Earlham College and a 1981 graduate of the University of Cincinnati School of Law, Law Review. Following law school Mr. Veith served as a judicial clerk to the Honorable Robert L. Black, Jr., Court of Appeals, First District, Ohio. He is admitted to the Pennsylvania Bar, the United States District for the Eastern District of Pennsylvania and the United States Court of Appeals for the 3rd Circuit. He was a member of the Litigation, Dispute Resolution and Tort and Insurance Practice Section of the American Bar Association and is a member of the Montgomery County and Pennsylvania Bar Associations. Currently, he focuses primarily in the property insurance area, handling first and third party matters, major subrogation claims, products and professional liability matters, construction defect claims and casualty matters, particularly those involving fire, explosion or collapse. He has recovered well over $100 million for his subrogation clients and has defended numerous clients in cases with claims over $1 million. He has tried numerous cases to verdict in both state and federal courts in a number of jurisdictions. Mr. Veith has also written and spoken extensively in connection with his areas of practice.

BAR ADMISSIONS
Pennsylvania
United States District Court for the Eastern District of PA
United States Court of Appeals for the 3rd District

PRACTICE AREAS
Subrogation
Professional Liability
Property Insurance

EDUCATION
University of Cincinnati School of Law, Law Review (J.D., 1981)
Earlham College (B.A., cum laude, 1978)

PROFESSIONAL ASSOCIATIONS
Pennsylvania Bar Association
Montgomery County Bar Association
American Bar Association: Litigation, Dispute Resolution and Tort and Insurance Practice Section

Ron L. Woodman

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Ron L. Woodman is a 1997 graduate of the University of Idaho and a 2001 graduate of Rutgers University School of Law, where he was a member of the Rutgers Law Journal and founding member of the Rutgers Journal of Law and Religion. Mr. Woodman concentrates his practice on creditor's rights and bankruptcy; in this capacity, Mr. Woodman has represented many of the nation's largest banks, insurance carriers, premium finance companies, technology and software firms, equipment lessors, automobile manufacturers, airports and shipping companies. This representation ranges from simple insolvency matters to creditor representation in some of the largest complex national and international bankruptcies. In addition, Mr. Woodman has represented and advised creditors' committee members and has defended and prosecuted preference/fraudulent transfer actions in numerous jurisdictions.

Mr. Woodman's special expertise includes representing insurance carriers and premium finance companies on the "business side" of the insurance industry. Mr. Woodman has successfully represented one of the world's largest insurance companies in bankruptcies throughout the United States, where he has sought payment of insurance premiums from bankrupt insureds, setoff/recoupment of return premiums a/k/a unearned premiums and relief from the automatic stay to withdraw surety bonds. Additionally, Mr. Woodman has represented insurers in avoidance litigation and complex claim litigation involving a bankrupt insured and employee claimant.

Outside of bankruptcy court, Mr. Woodman has extensive experience in state insolvency matters and has represented lending institutions in collections, attachment, garnishment and replevin matters throughout the state. His practice extends to commercial and consumer replevin of automobiles and other personal property. Mr. Woodman's experience also encompasses collection of unsecured loans and deficiency balances.

Mr. Woodman also has significant experience in complex litigation in both state and federal court. Mr. Woodman has represented class action plaintiffs and defendants, real estate owners, accountants, asset purchasers and sellers, banks and factoring companies. Mr. Woodman's range of litigation experience spans from products liability to professional malpractice defense.

BAR ADMISSIONS
Supreme Court of Pennsylvania
Supreme Court of New Jersey

PRACTICE AREAS
Commercial Litigation and Business Representation Creditor's Rights

EDUCATION
1997: B.S. in Political Science, University of Idaho
2001: J.D. Rutgers University School of Law
- Member of Rutgers University Journal of Law and Religion, Founding Member of Rutgers Journal of Law and Religion,

Dean’s Writing Fellows, Moot Court and Dean’s list
2001: Non-Matriculating Visiting Scholar, University College of London

PUBLICATIONS

Recent Cases Throw Deepening Insolvency Into the Deep End, March 2007 Bankruptcy Supplement to Legal Intelligencer.

Advanced Issues In Judgment Enforcement, Pennsylvania Bar Institute, 2003

William G. Zieden-Weber

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William G. Zieden-Weber is a partner in the New York office of The Chartwell Law Offices, LLP. Mr. Zieden-Weber's practice is concentrated in counseling and litigating domestic and international property insurance matters, including Energy, CAR/Builder's Risk, and Boiler & Machinery claims. He has experience in all phases of dispute resolution including trials, arbitrations and mediations. Additionally, Mr. Zieden-Weber has extensive experience in investigating, counseling and litigating reinsurance and subrogation matters.

In addition to having litigated matters in numerous state and federal courts throughout the United States, Mr. Zieden-Weber has handled international property, reinsurance and subrogation cases for many global insurance companies. Mr. Zieden-Weber has significant experience in handling and counseling domestic and international insurers on foreign insurance matters. He has conducted investigations, examinations, discovery and litigation in many countries within Europe, the Middle East, Asia, and South America.

Mr. Zieden-Weber earned his Bachelor of Arts, magna cum laude, from the State University of New York at Albany. He was awarded the degree of Juris Doctor in 1991 and Master in Laws, Taxation in 1995 from the University of Miami School of Law.

Mr. Zieden-Weber is admitted to practice before the Courts of the States of New York and Florida. He is also member of the Bar of the District Courts for the Southern and Eastern Districts of New York. He is a member of the New York State and Florida Bar Associations.

BAR ADMISSIONS
New York
Florida
District Court for the Southern District of New York
District Court for the Eastern District of New York

PRACTICE AREAS
First-Party Property
International
Reinsurance
Subrogation

EDUCATION
University of Miami School of Law (J.D., 1991; M.A., 1995)
State University of New York at Albany (B.A., manga cum laude, 1988)

PROFESSIONAL ASSOCIATIONS
New York Bar Association
Florida Bar Association