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RECENT DEVELOPMENTS IN INSURANCE COVERAGE LITIGATION

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I. RECENT DEVELOPMENTS AFFECTING THE DUTY TO DEFEND

A. *Recent Cases and the Four Corners Rule*

Recent decisions from complaint allegations or four corners jurisdictions have sought to blunt the force of those doctrines where the insurer "had actual knowledge of facts establishing a reasonable possibility of coverage." For example, in a recent Connecticut Supreme Court case, the insurer had knowledge from multiple sources that the individual insured was an employee of a corporate insured and thus entitled to a defense.[1]

1. Merits Are Irrelevant

Aurafin-OroAmerica, LLC v. Federal Insurance Co.[2] involved an underlying lawsuit in which the insured, OroAmerica, was defending a counterclaim asserted by D&W. The counterclaim alleged that OroAmerica made statements to QVC that D&W's gold chains infringed OroAmerica's patents. The court held that such factual allegations gave rise to a duty to defend because, when taken together, they could constitute a claim for true libel.[3] Further, the court reiterated the basic legal standard requiring an insurer to defend its insured even when the claim is meritless:

> To the extent that the district court found that D&W's counterclaims alleged each element of libel, but that the facts did not support a libel claim as a matter of law, the district court applied the wrong legal standard and impermissibly considered the merits of the libel claim. The viability of the underlying claim against the insured does not affect an insurance company's duty to defend. Rather, even "when the underlying action is a sham," the insurer may

1. Hartford Cas. Ins. Co. v. Litchfield Mut. Fire Ins. Co., 876 A.2d 1139, 1146 (Conn. 2005) (quoting Fitzpatrick v. Am. Honda Motor Co., 575 N.E.2d 90, 93 (N.Y. 1991)).
2. No. 04-56681, 2006 WL 1880088, at *1 (9th Cir. June 26, 2006) (applying California law).
3. *Id.*

> terminate its duty to defend only by "demur[ring] or obtain[ing] summary judgment on its insured's behalf.[4]

In short, the district court could not relieve the insurer of the duty to defend based on "the merits of the underlying claim."[5]

2. Exclusionary Language That Will Not Come into Force Under All Possible Factual Scenarios May Not Justify the Denial of a Defense

Addressing an underlying antitrust lawsuit where factual allegations of malicious prosecution were at issue, the Tenth Circuit found no potential duty to indemnify existed in *Reagan National Advertising v. Hartford Casualty Insurance Co.*[6] Reagan was sued for allegedly violating Texas antitrust laws by abusing the regulatory regime for billboard advertising. Claims against it included tortious interference with prospective business relationships, property rights, and breach of contract. The Hartford policy had an express exclusion for personal and advertising injury arising out of the violation of any antitrust law. The underlying plaintiff amended its pleading to assert malicious prosecution. This led the insured to renew its demand for a defense, arguing that the malicious prosecution claims could survive even if the antitrust claims did not and thus the antitrust exclusion should not bar a defense.[7] The Tenth Circuit disagreed and affirmed the district court:

> The policy states that the insurance does not apply to any "personal and advertising injury [including malicious prosecution] arising out of a violation of any anti-trust law." As the district court found, all of the claims in *Harrill* "arise out of" allegations of antitrust violations. . . . The amended petition, in particular, describes the "sham litigation" pursued by Reagan as "simply an abuse of the legal process for the sole purpose of maintaining Reagan's monopoly by increasing costs, causing delay, and unfairly harming landowners and Reagan's competitors."[8]

The court noted that the phrase *arising out of* is broadly construed under both Utah and Texas law. Looking to analogous authority, it found thus:

> Faced with the same issue before this court, the *Upsher* court stated that the alleged "common law causes of action flow directly from the underlying antitrust allegations," and rejected the plaintiffs' argument that the antitrust exclusion in that case did not apply to exclude the common law and non-antitrust statutory claims where "the factual basis for all of the 'separate common law and non-antitrust claims' is the underlying antitrust action[]."[9]

4. *Id.* (citing Horace Mann Ins. Co. v. Barbara B., 846 P.2d 792, 799 (Cal. 1993)).
5. *Id.*
6. No. 05-4131, 2006 WL 2045836 (10th Cir. July 24, 2006).
7. *Id.* at *1.
8. *Id.* at *3 (citations omitted).
9. *Id.* at *4 (citing Upsher-Smith Labs., Inc. v. Fed. Ins. Co., 264 F. Supp. 2d 843, 850 (D. Minn. 2002)).

The court, in essence, did not believe that the malicious prosecution claims could stand apart from the antitrust allegations and thus found the arising out of connection implicated. The court appears to adopt an indemnity analysis because one cannot determine whether, in fact, malicious prosecution claims could stand apart and form a basis for indemnifiable conduct outside and independent of the antitrust claims until the suit was finally resolved.

B. *Reimbursement of Defense Cost*

Most insureds take for granted their insurer's obligation to provide a defense under a commercial general liability policy ("CGL") to the extent that claims against them are, or would be, covered under the insurance policy. However, not all jurisdictions uniformly implement an insurer's obligation to defend. Insurers have, in some instances, been able to either limit the duty to defend or ultimately recover defense costs from their insureds. Their success in restricting their financial obligations to pay for a defense typically arise in situations involving (1) alleged tortious conduct that occurs over a period of numerous years, (2) covered and noncovered claims occurring during the policy period, and (3) covered claims occurring during the policy period coupled with noncovered claims occurring outside the policies' effective dates.

Most states continue to hold that if a suit contains at least one allegation potentially covered under the insurance policy, the insurer has a duty to defend the entire action.[10] Other jurisdictions impose a narrower defense obligation. For example, when the complaint alleges both covered and noncovered acts, the insurer is only obligated to defend the allegations covered by the policy.[11]

1. Right to Reimbursement Cannot Be Imposed Unilaterally

Some states recognize the insurer's right to reimbursement of defense costs paid, but others hold that the right to reimbursement cannot be unilaterally

10. *See, e.g.*, Scottsdale Ins. Co. v. MV Transp., 115 P.3d 460, 466 (Cal. 2005) (stated or inferable facts alleged, or otherwise known or discovered by the insurer, create a duty to defend if they suggest a claim is potentially covered, until the insurer negates all facts suggesting potential coverage); Keystone Ins. Co. v. Walls, No. 03C-01-055 CHT, 2006 WL 1149143, at *4 (Del. Jan. 31, 2006) (the duty to defend extends to all causes of action asserted as long as one cause of action is potentially covered); Sharonville v. Am. Employers Ins. Co., 846 N.E.2d 833, 837 (Ohio 2006) (the insurer has an absolute duty to defend if the complaint contains an allegation in any of its claims that could arguably be covered by the insurance policy); Smith v. McCarthy, 195 S.W.3d 301, 308 (Tex. 2006) (the insurer's duty to defend any of the claims against its insureds requires the insurer to defend the entire lawsuit).

11. *See* Tanner v. State Farm Fire & Cas. Co., 874 So. 2d 1058, 1065 (Ala. 2003) ("If the allegedly injured person's complaint against the insured alleges or the evidence proves not only claims based on a covered accident or occurrence but also claims not based on a covered accident or occurrence, the insurer owes a duty to defend at least the claims based on a covered accident or occurrence.") (citations omitted).

imposed.[12] For example, in *Perdue Farms, Inc. v. Travelers Casualty & Surety Co. of America*,[13] the insurer issued a pension and welfare fund fiduciary responsibility policy to cover Employee Retirement Income Security Act ("ERISA") claims, which included the right and duty to defend the insured. An action was brought against the insured both under ERISA and for alleged violations of wage and hour laws. Because wage and hour claims were potentially excluded from coverage, the insurer reserved its rights, including the right to seek reimbursement for defense costs expended on noncovered claims. Subject to that reservation, the insurer paid defense costs for the next several years.[14]

After the underlying suit settled, the insurer sought partial reimbursement of defense costs, which would require an allocation of certain amounts paid to defend the noncovered wage and hour claims. The federal appellate court, looking to Maryland law, noted that the insurer could not identify a single Maryland decision that extended the right to reimbursement to insurers.[15] It further noted that the duty to defend under Maryland law is broad, with the defense obligation triggered for any potentially covered claim asserted in the underlying complaint and requiring the insurer to defend the entire suit, including noncovered claims.[16] It concluded that "a partial right of reimbursement would . . . serve . . . as a backdoor narrowing of the duty to defend," which "would appreciably erode Maryland's long-held view that the duty to defend is broader than the duty to indemnify." Further, allowing reimbursement would "undermine the bargain that Maryland courts describe insurers reaching with their insureds."[17] It would also "tip the scales in favor of the insurer . . . [and would] merely provid[e] insureds with an up-front defense whose line-item cost would then be the subject of subsequent litigation."[18] Even if partial reimbursement of defense costs could be appropriate in some cases, the claims in the current case involved too much overlap to make partial reimbursement practicable. Ultimately, the court expressly refused to "grant insurers a substantial rebate on their duty to defend."[19]

Likewise, in *Employers Mutual Casualty Co. v. Industrial Rubber Products, Inc.*,[20] the insurer sought summary judgment, alleging the claim against the insured in the underlying suit was excluded pursuant to the insurance

12. *See, e.g.*, Gen. Agents Ins. Co. of Am., Inc. v. Midwest Sporting Goods Supply Co., 828 N.E.2d 1092, 1101 (Ill. 2005).
13. 448 F.3d 252 (4th Cir. 2006).
14. *Id.* at 255.
15. *Id.* at 259.
16. *Id.* at 257.
17. *Id.* at 258.
18. *Id.* at 259.
19. *Id.*
20. No. Civ. 04-3839, 2006 WL 453207 (D. Minn. Feb. 23, 2006).

policy's pollution exclusion. The insurer also filed a separate motion seeking reimbursement of all defense costs paid in defending its insured. Based on Minnesota law, the court concluded that the policy at issue did not provide coverage.[21] Although the district court had previously allowed an insurer reimbursement in a matter governed by California law, the district court instead reasoned that the insurer "could not recover defense costs pursuant to a reservation of rights absent an express provision to that effect in the insurance contract."[22]

2. Recent Cases Allowing Insurers to Recover Defense Costs

Other courts have held to the contrary, allowing insurers to recover defense costs after the underlying claims were resolved. For instance, in *St. Paul Fire & Marine v. Compaq Computer Corp.*,[23] the insurer sought to recoup money spent to defend Compaq under a multicoverage package policy. The insurer initially accepted the tender and acknowledged the duty to defend but also reserved its rights with respect to coverage. The insurer then issued a second reservation of rights letter after an amended complaint was filed against Compaq, in which it reserved the right to withdraw from Compaq's defense and seek recovery of all fees and expenses incurred in defending its insured if it was later determined that there was no coverage or duty to defend.[24] Immediately after issuing the second reservation of rights letter, the insurer reimbursed Compaq for outstanding defense costs; after Compaq cashed the St. Paul checks, St. Paul withdrew from Compaq's defense. Although Compaq successfully defended the underlying claims against it, further litigation continued with its insurer over defense obligations, including St. Paul's suit to recoup all expenses and costs incurred in defending Compaq.[25]

Accordingly, the district court was required to determine whether a liability insurer, under Texas law, could recover defense costs paid pursuant to a purported reservation of rights to reimbursement when the insurance policy was silent on the matter. Although no Texas appellate court "has ever answered that question in the affirmative," the federal court sitting in Minnesota concluded that the Texas Court of Appeals

21. *Id.* at *5.

22. *Id.* (citing Liberty Mut. Ins. Co. v. FAG Bearings Corp., 153 F.3d 919, 924 (8th Cir. 1998)) (concluding that the duty to defend under Missouri law continues until the determination of no coverage occurs, without the insurer obtaining reimbursement of defense costs); *see also* Gen. Agents Ins. Co. of Am. v. Midwest Sporting Goods Co., 828 N.E.2d 1092 (Ill.2005).

23. 377 F. Supp. 2d 719 (D. Minn. 2005).

24. *Id.* at 721.

25. *Id.* at 721–22. The reimbursement of defense costs related to the second amended complaint because the obligation to defend the original suit first was rejected on res judicata. *Id.* at 722.

has "suggested the possibility of reimbursement in an appropriate case."[26] Accordingly, the district court "believe[d] that the Supreme Court of Texas would apply the doctrine of *quantum meruit* to this dispute."[27] It disagreed with Compaq's argument that the Texas Supreme Court impliedly rejected the notion that defense costs could be recovered under a reservation of rights when no such right existed in the insurance policy.[28] In this regard, the court noted that there was "nothing in the policy" that entitled Compaq to a defense of any part of the action.[29] Moreover, in at least one case, the Texas courts recognized that in certain circumstances, unilateral conduct of the insurer can give rise to a right of reimbursement.[30] Accordingly, reimbursement was permitted.

The Eighth Circuit affirmed, finding that St. Paul's letter was not a unilateral reservation of rights, but a situation in which the insurer agreed to relinquish another right under the policy in return for the reservation of the right to recover defense costs paid.[31] Specifically, St. Paul agreed to give up its right to veto Compaq's choice of counsel if Compaq would agree to reduced coverage of defense costs and to St. Paul's reservation of the right for reimbursement of such defense costs. Compaq could have dismissed the attorneys it hired and selected a firm acceptable to St. Paul, although it did not.[32] Accordingly, "by accepting to employ its chosen counsel while accepting St. Paul's partial defense, Compaq accepted St. Paul's offer and created a supplemental agreement."[33]

In *Travelers Casualty & Surety Co. v. Ribi Immunochem Research, Inc.*,[34] the court addressed coverage under a CGL policy for environmental damage allegedly resulting from the intentional disposal into a landfill of hazardous waste that eventually migrated into groundwater. Travelers issued the CGL

26. *Id.* at 722 (citing Matagorda County v. Tex. Ass'n of Counties County Gov't Risk Mgmt. Pool, 975 S.W.2d 782, 784–85 (Tex. App. 1998)) (observing that other states hold that the right to reimbursement exists where the insurer specifically reserves the right and the insured does not object); *see also* Tex. Ass'n of Counties County Gov't Risk Mgmt. Pool v. Matagorda County, 52 S.W.3d 128, 131 (Tex. 2000) (holding no right to reimbursement from the insured because the policy did not contain a right of reimbursement for settlement payments, and a unilateral reservation of rights letter cannot create rights not contained in an insurance policy).

27. *Compaq*, 377 F. Supp. 2d at 723.

28. *Id.* at 724 (distinguishing Shoshone First Bank v. Pac. Employers Ins. Co., 2 P.3d 510, 515–16 (Wyo. 2000) ("[A] unilateral reservation-of-rights letter cannot create rights not contained in the insurance policy.").

29. *Id.*

30. *Id.* (citing Excess Underwriters at Lloyds, London v. Frank's Casing Crew & Rental Tools, Inc., No. 02-0730, 2005 WL 1252321, at *5 (Tex. May 27, 2005), *reh'g granted*, Jan. 6, 2006).

31. St. Paul Fire & Marine Ins. Co. v. Compaq Computer Corp., 457 F.3d 766, 773 (8th Cir. 2006).

32. *Id.*

33. *Id.* at 772 (citation omitted).

34. 108 P.3d 469 (Mont. 2005).

policy from 1982 to 1985. The insured was sued in 1993 by neighboring property owners for personal injury and property damages. The State of Montana "also sued Ribi in 1997 to recover its . . . costs arising from contamination in and around the landfill," and the following year "the United States sought contribution from Ribi." Eventually, Ribi settled with all plaintiffs, but litigation continued with Travelers related to Ribi's coverage and defense costs.[35]

Travelers initially sent Ribi a reservation of rights letter for the neighboring property owners' claims. Thereafter, Travelers sent a separate letter advising of "its intention to seek reimbursement for defense costs paid, but the parties eventually agreed that Travelers would pay fifty percent of defense costs" related to the neighboring property owners' suit.[36] Two additional reservation of rights letters were sent in response to Ribi's further demands for defense and indemnity of the claims brought by the state and federal governments.[37] Once again, Travelers advised "that it owed no indemnity . . . and therefore no defense" costs, and it would "seek recoupment of . . . defense costs in the two government actions." The insured raised no objections, and Travelers defended the insured. Travelers finally brought an action seeking a declaration that it had no defense and indemnity obligations.[38]

The Montana Supreme Court agreed that Travelers could recoup its defense costs, recognizing that other jurisdictions allow for reimbursement under certain circumstances.[39] Recoupment was allowed because "Travelers timely and explicitly reserved its right to recoup defense costs" in its initial reservation of rights letters. Moreover, "Travelers expressly reserved its right to recoup defense costs if a court determined" there was no duty to defend, and Ribi had specific and adequate notice. Perhaps more important, Ribi implicitly accepted Travelers' defense pursuant to the terms of a reservation of rights when it posed no objections.[40]

35. *Id.* at 472–73.
36. *Id.* at 473.
37. *Id.*
38. *Id.*
39. *Id.* at 479–80 (discussing Grinnell Mut. Reins. Co. v. Shierk, 996 F. Supp. 836, 839 (S.D. Ill. 1998)) (allowing reimbursement when the insurer specifically reserved that right and provided the insured with adequate notice of the potential reimbursement, and the insured accepted the benefit and was fully aware of the insurer's reservation of rights); *see also* United Nat'l Ins. Co. v. SST Fitness Corp., 309 F.3d 914, 919 (6th Cir. 2002) (allowing reimbursement because the reservation was timely and explicit and provided adequate notice, even absent an express agreement by the insured); Colony Ins. Co. v. G & E Tires & Serv., Inc., 777 So. 2d 1034, 1039 (Fla. Dist. Ct. App. 2000) ("Colony timely and expressly reserved the right to seek reimbursement of the costs of defending clearly uncovered claims, which it consistently identified as such. Having accepted Colony's offer of a defense with a reservation of the right to seek reimbursement, G & E ought in fairness make Colony whole, now that it has been judicially determined that no duty to defend ever existed.").
40. *Ribi*, 108 P.3d at 480; *see also* Scottsdale Ins. Co. v. MV Transp., 115 P.3d 460, 467–68 (Cal. 2005) (concluding that the insurer's right to reimbursement under California law does

II. RECENT DEVELOPMENTS IN CONSTRUCTION DEFECT COVERAGE

Recent decisions by courts in several jurisdictions have generated uncertainty as to the scope of insurance coverage available to contractors sued in connection with their subcontractors' defective construction.[41] The primary focus of the case law has been on the property damage and occurrence requirements as well as on external doctrines such as the business risk theory and the economic loss rule. The cases, although interpreting standard language, reach different results. The critical factor usually centers around whether the court follows a business risk theory or believes that the 1986 amendments to the CGL policy—in particular, the subcontractor exception to exclusion *l*—contemplate coverage for contractors when the damaged work or the work out of which the damage arises was performed on the insured's behalf by a subcontractor.

A. *Tort Versus Contract*

In *Lamar Homes v. Mid-Continent Casualty Co.*,[42] the district court granted the insurer's motion for summary judgment and declared that it had no duty to defend and indemnify against claims brought by a homeowner against its builder. In reaching its conclusion, the court applied the economic loss doctrine to eliminate the tort claims and then, applying a business risk theory, concluded that the remaining contract and warranty claims fell outside the insuring agreement of the CGL policy.[43]

On appeal, the Fifth Circuit recognized the long line of inconsistent case law and thus certified two questions to the Supreme Court of Texas:

> (1) When a homebuyer sues his general contractor for construction defects and alleges only damage to or loss of use of the home itself, do such allegations allege an "accident" or "occurrence" sufficient to trigger the duty to defend or indemnify under a CGL policy?
>
> (2) When a homebuyer sues his general contractor for construction defects and alleges only damage to or loss of use of the home itself, do such allegations allege "property damage" sufficient to trigger the duty to defend or indemnify under a CGL policy?[44]

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not apply only on a prospective basis when the "no duty" determination that extinguishes the defense obligation is premised on a judicial decision; instead, the insurer "having reserved its right to do so, may obtain reimbursement of defense costs which, in hindsight, it never owed.").

41. All of the cases discussed in section II of this article address the standard 1986 International Standards Organization ("ISO") commercial general liability policy ("CGL") form, CG 00 01.

42. 428 F.3d 193 (5th Cir. 2005).

43. *Id.* at 196.

44. *Id.* at 200–01. The Texas courts clearly are split on the issue of coverage for construction defects. For example, during the survey period, a number of inconsistent opinions were

The Supreme Court of South Carolina reheard and then reissued its opinion in *L-J, Inc. v. Bituminous Fire & Marine Insurance Co.*[45] In *L-J, Inc.*, a contractor built a road system for a subdivision. As part of the contract, subcontractors performed much of the site development and roadbed preparation. Four years after completion of the project, the roads deteriorated and the owner sued the contractor.[46] The trial court found that the damage to the roads caused by the faulty site development was an occurrence under the standard policy definition and that the "your work" property exclusion did not apply because of the subcontractor exception. The court of appeals affirmed.

The Supreme Court of South Carolina reversed, emphasizing that the contractor's "negligent acts constitute[d] faulty workmanship, which [in turn] damaged the roadway system."[47] The court further emphasized that the "policy was not intended to cover economic loss resulting from faulty workmanship" and that the only damage was to the work product (looking at the road system as a whole). The lower courts had identified the cracking and deterioration of the road surface as damage resulting from the subcontractor's faulty site development and preparation. The supreme court, on the other hand, characterized the road system as a unit and all part of the work product of the contractor. Faulty workmanship (which is part of the insured's contractual liability, is not typically caused by an accident and results in damage only to the work product itself) does not constitute an occurrence under a CGL policy.[48] Because the court found no initial grant of coverage, it declined to address the exclusions or subcontractor exception as the lower courts had done at length.

In *McDonald Construction Co., Inc. v. Bituminous Casualty Corp.*,[49] the Georgia Court of Appeals concluded that the damages at issue were economic losses arising squarely from a contractual obligation and thus not recoverable under the policy. In *McDonald*, the owner refused to accept the project as complete until certain defective tiles were replaced.[50] The contractor repaired and replaced the tiles and then sued its insurer

issued. *See, e.g.*, Century Sur. Co. v. Hardscape Constr. Specialties, Inc., No. 4:05-CV-285-Y, 2006 WL 1948063, at *4 (N.D. Tex. July 13, 2006) (finding no duty to defend); Summit Custom Homes, Inc. v. Great Am. Lloyds Ins. Co., 202 S.W.3d 823, 833 (Tex. App. 2006) (finding a duty to defend); Pine Oak Builders, Inc. v. Great Am. Ins. Co., No. 14-05-00487-CV, 2006 WL 1892669, at *15 (Tex. App. July 6, 2006) (finding a duty to defend); Grimes Constr., Inc. v. Great Am. Lloyds Ins. Co., 188 S.W.3d 805, 813–14 (Tex. App. Feb. 23, 2006) (finding no coverage); *see* Lennar Corp. v. Great Am. Ins. Co., No. 14-02-00860-CV, 2006 WL 406609 (Tex. App. Apr. 11, 2006) (extensive discussion of issues).

45. 621 S.E.2d 33 (S.C. 2005).
46. *Id.* at 35–36.
47. *Id.* at 36.
48. *Id.*
49. 632 S.E.2d 420 (Ga. Ct. App. 2006).
50. *Id.* at 421.

for indemnity. The contractor sought, inter alia, to recover the cost of (1) repair and replacement, (2) tests to determine why the original tiles failed, and (3) labor to move and replace furniture. The trial court found that the cost to replace the tiles was part of the "risk borne by the contractor to make the building project conform to the agreed contractual requirements," but the other costs might be considered "damage to other property" and thus were covered.[51]

For the court of appeals, "the threshold question [was] not whether the damaged tiles constituted an 'occurrence' under the policy" but whether the insured "incurred the amount it is claiming under the policy after it had become legally obligated to pay as damages sums resulting from either 'bodily injury' or 'property damage' for which the policy provided coverage."[52] The court offered that CGL coverage is intended to cover the "potentially limitless liability" associated with the risk that "the work of the insured, once relinquished or completed, will cause bodily injury or damage to property other than to the completed work itself, and for which the insured may be found liable."[53] For there to be coverage under a CGL policy for faulty workmanship, there must be damage to property other than the work itself, and the insured's liability for such damage must arise from negligence, not breach of contract.[54]

In *Cincinnati Insurance Co. v. Grand Pointe, LLC*,[55] the district court granted the insurer's motion for summary judgment and declared that it had no duty to defend or indemnify the defendants against claims brought by a condominium association. The condominium association filed suit in 2003 for causes of action including negligence, wantonness, breach of warranty, and breach of contract.[56] The insurer agreed to defend subject to a reservation of rights and subsequently brought this declaratory action. The insurer asserted that the underlying complaint sought only damages to correct faulty workmanship and, thus, did not fall within the scope of coverage. The association argued that the complaint alleged consequential damages from the entry of moisture, physical damage to work and materials supplied by subcontractors, and future damage once the repair and replacement of defective work began.[57] The court concluded that the damages alleged were to the condominium as a whole, which is the work product of the defendants who were contracted to do the design and

51. *Id.* at 422.
52. *Id.* at 423.
53. *Id.*
54. *Id.* at 424 (citing Custom Planning & Dev. v. Am. Nat'l Fire Ins. Co., 606 S.E.2d 39, 41 (Ga. Ct. App. 2004)).
55. No. 1:05-CV-161, 2006 WL 1806014 (E.D. Tenn. June 29, 2006).
56. *Id.* at *2.
57. *Id.* at *6.

construction, and that there was no allegation of damage to anything other than the defendant's own work product.[58]

B. *Emerging Middle Ground?*

In the cases discussed so far, the characterization of the allegations made against the insured had a significant impact on the case. Recognizing that the CGL policy contains no explicit demarcation between contract and tort claims, other courts have rejected any coverage distinction between the two.

In *Travelers Indemnity Co. of America v. Moore & Associates, Inc.*,[59] the insurer sought a declaration that it had no duty to defend or indemnify the contractor for claims raised against the contractor in a demand for arbitration. The underlying construction defect case involved leaky windows and water intrusion issues. In particular, as alleged, water and moisture penetrated improperly installed windows, causing damage to interior and exterior wall structures, room finishes, and fixtures and requiring mold remediation.[60] The insurer argued that it did not have a duty to defend or indemnify the contractor because the claims did not amount to property damage caused by an occurrence other than to "your work," according to the terms of the insuring agreement.[61]

The appeals court noted that under existing Tennessee law, standard CGL insurance policies do not provide coverage to "an insured contractor for breach of contract grounded upon faulty workmanship or materials, where damages claimed are the cost of correcting the work itself."[62] The insurer further asserted that because the insured is the designer/builder, the entire hotel was all part of the insured's work product, and the claims solely pertained to work product and were outside the scope of its duty to defend.[63]

The insured countered that certain damaged property was expressly omitted from the contract and supplied by the owner. The insured further argued that the occurrence was not the faulty workmanship but the water leakage caused by faulty workmanship.[64]

The appeals court, finding a duty to defend, concluded thus:

> Clearly, water penetration of the sort at issue in this case falls within the definition of "occurrence" established by the insuring agreement as, "an accident, including continuous or repeated exposure to substantially the same

58. *Id.* at *8.
59. No. M2004-01233-COA-R3-CV, 2005 WL 2293009 (Tenn. Ct. App. Sept. 20, 2005).
60. *Id.* at *1.
61. *Id.* at *2.
62. *Id.* at *3 (quoting Vernon Williams & Son Constr., Inc. v. Cont'l Ins. Co., 591 S.W.2d 760, 764 (Tenn. 1979)).
63. *Id.* at *4.
64. *Id.*

> general harmful conditions." Furthermore, by Traveler's [sic] own admission, defective construction itself can be an "occurrence" as long as there is damage to a third party's property [here, the owner-supplied fixtures].[65]

The appeals court found that the claims were covered in the initial grant of coverage and went on to analyze the exclusions and exceptions. Notably, on the subject of the nature of the property, the appeals court found that "[t]he plain language of the 'your work' exclusion and its subcontractor proviso is effective to provide coverage to the contractor for repair and replacement of defective work by a subcontractor. Any other conclusion perverts the plain meaning of the insurance industry's own language."[66]

Right before press time, the Supreme Court of Tennessee issued its opinion and held that: (i) defective workmanship may constitute an "occurrence;" (ii) damages caused by faulty workmanship are "property damage," and (iii) damages resulting from faulty workmanship of a subcontractor are not excluded from coverage.[67] Most notably, in rejecting the "performance bond" analysis, the court noted that "our acknowledgment that damages arising from faulty workmanship may be the result of an 'occurrence' does not convert the CGL policy into a performance bond."[68] In particular, the court recognized that coverage should be won or lost by analyzing the exclusions.[69] Likewise, the court specifically rejected the "foreseeability" test for determining whether damages arising from faulty workmanship constitute an "occurrence" by recognizing that it would render a CGL "almost meaningless."[70] Finally, the state supreme court joined the list of recent courts that have recognized the difference between a mere defect (i.e., not covered) and physical damage that results from faulty workmanship.[71]

In *Broadmoor Anderson v. National Union Fire Insurance Co. of Louisiana*,[72] a Louisiana appellate court was faced with whether a CGL policy covers a general contractor for damages resulting from leaky shower pans installed by a subcontractor. The insurer argued that the damages sought were contractual in nature and thus not an accident. The court disagreed: "While the term 'accident' may imply a tortious event, T-Z's deficient conduct, unexpected and with lack of foresight, can also be considered accidental."[73]

65. *Id.* at *12.
66. *Id.* at *14. Although the court found in favor of a duty to defend, it did so only because it first concluded that there was damage to property that was specifically excluded from the insured's work product. In other words, the court focused on the fact that property furnished by the owner was damaged by the water intrusion.
67. *See* Travelers Indemnity Co. of Am. v. Moore & Assoc., Inc., 2006 WL 4099997 (Tenn. Mar. 7, 2007).
68. *Id.* at *6.
69. *Id.*
70. *Id.* at *5.
71. *Id.* at *7.
72. 912 So. 2d 400 (La. Ct. App. 2005).
73. *Id.* at 405.

In *Essex Builders Group v. Amerisure Insurance Co.*,[74] a Florida district judge faced inconsistent decisions from the Florida state appellate courts. In particular, a series of state appellate court decisions stood for the proposition that no coverage exists for faulty workmanship despite the presence of the subcontractor exception.[75] Nevertheless, a more recent state appellate case had concluded that the 1986 amendments to the CGL policy clearly contemplated coverage when the damaged work or the work out of which the damage arose was performed for the insured general contractor by a subcontractor.[76] The *Essex* court concluded that the *J.S.U.B., Inc.* analysis represents a correct interpretation of the CGL policy.[77] In particular, the *Essex* court concluded that "the proper inquiry is not whether the claims . . . sound in tort or in contract, but whether there has been an 'occurrence' under the policy."[78] Further, the court concluded that if it were to read the policy as suggested by the insurers, "without considering the import of the exclusions, it is arguable that [the your work] exclusion and exception to this exclusion would have no meaning or effect in this policy, particularly when considering the nature of the occurrence leading to the Builder's claim."[79]

Similarly, in *Amerisure Insurance Co. v. Paric Corp.*,[80] a federal district judge in Missouri entered the coverage debate. At issue was coverage of underlying actions that sought damages against Paric Corp. for various deficiencies and defects in three hotels. The defects primarily related to the Exterior Insulation and Finish System ("EIFS") and the windows. In finding in favor of a duty to defend, the court rejected any distinction between those underlying lawsuits that sound in contract and those that added an allegation of negligence.[81] Moreover, the court concluded that the hidden nature of the defects in the EIFS and the windows, in addition to the fact that the owner chose the EIFS and the windows, demonstrated that the insured did not expect or intend the damage.[82]

The Kansas Supreme Court addressed coverage for faulty workmanship in *Lee Builders, Inc. v. Farm Bureau Mutual Insurance Co.*,[83] where poorly installed windows resulted in water damage over time. The court concluded that the faulty materials and workmanship provided by subcontractors caused continuous exposure to moisture, which, in turn, caused damage that was both unforeseen and unintended from the perspective of

74. 429 F. Supp. 2d 1274 (M.D. Fla. 2005).
75. *Id.* at 1278–81.
76. *Id.* at 1282 (citing J.S.U.B., Inc. v. U.S. Fire Ins. Co., 906 So. 2d 303 (Fla. Dist. Ct. App. 2005)).
77. *Id.* at 1286–87.
78. *Id.*
79. *Id.* at 1286.
80. No. 4:04CV430-DJS, 2005 WL 2708873 (E.D. Mo. Oct. 21, 2005).
81. *Id.* at *6.
82. *Id.*
83. 137 P.3d 486 (Kan. 2006).

the insured.[84] Although the Kansas Supreme Court recognized that courts across the country were split, the court ultimately concluded that the better-reasoned authorities supported a finding of an occurrence under such circumstances.[85]

In *Glendenning's Limestone & Ready-Mix Co., Inc. v. Reimer*,[86] the Wisconsin Court of Appeals attempted to clarify the contract-versus-tort distinction. Specifically, the Wisconsin Supreme Court had previously rejected the argument that the underlying claim could not be an occurrence under the standard ISO policy just because it "was for breach of contract/breach of warranty":

> CGL policies generally do not cover contract claims arising out of the insured's defective work or product, but this is by operation of the CGL's business risk exclusions, not because a loss actionable only in contract can never be the result of an "occurrence" within the meaning of the CGL's initial grant of coverage. This distinction is sometimes overlooked, and has resulted in some regrettably overbroad generalizations about CGL policies in our case law. . . . [T]here is nothing in the basic coverage language of the current CGL policy to support any definitive tort/contract line of demarcation for purposes of determining whether a loss is covered by the CGL's initial grant of coverage. "Occurrence" is not defined by reference to the legal category of the claim. The term "tort" does not appear in the CGL policy.[87]

The court emphasized that the proper analysis focuses on the factual basis of the claim and not on the theory of liability.[88]

In *Okatie Hotel Group, LLC v. Amerisure Insurance Co.*,[89] a federal court sitting in diversity considered whether damage to Okatie's hotel constituted an occurrence under its CGL policy. The federal court observed that the Supreme Court of South Carolina "recently held as a matter of first impression that property damage to the work product alone, caused by faulty workmanship, does not constitute an 'occurrence.'"[90] Contrasting cases in which the plaintiff alleges damage to the work product alone with those in which the plaintiff alleges continuing property damage that may constitute an occurrence,[91] the court held thus:

> In light of the aforementioned, the court concludes that contrary to the circumstances in L-J, Inc., Plaintiffs in the present case have alleged property

84. *Id.* at 495.
85. *Id.* at 497.
86. 721 N.W.2d 704 (Wis. Ct. App. 2006).
87. *Id.* at 711–12 (quoting Am. Family Mut. Ins. Co. v. Am. Girl, Inc., 673 N.W.2d 65, 76 (Wis. 2004)).
88. *Id.* at 712.
89. No. Civ. A. 2:04-2212–23, 2006 WL 91577 (D.S.C. Jan. 13, 2006).
90. *Id.* at *5 (citing L-J, Inc. v. Bituminous Fire & Marine Ins. Co., 621 S.E.2d 33 (S.C. 2005)).
91. *Compare* High Country Assocs. v. N.H. Ins. Co., 648 A.2d 474, 477 (N.H. 1994) ("The damages claimed are for the water-damaged walls, not the diminution in value of

> damage beyond damage to the work product and/or the improper performance of the task itself. Accordingly, the court holds that although damage to work product alone, caused by faulty workmanship, does not constitute an occurrence, the property damage to Plaintiff's hotel—caused by exposure to the harmful condition of leaks and moisture—constituted an occurrence under the CGL policies issued by Defendant to Devcon.[92]

Thus, the leaks and moisture infiltration experienced by Okatie could constitute an occurrence leading to covered property damage, and judgment as a matter of law was inappropriate.[93]

Recently, the Fourth Circuit adopted the same approach. In *French v. Assurance Co. of America*,[94] James and Kathleen French hired Jeffco Development Corporation to build their single-family home. "Pursuant to the construction contract, and via a subcontractor, the exterior of the home was clad with a synthetic stucco system known as" EIFS. Following completion of the home, "the Frenches discovered extensive moisture and water damage to the otherwise nondefective structure and walls of their home resulting from the defective [EIFS] cladding."

The Fourth Circuit held that

> a standard 1986 commercial general liability policy form published by ISO does not provide liability coverage to a general contractor to correct defective workmanship performed by a subcontractor. . . . [T]he same policy form [does] provide[] liability coverage for the cost to remedy unexpected and unintended property damage to the contractor's otherwise nondefective work-product caused by the subcontractor's defective workmanship.[95]

Said differently, although installation of the defective EIFS itself was not an occurrence, further physical damage caused by the defective EIFS to otherwise nondefective parts of the home was an occurrence. The court likened the water damage to other accidents caused by the defective cladding, such as a portion of it detaching and falling onto a car or falling inside onto artwork or furniture.[96] Such an event would clearly be an occurrence; thus, coverage should be extended to the water damage at issue.[97]

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cost of repairing work of inferior quality. Therefore, the property damage described in the amended writ, caused by continuous exposure to moisture through leaky walls, is not simply a claim for the contractor's defective work."), *with L-J, Inc.*, 621 S.E.2d at 36 ("[T]he complaint does not allege property damage beyond the improper performance of the task itself.").

92. *Okatie Hotel Group, LLC*, 2006 WL 91577, at *6.

93. *Id.*

94. 448 F.3d 693 (4th Cir. 2006).

95. *Id.* at 706.

96. *Id.* at 709.

97. *Id.* ("In this same vein, it is illogical to contend that had the defective [exterior] failed

III. RECENT DEVELOPMENTS IN INSURANCE COVERAGE IN HURRICANE-AFFECTED STATES

In the aftermath of the immense damage caused by Hurricanes Katrina and Rita, flood damage exclusions, concurrent cause clauses, and valued policy statutes requiring payment of full policy limits in the event of a total loss have recently become of paramount importance in insurance litigation.

A. *Recent Cases Interpreting Valued Policy Law in Louisiana and Mississippi*

1. Mississippi's Recent Hurricane-Related Decisions

Valued policy laws ("VPL") do not appear to be at the forefront of litigation in Mississippi, mainly because Mississippi's valued policy statute appears limited on its face to fire insurance policies.[98] Also, in 1987, the Mississippi legislature created the Mississippi Windstorm Underwriting Association to ensure an adequate market for windstorm and hail insurance in the state. Arguably, had the legislature intended the VPL to apply to windstorm coverage policies, it would have so stated in this most recent statutory restructuring.[99]

However, recent decisions in Mississippi interpreting exclusionary language in homeowners policies may have a much larger impact on hurricane litigation and the VPL debate in Louisiana and other hurricane-prone states. First, in *Tuepker v. State Farm Fire & Casualty Co.*,[100] the court held that the determination of whether wind or flood was the proximate cause of the property damage to the insured dwelling was a question of fact under Mississippi law.[101] In *Buente v. Allstate Property & Casualty Insurance Co.*,[102] a federal district court judge held that Hurricane Katrina caused a flood, and the policy's flood exclusion was unambiguous and enforceable.[103]

After these first two published opinions were released, *Leonard v. Nationwide Mutual Insurance Co.*[104] proceeded to trial. In *Leonard*, the

and caused damage to the flooring inside the home or to the structural members of the house, neither of which was defective at completion of construction and certification for occupancy, coverage would not have been provided under the [standard] 1986 ISO [policy provisions]."). Interestingly, less than a year earlier, the Fourth Circuit issued an unpublished opinion that took a more narrow view of coverage. *See* Travelers Indem. Co. of Am. v. Miller Bldg. Corp., No. 04-1536, 2005 WL 1690552 (4th Cir. July 20, 2005).

98. MISS. CODE ANN. § 83-13-5 (2006).

99. MISS. CODE ANN. §§ 83-34-1 to -29 (2006).

100. No. 1:05CV559 LTS-JMR, 2006 WL 1442489 (S.D. Miss. May 24, 2006).

101. *Id.* (citing Grace v. Lititz Mut. Ins. Co., 257 So. 2d 217 (Miss. 1972)).

102. No. 1:05 CV 712 LTS JMR, 2006 WL 980784 (S.D. Miss. Apr. 12, 2006).

103. *Id.* at *1 ("Since the water that entered and damaged the plaintiffs' home was tidal water, I find that the damage caused by this inundation is excluded from coverage under the Allstate policy. . . . The inundation that occurred during Hurricane Katrina was a flood, as that term is ordinarily understood. . . .").

104. 438 F. Supp. 2d 684 (S.D. Miss. Aug. 15, 2006).

plaintiffs owned a home in Pascagoula, Mississippi, that suffered significant damage as a result of Hurricane Katrina. The cause of the damage (wind versus flood) was central to the ensuing coverage dispute. The court found that the concurrent cause clause of the Nationwide policy, i.e., purporting to exclude coverage for damages caused by a combination of the effects of water (an excluded loss) and wind (a covered loss), was ambiguous and therefore invalid.[105] The court found that damage from wind was covered even if the home suffered storm surge flooding at or near the same time as the wind damage, and the insurer had the burden to prove what portion of the loss was attributable to flooding.[106]

Similarly, in the most recent Mississippi opinion, *Guice v. State Farm Fire & Casualty Co.*,[107] the court recognized that the cause—wind or rain or storm surge—of various items of damage was a question of fact but expressed the view that damage attributable to wind and rain would be covered regardless of whether an inflow of water caused additional, excluded damage.[108]

Accordingly, in Mississippi, it appears insurers can no longer argue that the entire loss is excluded based on concurrent cause clauses and exclusions in homeowners policies. Insurers may rely only upon the standard flood or water exclusions, and each disputed case must be decided on an individual basis.

2. Louisiana's Valued Policy Law

Louisiana's VPL provides that where the property's value has been utilized to determine the policyholder's insurance premiums, "in the case of a total loss the insurer shall compute and indemnify or compensate any covered loss of, or damage to, such property which occurs . . . without deduction or offset."[109] Although referring to a fire insurance policy, the statute arguably covers all property insurance policies.[110] Unfortunately, when Hurricanes Katrina and Rita wreaked havoc on coastal Louisiana, Louisiana courts had not applied the statute in circumstances where the insured property was a total loss due to both covered and noncovered perils.[111]

105. *Id.* at 694.
106. *Id.* at 693–95.
107. No. 1:06CV1-LTS-RHW, 2006 WL 2359474 (S.D. Miss. Aug. 14, 2006).
108. *Id.* at *4.
109. LA. REV. STAT. ANN. § 22:695 (2006).
110. Several cases apply "fire insurance" statutes to homeowners policies. *See, e.g.*, Washington v. Allstate Ins. Co., Civ. A. No. 91-3779, 1992 WL 167030, at *3–4 (E.D. La. June 30, 1992); Grice v. Aetna Cas. & Sur. Co., 359 So. 2d 1288, 1291 (La. 1978); Smith v. Metro. Prop. & Cas. Ins. Co., 868 So. 2d 57, 59 (La. Ct. App. 2003).
111. The statute had been applied to situations involving a total loss caused solely by a covered peril. *See* Real Asset Mgmt., Inc. v. Lloyd's of London, 61 F.3d 1223 (5th Cir. 1995) (hurricane); LaHaye v. Allstate Ins. Co., 570 So. 2d 460 (La. Ct. App. 1990) (fire).

Numerous class action suits have been filed in Louisiana on behalf of plaintiffs seeking full face value of their policies under Louisiana's VPL.[112] In one of them, *Wallace v. Louisiana Citizens Property Insurance Co.*,[113] the federal court remanded the matter back to state court to determine whether or not the insureds were entitled to the total value of the policy in the event of a total loss under the VPL.[114] In another case, the same district court retained jurisdiction and denied the plaintiffs' request for remand.[115] Accordingly, it seems the issue will be decided on both state and federal levels.

At least two federal courts in Louisiana have rejected the contention that an insurer must pay the face value of the policy under the VPL where the loss was caused by both covered and noncovered perils. First, in *Turk v. Louisiana Citizens Property Insurance Corp.*,[116] the court held that the insurer is responsible for paying only the percentage of the loss attributable to the covered peril.[117] Still more recently, in *Chauvin v. State Farm Fire & Casualty Co.*,[118] the court held Louisiana's valued policy, which it found to be ambiguous, did not allow full recovery for total loss caused by hurricanes to insured homes. The most hotly contested issue was whether Louisiana's VPL mandates "that an insurer pay the full value of the covered property stated in the policy in the event that a total loss by any cause occurs simultaneously with a covered loss, however small."[119]

The insureds contended that because some of their damage was caused by wind and/or rain, they were entitled to recover the full value of their homes. The court found this interpretation to be absurd and thus impermissible:

> Because plaintiffs' proposed interpretation would lead to such absurd consequences, the Court must reject it. If the VPL has the meaning plaintiffs ascribe to it, an insured holding a valued homeowner's policy that covered wind damage but specifically excluded flood losses could recover the full value of his policy if he lost 20 shingles in a windstorm and was simultaneously flooded under 10 feet of water. The insurer would thus have to compensate the covered loss of a few shingles at the value of the entire house. In effect, the insurer would be required to pay for damage not covered by the policy and for which it did not

112. *See* Wallace v. La. Citizens Prop. Ins. Co., Civ. A. No. 06-0114, 2006 WL 851401, at *1 (E.D. La. Mar. 16, 2006); Davis v. State Farm Fire & Cas., Nos. 06-0560, 06-0596, 06-0830, 06-0831, 06-1090, 06-1091, 06-1092, 06-1242, 06-1597, 2006 WL 1581272, at *1 (E.D. La. June 7, 2006); Chauvin v. State Farm Fire & Cas. Co., 450 F. Supp. 2d 660 (E.D. La. 2006) (holding Louisiana's valued policy law ambiguous).

113. No. Civ. A. 06-0114, 2006 WL 851401 (E.D. La. Mar. 16, 2006).

114. *Id.* at *1.

115. *Davis*, 2006 WL 1581272, at *1.

116. No. Civ. A. 06-144, 2006 WL 1635677 (W.D. La. June 7, 2006).

117. *Id.* at *1.

118. 450 F. Supp. 2d 660 (E.D. La. 2006).

119. *Id.* at 665.

> charge a premium. Such a result would be well outside the boundaries of any party's reasonable expectation of the operation of an insurance contract.[120]

The court also found support for its holding in legislative intent, which suggested the VPL was enacted to "regulate the valuation of a covered loss, not to create coverage for perils not covered under the policy."[121] Although it "would have welcomed a valid basis to alleviate the financial losses suffered by so many Louisiana homeowners," the court was bound by the legislative intent of fixing valuations of losses and could not extend coverage to noncovered perils.[122]

B. *Jurisdictional Issues*

At the forefront of the hurricane litigation debate is the proper jurisdiction under which insurance claims, including those alleging a violation of Louisiana's VPL, should be heard. An apparent majority of recent federal decisions have remanded such cases back to state court.[123] Although insurance companies regularly claim federal diversity jurisdiction applies, federal courts tend to remand when the claims at issue involve the plaintiffs' local insurance agents for breach of fiduciary duties and negligent failure to procure adequate homeowners and flood insurance. For example, in *Seruntine v. State Farm Fire & Casualty Co.*,[124] the court held that the plaintiffs' state law claims against their insurance agents defeated diversity jurisdiction.[125] The fact that the claims may have arisen out of procurement of federally backed flood insurance did not preempt state tort law for removal purposes.[126]

Insurers have also tried, without success, to argue that the Multiparty, Multiforum Trial and Jurisdiction Act of 2002 ("MMTJA") requires that such claims be tried in federal court.[127] The original jurisdiction provision of the MMTJA, codified at 28 U.S.C. § 1369, grants original federal jurisdiction over "any civil action involving minimal diversity between adverse parties that arises from a single accident, where at least 75 natural persons

120. *Id.* at 666.

121. *Id.* (citing Atlas Lubricant Corp. v. Fed. Ins. Co., 293 So. 2d 550, 556 (La. Ct. App. 1974) ("The legislative intent of these [valued policy] laws was to prevent over-insurance and other abuses, that is, to keep insurers and their representatives from writing insurance on property for more than it is actually worth.").

122. *Id.* at 669. Having disposed of the case on this basis, for reasons of comity, the court declined to decide whether Louisiana's valued policy law applies to hazards other than fire. It noted that this question was significant and unsettled and would be best resolved by state courts in the first instance. *Id.* at 664–65.

123. Seruntine v. State Farm Fire & Cas. Co., 444 F. Supp. 2d 698, 704 (E.D. La. 2006); Southall v. St. Paul Travelers Ins. Co., No. 06-3848, 2006 WL 2385365, at *6 (E.D. La. Aug. 16, 2006); Harrington v. Lexington Ins. Co., No. 06-1440, 2006 WL 2192853, at *3 (E.D. La. Aug. 1, 2006).

124. 444 F. Supp. 2d 698 (E.D. La. 2006).

125. *Id.* at 702–03.

126. *Id.* at 704.

127. *Southall*, 2006 WL 2385365, at *1–2.

have died in the accident at a discrete location."[128] The term *accident* means "a sudden accident, or a natural event culminating in an accident, that results in death incurred at a discrete location by at least 75 natural persons."[129] Noting its requirement to construe statutes strictly in favor of remand, the *Southall v. St. Paul Travelers Insurance Co.* court disagreed that Hurricane Katrina was an "accident" within the meaning of this statute:

> Contrary to Defendant's assertion, this Court determines that it is anything but *clear* that Hurricane Katrina was an "accident" within the meaning of the statute. If anything, it is more *clear* that it was *not* an accident within the meaning of this statute. This Court concludes that although more than 75 died as a result of Hurricane Katrina and its aftermath, those deaths did not arise from a "single accident" and did not occur at a "discrete location" so as to trigger jurisdiction under this statute.[130]

The court also summarily rejected the insurer's argument that supplemental jurisdiction existed under 28 U.S.C. § 1441(e)(1)(B).[131]

C. *Extension of Time to File Hurricane Lawsuits*

When Hurricanes Katrina and Rita hit Louisiana in August and September 2005, Louisiana law permitted insurers to require insureds by contract to bring claims within one year of the date of loss.[132] In response to the extraordinary circumstances faced by many Louisiana citizens, the Louisiana legislature enacted new legislation extending by one year the deadline for most insureds to sue their insurers for hurricane-related claims (commonly known as Acts 2006, Nos. 739 and 802).[133] The Louisiana Supreme Court's unanimous decision upholding the 2006 Acts is summarized in this section.[134]

1. 2006 Acts

The Louisiana legislature found that the hurricanes created a statewide emergency that imposed undue hardship on Louisiana residents, thereby justifying passage of the 2006 Acts.[135] Act 739 provides that the deadline

128. *Id.* at *5 (citing 28 U.S.C. § 1369).
129. *Id.* (citing 28 U.S.C. § 1369(c)(4)).
130. *Id.*
131. *Id.* at *6. Of course, any suit involving coverage under federally backed standard flood insurance policies may well end up in federal court under federal question jurisdiction. *See, e.g.*, Greer v. Owners Ins. Co., 434 F. Supp. 2d 1267, 1270 (N.D. Fla. 2006).
132. LA. REV. STAT. ANN. § 22:629(A)(3) (2004), *amended by* H.R. 1289, Leg., Reg. Sess. (La. 2006) & H.R. 1302, Leg., Reg. Sess. (La. 2006).
133. State v. All Prop. & Cas. Ins. Carriers Licensed to Do Bus. in the State of La., 937 So. 2d 313, 317 (La. 2006) (citing 2006 La. Sess. Law Serv. 739 (West) (codified in part at LA. REV. STAT. ANN. § 658.3) [hereinafter Act No. 739]; 2006 La. Sess. Law Serv. 802 (West) [hereinafter Act No. 802]).
134. *All Prop. & Cas. Ins. Carriers*, 937 So. 2d at 330.
135. *See* Act No. 802, § 1 (the "undue hardships" include, inter alia, "the loss of personal legal documents including insurance contracts, the complexity of legal issues, discerning the distinctions between flood insurance, hurricane insurance, and homeowners insurance

for filing Katrina-related claims under any homeowners insurance (including tenant and condominium homeowners policies), personal property insurance, or commercial property insurance policy is September 1, 2007, regardless of the policy's stated deadline.[136] Act 739 extends the deadline to file claims for damage caused by Hurricane Rita until October 1, 2007.[137] Act 802 extends the "prescriptive period"[138] for insureds to file suit against an insurer

> on any homeowners' insurance policy, including tenant and condominium policies, personal property insurance policy, commercial property insurance policy, or flood insurance policy, on any automobile or fleet policy for loss or damage to an insured's vehicle caused by flood, wind, or rain, or on any policy for loss or damage to crop or livestock, when such loss or damage was caused by or as a result of Hurricane Katrina or Hurricane Rita, or both.[139]

The deadline to file any such Katrina-related claim is September 1, 2007, and the deadline to file any such Rita-related claim is October 1, 2007.[140]

2. Litigation

Anticipating a court challenge to the 2006 Acts, the legislature included a provision directing the Louisiana attorney general to file a declaratory judgment lawsuit to determine their constitutionality.[141] Accordingly, the attorney general sued all property and casualty insurers licensed to do business in the State of Louisiana but dismissed suits against those that stipulated they would voluntarily abide by the provisions of the 2006 Acts.[142] After a removal and remand, the attorney general filed a writ of certiorari asking the court to exercise its supervisory jurisdiction over the case due to the impending one-year anniversary of Hurricane Katrina on August 29, 2006.[143] The court granted the writ and remanded the matter to the district court for an expedited hearing. The state district court held its hearing the following day, and immediate review of its ruling that the

and understanding how these types of coverage work together, possible multiple insurance carriers, the limited availability of adjusters and the time constraints on such adjusters in processing the more than one and one-half million claims filed for Hurricane Katrina and Hurricane Rita combined, complex negotiations with insurance companies, and decisions as to whether to enter into mediation offered by the Louisiana Department of Insurance.").

136. *See* Act No. 739, § 2 (codified at LA. REV. STAT. ANN. § 22:658.3 (A) (2006)).

137. *Id.* (codified at LA. REV. STAT. ANN. § 22:658.3 (B) (2006)).

138. A "prescriptive period," as used here, is analogous to a "limitations period" in which to file a claim in common law jurisdictions. *See* LA. CIV. CODE ANN. art. 3447 (2006) ("Liberative prescription is a mode of barring of actions as a result of inaction for a period of time.").

139. Act No. 802, § 2.

140. *Id.*

141. *See* Act No. 739, § 3; Act No. 802, § 3.

142. State v. All Prop. & Cas. Ins. Carriers Licensed to Do Bus. in the State of La., 937 So. 2d 313, 316 (La. 2006). At the time of trial, only three insurance companies remained as defendants: Allstate, State Farm Insurance Co., and USAA Insurance Co. *Id.*

143. *Id.* at 321.

2006 Acts were constitutional was sought.[144] After a hearing, the court issued a unanimous decision holding that the 2006 Acts do not violate the U.S. or Louisiana Constitutions.

The insurers argued that the retroactive extension of prescriptive periods provided by the 2006 Acts violates the Contract Clauses of the U.S. and Louisiana Constitutions by substantially altering the contractual relationship between them and their insureds.[145] The court recited a four-step test based on the U.S. Supreme Court's decision in *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*[146] to guide its analysis of whether the 2006 Acts were constitutionally valid.[147]

The first inquiry—whether the state law actually impairs a contractual relationship—was readily satisfied. Extending the deadline for defendants' policyholders to file suit against them obviously impairs the contractual relationship between defendants and their policyholders.[148]

The second step requires the court to determine if the impairment "is one of constitutional dimension."[149] The more severe the impairment, the more carefully the court must examine the nature and purpose of the legislation.[150] The court held that impairments were "more than minimal alteration of the insurers' contractual obligations" but less than "total destruction of the insurers' contractual expectations."[151] The court noted that insurance is a heavily regulated industry, and the previous one-year prescriptive period was set by statute. For these reasons, the insurers knew or should have known that a change in the prescriptive period "was a legal possibility."[152]

Accordingly, the court held that although it would conduct a constitutional inquiry, it would give considerable deference to the legislature's judgment when performing the third step of the analysis, i.e., discerning whether there was a significant and legitimate public purpose for the 2006 Acts.[153] The public purpose inquiry is "primarily designed to prevent a state from embarking on a policy motivated by a simple desire to escape its financial obligations or to injure others through the repudiation of debts

144. *Id.*
145. *Id.* at 319. The Contract Clause of the U.S. Constitution provides that "[n]o state shall . . . pass any . . . law impairing the Obligations of Contracts." U.S. CONST. art. I, § 10. Similarly, the Contract Clause of the Louisiana Constitution states that "[n]o bill of attainder, ex post facto law, or law impairing the obligation of contracts shall be enacted." LA. CONST. art. I, § 23.
146. 459 U.S. 400 (1983).
147. *See All Prop. & Cas. Insurers*, 937 So. 2d at 323–24.
148. *Id.* at 324.
149. *Id.*
150. *Id.* (citing Segura v. Frank, 630 So. 2d 714, 729 (La. 1994)).
151. *Id.* at 325.
152. *Id.*
153. *Id.*

or the destruction of contracts or the denial of means to enforce them."[154] The court referenced (1) the fact that the 2006 Acts applied primarily to private businesses and individuals, not to the state; and (2) the stated purpose of Act 802 itself, which described the devastation that the hurricanes inflicted upon "hundreds of thousands of Louisiana citizens" and the "subsequent hardships" that they suffered.[155] The court noted the "inadequacy of words to describe the total devastation of property, community and social structure which are the after-effects of these catastrophic storms."[156] Not surprisingly, the court found that the 2006 Acts served a significant and legitimate public purpose.

The fourth and final step is a balancing test: "whether the adjustment of the rights and responsibilities of the contracting parties is based upon reasonable conditions and is of a character appropriate to the public purpose justifying the legislation. . . ."[157] The court found that the impairment suffered by the defendants, although substantial, is "of the type that may be anticipated in the highly regulated industry."[158] The fact that the state is also an affected property owner is "incidental" to the scope of the matter at issue.[159]

In sum, the court found that the 2006 Acts are both "appropriate and reasonable in order to protect the rights of the citizens of Louisiana and their general welfare."[160]

The defendants also alleged that Act 802 violated the Supremacy Clause of the U.S. Constitution because it included flood insurance among the types of insurance to which it applies.[161] The court determined that the legislature's use of the phrase "or flood insurance policy" in Act 802 could be read to reference "types of flood insurance policies other than the federally regulated flood insurance program."[162] Accordingly, there was no implication of the Supremacy Clause, and the flood insurance reference did not need to be severed from the remainder of the legislation.[163]

154. *Id.* (citing *Segura*, 630 So. 2d at 731) (citation omitted).
155. *Id.* at 326 (citing Act No. 802, § 1).
156. *Id.*
157. *Id.*
158. *Id.* at 327.
159. *Id.*
160. *Id.* The court devoted only a footnote to the defendants' constitutional due process arguments, holding that its Contract Clause analysis would hold true for a due process analysis, too. *Id.* at 327 n.14.
161. *Id.* at 328.
162. *Id.* at 330.
163. *Id.*