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Taking Stock of Your Insurance Post-Katrina

"if you always do what you always have done,
you will always get what you always have got"

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There is old adage that goes something like this, "if you always do what you always have done, you will always get what you always have got". This philosophy may be partly to blame for the catastrophic losses that befell a seemingly unprepared New Orleans. Why should New Orleans have feared or even prepared for this potential. New Orleans did not suddenly sink below sea level—it was built that way. Hurricanes have ravaged the Gulf Coast for centuries and New Orleans and its citizens, in stereotypical fashion, prepared for each approaching storm the same way, tape for the windows, plywood for the doors, Coleman fuel for the lanterns, and if you were really pessimistic a generator. They prepared for loss of electricity for a few days, no school, no work, and of course some prepared by hosting the now famous "Hurricane Parties." New Orleans always did this, so why shouldn't they have been justified in expecting to "get what they always got?"

Hindsight is, of course, 20-20, but stronger levees, earlier evacuation, better communication, and better response times, are but a few of the obvious issues that common sense would suggest should be done differently in the future by our leaders. Unfortunately, these matters invite painstaking study, and bureaucratic red tape, that at this point seem strangely at odds with the urgency of a rapidly approaching "new hurricane season."

While the debate on how to prevent a reoccurrence of the catastrophes of 2005 rages on, there are some actions that everyone can and should take now to prepare against the unthinkable—another bad storm. One area in particular that every business owner, home owner, or lessee should take the time to do now, is a complete review of the insurance policies that are in place to protect their property. The policies should be kept in a secure place that ensures their

accessibility in the event of a total loss of the property. The policy numbers should be recorded and stored in a separate place as a redundant means of ensuring an accurate record of the policies in the event of a total loss.

The insured should take the time to make certain he knows what risks his insurer has agreed to cover, i.e., if the pipe breaks and "floods my whole house" versus, the hurricane causes severe unprecedented flooding, versus, a levee breaks causes my house to flood. The insured's problems are the same, his or her house is flooded, and he or she needs money to repair it. But, the source of flooding, or the cause of the flooding in most cases will determine if the homeowner will or will not be entitled to recover under his policy.

If there is a covered loss, how is the amount of the insurance payment determined? The term "replacement cost" seems to suggest that if the home is destroyed, and the owner has "replacement cost" coverage then the amount of the insurance payment should be the actual cost of "replacing" the home. Unfortunately, for many unsuspecting victims of Hurricane Katrina, that may not be the end result. The "fine print" of the policies contained in the "definition and exclusions" sections restricts and refines the meaning of words or phrases. "Replacement Cost" is often defined to allow an offset or reduction on account of depreciation, or is limited to a certain value per square foot, or some other limiting criteria. Each policy is different and each should be read and studied from a "worst case scenario" in an effort to clearly define and understand exactly what risk you are insured against.

The time to perform this review and organization of insurance policies is now, before you need them. Waiting until after the loss to discover that you really did not understand what coverage had been purchased is one catastrophe that can and should be prevented.

Hurricanes Katrina and Rita, not only caused unprecedented damage but their aftermath continue to wreak havoc on their victims though unprecedented insurance coverage challenges. Such issues include, but are by no means limited to:

- Was the damage to the home or business caused by hurricane storm damage (which would be covered) or was it caused by flooding (which would not be covered under some policies)?

- Was the loss of renters property covered by the hurricane storm damage coverage or is it excluded because there is the possibility that the loss was caused by looters (theft) which may not be covered?

- Does a valid "mold exclusion" give the insurer the right to deny a claim for water damage to sheetrock if only some of the home has evidence of mold growth.

- If the insured proceeds are made payable to the insured and the mortgage holder, who is entitled to the use of these funds during the period of the repair?

In the First Extraordinary Session of 2006, the Louisiana Legislature responded to many of these issues and passed a series of Acts which directly addressed some of the many post-Katrina/Rita insurance issues. The following is a brief synopsis of those Acts.

Act 42 (effective as of 4-18-2006) Amended and Reenacted La. R.S. 22:667.1 and 696 and Enacted La. R.S. 22:1447.

The Act was directed at the issue of making sure the homeowner understands what risk the insurer is agreeing to cover. Specifically La. R.S. 22:1447 will require the following:

A **homeowners policy** providing coverage to **residential** property **must** advise the insured on a form developed by the commissioner of insurance:

(1) which coverages are included;
(2) whether coverage extends to flood or mold and whether there is an increased deductible for wind and other specified damages;
(3) the sources of availability for flood insurance;
(4) the distinction between replacement cost and actual cash value, the use of depreciation in determining losses, and any time limitation for repairs; and,
(5) that the policy determines the process for providing the insurer with notification of a loss, and the timelines provided by law within which the insurer must adjust, settle and pay the claim. The insurer must also advise the insured of the availability of penalties which may be imposed against the insurer if it fails to comply with law.

Act 23 (Effective on 4-18-2006) Enacted La. R.S. 22:682.

Act 23 will apply to all **new** homeowner's policies and renewal policies issued after April 18, 2006. It creates special rules for losses ***"due to a catastrophic event for which a state of disaster or emergency"*** was declared by civil officials and only applies to those areas included within the declaration. The Act creates:

(1) a statutory 180 day time limit for filing proofs of loss regardless of contrary time limits set forth in the policy,

(2) prohibits the insurer from automatically denying a claim based upon the insured's inability to produce proof of loss with the time limits of the policy,
(3) mandates that repairs done pursuant to "replacement cost policies" be completed within one year; and,
(4) provides for full value of the covered damage that has been repaired, without reduction due to depreciation.

Act 21 (Effective on 4-1-2006) Enacted La. R.S. 6:337.

It is specifically limited to issues relating to the handling of insurance settlement proceeds for damages resulting from Hurricanes Katrina or Rita or both. After the storms many homeowners made claims against their insurer for property damage losses. In cases in which the property was secured by a mortgage the insurance companies typically issue the settlement check jointly to the homeowner and the mortgage holder. The delay experienced by financially strapped homeowners in receiving the excess amount back from the mortgage holder was the impetus behind this act. The act requires such excess funds to be released to the homeowner within 30 days after receiving a request for such from the homeowner. A mortgage holders failure to act within the 30 timeline can result in the imposition of a penalty of up to $150.00 per day.

Act 12 (Effective on 2-23-2006) Enacted La. R.S. 22:658.2 and 1220(b)(6)

Under this act, if a homeowner experiences property damage that is covered either in whole or in part under the homeowner insurance policy:

(1) the burden is on the insurer to establish an exclusion;
(2) the insurer may not use the flood water mark on a covered structure, without considering other evidence, when determining if the loss is covered;
(3) the insurer shall not use the fact that a home is removed or displaced from its foundation, without considering other evidence in determining whether a loss is covered; and,
(4) an insurer who violates the provision may be liable for penalties.

In addition to the above, the legislature is expected to consider another bill during the regular session which may require all insurers to obtain a written rejection of flood insurance from the insured prior to issuing a policy. House Bill No. 360 if enacted as currently written would apply to both commercial and residential property. It purports to prohibit the issuance of **any** fire insurance policies which provide coverage for damage to property which purport to exclude coverage for damage caused by flood unless the insured signs a written rejection of coverage for damage caused by the flood.

There are many things that are beyond the control of mankind—among them the weather. We may not be able to stop Hurricanes, or flooding, or any number of other potential disasters, but we can and should plan for the absolute worst so that we can be pleasantly surprised if it turns out to be not as bad as we thought. As a trial attorney, this is the closest I can come to being an optimist.

About the Author:

David Nelson is a partner in the Baton Rouge office of Kean Miller and a member of the Management Committee. He joined the firm in 1985 and practices in the litigation area with special interest in construction and toxic tort litigation including most recently mold litigation. David represents construction clients in a wide variety of construction disputes including litigation, contract negotiation and interpretation, arbitration and mediation, lien rights and remedies under the Public Works Act and the Private Works Act, performance, payment, bid and retainage bond rights, and liability and responsibility issues. David represents engineers, contractors, industrial concerns, building owners, architects and engineers in a wide variety of matters including improper construction and design issues. David has particular expertise in construction law issues relating to building cladding issues, water intrusion, and corresponding damage claims including "toxic mold" claims. He can be reached at 225.382.3417 or david.nelson@keanmiller.com