

# Lessons learned after the storms

*Two years after hurricanes Katrina and Rita, policyholders are still fighting to get coverage for their losses. If you're going to help these policyholders take on their insurers, you need to be prepared.*

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Something positive has emerged out of the devastation the 2005 hurricanes caused—and is still causing—to individuals, businesses, and communities throughout the Gulf Coast states. For those of us who toil routinely on behalf of policyholders and are passionate about the rights of insureds, this post-Katrina phase is an exciting time.

Investigative reporting on insurers' anticonsumer actions is at a historic high. News media are providing in-depth coverage of insurers' top-down strategies to increase profits by cheating claimants. Improper sales and adjusting practices that deprive honest Americans of paid-for financial security are being exposed. Lawmakers and judges at the state and federal levels are scrutinizing the private insurance system that is so inextricably intertwined with our economy. Government's role in the business of insurance is being weighed.

More and more policyholders are questioning whether they are really in good hands. Consumer trust of the industry is at an all-time low.

News stories about altered expert reports, lowballing, bad faith, and unfair

exclusions are hardly revelations to the policyholder advocates and disaster victims who have been contending with these chronic problems for decades. But now, a powerful senator, Trent Lott (R-Miss.); other members of Congress; and state legislators are moving to enact legislative reforms. Several states recently enacted or proposed laws that allow policyholders to get redress in court for insurers' bad faith.<sup>1</sup> Policyholder bills of rights were introduced in Florida, Louisiana, and Mississippi in the 2007 legislative sessions.

Many thousands of property owners are pursuing their rights in court to collect on broken insurance promises. And despite intensive maneuvering by insurance industry strategists, the judicial system is functioning effectively.<sup>2</sup> Insurers are feeling the pressure, and some of those top-secret corporate directives that turn claims into profit centers are going to be stopped.

According to Robert Crown, a public adjuster based in California, there is an industry standard known as the "rule of 9" under which insurers calculate that 9 out of every 10 claimants simply accept whatever they're offered

on claims. This means that only 1 in 10 policyholders typically challenges a lowball offer or denial. Fewer still hire counsel and file suit.

So insurers have numbers on their side. They can point to the extraordinarily large numbers of claimants who don't sue as proof of happy customers. They can aggregate claim payouts after natural disasters as evidence of all the money they paid out. And they do. Consider this press release issued a year ago by the Insurance Information Institute (III):

One year after Hurricane Katrina, nearly 95 percent of homeowners insurance claims have been settled in Louisiana and Mississippi, insurance companies have paid billions in storm damage claims, and the vast majority of homeowners' in both states say they are satisfied with their insurance company. . . . In Louisiana, insurers have settled 658,700 homeowners' claims or 94.8 percent of expected homeowners' claims from Hurricane Katrina, totaling \$10.3 billion, reported the III. In Mississippi, 334,800 or 94.3 percent of expected homeowners' claims, totaling \$5.2 billion, have been settled.<sup>3</sup>

These claims stand in stark contrast with direct reports from Katrina and Rita victims<sup>4</sup> and the unprecedented

volume of litigation that policyholders initiated against their insurance companies in Katrina's aftermath. Yet the numbers appear to be empirical statistics that support insurers.

Digging deeper, it turns out that these "statistics" about satisfied customers were compiled and massaged by a company called IPSOS. Here's how IPSOS advertises its services to clients like Allstate and the III: "At IPSOS, we work with you as a true partner. By developing a deeper understanding of your brands, consumers, and marketplace, we always deliver actionable recommendations rooted in reality."<sup>5</sup>

The III touts its nonprofit status and purports to be a reliable source of accurate information, but in reality, it is funded by the insurance industry to advance its views and interests.

Numerous legal issues are at the center of the unresolved questions left in the wake of the unusual—if not unprecedented—series of hurricanes that hit the southern Gulf states, especially Florida, Louisiana, and Mississippi. Indeed, insurance-related legal questions loom large among the many factors that will determine the extent to which policyholders are ultimately compensated for their tremendous losses.

## Defense tactics

If a potential client comes to you claiming his or her insurance company is refusing to pay for post-storm losses, you should know what to expect from the insurer. First, you should be prepared for insurers to claim that your client's loss is excluded from his or her policy—and to file numerous motions on a variety of legal issues when litigating these cases. The federal court system's PACER document database contains a wealth of helpful information that can help you fight these motions.<sup>6</sup> Because insurers file many standard motions, you may be able to find another policyholder attorney who has already researched and addressed the motion at hand.

**Exclusions.** Following the devastation of the recent hurricane seasons, policyholders learned the hard way that their insurers did not believe their losses or damages were covered under their all-

risk or windstorm policies. Insurers routinely pointed to "flood" exclusions in their policies and claimed that most, if not all, damage was excluded due to "storm surge."

Insurers also pointed to their "anti-concurrent causation" clauses as a way to deny all coverage. With a typical anti-concurrent causation clause, the insurer attempts to exclude coverage where there are multiple causes of a loss and the policy purports to deny coverage where any one of the causes is not a covered event. Such clauses essentially attempt to exclude coverage in situations where a loss is caused by an excluded event (such as a flood), regardless of whether a covered event (such as wind) also contributed to the same loss.

Under this rationale, these clauses would deny coverage to countless policyholders. Insureds argue that enforcing such clauses would completely defeat the policy's intent to cover hurricane damage, particularly in situations where storm winds caused a significant portion of the damage, even if another part might have been caused by excluded flooding.

In one of the first cases involving an anti-concurrent causation clause, the court in *Leonard v. Nationwide Insurance Co.* addressed the application of the clause in a situation where the plaintiff insured's home was damaged by water associated with a storm surge and flooding, as well as by wind. Senior District Judge L.T. Senter concluded that the insurer had sufficiently demonstrated that the type of storm surge flooding that caused significant damage to the home was excluded from coverage.<sup>7</sup>

But Senter sided with the policyholder on the significant issue of whether the clause could also exclude damage directly caused by wind. He found that the policy provisions that "purport to exclude coverage entirely for damages caused by a combination of the effects of water (an excluded loss) and damages caused by the effects of wind (a covered loss) are ambiguous."<sup>8</sup>

**Federal removal.** All of this confusion has, of course, resulted in litigation. Particularly in Louisiana and Mississippi, many of the early lawsuits were imme-

diately removed to federal court based on diversity of citizenship. Many policyholder attorneys then began filing their cases in federal court to avoid the delay of removal. Some policyholders also sued their agents for failing to advise them of the need for flood coverage, and if the agent was a citizen of the same state as the insured, questions of improper joinder and attempts to defeat diversity arose.

**Preemption.** You should be prepared for a preemption argument if there is any mention in the complaint about flood coverage. For example, in cases claiming the agent was negligent in not procuring flood coverage, insurers have argued that the National Flood Insurance Program (NFIP) preempts state law claims. Although this argument will typically prevail as to the contract and claims handling, courts have found that the NFIP does not preempt a state law claim for negligent policy procurement.<sup>9</sup> However, you must be careful when dealing with a claim that involves an NFIP policy. Cases must be filed in a federal district court, and if a lawsuit is improperly filed in state court, the plaintiff may miss the policy's one-year statute of limitations.

**Additional parties.** If the insured has procured a Small Business Administration loan, the insurer may claim that the SBA is the real party in interest and argue that all necessary parties are not properly before the court. If the insured is a homeowner with a mortgage, the insurer may argue that the mortgage company should be added to the lawsuit.

If such arguments arise, they often can be cured by asking the mortgage company to execute a document to be filed with the court indicating their approval of the litigation. In Katrina liti-

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gation in Southern Mississippi, courts have allowed the mortgage company three options: One is to intervene in the lawsuit, the second is to approve and ratify the actions of the insured by filing a written statement, and the third is to do nothing.<sup>10</sup>

**Change of venue.** Because of the negative publicity surrounding the lawsuits filed in the Southern District of Mississippi following Hurricane Katrina, insurers have also taken to filing motions to change venue, arguing they cannot get a fair trial in that area. Currently, the authors are not aware of any case in which this argument has been successful.

**Protective orders.** In discovery against insurance companies, you may face delay and extensive motion practice. Insurers often file motions for protective orders, arguing that the documents and information you seek are trade secrets and can be produced only with a confidentiality order. This can become problematic, particularly when a policyholder's law firm has filed numerous cases against the same insurer and wishes to use documents in multiple cases. Unfortunately, courts are typically willing to enter such protective orders, and you must be prepared to deal with them.<sup>11</sup>

**Limiting events.** Other issues can arise when multiple storms ravage an area, as occurred in Florida in 2004. The policy may contain a limit for hurricane damage, but the insured may suffer multiple losses during the same policy period. The insured expects to recover benefits under each policy limit for each event, but the insurer may seek to limit the total amount recoverable to one policy limit per policy period. Depending on the language of the policy and your ability to prove damage from each separate storm event, you should advocate for multiple limits.

## Experts

One important practice lesson to come from the *Leonard* trial and opinion is the importance of experts in this type of litigation. Particularly because these cases are being tried in federal court, expert disclosures will creep up quickly, and the court may set them early in the discovery process. Depending on the

causes of action brought, several different types of experts may be necessary.

Once an insured is forced into a dispute regarding what caused the damage, he or she must be prepared to make the factual case that an insurable event caused the loss.<sup>12</sup> Engineers and meteorologists play a key role in determining causation at trial, and you should retain them early in the process. You should also be prepared to submit expert evidence from construction, repair, and mold-remediation professionals to support your client's claims about the amount of damage to the property.

Senter's discussion in rejecting State Farm's motion to dismiss in *Tuepker v. State Farm Fire & Casualty Co.* demonstrates the need for experts. The judge noted that the issue of what caused the loss involves fact-specific inquiries: "Of course, I cannot know at this juncture what the evidence will be. It is likely that both the plaintiffs and State Farm will present expert evidence on the issue of the cause or causes of the damage to the plaintiffs' property."<sup>13</sup>

In *Leonard*, Senter addressed the question of agent liability. He found that, although the agent specifically advised the policyholders that they did not need separate flood coverage because they were not in a flood zone, the agent did not materially misrepresent the terms of the policy to the homeowners.

Senter did not find that the agent was negligent in his duties to the insureds.<sup>14</sup> It is plausible that he would have found differently if more evidence via expert testimony had been submitted to establish the standard of care applicable to an insurance agent. Attorneys whose clients are underinsured should always give serious consideration to putting on expert testimony to establish what standard of care applied to the agent in advising his or her customers on the adequacy of their coverage.

Although courts across the country remain unwilling to go beyond holding insurance agents to a general duty of candor, advocates must lay a proper foundation. Most people rely on their insurance agent to advise them on what types and amounts of coverage to buy.<sup>15</sup>

If the complaint includes a count of

bad faith, you should evaluate whether you need a claims practices expert. If you do name one, you should be prepared for a motion to strike by the insurer.

Typically, the insurer argues that the claims practices expert is usurping the role of the trial court in determining the meaning of the policy language. Although it is the court's place to determine how the policy should be interpreted, it is appropriate to allow a claims practices expert to testify regarding the general standard of care for insurance adjusters and other claims handlers, what conduct would have met the standard of care required in the particular case at hand, and whether the insurer breached that standard of care in handling the insured's claim.<sup>16</sup>

In opposing these types of motions, make sure your expert does not address matters reserved for the trial court. Also, be prepared to brief the subject thoroughly so that the trial court is fully aware of other instances where claims practices experts have been allowed to testify.

## Litigation tips

Sharing information and discovery among policyholder attorneys is critical to effectively and efficiently prosecuting their clients' cases. Obtaining depositions of defense experts and evidence from other successful cases against the same insurance company, as well as publicly available documents about the company's structure and finances, is an economical way to conduct discovery.

If you discover high-level corporate cheating by the insurer you're suing, this information may not be as helpful as you'd like it to be. If you don't link that evidence to what the insurer did to your client, it probably won't help you. The cases that get litigated and tried are generally highly fact-specific, so don't make the mistake of painting too broad a picture for a judge or jury.

More and more insurers are going "paperless," which means you need to get up to speed on the federal rules on electronic discovery to obtain claim and underwriting files, as well as e-mail and internal memoranda. If an insurer's electronic files are maintained in a sys-

tem that many company employees can access, you can make a strong argument for a privilege waiver to obtain broad discovery.

Another avenue to consider is consolidation of discovery or legal issues. A federal court in Louisiana has recognized that coordinated document production and a joint electronic repository will potentially streamline discovery in several cases. The court issued an order for coordinated document production and discovery that envisions the selection of a third-party vendor to manage a repository where defendants will initially produce documents in electronic form.<sup>17</sup>

However, the federal court for the Southern District of Mississippi recently denied a motion for consolidation of several Katrina-related cases, finding that many of the cases were at different stages of discovery and that they presented factual differences that would affect how damages were calculated.<sup>18</sup>

## Soaring profits

Insurers earned record profits the year after Hurricane Katrina devastated the Gulf Coast.<sup>19</sup> Are insurers accumulating these profits at the expense of their policyholders? National leaders are exploring this question through congressional hearings, and advocacy groups such as United Policyholders and AAJ have been monitoring these efforts and encouraging policyholders to get involved.<sup>20</sup>

Complaints have been submitted to the insurance departments in all five states affected by Katrina and Rita. More than 9,000 consumers have contacted the Louisiana Department of Insurance to seek help with resolving claim disputes with insurance companies.<sup>21</sup>

Much has been learned about insurance company practices—and how courts address them—from the recent hurricanes, and much more is still to come. Are profits for the property-casualty sector soaring because of or in spite of catastrophic events in recent years?

The answer is clear: Property-casualty industry leaders have responded to disasters by cutting essential coverage out

of policies without reducing rates, and they have allowed claims practices that result in payments below the full amount owed. The result is soaring profits and sore policyholders.

Prosecuting insurers for wrongful conduct is expensive, time-consuming, and risky under the best of circumstances. Insurers are highly sophisticated and well-financed frequent users of the judicial system, and they spare no expense, often using “scorched-earth” litigation tactics to intimidate policyholder plaintiffs and their counsel.

Katrina cases pose additional challenges. Most require expert testimony on highly technical wind- and water-science issues. Plaintiff attorneys have had to conduct discovery to expose high-level corporate directives regarding claims handling—an expensive and challenging endeavor—in most, if not all, the Katrina cases. And many of the lawyers handling the hurricane claims typically handled only a few insurance cases a year; they have suddenly found themselves juggling hundreds, even thousands, of cases.

Clients, particularly those who lost their homes and everything in them, rely heavily on their attorneys to help them get back on their feet. Trial lawyers have met these expectations with unprecedented collaboration, dedication, and hard work, and the result of this collaboration is beginning to bear fruit.<sup>22</sup> ■

### Notes

1. *E.g.* 2007 Md. Laws ch. 150, and 2007 Wash. Laws ch. 498.

2. Katrina insurance cases are proceeding apace. Efficiency measures such as coordinated cases, single-judge assignments, and liaison counsel are in place. State Farm’s lawyers tried to get Senior District Judge L.T. Senter of the Southern District of Mississippi to recuse himself from coordinated hurricane litigation proceedings. Had they been successful, they would have removed the federal judge who has perhaps the most extensive expertise in post-Katrina insurance legal issues and derailed pending settlements for thousands of Mississippi property owners.

3. Press Release, Ins. Info. Inst., *Homeowners Claims Settlements from Private Insurers Estimated at Nearly \$15.5 Billion to Date; High Level of Customer Satisfaction Found by New Survey*, www.iii.org/media/updates/press.760032 (Aug. 22, 2006).

4. For examples, see witness testimony from public forums hosted by United Policyholders in December 2006 and captured on video, now available at [www.unitedpolicyholders.org](http://www.unitedpolicyholders.org), and “Katrina Horror Story” forms submitted to the office of Rep. Gene Taylor (D-Miss.).

5. See IPSOS’s Web site, [www.ipsos-na.com](http://www.ipsos-na.com).

6. The PACER database can be found at <http://pacer.psc.uscourts.gov>.

7. *Leonard v. Nationwide Ins. Co.*, 438 F. Supp. 2d 684, 695 (S.D. Miss. 2006).

8. *Id.* at 693.

9. *E.g. Landry v. State Farm Fire & Cas. Co.*, 428 F. Supp. 2d 531, 534 (E.D. La. 2006).

10. Order, *Ross v. State Farm & Cas. Co.*, No. 1:06cv443 (S.D. Miss. Oct. 23, 2006).

11. For a discussion of how to fight these motions, see Charles M. Miller, *Protesting Insurer Protective Orders*, TRIAL 46 (July 2007).

12. Although there has been much litigation over which party bears the burden of proof, you should be prepared to submit expert evidence of causation at trial.

13. *Tuepker v. State Farm Fire & Cas. Co.*, 2006 WL 1442489 at \*5 (S.D. Miss. May 24, 2006).

14. *Leonard*, 438 F. Supp. 2d 684, 691-92.

15. For a good discussion of the limited circumstances under which agents have been held liable for failing to procure adequate coverage, see Kirk A. Pasich, *Broker Responsibility Extends Beyond Procuring Coverage*, Daily J. (Feb. 9, 2006), and related articles at [www.unitedpolicyholders.org/pdfs/BrokerResponsibility.pdf](http://www.unitedpolicyholders.org/pdfs/BrokerResponsibility.pdf).

16. See *Hangarter v. Provident Life & Accident Ins. Co.*, 373 F.3d 998, 1017 (9th Cir. 2004).

17. *In re: Katrina Canal Breaches Consol. Litig.*, 2007 WL 701271 (E.D. La. Mar. 1, 2007).

18. *Chapoton v. State Farm Fire & Cas. Co.*, 2007 WL 1206744 (S.D. Miss. Apr. 24, 2007). The same court denied class certification in *Guice v. State Farm Fire & Cas. Co.*, 2006 WL 2359474 (S.D. Miss. Aug. 14, 2006).

19. Americans for Ins. Reform et al., *Property/Casualty Insurance in 2007, Overpriced Insurance, Underpaid Claims, Declining Losses and Unjustified Profits* (Consumer Fedn. of Am. Jan. 8, 2007), [www.unitedpolicyholders.org/pdfs/WhitePaper\\_report.pdf](http://www.unitedpolicyholders.org/pdfs/WhitePaper_report.pdf). See also David Ratcliff, *Putting Profits over Policyholders*, TRIAL 24 (July 2007).

20. United Policyholders recently participated in a mailing to property owners to encourage them to complete and mail in “My Katrina Horror Story” forms. United Policyholders also sponsored public hearings in December 2006 in four Louisiana parishes. See [www.unitedpolicyholders.org](http://www.unitedpolicyholders.org).

21. E-mail from Neysa P. Hurst, Asst. Dir., Office of Property & Casualty Consumer Affairs, Louisiana Dept. of Ins., to Amy Bach (May 9, 2007) (on file with the author).

22. See *e.g. Weiss v. Allstate Ins. Co.*, 2007 WL 891869 (E.D. La. Mar. 21, 2007).

