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POST CATASTROPHE LOOTING LIKELY TO BE CONSIDERED A SEPARATE OCCURRENCE

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A quick search of news articles following any of the recent natural catastrophes in the United States will confirm that looting is a common post-catastrophe phenomenon. As a result, one can almost be certain that the recent tornados and floods in the Southeastern United States will result in claims for damages from looting.

If this occurs, Insurers will be faced with questions regarding whether specific acts of looting/vandalism arose out of, or originated from, the flood and/or tornado damage. To answer these questions, Insurers will likely have to consider whether the acts of looting/vandalism are independent intervening causes, separated in time and space from the flood and tornado damage, thereby creating a separate occurrence under the Policy. Recent decisions involving claims for looting following Hurricanes Katrina and Rita may provide guidance on how courts might rule on these issues.

In Lundy Enterprises, LLC v. Wausau Underwriters Insurance Co., 2009 WL 5217412 (E.D. La.), the insured filed suit against Wausau in 2006 for improperly denying coverage under its policy for water damage. Subsequently, on December 29, 2009, the insured filed its first supplemental and amended complaint for damages. In the amended complaint, the insured alleged, *inter alia*, that its properties were looted and suffered wind damage.

Wausau filed three separate motions for summary judgment. One motion sought partial summary judgment seeking dismissal of plaintiffs' looting claim on the grounds that the claim was prescribed. Specifically, Wausau argued that plaintiffs' looting claims were prescribed because they were not brought within two years of the date of the loss as required by the policy.

In response, the plaintiffs asserted that their looting claims should relate back to the filing of the action because the looting claims arose out of Hurricane Katrina, which caused the flooding and wind damage, and because Wausau had notice of such claims.

In considering this issue, the court noted that the original petition did not include such a claim. The court then analyzed Federal Rule of Civil Procedure 15(c) and noted that it is a procedural provision allowing a party to amend an operative pleading despite an applicable statute of limitations if the parties to the litigation have been sufficiently put on notice of facts and claims which may give rise to future related claims. In this regard, the court noted that the Rule provides that an amendment of a pleading relates back to the date of the original pleading when "the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading." To the contrary, relation back is not allowed when the plaintiff tries to add an entirely different conduct, transaction, or occurrence. Thus, the question for the court was whether the claims for looting arose out of the same conduct, transaction, or occurrence set forth in the original pleading for water damage.

Relying on Adams v. Lexington Ins. Co., 2009 WL 362446 (E.D. La.), the court concluded that the plaintiffs' claims did not relate back to the filing of the original petition. It reasoned that in the original petition, plaintiffs alleged that they suffered wind and flood damage that resulted from Hurricane Katrina. In their Amended Complaint, plaintiffs added a claim for looting. **"Hurricane Katrina was a meteorological event. Looting was caused by human action. Therefore, the two claims do not arise out of the same conduct, transaction, or occurrence."** [emphasis added]

We recognize that an insured might try to distinguish this decision on the basis that the court addressed a procedural rule rather than the actual policy wording or rules of contract interpretation. In this regard, an insurer facing such a claim should be aware that other factors exist that might impact a court's evaluation of this issue. In particular, a policy wording's occurrence definition, the particular jurisdiction's rules on proximate cause, and whether the policy contains anti-concurrent causation language will all likely have an impact on a court's analysis. Nevertheless, we expect a court addressing this issue would, at the very least, find the Lundy Enterprises decision persuasive.

Insurers should keep the Lundy Enterprises decision in mind as they evaluate their exposures for claims arising out of the recent tornados and Mississippi River flood losses.

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