



CLASS ACTION LITIGATION



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Wind Versus Flood Coverage and Hurricane Katrina

By MARK D. MESE

The damages caused by Hurricane Katrina in Louisiana, Mississippi, and Alabama constitute the largest natural disaster in U.S. history. Hurricane Katrina's impact on insurers and their policyholders have already set in motion what will probably be one of the largest legal and public policy storms to hit the United States in modern times. Nowhere will the storm be more evident than in disputes involving wind and water damage coverage.

The eye of the coverage storm is already manifesting itself in coastal areas of Louisiana, Mississippi, and Alabama. Insurers providing property and homeowner coverage in Katrina affected areas are taking the position in many cases, that most if not all of a policyholder's damages resulted from rising water—flooding. Thus, resulting damages are not covered. A typical flood exclusion found in many policies provides:

B. Exclusions

1. We will not pay for loss or damage caused directly or indirectly by any of the following. Such loss or damage is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss. . . .

g. Water

- (1) Flood, surface water, waves, tides, tidal waves, overflow of any body of water, or their spray, all whether driven by wind or not;
- (2) Mudslide or mud flow;
- (3) Water that backs up from a sewer or drain; or

- (4) Water under the ground surface pressing on, or flowing or seeping through;
 - (a) Foundations, walls, floors or paved surfaces;
 - (b) Basements, whether paved or not; or
 - (c) Doors, windows or other openings.

But if loss or damage by fire, explosion or sprinkler leakage results, we will pay for that resulting loss or damage.²

A large portion of the damages caused by Hurricane Katrina in coastal areas involved rising water. The rising waters can generally be characterized as follows: (1) wind-driven water that resulted in tidal surges which inundated coastal areas which were not protected by levees; and (2) water passing through breaches in manmade levees.

Homeowner insurers and property insurers will ask courts to read their flood exclusions literally and enforce them, thereby, leaving large numbers of policyholders uninsured or underinsured. Approximately one-fifth of the businesses in Mississippi, and less than half of properties in New Orleans were covered by flood insurance.³

Causation Analysis. Policyholders seeking to avoid flood exclusions may take advantage of some or all of the following arguments: (1) the "cause" of the policyholder's loss was not caused by flood or was not entirely caused by flooding; (2) the flood exclusion is ambiguous; (3) enforcement of the flood exclusion would not meet the reasonable expectations of the parties; and (4) the flood exclusions are unenforceable based on public policy considerations.

Mark D. Mese is a partner with Kean Miller Hawthorne D'Armond McCowan & Jarman LLP in Baton Rouge, La. He can be reached at mark.mese@keanmiller.com.

² Form SS 00 07 07, Pg. 9, Hartford Insurance Company, 1997.

³ Theo Frances, "Many in Area Hit by Flooding Lack Insurance," *Wall Street Journal*, Aug. 31, 2005 at pg. A-5.

If the past is any guide to the future, many courts will consider the referenced policyholder's arguments in reaching a decision, but written opinions will often be couched in terms of causation analysis. The types of causation analysis used by courts will depend upon the jurisdiction, the specific facts of the case, policy language, and perhaps the desired result. The types of causation analysis which can be found in the jurisprudence, include: "efficient proximate cause doctrine" versus the "concurrent cause doctrine"; or the "dominate versus incidental cause theory."

A class action for policyholders in Louisiana has been filed against insurers. Policyholders are seeking to avoid application of flood exclusions in future coverage disputes based on the Hurricane Katrina water damage. Attorneys for the class argue that the breach of New Orleans levees and the levees' negligent construction/maintenance was the proximate or dominant cause of damages in New Orleans (*Chehardy v. Louisiana Insurance Commissioner J. Robert Wooley*, No. 53645, La. Dist. Ct., 19th Jud. Dist., East Baton Rouge Parish).

In Mississippi, the attorney general has filed a suit on behalf of the state seeking a court ruling that insurers should pay for Hurricane Katrina-related flood damages. The Mississippi attorney general has argued that insurers' flood exclusions are ambiguous and violate unfair trade practice acts and should not be enforced based on public policy considerations. The attorney general has also argued that wind caused the tidal surge in coastal Mississippi, thus flood exclusions should not be enforced in Katrina-related coverage disputes. Louisiana's attorney general has indicated that he may also file a suit seeking a similar declaration.⁴

Courts in Mississippi and Louisiana have in some instances allowed policyholders to recover even where flooding was involved by finding that evidence produced at trial showed that wind was the efficient or dominate proximate cause. For example, see *Glenn Falls Ins. Co. of Glenn Falls, N.Y. v. Linwood Elevator*, 241 Miss. 400, 130 So.2d 262 (Miss. 1961); *Roach-Strayhan-Holland Post No. 20, Am. Legion Club Inc. v. Continental Ins. Co. of N.Y.*, 237 La. 973, 112 So.2d 680 (La., 1959).

Other Louisiana and Mississippi cases dealing with storm damage and causation include the following: *Urrate v. Argonaut Great Insurance Co.*, 881 So.2d 787, 04-256 (La. App. 5 Cir. 2004); *Durkin v. Federal Emergency Management Agency*, 1987 WL 14935 (E.D. La., 1987); *Southern Hotels Limited Partnership v. Lloyd's Underwriters at London Companies*, 1997 WL 325972 (E.D. La., 1997); *Loyola University v. Sun Underwriters Ins. Co. of New York*, 93 F. Supp. 186 (E.D. La., 1950), affirmed 196 F.2d 169 (5 Cir. 1952); and *Ludlow Corp. v. Arkwright-Boston Mfrs. Mut. Ins. Co.*, 317 So.2d 47 (Miss., 1975).

Anti-Concurrent Causation Clauses. Many insurance policies in use today have what is termed anti-concurrent causation clauses. These clauses attempt to

exclude coverage when there are multiple causes of a loss and any one of the causes are non-covered causes. The following is an example of an anti-concurrent causation clause:

G. Exclusions

1. We will not pay for loss or damage caused directly or indirectly by any of the following: *Such loss or damage is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss.*

* * * * *

g. Flood

- 1) Including surface water, waves, tides, tidal waves, overflow or any body of *1321 water of their spray, all whether driven by wind or not; . . . (*Paulucci v. Liberty Mut. Fire Ins. Co.*, 190 F. Supp.2d 1312 (M.D. Fla., 2002).

Neither Louisiana nor Mississippi have reported cases addressing anti-concurrent cause clause enforcement. There is no consensus in other jurisdictions on the enforceability of the clauses. For example see: *Kelly v. Farmers Ins. Co.*, 281 F. Supp.2d 1290 (W.D. Okla, 2003); *Lexington Ins. Co. v. Unity/Waterford-Fair*, 2002 WL 356756 (N.D. Tex.); *Paulucci v. Liberty Mutl. Fire Ins. Co.*, 190 F. Supp.2d 1312 (M.D. Fla., 2002); *Preferred Mut. Ins. Co. v. Meggison*, 53 F. Supp.2d 139 (D. Mass., 1999); *Alf v. State Farm Fire and Cas. Co.*, 850 P.2d 1272, 1277 (Utah, 1993); *Safeco Ins. Co. of America v. Hirschmann*, 112 Wash.2d 621, 773 P.2d 413, 414, 416 (Wash., 1989); and *Murray v. State Farm Fire and Cas. Co.*, 203 W.Va. 477, 509 S.E.2d 1, 14 (W. Va., 1998).

The Legislatures and Insurance Commissioners in Katrina-affected areas may look to Florida's reaction to the insurance crisis triggered by the series of hurricanes which visited Florida between 1992 and 2004. Florida, through Insurance Commissioner's orders and legislation, has attempted to influence coverage issues, and to balance insurers' business interest with policyholders' needs. (See, Elliott Mittler, "A Case Study of Florida's Homeowners' Insurance Since Hurricane Andrew," *National Hazards Research and Applications Information Center Institute of Behavioral Science University of Colorado*, September 12, 1997 at Web site: www.colorado.edu/hazards/up/up96.html). Indeed, the Louisiana Insurance Commissioner has reviewed emergency orders issued by Florida's Commissioner and issued orders in Louisiana affecting Katrina related coverage which prevents termination of policies and extends notice periods. (See, Louisiana Commissioner of Insurance, Robert Wooley's Emergency Rule No. 15 on the Louisiana Insurance Commissioner's Web site: www.ldi.state.la.us)

Conclusion. The ultimate determination of coverage or non-coverage of flood damages in Katrina-affected areas may be couched in terms of causation theory. Public policy considerations, existing case law, policy language and case specific facts will affect the final outcome in most cases as the courts struggle to find a consistent theory to allocate losses between policyholders and insurers in Katrina-affected areas.

⁴ Ned Randolph, "Wilma May Extend Delays in Insurance," *The Advocate*, Oct. 20, 2005, pg. 1D, published daily by Capital City Press in Baton Rouge, La.