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YEAR END REVIEW OF INSURANCE COVERAGE LITIGATION IN THE AFTERMATH OF HURRICANE KATRINA

I. INTRODUCTION

On August 29, 2005, Hurricane Katrina reached the continental United States, tearing through the gulf coasts of Alabama, Mississippi and Louisiana. During the ensuing days and months, the country assessed the damage, learning that over 1000 lives had been lost, thousands of businesses were in ruin and countless homes had been damaged or completely destroyed. All told, financial losses from Hurricane Katrina are estimated to exceed \$200 billion.

One of Hurricane Katrina's many legacies is the unprecedented battle between insureds and insurers over coverage for losses sustained during the storm. Much of the dispute lies in the distinction between wind damage (which is generally covered by a homeowners policy or business owners policy) and flood damage (which is generally not covered unless the insured purchased flood coverage). For property owners who lack a flood insurance policy issued under the National Flood Insurance Program (NFIP), the distinction has proven critical.

Balch & Bingham has the unique perspective of claimant and advocate in the battles arising under property policies. In addition to assisting clients through this difficult time, we similarly have pursued our own insurance claims for property and business interruption losses sustained to our Gulfport, Mississippi office. It seems fitting as we approach year-end to reflect upon the recent court decisions in Mississippi that are likely to shape the outcome of the remaining Katrina insurance coverage litigation.

II. TYPICAL POLICY LANGUAGE

A typical property policy contains two separate "coverages," one for "dwellings" and another for "personal property." For business owners,

the typical policy also includes coverage for lost profits due to business interruption and the extra expense associated with resuming and continuing operations. The homeowners and business owners policies apply to "accidental direct physical loss" to the dwelling and/or personal property so long as certain conditions are met, including that the loss is not included in one of the "Losses We Do Not Cover." Under most privately issued policies (as opposed to policies issued under the NFIP), wind and rain damage is covered, but flood is excluded as one of the "Losses We Do Not Cover." Most policies also exclude damage where flood (or any other excluded loss) is the "predominant cause" of the loss.

III. RECENT DECISIONS BY U.S. DISTRICT COURT JUDGE SENTER

Much of the Katrina insurance coverage litigation in Mississippi is being handled by Judge L.T. Senter, Jr., who is a Senior United States District Court Judge in the Southern District of Mississippi. He has issued several opinions involving Katrina claims under policy language materially identical to that above. His decisions will carry great weight in future claims, particularly in federal court, unless and until the Fifth Circuit and/or Eleventh Circuit weigh in on the issue. Judge Senter's Hurricane Katrina insurance orders and opinions are available at <http://www.mssd.uscourts.gov/insurance.htm>.

Judge Senter's position regarding the wind versus flood issue is set forth in *Buente v. Allstate Ins. Co.*, 442 F. Supp. 2d 690 (S.D. Miss. 2006); *Tuepker v. State Farm Fire & Casualty Co.*, 2006 WL 1442489 (S.D. Miss., May 24, 2006); *Guice v. State Farm Fire and Casualty Co.*, 2006 WL 2359474 (S.D. Miss., Aug. 14, 2006); and *Leonard v. Nationwide Mutual Ins. Co.*, 438 F. Supp. 2d 684 (S.D.



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Miss. 2006). This article focuses on *Buente*, but the holdings in the other cited cases are similar. Key differences are noted.

In *Buente*, Allstate moved for judgment on the pleadings where plaintiffs sought coverage for damage to their residence in Gulfport, Mississippi allegedly caused by “hurricane wind, rain, and/or storm surge from Hurricane Katrina.” 442 F. Supp. 2d at 695. The plaintiffs further alleged that “Allstate and its agent Brenda Pace expressly represented to Plaintiffs that they would have full and comprehensive coverage [under their homeowners policy] for any and all hurricane damage, including any and all damage proximately, efficiently, and typically caused by hurricane wind and ‘storm surge’ proximately caused by hurricanes.” *Id.* at 692. Before the lawsuit was filed, Allstate sent an adjuster to inspect the insured property, who stated that “Allstate only pays for adjustment of damages caused by wind, not water,” and ultimately tendered a check for \$2,600.35, representing his determination of the amount of the covered loss (compared to plaintiffs’ claim that their covered losses were between \$50,000 and \$100,000). *Id.* at 693.

The *Buente* court noted that it was undisputed that “damage caused by wind and rain” are damages covered by the policy, although there was “obviously a dispute about the extent of this covered loss.” *Id.* at 695-96. The major dispute was:

[W]hether losses attributable to “storm surge” are covered losses because the “storm surge” is wind driven or whether losses attributable to “storm surge” are excluded from coverage because such damages are caused by “water” . . . or by “flood, including but not limited to surface water, waves, tidal water or overflow of any body of water, or spray from any of these whether or not driven by wind”

Id. at 696. Judge Senter denied Allstate’s motion for judgment on the pleadings, but established several rules that create a framework for analyzing future “wind versus flood” claims:

Flood and Water Exclusions are Valid: “The exclusions found in the policy for water damage and for damages attributable to flooding are valid and enforceable policy provisions. . . . But because this is an exclusion from coverage in a comprehensive homeowners insurance policy, and because the exclusion constitutes an affirmative defense, Allstate would bear the burden of proving that the exclusion applies to

the plaintiffs’ claims.” *Buente*, 422 F. Supp. 2d at 696.

Storm Surge is Included Within Flood Exclusions: “Hurricane Katrina moved tidal waters from the Mississippi Sound on shore and inundated thousands of homes, some within and some beyond the ordinary flood plane established by responsible agencies of the United States government. Since the water that entered and damaged the plaintiffs’ home was tidal water, I find that the damage caused by this inundation is excluded from coverage under the Allstate policy.” *Buente v. Allstate*, 2006 WL 980784 (S.D. Miss., April 12, 2006).

Hurricane Deductible Endorsement Creates Ambiguities: “Because this policy carries a specific ‘Hurricane Deductible Endorsement,’ it is apparent to me that it was intended to cover damages sustained in a hurricane because of the effects of rain, hurricane winds, and objects that might be carried by those winds, whether or not there was also damage caused by high water. Thus, to the extent Allstate contends that the hurricane itself . . . would constitute a weather condition that would relieve them of liability . . . [under one or more exclusions], I find that the policy is ambiguous and its weather provision therefore unenforceable in the context of Mississippi law, where there is damage caused by both wind and rain (covered losses) and water (losses excluded from coverage)” *Buente*, 422 F. Supp. 2d at 696-97.

Wind and Rain Damage is Always Covered: “[W]here there is damage caused by both wind and rain (covered losses) and water (losses excluded from coverage) the amount payable under the insurance policy becomes a question of which is the proximate cause of the loss. To the extent that the Allstate policy is inconsistent with this well settled rule of Mississippi law, under [one or more exclusions] . . . , the exclusionary language is invalid.” *Id.* at 697.

Question of Wind versus Flood is for Jury: “If the evidence were to indicate that part of the plaintiffs’ losses were attributable to wind and rain . . . and part of the losses were attributable to flooding . . . , the

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determination which was the proximate cause . . . would be a question of fact under Mississippi **For Damage Over Time, Look to What Occurred First**: “[I]f the evidence shows that the damage occurred over time, so that wind damage preceded damage from the ‘storm surge,’ the wind damage would be a covered loss even if subsequent damage from the ‘storm surge’ that exacerbated the loss were properly excluded from coverage.” *Id.* at 696.

Judge Senter also left clues about his views on claims alleging misrepresentations by an insurance company’s agents:

Allstate’s agent was under no duty to advise the plaintiffs what coverages were necessary for the protection of their property. Yet if the plaintiffs made an inquiry of the agent and the agent (or one of her employees with actual or apparent authority to respond to the inquiry), in response, made the representations concerning coverage that the plaintiffs have alleged, Allstate may have potential liability for all of the damage to the plaintiffs’ property. Again, this is a fact-specific inquiry into exactly what the plaintiffs asked and exactly what was said in response to their inquiry.

Buente, 442 F. Supp. 2d at 697-98.

IV. CONCLUSION

Judge Senter has established several rules for insurers and insureds (and their respective attorneys) to use when assessing Katrina claims, particularly in Mississippi. Wind and rain damage are always covered in policies similar to the one applied in *Buente*. Flood exclusions are unambiguous and apply to exclude damages caused by inundation, including “storm surge.” While the rules seem clear, they are not as easy to apply in real practice. Disputes over causation will continue, and, as Judge Senter noted, will be greatly debated through the use of expert testimony. *Tuepker*, 2006 WL 1442489, *5. With these general rules in mind, coverage for disputed losses will continue to be determined on a claim-by-claim basis.

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