WINDSTORM® INSURANCE NETWORK

Gulf Coast/Southeast

INSURANCE CASE LAW UPDATE

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Gulf Coast/Southeast
INSURANCE CASE LAW UPDATE

Please note that the case facts, questions and answers below illustrate a cross section of property coverage cases across the Gulf Coast/Southeast, and the outcome of such cases may vary, depending on jurisdiction.

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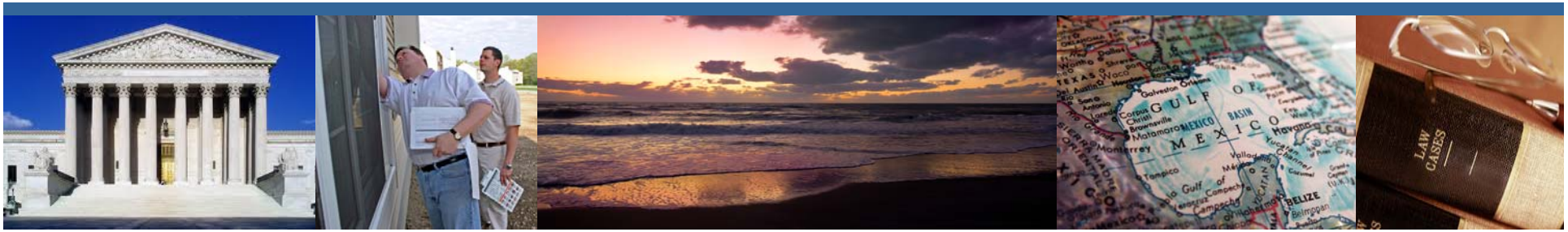

Gulf Coast/Southeast

INSURANCE CASE LAW UPDATE

Case Study Questions & Answers

How Would You Answer These?

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Gulf Coast/Southeast INSURANCE CASE LAW UPDATE

Appraisal

Case #1 Facts:

The insured property in Mississippi sustained damages as a result of Hurricane Katrina on August 29, 2005. After being notified of the damage, the insurer inspected the loss and paid $43,407.47 in December 2005, and $18,480 .06 in May 2006. The insurer later received notice that an additional building covered under the policy sustained damages and sent adjusters to inspect the additional building and provide an estimate, resulting in an additional payment of $7,758.65 in December, 2006. On February 27, 2007, a lawyer purportedly representing the policyholder requested copies of the claims documents. The insurer provided the requested copies by letter dated March 7, 2007, and explained the claim was still open and that if repairs were made to the property, the insured could still submit copies of the invoices for the work performed and receive payment of the depreciation holdback up to the Replacement Cost Value of the loss as found by the adjuster. Neither the policyholder nor the attorney responded, and the insurer closed its file on this claim.

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Case #1 Facts Cont'd:

More than three years later, on April 1, 2010, another attorney wrote the insurer claiming that the insured disputed the amount of the loss as paid and requested the insurer enter into an appraisal of the loss pursuant to the appraisal provision of the policy. On May 25, 2010, the insurer declined the request, claiming the request was untimely because it was sent nearly five years after the date of loss and over three years following final payment of the claim. Fifteen months later, the policyholder filed suit, asking the court to compel appraisal.."

Appraisal

Case #1

Question:

Is court-ordered appraisal proper under the circumstances?

Appraisal

Case #1

Question:

Is court-ordered appraisal proper under the circumstances?

Answer:

No.

If an appraisal is a condition precedent to filing suit and appraisal is requested after the statute of limitations for filing suit has expired, the appraisal request is not timely and cannot circumvent the statute of limitations on an otherwise time-barred claim. *Greater Trueway Apostolic Church v. Church Mut. Ins. Co.*, 2012 WL 1143947 (S.D. Miss. 2012).

Gulf Coast/Southeast INSURANCE CASE LAW UPDATE

Appraisal

Case #2 :

Question:

Where an appraisal provision in a Louisiana policy provides that each party shall appoint a "competent and impartial appraiser" to present the claim to an umpire, can an insurer select as its appraiser the adjuster it originally assigned to the claim?

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Gulf Coast/Southeast INSURANCE CASE LAW UPDATE

Appraisal

Case #2 :

Question:

Where an appraisal provision in a Louisiana policy provides that each party shall appoint a "competent and impartial appraiser" to present the claim to an umpire, can an insurer select as its appraiser the adjuster it originally assigned to the claim?

Answer:

Yes.

Generally, adjusters are considered qualified unless the party opposing appointment can demonstrate a proposed appraiser lacks impartiality or competence or that his honesty or integrity was suspect. *Dufrene v. Certain Interested Underwriters at Lloyd's of London Subscribing to Certificate No. 3051393*, 91 So.3d 397 (La.App. 5 Cir. 2012).

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Gulf Coast/Southeast INSURANCE CASE LAW UPDATE

Appraisal

Case #3 Facts:

A Texas insured filed a claim for property loss, which was not quickly resolved. The insureds hired an attorney to file suit and an engineer and estimator for litigation. During discovery, the insurer asked the court to compel appraisal.

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Case #3

Question:

Did the insurer waive appraisal by waiting until litigation was well underway before attempting to assert its contractual right?

Gulf Coast/Southeast INSURANCE CASE LAW UPDATE

Appraisal

Case #3

Question:

Did the insurer waive appraisal by waiting until litigation was well underway before attempting to assert its contractual right?

Answer:

No.

In *In re Cypress Texas Lloyds*, 2012 WL 1435739 (Tex.App.–Beaumont 2012), the Texas Court of Appeals held the insurer did not waive appraisal by waiting to file its motion to compel appraisal during discovery, and after the insureds hired an engineer and an estimator for purposes of litigation. The insureds could have avoided the costs by requesting appraisal themselves. The insurer notified the insureds that appraisal was a condition precedent to suit by asserting the appraisal provision in its answer and seeking abatement of the suit pending appraisal. To establish waiver of an insurance appraisal in Texas, a party must show that the failure to invoke the policy's appraisal provision within a reasonable time after an impasse was reached caused prejudice.

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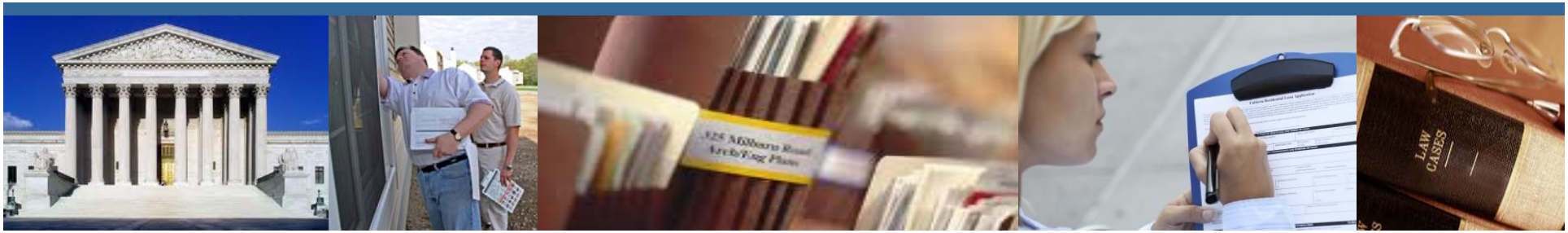
Case #4 Facts:

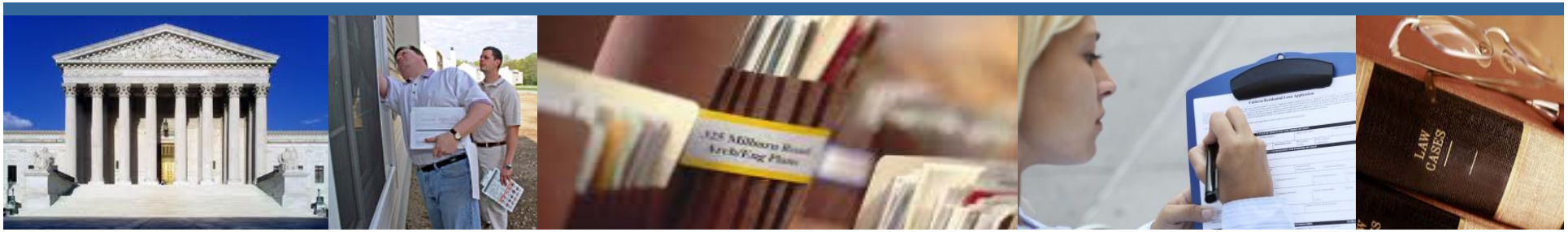
During a contentious property insurance claim in Alabama, the parties' appraisers could not agree on the selection of a neutral umpire. The insurer filed a petition and simultaneously submitted the names of three potential umpires. The insured filed a petition, asserting a counterclaim requesting the court to appoint a neutral umpire and proposed two additional umpires. Thereafter, the parties submitted briefs outlining their arguments in favor of their proffered umpires and objections to the names submitted by the opposing party.



Case #4

Question:

Is the court limited to the proposed umpires in making its selection?



Case #4

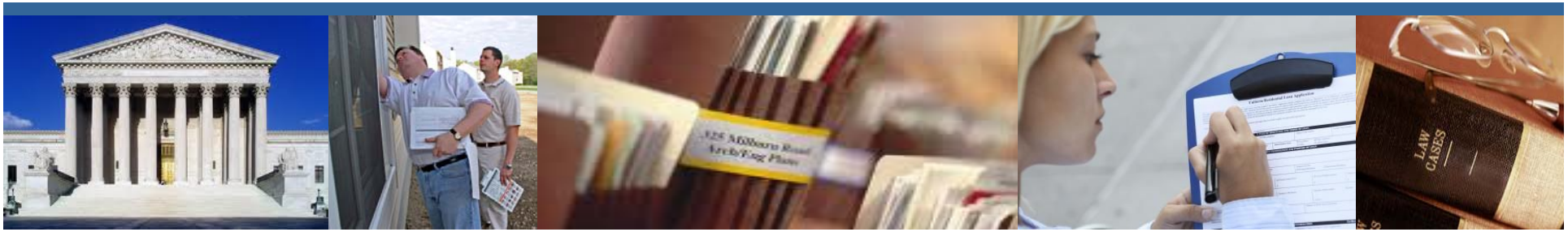
Question:

Is the court limited to the proposed umpires in making its selection?

Answer:

No.

Given the deep level of distrust between the parties and their respective attorneys, the court concluded selection of any of the proffered umpires would be misconstrued by the parties as a vindication of the fiscal interests of one at the expense of the other. The court invoked its inherent supervisory powers and appointed an umpire who was not proffered by either party. *Pennsylvania Lumbermens Mut. Ins. Co. v. Buettner Bros. Lumber Co., Inc.*, 2012 WL 1748028 (N.D.Ala. 2012).



Gulf Coast/Southeast INSURANCE CASE LAW UPDATE

Appraisal

Case #5 Facts:

A tornado severely damaged a church in Dallas, and the insured made a claim. The insurer inspected the property, and made an initial payment of $300,000. When the insured disputed the amount of damages, the insurer invoked the appraisal process, which produced an award in excess of $1 million. The insurer timely paid the difference between the $1 million appraisal award and the initial payment, and the insured accepted the payment.

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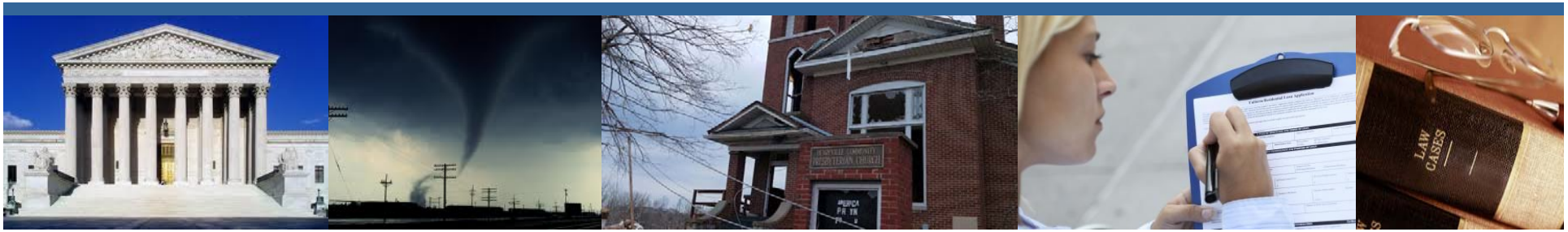

Gulf Coast/Southeast INSURANCE CASE LAW UPDATE

Appraisal

Case #5

Question:

Because the appraisal award was substantially greater than the initial payment, can the insured file suit, contending the insurer's final payment of the claim was untimely and constituted a breach of contract?

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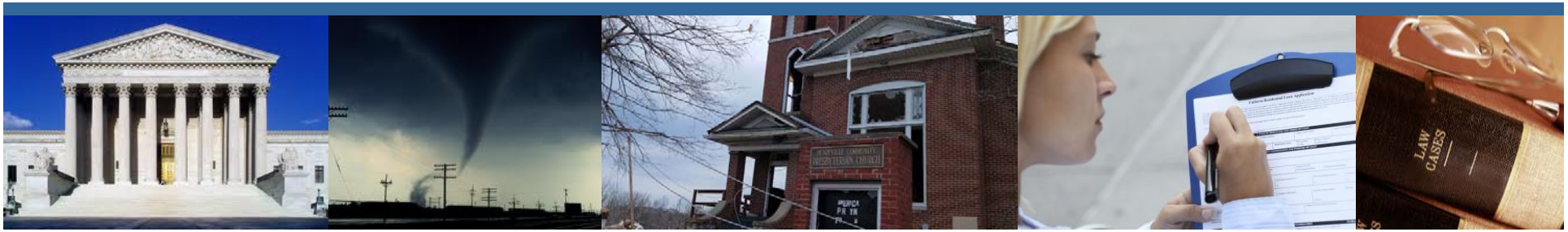

Gulf Coast/Southeast INSURANCE CASE LAW UPDATE

Appraisal

Case #5

Question:

Because the appraisal award was substantially greater than the initial payment, can the insured file suit, contending the insurer's final payment of the claim was untimely and constituted a breach of contract?

Answer:

No.

Under Texas law, when an insurer makes timely payment of an appraisal award and the insured accepts payment, the insured cannot maintain a breach of contract claim. *Blum's Furniture Company v. Certain Underwriters at Lloyds London*, 459 Fed. Appx. 366, 2012 WL 181413 (5th Cir. Jan. 24, 2012).

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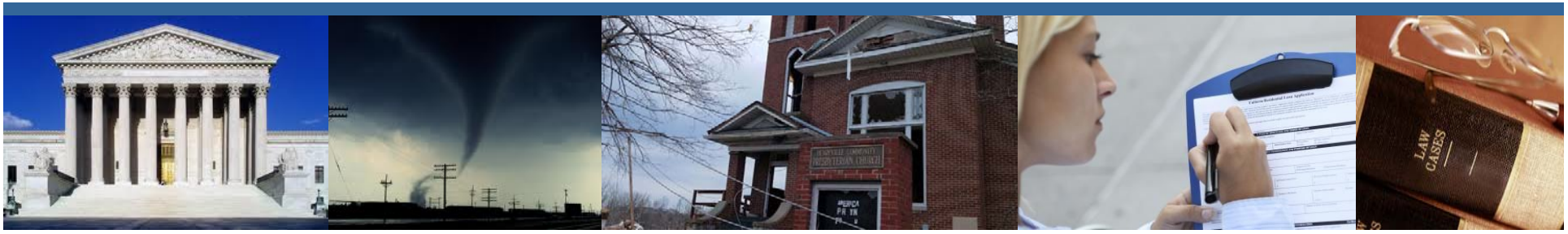

Gulf Coast/Southeast INSURANCE CASE LAW UPDATE

Appraisal

Case #6 Facts:

A Florida insured suffered water damage in his home as a result of a plumbing leak, and his insurer provided coverage for the loss. The insured hired a restoration company to perform remediation, disinfection, drying, and related work. The contract between the insured and the restoration company assigned the insured's rights under the insurance policy to the restoration company. The company estimated the cost of repair to be $1,827.00, and billed the insurer for services rendered. The insurer estimated the cost of repair at $800, and did not pay the bill; instead it mailed a check for the lower amount to and advised the insured the check had been mailed. The restoration company refused the check.

The insurer notified the insured and restoration company of their right to mediation and stated, they "demand appraisal to resolve the issue of the amount of loss," if the restoration company and insured did not request mediation. The restoration company requested mediation, which resulted in an impasse. The restoration company filed suit, and the insurer moved to dismiss and demanded appraisal pursuant to the contract terms that made appraisal the compulsory means of resolving disputes over amounts of loss upon written demand by either party.

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Case #6 Facts Cont'd:

Florida Statute Section 627.7015 provides:

> (2) At the time a first-party claim within the scope of this section is filed, the insurer shall notify all first-party claimants of their right to participate in the mediation program under this section....
>
> (7) If the insurer fails to comply with subsection (2) by failing to notify a first-party claimant of its right to participate in the mediation program under this section or if the insurer requests the mediation, and the mediation results are rejected by either party, the insured shall not be required to submit to or participate in any contractual loss appraisal process of the property loss damage as a precondition to legal action for breach of contract against the insurer for its failure to pay the policyholder's claims covered by the policy.

Rule 69B–166.031(10)(c) provides:

> If the insured decides not to participate in this program or if the parties are unsuccessful at resolving the claim, the insured may choose to proceed under the appraisal process set forth in the insured's insurance policy or by litigation, or by any other dispute resolution procedure available under Florida law.

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Gulf Coast/Southeast INSURANCE CASE LAW UPDATE

Appraisal

Case #6

Question:

Pursuant to Florida Statute Section 627.7015 and Rule 69B–166.031(10)(c) of the Florida Administrative Code, did the insurer waive its right to demand appraisal by participating in mediation?

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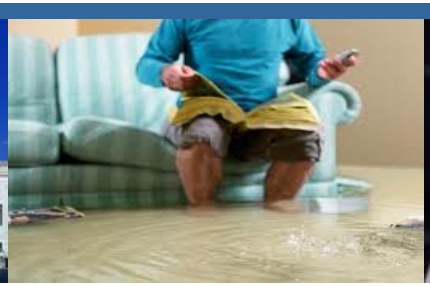
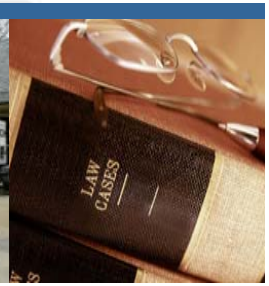


Gulf Coast/Southeast INSURANCE CASE LAW UPDATE

Appraisal

Case #6

Question:

Pursuant to Florida Statute Section 627.7015 and Rule 69B–166.031(10)(c) of the Florida Administrative Code, did the insurer waive its right to demand appraisal by participating in mediation?

Answer:

No.

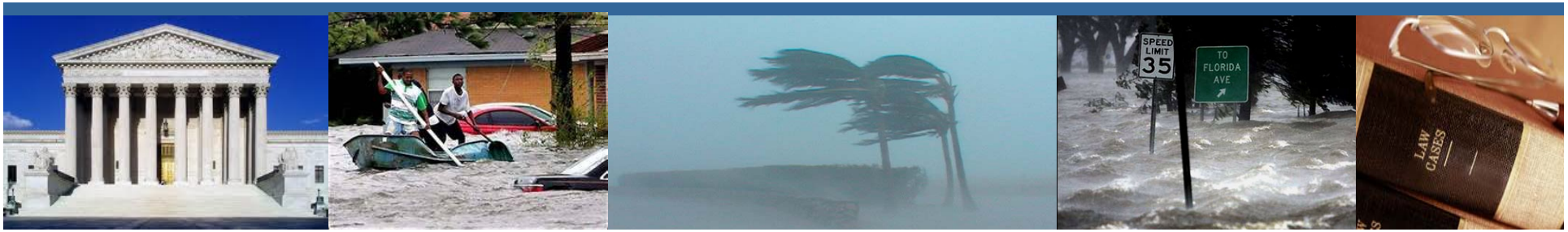
In *State Farm Florida Ins. Co. v. Unlimited Restoration Specialists, Inc.*, 84 So.3d 390 (Fla. 5th DCA 2012), Florida's Fifth District Court of Appeal held Rule 69B-166.031(10)(c) modified and enlarged the statute governing alternative dispute resolution for property insurance claims, so the rule is invalid. The statute only contemplated waiver of appraisal when an insurer failed to notify its insured of the right to mediation or when *an insurer* requested mediation and mediation was unsuccessful. "The rule modified and enlarged the statute when it allowed the insured the choice of how to proceed following an unsuccessful mediation that the insured, itself, requested. That option is simply not contained within the statute."

WINDSTORM INSURANCE NETWORK

Concurrent Causation

Case #7 Facts:

The policyholders' home was located a few hundred feet from a canal and one block north of the Gulf of Mexico in Pascagoula, Mississippi. The home was destroyed during Hurricane Katrina. Their homeowner policy contained both a hurricane endorsement and an anticoncurrent causation clause, which excluded all damage resulting directly or indirectly from by flood and storm surge. The home was undoubtedly destroyed by storm surge.

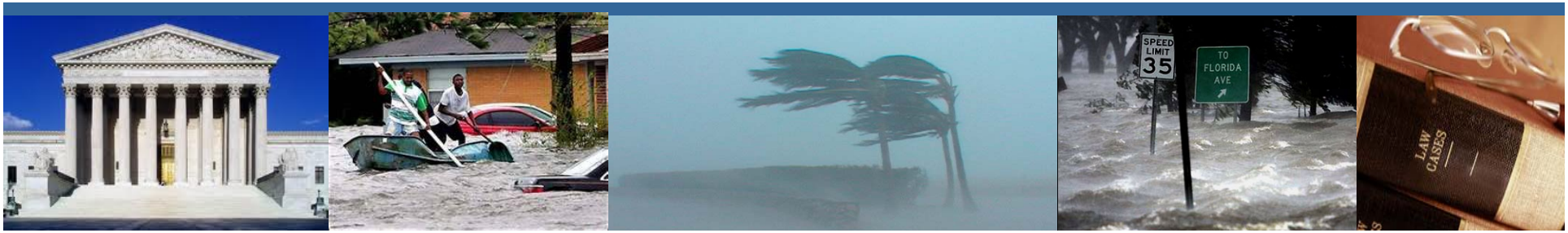


Concurrent Causation

Case #7

Question:

Are the policyholders precluded from coverage by the anticoncurrent causation clause?



Concurrent Causation

Case #7

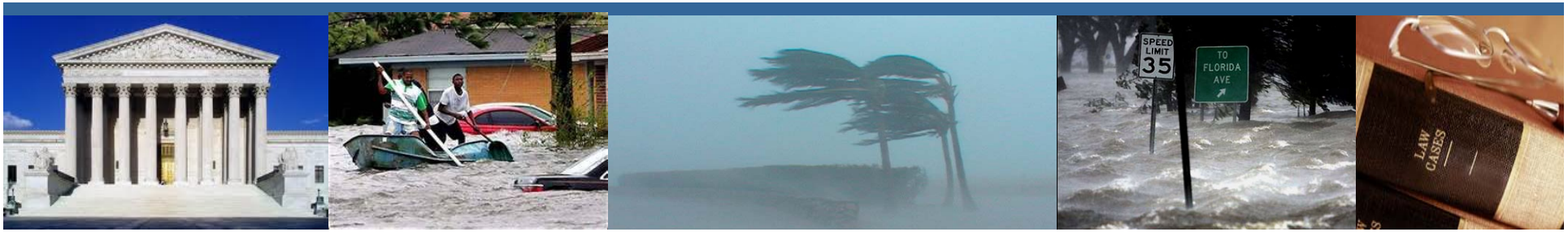
Question:

Are the policyholders precluded from coverage by the anticoncurrent causation clause?

Answer:

No.

Not all of the damage to the residence was caused by the simultaneous convergence of wind and water; accordingly, the ACC clause was inapplicable. Any wind damage that occurred prior to the storm surge would be covered by the hurricane endorsement. *Robichaux v. Nationwide Mut. Fire Ins. Co*., 81 So.3d 1030 (Miss. 2011).



Gulf Coast/Southeast INSURANCE CASE LAW UPDATE

Concurrent Causation

Case #8 Facts:

An insured property in Louisiana was washed away during a hurricane. The policy covered damages arising out of a windstorm, but also allegedly excluded losses or damages for “flood, surface water, waves, tides, tidal waves, overflow of any body of water, or their spray, all whether driven by wind or not.” There was evidence that wind forces, ranging from 110 to 135 miles battered the building for nine hours before the onset of flood surges. But the insurer could not determine the amount of damage attributable to wind, admitting it could be anywhere between a small amount and 100% of the damage.

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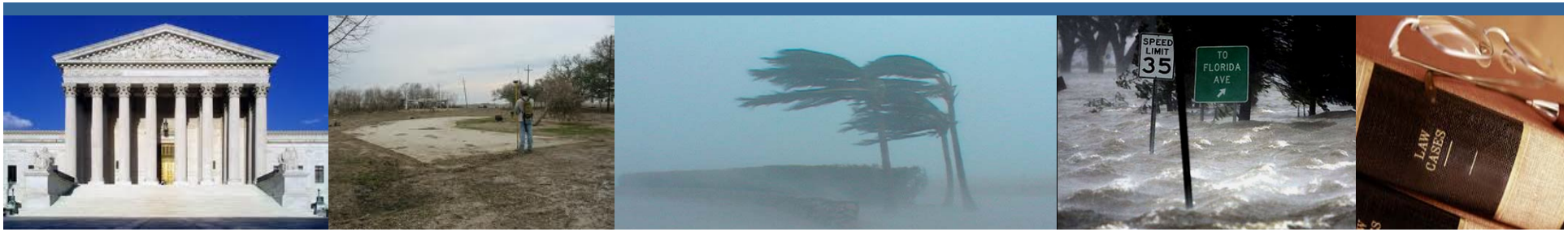
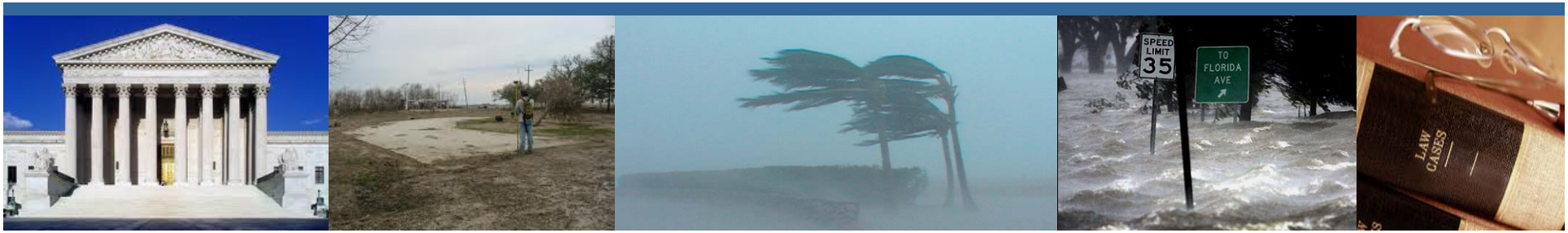


Concurrent Causation

Case #8

Question:

If the claim is not settled and the case goes to trial, what is the insurer's burden of proof?



Gulf Coast/Southeast INSURANCE CASE LAW UPDATE

Concurrent Causation

Case #8

Question:

If the claim is not settled and the case goes to trial, what is the insurer's burden of proof?

Answer:

In *J.R.A. Inc. v. Essex Ins. Co.*, 72 So.3d 862 (La.App. 4 Cir. 2011), the appellate court held the trial court was not required to determine the specific percentage of damage caused by wind versus storm surge of properties completely destroyed by Hurricane Katrina. It was sufficient for the court to determine the wind insurer did not prove it was more likely than not that only a small percentage of the damage was due to wind forces; none of the wind insurer's experts could state that 100% of the damage sustained by the properties, or anything in the immediate vicinity, was caused solely by flood waters. Recovery from both wind insurer and flood insurer for business personal property losses did not constitute an impermissible double recovery because the total amount of recovery did not exceed the value of the property loss.

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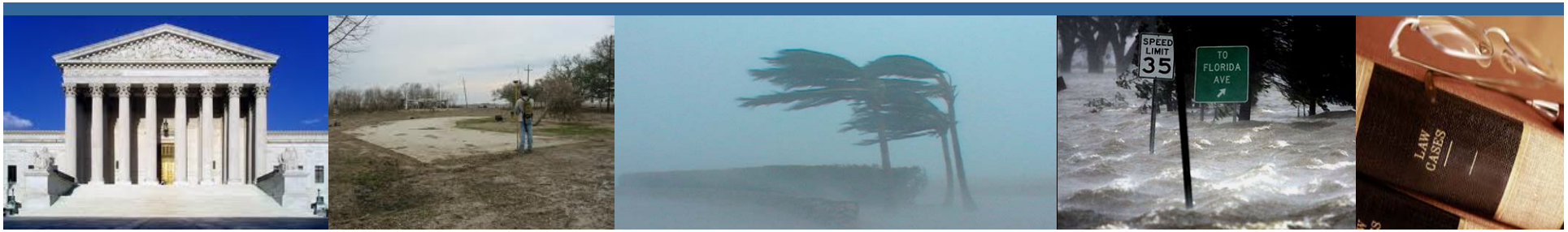

Case #9 Facts:

Following destruction of his Mississippi home in Hurricane Katrina, the insured, who had purchased flood insurance under the Federal National Flood Insurance Program (NFIP) not knowing of his eligibility for a preferred risk insurance policy, sued his Write Your Own insurer in state court for negligent misrepresentation, seeking to recover the difference between the coverage he had and the coverage he could have purchased under the preferred risk policy.

Gulf Coast/Southeast INSURANCE CASE LAW UPDATE

Flood

Case #9

Question:

Can the insured maintain a state court action against the insurer?

WINDSTORM INSURANCE NETWORK

Case #9

Question:

Can the insured maintain a state court action against the insurer?

Answer:

No.

The key factor to determine whether an insured's interaction with an insurer participating in the National Flood Insurance Program (NFIP) is “claims handling,” for preemption purposes, is the status of the insured at the time of the interaction between the parties. If the individual is already covered and in the midst of a non-lapsed insurance policy, the interactions between the insurer and insured, including renewals of insurance, are “claims handling” subject to preemption by federal law. Accordingly, the insured’s state-law claim for negligent misrepresentation was preempted by federal law. *Grissom v. Liberty Mut. Fire Ins. Co.*, 678 F.3d 397 (5th Cir. 2012).

Case #10 Facts:

The insured's condominium building in Texas was insured by a Write Your Own (WYO) carrier under the National Flood Insurance Program. On September 13, 2008, it was damaged by flood caused by Hurricane Ike. On December 5, 2008, the WYO insurer paid the insured a $25,000.00 advance on its potential claim. On December 9, 2008, the insured submitted a Proof of Loss claiming flood damage in the amount of $352,885.21. On January 12, 2009, the WYO insurer sent a letter to the insured explaining only $93,475.22 was covered, and the remainder of the claim, $259,409.99, was rejected. A check for the balance accompanied the letter. Dissatisfied with the WYO insurer's decision, the insured sought reconsideration of the claim. On April 10, 2009, following a re-examination of the claim, the insurer paid the insured an additional $101,609.46. At no time, however, did FEMA's Administrator formally rescind the January 12, 2009 partial rejection of Plaintiff's claim.

Case #10

Question:

Can the insured maintain a suit against the insurer for breach of contract and related torts?

Case #10

Question:

Can the insured maintain a suit against the insurer for breach of contract and related torts?

Answer:

No.

Once a WYO carrier triggers the statute of limitations by denying a claim, in whole or in part, the limitations period cannot be reinstated unless the "Federal Insurance Administrator expressly and in writing sets aside the ... disallowance of a Plaintiff's claim." Reconsideration of the denial or responding to further inquiries about the claim "has no effect on the running of the limitations period." The court was powerless to toll the statute of limitations even if the carrier, upon reconsideration, tenders additional, but not full payment of the claim. *St. Germain Place Owners Ass'n, Inc. v. Texas Farmers Insurance Company*, No. 11-71, 2012 WL 2564441 (S.D.Tex. 2012)

Gulf Coast/Southeast INSURANCE CASE LAW UPDATE

Expert Testimony

Case #11 Facts:

After observing the devastation after Hurricane Ivan, a restaurateur in Mississippi contacted her insurance company, to inquire about increasing the current coverage limits on the restaurant. Over the course of three or four meetings, she and her insurance agent discussed a series of changes to the restaurant's policies. She asked her agent to increase the structure coverage from $149,477 to $300,000; to increase the contents coverage from $76,794 to $150,000; and to increase the business interruption coverage from $35,000 to $300,000.

A month later, Hurricane Katrina devastated the restaurant. She learned the agent failed to increase the wind policy's limits on the structure, contents, and business interruption, as she requested. The total payments paid on the restaurant's flood and wind policies failed to cover the losses. The claim ultimately went to trial, and the policyholders sought to present expert testimony regarding insurance agency operations. The proposed expert's experience was limited to one year when he first started in the insurance industry. He worked as a claims adjuster and file reviewer for a law firm for the majority of his career.

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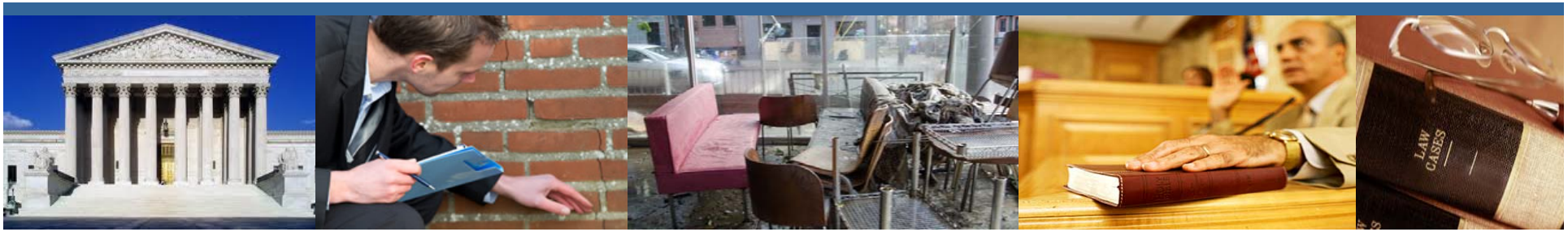


Gulf Coast/Southeast INSURANCE CASE LAW UPDATE

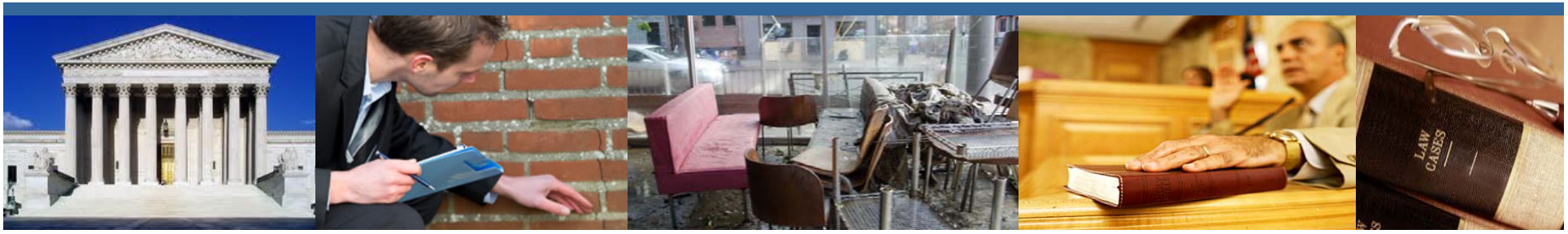
Expert Testimony

Case #11

Question:

Is the proposed expert qualified to testify in court?

WINDSTORM INSURANCE NETWORK



Expert Testimony

Case #11

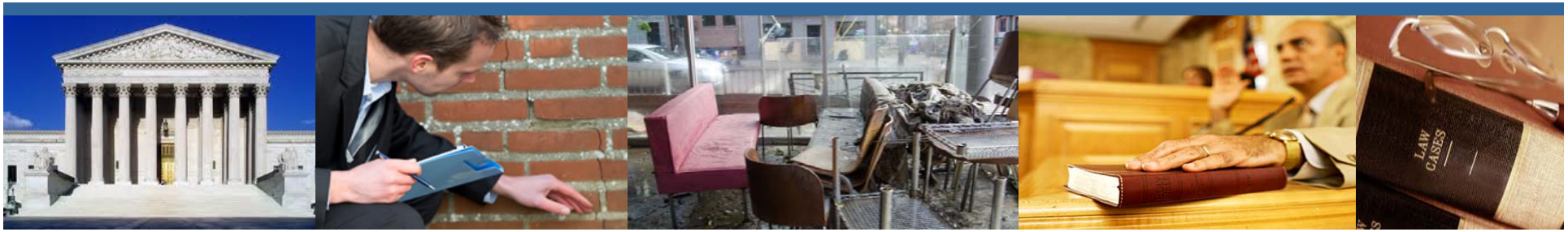
Question:

Is the proposed expert qualified to testify in court?

Answer:

No.

In *Trapani v. Treutel*, 87 So.3d 1096 (Miss. App. 2012), the trial court held an insured restaurant owners' proposed insurance expert was not qualified to testify regarding their agent's lack of diligence in securing the owners' alleged request for increases in coverage under their property and casualty windstorm policy. The proposed expert's experience in procuring property and casualty insurance for clients was limited to one year when he first started in the insurance industry, and most of his practice was as a claims adjuster and file reviewer for a law firm.



Gulf Coast/Southeast INSURANCE CASE LAW UPDATE

Vacancy

Case #12 Facts:

In July 2007, a Texas policyholder notified her insurer that she was moving to a retirement community and placing her house on the market for sale. Four months later, a fire spread from neighboring property, causing the insured to suffer a loss. The insured made a claim for damages to her dwelling. Relying on the vacancy provision, the insurer denied the claim. The vacancy clause provided:

> If the insured moves from the dwelling and a substantial part of the personal property is removed from that dwelling, the dwelling will be considered vacant. Coverage that applies under Coverage A (Dwelling) will be suspended effective 60 days after the dwelling becomes vacant. This coverage will remain suspended during such vacancy.
>
> § 862.054. Fire Insurance: Breach by Insured; Personal Property Coverage
> Unless the breach or violation contributed to cause the destruction of the property, a breach or violation by the insured of a warranty, condition, or provision of a fire insurance policy or contract of insurance on personal property, or of an application for the policy or contract:
> (1) does not render the policy or contract void; and
> (2) is not a defense to a suit for loss.

WINDSTORM INSURANCE NETWORK

Vacancy

Case #12

Question:

Did the insured breach the insurance contract by moving out?

Vacancy

Case #12

Question:

Did the insured breach the insurance contract by moving out?

Answer:

No.

In *Farmers Ins. Exchange v. Greene*, 376 S.W.3d 278 (Tex.App.–Dallas 2012), the Texas Court of Appeals the vacancy clause in the insured's policy did not provide a forfeiture of coverage but, rather, suspended coverage for the dwelling. The other coverage under the policy remained in effect, so the vacancy clause functioned as an exclusion and excepted a specific condition of vacancy from coverage; the vacancy clause stated coverage that applied under Coverage A (Dwelling) would be suspended effective 60 days after dwelling became vacant and this coverage would remain suspended during vacancy.

Vacancy

Case #12

Question:

Could Texas Code § 862.054. reinstate coverage?

Vacancy

Case #12

Question:

Could Texas Code § 862.054. reinstate coverage?

Answer:

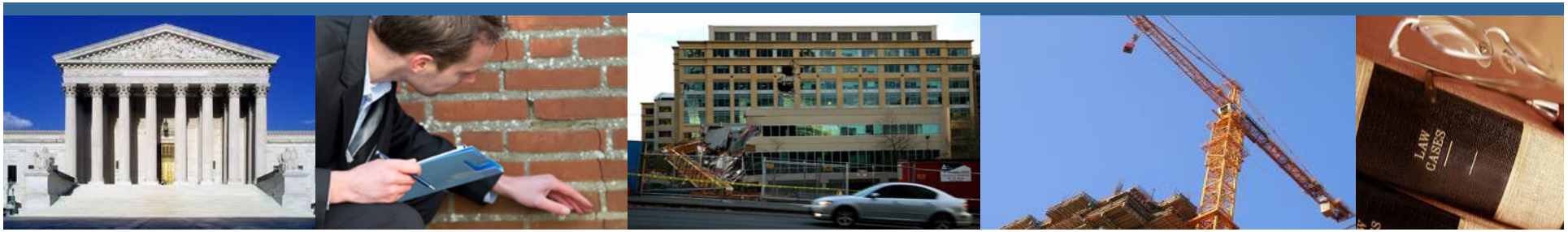
No.

§ 862.054 did not apply to the homeowners' policy. Describing policy's vacancy exclusion in terms of a breach or violation was a non sequitur; since there was no promised performance, insured could not have breached or “violated” the vacancy clause in homeowners' policy.

Diminution in Value

Case #13 Facts:

The insured owned a building in Georgia that was damaged by construction activity on the adjacent property. They filed a claim seeking the costs of repair and post-repair diminution in value resulting from the damage. The insurer paid the estimated costs of repair but denied responsibility for diminution in value.

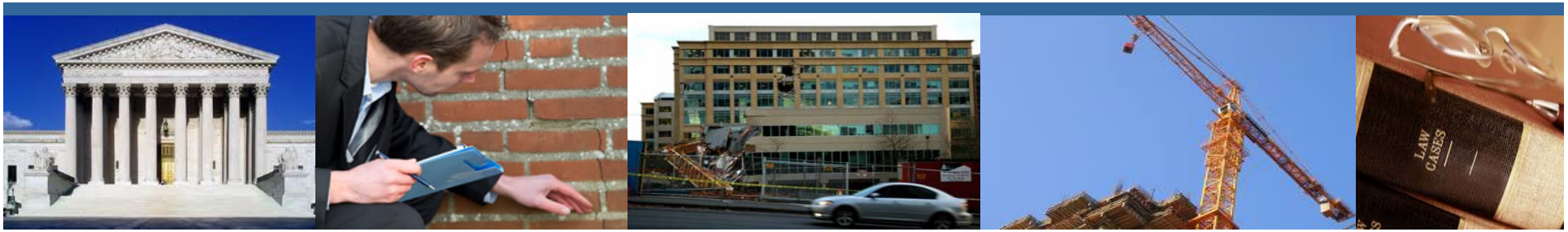


Diminution in Value

Case #13

Question:

Is the insured entitled to benefits for diminution in value?



Diminution in Value

Case #13

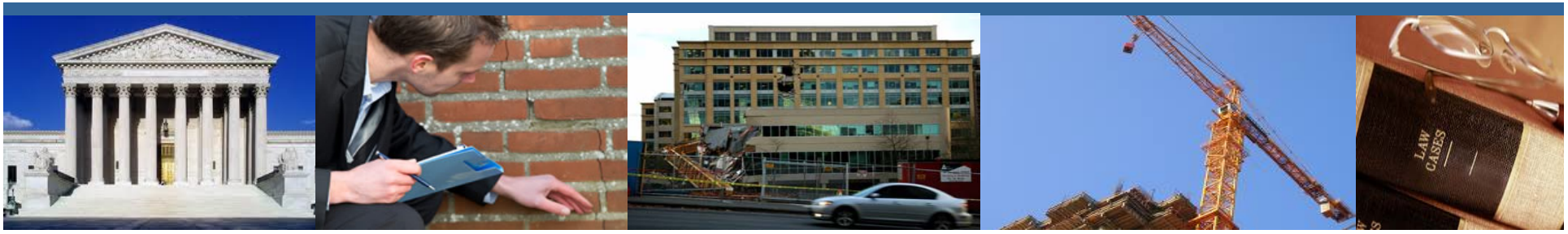
Question:

Is the insured entitled to benefits for diminution in value?

Answer:

Yes.

In *Royal Capital Development LLC v. Maryland Cas. Co.*, 728 S.E.2d 234 (Ga. 2012), the Georgia Supreme Court extended a prior holding that value, not condition, is the baseline measure of damages in a claim under an automobile insurance policy to claims under property insurance policies. The Court explained, "diminution in value as an element of loss to be recovered on the same basis as other elements of loss merely reflects economic reality."



Gulf Coast/Southeast INSURANCE CASE LAW UPDATE

Bad Faith

Case #14 Facts:

Insured homeowners reported water damage in their Georgia home to the insurance agent who sold them a homeowners' insurance policy. The agent referred them to a construction company, which found a slab leak in the kitchen and stopped it. The construction company and its sister company placed air blowers and fans in the home and began preliminary remediation. They also contacted an industrial hygienist to provide a protocol for remediation. The insurer brought in a second-opinion consultant who concluded that only mold, not bacteria, was present. Conceding partial coverage, the insurer determined “[a] broken pipe caused water and mold damage,” but not as much as the insureds claimed, and partly paid the claim. The parties had a dispute over bacteria. Bacteria, caused by the water leak, had to be detected or else the policy's $10,000 mold (or “fungal”) contamination limit applied. If bacteria were detected, a higher coverage amount would be triggered for more expensive remediation. The insureds contended bacteria was present, while the insurer claimed it was mold alone.

WINDSTORM INSURANCE NETWORK

Case #14 Facts Cont'd:

The policyholders filed suit and sought four other water-leak claim files from the insurer in which their remediation men participated. They wanted to know whether State Farm handled their claim differently from the preceding four, and whether State Farm deviated from its usual custom and practices—a bad faith marker. The insureds also wanted to review "Engineering Firm Selection Applications" to learn "what type of information was in the list," and how much the insurer has paid the remediators for such claims over a specified time period.

Case #14

Question:

Are the policyholders entitled to the material in discovery?

Case #14

Question:

Are the policyholders entitled to the material in discovery?

Answer:

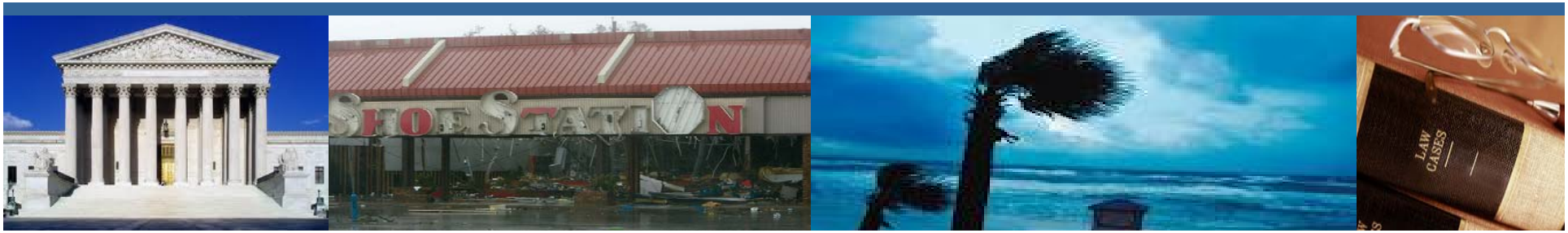
Yes.

The success of the insured's bad faith claim hinged on whether bacteria or fungus resulted from the water leak. The court granted the request, finding it not unreasonable in size or subject matter. "[T]he relevancy standard for discovery is not the same as for at-trial evidence. For discovery it is more liberal, though not a fishing license." *Southard v. State Farm Fire & Casualty Company*, No. 411-243, 2012 WL 2191651 (S.D. Ga. June 14, 2012).

Case #15 Facts:

The insured shopping center in Florida was damaged during a hurricane and filed a claim with its insurer. Over several months, the insurer paid approximately half of the insured's claimed loss. The insured filed suit, alleging the insurer breached its contract of insurance by failing to pay all proceeds due. A month later, the insurer advised the insured its investigation was complete and tendered an additional payment, and also invoked the appraisal provision of the insurance contract, which stated:

> If we and you disagree on ... the amount of loss, either may make written demand for an appraisal of the loss. In this event, each party will select a competent and impartial appraiser.



Case #15 Facts Cont'd:

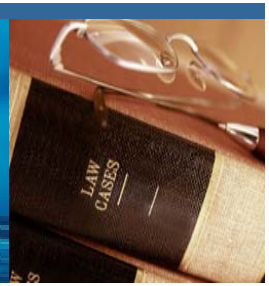
The two appraisers will select an umpire. If they cannot agree, either may request that selection be made by a judge of a court having jurisdiction. The appraisers will state separately the ... amount of loss. If they fail to agree, they will submit their differences to the umpire. A decision agreed to by any two will be binding. Each party will:

a. Pay its chosen appraiser; and
b. Bear the other expenses of the appraisal and umpire equally.

If there is an appraisal, we will still retain our right to deny the claim.

The insured was awarded approximately twice the amount the insurer had paid, and the insurer paid the additional amount due. The trial court confirmed the award and granted the insurer's motion for summary judgment on the underlying breach of contract action.





Gulf Coast/Southeast INSURANCE CASE LAW UPDATE

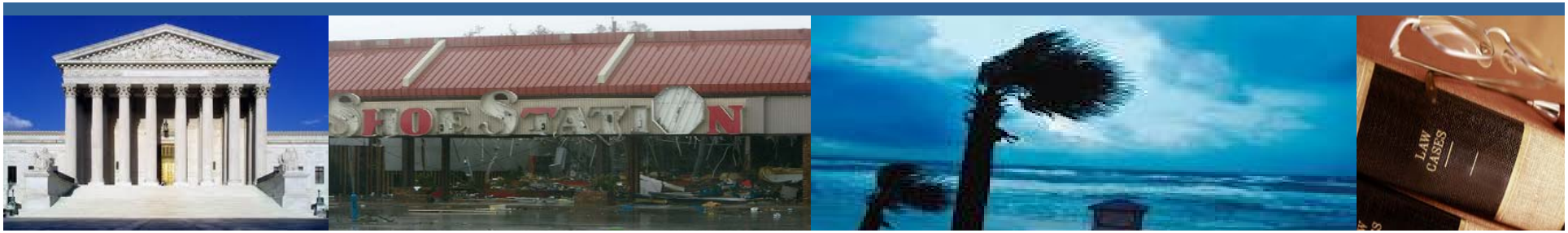
Bad Faith

Case #15

Question:

Does summary judgment preclude the insured's ability to pursue a bad faith claim?

WINDSTORM INSURANCE NETWORK



Gulf Coast/Southeast INSURANCE CASE LAW UPDATE

Bad Faith

Case #15

Question:

Does summary judgment preclude the insured's ability to pursue a bad faith claim?

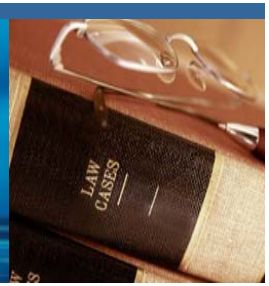
Answer:

In Florida, no.

In *Trafalgar at Greenacres, Ltd. v. Zurich American Ins. Co.*, 2012 WL 3822215 (Fla. 4th DCA 2012), Florida's Fourth District Court of Appeal explained a judgment on a breach of contract action is not the only way of obtaining a favorable resolution necessary to pursue a claim for bad faith. "As our supreme court has recognized, an arbitration award establishing the validity of an insured's claim satisfies the condition precedent required to bring a bad faith action. *Dadeland Depot, Inc. v. St. Paul Fire & Marine Ins. Co.*, 945 So.2d 1216 (Fla.2006). We see no meaningful distinction between an arbitration award and the appraisal award in this case for the purpose of deciding whether the underlying action was resolved favorably to the insured."

WINDSTORM INSURANCE NETWORK



Gulf Coast/Southeast INSURANCE CASE LAW UPDATE

Bad Faith

Case #16

Question:

Does Florida recognize a claim for breach of the implied warranty of good faith and fair dealing by an insured against its insurer based on insurer's failure to investigate claim within a reasonable period of time?

WINDSTORM INSURANCE NETWORK

Case #16

Question:

Does Florida recognize a claim for breach of the implied warranty of good faith and fair dealing by an insured against its insurer based on insurer's failure to investigate claim within a reasonable period of time?

Answer:

No.

In *QBE Ins. Corp. v. Chalfonte Condominium Apartment Ass'n, Inc.*, 94 So.3d 541 (Fla. 2012), the Florida Supreme Court explained Florida does not recognize a common law claim for breach of the implied warranty of good faith and fair dealing by an insured against its insurer based on the insurer's failure to investigate and assess the insured's claim within a reasonable period of time. Such first-party claims are actually statutory bad-faith claims which must be brought under the statute that created a statutory first-party bad-faith cause of action, and codified prior decisions authorizing a third party to bring a bad-faith action under the common law.

Late Notice

Case #17 Facts:

Florida homeowners have a policy which under post-loss duties states: "*give immediate notice to us or our agent…*"

After Hurricane Wilma, the insureds became "aware of roof damage" to their home. They hired a company to replace twenty-three broken roof tiles, for which they paid $300. The insureds' roof continued to leak, and they made a claim to the insurer in 2009, three years after Hurricane Wilma. An investigator for the insurer observed the replaced roof tiles, but was unable to establish a date and cause of loss. As a result, the insurer stated it could not determine the loss was directly related to Hurricane Wilma. The insureds provided the insurer a receipt for $300 in repairs from 2005 reflecting that the repairs were the result of storm damage caused by Hurricane Wilma. The insurer claims the receipt does not sufficiently overcome its prejudiced ability to independently investigate the cause and date of any damage which necessitated the roof repairs. Insured files suit and the insurer moves to dismiss based on the late notice.

Late Notice

Case #17

Question:

Based on these facts alone, will the insurer's motion be granted?

Late Notice

Case #17

Question:

Based on these facts alone, will the insurer's motion be granted?

Answer:

Yes.

When notice is late, prejudice to the insurer in its ability to investigate a claim is presumed.

Case #17 Additional Facts:

The Insured filed two affidavits:

1) An affidavit by the insured's engineer who inspected the roof 4 years after Hurricane Wilma: "The inspection revealed a classic pattern of wind damage. The only possible event that could have caused this type of damage was Hurricane Wilma." . . . . "[W]ithin reasonable engineering probability the classic pattern of windstorm damage from Hurricane Wilma was clearly evident upon the inspection which was conducted in 2010 and would have been evident upon an inspection by" the insurer.

2) An affidavit by public adjuster who claimed that he had met with the insurer's investigator that had inspected the insureds' home. The investigator told the PA there appeared to be storm damage to the roof. The PA believed the damage to the insureds' roof was caused by Hurricane Wilma.

Late Notice

Case #17

Question:

Based on the additional facts, should the insurer's motion be granted?

Late Notice

Case #17

Question:

Based on the additional facts, should the insurer's motion be granted?

Answer:

No.

Prejudice from late notice is a rebuttable presumption. In *Stark v. State Farm Florida Insurance Company*, 95 So. 3d 285 (Fla. 4th DCA June 20, 2012), the court found, under these facts, the insured had created an issue of material fact as to whether the insurer was prejudiced by the late notice.

Examination Under Oath

Case #18 Facts:

The insured made a claim for wind damage to his home in Florida. After inspecting the damages, the insurer paid $14,416. Four years later, the insured hired a public adjuster and submitted a new $138,419 estimate for damages invoked his right to appraisal pursuant to the insurance policy. The insurer started investigating and asked the insured to sit for an examination under oath. The insurance contract provided:

> 2. Your Duties After Loss. In case of a loss to covered property, you must see that the following are done:
>
> f. As often as we reasonably require:
> (3) Submit to examination under oath, while not in the presence of any other "insured," and sign the same....

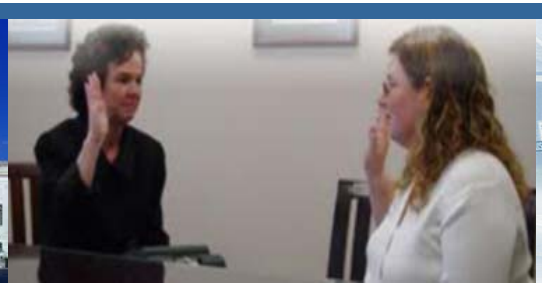
The insurance policy specifically defined "insured" as "you and residents of your household who are: ... Your relatives; or Other persons under the age of 21 and in the care of any person named above."

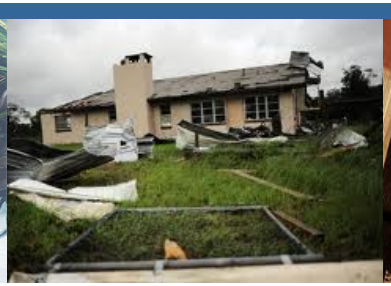
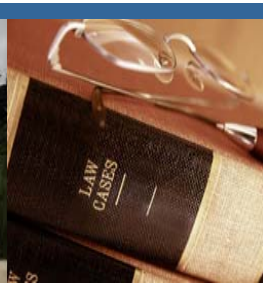
Examination Under Oath

Case #18

Question:

Is the insured entitled to have his public adjuster present during the examination under oath?

Examination Under Oath

Case #18

Question:

Is the insured entitled to have his public adjuster present during the examination under oath?

Answer:

Yes.

In *Nawaz v. Universal Property & Cas. Ins. Co.*, 91 So.3d 187 (Fla. 4th DCA 2012), Florida's Fourth District Court of Appeal held a property insurance policy that required the insured to submit to an examination under oath while not in the presence of any other "insured" did not allow the insurer to exclude the insured's public adjuster from the insured's examination under oath. The public adjuster was not an insured under the policy, and the plain language of the policy did not delineate anyone else the insurer could exclude from the insured's examination under oath.

Gulf Coast/Southeast

INSURANCE CASE LAW UPDATE

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