Leonard v. Nationwide Mutual Insurance Co.: WHY THE HIGH WATER MARK IN THE TORT – CONTRACT DEBATE MAY CAUSE THE NEXT WAVE OF INSURANCE LITIGATION TO INUNDATE THE FIFTH CIRCUIT COURT OF APPEALS WITH TORT CLAIMS

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I. INTRODUCTION

Hurricane Katrina made landfall along the Gulf Coast on August 29, 2005, bringing with it a swath of utter destruction, laying waste to a coastal region stretching nearly two hundred miles. In the hours and days following Hurricane Katrina, the federal government declared widespread areas of Louisiana, Mississippi, and Alabama as federal disaster zones.[1] In the wake of its one hundred-plus mile per hour winds, and fifteen-plus foot storm surge, lay the ruins of homes, lives, cities and towns from Grand Isle, Louisiana, to the drowned city of New Orleans, and finally through the washed out coastal Mississippi towns of Pascagoula, Biloxi, and Pass Christian. Even Bay St Louis, the highest point on the Mississippi Gulf Coast, was inundated by a nearly thirty foot storm surge.[2]

Although the physical destruction and emotional ruin of the communities along the Gulf of Mexico has long since receded into our nations' collective memory, for the hundreds of thousands of lives directly affected by Katrina, a recitation of the devastation wrought by the storm would be tortious itself. The memories of what once was, what was lost, and what is left have been permanently seared into our souls. Likewise, the memory of Katrina is (not quite as) equally painful for the private insurance industry. Estimates of the damages left in the wake of

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[1] Mazzola, Jean-Claude; Wilson, Elsner, Moskowitz, Edelman & Dicker, L.L.P., Article, *Katrina Spawns Storm Over Insurance*, http://www.wemed.com, (October, 2005).

[2] Margaret H. Clune. *Time for a New Look at "Windfalls for Wipeouts",* 20 No. 4 A.B.A. Section of Environmental, Energy and Resources 64 (Spring 2006).

Katrina predict total potential economic losses which could exceed one hundred billion dollars.[3] The storm rocked the boats of private insurance companies, where industry losses are estimated between forty and sixty billion dollars, making it the costliest catastrophe ever to occur in the United States.[4]

Hurricane Katrina achieved the distinction of 'the costliest natural disaster in U.S. history' primarily due to the catastrophic effects of wind-driven water.[5] Three of Mississippi's southern counties directly abut the shallow fringes of the Gulf of Mexico.[6] With no manmade barriers to separate them from the immense storm surges which moved ashore, the primary wave of litigation has predominantly disputed issues of policy coverage,[7] including increased debate over the language and meaning of policy terms and exclusions. Unfortunately for many Mississippi plaintiffs, the terms of insurance policies are generally held to be unambiguous in nature. Thus, such claims will continue to be expediently dismissed, avoiding-- to use an (in)appropriate, if not ironic, term of art-- "a flood of litigation."

Nevertheless, there rises a growing wave of claims which are, sometimes in part and occasionally unintentionally, based on theories of negligence, misrepresentation, and breach of fiduciary duty (where statute permits) on the part of insurance agents. *Leonard v. Nationwide Mutual Insurance Co.* represents the calm before the storm of such "agency" cases. While cases in this category are developing slowly, the flood of negligence actions will likely breach the pleading and evidentiary barriers which currently preclude recovery.

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[3] *Mazzola.*

[4] *Post-Katrina Insurance Still an Issue*, The Injury Lawyer Blog, http://www.the-injury-lawyer-directory.com; (June, 2006).

[5] Insurance Litigation Reporter, 29 No 16 INSLITREP 634 (9/20/07).

[6] John Manard, Patrick O'Hara and Kelly Blackwood. *Katrina's Tort Litigation: An Imperfect Storm*. 20 No. 4 ABA Section of Environmental, Energy and Resources 31 (Spring 2006).

[7] *Id.*

Leonard illuminates the glaring problem of finding judicial relief for claims on the fringes of tort and contract theory. Moreover, *Leonard* points out the faulty logic which drives the judicial system to decide such cases under the guise of certainty, for lack of ambiguity, utilizing contract theory. In *Leonard*, this inherent preference, due in part to they gray area between tort and contract theory and the uncertainty of remedy and recovery in tort claims, clouds the courts' factual analysis. Consequently, the Leonard's are denied any recovery, despite the existence and (an admittedly poor) presentation of reasonable tort claims.

The instant case, and similarly styled litigation will ultimately compel the courts to evaluate and re-evaluate the collision of contract and tort theory in light of Hurricane Katrina, while considering the future implications for the insurance industry and the National Flood Insurance Program (hereinafter "NFIP"). These cases will also demand that the courts revisit the principals of agency and the duties, standard of care, and liability regarding insurance agents and their principals. The welfare of citizens who rely upon those services to protect their homes and families must outweigh the interests of private insurers.

Section II of this Note follows immediately, containing a summary of the facts and procedural history of *Leonard*. Section III includes discussion of the relevant law and legal principles addressed by the courts, and the analysis within this Note. Section IV details the peculiar motivation and strategy of this appeal, brought by the defendant from a favorable lower court decision.[8] Concluding Section IV is a presentation of the opinion, analysis and rationale of the Fifth Circuit Court regarding the findings of the lower courts and its disposition on appeal. Finally, Section V explores the significance the Circuit Court's uncertainty as to whether or not Leonard was proceeding under contract or tort theory.[9]

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[8] *See* Leonard v. Nationwide Mutual Insurance Co., 438 F.Supp.2d 684, 691 (S.D. Miss. 2006).
[9] Leonard v. Nationwide Mutual Insurance Co, 499 F.3d 419, 439 (5th Cir. 2007).

The analysis goes on to examine the case under tort theory, followed by discussions of the significance of the factual and evidentiary rulings of *Leonard* and the future implications for insurance litigation in federal courts, and the conflict in the resolution of claims which are colorable under either contract or tort principals.

II. FACTS

A. Factual Summary

Leonard commenced with a civil action brought by Paul and Julie Leonard (hereinafter "Leonard" or "the Leonards") against Nationwide Mutual Insurance Company (hereinafter "Nationwide"), and their agent, Jay Fletcher (hereinafter "Fletcher"). The relevant facts include a discussion of the policy language,[10] the specific request for advice regarding the purchase of an NFIP policy, knowledge that Nationwide agent Jay Fletcher should have had, and likely should have imparted to the Leonard's regarding hurricane coverage.[11]

For this analysis, the vital facts concern the inquiry by Leonard, Fletcher's statements in response to the inquiry, the manner in which his opinion was formed, the materiality of his statements, the eighteen year relationship between Leonard and Fletcher,[12] and the alleged misrepresentations made by Fletcher to Leonard (and others) regarding the need to purchase additional hurricane insurance.[13] Most significant, however, is Leonard's (*reasonable?)* reliance upon representations made by Fletcher in his capacity as an insurance agent, and the consequences of such reliance.[14]

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[10] *Leonard*, 499 F.3d at 425. (When Leonard renewed their policy, they received this notice: "Your policy does not cover flood loss. You can get protection through the National Flood Insurance Program. If you wish to find out more about this protection, please contact your Nationwide agent.")

[11] *Leonard*, 438 F.Supp.2d 684, 691. ("Fletcher was authorized by Nationwide to interpret and explain all the coverages provided under Nationwide's policies.")

[12] *Leonard*, 499 F.3d at 425

[13] *Id.* at 426.

[14] *Id*. at 425.

Leonard's home lies twelve feet above sea level in the southernmost region of Pascagoula, Mississippi, less than two hundred yards from the Mississippi Sound.[15] Leonard first purchased a homeowner's policy from Nationwide's Pascagoula-area agent, Fletcher, in 1989.[16] Leonard testified that when he first bought the policy, he asked Fletcher whether the Nationwide policy covered hurricane-related losses.[17] According to Leonard, Fletcher responded that all hurricane damage was covered, though Fletcher denied any memory of this conversation in his deposition.[18] Leonard claimed that he called Fletcher ten years later after seeing advertisements for additional NFIP[19] coverage following the 1998 landfall of Hurricane George along the Mississippi coast.[20] Fletcher allegedly assured Leonard that he did not need to purchase the supplemental NFIP policy because he did not live in an area classified "Zone A"[21] for flood risk by the Federal Emergency Management Agency (hereinafter "FEMA"), even assuring Leonard by offering that his own property was not insured under the NFIP.[22]

When Hurricane Katrina struck, it battered Pascagoula with torrential rain and sustained winds in excess of one hundred miles per hour, and by midday, "the storm had driven ashore a formidable tidal wave . . . that flooded the ground floor of Leonard's house."[23] Leonard's neighborhood suffered a seventeen-foot storm surge, causing their home to be inundated by five

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[15] *Id.* at 423.

[16] *Leonard,* 499 F.3d at 425.

[17] *Id.*

[18] *Id*. (The district court deemed this testimony irrelevant to the case.)

[19] The National Flood Insurance Program provides supplemental flood insurance policies. Although these policies are sold by independent insurers, they are funded by the federal government. These policies are distinct from any other type of property insurance policy sold by private insurance companies. NFIP policies have independent price rates, contracts, and claim handling procedures, and are in no way construed to be included in a private homeowner's policy, or any type of coverage provided by the insurer.

[20] *Leonard*, 499 F.3d at 425.

[21] Areas most prone to flooding are designated Floodzone A, those less susceptible are designated Floodzone B, and those even less, Floodzone C. NIFP coverage is available to anyone, regardless of which zone they are situated in.

[22] *Leonard*, 499 F.3d at 425. (Here, Fletcher may implicitly admit that Leonard's inquiry was regarding additional flood insurance provided by the NIFP and thus not on which could be construed as an iquiry concerning his existing policy.)

[23] *Id.* at 426.

feet of water, and extensively damaging the walls, floors, fixtures, and personal property inside the first floor of the house.[24]

From the testimony of witnesses, including Fletcher's assistant, it was clear that Fletcher sometimes discouraged his clients from purchasing flood insurance policies.[25] The district court admitted as evidence that Fletcher, "as a matter of habit and routine, expressed his opinion . . . that customers [in Pascagoula] should not purchase flood insurance unless they lived in a flood prone area (Flood Zone A) where flood insurance was required in connection with mortgage loans."[26] Further, trial evidence demonstrated that between 2001 and Katrina's landfall in 2005, Fletcher sold one hundred eighty-seven NIFP policies to Pascagoula residents, twelve of whom lived in Leonard's waterfront neighborhood.[27]

Nationwide is among the privately-owned insurers who are qualified to write and sell supplemental NIFP coverage.[28] Fletcher would have earned a fifteen percent commission on the sale of such flood insurance policies.[29] Moreover, Fletcher was expressly authorized by Nationwide to interpret and explain the coverage provided under all policies sold by Nationwide, and Nationwide consistently informed policy holders that they should direct all questions concerning their coverage to the local agent, in this case, Fletcher.[30]

Leonard made his inquiry to Fletcher seeking advice as to whether it would be advisable for him (Leonard) to purchase a flood insurance policy, and when Fletcher ventured his opinion that such a policy was not necessary, Leonard refrained from buying a flood policy.[31] There was no discussion of the reason Fletcher did not believe Leonard needed to buy a flood insurance

[24] *Id*. at 426.
[25] *Leonard*, 438 F.Supp.2d at 690.
[26] *Id.*
[27] *Leonard*, 499 F.3d at 425.
[28] *Leonard*, 438 F.Supp.2d at 689.
[29] *Id.*
[30] *Id.*
[31] *Id.* at 691.

policy, and Leonard inferred that Fletcher's advice meant that his existing policy would cover water damage from a hurricane.[32] The District Court also noted the absence of testimony establishing a standard of care for insurance agents applicable to an insurance agent who is asked about the advisability of purchasing flood insurance[33] or an established standard of care for the training of agents who are authorized to sell and interpret such policies.[34]

B. Procedural History

Paul and Julie Leonard brought suit against the provider of their homeowners' insurance policy, Nationwide Mutual Insurance Company (hereinafter "Nationwide") to recover for damage to their residence caused by wind damage and storm surge from Hurricane Katrina.[35] The suit commenced in the Chancery Court of Jackson County, Mississippi,[36] with the Leonard's local insurance agent, Jay Fletcher as a named defendant. Nationwide removed the case to the United States District Court for the Southern District of Mississippi, and all claims against Fletcher were dismissed.[37] Leonard facilitated the removal by filing a motion to dismiss Fletcher without prejudice noting that Leonard "clearly stated viable claims against the in-state agent" for misrepresentation.[38] The motion also declared that Leonard would not resist removal specifically due to "Mississippi statute and common law binding Nationwide to the misrepresentations of its agent."[39]

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[32] *Id.*

[33] See, *infra*, notes 73-76. (This issue is well settled in Mississippi case law.)

[34] *Leonard*, 438 F.Supp.2d at 691. (See Pub. L. 108-264, 2004 S 2238, *infra*, note 95.) (Amending 42 U.S.C.A. § 4011.) (These standards were to be set by FEMA's congressional mandate to create a training program for agents authorized to sell NFIP policies, however the program had not been implemented at the time of the storm.)

[35] *See Leonard*, 499 F.3d 419.

[36] *Leonard*, 438 F.Supp.2d at 687.

[37] *Id.*

[38] Plaintiffs' Motion to Dismiss Defendant Jay Fletcher, Leonard v. Nationwide Mutual Insurance Co., 438 F.Supp.2d 684 (S.D. Miss. 2006) (C.A. No. 1:05CV475LG-RHW).

[39] *Leonard*, 438 F.Supp.2d 684 at 687.

Following bench trial, Senior District Judge Senter's findings included the fact that Fletcher did not breach any standard of care owed to Leonard by advising of his opinion that they did not need flood insurance, and that Fletcher's statements did not, in fact, constitute negligent misrepresentation.[40] The findings also determined that evidence demonstrated that "Fletcher sometimes discouraged his clients from purchasing flood insurance policies," and found sufficient evidence to warrant that Fletcher "as a matter of habit and routine, expressed his opinion" that customers should not purchase flood insurance.[41]

In its ruling as to damages,[42] the District Court held that some of Leonard's claims were included under the policy, while others were excluded. The remaining claims were dismissed on August 15, 2006.[43] Leonard's recovery included only damages covered by his homeowner's policy, merely the damages which were found to have been the result of high winds.[44] The damages amounted to just over two hundred and thirty dollars for broken windows, and just under one thousand dollars for pressure-washing of the half of the house which had remained above the water line.[45]

Interestingly, Nationwide then appealed the decision of the District Court.[46] Nationwide also moved *in limine* to exclude evidence of Fletcher's statements to policyholder's other than Leonard, and the motion was carried with the appeal.[47] The Fifth Circuit Court of Appeals denied Nationwide's motion regarding Fletcher's oral statements.[48] Furthermore, the Circuit Court affirmed the lower court's finding that Fletcher did not materially misrepresent policy

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[40] *Id.* at 691.
[41] *Id.*
[42] *Id.* at 696.
[43] *See Leonard*, 499 F.3d 419.
[44] *Leonard*, 438 F.Supp.2d 684 at 696.
[45] *Id.*
[46] *Leonard*, 499 F.3d 419 at 427. (Leonard withdrew a cross-appeal.)
[47] *Id.* at 426.
[48] *Id.*

terms.[49] Additionally, the Circuit Court upheld the lower court's holding that Fletcher's alleged misrepresentations did not support a negligent misrepresentation claim.[50] The analysis and ultimate holding of the Fifth Circuit holdings were supported only by the statutory code and case law of the State of Mississippi, or prior interpretation of such by the Circuit Court, and rely primarily on contract law analysis.

III. BACKGROUND AND HISTORY OF THE LAW

A. Jurisdiction

The Circuit Court exercised appellate jurisdiction over Nationwide's appeal pursuant to Title 28, Article 1291 of the United States Code,[51] despite Leonard's contention that the appeal should be dismissed for "mootness and lack of standing."[52] The Circuit Court recognized Nationwide's right to appeal any adverse judgment redressable on appeal, notwithstanding the fact that the original ruling was generally favorable.[53] Furthermore, the Circuit Court held that Nationwide was an "aggrieved party" with respect to the district court's holdings regarding certain policy language and the negligent misrepresentation issue, and consequently entitled to this appeal.[54]

B. Standard of Review

[49] *Id.* (However, relevant to this analysis is not whether Fletcher misrepresented terms of the policy, or "orally modified or altered" the terms of the policy, but rather whether representations made by Fletcher caused detrimental reasonable reliance by Leonard in refraining from purchasing a flood policy.)

[50] *Id.*

[51] 28 U.S.C. § 1291 states that "The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court."

[52] *Leonard*, 499 F.3d at 427.

[53] *Id.* (Citing Deposit Guaranty Nat'l Bank v. Roper, 445 U.S. 326 at 345-46 (U.S. 1980)).

[54] *Id.* at 428.

The standard for reviewing a district court's determination of Mississippi Law is *de novo*.[55] The factual findings of the lower court, whether based on oral or documentary evidence, shall be preserved unless clearly erroneous.[56] The Mississippi Supreme Court has held that a finding of fact is clearly erroneous when "although there is evidence to support it, the reviewing court on the entire evidence is left with a firm conviction that a mistake has been made.[57] Additionally, the Circuit Court reviews evidentiary rulings of the lower court for abuse of discretion.[58] A trial court abuses its discretion when its ruling regarding admissibility of evidence is based on an erroneous view of the law or a clearly erroneous assessment of the evidence.[59]

C. The Interplay of Insurance, Contract and Agency Law

Where the language of an insurance contract is clear and unambiguous, Mississippi courts give effect to the plain meaning of such policy language.[60] Nothing requires or permits the Mississippi courts "to make a contract differing from that made by the parties themselves, or to enlarge an insurance company's obligations where the provisions are clear."[61] Nor will a court resort to extrinsic evidence or rules of contract construction if policy provisions are unambiguous.[62]

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[55] Welbourne v. State Farm Mut. Auto. Ins. Co., 480 F.3d 685, 687 (5th Cir. 2007).

[56] Reliable Home Health Care, Inc. v. Union Central Insurance Co., 295 F.3d 505, 510. (Citing FEDERAL RULE OF CIVIL PROCEDURE 52(a)).

[57] In Re Estate of Leonard, 609 So. 2d 390, 392 (Miss. 1992). (Quoting Sam v. Sorrel Electric Contractors, Inc. 525 So. 2d 246, 254 (La. App. 1998).

[58] *Leonard*, 499 F.3d at 429.

[59] Bocanegra v. Vicmar Services, Inc., 320 F.3d 581, 584 (5th Cir. 2007).

[60] *Leonard*, 499 F.3d at 429. (Citing Robley v. Blue Cross/Blue Shield of Mississippi, 935 So. 2d 175, 182 (Miss. 2006)).

[61] *Id*. (Quoting State Automotive Mutual Insurance Co. of Columbus v. Glover, 176 So. 2d 256, 258 (Miss. 1965)).

[62] *Id*. (Citing Jackson v. Daley, 739 So. 2d 1031, 1041 (Miss. 1999)).

Under Mississippi law, the insured has an affirmative duty to read the policy.[63] Further, a party's reliance on representations by an insurance agent that contradict the policy is unreasonable.[64] The relationship between insurance companies and their agents is controlled by agency law.[65] The Supreme Court of Mississippi has held that the acts of an agent can bind the principal insurer.[66] Accordingly, the Court has declared it "well settled that an insurer is liable for the acts of its agents within the scope of the agent's actual or apparent authority.[67]

D. Apparent Authority and Actual Authority of the Agent

The actual authority of an agent binds the principal as to those powers, duties and activities an agent may exercise when he has been "in fact authorized by the principal to act on their behalf."[68] Apparent authority creates a binding agent-principal relationship when the principal "has by words or conduct held the alleged agent out as having"[69] such authority and is thereby estopped to deny it.[70] The Supreme Court of Mississippi has recognized a three part test to determine if apparent authority exists to bind the principal.[71] First, there must be an act or some conduct by the principal indicating the agent's authority.[72] Next, the Court examines the reasonable reliance upon the act or conduct by a third party.[73] Finally, a detrimental change in position by the third party must result.[74]

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[63] *Id.* at 438 (Citing Smith v. Union National Life Insurance Co., 286 F.Supp2d 782, 788 (S.D. Miss. 2003).

[64] *Id.* (Citing Ross v. Citifinancial, Inc., 344 F. 3d 458, 464 (5th Cir. 2003)).

[65] *Id.* at 439 (Citing Barhnovich v. American National Life Insurance Co., 947 F.2d 775, 777 (5th Cir. 1991)).

[66] Andrew Jackson Life Insurance Co. v. Williams, 566 So. 2d 1172, 1180 (Miss. 1990).

[67] Dixie Insurance Co. v. Mooneyhan, 684 So. 2d 574, 583 (Miss. 1996).

[68] McFarland v. Entergy Mississippi, Inc., 919 So. 2d 894, 902 (Miss. 2005). (Quoting Cooley v. Brawner, 881 So. 2d 300, 302 (Miss. Ct. App. 2004)).

[69] Patriot Commercial Leasing Co. v. Jerry Enis Motors, 928 So. 2d 856, 864 (Miss. 2006).

[70] *Id.*

[71] Christ Methodist Episcopal Church v. S & S Construction Company, Inc., 615 So. 2d 568, 573 (Miss. 1993).

[72] *Id.*

[73] *Id.*

[74] *Id.*

E. Tort Liability

1. Duty and Standard of Care

Under Mississippi law, the legal standard governing the agent's duty of care owed to the insured is well settled.[75] An insurance agent must "use that degree of diligence and care with reference thereto which a reasonably prudent [person] would exercise in the transaction of his own business."[76] Consequently, an insurance agent who gives advice "concerning the coverages an insured should purchase in circumstances where the advice is reasonably relied upon by the prospective insured may incur liability if the advice is the product of a failure on the part of the agent to exercise reasonable care."[77] Finally, the Mississippi Supreme Court has expressly adopted Restatement (2d) of Torts § 522 which states:

> One who, in the course of his business, profession or employment, or in any other transaction which he has a pecuniary interest, supplies false information for the guidance of others in their business transaction is subject to liability for pecuniary loss suffered by them by their justifiable reliance upon the information if he fails to exercise reasonable care or competence in obtaining or communicating information.[78]

2. Negligent Misrepresentation

To maintain a common-law claim for misrepresentation, it must be shown that the party making the representations did so "with actual knowledge of their falsity, or without knowing whether they were true or false, or under such circumstances that he ought to have known they were false."[79] Modern day case law suggests that what is misrepresented or omitted must concern a fact, not merely an opinion.[80] In addition, the claimant must prove by a preponderance

[75] Mississippi Insurance Law and Practice § 5:14, MS-ILP S § 5:14 (2007).
[76] Security Insurance Agency, Inc. v. Cox, 299 So. 2d 192, 194 (Miss. 1974).
[77] Jimerson v. Allstate Insurance Company, 2006 WL 2192655 (S.D. Miss. 2006) at 2.
[78] Touche Ross v. Commercial Union Insurance, 514 So. 2d 315, 319 (Miss. 1987).
[79] H. D. Sojourner & Co. v. Joseph, 191 So. 418, 421 (Miss. 1939).
[80] Bank of Shaw, A Branch of the Grenada Bank v. Posey, 573 So. 2d 1355, 1360 (Miss. 1990).

of the evidence, the materiality of the misrepresentation, the negligence or failure to exercise appropriate diligence or expertise, reasonable reliance, and proximate damages.[81]

Recently, however, the United States District Court for the Southern District of Mississippi has allowed the testimony of an agent's opinion to remain admissible in a negligence claim.[82] The District Court held that such testimony was a question of industry standards, and admissible under the Mississippi Rules of Evidence 701 and 704.[83] Furthermore, in negligence claims, lay opinion testimony concerning an ultimate fact has been held to be proper so long as the matter testified on is within the witness's personal knowledge, and is helpful to the finder of fact in resolving the issue.[84]

3. Liability of the Agent

The Supreme Court of Mississippi held that "parties who are foreseeable recipients of a negligently prepared professional opinion and who detrimentally rely on that opinion in their business affairs may recover from the person offering the opinion."[85] Thus, although Fletcher was dismissed from this action, he might be found liable under a claim brought in a state court, because under Mississippi law, an agent who commits a tort is liable in both his representative capacity and in his individual capacity.[86]

4. Liability of the Principal

Title 83 Chapter 17 Section 1 of the Mississippi Code, which defines an agent, was enacted "to prevent insurers from operating through third persons and later denying

[81] Berkline v. Bank of Mississippi, 453 So. 2d 699, 702 (Miss. 1984).
[82] United American Insurance Co. v. Merrill, 2007 WL 2493905 (Miss. 2007) at 18.
[83] *Id.* (MS. R. Rev. 704 is entitled "Opinion on ultimate issue," and states that "testimony in the form of opinion is not objectionable because it embraces an ultimate issue to be decided by the trier of fact").
[84] Bower v. Bower, 758 So. 2d 405, 413 (Miss. 2000).
[85] Strickland v. Rossini, 589 So. 2d 1268, 1277 (Miss. 1991).
[86] American Fire Protection, Inc. v. Lewis, 653 So. 2d 1387, 1391 (Miss. 1995).

responsibility for the acts of those persons."[87] In addition, the "power of an agent to bind his principal is not limited to the authority actually conferred upon the agent, but the principal is bound if the conduct of the principal is such that persons of reasonable prudence . . . dealing with the agent might rightfully believe the agent to have the power he assumes to have."[88] Further, under the doctrine of respondeat superior, it has been held that a principal is responsible for the torts of its agent committed within the scope of the agent's employment.[89]

And finally,

> [a] principal, having clothed his agent with the semblance of authority, will not be permitted, after others have been led to act in reliance of the appearances thus produced, to deny, to the prejudice of such others, what he has theretofore tacitly affirmed as to the agent's powers.[90]

Thus, by virtue of the doctrine of estoppel, the principal cannot disclaim liability for the actions of an agent when such actions have been expressly designated as within the scope of the agent's authority,[91] nor when those same actions have not been actually or constructively limited by the principal.[92]

5. Demonstrating Evidence of Negligence

Under Mississippi law, a negligence action based on a discussion between an agent and a potential insured does not require expert testimony to establish the existence or breach of the standard of care.[93] These matters are of a nature which a layman can understand based on

[87] McCann v. Gulf National Life Insurance Co., 574 So. 2d 654, 656 (Miss. 1990). (Quoting Ford v. Lamar Life Insurance Co., 513 So. 2d 880,888 (Miss. 1987)).
[88] McPherson v. McClendon, 221 So. 2d 75, 78 (Miss. 1969).
[89] Hutton v. American General, 909 So. 2d 87, 96 (Miss. App. 2005). (Citing Odier v. Sumrall, 353 So. 2d 1370, 1372 (Miss. 1978)).
[90] *McPherson*, 221 So. 2d at 78. (Quoting 2 C.J.S. Agency § 96(c)).
[91] *Id.*
[92] *Id.* at 79.
[93] Lovett v. Bradford, 676 So. 2d 893, 895 (Miss. 1996).

common sense and practical experience.[94] Notably, the Supreme Court of Mississippi has held that where an insurance agent bases his advice against purchasing flood insurance on erroneous information, such evidence supports the finding of negligence by a jury.[95]

F. Negligence Per Se and/or Joint Negligence

The NFIP was projected to have 4.7 million policyholders in nearly 19,000 communities by 2005.[96] The Federal Emergency Management Administration "oversees" the NFIP with a mere forty FEMA employees and under two hundred contractor employees.[97] In June of 2004, Congress passed the Bunning-Bereuter-Blumenauer Flood Insurance Reform Act,[98] amending the National Flood Insurance Act of 1968. Within the Act, Congress mandated that

> The Director of [FEMA] shall, in cooperation with the insurance industry, State insurance regulators, and other interested parties – (1) establish minimum training and education requirements for all insurance agents who sell flood insurance policies; and (2) not later than six months after the date of enactment of this Act, publish these requirements in the Federal Register, and inform insurance companies and agents of the requirements.[99]

As of the April 2005 testimony before a Subcommittee of the U.S House of Representatives, FEMA *estimated* that it would be after October 2005 before it had fully complied with the mandates, nearly a year behind schedule and one month after the landfall of

[94] *Id.* (*See* Palmer v. Anderson Infirmary Benevolent Association, 656 So. 2d 790, 795 (Miss. 1995); MS R. Rev. 702).

[95] McKinnon v. Batte, 485 So. 2d 295, 297 (Miss. 1986).

[96] *National Flood Insurance Program; Oversight of Policy Issuance and Claims: Before the Subcommittee on Housing and Community Opportunity, of the House Committee on Financial Services*, 109th Congress 4 (April 2005).

[97] *Id.*

[98] See Pub.L. 108-171, § 1(a) (June 30, 2004)

[99] Pub. L. 108-264, 2004 S 2238. (Amending 42 U.S.C.A. § 4011).

Hurricane Katrina.[100] According to one FEMA official, the Agency was still in the "planning stages of meeting the requirement" and had not yet developed an action plan.[101] Yet, while it seems that violation of the above provisions places some liability upon FEMA, the agency has the right to review claims against a private insurer.[102] Cases involving agent or insurer negligence are considered outside the scope of the National Flood Insurance Act, and are therefore not attributable to FEMA.[103]

IV. INSTANT CASE

A. Nationwide Mutual Insurance Company's Appeal

The appeal brought by Nationwide was an obvious signal to the Fifth Circuit Court of Appeals that Nationwide had foreseen the issue of agent misrepresentation, in the instant case and "hundreds of cases in the trial courts," potentially causing Nationwide to "incur considerable litigation expense and potential enormous liability to other policyholders."[104] The appeal questions the trial court's ruling regarding the ambiguity of the "ACC" clause Leonard's insurance policy,[105] and the District Court's resolution regarding Fletcher's alleged negligent misrepresentation.[106]

Nationwide did not challenge the amount awarded to Leonard by the trial court,[107] but focused their appeal primarily upon the evidentiary ruling surrounding the alleged

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[100] *National Flood Insurance Program; Oversight of Policy Issuance and Claims: Before the Subcommittee on Housing and Community Opportunity, of the House Committee on Financial Services*, 109th Congress 4 (April 2005).

[101] *Id.* at 11.

[102] 44 C.F.R. Pt. 62, App. A Art. III(D)(4)

[103] *Id.*

[104] *Leonard*, 499 F.3d at 428.

[105] *Id.* (This portion of the appeal is not relevant to the analysis in this Note.)

[106] *Id.* at 426.

[107] *Id.* (The trial court denied Nationwide's Motion for Partial Summary Judgment regarding Fletcher's oral statements, but held that Fletcher neither materially misrepresented policy terms, nor did he "make any statements which could be reasonably understood to alter" the policy terms.)

misrepresentations of its agent.[108] Nationwide appealed to the Fifth Circuit Court to modify the holding of the lower court in an effort to insulate itself from liability with regards to future claims involving alleged misrepresentation or negligence on the part of its agents and simultaneously estopp future similar actions. The Court of Appeals determined that the district court's findings as to the issue of negligent misrepresentation, and the threat of liability in future litigation, rendered Nationwide "sufficiently aggrieved," and thus entitled Nationwide to this appeal.[109]

B. The Opinion of the Fifth Circuit Court of Appeals

Chief Judge Edith H. Jones delivered the opinion of the Court in *Leonard v. Nationwide Mutual Insurance Co.*, joined by Judges Reavley and Smith. In an opinion which affirmed and criticized the holding of the trial court, the Court of Appeals held (omitting the findings irrelevant to this analysis) that Fletcher's alleged misrepresentations did not support Leonard's claim of negligent misrepresentation, and that those misrepresentations did not amount to a valid modification of the policy.[110] While addressing Leonard's claim of negligent misrepresentation, the Court made three primary findings, based on analysis under contract and insurance law.[111]

First, the Court delivered its holding with regards to negligent misrepresentation concurrent with, as opposed to separate from, the issue of "oral modification" of the policy.[112] The Court's holding is laced with the assumption that the claim of negligent misrepresentation can and should be analyzed in an "oral modification" context. Secondly, the Court analyzed the allegations of negligent misrepresentation only as to the terms of Leonard's existing

[108] *Id*. at 427

[109] *Id*. (*See* Custer v. Sweeney, 89 F.3d 1156, 1164 (4th Cir. 1996)) ("A party may be aggrieved by a district court decision that adversely affects its legal rights or position vis-à-vis other parties in the case or other potential litigants.")

[110] *Leonard*, 499 F.3d at 440-42.

[111] *Id* at 439-41.

[112] *Id.* at440-42.

homeowner's policy, rather than resulting from the agent's answer to an inquiry about an entirely separate policy.[113] Under this "oral modification" analysis, the Court held that Leonard's reliance on Fletcher's statements were objectively unreasonable in light of the policy language of his existing insurance contract.[114]

Still commingling the agency and contract based issues of "oral modification" with the tort issue of negligent misrepresentation, the Court held that "even if the Leonard's [could] satisfy the third element of apparent authority—detrimental change in position—their misrepresentation claim is stale," and thus time-barred.[115] The Court held that, pursuant to Title 15, Chapter 1, Article 49 of the Mississippi Code, the statute of limitations for bringing a claim of negligent misrepresentation was three years, and the last conversation alleged between Leonard and Fletcher, having occurred six years ago, in 1999, barred the claim.[116] Ultimately, the analysis by the Court rests upon the foundation that the negligent misrepresentation claim could be properly dealt with using the general principles of agency, contract, and insurance law.[117]

C. The Issues of Oral Modification of the Policy and Negligent Misrepresentation

While the Court found it "not at all clear whether the Leonards are proceeding under a tort or contract theory," it asserts that "whether they proceed under a misrepresentation theory or

[113] *Id.* at 425. ("Leonard called Fletcher after seeing advertisements **for additional NFIP coverage** in the wake of Hurricane George . . . Fletcher allegedly assured Leonard that he did not need additional flood coverage" (emphasis added).)

[114] *Id.* at 439-40

[115] *Id.* at 440.

[116] *Leonard*, 499 F.3d at 441. (See also, MISS. CODE ANN. § 15-1-49; But see, *contra* , Neglin v. Breazeale, 945 So. 2d 721 (Miss. 2006); Sarris v. Smith 782 So. 2d 721 (Miss. 2001); Flores v Elmer, 938 So. 2d 824 (Miss. 2006); THE ENCYCLOPEDIA OF MISSISSIPPI LAW, Chapter 5, § 44:21, MSPRAC-ENC §44:21 (2007)). (For the proposition that the 'Discovery Rule' allows tolling of the statute until discovery of the misrepresentation.)

[117] *Id.* at 440. ("Because the policy terms are unambiguous, the Leonard's claim accrued at the time the misrepresentation was made.")

a contract-modification theory, [they] lose on both scores."[118] The Court held that neither theory should garner consideration because Fletcher's statements were "irrelevant to interpreting the policy as a matter of Mississippi insurance law."[119]

Thus, in one fell swoop, the Court simultaneously rejected both issues, holding that Leonard's claim of negligent misrepresentation was not actionable primarily because Nationwide in no way indicated that Fletcher had the authority to orally modify its insurance policies.[120] Moreover, the Court held that Fletcher's oral statements did not support a negligent misrepresentation claim foregoing any analysis of the facts or evidence demonstrating the existence of such a claim, specifically, Fletcher's alleged statements[121] and the method or manner of his advice. Giving no consideration to potential liability issues arising under tort and agency law, derived from Fletcher's course of dealing with Leonard, or the testimony of other Nationwide policyholders advised by Fletcher, the Fifth Circuit Court held that the District Court abused its discretion by allowing into evidence Fletcher's statements to other policy holders.[122]

D. The Finding of Abuse of Discretion Regarding the Admissibility of Third Party Testimony and Various Oral Statements Made by Fletcher

The District Court acknowledged as fact that Fletcher not only represented that he did not carry NFIP coverage,[123] but did so in the course of assuring a client that they need not purchase the same supplemental flood coverage.[124] The district court, citing testimony of various witnesses, also found that Fletcher sometimes discouraged clients from purchasing flood

[118] *Id.* at 440.
[119] *Id.*
[120] *Id.* at 441. (As the analysis will make apparent, the issue is whether Fletcher was negligent in his advice as to an NFIP policy. Leonard's existing policy has nothing to do with this issue; nor can Leonard's duty to read his existing policy immunize Fletcher.)
[121] *Id.* (See, *supra*, note 60).
[122] *Leonard*, 499 F.3d 419 at 442.
[123] *Leonard*, 438 F.Supp2d at 690.
[124] *Id.*

policies,[125] and concluded that there was ample evidence to warrant the finding that Fletcher, when asked, as a matter of habit and routine, expressed his opinion that customers should not purchase flood insurance unless they lived in Flood Zone "A."[126]

The Court recognized the fact that Fletcher had sold NFIP policies to twelve residents of Leonard's neighborhood.[127] Further, while noting that Fletcher had nearly fifteen hundred customers (and sold less than two hundred NFIP policies to those customers),[128] the Court found that the district court was erroneous in their findings regarding Fletcher's statements to Leonard.[129] Accordingly, the Circuit Court held that the lower court abused its discretion in considering evidence of statements made by Fletcher to other policyholders under Federal Rule of Evidence 406.[130]

The Court interpreted Rule 406's use of the word "habit" as a "regular response to a repeated situation" that has become "semi-automatic,"[131] and held that the testimony surrounding Fletcher's comments to five other policyholders about the need for additional flood insurance "did not remotely qualify or quantify as a habit within the meaning of Rule 406."[132] Thus, according to the Circuit Court, Fletcher's statements did not reveal an "invariable, reflexive response to his treatment of inquiries about supplemental flood insurance,"[133] and was thus inadmissible to demonstrate Fletcher's routine practice of advising clients that they did not need to purchase additional flood policies under the NFIP program.

V. ANALYSIS

[125] *Id.*
[126] *Id.*
[127] *Id.*
[128] *Leonard*, 499 F.3d 419 at 442.
[129] *Id.*
[130] *Id.*
[131] F.R.E. 406 permits evidence of the habit or other routine practice of an organization as relevant to prove that the conduct of an organization in a particular instance was in conformity with that habit or routine practice.
[132] *Leonard*, 499 F.3d at 442.
[133] *Id.*

A. "It is Not at All Clear Whether the Leonard's are Proceeding Under a Tort or Contract Theory."[134]

It would have served the Fifth Circuit Court well to address the fact that when Leonard asked Fletcher about purchasing additional flood insurance, Leonard was inquiring about coverage under an entirely different policy than his existing homeowner's insurance. Recognition of this fact may very well have influenced the Court to examine the possibility of a tort analysis and a reconsideration of both the lower court's admission of evidence, and that court's findings regarding that evidence. In the alternative, had Leonard clearly plead a pure negligence claim, it may have eliminated the Court's dependence on contract-based "oral-modification" analysis.

The Fifth Circuit Court's holding included the finding that Leonard's claim of negligent misrepresentation was not actionable primarily because Nationwide in no way indicated that Fletcher had the authority to orally modify its insurance policies.[135] Conversely, while the Leonard's misrepresentation claims may have lacked definition, the Court could neither deny their existence nor hide its confusion.[136] The Court's uncertainty over adjudicating the issue of negligence under the principals of contract or tort law[137] result in a ruling which affirms that contract claims will not survive, but negligence claims may have a future (having learned how not to plead such a complaint).

There is no doubt that the agent lacked authority to orally modify Leonard's existing policy, yet, absent a more specific analysis of tort issues, doubts remain as to Fletcher's potentially negligent 'opinion/possibly-habitual advice' regarding the need for NFIP policies.

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[134] *Id.* at 439.
[135] *Id.* at 440.
[136] *Id.* at 439.
[137] *Leonard*, 499 F.3d at 439. (See also, *supra*, note 109).

Furthermore, the fact that the Circuit Court announces its confusion regarding which theory Leonard attempted to present casts significant doubt on the ruling that the District Court abused its discretion in admitting evidence which supported the tort claim of negligent misrepresentation.[138]

Consequently, while the disposition of the instant case effectively protects the insurer, it by no means precludes the future success of a properly plead and substantiated negligence claim. Instead, both the District Court and Fifth Circuit Court rulings on *Leonard* suggest, at least implicitly, that agent negligence may be actionable under different factual circumstances.[139] Unfortunately, in light of the nature of the complaint, and the theories of recovery offered by Leonard, a discussion of tort liability, absent an express tort claim, might have been construed as either an abuse of discretion, or judicial activism, upon further review.

Nevertheless, whether the Fifth Circuit Court reasonably declined to recognize a cause of action which was not specifically or sufficiently plead remains arguable. Moreover, the Circuit Court undeniably exceeded the scope of analysis upon review of the appeal. Nationwide asked for a ruling only on the admissibility of evidence allowed by the District Court. In return, the Circuit Court delivered a ruling which discussed both the admissibility of such evidence, and the sufficiency of evidence required to recover under tort theory.[140]

B. Analyzing Leonard v. Nationwide Mutual Insurance Co. *Under Tort Theory*

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[138] *See* Plaintiffs' Opposition to Defendant's Motions in Limine Seeking to Exclude Evidence, Leonard v. Nationwide Mutual Insurance Co., 438 F.Supp.2d 684 (S.D. Miss. 2006) (C.A. No. 1:05CV475LG-RHW). (Citing 1 McCormick on Evidence s197 (5th Ed.)) ("In cases alleging fraud or misrepresentation, proof that the defendant perpetrated similar deceptions frequently is received into evidence.").; *See also*, Brief of Appellee/Cross-Appellants, Leonard v. Nationwide Mutual Insurance Co., 499 F.3d 419 (5th Cir. 2007) (C.A. No. 06-61130), 2007 WL 402447 at 28, 29. (Quoting Pavlides v. Galveston Yacht Basin, Inc., 727 F.2d 330 at 339 (5th Cir., 1984)) ("Where 'a finding of fact is based on a misconception of the underlying legal standard, an appellate court is not bound by the clearly erroneous standard of review.'").

[139] *Leonard*, 499 F.3d 419, 440 (In determining why the Leonard's misrepresentation claim is un actionable, the Court also implicitly demonstrates what might constitute actionable misrepresentation.)

[140] *See generally, Leonard*, 499 F.3d 419.

1. Agent Responsibility, the Nature of the Misrepresentation, and Leonard's Reliance

As an insurance agent, Fletcher was held out by his principal as having the express authority to represent Nationwide in the explanation of its policy coverages, and to inform and advise about additional policies and protections.[141] However, when the agent gave his opinion, it was not considered an "expert" or "professional" opinion for purposes of his principal's liability regarding the reliance of the clients upon statements of the agent made in his authorized capacity. This is surely an injustice.

The quality and competence of the agent's opinion and advice, and the due diligence upon which he bases that opinion or advisement (given his express knowledge, or such imputed by his authority), be they reckless, negligent or well-informed, are the factors which must be weighed in determining a breach of the standard of care. Leonard specifically asked Fletcher about purchasing supplemental NFIP coverage in the wake of Hurricane George.[142] Fletcher's "professional" advice, his opinion as an agent of the principal authorized to write such policies, was sought. Fletcher was solicited by an existing policyholder about potentially purchasing an entirely different policy (which, incidentally, renders irrelevant any analysis based on Fletcher's oral modification of the existing homeowner's policy). Finally, insurance agents routinely advise customers on whether or not to purchase certain policies, thus when an agent provides incorrect, incomplete and unsubstantiated information or advice, that agent is wrong.[143]

The agent had advised clients about and sold NFIP policies before. As the Fifth Circuit noted, Fletcher had one hundred eighty seven NFIP customers in the Pascagoula area.

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[141] *Leonard*, 499 F.3d at 425. (When Leonard renewed their policy, they received this notice: "Your policy does not cover flood loss. You can get protection through the National Flood Insurance Program. If you wish to find out more about this protection, please contact your Nationwide agent."); *Leonard* 438 F.Supp.2d at 691. ("Fletcher was authorized by Nationwide to interpret and explain all the coverages provided under Nationwide's policies.")

[142] *Id*.

[143] Insurance Litigation Reporter, 29 No 16 INSLITREP 634 (9/20/07).

Moreover, the agent sold twelve flood policies to residents of Leonard's neighborhood,[144] just two hundred yards from the Gulf of Mexico.[145] Yet Fletcher advised Leonard not to purchase an NFIP policy due to the fact that his home was not located in flood zone "A,"[146] despite the fact that Leonard's neighborhood is predominantly designated as flood zone "A."[147] Regardless of the agent's qualifications or reasoning, Fletcher owed Leonard the duty of "reasonable care."[148] Such care is defined as "the degree of care that a prudent and competent person engaged in the same line of business . . . would exercise under similar circumstances"[149] (emphasis added). Black's Law Dictionary subsequently provides that "prudent" describes someone who is "circumspect or judicious in one's dealings; cautious."[150] Moreover, one who is "competent" would be described as "well-qualified; capable; fit."[151]

Yet the alleged statements made to Leonard and other policyholders, even the impression of Fletcher's attitude and diligence in providing advice, demonstrate a carelessness so arbitrary and capricious (words often used to measure abuse of discretion) as to flirt with recklessness with respect to the interests of both Leonard and Nationwide. An off-the-cuff 'opinion' advising clients that they don't need flood coverage seems neither prudent nor competent, especially given the flood zone information available, the proximity of Leonard's property to the Gulf of Mexico, and the purpose of the NFIP.

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[144] *Leonard*, 438 F.Supp2d at 690.
[145] *Leonard*, 499 F.3d at 423.
[146] *Leonard*, 438 F.Supp.2d at 690.
[147] See FEMA NFIP FLOOD INSURANE RATE MAP, CITY OF PASCAGOULA, MS, (Rev. 1984).
[148] See, *supra*, notes 73-76.
[149] BLACK'S LAW DICTIONARY (8th Ed. 2005).
[150] *Id.*
[151] WEBSTER'S NEW WORLD COLLEGE DICTIONARY (2004).

Would Fletcher's opinion change upon realizing that from 1996-2006 a total of seventeen named storms either threatened or made landfall along the Mississippi Gulf Coast?[152] What if he were told that six of the most destructive hurricanes on record, all occurring since 1969, were in that group?[153] Is it reasonable, prudent or simply good business practice to know these facts and use them to formulate an informed opinion? Might the District Court and Circuit Court have ruled differently on the evidence presented?

One cannot reasonably deny that consideration of the evidence, or mere common sense[154] suggests that Fletcher, by virtue of his actual authority[155] (or purported expertise), should have had something more prudent and competent to offer when approached about the sale of an insurance policy.[156] The fact that Fletcher had express knowledge that Leonard sought advice as to an additional NFIP policy only reinforces such a sentiment.

Yet, Fletcher advised Leonard that his existing policy would cover hurricane-related loss, and that Leonard did not need to purchase an additional flood policy. While Mississippi law clearly states that Fletcher is not liable for misrepresentations regarding the existing policy, which Leonard should have read, the law requires more of an agent who gives poor advice which is subsequently relied upon.[157] Thus, the true issue before the Court is not one of oral modification, but rather, whether a manifestation of negligence in the insurance agent's advice or opinions to a client regarding acquiring NFIP coverage constitutes actionable misrepresentation.[158]

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[152] The National Hurricane Center Archive of Hurricane Seasons, http://www.nhc.noaa.gov/pastall.shtml, (November 2007).

[153] Eric S. Blake et. al., Report, *The Deadliest, Costliest and Most Intense United States Tropical Cyclones From 1851 to 2006*, National Weather Service (April 2007).

[154] See, *supra*, note 92.

[155] See, *supra*, note 66.

[156] See, *supra*, note 74.

[157] See, *supra*, notes 77,78.

[158] See, *supra*, notes 66-68.

Leonard sought out his long-time insurance agent to inquire about an additional flood policy. Fletcher told Leonard that he did not need to purchase one. Leonard, relying upon the agent's advice, refrained from buying NFIP coverage. Having no way to read the policy himself, and taking the agent's erroneous opinion as a prudent and competent one, Leonard's reliance upon Fletcher's statements is indeed reasonable.

2. The Responsibility and Subsequent Liability of FEMA and Private Insurers

The selling of NFIP policies is carried out by private sector insurance agents who either work independently or are employed by insurance companies.[159] Agents, prior to Hurricane Katrina, were not required to complete training or demonstrate a basic level of knowledge regarding the NFIP.[160] Meanwhile, flood program managers for the insurance companies who write and sell policies under the NFIP have expressed concern about the varying levels of knowledge that agents have regarding flood policies.[161]

FEMA and the insurance companies claim that they support agents selling the NFIP policies in the form of training, customer service hotlines, rate quote development, and Web sites.[162] However, other than requiring agents to meet state licensing requirements, historically agents have not been required to complete training or demonstrate a basic level of knowledge regarding the NFIP.[163]

Some jurisdictions have found that FEMA has immunity in regards to claims of agent negligence,[164] others, including the Fifth Circuit Court, reach different conclusions.[165] In fact,

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[159] *National Flood Insurance Program; Oversight of Policy Issuance and Claims: Before the Subcommittee on Housing and Community Opportunity, of the House Committee on Financial Services*, 190th Congress 6 (April 2005).

[160] *Id.*

[161] Eric S. Blake et. al., at 7.

[162] *Id.*

[163] *Id.*

[164] See, *supra*, notes 100-01; See also, Scherz v. South Carolina Insurance Co., 112 F.Supp.2d 1000, 1006 (C.D. Cal., 2000).

courts have recognized that insurance companies issuing NFIP policies are, by statute, fiscal agents of the United States.[166] Consequently, a claim brought against an insurer for the acts of its agent may arguably bind FEMA,[167] regardless of a determination as to the agency's statutory negligence.[168] Private insurers, of course, are not so lucky to be provided a statutory safe harbor. As discussed above in Section III (E) (4), Mississippi law clearly holds the principal liable for the tortuous conduct of agents acting within the scope of their employment.[169]

C. The True Errors of the Leonard *Cases*

The finding of error in the District Court's evidentiary findings by the Circuit Court remains questionable. If the Fifth Circuit Court concedes that it is unable to determine whether the Leonard's sought a remedy in contract or in tort, finding abuse of discretion in admitting evidence establishing misrepresentation seems somewhat contradictory. The true error, one which could hardly have been avoided due to the lack of jurisprudence,[170] occurred in the findings of fact, and consequently, the theories upon which *Leonard* was adjudicated. Furthermore, pursuant to Rule 15(b) of the Federal Rules of Civil Procedure, issues not raised in pleading tried expressly or impliedly shall be treated as if they are in the pleadings.[171]

Accordingly, it was error on the part of the District Court in not dismissing insufficient tort claims,[172] or requiring that pleadings be amended or further discovery propounded in the interest of justice and fairness, before adjudicating such claims under any theory. Similarly, it

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[165] *See* Gowland v Aetna, 143 F.3d 951, 952 (5th Cir., 1998); *See also* Van Holt v. Liberty Mutual, 163 F.3d 161, 166 (3rd Cir., 1998).
[166] See 42 U.S.C. §§ 4071, 2072.
[167] Neill v. State Farm Fire and Casualty Co., 159 F.Supp.2d 770, 774 (E.D. Pa., 2000).
[168] See, *supra*, notes 97-98.
[169] See, *supra*, Liability of the Principal, page 14.
[170] Carter v. Metropolitan Casualty Insurance Company, 2006 WL 2359044 (S.D. Miss. 2006).
[171] See F.R.C.P. 15(b).
[172] See F.R.C.P. 12(b)(6).

was error on the part of the Circuit Court to deliver an evidentiary ruling concerning those very tort claims, when such a ruling rests on the foundation of a contract which never existed.

Applying tort law to cases which straddle the fence between contract and tort, while difficult, is nonetheless necessary. *Leonard* demonstrates precisely why there is a need for tort analysis in similar factual scenarios: Plaintiffs simply have no remedy otherwise. Admittedly, the applicable standard of care may vary based on the knowledge of agent, the agent's awareness of risks of which the customer is unaware, and the degree to which the customer relies on the advice of an agent.[173] Further, Mississippi case law provides little authority concerning the scope of the agent's responsibility to alert customers to risks in light of the agent's knowledge of the risks covered by various policies.[174]

However, under Mississippi law, an agent (and vicariously, the principal) who gives advice "concerning the coverages an insured should purchase in circumstances where the advice is reasonably relied upon by the prospective insured"[175] incurs liability if "the advice is the product of a failure on the part of the agent to exercise reasonable care." [176] Accordingly, the finding that, in the absence of evidence of a standard of care, Fletcher did not breach a duty owed to the Leonard's cannot stand. The standard of care exists independent from an affirmative showing of it. Mississippi courts have determined that these are matters for a layman to determine, based on common sense and practical experience.[177]

Given the above, the finding that Fletcher's opinion did not constitute negligent misrepresentation, and though made under circumstances in which it was foreseeable that they might be relied upon, that reliance upon his advice was unreasonable given the language of the

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[173] *Id.* at 2.
[174] *Id.*
[175] *Jimmerson*, 2006 WL 2192655 (S.D. Miss. 2006) at 2.
[176] *Id.*
[177] *Lovett*, 676 So. 2d at 895.

existing policy should be found similarly erroneous. Similarly, attempting to analyze the case under contract theory alone just does not satisfy.

Allowing Nationwide, perhaps even FEMA, to avoid liability for the negligent conduct of its agent by hiding behind the absence of vagueness or ambiguity in Leonard's existing homeowner's policy smacks of unfairness. *Leonard*, after all, revolves around the advice given by a fully authorized agent regarding whether or not to purchase an entirely different policy, and the reasonableness of relying on such advice. A contract dispute the instant case simply is not.

D. The Significance of Leonard v. Nationwide Mutual Insurance Co.

1. Nationwide's Attempt to Avoid Liability Inherent Under Agency Principles Backfires

Intriguingly, it was not Leonard, but Nationwide which brought this appeal.[178] The goal was blatantly pronounced: Nationwide sought to avoid future litigation based on the potentially negligent statements of it agents.[179] While the ploy proved successful in the instant case, the results of employing this tactic may prove increasingly more damaging in future litigation. Taking issue with an evidentiary ruling, which given the facts at hand had no significant effect on the ruling of the lower court, appears to have at least loosened the lid on Pandora's Box. While Nationwide avoids liability for now, the Fifth Circuit opinion makes clear exactly what will not support a claim of negligent misrepresentation, which in turn presents future litigants with a better idea of what will.

2. Removal Creates Valid Federal Jurisdiction for a State Court Issue

The procedural details of *Leonard* create quite the conundrum. Tactically, a defendant like Nationwide would normally relish a hearing in Federal court. State courts have regularly

[178] *Leonard*, 499 F.3d at 427.
[179] *Id.* at 428.

proven more sympathetic to plaintiffs, especially in this context.[180] Now however, the removal of *Leonard* has led to a Federal court ruling regarding the viability of a negligence claim against an alleged agent-tortfeasor and a non-diverse claimant. This ruling, although favorable to the defendant in the instant case, endangers the traditional 'safe harbor' defendant insurers have enjoyed in Federal courts.

Further, as Leonard noted in moving to dismiss the non-diverse Fletcher, because Mississippi law clearly binds the principal in such circumstances, the federal courts may soon become, through the binding effect of the agent-principal relationship, just as plaintiff-friendly as state courts. *Leonard* suggests that a well-plead action in negligence, initially brought against a non-diverse co-defendant, might be equally damaging to the principal insurance companies upon dismissal of the agent and removal to Federal Court.

3. Nationwide's Fears Regarding Future Liability for Negligence May Soon Be Realized

The United States District Court for the Southern District of Mississippi (and subsequently the Fifth Circuit Court of Appeals) held that, although Fletcher's alleged statements were not actionable given the facts of this case, Leonard -- and presumably future plaintiffs -- could state a negligent misrepresentation claim as a matter of law.[181] The Circuit Court ruling damages defendant insurance companies in two ways.

First, rather than extinguishing the possibility of future tort claims, the Court recognizes that there may indeed come a factual scenario where a tort claim, properly plead and proven, will succeed. Secondly, instead of concluding with a District Court ruling which was generally

[180] It is important to acknowledge that the United States District Court for the Southern District of Mississippi is located in Gulfport Mississippi, an area also devastated by Hurricane Katrina, and it would be ridiculous to suggest that the recent opinions from the District Court have been unilaterally favorable towards defendant insurance companies or their agents.

[181] Brief of the Appellant, Leonard v. Nationwide Mutual Insurance Co., 499F.3d 419 (5th Cir. 2007) (C.A. No. 06-61130), 2007 WL 4024474 at 11.

favorable to defendant insurers, and would serve only as a persuasive ruling in federal courts, Nationwide is left with Fifth Circuit precedent which all but invites plaintiffs to present sufficient facts and evidence to support a tort claim. Dicta or not, this precedent need not carry any weight in future cases. This precedent need not be cited, but rather, it need only be followed- as a road map or recipe for preparing a successful tort claim.

D. The Implications of Leonard v. Nationwide Mutual Insurance Co.

1. The Plaintiff Insureds

Commingling tort and contract claims in *Leonard* results in incomplete justice regarding their tort claims. Consequently, future plaintiffs gain a clearer understanding of how an actionable tort claim might be brought, and how contract-based analysis may be avoided. Plaintiffs must first plead the case properly, thereby avoiding evidentiary problems such as those in *Leonard*. In fact, admission of the evidence, found to be an abuse of discretion in the instant case, will prove essential in proving tort claims.

Plaintiffs must demonstrate, according to the ruling in the instant case, the existence of a standard of care. Further, plaintiffs are required to demonstrate a breach of that standard of care. Moreover, they must be able to prove reasonable reliance and actual damages resulting from the breach and subsequent reliance. Most significantly, however, plaintiffs should remain mindful of the conflict between tort and contract theory and the Court's predisposition to contract analysis.

Leonard alerts plaintiffs to the confusion and discomfort with which the Court handles a claim that doesn't fit neatly into a purely contract or tort context. *Leonard* also demonstrates the inequity of judicial resolution when analysis depends upon consideration of multiple areas of

law. While disheartening in the instant case, future plaintiffs now realize the importance of demonstrating an independent tort in any context which might be construed as a contract dispute.

In the end, *Leonard* should never have been plead as a contract claim given the pivotal issue of negligent advisement as to an insurance policy which had not yet been purchased. Consequently, plaintiffs must realize not only the shortcomings of their pleadings, but the Court's unwillingness to explore the intricacies of a tort claim where a ruling based on contract law is even remotely (and in the instant case, erroneously) available. Consequently, *Leonard* will likely encourage plaintiffs to seek their remedy purely in tort, rather than continue to be impeded by the more stoic contexts of contract law.

2. The Defendant Insurers

Alternatively, the ruling might also be viewed as a shot across the bow of private insurance companies, absolving them momentarily, yet encouraging reevaluation of future decisions regarding agent training, and their prospective relationship with and duty owed to those they insure. Regardless, *Leonard* signals the start of a new race towards, or away from, the courthouse, with potential defendants in the driver's seat. Thus, the lingering question remains: Will the result of the instant case compel change within the insurance industry now, or will the necessary reforms come only after future tort claims?

Nationwide, and indeed the entire insurance industry, should find no comfort in the ruling of the Fifth Circuit Court. While attempting to snuff out the issue of misrepresentation, *Leonard* instead demonstrates its potential vitality. Thus, insurers are faced with two options. First, they might simply continue to take their chances in the courts. However, the better choice might be to "self-insure" themselves by formulating and implementing appropriate training procedures.

One obvious alternative might require documentation of agent advice given to insureds and potential insureds regarding the procurement of insurance. This would evidence the process and basis for the opinion, thus providing a defense against a tort claim, assuming such documentation would demonstrate that the opinion was one reached in a prudent and competent manner. Regardless of what measures might be taken, these potential future defendants control whether or not their agents might be found in breach of the standard of care, and ultimately whether or not they, the principal insurers, end up in court.

3. The Courts and Public Policy

The tort issue so apparent in *Leonard* becomes the proverbial pink elephant in the room, while the Court attempts to explain away the possibility of recovery under contract (a contract which, in fact, never existed, because Leonard never bought it, because Fletcher advised him not to). Courts must become as comfortable and adept at recognizing and allowing recovery for torts occurring under the veil of contract as they are in recognizing a contract remedy despite overtones of a tort claim. The errors of *Leonard* might remind the courts of the goals of such tort litigation: Compensating the injured and deterring conduct contrary to justice and public policy. The instant case should also exemplify, to both the courts and the public, the struggles facing the courts in the administration of justice amidst admitted confusion regarding the application of competing legal theories.

Likewise, the judiciary must begin to concern itself with the problems of strict contract and tort characterization. In determining the appropriate analysis, and the preclusion of another, the *Leonard* Court seems to choose form over fairness. Moreover, this breakdown allowed for the under-development of viable tort claims to persist through trial and appeal, finally dismissing them altogether as insignificant to the analysis of the facts under principals of contract.

At what point must it be demanded that fairness override form, and when should courts require, *sua sponte* or by amendment of pleadings, an examination of all potential theories of recovery? Is this not already the function of the courts? Can justice permit the dismissal of tort-related claims in a contract-based ruling, or does an overarching interest in compensating the injured require that those issues be tried fully and separately, apart from any contract analysis?

Likewise, at what point do public policy and the interest of the individual citizen compel change in the judiciary? *Leonard* should serve as a high-water mark in the contract-tort debate, a point at which both the public and the courts decry the misuse of contract theory in order to avoid an analysis under tort theory. Never again should a party whose only means of recovery may lie in a muddled pleading of tort and contract claims, be denied such recovery in tort simply because contract theory is less ambiguous.

VI. CONCLUSION

In sum, *Leonard* cuts to the very heart of the conflict between tort and contract analysis. In fact, the most important aspect of *Leonard* concerns the botched attempt to handle a claim where tort and contract issues were so intertwined. The fact that the Circuit Court announces its confusion regarding which theory the Leonards attempted to present casts significant doubt on the ruling that the District Court abused its discretion in admitting evidence which supported the tort claim of negligent misrepresentation,[182] in turn calling into question the findings of fact regarding the issue of negligence, and their affirmation by the Fifth Circuit Court.

[182] *See* Plaintiffs' Opposition to Defendant's Motions in Limine Seeking to Exclude Evidence, Leonard v. Nationwide Mutual Insurance Co., 438 F.Supp.2d 684 (S.D. Miss. 2006) (C.A. No. 1:05CV475LG-RHW). (Citing 1 McCormick on Evidence s197 (5th Ed.)). ("In cases alleging fraud or misrepresentation, proof that the defendant perpetrated similar deceptions frequently is received into evidence."); *See also*, Brief of Appellee/Cross-Appellants, Leonard v. Nationwide Mutual Insurance Co., 499 F.3d 419 (5th Cir. 2007) (C.A. No. 06-61130), 2007 WL 402447 at 28, 29. (Quoting Pavlides v. Galveston Yacht Basin, Inc., 727 F.2d 330 at 339 (5th Cir., 1984)) ("Where 'a finding of fact is based on a misconception of the underlying legal standard, an appellate court is not bound by the clearly erroneous standard of review.'")

While the Leonards will not recover on their claim, *Leonard v. Nationwide Mutual Insurance Co.* provides a road map of sorts for future claimants, and a warning for future defendants. Plaintiffs should carefully consider the strategy of their cases, the value of pleading precisely, the evidence necessary to prevail, and most significantly, their choice of forum. In doing so, they should not forget *Leonard's* most important lesson: The tension at the edges of tort and contract theory is a slippery slope. That slope is one which the courts prefer not to walk on, and regularly defer to contract theory instead. Until courts become more comfortable in thinking outside of the traditional contract – tort boxes, plaintiffs must distinguish one from the other themselves, thus forcing the courts to address the issue under both theories.

Notwithstanding the plaintiff's responsibility, the courts have responsibilities of their own, and in *Leonard,* those responsibilities were not met. The Court cannot declare that it is not at all clear whether the Leonard's are proceeding under tort or contract theory and then claim to deliver justice by dismissing the tort claim under contract theory. If it is not at all clear, then clarity should be the first and only problem addressed, as it is reasonable to render judgments on issues only after they have become sufficiently defined. To do otherwise would lead to an erroneous application of law, requiring reversal or remand.

Finally, to acknowledge the existence of potential tort claims, yet to find inadmissible the very evidence which supports those claims cannot suffice. The ruling is not only self-contradicting, it denies the plaintiff the ability to bring a pure tort claim of negligent misrepresentation in the future, the issue having been previously adjudicated under a contract-based analysis. Justice and fairness require a complete analysis of all legal theories which become obviously relevant to a court's decision, even when not specifically plead.[183] This is

[183] See F.R.C.P. 15(b).

especially true of *Leonard* and other cases in which the absence of such an analysis precludes current remedies under one theory and simultaneously bars future recovery under another.[184]

[184] The Leonard's Petition for a Writ of Certiorari to the Supreme Court of the United States was denied on April 14, 2008. (See 128 S. Ct. 1873 (2008)).