Insurance Law Section

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JOSEPH N. KRAVEC, JR.

THE CHAIR'S MESSAGE

The Issues You Want to Know About

The two insurance areas that seem to top most practitioners' lists lately are those involving hurricane and long term care insurance issues. The Insurance Law Section has responded by making those issues a focal point of our activities this year.

At the upcoming Annual Convention in Seattle this summer, the Insurance Law Section will hold its educational program on Sunday, July 16. The program will largely be devoted to hurricane and long term care insurance issues. We have assembled speakers from the private, public, and public interest sectors to speak. For example, Bill Lockyer, California's Attorney General, will speak on mass disaster and health insurance issues.

We also plan to have a speaker from one of the hurricane-affected states to give you a firsthand view of the relevant insurance issues and tactics. Turn to page 11 for details on the education program.

Please mark your calendars to join us in Seattle on Sunday, July 16 for what will be an entertaining and

Chair's Message, continued on Page 2

Joseph N. Kravec, Jr.

INSIDE

Page 6
Creative Denial—the "Building Laws Exclusion"

Page 7
Gain Tips and Tactics from Your Colleagues

Page 8
Insurance Coverage for Asbestos Claims

Page 11
The Basic Necessities for Hurricane Insurance Claims

Annual Convention CLE

Blow Away the Exclusions and Recover from Hurricane Damage

By Charles M. Miller, Oakland, Calif.

Hurricane damage in the Gulf states and southeast surpassed all prior damage records in 2005. Consequently, thousands of those states' residents were either left with badly damaged homes or no homes at all. New Orleans remains heavily damaged and largely unoccupied. As a result of the devastation, homeowners have not only turned to the U.S. Federal Emergency Management Agency (FEMA), but also to their own insurers for help.

Although the insurance industry has responded with thousands of adjusters to evaluate and settle claims, many remain unsettled or underpaid. This article surveys a number of issues that have arisen between policyholders and their insurers[1] and suggests strategies on how the practitioner should approach, and hopefully resolve to the client's benefit some of the more difficult coverage disputes.

THE FLOOD EXCLUSION[2]

Homeowners' policies contain exclusions for flood damage. Those

Blow Away . . ., continued on Page 3

Chair's Message, cont. from Page 1

informative day with the Insurance Law Section. And please, also join us for the free cocktail reception that will follow the program.

The Section education program is but the Section's latest effort to promote hurricane and long term care insurance issues. Over the past several months, the Insurance Law Section, in conjunction with the Bad Faith Litigation Group, presented two seminars on hurricane insurance issues. The first was a telephone seminar last December and the second took place at the Winter Convention in February. The Insurance Law Section also held a roundtable on long term care insurance issues at the Winter Convention.

Our Section also published ATLA's first ever Section e-newsletter last fall with two articles addressing the hot-button hurricane insurance issues. Continuing this effort, this newsletter presents a new hurricane insurance article from Charles Miller who recently conducted seminars on hurricane insurance issues to the Mississippi Trial Lawyers Association.

I hope you enjoy the articles in this edition. As always, you should feel free to submit any suggestions about activities or issues you would like to see the Insurance Law Section address. To submit suggestions, please e-mail me at *insurance_section@ssem.com*.

And, of course, do not forget to contribute to or use our list server (www.atla.org, click on "List Servers" and look for the Insurance Law Section) and our document library (*www.atla.org/LegalResearchServices/Tier3/DocLibraries.aspx*). You can also visit our Home page (*www.atla.org/Sections/insurance/*) for listings of and links to all of our Section activities and benefits. I hope you will all take advantage of and contribute to these valuable resources.

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Blow Away. . . cont. from Page 1

exclusions may be any of the following:

> "loss caused by, resulting from, contributed to or aggravated by...flood, surface water, waves, tidal water or tidal wave, overflow of streams or other bodies of water."
>
> "loss caused by or resulting from flood, whether or not driven by wind."
>
> "Flood, surface water, waves, tidal water, overflow of a body of water, or spray from any of these, whether or not driven by wind."

Insurers are denying many claims because, in their view, the homes have been solely damaged by the floods which resulted when the hurricanes came ashore. Several courts have upheld the exclusion in the face of similar or identical claims.[3] Nonetheless, strong arguments for coverage remain in spite of the flood exclusion.

No Exclusion for Storm Surge—Storm surge caused much of the hurricane damage, particularly on the coasts.[4] In many commonly used flood exclusions the term "storm surge" is not expressly excluded. This is in spite of the fact that some insurers have recognized the need to exclude storm surge, in addition to flood. For example, one insurer has adopted the following flood exclusion:

> Waves, storm surge, tide or tidal waters, and the rising (including the overflow or breaking of boundaries) of lakes, ponds, reservoirs, rivers, harbors, streams and other similar bodies of water or surface waters, rain accumulation or run off, or by spray from any of the foregoing, whether driven by wind or not, including:
>
> a. The backup up of sewers or drains.
>
> b. Water below the surface of the ground...

Many courts have held that a policy will cover a specific cause of loss if it is not excluded. In *Pan American World Airways, Inc. v. Aetna Casualty Surety Co.*,[5] the court concluded that a policy's war exclusion did not expressly exclude hijacking.[6] In its ruling, the court noted that, unlike the exclusion in the policy, other insurers had adopted policy language which expressly excluded hijacking.[7]

The court concluded that the policy was ambiguous, and noted that, "[c]ontra referendum has special relevance as a rule of construction when an insurer fails to use apt words to exclude a known risk."[8] Similarly, where it can be shown that the hurricane damage resulted from a storm surge, an argument can be made that the damage is not excluded because the particular risk of loss-storm surge-is not expressly mentioned in the flood exclusion.

Concurrent Causation and the Flood Exclusion—It is now well known that many homes in New Orleans were flooded when the levees failed. The standard flood exclusions may also be inapplicable to flooding due to this levy, or similar failures.

In *State Farm Fire & Casualty Co. v. Von Der Lieth*,[9] the insured sought coverage for damage to their residence caused by a landslide. State Farm denied coverage based on the policy exclusion for losses caused by earth movement. In response, the insureds argued that there were two causes of loss, the earth movement which admittedly was excluded, and third party negligence, which was not included.

The third party negligence was the developer's failure in the planning, approving, and building the development which contained the insured's residence.[10] The court applied the efficient proximate cause doctrine, which states: "[w]hen a loss is caused by a combination of covered and specifically excluded risks, the loss is covered if the covered risk was the efficient proximate cause."[11]

The court concluded that there was coverage for the loss because at least one of the causes of the loss—third party negligence—was not excluded. Further, substantial evidence existed that proved third party negligence was the proximate cause of the loss.[12] If plaintiffs can show that the levy, or failures of similar man-made flood protection structures, resulted in the damage, then coverage may be afforded despite the flood exclusion.[13]

"If water marks are present, the insurer may conclude that the loss resulted solely from a flood and deny the claim. Such cursory investigation is contrary to insurance industry standards, and may result in a wrongful denial of coverage."

Was It Flood At All?—Insurers may be quick to deny claims based on the flood exclusion. Some denials undoubtedly will be based simply on a brief examination of the dwelling to determine if there are water marks on the walls. If water marks are present, the insurer may conclude that the loss resulted solely from a flood and deny the claim. Such cursory investigation is contrary to insurance industry standards, and may result in a wrongful denial of coverage.

For example, a more thorough investigation may reveal that the water damage was not from flood but rather from wind damage which tore off roofs and broke windows, thereby allowing water to enter and damage the home. This type of loss is covered under most homeowner policies. Therefore, the practitioner must conduct a thorough investigation to determine the exact cause of the loss. Such an investigation may include the following:

1. Is there any evidence that water entered the house?

continued on Page 4

Blow Away. . . cont. from Page 3

2. Is there any evidence that water entered the house through damaged or destroyed wind or roofs?
3. Even if there water marks on the walls of the interior of the house can that be attributed to wind driven rain through openings in the house versus flood waters?
4. How long after the loss did the first adjuster investigate the house?
5. What were the weather conditions between the time of the hurricane and first inspection of the house by the adjuster?
6. Is there eyewitness testimony on what caused damage?[14]
7. Is there television or other film of damage?
8. What caused damage to neighboring houses or businesses?

At the least, it may be possible to show that although some of the damage is excluded, other damage was covered. Several courts have permitted recovery under homeowner policies where at least some covered damage is shown.[15] However, the insured has the burden to show the covered damage.[16] Frequently, practitioners will be required to retain qualified experts to prove that the damage, at least in part, resulted from a covered cause of loss.

THE BATTLE OVER CONCURRENT CAUSATION

Over the past several years, insurers, responding to the development of the "concurrent causation" and "efficient proximate cause" doctrines, have adopted various forms of anti-concurrent causation exclusions. One such exclusion reads:

> We will not pay for loss or damage caused directly or indirectly by any of the following. Such loss or damage is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss.

Some courts have upheld the exclusion to preclude coverage where the damage is caused, at least in part, by a non-excluded cause of loss.[17] Nonetheless, other courts have found that the exclusion is contrary to public policy. California appellate courts have held that the exclusion is unenforceable because it is contrary to the insurance code.[18] One California appellate court observed:

> If we were to give full effect to the exclusion clauses contained in [the insurer's] policies "the insurer would be exempt even though an insured peril was the proximate cause of the loss. Such a result would be directly contrary to the provision in section 530, in accordance with the general rule for liability of the insurer where the peril insured against proximately resulted in the loss...." In short, the exclusion clauses are contrary to section 530, which provides that an insurer "is liable for a loss" proximately caused by a covered peril. Consequently, the exclusion clauses are not enforceable to the extent they purport to limit the insurer's liability beyond what is permitted by California law.[19]

In other states, which have similarly codified the efficient proximate cause doctrine, the courts also refused to enforce the anti-concurrent cause exclusion.[20] Some courts have rejected the anti-concurrent causation provision on the grounds that it is contrary to the insured's reasonable expectations. Therefore, in *Murray v. State Farm Fire & Cas. Co.*[21], the court observed:

> [W]hen an insurance carrier chooses to insure against a loss proximately caused by a particular peril, it may not rely on the mere concurrence of an excluded peril to deny coverage. The excluded peril must itself be the efficient proximate cause of the loss. Because State Farm's lead-in clause conflicts with the reasonable expectations of the parties, it should be construed to allow coverage for losses proximately caused by a covered risk, and deny coverage only when an excepted risk is the efficient proximate cause of the loss.[22]

It may be argued in jurisdictions which have not addressed the public policy issue that anti-concurrent causation provisions are unenforceable.

"Insurers frequently rely upon the traditional mold exclusion in the homeowner policies... Several courts have, however, rejected this exclusion in cases where the mold resulted from a covered cause of loss."

THE PROBLEM OF MOLD

Many water-damaged homes have developed mold. Indeed, most of the mold damage probably begun within 24 to 48 hours after the first water damage took place. Once begun, mold can become a more serious problem than the water damage. Removing mold is difficult and costly compared to remediating the water damage.

Insurers have sought to avoid mold claims and the possible substantial costs to remediate mold. Insurers frequently rely upon the traditional mold exclusion in the homeowner policies, which simply exclude: "Smog, rust or other corrosion, mold, wet or dry rot." Several courts have, however, rejected this exclusion in cases where the mold resulted from a covered cause of loss.[23]

Some policies contain a loss provision, which provides, "that any ensuing loss to property described in Coverages A and B [Dwelling and Other Structures] not excluded or excepted in this policy is covered." Many courts, construing this language, have held that the loss is covered even if it caused by an excluded cause of loss.[24] Accordingly, it may be argued that mold damage is covered when it ensues from an excluded cause of loss.

In response to this argument, insurers frequently point out that even

though the mold ensues it is still not covered because the policy contains a mold exclusion.[25] This position, however, appears to conflict with the widely accepted interpretation of the mold exclusion that it only applies where the mold caused the loss and, the mold was not caused from a covered peril.[26] A Pennsylvania Court of Appeal also rejected the insurer's argument in *Tatalovich v. Pennsylvania National Mutual Casualty Insurance Company,*[27] where the court concluded:

> The Defendant contends that mold cannot be covered by the ensuing loss clause because it is specifically "excluded or excepted" in the policy. We reject this argument because it would completely emasculate the ensuing loss clause. At best, the language in the ensuing loss clause is reasonably susceptible to more than one meaning and reasonably intelligent persons could differ as to whether mold can be an ensuing loss. Therefore, the clause is ambiguous and must be construed against the Defendant and in favor of the Plaintiffs.[28]

It can be anticipated that insurers will continue to resist providing full coverage for hurricane damage. This article is a starting point to address the most serious insurance coverage issues for those who suffered losses from the hurricanes. Insurers may raise other exclusions, such as the workmanship exclusion, the exclusion for power losses, and exclusions related to the insured's failure to protect property.

NOTES

1. Although the focus of this article is on homeowners' policies the same issues discussed herein would also apply to business property policies, business interruption policies, and similar coverage.
2. Also see 78 ALR 4th 817 and 48 Proof of Facts 3d 419
3. See *E.B. Metal & Rubber Industries, Inc., v. Federal Insurance Company*, 84 A.D.3d 662, (App. Div.3d Dept., 1981), and *Hardware Dealers Mutual Ins. Co. v. Berglund*, 393 S.W.2d 309 (Tex. 1965)
4. The National Oceanographic and Atmospheric Administration ("NOAA") describes storm surge as "water that is pushed toward the shore by the force of the winds swirling around the storm." [i]. A storm surges is not a giant wave. Rather, it is a "rise in sea level along a coastline caused by the combination of a hurricane's surface winds and the physical geography of a coastline." An Australian government site defines a "storm surge" as "a rise above the normal water level along a shore that is the result of strong onshore winds and /or reduced atmospheric pressure." (www.nhc.noaa.gov/HAW2/english/storm_srg.shtml., and p://www.comet.ucar.edu/nsflab/web/hurricane/313.htm.)
5. 505 F.2d 989 (2nd Cir. 1974).
6. The Exclusion read: "This policy does not cover anything herein to the contrary notwithstanding loss or damage due to or resulting from:
'1. Capture, seizure . . . or any taking of the property insured or damage to or destruction thereof . . . by any military . . . or usurped power, whether any of the foregoing be done by way of requisition or otherwise and whether in time of peace or war and whether lawful or unlawful . . .;
'2. war, . . . civil war, revolution, rebellion, insurrection or warlike operations, whether there be a declaration of war or not;
'3. . . . riots, civil commotion."
(*Pan American v. Aetna*, 505 F.2d at 1004.)
7. Id., at 1000.
8. Id.
9. 54 Cal. 3d 1123 (1991)
10. *State Farm v. Von Der Leth*, 54 Cal. 3d at 1134.
11. Id. at 1135. Other courts have also adopted the doctrine. See *Riche v. State Farm Fire & Cas. Co.*, 356 So.2d 101 (LA Ct. App.) cert. & rev. denied 358 So. 2d 639 (La. 1978) ("[I]t is sufficient to show that the particular peril was the efficient cause of the loss notwithstanding that another cause or causes contributed to the loss."), *Lorio v. Aetna Insurance Company* 232 So.2d 490 (La. 1970), *Safeco Ins. Co. v. Guyton*, 629 F.2d 551 (1982) (coverage found for flood damage because operative cause of loss was third-party negligence in maintaining flood control systems), and *Grace v. Littitz Mutual Ins. Co.*, 257 So. 2d 217, 224 (Sup. Ct. Miss. 1972) (it is sufficient to show that wind was the proximate or efficient cause of the loss or damage notwithstanding other factors contributed to the loss)
12. Id. at p. 1132
13. Many insurers have responded to the efficient proximate cause and concurrent cause doctrines by expressly excluding losses that result from both covered and non-covered losses. The issues by raised by these exclusions are discussed later in this article.
14. See *Loyola University v. Sun Underwriters Ins. Co. of New York*, 93 F. Supp. 186 (E.D. La. 1950) affirmed 196 F. 2d 169 (5th Cir. 1952)
15. See e.g., *Southern Hotels Limited Partnership v. Lloyd's Underwriters at London Companies, et al.*, 1997 U.S. Dist. LEXIS 8384 (E.D. La.) (court allocated 35 percent of damage to wind driven rain and 65 percent to flood)
16. See *Constitution State Insurance Co. v. Werner Enterprises, Inc.* 1987 U.S. Dist LEXIS 6023 (E.D. La.), and *Ludlow Corporation v. Arkwright-Boston Manufacturers Mutual Ins. Co.*, 317 So.2d 47 (Miss. 1975).
17. *Boteler v. State Farm Casualty Ins. Co.* (Miss. App., 2004) 876 So.2d 1067.
18. See *Howell v. State Farm Fire & Cas. Co.*, 218 Cal.App.3d 1446 (1990), and *Palub v. Hartford Underwriters Ins. Co.*, 92 Cal.App.4th 645 (2001).
19. *Howell v. State Farm*, 218 Cal.App.3d at 712-713.
20. See, *Western National Mut. Ins. Co. v. University of North Dakota* (N.D. 2002) 643 N.W.2d 4, 2002 ND 63
21. (WV 1998) 203 W.Va. 477, 509 S.E.2d 1, and see (*Cox v. State Farm Fire & Cas. Co.*, 217 Ga.App. 796, 459 S.E.2d 446 (1995)), and *Safeco Ins. Co. of Am. V. Hirschman*, (WA 1989) 773 P.2d 413. But at least five jurisdictions hold that the lead-in clause is enforceable: Alaska (*State Farm Fire & Cas. Co. v. Bongen*, 925 P.2d 1042 (Alaska 1996)); New York (*Kula v. State Farm Fire & Cas. Co.*, 212 A.D.2d 16, 628 N.Y.S.2d 988 (N.Y.A.D.1995)); Utah (*Alf v. State Farm Fire & Cas. Co.*, 850 P.2d 1272 (Utah 1993) and *Village Inn Apartments v. State Farm Fire & Cas. Co.*, 790 P.2d 581 (Utah App.1990)); Nevada (*Schroeder v. State Farm Fire & Cas. Co.*, 770 F.Supp. 558 (D.Nev.1991)); and Arizona (*Millar v. State Farm Fire & Cas. Co.*, 167 Ariz. 93, 804 P.2d 822 (1990)).
22. Id. at p. 491, 15.
23. See *Belt Painting Corp. v. TIG Insurance*, (N.Y. Court of Appeals July 1, 2003), and *Richardson v. Nationwide Mutual Insurance Co.*, (D.C. Cir. June 12, 2003), *Simonetti v. Selective Ins. Co.*, 2004 N.J. Super LEXIS 384, *Liristis v. American Family Mut.* Ins. Co., 61 P.3d 22 (Ariz. App. 2002), *DeLaurentis v. United Services Auto. Assoc.*, 2004 Tex. App. LEXIS 8758, *Bowers v. Farmers*, 99 Wn. App. 41, 991 P.2d 734 (2000), *Graff v. Allstate*, 113 Wn. App. 799, 54 P.3d 1266 (2002), and *Home Ins. Co. v. McClain* 2000 WL 144115 (Tex. App.) But See *Leverence v. USF&G*, 158 Wis. 2d 64, 462 N.W. 2d 218 (1990) (although mold constitutes a pollutant there was no discharge because the mold grew from water vapor trapped in the walls of a prefabricated home), *Cooper v. American Family Mutual Ins. Co.*, 184 F. Supp. 2d 960 (D. Az. 2002) (no coverage under homeowners policy for mold resulting from plumbing leak), *Lexington Ins. Co. v. Unity/Waterford-Fair Oaks, Ltd.*, 2002 U.S. Dist. LEXIS 3594 (N.D. Tex. 2002)(no coverage but policy defined fungus as a pollutant), *West American Insurance Co. v. Band & Desenberg*, 925 F. Supp. 758 (M.D. Fla. 1996), aff'd, 138 F. 3d 1428 (11th Cir. 1998)(no coverage for sick building syndrome when air conditioning system circulated air borne contaminants from attic space into building office space).
24. See *Sentinel Management Co. v. New Hampshire Ins. Co.*, 563 N.W.2d 296 (Minn. App. 1997) (exclusion only applies to part of loss attributable to the excluded defective construction), *Phillips v. United Services Automobile Assoc.*, 2004 WL 578604 (Tenn. Ct. App.), *Arnold v. Cincinnati Ins. Co.*, 2004 WL 2110280 (Wis. App.), *Tento International Inc. v. State Farm Fire and Casualty Co.*, 222 F.3d 660 (9th Cir.2000), and *Blaine Construction Corp. v, Insurance Co. of North America*, 171 F.3d 343 (6th Cir.1999), But see *Weeks v. Cooperative Insurance Companies*, 817 A.2d 292 (N.H. 2003), *Swire Pacific Holdings, Inc. v. Zurich Ins. Co.*, 139 F.Supp.2d 1374 (S.D. Fla. 2001), *Alwart v. State Farm Fire and Cas. Co.*, 508 S.E.2d 531 (N.C. App. 1998), and *Morgan v. Auto Club Family Ins. Co.*, (LA App. 2005) 899 So. 2d 135.
25. See *Wright v. Safeco Ins. Co. of America*, (WA App. 2004) 109 P.3d 1.
26. *Bowers v. Farmers*, 99 Wn. App. 41, 991 P.2d 734 (2000)
27. 2003 WL 22844173 (Pa.Com.Pl.)
28. Id.

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Creative Denial—the "Building Laws Exclusion"

By Robert L. Collins, South Padre Island, Texas

November 17, 2003 was an eventful day in Houston, Texas. Because of widespread thunderstorms, 19 confirmed tornadoes touched down in the city. One F-2 tornado was confirmed near the Reyes home in Southwest Houston.

Mr. Reyes was only worried about his family when his wife called him at work with the news that the tornado hit their home—as Mr. Reyes sped to see to his family, he was not concerned about how he would repair the damage to the home. He was insured by Allstate Insurance Co. and has become convinced from viewing its years of advertising that he is in "Good Hands."

The Reyes family ended up with an Auto Zone sign from over a mile away, now adorning their seriously damaged roof. Rain poured in through the resulting holes in the roof and ceilings. Mr. Reyes reported the damage that day and immediately began to do temporary repairs to minimize the water leaking into the home.

The Allstate adjuster showed up a few days later, spent a few minutes in the home, left without explanation of coverage or any indication of future action. The company agreed to a minimal payment to the homeowner of such a paltry amount that it barely paid for the emergency repairs. Allstate persisted in its refusal to pay for the full repair of the substantial roof and water damage in the Reyes home, resulting in a very frustrated homeowner seeking counsel.

We immediately sent experts to inspect the home. We suspected serious mold growth from the water-intrusion damage. Our experts also performed indoor air quality testing and causation evaluation. Since the house was built before 1978, we also conducted asbestos tests. The experts found serious mold growth and confirmed suspicions of asbestos presence. Asbestos was located in the drywall installation materials and floor tiles. Allstate ignored our request to reconsider the case, and the inevitable lawsuit followed.

Robert L. Collins

Texas has become a virtual playground for corporate wrongdoers and insurers since George W. Bush was first elected governor in 1995. They have been successful in seizing every position on the Texas Supreme Court and in the legislature, and their maneuvering has reversed consumers' longstanding civil rights and effectively eliminating all medical malpractice liability in even the most egregious circumstances. These developments have led insurers to become particularly creative in their approaches to Texas trial and appellate courts, seeking expanded immunity from responsibility under the insurance policies they issue in this state.

The consistently pro-insurer and pro-corporatist Texas Supreme Court recently adopted further radical protections for insurers from being held to the "coverage" they sold. The court has allowed the insurance company to intervene in cases on appeal to assert claims or defenses that benefit the insurer rather than the insured. The court also allowed insurers to control defense counsel, control defense strategy, settle a case, and then sue the insured for the settlement amount and costs claiming that there was never coverage.

With this background of consistent victory in their quest to rescind civil rights of Texas consumers, it is little wonder that homeowners' insurance companies constantly push Texas Courts for creative and extreme rulings of "no coverage." No wonder Allstate became incensed that it was called upon to pay for the increased costs of asbestos remediation in the Reyes residence.

After all, Allstate, and others, had won the "mold wars" in Houston by "acquiring" the political power to rescind mold coverage in Texas by even more "tort reform," and they had forced changes in the state-approved policy form with a new, specific limitation of mold coverage to $5,000 for all remediation costs, regardless of the harm done to the affected homeowner. One can well imagine that Allstate's claims managers were quite upset to realize that the asbestos remediation required for the Reyes home was not affected by the new "mold" exclusion they had obtained.

Something had to be done!—So Allstate instructed its captive counsel to assert not one, but two positions asserting "no coverage." First, Allstate claimed it was not required to address the asbestos in the Reyes home, because there are no laws or regulations that require any special removal or remediation of asbestos found in residences.

When that approach failed, Allstate claimed the opposite—that the "Building Laws Exclusion" found in the new Texas homeowners policy excluded "pollutant" coverage, arguing further that asbestos is a "pollutant" and that since OSHA regulations apply to the workers who would remove the asbestos-laden sheetrock and floor tile, the "Building Laws Exclusion" applies and, as a result, there was no coverage for what Allstate characterized as "asbestos/ pollutant" remediation.

These arguments found no legal support—even radical pro-insurer Texas law of recent vintage. Likewise, they found no support in the proceedings before the Texas Department of Insurance that allowed the "Building Laws Exclusion" to be included in the state-approved Texas Homeowners policy at issue. Despite the lack of support

for its position, Allstate persisted and focused its defense on expansion of insurer immunity from coverage.

Unfortunately, Texas trial and appellate courts of the Bush era regularly adopt the flawed logic and absurd arguments for immunity from coverage that insurance companies assert. In this writer's view from almost 30 years of practice, the recent Texas experience of consistent success of the absurd insurer argument begets more of the same.

The insurer counsel, who are regularly appointed as judges in Texas, seem uniformly inclined, once on the bench, to adopt pro-insurer arguments in lockstep, as we all march toward a promised land where every American is forced by the government to pay higher premiums for no coverage at all.

The tragic result of this constant assault on logic and reason is that competent judges, like the one who rejected Allstate's argument in the Reyes case, who might rule on some basis other than a deep desire to please an insurance company, may become increasingly frustrated as they are targeted by the insurance companies for what has been referred to in Allstate's particular case as the "D.O.L.F. Strategy—a/k/a Defense of Litigated Files Strategy."

Reports of this "strategy" are that judges who the insurer has concluded might rule for a homeowner or insured in future cases are targeted for a "scorched earth" strategy for all cases pending in their court. The idea is that eventually these judges will become weary of the fight and the drag on their dockets by the relentless motions and discovery disputes orchestrated by the insurance companies through their captive employee lawyers to bring the entire judicial process to a halt. These judges will get the message and will get with the program of dismissing consumer victims' claims against insurance companies on summary judgment, like their more "enlightened" judicial colleagues on the federal bench.

As consumer advocates, our challenge is to spend the long hours needed to develop facts proving insurer misconduct—find the "asbestos," "green water damage, f/k/a mold" and other coverage to benefit homeowners we represent, even where the insurer claims there is no coverage. We must also dig deeper than we ever have, to find the proof to defeat insurer's bogus claims of exclusions to coverage. Maybe even one day we'll find the insider who admits the D.O.L.F. strategy details.

We must remind ourselves—and our judges and juries when we can—that Americans buy insurance to have coverage (even Texans think we do), so that damage to our home from a storm or some other unforeseen event will be repaired promptly, and that risk of catastrophic loss is spread. It is not as a prefiling fee to litigate coverage.

The basic rules of insurance favor our homeowner clients. The policies must be construed to grant coverage and any ambiguity must be resolved in the insured's favor. We must demand that trial courts and jurors enforce those rights. We can never assume validity of the insurer's assertions about what is or is not covered, and we must focus our proof on the human harms that result from the decisions insurers make to increase their profits.

The *Reyes* court had the courage to reject the insurer's creative assault on coverage and the Reyes home is finally being fully repaired after a settlement with Allstate for a multiple of actual damages. In the end, the insurer's creative attempts to deny coverage made me a better lawyer as they stirred my own efforts at creativity, resulting in a more effective damage model and a simpler approach to "telling the story" of the case. Thanks, Allstate. And don't worry—you ARE in good hands.

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Gain Tips and Tactics from Your Colleagues

The ATLA Exchange offers ATLA plaintiff members almost 20 insurance Litigation Packets, encompassing a variety of defendant insurers and issues, which will assist with handling bad faith insurance claims on behalf of injured clients. Some of these packets are listed below.

*Exchange Litigation Packets are developed by ATLA staff lawyers working closely with experienced ATLA plaintiff members. Visit the Exchange at www.exchange.atla.org or call 1-800-344-3023.

What You Need to Know About the Farmers Group of Insurance Companies: Structure of the Enterprise and Employee Incentive Program (April 2005)
Allstate Claim Core Process Redesign (CCPR) Implementation Training Manual (July 1995)

Allstate Unauthorized Practice of Law (November 2002)

Diffusing the Testimony of the "Independent" Medical Examiner (April 2004)

Insurance Bad Faith: Travelers Claims Professional Incentive Program (Updated January 2006)

Insurance Company Defense Experts in MBTI Cases: Cross-Examining Neuropsychologists, Psychiatrists, and Neurologists (January 2004)
Colossus: The Insurer's Use of Computer Software in Claims Evaluation (Updated June 2005)

UnumProvident Bad Faith: Deposition and Trial Transcript Collection (Updated November 2005)

UnumProvident Bad Faith: Occupational Stress Disability Deposition Collection (Updated November 2005)

UnumProvident Customer Care Center Claims Manuals - April 2001 Version and November 2002 Version

Insurance Coverage for Asbestos Claims
Laying Out a Case on Behalf of Insulation Contractors

By Scott N. Godes, Washington, D.C.

Companies that installed, repaired, and/or removed asbestos-containing insulation from the 1940s through the 1980s likely have insurance to protect them in the event they are held liable for asbestos-related claims. These companies may also have substantial insurance coverage for claims under comprehensive general liability (CGL) insurance policies.

For many years, insurers sold CGL policies that imposed no aggregate liability limit on claims arising from a policyholder's operations (known as premises/operations or non-products coverage), such as bodily injury claims due to alleged exposure to asbestos released during such insulation contracting operations.

This article summarizes the law regarding this type of premises/operations coverage. It also outlines a strategy on how to litigate an insurance coverage case against an insulation contractor relating to asbestos claims.

Scott N. Godes

NO AGGREGATE LIMIT

From the 1940s through approximately 1986, the insurance industry relied upon standard form CGL policies to insure thousands of businesses. The basic type of coverage in those policies was known as "premises/ operations" coverage.[1]

Premises/operations coverage was designed to provide broad and comprehensive coverage for liability arising out of a business' premises or operations.[2] For every covered accident or occurrence under those CGL policies, the policies promised to pay up to the policy limit.[3] No matter how many accidents or occurrences there were, CGL policies promised to pay for them.[4]

CGL policies, however, applied an aggregate limit, or overall cap, to certain other kinds of claims, known as "products hazard" claims and "completed operations" hazard claims.[5] The products hazard has three requirements, that the accident: 1) occurred away from the policyholder's premises; 2) involved the policyholder's product; and 3) occurred after the policyholder relinquished possession of the product.[6]

Generally, the completed operations hazard applies when the accident occurred after the policyholder's operations were complete.[7] For claims that meet all the requirements of either the products or completed operations hazard, an annual aggregate limit applies, in addition to per accident or per occurrence limits.[8] The aggregate limit caps total indemnity, without regard to the number of accidents or occurrences during the policy period.[9]

EXPOSURE TO INSULATION CONTRACTING OBLIGATIONS

A developing body of case law states consistently that premises/operations coverage applies to asbestos-related bodily injury claims arising from exposure to on-going insulation contracting operations.[10]

This case law is critical for policyholders facing asbestos-related bodily injury claims stemming from their contracting operations. Traditionally, insurers have applied the products hazard—and its aggregate limit—to nearly all asbestos-related bodily injury claims, whether based on exposure to on-going insulation contracting operations or not.[11] By doing so, insurers cut short the true value of the policyholder's asset.

Case law demonstrates, however, that such an approach is improper for claims arising from contracting operations. With no products and completed operations hazard-based aggregate limit applicable, this is a sensitive issue for insurers, and certain insurers continue to treat all asbestos-related bodily injury claims as subject to the products hazard and its corresponding aggregate limit, cutting short insurance available for policyholders.[12]

PRESENTING A CASE

For those policyholders for whom insurers refuse to provide premises/operations coverage for asbestos claims, a coverage trial may be necessary. There are three critical points for a policyholder to establish in such a trial: (1) explaining the policyholder's contracting operations; (2); explaining when the products and completed operations hazards apply; and (3) illustrating the nature of the claims against the policyholder.

The first step in a trial seeking premises/operations coverage for asbestos claims is to demonstrate that the policyholder installed, repaired, and/or removed asbestos-containing materials, besides manufacturing and/or distributing such products. This is a critical step because insurers may be quick to point to the policyholder's manufacturing and/or distribution operations, ignoring that the policyholder also installed, repaired, and/or removed those products. Two recent cases demonstrate that some policyholders that sold and/or manufactured asbestos products also installed, repaired, and removed asbestos products in their contracting operations. For example, *Travelers Cas. & Sur. Co. v. Gerling Global Reins. Corp. of Am.*, 419 F.3d 181, 184 (2d Cir. 2005) was a reinsurance dispute relating to premises/operations coverage for Owens Corning's contracting-

based claims, as opposed to manufactured products-based claims. And in *Nat'l Union Fire Ins. Co. v. Porter Hayden Co.*, No. AMD 03-3408, slip op at 2 (D. Md. Sep. 9, 2005), the court noted that one Porter Hayden division installed insulation, and another distributed it.

Moreover, the standard form complaints in asbestos-related bodily injury actions often are broadly pleaded, bringing claims against companies that manufactured, distributed, mined, and/or installed asbestos-containing materials. View a complaint in In re *New York City Asbestos Litig.*, No. 4000, Standard Complaint (BF1) (N.Y. Cty. Sup. Ct.), or on the Web site: http://www.nycal.net/PDFs/cmo/BF_Standard_Complaint.pdf. The court in Commercial Union Ins. Co., 698 A.2d at 1208, also detailed allegations in standard form complaints. Because plaintiffs can bring cases based on exposure to asbestos released during the defendant's contracting operations, however, the products hazard does not automatically apply.[13]

Former (and current) employees, such as job site foremen, estimators, and salesmen, may be able to testify on the types of jobs that the policyholder performed involving asbestos-containing materials. Ideally, these employees will be able to testify at trial as to the nature of the policyholder's business and where and when the policyholder installed, repaired, and/or removed asbestos-containing materials.

The insurance policies at issue also may provide telling details regarding the policyholder's contracting operations. For example, CGL policies generally describe the business of the policyholder and may describe the policyholder as an insulation contractor. Other policy provisions may state that premises/operations coverage was provided for asbestos insulation work.[14]

Also consider documents from the policyholder and the insurer. The policyholder may have contracts, correspondence with site owners, or even letterhead that notes the policyholder's installation operations during the relevant time periods. The insurer's underwriting files may detail the types of business in which the policyholder engaged at the time the policies were issued.

The insurer's current claim handling documents may also note the policyholder's business activities and the nature of the claims against the policyholder. Although insurers usually refuse to produce such documents, documents relating to claims handling are not privileged and are discoverable.[15]

EXPLAINING THE COVERAGE

Once the policyholder has established that it engaged in contracting operations, the next step should be to demonstrate how CGL coverage works, including how and when the products hazard and completed operations hazard apply. Because many insurers attempt to blur the products hazard and completed operations hazard definitions, it is important to show the finder of fact exactly when those hazards do and do not apply.

As noted above, the products hazard has three requirements: (1) off the premises; (2) arising out of the named insured's product; and (3) after relinquishment of physical possession and/or control of the product.16 Insurers often ignore these three requirements, however, arguing that all product liability claims in tort are subject to the products hazard, as a blanket rule.[17]

To avoid the insurers' broad-brush arguments, it is important to explain clearly the products hazard's three requirements. Consider using a demonstrative exhibit with an enlarged copy of the products hazard to walk through the requirements and show that they do not track the requirements in tort for an asbestos claim. In addition, consider using demonstratives with on-point cases during cross-examination of the insurers' claims handlers, who almost certainly will testify that all products liability claims are products hazard claims, contrary to the growing body of case law.[18]

Similarly, the plain language of the completed operations hazard shows that the hazard applies only to liability arising from the policyholder's completed operations. For example, the court in Frontier Insulation Contractors, Inc., 91 N.Y.2d at 177 said: "accidents or occurrences that allegedly took place while [an insulation contractor's] installation work was in progress" are premises/operations claims.

Also, in *Johnson v. Nat'l Union Fire Ins. Co.*, 56 Misc. 2d 983, 987, 289 N.Y.S.2d 852, 856 (Sup. Ct. Nassau Cty. 1968), aff'd, 33 A.D.2d 924, 309 N.Y.S.2d 110 (2d Dep't 1970), the court said that premises/operations coverage applies to "injuries caused by the contractor's work occurring during the policy period," even if "the injury occurs after the contractor has completed his operations."

Therefore, it is important to demonstrate that the completed operations hazard does not apply to claims under policies in place during ongoing operations, at a minimum. In cases in which insurers rely upon the completed operations hazard to avoid premises/operations coverage, it is important for the policyholder to demonstrate the full scope of its asbestos contracting activities, such as repair, ripout, and abatement work.

Many policyholders engaged in asbestos repair, ripout, and abatement work long after they stopped installing asbestos; evidence of such activities should prevent the insurer from applying the completed operations hazard to all claims as of the date by which the policyholder stopped installing asbestos. The court in Nat'l Union Fire Ins. Co. slip op. at 27-28 refused to allow the insurer to apply completed operations hazard to all claims after the policyholder stopped installing asbestos insulation.

OTHER HELPFUL DOCUMENTS

Other helpful documents include briefs and documents from the appellate records of cases that found that premises/operations coverage is appropriate for claims of exposure to asbestos during on-going contracting operations. Many of these documents demonstrate, for example, that insurers continually recycle previously rejected arguments regarding premises/operations coverage.[19]

continued on Page 10

Insurance Coverage...cont. from Page 9

Insurers' internal documents also may interpret premises/operations coverage to apply to contracting operations-based asbestos claims. Through discovery, policyholder's counsel may find that the insurer's own documents contradict the policy interpretation that the insurers counsel is espousing at trial. Internal case summaries, computer workbooks and claims handling manuals may provide telling information regarding to how the insurer interprets premises coverage in its own policies. Moreover, insurers' correspondence with their reinsurers almost certainly contains discussions to how the products hazard and the completed operations hazard apply.20

Insurers' litigation with reinsurers also provides a window into how insurers interpret premises/operations coverage. *See, e.g., Nat'l Cas. Co., No. 04-10167MLW, Affidavit of Mark C. Kareken in Support of National Casualty's Petition to Vacate an Arbitration Award Under §§ 9 U.S.C. 10(A)(I) and (3) (D. Mass. Jan. 13, 2005)*. The Wausau claim handler testified that "someone exposed to asbestos while working at a location where the insured was installing asbestos containing products would be an operations risk."

PROVE THAT CLAIMS ARE BASED ON EXPOSURE

The final step for the policyholder is to show that some of the underlying tort claims are based upon exposure to asbestos released during insulation contracting operations. The policyholder, however, does not bear the burden of proof on this issue.[21]

The policyholder's underlying defense counsel might be able to serve as witnesses on this issue, offering testimony about the facts on which cases and settlements were based. In addition, the policyholder should study the transcripts and exhibits from actual underlying trials; claimants often testify vividly that they were exposed to dust released when the policyholder cut, sawed, and mixed asbestos products. For example, claimants testifying in New York state court asbestos actions have told juries about being exposed to snow storms of dust created by installation contractors cutting, sawing and mixing asbestos containing installation all around them.[22] Testimony that the policyholder was using the product when the accident (or bodily injury) occurred should support the policyholder's argument that the claim does not satisfy the products and/or completed operations hazards. When a claim is based on the policyholder using the product in its ongoing operations, the products hazard does not apply.[23] Nor does the completed operations hazard apply.[24]

Because it is not subject to aggregate limits, premises/operations coverage is a highly valuable resource for any policyholder facing asbestos-related bodily injury claims based on exposure to asbestos released during contracting operations. Regardless of how insurers have classified asbestos claims in the past, case law recognizes that premises/operations coverage is appropriate for contracting operations-based asbestos claims. Policyholders with asbestos claims based on insulation contracting operations should not shy from taking action that will protect this valuable asset.

Notes

1. See, e.g., *Am. Emp. Ins. Co. v. Eagle, Inc.*, 122 Fed. Appx. 700, No. 03-31129 (5th Cir. Dec. 6, 2004).
2. See, e.g., *ACandS, Inc. v. Travelers Cas. & Sur. Co.*, ___ F.3d ___, Nos. 04-3926, 04-3929, 2006 WL 133546, at *1 (3d Cir. Jan. 19, 2006) (Alito, J.); Eagle, Inc., 122 Fed. Appx. at 701, 701 n.1; *Nat'l Cas. Co. v. First State Ins. Grp.*, __ F.3d ___, No. 05-1505, 2005 WL 3249456, at *1 (1st Cir. Dec. 2, 2005).
3. See, e.g., ACandS, Inc., 2006 WL 133546, at *1; Nat'l Cas. Co., 2005 WL 3249456, at *1.
4. See, e.g., ACandS, Inc., 2006 WL 133546, at *1; Nat'l Cas. Co., 2005 WL 3249456, at *1; Eagle, Inc., 122 Fed. Appx. at 701-02.
5. See, e.g., ACandS, Inc., 2006 WL 133546, at *1.
6. *Frontier Insulation Contractors, Inc. v. Merchants Mut. Ins. Co.*, 91 N.Y.2d 169, 176 (1997). (In standard form CGL policies after 1966, the products hazard substituted "bodily injury" for "accident.")
7. See, e.g., *Frontier Insulation Contractors, Inc. v. Merchants Mut. Ins. Co.*, 91 N.Y.2d 169, 176 (1997) at 176, n.*. (After 1966, in standard form CGL policies, bodily injury was substituted for accident.)
8. See, e.g., Eagle, Inc., 122 Fed. Appx. at 701-02.
9. See id.
10. See, e.g., Nat'l Cas. Co., 2005 WL 3249456, at *1, *6 n.1; Eagle, Inc., 122 Fed. Appx. at 701; Frontier Insulation Contractors, Inc., 91 N.Y. 2d at 176-178; *Porter Hayden Co. v. Commercial Union Ins. Co.*, No. 90254033/CL119651, slip op. at 13-14 (Md. Cir. Ct., Baltimore City 1996), aff'd sub nom *Commercial Union Ins. Co. v. Porter Hayden Co.*, 116 Md. App. 605, 698 A.2d 1167 (Ct. Spec. App. 1997).
11. E.g., in Eagle, Inc., 122 Fed. Appx. at 702; cf. ACandS, Inc., 2006 WL 133546, at *1, Travelers paid 45 percent of ACANDS claims as premises/operations claims.
12. See, e.g., Eagle, Inc., 122 Fed. Appx. 702.
13. See, e.g., Frontier, 91 N.Y.2d at 175-77.
14. See, e.g., Commercial Union Ins. Co., 698 A.2d at 1208.
15. See, e.g., *Brooklyn Union Gas Co. v. Am. Home Assurance Co.*, 2005 NY Slip Op. 08193 (1st Dep't Nov. 3, 2005); see also *Cont'l Cas. Co. v. Employers Ins. Co.*, No. 601037/03, Procedural Order No. 3 (N.Y. Cty. Mar. 25, 2004).
16. See, e.g., Frontier Insulation Contractors, Inc., 91 N.Y.2d at 176-77; Commercial Union Ins. Co., 698 A.2d at 1209.
17. See, e.g., Frontier Insulation Contractors, Inc., 91 N.Y.2d at 176-77; Commercial Union Ins. Co., slip op. at 13-14.
18. See, e.g., id.; Nat'l Union Fire Ins. Co., slip op.
19. Compare, e.g., *Cont'l Cas. Co. v. Employers Ins. Co.*, No. 601037/03, Continental's Proposed Findings of Fact and Conclusions of Law, at 141 et seq. (N.Y. Cty. Sup. Ct. Oct. 14, 2005) (arguing that all product liability claims are subject to the products hazard) with Frontier Insulation Contractors, Inc., 91 N.Y.2d 169, Respondent's Brief (Oct. 16, 1997) (same) and Frontier Insulation Contractors, Inc., 91 N.Y.2d at 177 (Court of Appeals holding that theory of tort liability is irrelevant to application of premises/operations coverage).
20. See, e.g., Gerling Global Reins. Corp. of Am., 419 F.3d 181 (2d Cir. 2005) (reinsurer and insurer dispute how to treat premises/operations claims under reinsurance and direct policies); Nat'l Cas. Co., __ F.3d ___, No. 05-1505, 2005 WL 3249456 (1st Cir. Dec. 2, 2005) (same); *Cont'l Cas. Co. v. Employers Ins. Co.*, No. 601037/03, Def. Class' Exs. DV, DW, FE, FL; Pls.' Ex. 116 (N.Y. Cty. Sup. Ct.) (same).
21. See *Am. Employers Ins. Co. v. Eagle, Inc.*, No. Civ. A. 03-0048, 2003 WL 23305664, at *1 (E.D. La. Nov. 12, 2003), aff'd, 122 Fed. Appx. 700, 2004 WL 2790622 (5th Cir. Dec. 6, 2004); *Lang v. Asten, Inc.*, No. 2002-02973, slip op. at 2 (La. Dist. Ct. Mar. 26, 2004), aff'd, No. 2004-CA-1665, __ So.2d __, 2005 WL 896475 (La. Ct. App. Mar. 30, 2005), aff'd in part, rev'd in part on other grounds, 2005-1119 (La. 1/13/06), ___ So.2d ___, 2006 WL 92880 (La. Jan. 13, 2006) (reversing only contempt finding against insurers).
22. *Cont'l Cas. Co. v. Employers Ins. Co.*, No. 601037/03, Def. Class' Exs. E, DH (N.Y. Cty. Sup. Ct.); cf. Nat'l Union Fire Ins. Co., slip op. at 27-28 (noting claimants' affidavits regarding exposure to policyholder's contracting operations).
23. See, e.g., Frontier Insulation Contractors, 91 N.Y.2d at 176-78.
24. See, e.g., id.

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INSURANCE LAW SECTION

**Continuing Legal Education Program

Sunday, July 16, 2006

Meeting Rooms 613 & 614 (Level 6, Washington State Convention & Trade Center)

Chair and moderator: Joseph N. Kravec, Jr., PA
Program Theme: Hot Issues Forum

1:45 pm **Opening Remarks/Elections**

2:00 pm **Litigator's Perspective: Hot Issue Forum-Long-Term Care Insurance**
Frank N. Darras, CA

2:30 pm **Litigators' Perspectives: Hot Issue Forum-Advocating for Hurricane Victims—Obtaining Just Compensation from Insurance Companies**
Amy R. Bach, CA
Allan Kanner, LA

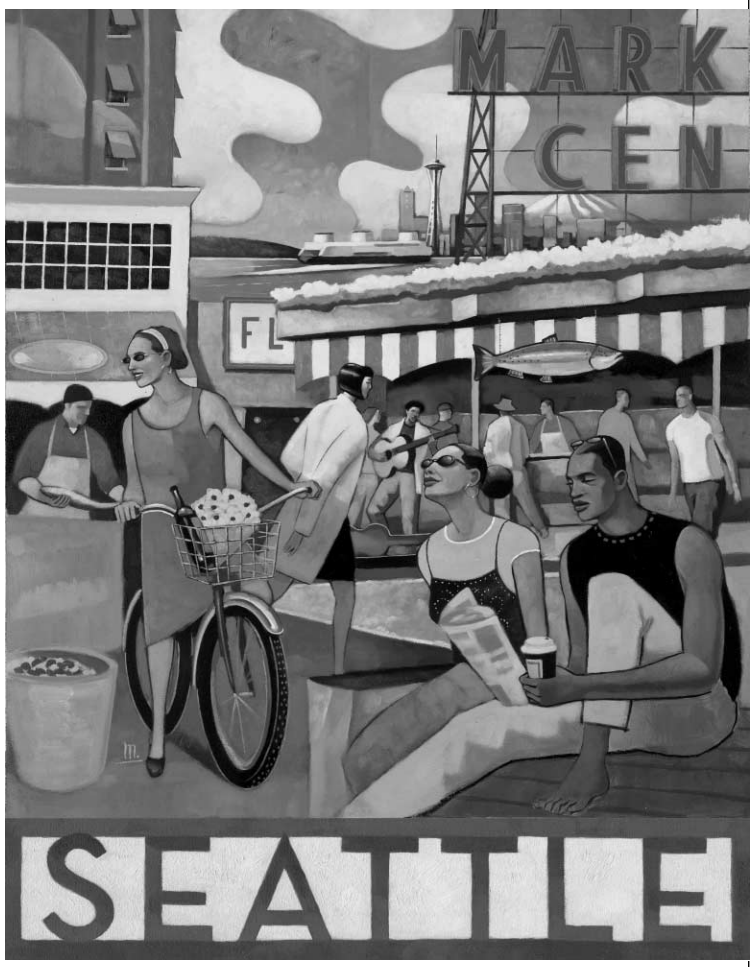
3:30 pm **Attorney General Perspective: Mass Disasters and Health Insurance**
Hon. Bill Lockyer,
California Attorney General

4:15 pm **Litigator's Perspective: Hot Issue Forum—Mass Disaster Insurance**
Sagi Shaked, FL

5:00 pm **Litigator's Perspective: What Every Personal Injury Lawyer Needs to Know to Avoid the Insurance Company Crunch**
- How insurers evaluate personal injury cases
- How to preserve policy coverage
- How to sniff out hidden coverage

David Sampedro, FL

5:30 pm **Adjourn and Cocktail Reception**



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