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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

WILLIAM DWYER, JR. AND
CYNTHIA DWYER

V.

CIVIL ACTION NO. 06-4793 "J"
NEW ORLEANS, LOUISIANA
WEDNESDAY, MARCH 7, 2006, 9:48 A.M.

FIDELITY NATIONAL PROPERTY
AND CASUALTY INSURANCE
COMPANY

TRANSCRIPT OF MOTIONS HEARING
HEARD BEFORE THE HONORABLE CARL J. BARBIER
UNITED STATES DISTRICT JUDGE

APPEARANCES:

FOR THE PLAINTIFF: HERMAN, HERMAN, KATZ AND COTLAR, LLP
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1 P-R-O-C-E-E-D-I-N-G-S

2 WEDNESDAY, MARCH 7, 2006

3 M O R N I N G S E S S I O N

4 (COURT CALLED TO ORDER)

5
6 THE COURT: Good morning, everyone. Call this case.

7 THE CLERK: Civil Action #06-4793, *William Dwyer, Jr.*,
8 *versus Fidelity National Property and Casualty Insurance Company.*

9 THE COURT: All right. Counsel, you can make your
10 appearances.

11 MR. GISLESON: Soren Gisleson on behalf of plaintiff.

12 MR. NIELSEN: Jerry Nielsen and Mike Weber on behalf of
13 defendant, Fidelity.

14 THE COURT: I apologize for my voice here this morning.
15 I'm suffering from a little sinus congestion so if I don't ask
16 too many questions or say too much, it's not that I'm not
17 interested, it's just I figure it would be better if I listen to
18 you-all for the most part; although, I probably will have a few
19 questions.

20 This matter is before the Court on two motions,
21 actually, one for partial dismissal and a second Motion to Compel
22 appraisal.

23 Let's take up the simple motion first. I think the
24 Motion to Compel appraisal. Mr. Nielsen.

25 MR. NIELSEN: Yes, Your Honor. Good morning,

1 Your Honor. National Flood Insurance Program claims dispute, the
2 defendant and the plaintiff have worked together.

3 THE COURT: Maybe I can short circuit by asking a few
4 questions. When did your client first request this appraisal?

5 MR. NIELSEN: Once we got the documentation from the
6 plaintiff and could evaluate it. This was within the last
7 30 days.

8 THE COURT: Within the last 30 days.

9 MR. NIELSEN: What would be the date?

10 MR. WEBER: It was --

11 MR. GISLESON: Your Honor, yeah, the request was made in
12 writing on the same day the Motion to Compel was filed.

13 THE COURT: Which looks like it was filed February 13th;
14 does that sound right?

15 MR. GISLESON: Yes, Your Honor, I don't have the file
16 with me but we spoke, I spoke on the phone with Mr. Weber.

17 MR. NIELSEN: That's the correct date.

18 THE COURT: The trial was set for when?

19 MR. NIELSEN: April 16th.

20 THE COURT: You don't think there is any requirement of
21 timeliness here, that the request for an appraisal be made in a
22 timely manner? The whole purpose, as I understand it, is to try
23 to avoid a lawsuit or litigation, kind of, it kind of turns
24 things on its head if you wait until not only a lawsuit is filed,
25 this lawsuit was filed some time in '06. I'm not sure when the

1 suit was filed. When was it filed, Mr. Gisleson?

2 MR. GISLESON: It was filed in August of '06,
3 Your Honor.

4 THE COURT: August '06 and Fidelity National waits until
5 two months before trial to request an appraisal under the policy.
6 Is there no reasonableness, no, I understand there is no strict
7 deadline in the policy. It doesn't say it has to be in so many
8 days, but it seems to me common sense says that it should be done
9 before litigation is filed. Certainly within a reasonable time.

10 MR. NIELSEN: Actually, I'm being more than reasonable,
11 and I will explain why. Under the policy --

12 THE COURT: Just answer my question, if you could. Is
13 there no deadline for this?

14 MR. NIELSEN: None.

15 THE COURT: Could you do it the day before trial?

16 MR. NIELSEN: Yes, sir.

17 THE COURT: You could do it the morning of trial?

18 MR. NIELSEN: Yes, sir.

19 THE COURT: You could do it during jury selection?

20 MR. NIELSEN: Your Honor, I know of --

21 THE COURT: You could do it after we pick the jury?

22 MR. NIELSEN: I know of no time limit that is --

23 THE COURT: You could do it while the jury is out
24 deliberating?

25 MR. NIELSEN: Your Honor, I think at some point I'd have

1 the ire of the federal judge --

2 THE COURT: No, you're saying legally you can do this at
3 any time. What about after the verdict is returned? After the
4 judgment? You could do it on appeal? You could request, I mean,
5 that seems to be your position here. If there is no deadline,
6 there is no deadline.

7 It seems to be, I mean, an absurd proposition, frankly,
8 Mr. Nielsen. Now you can respond.

9 MR. NIELSEN: Thank you, Your Honor. What the rule
10 technically requires in terms of documentation is that that be
11 submitted with the proof of loss before you file a lawsuit. I am
12 trying to bend over backwards to work with plaintiffs and the
13 plaintiff's bar to not be that hypertechnical. FEMA --

14 THE COURT: It seems like there is a lot of
15 hypertechnicality, I got to tell you. I'm not blaming this on
16 you, but that, and I'm not just blaming it on Fidelity National,
17 but I've seen this in case after case around here.

18 There are a lot of hypertechnical arguments that are
19 being made in trying to, I'll put this as kindly as I can, to
20 decline to pay flood claims under the National Flood Insurance
21 Program following the worst catastrophe in the history of this
22 country. And I see nothing but technicality after technicality
23 being thrown up on these claims.

24 Now, maybe you and your clients believe that that's
25 your right and your duty. I don't know. Apparently you do. It

1 seems to me almost obscene, and maybe it's something, I don't
2 know why anybody has not brought some of this stuff to the
3 attention of Congress, frankly. Or Mr. Bush, since he was just
4 down here recently and he's so concerned, maybe, you know, maybe
5 he can do something about it by whispering in the ear of the FEMA
6 director.

7 But this is not the only case where I've seen this kind
8 of defense put up. It seems to me we ought to all be working to
9 resolve these claims fairly, and you know, if somebody is
10 entitled to be paid, they ought to be paid. If they are not
11 entitled to be paid, they ought not to be paid. But don't stand
12 there and tell me that you're trying to avoid hypertechnicalities
13 because I've seen it in case after case around here.

14 MR. NIELSEN: Your Honor, if I may explain what I'm
15 trying to do. All right. If I were being hypertechnical as to
16 the documentation, I could have immediately come in and said,
17 Okay, that proof of loss did not have attached to it their
18 documentation and said, Okay, I want the case dismissed. I
19 didn't do that.

20 A proof of loss is in. We then got the documentation
21 during the lawsuit. That's a violation of the policy. It was
22 supposed to have been submitted before. I'm trying to do exactly
23 what the Court is saying I ought to be doing, is looking for ways
24 to still be able to resolve the dispute. When we got --

25 THE COURT: Let me ask you this: Because we may be

1 talking about something that is not really significant to what
2 I've got to decide here today. Assuming I grant your motion for
3 the appraisal, how does this work? Tell me how it works.

4 MR. NIELSEN: Both sides pick a disinterested appraiser.
5 Those gentlemen are experienced in pricing and figure out the
6 right price. If they can't agree, they have an umpire. If they
7 can't agree on a umpire, the Court picks a umpire. It is a
8 quick, simple, efficient process. Once they come up with a
9 number, that sets the value of the loss. If you do appraisal
10 properly --

11 THE COURT: That's not binding is it?

12 MR. NIELSEN: Yes, it is.

13 THE COURT: How do you jive that with --

14 MR. NIELSEN: The appraisal clause says that a decision
15 agreed to by any two will set the amount of actual cash value and
16 loss or if it applies to the replacement cost and loss. When you
17 do the appraisal clause, that's your last issue, which is how
18 much. And then in the regs at 44 C.F.R. Pt. 62.23 --

19 THE COURT: What about code of federal regulations title
20 44 section 62.22, which deals with judicial review, which and I'm
21 not reading the entire part but it says, Upon the refusal of the
22 complainant to accept the amount allowed upon any claim after
23 appraisal pursuant to policy provisions, the claimant within one
24 year after the date of mailing by the blah, blah, blah, to
25 participate and write-your-own company or the servicing agent of

1 the notice of disallowance or partial disallowance of the claim
2 may, pursuant to 42 USC 4072, institute an action of such claim
3 against the insurer in the United States District Court.

4 It seems to me they are clearly saying that following
5 appraisal, it's not binding on the claimant. They have one year
6 to file a suit after the appraisal.

7 MR. NIELSEN: Your Honor, this provision has never been
8 invoked in any of the WYO cases, so I don't know what this would
9 apply to. I think it might apply in the FEMA direct cases, but
10 this --

11 THE COURT: What do you mean the FEMA direct cases?

12 MR. NIELSEN: Approximately 7 percent of the policies
13 are issued by FEMA directly. And --

14 THE COURT: Obviously, it is not limited to that. I'll
15 read the first part. I skipped the first part. It's section
16 62.22, which is entitled judicial review, subpart A. "Upon the
17 disallowance by the Federal Insurance Administration, a
18 participating write-your-own company, or the servicing agent," so
19 it's obviously not limited to FEMA direct policies only.

20 MR. NIELSEN: You're correct.

21 THE COURT: And it does say, "Upon the refusal of the
22 claimant to accept the amount allowed upon any claim after
23 appraisal pursuant to the policy provisions," and it goes on to
24 say a claimant has one year to file a lawsuit. It seems to me
25 that appraisals is clearly not contemplated as being binding on

1 the insured at least. Maybe it's binding on the government, I
2 don't know, but it's not binding on the insured.

3 MR. NIELSEN: What I am relying on --

4 THE COURT: In the regulations, the regulation to me
5 also reinforces my idea and notion that it contemplates appraisal
6 before a suit is filed. You know, this whole notion of coming in
7 on the eve of trial and requesting trying to enforce an appraisal
8 provision, I have no problem with it if both of y'all want to
9 agree to go do an appraisal. I have a problem with first of all,
10 with two things, I have, it doesn't seem to me that it's binding,
11 so it wouldn't, you know, you could do the appraisal if I ordered
12 it. They may like it, they may not like it. They still have a
13 right to go to trial, it seems to me, if they don't like it.

14 Secondly, so I don't think it's binding. And I have a
15 problem with, the big problem with the timeliness, because you
16 know, I've got to tell you, it seems like it's just designed to
17 thwart this trial date here.

18 MR. NIELSEN: If I could ask a question of a court.

19 THE COURT: Sure.

20 MR. NIELSEN: And I'm asking this very respectfully. I
21 have two choices. I can either, when a case comes in, if the
22 documentation is not with the proof of loss, file a motion to
23 dismiss because the proof of loss, even if perfect, is not itself
24 supported by documentation, and then I'm not letting the case
25 move forward.

1 Or as a completely separate alternative, I can say, no,
2 let me not do that, let me work with plaintiff's counsel and
3 we're having a difficult time, and we've had immense discussions
4 with Judge Feldman and Judge Fallon with 50 plaintiffs' lawyers
5 in the room about, Get me the documentation. I've got to verify
6 this. Get me the documentation. We either then work it out or
7 we'll go to appraisal. And that's what we're doing in those
8 sections. And in those sections, that is our plan. Get me in
9 the documentation and then we can work it out. And that's what
10 we've got here, is we've got an exchange of documentation. There
11 are no coverage issues left.

12 THE COURT: But your client, this suit was filed in
13 August, you said?

14 MR. GISLESON: Yes, Your Honor.

15 THE COURT: You don't get involved until the suit is
16 filed, right?

17 MR. NIELSEN: Correct. And so when the documentation
18 is --

19 THE COURT: So you got involved probably August or
20 September sometime.

21 MR. NIELSEN: Correct.

22 THE COURT: Your client, your client, not you, your
23 client had a year before the suit was filed. They waited a year
24 before the suit was filed.

25 MR. NIELSEN: But we did not have this documentation.

1 What would we have been looking at?

2 THE COURT: You didn't have what documentation?

3 MR. NIELSEN: When was the documentation that we're
4 looking at now submitted?

5 MR. GISLESON: Your Honor, Mr. Nielsen is referring to
6 the expert report that was submitted pursuant to the expert
7 deadlines. To the extent that I'm jumping ahead to what I would
8 argue, I would submit to the Court that my client dutifully
9 obtained a contractor estimate, submitted it to Fidelity,
10 repeatedly called Fidelity, sent Fidelity certified mail
11 requesting that they act upon this particular estimate, and all
12 Fidelity did was try to pawn him off on the independent
13 appraiser. Go talk to him, go talk to him, go talk to him.

14 THE COURT: Independent appraiser meaning who?

15 MR. NIELSEN: Adjuster. The contractor's estimate came
16 to us in mid-January after a two-week extension. So we were
17 waiting to get the documentation.

18 THE COURT: No, but here is the allegation, his is that
19 his client sent this to you, not to you, to your client long ago,
20 to Fidelity and they would just ignore it.

21 MR. GISLESON: Yes, Your Honor, in approximately January
22 of '06.

23 THE COURT: January '06. A few months after the
24 hurricane.

25 MR. GISLESON: Before I ever got involved.

1 THE COURT: And your client just ignored it.

2 MR. NIELSEN: So in every case that --

3 THE COURT: If your client gets, it seems to me that if
4 I'm the insurer and my adjuster says there is \$20,000 worth of
5 damage, and then the insured comes in with an estimate saying,
6 No, it's a hundred thousand -- I'm just throwing these numbers
7 out. I have no idea what the numbers are in this case. It's
8 really a hundred thousand, that's going to trigger in my mind as
9 the insurer the adjuster made, maybe now is the time to invoke
10 this appraisal clause. Not to wait another year until we're on
11 the eve of trial. That's, that's what seems to have happened in
12 this case. It seems not to have happened, I guess. Why did your
13 client sit on this from --

14 MR. NIELSEN: What was the date on which your proof of
15 loss was submitted?

16 MR. GISLESON: Your Honor, we've submitted that there
17 were a couple of proofs of loss; there were a couple of documents
18 that my clients submitted to Fidelity which would qualify as
19 proof of loss. The first was in January. It was a certified
20 letter to Fidelity which outlined all the reasons why he should
21 receive an additional payment or payment in excess or to the
22 limits of the policy, as well as the supporting documentation of
23 a contractor's estimate.

24 We submitted a formal proof of loss, at least I did, on
25 behalf of my clients just almost coinciding with the filing of

1 this lawsuit, maybe a week before or some days before. It was
2 basically at the same time. There hasn't been any allegation and
3 the defendant has agreed in papers to the Court that he is not
4 going to contest the validity of the proof of loss in the
5 litigation.

6 So this is what we've got. We've got an August of 2005
7 loss event. The administrator waives the proof for one year. If
8 you've got an agreement as to your amount, that can be paid
9 without a proof. One year after this loss date, this insured
10 submits through counsel a sworn proof of loss. We then get a
11 lawsuit contemporaneously with the filing of this.

12 THE COURT: In the meantime, your client spent a year
13 ignoring the plaintiff.

14 MR. NIELSEN: Your Honor, we've dealt with 250,000 flood
15 claims.

16 THE COURT: I know but --

17 MR. NIELSEN: We weren't ignoring anything.

18 THE COURT: This is the U.S. government, you know?
19 You've got the entire force of the U.S. government behind you.

20 MR. NIELSEN: And there are only so many competent
21 adjusters. I'm not prepared today to explain what happened in
22 every single -- I can't say that they did or did not submit this.
23 We did not set this up as a hearing on the timeliness of their
24 documentation.

25 If you would want me to give you a chronology of when,

1 I can do that.

2 THE COURT: No. For purposes of this motion, I'm going
3 to deny the defendant's Motion to Compel appraisal for the
4 reasons that it comes too late on the eve of trial and that it
5 would not be binding in any event, and that since this matter is
6 two weeks before trial, I'm not going to compel it.

7 Let's argue about your Motion to Dismiss.

8 MR. NIELSEN: All right. As to the Motion to Dismiss
9 the extra-contractual claims, what the plaintiff is setting for
10 there is they acknowledge that state law extra-contractual claims
11 are preempted, so they want to do the exact same thing under a
12 federal label. They ask you to interpret the federal statutes of
13 NFIP and the phrase federal common-law in the SFIP and they also
14 ask you to view your inherent powers as allowing --

15 THE COURT: What does that phrase mean? Why did, that
16 comes from the FEMA regulations, right?

17 MR. NIELSEN: It's in the flood policy at article 9. It
18 was added to the policy 22 years ago.

19 THE COURT: That language?

20 MR. NIELSEN: Yes, sir. It's been in there through
21 every hurricane season for 22 years.

22 THE COURT: The exclusively language was added more
23 recently, right?

24 MR. NIELSEN: In the year 2000.

25 THE COURT: Okay.

1 MR. NIELSEN: And every court that's looked at that
2 phrase has interpreted it to mean that that gives federal judges
3 the authority to look not just at FEMA's regulations per se but
4 to look at standard principles of insurance law so as to
5 interpret --

6 THE COURT: There haven't been many courts that
7 interpreted that at all.

8 MR. NIELSEN: Very few. Very few.

9 THE COURT: My sense is that the case or cases that you
10 cited, well, I don't think, I'm trying to remember the name of
11 cases that you cited now. But I don't think the, I don't think
12 the case says necessarily that that's the only meaning of that
13 phrase, federal common-law. It does say that that is a
14 permissible use of that phrase to apply, you might call it
15 standard contract principles, when interpreting the insurance,
16 flood policy provisions.

17 MR. NIELSEN: And then subsequent to 2000, when FEMA did
18 expressly preempt, three judges did look at it with the exact
19 argument that is being made today, and all three have said, No,
20 in *Scritchfield*, in *Hoyt* and in *Howell*, three federal judges have
21 looked at this and said --

22 THE COURT: All district courts, right?

23 MR. NIELSEN: Yes, sir. It's before the Fifth Circuit
24 in the *Wright* case right now.

25 THE COURT: This precise issue?

1 MR. NIELSEN: This precise issue. It's also pending
2 before Judge Vance.

3 THE COURT: Remind me. Was the *Wright* case, where did
4 that come out of? This Court?

5 MR. NIELSEN: No, out of the, it's one of the district
6 courts in Texas, I think the Eastern District. It went up to
7 appeal in the Fifth Circuit.

8 THE COURT: Which was the one that was Judge Duval's
9 case?

10 MR. NIELSEN: *Gallup v. Omaha*. They held that it
11 expressed preemption. *Wright* was conflict preemption. The
12 phrase, federal common-law has not been interpreted by anyone.

13 THE COURT: They did agree it must mean something.

14 MR. NIELSEN: Yes.

15 THE COURT: It's not superfluous.

16 MR. NIELSEN: Right. It embodies in the policy the
17 concepts set forth in the statutes that we are to look at this as
18 an insurance program and embodies standard insurance law
19 principles, and that's what courts have always interpreted it to
20 be. Not looking to the law of any particular state. You
21 wouldn't look to Louisiana law to interpret a federal flood
22 policy. You look to *Couch on Insurance, Appleman*, that type of
23 thing. You look at standard principles. No one has argued that
24 that would be a predicate for adding in a new remedy in money, in
25 the context of the National Flood Insurance Program because --

1 THE COURT: Mr. Gisleson is arguing that --

2 MR. NIELSEN: Yes, he is. But no judge has held such.
3 The statutory basis that he gives you, 4053 is part A. That's
4 been dead since 1978. 4081(C), the Fifth Circuit in *Wright*
5 directly held that has nothing to do with insurance companies.
6 And in *Gallup*, the United States appeared as *amicus curiae* and
7 said, Look, we need these people listening to us. We're going to
8 pay any resulting judgment coming out of NFIP claims handling,
9 and 4082 that he relies on is also part A. It's a dead letter
10 statute. The basis of the program today is 4081(A). As for --

11 THE COURT: Wait. Say that again.

12 MR. NIELSEN: The basis of the arrangement --

13 THE COURT: No, you said something about something is a
14 dead letter statute.

15 MR. NIELSEN: 4082 relates to the power of the federal
16 government to sign contracts with an insurance pool to run a
17 reinsurance program between 1968 and 1978, when that part of the
18 program -- they've tried the program under different methods of
19 operation. The 4053 method ended in 1978. It didn't work. From
20 1978 to 1983, they operated it as a government-only program.
21 From 1983 to today, it's a government program where the insurance
22 industry is the grunt. But it's the government's money; it's all
23 routed through the federal treasury.

24 THE COURT: How does your client, just out of curiosity,
25 how does the WYO company get paid?

1 MR. NIELSEN: How do we make money?

2 THE COURT: Yeah. Obviously you're not doing this out
3 of the goodness of your heart.

4 MR. NIELSEN: No, sir. The regulations provide that we
5 are paid a 3.3 percent commission on every dollar that goes out
6 the door. In this case, plaintiff seeks an additional 50 grand.
7 If they get that 50 grand, we make 3.3 percent off of that. So
8 if at trial you award them that extra 50 grand, Fidelity gets its
9 3.3 percent, plaintiffs get their 50,000, I get all of my
10 attorney's fees paid by the federal government, routed through
11 Fidelity's accounting department. Fidelity has zero risk.

12 THE COURT: They get paid first and reimbursed by the
13 government?

14 MR. NIELSEN: For the claim, that comes directly out of
15 the federal treasury from a segregated account. The only thing
16 that is reimbursed to Fidelity are my legal bills. They pay that
17 up front and get reimbursed for claims expenses. But the claim
18 itself, there is a segregated account with letters of credit we
19 withdraw, and during Katrina we were withdrawing hundreds of
20 millions of dollars at a time and dispensing hundreds of millions
21 of dollars almost weekly.

22 And to note your earlier comment, Your Honor,
23 99.7 percent of those claims that we handled didn't result in
24 lawsuits. I understand and I appreciate from the Court's
25 perspective you're very concerned with what's going on in the

1 litigation.

2 After Katrina and all of these adjusters and all of the
3 work that they did, less than three tenths of one percent --
4 there is so little litigation involving the NFIP after Katrina,
5 one law firm, mine, is handling almost all of it. It's that
6 little.

7 THE COURT: Pretty good niche you found there,
8 Mr. Nielsen.

9 MR. NIELSEN: Yes, sir. I'm a very lucky person.

10 THE COURT: If I see you at a cocktail party, I'll ask
11 you how you managed that.

12 MR. NIELSEN: But it's tiny. It's a tiny sliver of the
13 cases. And Judge Fallon was making a similar comment about all
14 of this litigation. But there is 250 --

15 THE COURT: That's all we see.

16 MR. NIELSEN: That's why I want you to see the bigger
17 picture.

18 THE COURT: We see all of the litigation and we see what
19 goes on in the litigation.

20 MR. NIELSEN: This courthouse has 800 NFIP cases in it.
21 Pending right now, there are less than 1200 nationally. In the
22 last two years from the catastrophic 2004 and 2005 storm seasons,
23 we handled 307,000 claims. That's less than three tenths of
24 1 percent in lawsuits. Somebody is doing something right. And
25 we get a percentage of what goes out the door to pay these

1 claims. We're not sitting there ignoring --

2 THE COURT: Is that the only way your company gets paid?

3 MR. NIELSEN: On the --

4 THE COURT: What if you win a case and the plaintiff
5 gets nothing? Fidelity must get paid something to administer it.

6 MR. NIELSEN: Out of their 3.3 percent.

7 THE COURT: They get paid nothing? No administration,
8 administrative costs?

9 MR. NIELSEN: They are out. They don't get anything for
10 watching me.

11 THE COURT: What about when they write the policy? They
12 must get a commission on that.

13 MR. NIELSEN: On the policy administration side preloss,
14 they obviously take out monies for the insurance agent. They get
15 a commission. There's monies that come out of that premium to
16 pay for the administering of the policy. That's based on
17 something called best averages for policy administration services
18 in the private sector. I'm not an expert on that. But it's
19 basically to cover the cost. Nobody is looking to make a profit
20 on that end.

21 As the courts have recognized, when you have a giant
22 storm and these companies get fully in gear and get people out
23 there to get these adjustments made, that's where they make the
24 money for participating in the NFIP.

25 So the notion that these companies are out there either

1 lowballing people or ignoring claims, that's how they make their
2 money. They have zero risk here. They don't even have to front
3 the money.

4 THE COURT: Well, you have a risk of not keeping FEMA
5 happy.

6 MR. NIELSEN: Well, we do have to verify the amount.

7 THE COURT: I imagine if they found out you or your
8 client were paying claims they didn't think should be paid --
9 you've got, you wouldn't have the business any more, and your
10 client wouldn't be, you could be cut out of this business, is
11 the --

12 MR. NIELSEN: I would be worried about much worse than
13 that.

14 THE COURT: I'm not talking about fraud or anything, I'm
15 just talking about you didn't meet their guidelines or whatever.
16 I'm assuming there are guidelines, there are audits probably done
17 and so forth, right?

18 MR. NIELSEN: Yes, sir.

19 THE COURT: All right. Go ahead, I'm sorry, I didn't
20 mean to interrupt your argument.

21 MR. NIELSEN: In this idea of having a federal remedy, a
22 federalized bad-faith team just for the NFIP, it brings in to
23 account the four U.S. Supreme Court decisions that govern all
24 federal insurance and benefit programs, going back to *Lynch*, a
25 war insurance case, that it's only for the Congress and not the

1 courts to set the remedies. And in that court, they squarely
2 held that Congress could assert just an administrative remedy,
3 which is relevant to the appraisal clause, that in *OPM v.*
4 *Richmond* the courts cannot add remedies that Congress did not
5 itself sanction.

6 In *Till v. Universe*, the Fifth Circuit said there is no
7 implied private right of action in the flood program because
8 Congress gave two: One is the right to sue for benefits under
9 the policy, and there is another private right of action to
10 challenge zone determinations for what flood zone you're in,
11 which determines your premium rates and how your land can be
12 developed. So in all this huge statutory scheme, which is
13 immensely complex, they came up with two private rights of action
14 that are expressed and there are no others to be added by the
15 judiciary.

16 From time to time, people do go to Congress and say,
17 Hey, we want this changed or that changed. Louisiana's
18 Congressional delegation, particularly Lindy Boggs, over decades
19 have monitored that and watched it and tried to balance between
20 what would be the cost in premiums versus the benefits and
21 balance between those states that don't flood and the states that
22 do. People in Iowa think the flood program is a boondoggle.
23 They hate it. They think it's ridiculous. It's helping people
24 build mansions on the beach in Florida.

25 THE COURT: I wonder what they think about the farm

1 subsidies.

2 MR. NIELSEN: I've got many arguments to pop back to
3 them. I'm from this state.

4 THE COURT: I understand.

5 MR. NIELSEN: I've been debating this thing for
6 20 years.

7 THE COURT: Everybody gets their subsidies. It's a
8 matter of what program.

9 MR. NIELSEN: It balances out one way or the other.

10 THE COURT: Yes.

11 MR. NIELSEN: But the Court's job is not to decide what
12 the law ought to be. The Court's job, when we're dealing with
13 United States treasury funds under the appropriations clause, is
14 to strictly construe and to enforce what is the law. This is not
15 a court of equity at the moment. This is a court of straight
16 law. And there is no law granting a damages remedy for
17 attorney's fees in this context. And I would respectfully submit
18 if one were suddenly created in the midst of all this, we'll
19 never resolve any of these 800 cases.

20 THE COURT: I'm jumping around here, but let me ask
21 Mr. Gisleson, what specific remedies or damages are you asserting
22 here or claiming here beyond, you know, obviously the amounts due
23 under the policy? Attorney's fees I know, anything else?

24 MR. GISLESON: No, Your Honor.

25 THE COURT: We're only talking about attorney's fees?

1 MR. GISLESON: Your Honor, we're only talking about
2 attorney's fees, although the complaint admittedly did --

3 THE COURT: You're not claiming general damages,
4 punitive damages, none of --

5 MR. GISLESON: No consequential damages, Your Honor,
6 only attorney's fees.

7 THE COURT: I wanted to clarify that.

8 MR. NIELSEN: So we've got the original Fifth Circuit's
9 decision in *West v. Harris*, which is the seminal flood damage
10 case, which says that you can't have attorney's fees under
11 Louisiana state law. And so now we've got before the Court the
12 question, can you do the exact same thing if you give it a
13 federal common-law label. And that's what the Court would have
14 to decide.

15 If yes, I as a court from the judicial branch can
16 implement an attorney's fees remedy that's found nowhere in the
17 statutes or the regs, and I am empowered to do that.

18 Just, if I may just back up. I know you've already
19 ruled on the appraisal issue, but I would just leave the Court
20 with a thought and you've been most patient with me, the Court's
21 ruling grants the WYO carrier the unilateral right if the
22 plaintiff has not invoked the appraisal clause significantly in
23 advance of trial to say, no. And I would prefer not to have that
24 right. I think it's an effective way of shutting down cases but
25 I --

1 THE COURT: Wait. Say that again.

2 MR. NIELSEN: If you are saying that the insured has the
3 right to say no to appraisal a month before trial, then you are
4 necessarily logically also holding that the government's fiscal
5 agent can do the same thing. So if I've got a plaintiff's
6 attorney that wants to go to appraisal, doesn't want to go to
7 trial, doesn't want to go through the expense of expert reports
8 and whatnot, and wants to go to appraisal, is perfectly willing
9 to concede all coverage and scope issues and says, Look, guys,
10 let's just shut it down on appraisal. Under your logical path, I
11 lawfully and appropriately get to say, No. And I would rather
12 not have that power. I would rather be bound that if he's going
13 to be that amenable --

14 THE COURT: It doesn't mean you have to say no.

15 MR. NIELSEN: But it means I can.

16 THE COURT: What motivation would you have to do that?

17 MR. NIELSEN: To take it to trial. But no more
18 motivation, the plaintiff here is saying, No, I don't want to go
19 appraisal. I want to go through the expense of a trial. Same
20 exact motivation flipped over.

21 THE COURT: You just told me earlier that you and your
22 client and program had no such motivation, so I've got to take
23 you at your word on that.

24 MR. NIELSEN: But if this is the way the game is going
25 to be played, Your Honor, it works both ways.

1 THE COURT: I hope you're not playing a game here.

2 MR. NIELSEN: I think, Your Honor, with all respect,
3 we've got an appraisal clause that could end this matter in a
4 couple of weeks. And instead, we're going to go to a trial in a
5 federal courtroom to determine the price of two-by-fours and
6 sheetrock.

7 THE COURT: Since we now, since I now understand it,
8 we're only talking about attorney's fees potentially, what's your
9 response to the notion that in certain limited instances,
10 particularly if you look at the Fifth Circuit case from 1986, *In*
11 *re: Owners of Harvey Oil Center*, with which I'm very familiar
12 since I grew up almost across the street from it in Harvey, I
13 didn't know until I read this case that was the subject of some
14 litigation. But in the federal courts, I'm quoting from that
15 case, "Federal courts have traditionally enjoyed the power
16 originating in equity to contravene the American rule where
17 litigants pay their own attorney's fees when the losing party has
18 acted in bad faith vexatiously, wantonly or for oppressive
19 reasons."

20 And it goes on to say, "The purpose of this exception
21 is to prevent abuse of the court system by parties which can best
22 their opponents by simply spending time on attorney's fees and
23 dilatory litigation. The principal of compensation based on
24 vexatiousness applies whenever the federal courts are made a tool
25 of improper conduct. Either the lack of legal foundation or the

1 abusive nature of the litigation tactics employed by a party
2 could support an award of attorney's fees against it."

3 Obviously that's a pretty high standard. You don't
4 just get it because you win your case.

5 MR. NIELSEN: Correct.

6 THE COURT: You're right and they are wrong. Isn't that
7 a possible way the plaintiffs could, if the facts warranted it at
8 trial in this case?

9 MR. NIELSEN: No, Your Honor. What is the date of that
10 decision, please?

11 THE COURT: 1986.

12 MR. NIELSEN: I could be wrong but I'm virtually certain
13 it predates *OPM v. Richmond*. And as the courts have recognized,
14 the OPM case in point that discusses it is *Wagner v. Direct* --
15 no, *Flick v. Liberty Mutual*, talking about how OPM curtails the
16 ability of the federal courts to get around FEMA regulations. In
17 that case they were talking about the proof of loss requirement.
18 But also more importantly, looking at the cases on federal
19 common-law, on judicial remedies, on separation of powers, the
20 Supreme Court over the past 20 years has gone in the opposite
21 direction of saying, Wait, we really want to respect separation
22 of powers. We are not the legislative branch.

23 I fully get it that if I as an attorney do improper
24 stuff in your courtroom, you can do bad things to me. No
25 question. But can you, because an adjuster or a claims rep took

1 a position that you think was unreasonable, award against the
2 government's fiscal agent in a U.S. treasury funded case?

3 And that's the operative thing here, whether you could
4 or you couldn't in a private dispute, I think not, but I'm
5 uncertain. I am certain it doesn't work in this context.

6 THE COURT: Well, suppose for the sake of argument here
7 that your client, and I'm talking about not the federal
8 government, I'm talking about Fidelity or its agents, had engaged
9 in just, I don't really know what the facts are in this case. I
10 know very little about the facts, almost none, but just horrific
11 conduct here in, let's say even bordering on fraud, denying this
12 claim.

13 MR. NIELSEN: Malice.

14 THE COURT: Bad faith. As bad as it gets. A, is there
15 no remedy to an insured if that would occur and, B, if there is a
16 remedy, whether it be an award of attorney's fees or whatever,
17 isn't there something in the rules and regulations here that
18 says, FEMA, the federal government can say, We ain't paying for
19 that. That's yours, not ours.

20 MR. NIELSEN: Here is the remedy that Congress settled
21 upon. If you've got a claims adjustment problem, if you disagree
22 with your adjuster, get me to the federal judge. That federal
23 judge can order that claims payment. You have an expressed
24 private right of action to go right to that federal judge in the
25 community where the flood happened and you can order me, if you

1 disagree with me and you think that 50 grand is owed, you can
2 order it. But Congress settled upon that as the remedy, not
3 attorneys' fees.

4 THE COURT: So you're saying there is no remedy. I
5 mean, a remedy is to get what you're entitled to anyway. That's
6 not a remedy for the outrageous conduct.

7 MR. NIELSEN: That is the remedy that -- I can't stop
8 you. You can come to court and get the money. There is no way I
9 can succeed. If there that is my objective, I can't succeed.

10 THE COURT: You can certainly succeed in putting
11 somebody through hell and back in a year, year and a half while
12 this is going on.

13 MR. NIELSEN: And the second part of my answer would be
14 this --

15 THE COURT: I'm not saying you're wrong, I'm just, I'm
16 just, want to know what, you know, what you think the law is
17 here.

18 MR. NIELSEN: I need to get into your mind, please, the
19 second part of my answer. Congress at 4072 gave the insured the
20 expressed private right of action. At 4019, they said of the
21 federal government, You design a claims adjustment process that's
22 going to work in disasters. They did that. The appraisal clause
23 is a key portion of that, and I'm very worried as to how the
24 Court's ruling is going to impact that.

25 The second thing they did was turn the profit incentive

1 of normal insurance workings on its head. There is no risk to
2 these companies, they get a 3.3 percent commission, plus every
3 independent adjuster also works on a sliding fee scale that's
4 published on FEMA's web site. The higher the claim, the more
5 money they make.

6 THE COURT: Yeah, I know. I've heard that after
7 Katrina, which sounds a little counterintuitive.

8 MR. NIELSEN: It is counterintuitive. For the purpose
9 of what --

10 THE COURT: I understand, too, how the real world works,
11 that you have to keep the person who gives you the business
12 happy. That's all I'm going to say about that.

13 MR. NIELSEN: But are we going to legislate from a court
14 on the sliver of cases when 99.7 worked great? And that's what
15 Congress does.

16 THE COURT: I'm not intending to legislate anything
17 here.

18 MR. NIELSEN: I misspoke, Your Honor. I apologize.

19 THE COURT: I'm intending to try to understand what the
20 law is here and apply it. Some of my other commentary has just
21 been that, just commentary.

22 MR. NIELSEN: I misspoke. I apologize.

23 THE COURT: And it's not an indication of how or why I'm
24 going to decide this case. I do think there is some significant
25 issues here that hopefully will be addressed by Congress, and

1 there is a lot going on. But I think this catastrophe of
2 unprecedented proportions has brought to light many problems or
3 issues in this whole, just in the insurance industry generally
4 and in the flood insurance program also.

5 To me, this whole notion of having the courts in the
6 litigation doesn't apply to this case at all. This whole wind
7 versus water issue is absorbing and causing the spending of
8 enormous amounts of time, effort, money, litigation, by all
9 parties, on all sides.

10 And it seems ridiculous to me when you got the kind of
11 catastrophe we have here that we ought to be in the business of
12 arguing whether it was wind versus water. Maybe that's going to
13 require Congress to revise the, I guess the long-term solution is
14 a more expanded catastrophic insurance fund. Apparently the
15 insurance industry is not either willing or able to undertake
16 that. That's my editorial for this morning.

17 MR. NIELSEN: Just a final thought and I know the Court
18 is really trying to figure out what's the right thing to do, and
19 just as historical comment because you mentioned that you just
20 see the litigation. What we're in right now with our national
21 flood program is the last means of operating this thing that
22 anybody could ever come up with. In the '50s, they developed
23 four possibilities.

24 THE COURT: When did the first National Flood Insurance
25 Program, when did that start?

1 MR. NIELSEN: 1968. But it's been talked about since
2 the '20s. The four possibilities were: Just the private sector
3 would do it --

4 THE COURT: Is that the only national flood, national
5 catastrophic insurance program that exists is just for flood?

6 MR. NIELSEN: Crop also exists and there was also a --

7 THE COURT: People in Iowa probably like that.

8 MR. NIELSEN: They love that one.

9 THE COURT: Okay.

10 MR. NIELSEN: Because that's theirs. The four
11 possibilities were: A purely private enterprise which wouldn't
12 work because only the people at highest risk would buy the
13 product. It wasn't actuarially sound; it never will be.

14 The second would be to have the insurance company run
15 it with the government kind of off on the side. They attempted
16 that; it was a miserable failure because there was no chieftain.

17 The third was to have the government run it all by
18 itself. They tried that from '78 to '83; it was a disaster. The
19 government doesn't know anything about insurance. They blew it.

20 So in '83 they came up with what I call a *marriage made*
21 *in hell*. The government is the boss and sets all rules and all
22 public policy, and the insurance companies are the grunt and we
23 sign an arrangement every year where we are the fiduciary, like a
24 bank, the fiduciary of the United States Government. And we have
25 to account for the money that goes out the door. Very

1 significant, very high duties.

2 And the insurance companies have long made clear to the
3 federal government, this is why state law claims were preempted.
4 If we've got to enforce your strict rules and we're subject to
5 any risk at all, of bad faith or any judge can hurt us for doing
6 the government's bidding, we're out. And that's why it's a
7 one-year arrangement so we can get out.

8 THE COURT: The insurance companies enroll in this
9 voluntarily. It's not mandated?

10 MR. NIELSEN: Yes, we can get back out.

11 THE COURT: Just out of curiosity again, do you know,
12 are there some companies that are set up only to do this work?

13 MR. NIELSEN: There are some. State Farm and Allstate
14 obviously are multiple lines. There is a company called
15 Fidelity --

16 THE COURT: This Fidelity?

17 MR. NIELSEN: Yes, this is a Fidelity case. They do
18 homeowners in other states. Their market penetration in
19 Louisiana is very small. But are there companies that just do
20 flood? I'm pretty sure there are. But the major property and
21 casualty carriers in the country are multiple-lines carriers.

22 The point I would just leave the Court with is,
23 huge debates, lots of experience, tried and true things through
24 20-something hurricane seasons have gotten us to where we are
25 today.

1 Will there be things where this system breaks down?
2 Certainly. Absolutely. But would we change the rules of the
3 road for the lone problem or are we trying to make something
4 that's critical to Louisiana the whole country stay working.

5 I'm very concerned that knocking out the appraisal
6 clause and adding federal common-law claims just because somebody
7 wants to go to trial is hurting something very important as
8 opposed to building something that takes care of thousands and
9 thousands of people. Thank you for hearing me.

10 THE COURT: Thank you. Mr. Gisleson, I think I ought to
11 send you a bill. I think I've done most of your argument here.
12 But I want you to focus on this argument that with regard, let's
13 limit it to the attorney's fees because that's what we're talking
14 about here.

15 MR. GISLESON: Your Honor, Soren Gisleson on behalf of
16 the plaintiffs.

17 THE COURT: Go ahead.

18 MR. GISLESON: Our argument is exclusively relied upon
19 by or basing our argument on the inherent equitable powers of the
20 Court.

21 THE COURT: You have no case that supports what you're
22 trying to do here, right?

23 MR. GISLESON: That's correct, Your Honor, other than
24 the Fifth Circuit cases that we cited, which actually both rely
25 on a U.S. Supreme Court case, *Alyeska Pipeline Services Company*

1 *v. Wilderness Society* from U.S. 240. It's a 1975 case. There is
2 nothing in the flood policy, the NFIA, the National Flood
3 Insurance Act or the C.F.R. that precludes or divests this Court
4 from its equitable powers.

5 At the end of the trial of this matter, if the Court
6 finds there was bad faith, pursuant to what the Fifth Circuit has
7 already said, this Court can contravene the American rule and
8 order the defendant to pay attorney's fees.

9 THE COURT: That would be an equitable, that's an
10 equitable claim.

11 MR. GISLESON: Yes, Your Honor.

12 THE COURT: What Mr. Nielsen is arguing, as I understand
13 it, is that what Congress set up here is a very specific and
14 narrow right. Well, it's obviously, there would be no claim here
15 except that Congress created a claim, right? Would you agree
16 with that? There would be no claim in the first place, no remedy
17 here unless Congress creates it.

18 MR. GISLESON: Yes, Your Honor.

19 THE COURT: Under the National Flood Insurance Program.
20 And then that they set up a very narrow remedy that is, you know,
21 you can sue for benefits under the policy and nothing else that
22 the courts have said, generally speaking, that that statute is to
23 be in the regulations implementing it ought to be strictly and
24 narrowly construed because it involves, you know, the public's
25 fisc. So I'm not supposed to employ any equitable remedies here.

1 MR. GISLESON: I understand, Your Honor. Our position
2 is the insurance policy provides for the law between the parties,
3 in this case the WYO and the Dwyers, my clients. At the very end
4 of the policy, what law governs, section 9, the policy and all
5 disputes arising from the handling of any claim under the policy
6 are governed exclusively by the flood insurance regulations
7 issued by FEMA, the National Flood Insurance Act and federal
8 common-law. It was put in there for a purpose. If this Court or
9 an insured or a plaintiff ever wants to be made whole when there
10 is a dispute, they need to be recompensed attorney's fees. For
11 payment of the attorney they had to go get. There is nothing in
12 the NFIA --

13 THE COURT: Has that argument ever been made to
14 Congress? I agree with you as a matter of equity or principle,
15 but it seems like, I'm wondering why Congress didn't put in the
16 statute or FEMA in the regulations something about attorney's
17 fees, you know?

18 MR. GISLESON: Right. And there is no discussion.
19 There is nothing in the NFIA that speaks to attorney's fees.

20 To return to Your Honor's point earlier about the fraud
21 issue, if there was a fraud perpetrated by Fidelity, then we
22 would submit there would be a cause of action under federal
23 common-law because is there a federal common-law fraud provision
24 against Fidelity. Now, the issue becomes --

25 THE COURT: I doubt if you're going to get there on this

1 case.

2 MR. GISLESON: No, we're not. And it's not even
3 alleged, Your Honor.

4 THE COURT: I just used that as an extreme example.

5 MR. GISLESON: I agree, and we don't allege fraud in
6 this case. But it's sometimes important to set up the
7 parameters. Straight breach of contract, we agree we don't have
8 any claim for attorney's fees.

9 A fraud claim, federal common-law fraud, it's out
10 there, it's been there forever. In that situation you would be
11 able to get consequential damages as well as attorney fees.

12 In the middle somewhere is bad faith. Bad faith we
13 maintain provides for the award of attorney's fees pursuant to
14 the Court's equitable powers because the defendant acted in such
15 a wanton manner that there is, it would be unfair for the
16 plaintiff to pursue a court action and then never be made whole.

17 What I would submit is, and there is a lot of talk
18 about the public fisc and there was some talk earlier about
19 scaring off the WYOs. Fidelity made over \$100 million on flood
20 claims it adjusted in Louisiana with only two dozen employees.
21 That is what the corporate representative in this case testified.
22 A couple dozen employees, \$100 million dollars. In some ZIP
23 codes, they were just writing \$250,000 checks without sending
24 anyone out there.

25 Now, I bring that up simply because it's an incredibly

1 profitable industry. And a ruling by Your Honor is certainly not
2 going to scare off a business who is making \$100 million off of a
3 single incident.

4 The public fisc. We maintain that there are provisions
5 in the NFIA that provide that there is some sort of penalty
6 involved between, if the WYO acts in the manner of bad faith.
7 Your Honor, it's 4082(F). The WYOs are subject to a yearly
8 contract. They wrote it so that they are subject to a yearly
9 contract. They are subject to a yearly contract. I don't know
10 how it started or who enforced the provision. But if during the
11 course at any time during this contract, the director of FEMA may
12 terminate any such contract at any time if he finds that the
13 pooled company or organization has failed substantially to carry
14 out the contract or is carrying out the contract in a manner
15 inconsistent with the efficient and effective administration of
16 the Flood Insurance Program.

17 We maintain that they could lose that contract. That
18 \$100 million, that \$100 million that Fidelity earned in adjusting
19 something in the neighborhood of 35,000 flood claims in Louisiana
20 would be jeopardized because they acted in bad faith.

21 THE COURT: Is there also a provision that you say would
22 allow FEMA or the federal government not to reimburse or pay any
23 damages or monetary judgment that might result in a case like
24 this? In other words, where Fidelity itself would be stuck with
25 liability for that?

1 MR. GISLESON: I would submit in 44 C.F.R. Pt. 62,
2 appendix A, if the FEMA office of general counsel finds that the
3 litigation is grounded in actions by the company, the WYO, that
4 are significantly outside the scope of this arrangement and/or
5 involves issues of agent negligence, then the FEMA office of
6 general counsel shall make a recommendation to the administrator
7 regarding whether all or part of litigation is significantly
8 outside of the scope of the agreement.

9 We would maintain that outside the scope of the
10 agreement would include adjusting claims in bad faith. And we
11 would maintain that that's a decision that Your Honor make at the
12 end of a trial on this matter in order to allow us to put forth
13 our case for bad faith and to show the need for my client to be
14 made whole.

15 That's really just about it.

16 THE COURT: This is a bench trial, right?

17 MR. GISLESON: Yes, Your Honor.

18 THE COURT: It's all flood policies in a bench trial?

19 MR. GISLESON: Yes, Your Honor.

20 MR. NIELSEN: If Your Honor has any questions, I would
21 be happy to entertain them.

22 THE COURT: No, I don't think I have any more.

23 Mr. Nielsen, do you want to briefly respond to anything? I need
24 to be out of here in couple of minutes.

25 MR. NIELSEN: Let me just run through some points

1 quickly then.

2 THE COURT: Okay.

3 MR. NIELSEN: The comment was made that it was put there
4 for a purpose, meaning the reference to federal common-law. The
5 exact same agency that put it there 25 years ago is the same
6 agency that in 2000 implemented the expressed preemption
7 provision. So we would be holding --

8 THE COURT: The exclusive language, you mean?

9 MR. NIELSEN: Correct. We would hold that they intended
10 a federalized bad faith scheme when they preempted the state law.

11 THE COURT: Wait. Say that again.

12 MR. NIELSEN: The same sentence that has federal
13 common-law in it now has the reference that says you can't have
14 state law, that this rule applies to any claim and any dispute
15 arising out of your claims handling.

16 THE COURT: The exclusive clearly means, or clarifies
17 for sure, that you can't apply state law claims.

18 MR. NIELSEN: So what we would be saying is that the
19 exact same agency in the same sentence where they said you can't
20 have a state law based extra-contractual remedy intended all
21 along for all 25 years, that all along you could have a
22 federalized --

23 THE COURT: That's not necessarily inconsistent, though,
24 is it?

25 MR. NIELSEN: Sure it is.

1 THE COURT: Why?

2 MR. NIELSEN: Why would you say --

3 THE COURT: Well, you could say, we don't want 50
4 different state laws applying with a hodgepodge of laws and so
5 forth. But we don't, we could have one standard federal
6 common-law extra-contractual claim. I mean, I know you're
7 arguing that's not what they intended but certainly the two are
8 not necessarily inconsistent in my mind.

9 MR. NIELSEN: In the ERISA context, and it's dangerous
10 to bring ERISA into this because they are very different --

11 THE COURT: It's dangerous to bring ERISA into anything.

12 MR. NIELSEN: Anything.

13 THE COURT: I would say this statute pales by comparison
14 to the -- well, I've commented once before. I think ERISA is the
15 worst statute ever written by man.

16 MR. NIELSEN: But in that context, they said just
17 putting a federal label to get around your expressed preemption
18 wouldn't work. They intended to get rid of that type of claim.
19 Changing your label means nothing.

20 THE COURT: Well, it could be they intended to preempt
21 state law in favor of federal common-law. That's not necessarily
22 inconsistent. That's all I'm saying.

23 MR. NIELSEN: Two more points: 4082(F). 4082
24 specifically talks about the contracts with the pool formed or
25 otherwise created under Section 4051 of this title. That's

1 part A.

2 4082 is dead letter. That deals with a totally
3 different operating system that hasn't been in existence since
4 1978. The courts have recognized that what governs me today --

5 THE COURT: These statutes on the book have never been
6 officially repealed but you are saying they are dead letter --

7 MR. NIELSEN: The reason being, in '68, they gave the
8 federal government different options of how to make this, three
9 operating systems on the books concurrently.

10 THE COURT: They are still all on the books?

11 MR. NIELSEN: All kept on the books for the reason that
12 it was so hard to get a consensus to get a National Flood
13 Insurance Program agreed on. They said, Let's get them all on
14 the books at the same time and give the executive the option of
15 switching between the three.

16 Okay. 4081(A), as the courts have recognized, governs
17 me. And there is no restriction on what they are going to pay me
18 to stay working on this program.

19 Finally, another separation of power problem. He cites
20 44 C.F.R. Pt. 62, appendix A, and makes the argument FEMA might
21 not pay. The Fifth Circuit in *Wright* dealt with that same
22 argument, called it speculative and said, Look, every court has
23 looked at this. FEMA is going to pay as practical matter.

24 He then says, quote, we would maintain, close quotes.
25 Soren is great but Soren is not the chief of litigation for the

1 FEMA OGC. His name is Jordan Fries, and Jordan decides whether
2 FEMA is going to pay or not pay. And he says, quote, a decision
3 by Your Honor would make, close quotes, as Judge Messitte, in the
4 District of Maryland just ruled in *Moffett v. Computer Sciences*,
5 it's not for the judiciary to rule whether or not FEMA is going
6 to pay.

7 And we shouldn't be in the business of curtailing them
8 into whether, they have got to operate this thing and make it a
9 success. And with respect, every federal judge is but one
10 federal judge. They've got to look at the whole picture. And
11 not just the litigation and not just this storm event. They know
12 full well, and they have told courts this, that if they don't
13 stand behind these companies, two things are going to happen:
14 One, the companies are going to bolt, or two, they are not going
15 to follow the rules.

16 And there is a Third Circuit decision expressly talking
17 about that. It is *C.E.R. 1988, Inc. v. Aetna*, and it's talking
18 about it in the state law context of extra-contractual claims,
19 that if you add that problem into this mix, one of two bad things
20 is going to happen. Either these companies are not going to
21 strictly enforce the rules uniformly across the United States,
22 which is a core objective, or they are going to bolt. Either one
23 is bad.

24 So in balance, this is the way to go, and what the
25 Third Circuit held was, Let's have everybody stay within the

1 remedies that FEMA prescribes. That's the way to have this thing
2 be long-term sustainable.

3 Thank you, Your Honor.

4 THE COURT: All right. Thank you. I'll take that under
5 advisement. Have a good day.

6 MR. NIELSEN: Thank you, Your Honor.

7 (Whereupon, at 10:48 a.m., on Wednesday, March 7, 2006,
8 the proceedings were concluded.)

9 * * *

10

11 REPORTER'S CERTIFICATE

12

13 I, Cathy Pepper, Certified Realtime Reporter, Registered
14 Professional Reporter, Certified Court Reporter, Official Court
15 Reporter, United States District Court, Eastern District of
16 Louisiana, do hereby certify that the foregoing is a true and
17 correct transcript, to the best of my ability and understanding,
18 from the record of the proceedings in the above-entitled and
19 numbered matter.

20

21

22

23

Cathy Pepper, CCR, RPR, CRR

24

Official Court Reporter

25

United States District Court

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