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by Richard P. Lewis and Michael N. DiCanio

Hurricane Katrina was the most costly natural catastrophe in U.S. history. In the wake of this devastation, policyholders have sought to mitigate the damage to their businesses through Business Income (or "Business Interruption") coverage, which is designed to pay a policyholder's loss of profit, and its continuing, unavoidable expenses, following physical loss or damage to property used by the policyholder to conduct operations. Mass catastrophes are driving the development of the law on Business Income. More than half of the decisions construing Business Income and other time-element cases have been decided since September 11, 2001. Undoubtedly, the Katrina cases, as they are decided, will continue to follow a similar pattern. This precedent will shape how courts in Louisiana and elsewhere interpret these complex questions and will change how insurers draft Business Income provisions for the future.

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Prejudgment interest is widely accepted as an element of damages awardable to a party who has suffered a loss from the time a cause of action accrues until the time of the judgment. This article presents a case law survey of when and if prejudgment interest should be awarded in the first party property context subsequent to entry of an appraisal award.

Handling the Flood of Coverage Litigation: Lessons Learned from Katrina

by Wystan M. Ackerman and Seth A. Schmeeckle

Hurricane Katrina was a catastrophe of unparalleled proportions. Unsurprisingly, it led to a volume of property insurance coverage litigation never seen before in the state and federal courts of Louisiana and Mississippi. The first class action filed against insurers was filed before the floodwaters even receded in New Orleans—it had to be filed in Baton Rouge because the New Orleans courts had not yet reopened.[1] Thousands of insurance suits were filed.

After lengthy battles in both federal and state courts, insurers ultimately prevailed on the most critical coverage issues, including the applicability of the flood exclusion and the interpretation of the Louisiana Valued Policy Law.[2] Insurers also successfully defeated class certification in the Katrina class actions, except for a few classes certified against smaller domestic insurers in the state courts.[3]

A number of lessons for insurers can be drawn from the Katrina experience about best practices for coverage

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Insurance 101-Insights for Young Lawyers: Proper Settlement Credits in All Sums Jurisdictions

by Charles H. Mullin, Karl N. Snow and Noah B. Wallace

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1. Executive Summary

The debate on settlement credits in all sums jurisdictions has focused on two alternatives—a settlement credit equal to the policy limits of the settled policies (“policy limits”) and a settlement credit equal to the amount of the settlement (“pro tanto”). We demonstrate that the universal adoption of either of these two alternatives is inappropriate. When adopted without reference to the facts underlying the settlement, the policy limits approach may cause a fully covered policyholder to recover less than the loss incurred. In contrast, when adopted without reference to the facts underlying the settlement, the pro tanto approach may result in the policyholder recovering in excess of the loss incurred.

The proper settlement credit approach depends on the reason that the settlement amount differs from the policy limits. When a policy-specific argument motivates the discount, such as a unique coverage defense or insolvency risk, then the pro tanto approach may be reasonable. This approach leaves nonsettling insurers unaffected by the settlement and the policyholder whole. Alternatively, when a generic coverage defense or time value of money motivates the discount, the policy limits approach is preferable as it removes the possibility of over collection and leaves each party at least as well off as it was prior to the settlement. Whenever the settlement credit approach is out of alignment with the economic motivation for the discount relative to policy limits, either the policyholder or the nonsettling insurers receive a benefit at the other’s expense.

The proper settlement credit approach depends on the reason that the settlement amount differs from the policy limits

A rule that defaults to policy limits and allows policyholders to argue for pro tanto best aligns the incentives of all parties. First, the policyholder, being a party to the settlement, has information concerning the settlement that is not available to the nonsettling insurers. Therefore, the policyholder should be able to document why the settlement was discounted. Second, the fact patterns that justify a policy limits approach are more common than the fact patterns that justify a pro tanto approach. Third, in the absence of bearing the burden of proof, the pro tanto approach creates moral hazard problems—the policyholder has control over the settlement terms but lacks an

economic incentive to maximize the value of the settling insurer's policies since any shortfall will be borne by the nonsettling insurers. To ensure that the nonsettling parties receive equitable treatment, the insured should bear the burden of proof that the pro tanto approach is more appropriate than the policy limits approach.

2. History of Settlement Credits

Based on the all sums language common in Comprehensive General Liability (CGL) policies, some jurisdictions have ruled that policyholders have a reasonable expectation to be made whole through their purchase of any single policy triggered by a particular loss. Generally speaking, this means that so long as the policyholder respects the attachment points and the limits stipulated in the CGL contract, the policyholder can seek reimbursement for all of its covered losses under any triggered policy. All sums rulings also note that any insurer being held to pay all sums may seek equitable contribution from all other triggered policies. The concept of equitable contribution requires a determination of the share of the covered loss to be paid by each of the triggered policies. In practice, this question has numerous potential answers, but when the potentially impacted coverage line includes settled policies, it takes on an added level of complexity.

When a policyholder and an insurer settle on the value of insurance coverage due for a particular claim against a set of policies, the settlement amount stipulated in that agreement often differs from the available policy limits. In some cases, such as those where defense costs are covered outside of stated policy limits or where a claim might include more than one occurrence, the agreed upon settlement amount may exceed the policy limits. It is more common, however, for the agreed upon settlement amount to be less than the total available limits of the policies being settled.

The discrepancy between the settlement amount and the policy limits account for the realities of the coverage claim at hand. This may include the fact that the coverage claim may not exhaust the applicable policy limits or that the insurer has potentially valid coverage defenses. In the case of long-tailed liabilities, such discounting also reflects the time value of money. For example, a policy that is anticipated to owe $10 million over the next five years may settle today for the net present value of that $10 million.

2.1. Prevalent Treatments of Settlement Credits

For the purpose of determining equitable contributions in an all sums jurisdiction, the question as to how such a settled policy should be valued is still largely an open one. There are at least three proposed answers to this question; settlement credits based on policy limits, settlement credits based on the pro tanto settlement amount, or some form of pro rata allocation that is calculated independently from the policy's settlement amount. The third scenario is frequently a middle ground between the first two scenarios. Hence there are a myriad of variations in how this last approach can be applied. Since the first two approaches represent the extrema of possible allocations, we will use three distinct case studies to examine the effects of those approaches on settlement credits to unsettled insurers.

2.2. Public Policy Objectives

Two longstanding public policy objectives guide our assessment of the alternative treatments of settlement credits: (i) the desire to encourage settlement and, thereby, reduce litigation costs and uncertainty for the settling parties, as well as the burden on the court; and (ii) the desire to leave third parties to a settlement unaffected by the settlement. In general, a treatment of settlement credits that adheres to both of these public policy objectives will be deemed preferable to one that violates one of these public policy objectives.

3. Three Case Studies

In the following section, we analyze three case studies in which a hypothetical environmental claim is allocated to various insurance policies using both policy limits and pro tanto approaches to settlement credits. This analysis shows that the pro tanto approach unambiguously increases the incentive to settle when compared with the policy limits approach. The nonsettling insurers, however, finance the increase in this incentive. Specifically, crediting nonsettling insurers for only the settlement amount can increase and accelerate their payments.

3.1. Case Study 1: Discounting for Net Present Value of Future Losses

The policyholder has incurred a $100 million environmental loss. This amount is to be paid over the next ten years at $10 million per year and translates into $75 million in net present value (NPV). The policyholder has $200 million in available insurance. Insurer A is responsible for $80 million of coverage and Insurer B is responsible for the remainder.

In the absence of any settlement agreements ("pay-as-you-go"), Insurer A will pay $80 million over the next ten years (net of equitable contribution from Insurer B), a payment stream that has an NPV of

Exhibit 1: Insured's Recoveries under Alternative Choices of Law, Case Study 1

		Insurer A		Insurer B		Total	
		Nominal	NPV	Nominal	NPV	Nominal	NPV
Pay-as-you-go		$80M	$60M	$20M	$15M	$100M	$75M
Insurer A settles for $60M	Policy limits	$60M	$60M	$20M	$15M	$80M	$75M
	Pro tanto			$40M	$30M	$100M	$90M

$60 million. Similarly, Insurer B will pay $20 million over the next ten years with a corresponding NPV of $15 million. Exhibit 1 displays payments by insurers under the pay-as-you-go scenario in the first row.

However, instead of waiting to receive the stream of insurance payments, the policyholder and Insurer A settle today for $60 million, which is the net present value of the policies issued by Insurer A. As Exhibit 1 illustrates, the policy limits approach is preferable in this case study—policy limits adhere to both public policy objectives while pro tanto violates the public policy objectives.

3.1.1. Policy Limits Approach Adheres to the Public Policy Objectives

Under the policy limits approach, Insurer B receives an $80 million offset. Therefore, Insurer B is responsible for covering $20 million in nominal loss, which, just as it did under the pay-as-you-go scheme, has an NPV of $15 million. Thus, Insurer B is not harmed by the settlement. Further, the policyholder has an incentive to settle with Insurer A. First, the settlement leaves the policyholder whole—total recoveries across all insurers have an NPV of $80 million ($60 million today from Insurer A plus $15 million in NPV from Insurer B). Second, the policyholder avoids the transaction costs of collecting the money over 10 years from Insurer A.

3.1.2. Pro Tanto Approach Violates Public Policy Objectives

Under the pro tanto approach, Insurer B receives a $60 million offset. Therefore, Insurer B is now responsible for $40 million of loss, which is $20 million more than they were responsible for under pay-as-you-go. As a result, Insurer B is harmed and the policyholder double collects.

In particular, Insurer B is harmed in the amount of $15 million. The settlement between the policyholder and Insurer A increased the NPV of Insurer B's obligation from $15 million ($20 million paid over 10 years) to $30 million ($40 million paid over 10 years). At the same time, the policyholder double collects on that same $15 million of loss. The policyholder incurred losses with an NPV of $75 million and receives reimbursements with an NPV of $90 million ($60 million today from Insurer A plus $30 million in NPV from Insurer B).

3.2. Case Study 2: Discounting due to a Generic Policy Defense

The second case study is similar to the first case study. As in the prior case study, the policyholder has a $100 million environmental loss and $200 million in available insurance. Insurer A is responsible for $80 million of coverage and Insurer B is responsible for the remaining coverage. There are two key changes from the prior case study. First, the entire $100 million loss is due now instead of being paid over the ensuing 10 years. Second, all of the insurers have a common coverage defense that creates uncertainty about whether the loss is covered. For simplicity, assume that all parties agree that the policyholder has a 75 percent chance of prevailing should it choose to litigate this coverage defense and a 25 percent chance of losing.

In the absence of any settlement agreements, there are two potential outcomes. When the policyholder prevails in the coverage litigation, it recovers $80 million from Insurer A and $20 million from Insurer B. Alternatively, when the insurers prevail in the coverage litigation, the policyholder bears the entire loss. Hence, the total expected value of recoveries for the policyholder is $75 million—$60 million for Insurer A ($80 million 75 percent of the time) plus $15 million for Insurer B ($20 million 75 percent of the time).

Instead of litigating the coverage action, the policyholder and Insurer A settle for $60 million, which is the expected value of the policies issued by Insurer A. As Exhibit 2 illustrates, the policy limits approach is preferable in this case study—policy limits adheres to both public policy objectives while pro tanto violates the public policy objectives.

Exhibit 2: Insured's Recoveries under Alternative Choices of Law, Case Study 2

		Insurer A		Insurer B		Total	
	Outcome	**Expected**	**Payment**	**Expected**	**Payment**	**Expected**	
Pay-as-you-go	Policyholder prevails	$60M	$80M	$15M	$20M	$75M	$100M
	Insurers prevail		$0M		$0M		$0M
Insurer A settles for $60M	Policy limits	$60M	$60M	$15M	$20M 75% $0M 25%	$75M	$80M 75% $60M 25%
	Pro tanto			$30M	$40M 75% $0M 25%	$90M	$100M 75% $60M 25%

3.2.1. Policy Limits Approach Adheres to the Public Policy Objectives

Under the policy limits approach, Insurer B receives an $80 million offset. Therefore, Insurer B is responsible for $20 million in loss should the policyholder prevail in the coverage action (the same position Insurer B held prior to the settlement between the policyholder and Insurer A). Thus, Insurer B is not harmed by the settlement. Further, the policyholder has an incentive to settle with Insurer A. First, the settlement removes substantial risk—the policyholder receives $60 million with certainty instead of a gamble between $80 million and $0. Second, the policyholder avoids the transaction costs of litigating with Insurer A. Third, the expected total recovery of the policyholder is unaffected.

With regard to the third point above, the policyholder and Insurer B have two paths forward—settlement or litigation. If they settle for the expected value of $15 million, the policyholder recovers a total of $75 million—the expected value of all the insurance policies if it chose to litigate the coverage defense. Alternatively, if they litigate, the policyholder will prevail 75 percent of the time and, when it prevails, will have total recoveries of $80 million—$60 million from Insurer A and $20 million from Insurer B. If they litigate and Insurer B prevails, then the policyholder receives a total of $60 million to cover its losses: $60 million from Insurer A and nothing from Insurer B. Thus, the expected recovery would remain $75 million ($80 million 75 percent of the time plus $60 million 25 percent of the time).

3.2.2. Pro Tanto Approach Violates Public Policy Objectives

Under the pro tanto approach, Insurer B receives a $60 million offset. Therefore, Insurer B is now responsible for $40 million of loss should the policyholder prevail in the litigation, which is $20 million more than it was responsible for prior to the settlement between the policyholder and Insurer A. As a result, Insurer B is harmed and the policyholder double collects.

In particular, Insurer B is harmed in the amount of $15 million. The settlement between the policyholder and Insurer A increases the exposure of Insurer B from $20 million to $40 million in the event that the policyholder prevails in the coverage litigation. Thus, the expected value of the case to Insurer B has grown from $15 million ($20 million payment 75 percent of the time) to $30 million ($40 million payment 75 percent of the time). This result violates the second public policy objective.

The $15 million harm to Insurer B is a $15 million windfall for the policyholder. The expected recovery for the policyholder has increased from $75 million ($100 million 75 percent of the time) to $90 million ($60 million from Insurer A plus $40 million from Insurer B 75 percent of the time). In essence, the settlement between the policyholder and Insurer A allows the policyholder to reap the benefit of eliminating the downside risk associated with litigating coverage with Insurer A without foregoing the upside benefit of that same litigation. This outcome is accomplished by making Insurer B bear the downside risk previously held by the policyholder.

In particular, consider the situation in which the policyholder and Insurer B pursue litigation. If the policyholder prevails in the litigation, then it will recover $100 million, which is the same outcome as would have occurred in the absence of the settlement. However, if the policyholder loses, then it still recovers $60 million from the settlement with Insurer A. The upside of the litigation remains the same for the policyholder ($100 million) while the downside has improved from no recovery to a $60 million recovery. In contrast, if Insurer B prevails, then it pays nothing—the same outcome as prior to the settlement. However, if the policyholder prevails, then Insurer B loses $40 million in the presence of the settlement instead of $20 million in the absence of the

settlement. The upside scenario for Insurer B is unaffected by the settlement, but the downside scenario for Insurer B is twice as bad.

3.3. Case study 3: Discounting for a Specific Policy Defense

The third case study is similar to the second case study. As in the prior case study, the policyholder has a $100 million environmental loss that is due today and $200 million in available insurance. Insurer A is responsible for $80 million of coverage and Insurer B is responsible for the remaining coverage. There is one key change from the second case study. Instead of both insurers having a common coverage defense, now the coverage defense is applicable only to the policies issued by Insurer A. As before, assume that all parties agree that the policyholder has a 75 percent chance of prevailing should it choose to litigate this coverage defense and a 25 percent chance of losing.

In the absence of any settlement agreements, there are two potential outcomes. When the policyholder prevails in the coverage litigation, it recovers $80 million from Insurer A and $20 million from Insurer B. Alternatively, when Insurer A prevails in the coverage litigation, the policyholder recovers nothing from Insurer A and $100 million from Insurer B. Under both scenarios, the policyholder is made whole; it recovers the entire $100 million loss. Further, the expected cost is $60 million to Insurer A ($80 million 75 percent of the time) and $40 million to Insurer B ($20 million 75 percent of the time and $100 million 25 percent of the time).

Instead of litigating the coverage action, the policyholder and Insurer A settle for $60 million, which is the expected value of the policies issued by Insurer A. As Exhibit 3 illustrates, the pro tanto approach is preferable in this case study—pro tanto adheres to both public policy objectives while policy limits violate the public policy objectives.

3.3.1. Policy Limits Approach Violates Public Policy Objectives

Under the policy limits approach, Insurer B receives an $80 million offset. Therefore, Insurer B is responsible for $20 million in loss, which is $20 million less than Insurer B expected to pay prior to the settlement between the policyholder and Insurer A. In contrast, the policyholder recovers $80 million ($60 million from Insurer A plus $20 million from Insurer B), and that is $20 million less than what the policyholder would recover in the absence of a settlement. Thus, the $20 million windfall received by Insurer B comes at the expense of the policyholder. This outcome violates the first public policy objective because it strongly discourages the policyholder from settling.

3.3.2. Pro Tanto Approach Adheres to the Public Policy Objectives

Under the pro tanto approach, Insurer B receives a $60 million offset. Therefore, Insurer B is now responsible for $40 million of loss, i.e., the same as its expected payment prior to the settlement between the policyholder and Insurer A. At the same time, the policyholder recovers $100 million ($60 million from Insurer A plus $40 million from Insurer B), which is the same as it would have received in the absence of the settlement. This outcome adheres to both public policy objectives.

In fact, all parties benefit under this treatment. First, all parties avoid litigation costs. Second, the settlement removes substantial risk—the policyholder is made whole, Insurer A pays its expected loss instead of a gamble between $80 million and $0, and Insurer B pays its expected loss instead of a gamble between $100 million and $20 million. Third, the court's burden is reduced.

Policy Implications

The case studies above demonstrate that the choice between the policy limits and pro tanto approaches

Exhibit 3: Insured's Recoveries under Alternative Choices of Law, Case Study 3

		Insurer A		Insurer B		Total
	Outcome	Payment	Expected	Payment	Expected	
Pay-as-you-go	Policyholder prevails	$80M		$20M		$100M
			$60M		$40M	
	Insurer A	$0M		$100M		$100M
Insurer A settles for $60M	Policy limits	$60M	$60M	$20M	$20M	$80M
	Pro tanto			$40M	$40M	$100M

should be a fact-specific determination. In particular, the policy limits approach adheres to public policy objectives when generic discounts are available to all insurers. Examples of generic discounts include, but are not limited to, common coverage defenses and the time value of money. Utilizing the pro tanto approach in these settings results in double collection for the policyholder, in harm to the nonsettling insurers, and in the creation of significant moral hazard problems. These moral hazard problems fall into two categories. First, the policyholder has control over the settlement terms but lacks an economic incentive to maximize the value of the settling insurer's policies since any shortfall will be borne by the nonsettling insurers. Second, the pro tanto approach enables policyholders to attain recoveries in excess of their losses. Since the recoveries have economic value in excess of the losses, it creates an economic incentive for the policyholder to incur losses in the first place.

The pro tanto approach adheres to public policy objectives when insurer-specific discounts dominate generic discounts

In contrast, the pro tanto approach adheres to public policy objectives when insurer-specific discounts dominate generic discounts. Examples of insurer-specific discounts include but are not limited to insolvency risk and coverage defenses unique to the policies in question. Utilizing the policy limits approach in these settings results in a windfall for the nonsettling insurers at the expense of the policyholder and thus discourages the policyholder from settling.

In the context of long-tailed liabilities, the case studies demonstrate that the policy limits approach will be appropriate more often than not. Discounts for the time value of money and common coverage defenses are prevalent, if not almost universal, in the context of long-tailed liabilities. The first two case studies illustrates why policy limits is the appropriate approach in the presence of these factors.

First, long-tailed liabilities such as asbestos claims and large environmental remediation projects typically have known or projected losses reaching many years into the future. As such, it is common for policyholders to settle with insurers for the net present value of the policies they issued, instead of waiting for the incurred losses to reach the limits of those policies. The first case study illustrates why policy limits is the appropriate approach to deal with discounts driven by the time value of money.

Second, it is common for many insurers to invoke the same coverage defenses such as that the loss was expected or intended, or that late notice was given. As such, it is common for policyholders to settle with insurers inclusive of a discount for these unresolved coverage defenses instead of litigating the coverage defenses to conclusion. The second case study illustrates why policy limits is the appropriate approach to deal with discounts driven by common coverage defenses.

Even in the absence of potential future losses, the policy limits approach is likely to be appropriate. First, as with long-tailed liabilities, it is common for many insurers to invoke the same coverage defense. Second, the process of litigating coverage claims is time consuming. Thus, even when settlements involve only historical losses, insurers accelerate payment by waiving their right to litigate potentially valid coverage defenses and pay after the resolution of that litigation. Thus, a discount for the time value of money is typical in this setting as well.

Our case studies ignore several factors that may affect both the incentive to settle and the availability of discounts to insurers. We have assumed that both the insurer and policyholders are equally risk averse and that the costs of litigation are viewed as being equal for all parties. We also have assumed that there is no information asymmetry between the policyholder, the settling insurer, and the nonsettling insurers. In reality, the costs of litigation are not borne equally, parties have differing levels of risk aversion, and information asymmetries exist. Although incorporating these features into the case studies would complicate the analysis and might alter the conclusion in specific settings, the basic patterns illustrated by the above examples will hold in the vast majority of potential fact patterns.

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