

**SO YOU'VE JUST SUFFERED A
*!\$%=&+^ CATASTROPHE!!!!**

**DOES YOUR INSURANCE COVER
ANYTHING?**

**INSURANCE ISSUES FOR YOUR HOMES,
AUTOMOBILES, PERSONAL PROPERTY,
AND BUSINESSES**

**LIFE AFTER THE STORM, FIRE, FLOOD,
THE EARTHQUAKE, OR WHATEVER**

Town & Country Inn & Conference Center
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NBI, Inc.
Insurance Coverage Trends
Charleston, South Carolina

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The insurance industry defines the term “catastrophe” as a particular event causing more than \$5 million in losses.¹ It has also been defined as a “[c]onflagration, earthquake, windstorm, explosion, and other similar events [which] result in substantial losses.”² State Farm Fire and Casualty Company, one of the largest property and casualty insurance companies the United States, defines the term as follows:

A catastrophe typically:

- Is a weather-related event or natural disaster that causes widespread damage.
- Creates a large volume of insurance claims for damage to homes, businesses, cars, and other property located in a geographic area.
- Is unpredictable (like an earthquake) or of varied strength (such as a tornado, wind, hail, or ice storm), or related to a forecasted or ongoing occurrence (such as a hurricane, tropical storm, flood, or wildfire).³

¹ *Extremism in Pursuit of Kyoto* appearing in World Climate Report (www.worldclimatereport.com/archive/previous_issues/vol5/v5n02/feature1.htm). See also Rudy Yaksick, *Valuation of An American Put Catastrophe Insurance Futures Option: A Martingale Approach*, appearing in American Put Catastrophe Insurance Futures, 4th AFIR International Colloquium, p.849 (www.actuaries.org/AFIR/colloquia/Orlando/Yaksick.pdf).

² *Glossary of Terms* found at the South African Insurance Association (www.saia.co.za/ConsumerIssues/index.php?option=com_content&task=view&id=52&Itemid=78).

³ “What Is” section, Homeowners Insurance Claims, Catastrophe Information,

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The Connecticut Insurance Department characterizes a “catastrophe” in the following manner and makes certain suggestions to insureds:

What is a Catastrophe?

A catastrophe is defined by the insurance industry as an event that causes insured property losses in excess of established monetary amounts [\$5 million] and impacts a significant number of policyholders and insurers. It is important to note that although an event may not meet the criteria of an insurance catastrophe, it may indeed be "catastrophic" to an individual or group of individuals who are impacted by this event regardless of the amount of the total loss.

What are the Causes of a Catastrophe?

A catastrophe is usually caused by a natural event such as a hurricane, tornado, flood, earthquake[,] or wildfire. The event results in destruction or damage to insured property, including homes, businesses[,] and their contents.

Where do Catastrophes Occur?

As catastrophes are usually natural events, it is impossible to predict specifically when and where they will occur. However, it can be predicted with certainty that each year in the United States there will be some type of catastrophe. There is no area of the country exempt from these events. However, there are

(..continued)

State Farm Fire & Casualty Company website (www.statefarm.com/claims/whatis.htm).

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areas that are more susceptible than others to specific catastrophic risks, including the East Coast for hurricanes, the Midwest for tornadoes and the West Coast for earthquakes.

What do Catastrophes cost?

Every year U.S. property & casualty insurers pay billions of dollars to homeowners and businesses for insured property losses caused by multiple catastrophe events. These payments do not include uninsured losses and do not represent the intangible costs due to death, injury and human suffering sustained as a direct result of a catastrophe event.

What can you do if your property is damaged as a result of a Catastrophe?

- Contact your agent or insurance company immediately. You will want your claim investigated as soon as possible so that repairs can begin promptly. In addition, your insurance coverage may provide for additional living expenses for which you may be able to receive advanced payments.
- Take precautions to secure and protect your property from further damage. Board up windows or otherwise secure your property from looters. Move contents to protected areas or otherwise protect contents from further damage from the weather. Costs associated with this is usually covered by your policy and is usually a policy condition.⁴

⁴⁴ *Catastrophe Claims questions and answers*, Connecticut Insurance Department website (www.ct.gov/cid/cwp/view.asp?a=1259&q=254420).

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As noted by the various authorities, catastrophes include, but are not limited to hurricanes, severe thunderstorms, tsunamis, hail, tornadoes, winter storms (snow and ice storms), grassland and forest fires, etc., etc., etc.

For example:

HURRICANE WATCH!!! HURRICANE WARNING!!!

HURRICANE WATCH!!! HURRICANE WARNING!!!

Those words are probably the most chilling reminders to people who live along most American coastlines that living near the ocean is not all fun, sand, and surf. As the American Red Cross recently pointed out in a past advertising campaign "Life Is A Beach, Or Is It?" Even though Americans, who live on or near the coast, are generally afforded fairly substantial notice that a hurricane is on the way, there generally is never enough time to sufficiently protect much more than ourselves and our most precious belongings. Moreover, hurricanes, unlike tornados, normally move at a fairly slow speed, affording us the "opportunity" to chart their impending course and to anxiously await their inevitable arrival.

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This was particularly true with two recent Atlantic and Gulf of Mexico hurricanes: Katrina and Wilma. We are, of course all intimately familiar with those storms, thanks, in great part, to CNN, ABC, CBS, NBC, and all other electronic media. No matter how horrifying the destruction may look on television or in the print media, there is nothing like the experience of listening to (a) the roar of the hurricane as it surrounds you or (b) the silence of the eye as it passes over you. More importantly, there is nothing more emotionally daunting than going outside, either during the advent of the eye or after the hurricane has passed, and thinking you have been "magically" transported into the middle of Hiroshima in 1945, Beirut in the 1980's, Sarajevo and/or Bihac in the 1990's, or present-day cities in Iraq and Afghanistan.

As we all likely know from living in Charleston or, for that matter, South Carolina, in September 1989, Hurricane Hugo inflicted widespread destruction and devastation throughout most of eastern South Carolina, parts of North Carolina, and other sections of the United States' Eastern Coast. Similarly, in late August 2005 Hurricane Katrina struck the Louisiana, Mississippi, and

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Alabama coastlines. Death and destruction was widespread in each of those areas. Damages caused by hurricanes from Hugo, to Andrew, to Charley, to Katrina have been calculated in the many, many billions of dollars. Outstanding insurance claims from the latter storms, including Katrina, will be pending and/or litigated for years to come.

As a result of the widespread damage and destruction from these varied catastrophes, insurance companies have been, and will be for the immediately foreseeable future, faced with numerous property damage claims based upon varying and multiple fact patterns. Nevertheless, each individual claim should and, indeed, must be addressed in light of the facts surrounding that particular claim, together with the applicable policy language.

I. STANDARD HOMEOWNERS' PROPERTY DAMAGE
INSURANCE POLICY LANGUAGE

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Generally speaking, most homeowners' insurance policies contain broad, all-encompassing insuring agreements containing either the following or similar language:

SECTION I [PROPERTY COVERAGES] - PERILS INSURED AGAINST

COVERAGE A - DWELLING and COVERAGE B- OTHER STRUCTURES

We [the insurance company] insure against risk of direct loss to property described in Coverages A and B only if that loss is a physical loss to property. We do not insure, however, for loss:

* * *

3. Excluded under Section I - Exclusions.⁵

The enumerated exclusions include ordinance or law, earth movement, water damage, power failure, neglect, war, nuclear hazard, and intentional loss.⁶ In

⁵ Susan Miller & Peter Lefebvre, Miller's Standard Insurance Policies Annotated, Vol. I, pp. 205-206 (Legal Research Systems, Inc. 2005) (*citing* Insurance Services Office, Inc. ("ISO") Form No. HO 00 03 04 91 (hereinafter "Millers"). This form is commonly referred to as the HO 3. The Insurance Services Office, Inc. is more commonly referred to and known in the insurance business as the "ISO." See *also* Annotations To The Homeowners Policy (2d ed. Property Insurance Law Committee of American Bar Association's Torts Trial and Insurance Practice Section, 1990), pp. 8-9 (hereinafter "HO Anno.") (*citing* ISO Special Form 3 Ed. 4-84). In addition, while State Farm Fire & Casualty Company, one of America's largest residential insurers, uses internally generated policy forms, those forms contain similar language. HO Anno., p. 8 (*citing* State Farm Policy Form No. FP-7193 (6/86)).

⁶ HO-3 Form, pp.8-9 of 18.

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addition, while coverage is not provided for direct loss by weather conditions, acts or decisions, and faulty, inadequate, or defective conditions or action, any ensuing loss (not otherwise excluded) which resulted from any of those reasons is covered.⁷

The ISO Homeowners 2 Broad Form (No. HO 00 02 04 91) ("HO 2") provides in **SECTION I - PERILS INSURED AGAINST** as follows:

We [the insurance company] insure for direct physical loss to the property described in Coverages A, B[,] and C caused by a peril listed below unless the loss is excluded in SECTION I - EXCLUSIONS.

* * *

2. Windstorm or hail . . .⁸

Conversely, insurance companies, once providing such expansive language, have recently attempted to significantly limit the broad coverages set-forth above. This is especially true particularly concerning the "[v]arious types of water damage [which] are excluded from policy coverage, including

⁷ HO-3 Form, p.9 of 18.

⁸ 1 Stephen A. Cozen, *Insuring Real Property*, (Matthew Bender 2000), Appendix 4-A-6 (*citing* HO 2 at p. 6 of 16) (hereinafter "Cozen").

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damage caused by flood and surface water"⁹ Such coverage exclusions have been made with straightforward exclusionary language similar to or exactly as follows:

SECTION I [PROPERTY COVERAGES] - EXCLUSIONS

We [the insurance company] do not insure for loss caused directly or indirectly by any of the following. Such loss is excluded regardless of any other cause or event contributing concurrently or in any sequence to the loss.

* * *

- b. **Earth movement**, meaning earthquake, including land shock waves or tremors, before, during[,] or after a volcanic eruption; landslide; mine subsidence; mudflow; earth sinking, rising[,] or shifting; unless direct loss by:
- (1) Fire;
 - (2) Explosion; or
 - (3) Breakage of glass or safety glazing material which is part of a building, storm door[,] or storm window;

If any loss ensues and then we will pay only for the ensuing loss.¹⁰

- c. **Water Damage**, meaning:

⁹ 1 Cozen, § 4.05[4][c][iii].

¹⁰ HO-3 Form, p.8 of 18.

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- (1) Flood, surface waters, waves, tidal water, overflow of a body of water, or spray from any of these, whether or not driven by wind;¹¹
- (2) Water which backs up through sewer or drains or overflows from a sump; or
- (3) Water below the surface of the ground, including water which exerts pressure on or seeps or leaks through a building, sidewalk, driveway, foundation, swimming pool[,] or other structure.¹²

Consequently, due to the enumerated exclusions, homeowners are required to purchase separate insurance policies (*i.e.*; federal flood insurance) and/or pay an additional premium for a policy rider providing additional coverage protection (*i.e.*; earthquake coverage).

a. Purpose of the Flood Exclusion

¹¹ This provision is commonly referred to as the “flood exclusion”.

¹² HO-3 Form, pp.8-9 of 18. See also generally Miller's, p. 209 (*citing* ISO Form HO 3 at p. 8 of 18) (Emphasis added). See also H O Anno., p.12 (*citing* ISO HO 3 Special Form), pp.11-12 (*citing* State Farm Form FP-7193); Cozen, Appendix A-4-7 (*citing* ISO Form HO 2 at p. 7 of 16). This is commonly referred to as the "flood exclusion" excluding property damage coverage for losses caused by floods or similar "water related" events described in the exclusion.

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Under normal insurance principles, it is generally stated that floods are not the kinds of risks which insurance companies voluntarily undertake because they are usually catastrophic and affect many people.¹³ The United States District Court for the District of Minnesota, in Wyatt v. Northwestern Mutual Insurance Co.,¹⁴ determined that:

. . . . the reason for the insertion of a [flood] exclusionary clause. . . in all-risk insurance policies is to relieve the insurer from occasional major disasters which are almost impossible to predict and thus to insure against.

There are . . . floods which cause a major catastrophe and wreck damage to everyone in a large area rather than one individual policyholder. When such happens, the very basis upon which insurance companies operate is said to be destroyed. When damage is so widespread, no longer can insurance companies spread the risk and offset a few of the average percentage of losses by many premiums. Looking at the [flood exclusion] . . . it seems to cover situations

¹³ Safeco Insurance Co. of America v. Guyton, 471 F.Supp. 1126, 1130 (C.D.Cal. 1979), *judgment affirmed in part, reversed in part on other grounds*, 629 F.2d 551 (9th Cir. 1982).

¹⁴ Wyatt v. Northwestern Mutual Insurance Co., 304 F.Supp. 781 (D.Minn. 1969).

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where one single event could adversely affect a large number of policyholders.¹⁵

III. STANDARD AUTOMOBILE PHYSICAL DAMAGE
INSURANCE POLICY LANGUAGE

Not unsurprisingly, an automobile insurance policy is primarily designed to provide physical damage coverage¹⁶ for the vehicle when it is involved in a collision with another vehicle or with an inanimate object (*i.e.*; tree, wall, bridge abutment, *etc.*)¹⁷ or an animate thing (*i.e.*; pedestrian, animal, *etc.*). Nevertheless, in a catastrophe situation, normally a private automobile will be

¹⁵ Wyatt v. Northwestern Mutual Insurance Co., 304 F.Supp. 781, 783. See also Peters Township School District v. Hartford Accident & Indemnity Co., 833 F.2d 32, 35-36 (3rd Cir. 1987); Arcon Corporation v. Liberty Mutual Insurance Co., 591 F.Supp. 15, 21 (M.D.Tenn. 1983)

¹⁶ Burnet R. Maybank, III; Lee P. Jedziniak; Gwendolyn L. Fuller; Vernon R. Sumwalt, Jr.; Elizabeth Scott Moise; and Eugene C. Covington, Jr., The Law of Automobile Insurance in South Carolina: Fifth Edition, VI-2 n.9 (SCBar CLE Division 2002) (hereinafter "S.C. Auto. Law") (" 'Physical' and 'property damage' coverages are terms of art when used in the automobile insurance context. 'Physical' damage refers to first party (*e.g.*; collision) coverages; 'property' damage refers to third party liability coverage. ").

¹⁷ Long Motor Lines v. Home Fire & Marine Insurance Company, 220 S.C. 335, 67 S.E.2d 512 (1951) (includes violent collision with some part of the roadbed). See also S.C. Auto. Law, VI-4 n.20.

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afforded coverage due to property damage from, usually among one or more of the following: missiles, falling objects, winds, hail, flood, water, and/or fire.¹⁸

Generally speaking, most automobile insurance policies contain a broad insuring agreement containing either the following or very similar language couched in the context of “collision” and/or “comprehensive” (n/k/a “Other Than Collision”) physical damage coverages:

We will pay for direct and accidental loss to “your covered auto” or any “non-owned auto,” including their equipment, minus any applicable deductible shown in the Declarations. We will pay for loss to “your covered auto” caused by:

1. Other than “collision” only if the Declarations indicate that Other Than Collision Coverage is provided for that auto.

Loss caused by the following is considered other than “collision^[19]”:

1. Missiles or falling objects;
2. Fire;

¹⁸ S.C. Auto Law, VI-7, Section F (*citing Long Motor Lines v. Home Fire & Marine Insurance Company*, 220 S.C. 335, 67 S.E.2d 512; *Myers v. Calvert Fire Insurance Company*, 246 S.C. 46, 142 S.E.2d 704 (1965)).

¹⁹ See *Fowler v. Canal Insurance Company*, 300 S.C. 420, 389 S.E.2d 301 (Ct.App. 1990); *Moore v. Western Assurance of Toronto, Canada*, 186 S.C. 260, 195 S.E.2d 558 (1938).

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3. Theft or larceny;
4. Explosion or earthquake;
5. Windstorm;
6. Hail, water or flood;
7. Malicious mischief or vandalism;
8. Riot or civil commotion;
9. Contact with bird or animal; or
10. Breakage of glass.

(*Form PP 00 10 12 89*, pp.14-15). As previously noted, in the context of the “Other Than Collision Coverage”, most automobile insurance policies previously referred to such coverage and/or coverages as “comprehensive” coverage.²⁰

On the other hand, common physical damage coverage exclusions will include, but are not limited to radioactive contamination, wear and tear, freezing, discharge of a nuclear weapon, war, mechanical/electrical breakdown, civil war, insurrection, and damage to electronic equipment. (*Form PP 00 10 12 89*, pp.16-19).

²⁰ S.C. Auto. Law, VI-5 – Section C.

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IIII. STANDARD BUSINESSOWNERS PROPERTY DAMAGE
INSURANCE POLICY LANGUAGE

Most businesses will purchase a comprehensive business insurance policy which, in turn, provides both general liability insurance coverage and comprehensive property damage insurance protection. Typical “insuring agreement” language for such property damage protection is as follows:

We will pay for direct physical loss of or damage to Covered Property at the premises described in the Declarations caused by or resulting from any Covered Cause of Loss.

1. Covered Property

Covered Property includes Buildings as described under paragraph a. below, Business Personal Property as described under Paragraph b. below, or both. Depending on whether a Limit of Insurance is shown in the Declarations for that type of property. Regardless of whether coverage is shown in the Declarations for Buildings, Business Personal Property, or both, there is no coverage for property described under Paragraph 2, Property Not Covered.

- a. Buildings, meaning the buildings and structures at the premises described in the Declarations, including:
- (1) Completed additions;
 - (2) Fixtures, including outdoor fixtures;

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- (3) Permanently installed:
 - (a) Machinery; and
 - (b) Equipment;

* * *
 - (5) Personal property owned by you that is used to maintain or service the buildings or structures on the premises, including:
 - (a) Fire extinguishing equipment;
 - (b) Outdoor furniture;
 - (c) Floor coverings; and
 - (d) Appliances used for refrigerating, ventilating, cooking, dishwashing[,] or laundering;
 - (6) If not covered by other insurance:
 - (a) Additions under construction, alterations and repairs to the buildings or structures;
 - (b) Materials, equipment, supplies, and temporary structures, on or within 100 feet of the described premises, used for making additions, alterations or repairs to the buildings or structures;
- b. Business personal property located in or on the buildings at the described premises or in the open (on in a vehicle)

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within 100 feet of the described premises, including:

- (1) Property you own that is used in your business;
- (2) Property of others that is in your care, custody, or control, except as otherwise [excluded];
- (3) Tenant's improvements and betterments. Improvements and betterments are fixtures, alterations, installations, or additions:

* * *

- (4) Leased personal property for which you have a contractual responsibility to insure unless otherwise [addressed].
- (5) [Under certain circumstances] Exterior building glass, if you are a tenant

(Form BP 00 03 07 02, pp.1-3).

Nevertheless, as is always the case, there is no coverage for, among other things, the loss of or damage to aircraft, automobiles, money, securities, contraband, land, outdoor fences, trees, plants, outdoor signs, watercraft, accounts, or computers permanently installed in a vehicle designed to be

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registered with a governmental authority. (*Form BP 00 03 07 02*, p.3). Moreover, specific exclusions include, but are not limited to, ordinance or law, earth movement, government action, nuclear hazard, off premises power failure,²¹ war and military action, and water. (*Form BP 00 03 07 02*, pp.23-26). There is also no coverage for consequential losses, dishonesty, frozen plumbing, collapse,²² pollution discharge, neglect, and/or electrical disturbance. (*Form BP 00 03 07 02*, pp.27-28). Finally, while there

²¹ *But see* Brooklyn Bridge, Inc. v. South Carolina Insurance Co., 309 S.C. 141, 420 S.E.2d 511 (Ct.App. 1992) (Off-premise power loss exclusion did not eliminate coverage when reason for power loss was a covered cause of loss under the policy (*i.e.*; hurricane)).

²² *See* Ocean Winds Council of Co-Owners, Inc. v. Auto-Owners Insurance Company, 350 S.C., 268, 565 S.E.2d 306 (2002) (collapse must be imminent, not an actual collapse for coverage to apply).

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is no direct loss coverage, resulting loss coverage is provided for weather conditions, acts or decisions (or failure to act or decide), and/or negligent work. (*Form BP 00 03 07 02*, pp.29-30).

In South Carolina, windstorm and hail coverage may or may not be provided. (*Form BP 04 43 01 06*, pp.1-2). If so, there is usually an increased and/or separate premium. In any case, if the coverage is provided, it is subject to certain percentage deductibles and not the general loss deductible standard for the rest of the policy. (*Form BP 03 16 07 02*, pp.1-5). Earthquake coverage is, of course, subject to both a separate premium and a separate deductible. (*Form BP 10 03 07 02*, pp.1-3). §

IV. CONCURRENT OR MULTIPLE CAUSATION

As has been recently written by a well-known property law practitioner:

Insurance claims departments, defense [and plaintiffs'] counsel, and the courts have long wrestled with lawsuits concerning issues related to 'causes' of property insurance losses. The greatest controversies occur where losses are caused by a combination of covered and excluded perils.²³

²³ Douglas G. Houser, "*The Rise and Fall of Concurrent Causation: Background and Current Trends Affecting Property Insurance Coverage*," 44 Federation Insurance and

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In such situations when a loss is attributable to more than one cause no insurance policy is generally designed to protect an insured against all sources of loss.²⁴

Under any given policy some sources of a loss will not be covered, either because of express policy provisions,²⁵ or because of provisions which have been implied by operation of law.²⁶ The problem arises, however, when both **covered and noncovered** causes act together to bring about a loss. This situation is commonly referred to through the terms "concurrent causation" or "multiple causation."²⁷

(. . . continued)

Corporate Counsel Quarterly, 3 (Fall 1993) (hereinafter "Houser").

24 See Robert Keeton, Basic Text on Insurance Law, § 5-1(b) (1971) (hereinafter "Keeton"); Aetna Casualty & Surety Co. v. Yates, 344 F.2d 939, 940 (5th Cir. 1965). In Aetna Casualty & Surety Company v. Yates, the United States Court of Appeals for the Fifth Circuit stated:

The description of the policy as 'All-Risk' is rather a misnomer since it contains fourteen lettered exclusions, many of these covering a considerable number of separate items. The lettered exclusions are followed by exclusions from the exclusions.

Aetna Casualty & Surety Company v. Yates, 344 F.2d 939, 940. See also Keeton at § 5.1(b).

25 Edward Patterson, Essentials of Insurance Law, § 53 (2d Ed. 1957) (hereinafter "Patterson").

26 Patterson at §§ 58, 64; Keeton at § 53.

27 See generally, Stephen Brewer, "Concurrent Causation in Insurance Contracts", 59 Michigan Law Review 1141, 1145 (1961). See also Robert A. Fierce, Comment, "Insurance Law Concurrent Causation: Examination of Alternative Approaches," 1985 Southern Illinois Law Journal 527 (1985) (hereinafter "Fierce"); Burnett R. Maybank, III, Insurance Coverage Issues Relative to Natural Disasters, § VII (S.C. Bar CLE Div. 1989) (hereinafter "Maybank").

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Recently, one author addressed this issue succinctly and set forth the differences between insurance language today and that used in the past stating:

Under most 'all risk' insurance policies written before 1983, any loss that was not specifically excluded was covered under the policy. Thus, if the policy insured property against all risks of physical damage and the insured could show that the property suffered physical damage, the loss was covered. If[, on the other hand,] the insurer could prove that the sole cause of the loss was excluded under the policy, the loss would not be covered. However, if the loss was proximately caused by a combination of an excluded loss and a cause that was not excluded, the loss was covered. This is because of the widely accepted rule that when a policy of insurance expressly insures against direct loss or damage by one element, but excludes loss or damage caused by another element, the coverage extends to the loss even though the excluded element is a contributory cause.²⁸

²⁸ Bernard Mattis, "Earth Movement Claims Under All Risk Insurance: The Rules Have Changed in California," 31 Santa Clara Law Review 29, 31-32 (1990) (hereinafter "Mattis") (citing Stephen A. Cozen & Richard C. Bennett, "Fortuity: The Unnamed Exclusion," 20 The Forum 222 (1985); Paul Gorman, "All Risks of Loss v. All Loss: An Examination of Broad Form Insurance Coverage," 34 Notre Dame Law Review 346 (1959)) (Emphasis added)).

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As the Fifth Circuit stated in *Aetna Casualty & Surety Company v. Yates*, the typical "all risk" insurance policy provides insurance coverage for each and every peril which has not been specifically excluded by the terms and conditions of the policy.²⁹ Determining coverage under such policies often becomes very difficult when both included and excluded perils combine to produce an insured's loss. This situation is, of course, the exact one faced by insurance companies when adjusting a variety of catastrophe claims.

V. REDUCING INSURANCE FRAUD

The Office of the South Carolina Attorney General, in accord with the recognized authorities, estimates that the average American household pays \$1,030 per year for insurance fraud. The Attorney General notes that "[f]raud could be as simple as misrepresenting facts on an insurance application or 'padding' or inflating actual claims or as serious as submitting claims for injuries or damage that never occurred and 'staging' accidents. At least 10% of all auto, home[,] and business insurance claims are either fraudulent

²⁹ *Aetna Casualty & Surety Company v. Yates*, 344 F.2d 939, 940.

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or highly inflated.”³⁰ Unfortunately, the Attorney General notes that “insurance fraud” is quickly becoming an “acceptable” method to recover some of those insurance premiums which have been paid over the years:

Research indicates that the public's attitude about insurance fraud has grown increasingly tolerant in recent years. Studies show that 1 in 3 Americans believe it is ‘all right’ to pad claims to make up for premiums paid in previous years when they had no claims. Most people think that fraud is a victimless crime, but You Are the Victim. Insurance fraud directly affects the amount you pay for health, auto[,] and homeowner's insurance and increases the prices you pay for goods and services.³¹

The Attorney General's Office website, in the Insurance Fraud section, noted that the following are the seven most common types of insurance fraud:

- Under reporting the number of miles you drive on your auto policy.
- Failing to report an accurate medical history when applying for health insurance.

³⁰ South Carolina Attorney General website at the Insurance Fraud Section (www.scattorneygeneral.com/public/insurance.php).

³¹ South Carolina Attorney General website at the Insurance Fraud Section (www.scattorneygeneral.com/public/insurance.php).

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- An employee of a company who fakes or exaggerates injuries to avoid work and draws workers' compensation payout.
- An auto accident victim who falsifies or overstates injuries -- or even fakes the accident -- to achieve a large settlement or award.
- Staging automobile accidents which result in inflated injury claims.
- An insured who draws accident and health insurance benefits because of exaggerated or even fabricated injuries or illness.
- Exaggerating the amount and value of items stolen from a home or business.³²

In 1994 the South Carolina Legislature adopted the Omnibus Insurance Fraud and Reporting Immunity Act.³³ A person and/or insurance entity convicted of insurance fraud is subject to varying criminal penalties depending on the monetary amount involved in the offense and whether there were and

³² South Carolina Attorney General website at the Insurance Fraud Section (www.scattorneygeneral.com/public/insurance.php).

³³ See S.C. Code Ann. §§ 38-55-510 et. seq. (West Group 2002 rev. and West Group Supp. 2005).

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prior such offenses. Fines start at \$500.00 and progress to \$50,000.00.³⁴ Imprisonment begins at not less than 30 days and can reach a maximum of not less than ten years.³⁵ In addition, where the person and/or entity involved obtained an economic benefit from the violation, full and complete restitution of all of the economic benefits must be made to all victims.³⁶ In addition to the criminal penalties, anyone found to have violated S.C. Code Ann. § 38-55-510, et. seq. is subject to a civil fine payable to the South Carolina Department of Insurance (the “SCDOI”) of not less than \$5,000.00 nor more than \$15,000.00 depending on the frequency of the offenses.³⁷

The Office of the Attorney General of the State of South Carolina prosecutes suspected insurance fraud and the State Law Enforcement Division

³⁴ S.C. Code Ann. §§ 38-55-540(1)-(3) (West Group 2002 rev.).

³⁵ S.C. Code Ann. §§ 38-55-540(1)-(3) (West Group 2002 rev.).

³⁶ S.C. Code Ann. §§ 38-55-540 (West Group 2002 rev.). Double jeopardy does not bar a defendant’s convictions of both forgery and insurance fraud. See State v. Pace, 337 S.C. 407, 523 S.E.2d 466 (Ct.App. 1999).

³⁷ S.C. Code Ann. §§ 38-55-550(A)(1)-(3) (West Group 2002 rev.). These penalties also apply for any violation of S.C. Code Ann. § 38-55-170 (West Group 2002 rev.) (submitting false claim for payment to insured, HMO, etc.). The sums obtained through these

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(“SLED”) investigates suspected insurance fraud.³⁸ Reports of suspected insurance fraud may be made to the Insurance Fraud Division of the South Carolina Attorney General’s Office.³⁹ Any person and/or entity making a good faith report of suspected insurance fraud to the Insurance Fraud Division is “immune from any liability arising out of filing reports, cooperating with investigations by any authorized agency, or furnishing other information” regarding suspected insurance fraud.⁴⁰ Should, however, any person and/or entity make a report in bad faith or with malice, then there is no immunity for such a false report.⁴¹

Some useful internet links for combating insurance fraud:

(. . .continued)

fines must be used to enforce and administer S.C. Code Ann. §§ 38-55-510, *et. seq.*

38 S.C. Code Ann. § 38-55-520 (West Group 2002 rev.).

39 S.C. Code Ann. § 38-55-560 (West Group 2002 rev.).

40 S.C. Code Ann. § 38-55-580(A) (West Group 2002 rev.).

41 S.C. Code Ann. § 38-55-580(C) (West Group 2002 rev.).

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National Insurance Crime Bureau	www.nicb.org
Coalition Against Insurance Fraud	www.insurancefraud.org
SC Insurance News	www.scinsnews.com
SCIFI (SC Ins. Fraud Investigators)	www.sc-ifi.com
SC Department of Insurance	www.doi.state.sc.us
Insurance Journal	www.insurancejournal.com
For Insurance Fraud Bureaus in other states:	
	www.insurancefraud.org/fraud_bureaus_list.htm

**VI. NATIONAL AND STATE PROGRAMS SUPPLEMENTING
THE PRIVATE INSURANCE INDUSTRY**

A. Federal Flood Insurance

The United States Government, because of the existence of the "flood exclusion" in property damage insurance policies, has made it possible for individual homeowners and condominium associations to obtain insurance coverage for these normally excluded events through the National Flood Insurance Program (the "NFIP") pursuant to the Standard Flood Insurance Policy (the "SFIP").⁴² The Federal Emergency Management Agency, a

⁴² See 42 U.S.C. § 4001 *et seq.* (1993). See also Fire, Casualty & Surety Bulletins (Fire & Marine), F-1-8, Fc-1-9, Fpd-1-7, Fpgd-1-7 (The National Underwriter Co. 1989) (hereinafter "FC&S Bulletins").

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subdivision of the Department of Homeland Security (“FEMA”), administers the NFIP.⁴³ The courts have recognized that “Congress created the [NFIP] because ‘many factors have made it uneconomical for the private insurance industry alone to make flood insurance available to those in need of such protection on reasonable terms and conditions.’ ”⁴⁴ In addition, “[t]he purpose of the [NFIP] is to provide flood insurance on a uniform nationwide basis.”⁴⁵ As the authorities note:

⁴³ 42 U.S.C. §4011(a) (1993). See also 44 C.F.R. Pts. 59-77 (1993); Chesapeake Ship Propeller Co. v. Stinckney, 820 F.Supp. 995, 997 (E.D.Va. 1993); Mark Rhodes, Insurance Laws Annotated: Federal and Model Acts, § 4.2 (1993). In addition, the United States District Court for the Eastern District of North Carolina aptly characterized the purpose of the flood exclusion and the NFIP stating:

The NFIP is neither a disaster-relief program nor a welfare system, but a federal initiative designed to make affordable flood insurance available for relatively high-risk properties. While the [NFIP] provides insurance coverage at below-market rates [through the SFIP], its terms should be construed no more liberally than comparable private insurance policies.

Nida v. Federal Emergency Management Agency, 817 F.Supp. 597, 600 (E.D.N.C. 1992) (citing Leland v. Federal Insurance Administrator, 934 F. 2d 524, 529 (4th Cir. 1991)).

⁴⁴ Smietanka v. Director, Federal Emergency Management Agency, 830 F.Supp. 1014, 1014 (W.D.Mich. 1993) (quoting 42 U.S.C. §40001(b)). See also Burch v. Federal Insurance Administration, 23 F.3d 849, 852 (4th Cir. 1994).

⁴⁵ Davis v. Witt, 873 F.Supp. 223, 225 (E.D.Mo. 1995) (citing Nelson v. Becton, 929 F.2d 1287, 1291 (8th Cir. 1991)).

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The NFIP is based on an agreement between local communities and the federal government that states that if a community will implement measures to reduce future flood risks to new construction in 'special flood hazard areas', the federal government will make flood insurance available within the community as a financial protection against flood losses that do occur.⁴⁶

In fact, due to the complete devastation wrought by losses covered by the SFIP and the failure of many persons and/or entities to purchase flood insurance in the past, the Federal Government has made the purchase of flood coverage mandatory in many areas, especially in river flood plains and along America's extensive seacoasts.⁴⁷ FEMA enforces this mandate through cooperation with and "coercion" of the mortgage lending community.

⁴⁶ FC&S Bulletins (Fire & Marine), F-1.

⁴⁷ NFIP Description, pp.29-31.

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In addition, FEMA has the authority to suspend or terminate flood coverage availability to communities which refuse to comply with applicable NFIP rules and regulations relating to mandatory federal flood insurance.⁴⁸

Under applicable NFIP guidelines, federal “[f]lood insurance may be written on any type of [eligible] residential or nonresidential building . . . [c]ontents of eligible buildings . . . mobile home[s] . . . [c]ondominium buildings and contents[, etc.]”⁴⁹ The very language of the three NFIP insurance policies (*i.e.*; dwelling form, general property form, and the residential condominium building association policy) is set forth in the Code of Federal Regulations and is statutorily mandated.

Federal flood insurance policies, through the NFIP, are sold to owners of property located in the approximately 20,000 NFIP communities through one of two methods: first, on the one hand through state-licensed property and casualty insurance agents and/or brokers who deal directly with FEMA;

⁴⁸ NFIP Description, p.25.

⁴⁹ FC&S Bulletins (Fire & Marine), F-2-3.

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or, secondly, on the other hand, through private insurance companies with a program created in 1983 known as the “Write Your Own” (the “WYO”) program.⁵⁰

FEMA initiated the WYO Program to increase both the NFIP policy count and the geographic distribution of policies by taking advantage of the private insurance industry’s marketing channels and existing policy base to sell flood insurance.⁵¹ Some 86 private insurance companies issue policies and adjust flood claims in their own names under the NFIP.⁵² This is the manner in which most Americans obtain their flood coverage as about 95% of the flood policies issued under the NFIP are written through the WYO

⁵⁰ National Flood Insurance Program - Program Description, dated August 1, 2002, pp.22-23 found at Federal Emergency Management Agency website (www.fema.gov/doc/library/nfipdescrip.doc) (hereinafter “NFIP Description”).

⁵¹ NFIP Description, p.23.

⁵² The WYO Program insurers receive an expense allowance and remit premium income in excess of this allowance to the Federal Government. FEMA pays flood losses through a letter of credit and sets the rates, coverage limitations, and eligibility requirements. The premium charged for NFIP flood coverage by a WYO Company is the same as that charged by FEMA through the direct purchase program. NFIP Description, p.23.

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Program.⁵³ While FEMA has both an “emergency flood insurance program” and a “regular flood insurance program” virtually all current policies are written under the regular program – including our area.

The following are the applicable amounts of flood coverage which may be purchased under the NFIP:

- Residential 1-4 family unit buildings and individual residential condominium units are written under the Dwelling Form and are eligible for up to \$250,000.00 in building coverage and up to \$100,000.00 in personal property coverage.
- Residential buildings containing more than 4 units are eligible for up to \$250,000.00 in building coverage and up to \$100,000.00 on personal property.
- Non-residential buildings are eligible for up to \$500,000.00 in building coverage and up to \$500,000.00 on personal property written on the General Property Form.
- Under the RCBAP Form a condominium association can purchase coverage on a building, which includes all the units within the building and the improvements within the units, up to \$250,000.00 times the number of units

53 NFIP Description, p.23.

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within the residential building. Personal property coverage on the form is limited to \$100,000.00 per building.**54**

Just like regular insurance claims under standard property damage policies, NFIP claims require the insured to file a Proof of Loss.**55** This document must be submitted within 60 days of the loss, unless waived by FEMA’s Administrator. NFIP claims may be adjusted using either an independent adjuster or an adjuster employed by a WYO Program company.**56** Under all NFIP policies, the insured pays a portion of the loss through the application of a stated deductible.**57**

B. South Carolina Property and Casualty Insurance Guaranty Association

In 1962 the South Carolina Legislature adopted the South Carolina Property and Casualty Insurance Guaranty Act.**58** All insurers doing business in South Carolina are members of the South Carolina Property and Casualty

54 NFIP Description, p.25.
55 NFIP Description, p.27.
56 NFIP Description, p.27.
57 NFIP Description, p.28.
58 See S.C. Code Ann. § 38-31-10 (West Group 2002 rev.)

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Insurance Guaranty Association and are periodically assessed for a (1) workers' compensation, (2) automobile insurance, (3) homeowners multiple peril and farmowners multiple peril, and (4) "all other insurance" guaranty accounts.⁵⁹

The SCPCIGA comes into play when an insured is declared insolvent either by the SCDOI or some other Department of Insurance.⁶⁰ That can and does often occur as the result of a catastrophe. Individual claims are paid up to \$300,000.00 as long as there is not other available insurance coverage to provide any funds.⁶¹ If the claimant has any type of insurance coverage available to him or her relative to the claim, then the SCPCIGA is effectively given a "set off" for any applicable insurance coverage.⁶²

⁵⁹ S.C. Code Ann. § 38-31-40 (West Group 2002 rev.).

⁶⁰ S.C. Code Ann. § 38-31-60 (West Group 2002 rev. and West Group Supp. 2005)).

⁶¹ S.C. Code Ann. § 38-31-60. See also S.C. Code Ann. § 38-31-100 (West Group Supp. 2005)

⁶² S.C. Code Ann. §§ 38-31-60(1)-(2) (West Group Supp. 2005); S.C. Code Ann. § 38-31-100.

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C. South Carolina Wind and Hail Underwriting Association

The South Carolina Wind and Hail Underwriting Association was created in 1971 to provide windstorm and hail insurance coverage to those South Carolinians living along specified sections of the Carolina coast who were unable to obtain such coverage in the open insurance market.⁶³ All property and casualty insurers doing business in South Carolina are members of the association.⁶⁴

VII. DAMAGE MITIGATION MEASURES

All property and casualty insurance policies require the insured to mitigate his or her damages if and when an loss occurs. This mitigation requirement compels the insured to use reasonable means to protect the insured property from additional damages once the loss has taken place. This includes expensing money to make needed repairs o prevent more damage. The typical policy language, usually found in the generally-captioned “Your Duties After Loss” section reads as follows:

⁶³ S.C. Code Ann. § 38-75-310 (West Group 2002 rev.).

⁶⁴ S.C. Code Ann. § 38-75-330 (West Group 2002 rev.).

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Protect the property from further damage. If repairs to the property are required, you must:

- a. Make reasonable and necessary repairs to protect the property; and
- b. Keep an accurate record of repair expenses.

(Form HO 00 03 06 05, p.26).

NPCHAR1:301072.1-DOC-(SPG) 900000-00127